

# We (Who Are Not) the People: Interpreting the Undemocratic Constitution

Joy Milligan\*

Bertrall L. Ross II\*\*

*How should we interpret a Constitution that was not written for us? For most of American history, “We the people” excluded women and racial minorities. The Constitution and all but a few amendments were adopted amidst profoundly undemocratic conditions in which majorities of the population did not participate or see their interests represented. The United States did not approach even minimally egalitarian democracy until 1965, when the Voting Rights Act finally assured the right to vote to people of color, implementing the Fifteenth and Nineteenth Amendments’ guarantees.*

*In this Article, we argue that the undemocratic nature of the Constitution must be addressed in interpreting the document. Interpreters can exacerbate or ameliorate the Constitution’s democratic flaws; the methods they select may entrench old forms of political exclusion or help equalize rights and status across the citizenry.*

*To illustrate, we offer a case study of the perils and possibilities of interpretation, focusing on unenumerated rights. Such rights may have been unwritten because they were liberties commonly exercised by white men as full citizens, and hence could be assumed. Or they may have been unwritten because they mattered primarily for politically excluded populations and therefore could be ignored. We show that the Supreme Court’s recent adoption of an approach to unenumerated rights resting on “history and tradition” unjustifiably reinforces prior undemocratic conditions. As a corrective, we advocate a set of interpretive steps designed to ameliorate the Constitution’s democratic flaws and advance equal citizenship. Such methods may move us closer to egalitarian*

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\* Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law, University of Virginia School of Law.

\*\* Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law. For thoughtful feedback, we are grateful to Kathy Abrams, William Forbath, Kim Forde Mazrui, Ian Haney López, Josh Fischman, Pratheepan Gulasekaram, Jill Hasday, Dorna Mohaghegh, Melissa Murray, Victoria Nourse, Dan Ortiz, Maria Ponomarenko, Lawrence Sager, Elizabeth Sepper, Molly Shadel, Gregg Strauss, and faculty workshops at UC Berkeley, Georgetown, the University of Texas, and the University of Virginia, as well as the Critical Public Law workshop and University of Minnesota Public Law Workshop. We thank Solomon Ross-Milligan for his research assistance, as well as Celeste Biltz, Maggie Shirley, and the other editors of the *Texas Law Review* for their excellent editing.

*democracy, a prerequisite if we are ever to reshape our constitutional framework under truly inclusive conditions.*

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## Introduction

We were never the people. The Constitution’s drafters could not have included us when they began “We the people of the United States . . . .”<sup>1</sup>

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1. U.S. CONST. pmb1.

Women,<sup>2</sup> Native Americans, and African Americans were counted as “other . . . Persons” when the document set forth how political representation would be apportioned by population.<sup>3</sup> But no woman, Black American, or Native American took part in drafting or ratifying the document.<sup>4</sup> The drafters and ratifiers did not understand women or people of color to be full members of the polity—indeed, we were not understood to be fully human, at least in the sense that white men capable of exercising political, legal, and civil rights were deemed to be.<sup>5</sup> For the Constitution’s drafters, “we the people” was a term of art, omitting most of the people.<sup>6</sup> The Constitution was not by us, nor was it for us.

Because the Constitution was not drafted or ratified in anything akin to a democratic, much less a super-majoritarian, process, its origins bear serious

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2. We refer to “women” throughout the paper for ease of reference and historical consistency, using the term to include all those sharing the social position and/or reproductive needs of “women.”

3. U.S. CONST. art. I, § 2, cl. 3:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The provision, of course, infamously counted slaves as three-fifths of a person, simultaneously denying them the vote while strengthening slave states’ political power.

4. See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 230 (Merrill Jensen ed., 1976) (listing 55 delegates that attended the Constitutional Convention); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 178–81, 412–13, 415–16, 55–56 (Jonathan Elliot ed., 2d ed. 1836) (listing the delegates to state ratification conventions); see also Pauline Maier, *Narrative, Interpretation, and the Ratification of the Constitution*, 69 WILLIAM & MARY Q. 382, 388–89 (2012) (“Just who were ‘We the people’? The category included . . . ‘the American “political population”’—that is, those adult white men who qualified for the vote.”).

5. See GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC* 4–5 (2019) (“[T]he new Constitution made clear that propertied white men were not yet prepared to grant civic equality to women, black Americans, Indians, and the poor.”); ROBERT J. DINKIN, *BEFORE EQUAL SUFFRAGE: WOMEN IN PARTISAN POLITICS FROM COLONIAL TIMES TO 1920*, at 10 (1995) (“[W]omen were not seen as having a legitimate place in the political community” in the colonial period); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 12 (1980) (noting that republican ideology around women’s roles “provided no outlet for women to affect a real political decision”).

6. See Mary Anne Franks, *Where the Law Lies: Constitutional Fictions and Their Discontents*, in *LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* 32, 32–33 (Austin Sarat ed., 2015) (noting the Constitution’s “false claim to speak of and for ‘we the people’”); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (“When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America’s citizens.”); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1498 n.44 (1985) (“[R]oughly 2.5% of the population voted in favor of the Constitution’s ratification.”).

democratic deficits.<sup>7</sup> The problem is not simply what some term the “dead hand” problem as the flaws do not derive simply from the fact that none of the living were alive to participate or consent.<sup>8</sup> All enduring laws eventually suffer from that problem. Rather, the problem was one of systematic exclusion in which some types of people were ineligible for political voice.

That procedural flaw gave rise to a still-deeper substantive flaw: The drafters and ratifiers could not have effectively represented the interests of those excluded by virtue of their race or gender because they did not see them (us) as full members, nor full humans, deserving of equal regard and equal rights. The choices they made did not reflect all the people’s interests and did not anticipate their full inclusion.<sup>9</sup> Further, the governance processes that they set forth for changing those decisions laid nearly insuperable barriers to future majorities of the (actual) people.<sup>10</sup>

The problem does not exist solely in the original Constitution of 1789. No constitutional amendment can be said to have emerged from a functional, inclusive democracy until after 1965.<sup>11</sup> That leaves only three amendments

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7. In emphasizing democratic exclusion along grounds of race and sex, we do not mean to exaggerate the Constitution’s drafters’ commitment to democracy even among white men, which itself was qualified and premised on various limits on the “popular” will. See, e.g., ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 6–7 (rev. ed. 2009) (describing constraints on suffrage from colonial to post-revolutionary era); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUB. 219, 220 (2013) (arguing that suffrage among white men was more widespread than assumed but still limited). We also acknowledge that the meaning of “democracy” itself is contested; yet any modern version involves equal rights to participation without exclusions along race or sex lines.

8. See Reva B. Siegel, Heller & *Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1404–05 (2009) (succinctly describing the “dead hand” problem).

9. See Simon, *supra* note 6, at 1499–1500 (stating that the Constitution was adopted by “propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then”). Various substantive injustices in the original Constitution (the most glaring being its protections for slavery) thus should be understood as deeply interwoven with political exclusion. Abolishing slavery itself could not blot out the problem of political exclusion, nor could granting the vote prospectively to emancipated slaves erase the fact that most American institutions had already been designed without their input or interests and could not be easily reengineered. On the role of slavery in shaping the Constitution, see generally PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (3d ed. 2014).

10. On those barriers, see *infra* note 12.

11. Given massive disfranchisement in the South, the United States cannot be considered a functional democracy until after the enactment of the Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437. See STEVEN F. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941*, at 108–09, 118 (4th ed. 2015) (stating that only 43% of eligible African Americans were registered to vote in former Confederate states in 1964, while that figure rose to nearly 60% in some parts of the deep South within four years of the Act); cf. Morton J.

ratified under democratic conditions, only one of them of real significance.<sup>12</sup> While our institutions have become far more democratic, those who seek constitutional or statutory change must surmount institutional barriers originally set down in undemocratic conditions.<sup>13</sup> The Reconstruction Amendments and the Nineteenth Amendment, which provided something closer to full formal equality for people of color and women as a prospective matter, did not rectify (and could not have rectified) the deficits in the rest of the Constitution, nor the legal and social consequences of prior exclusion.<sup>14</sup>

The Constitution thus suffers from serious democratic flaws based on its dual procedural and substantive exclusion of racial minorities and women. Constitutional theorists have not adequately grappled with that problem, which is inherent in the document as well as the institutions and rights it

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Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 61 (1993) (“Only after the ratification in 1913 of the Seventeenth Amendment, which provided for the direct election of senators, and in 1920 of the Nineteenth Amendment, which provided for women’s suffrage, would it have made sense to speak of American Democracy as ‘by the people.’”). We do not mean to indicate that the United States fully achieved an egalitarian democracy in 1965, but rather select that year as the first period when it even arguably satisfied minimal conditions of inclusion. We discuss the conditions needed for egalitarian democracy and the point at which it might be deemed achieved later in the Article. See *infra* section III(C)(2).

12. See U.S. CONST. amend. XXV (ratified in 1967) (order of succession in executive branch); *id.* amend. XXVI (ratified in 1971) (voting rights for eighteen-year-olds); *id.* amend. XXVII (ratified in 1992) (regulating Congressional pay increases). Expanding the franchise to those between the ages of eighteen and twenty-one further expanded democracy. On the forces driving the Twenty-Sixth Amendment, see Mae C. Quinn, *Black Women and Girls and the Twenty-Sixth Amendment: Constitutional Connections, Activist Intersections, and the First Wave Youth Suffrage Movement*, 43 SEATTLE U. L. REV. 1237, 1259–60 (2020); Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1182–90 (2012).

13. For the formal barriers to constitutional change, see U.S. CONST. art. V; for formal barriers to statutory change, see U.S. CONST. art. I, § 7. Even if one believes that informal constitutional change often functions reasonably well as a mechanism for perfecting the Constitution, one must acknowledge that the formal barriers to amendment or legislative enactment operate as barriers that excluded groups never assented to (while lacking representation in the relevant drafting processes), and yet still must circumvent.

14. Cf. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1757–59, 1763–64 (2010) (making contrary claims). McGinnis and Rappaport, for example, argue that the Reconstruction Amendments likely “provide African-Americans with the provisions they would have been able to obtain in 1789 if . . . they had fully participated in the enactment process.” *Id.* at 1759. That claim is highly improbable, given the pervasive influence of slavery on the institutional compromises reached in the original Constitution. For a thorough discussion of this and other flaws in their claim, see James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 691–93 (2016). See also Franks, *supra* note 6, at 43–44 (arguing that the Fifteenth and Nineteenth Amendments could not retroactively legitimate the prior Constitution, and asking “What of the legal, social, and political institutions that were built up over years without contribution from women or African-American men?”). See generally FINKELMAN, *supra* note 9 (examining the influence of slavery on the 1789 Constitution).

creates. Not only do the Constitution's deep democratic deficits go relatively unaddressed—but many constitutional interpreters worsen the problem by ignoring it when they interpret the Constitution. Methods of constitutional interpretation may ameliorate the exclusions of the Constitution-drafting process, or they may exacerbate them.<sup>15</sup>

In this Article, we probe the risks of ignoring the Constitution's democratic deficits, focusing on one key area of constitutional interpretation: unenumerated rights. For over a century, courts have interpreted the Due Process Clause of the Fourteenth Amendment to protect certain rights not explicitly granted in the text. Few areas have been as hotly debated among judges and scholars as “substantive due process.” Even among those who believe due process does protect certain substantive rights, the method of discerning *which* rights deserve constitutional status has been sharply controversial.

Unenumerated rights present a pressing problem for constitutional interpretation given the democratic flaws of the Constitution. Such rights were likely to remain unwritten either because they were so well established that they could be assumed *or* because they were so implausible that they could be ignored. White men, as full participants in the polity, might have rights that were so commonly respected that there was no need to enshrine them in text. But marginalized groups, those not considered full members nor even full humans, could not assume their rights would be protected. Instead, because they lacked representation in the political process, their interests were those most likely to be ignored or outright rejected.<sup>16</sup>

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15. A number of critics have challenged originalism on related grounds. Mary Anne Case, *The Ladies?: Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 453 (2014); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 75; Fox, *supra* note 14, at 688; Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 522 (2011); Samuel Marcossou, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. 429, 468 (1998); Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 449 (2009–2010). For a recent, more informal critique, see ELIE MYSTAL, *ALLOW ME TO RETORT: A BLACK GUY'S GUIDE TO THE CONSTITUTION* 193 (2022). For a review and extension of Mystal's critiques, see Brandon Hasbrouck, *Allow Me to Transform: A Black Guy's Guide to a New Constitution*, 121 MICH. L. REV. 883, 894 (2023). For a view sympathetic to both critics and originalism itself, see Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 430, 432, 435 (2018), which outlines the critiques and suggests potential responses from an originalist perspective.

16. See Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 847 (2023) (arguing that “unenumerated rights tend to code female”); 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, 1909 (2021) (arguing that substantive due process decisions upholding unenumerated rights were “democracy-promoting” because they upheld “the liberties of subordinated groups that were underrepresented in the political process”).

Last year, the Court waded once more into the field of unenumerated rights. In *Dobbs v. Jackson Women’s Health Organization*,<sup>17</sup> the majority did not simply overrule past decisions upholding abortion rights.<sup>18</sup> The majority also reclaimed and revised an older method of interpreting the Due Process Clause, through the lens of “history and tradition.”<sup>19</sup> To the extent that *Dobbs* was a ruling about method, it announced a restrictive approach to gleaning which rights are fundamental ones.

We argue that the *Dobbs* method—one bearing strong similarities to that championed by Justices Rehnquist and Scalia decades earlier—doubles down on the Constitution’s democratic legitimacy problems. It constrains the Constitution’s meaning by reference to periods and sources that were deeply undemocratic. It ignores the problems created by choosing to recognize only those rights already protected by a ruling minority elite who were chosen to govern through undemocratic (or at best partially democratic) means. It fails to interrogate all the ways in which even practices more broadly endorsed by “society”—i.e., “traditions”—derive from that undemocratic, unequal political regime which coercively constructed social life according to a governing minority’s own preferences.

In Part I, we trace how the Court arrived at the current incarnation of its history and tradition approach to identifying fundamental, unenumerated rights. We identify the key moves the Court adopted in that approach, including choices the Court’s majority made regarding the definition of the right and the sources the Justices chose to rely upon. Those choices have significant implications for whether the Constitution will be read in inclusive and democracy-enhancing ways, or whether its interpretation will compound past exclusion.

In Part II, we consider leading defenses of the history and tradition approach. That approach theoretically may allow constitutional meaning to evolve in ways that originalist methods would not. However, many of the justifications for a constrained history and tradition approach overlap with originalist justifications and similarly fail to address democratic deficits. We show that those justifications collapse if we take seriously the failures to represent the interests of people of color and women in the drafting and ratification process as well as in the creation of the laws and judicial decisions that dominate as sources for history and tradition. Using *Dobbs* as an example, we point out the near-total lack of representation for women in the

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17. 142 S. Ct. 2228 (2022).

18. *Id.* at 2242.

19. *Id.*

legislatures and courts that the *Dobbs* Court cited as evidence that abortion is not a fundamental right.

In Part III, we examine the possible interpretive responses to the Constitution's democratic deficits in the area of unenumerated rights. One potential path is to improve the Court's approach to history and tradition. Interpreters might define the rights in question at higher levels of generality and broaden claimed rights so as to extend liberties analogous to those historically enjoyed by white men to all members of the polity. Interpreters might also look to a broader range of sources, refusing to presume that laws passed under undemocratic conditions represent societal consensus.

However, in some instances those methods will not be workable. There may be no true analogue to a right that minorities or women claim among those that white men historically practiced. It may be impossible to recreate the views of the full polity using extant sources, especially given the ways that coercion and hierarchy limited marginalized groups' expression, leaving silences and distortions in archives. The root problem is that the exclusionary historical governance of America taints its past in ways that cannot be addressed within a preservationist approach like history and tradition.

As a result, where those strategies prove insufficient, we argue that the Court should turn to alternative methods. Just as *Frontiero v. Richardson*'s<sup>20</sup> "suspect class" analysis interrogates how groups have suffered historic exclusion, the Court should rely upon historical analysis to examine whether a group has been excluded from the very political processes that regulate or prohibit their exercise of particular rights.<sup>21</sup> If a group is uniquely positioned in the exercise of a right, as, for example, women are vis-à-vis reproductive autonomy rights, then the fact that they were systematically blocked from participation in the legal processes controlling that right is powerful evidence favoring their claims. Such histories and traditions suggest that the right should be protected—as its denial likely served to oppress, reinforcing the group's exclusion from equal citizenship.

Thus, we propose that the Court use the doctrine of unenumerated rights to move the Constitution closer to a framework which would allow full democratic inclusion. One might consider this a more ambitious version of John Hart Ely's political process theory, one that rests on a more realistic appraisal of America's political flaws than Ely offered and that asks courts to acknowledge and help rectify their own role in the nation's distorted governance. In contrast to Ely, we do not think courts can avoid political

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20. 411 U.S. 677 (1973).

21. *Id.* at 688–89 (plurality opinion).



judgments altogether; we would ask courts to help hold the nation more closely to its baseline commitment to inclusive democracy.

Why do we focus on courts, flawed institutions that have been inconsistent allies to democracy? Pragmatism and principle guide our choice in this instance. As a practical matter, the federal judiciary currently dominates interpretation of the Constitution. Therefore, we think it critical to challenge courts' interpretive shortcoming even as we support a greater role for popular and legislative constitutionalism. Further, while the balance has swung too far toward judicial exclusivity, courts do have a role to play in securing the robust democracy that our country aspires toward. Pure majoritarianism is unlikely to safeguard such rights in all instances; while courts are imperfect, they provide a key forum for airing rights claims and, at least at times, a force for their defense.<sup>22</sup>

## I. The Constitution's Democratic Deficits and Unenumerated Rights

### A. *Democratic Exclusion and the Constitution*

1. *We Who Were Not the People.*—It is straightforward to summarize the democratic exclusions underlying the Constitution. The Constitution of 1789 was drafted in 1787 by an assembly of white men.<sup>23</sup> Conventions in each state ratified the Constitution over the period from 1787 to 1790.<sup>24</sup> The delegates to those conventions did not include any women or racial minorities.<sup>25</sup> At the time, New Jersey was the only state that permitted propertied women to vote.<sup>26</sup> Free Black people could theoretically vote in some states at that point if they met property qualifications, but most Black

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22. See NeJaime & Siegel, *supra* note 16, at 1909.

23. Meet the Framers of the Constitution, NATIONAL ARCHIVES <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/S37B-SR5T>].

24. Murray Dry, *The Debate Over Ratification of the Constitution*, in A COMPANION TO THE AMERICAN REVOLUTION 482, 482 tbl.1 (Jack P. Green & J.R. Pole eds., 2000).

25. E.g., Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 465 (1995); Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 876 (2007).

26. New Jersey's state legislature restricted the vote to white men in 1807. See Judith Apter Klinghoffer & Lois Elkis, "*The Petticoat Electors*": *Women's Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUB. 159, 160 (1992) (noting New Jersey's deviation "from the established norm of exclusive male suffrage" prior to 1807). Because of property qualifications and coverture, only single women could vote in New Jersey prior to 1807. *Id.* at 160 & n.1. On views about women's political participation leading up to this period, see ROBERT J. DINKIN, *BEFORE EQUAL SUFFRAGE: WOMEN IN PARTISAN POLITICS FROM COLONIAL TIMES TO 1920*, at 18 (1995).

people were enslaved and could not vote.<sup>27</sup> Thus, neither women nor people of color participated in the Constitution's original enactment except insofar as a very small subset of those groups held suffrage rights and thus a theoretical modicum of representation in the state legislatures that selected the state constitutional convention delegates.

For subsequent constitutional amendments, the first eighteen amendments were enacted when women's suffrage remained severely limited.<sup>28</sup> While Black and other nonwhite voters were theoretically and temporarily assured the vote in 1870 by the Fifteenth Amendment, full extension of the vote did not occur until the Voting Rights Act of 1965 effectively enfranchised the nearly 60% of Black people still living in the South.<sup>29</sup> Five more amendments were ratified during the period between the Nineteenth Amendment's enfranchisement of women in 1920 and the effective enfranchisement of Black Americans living in the South in 1965.<sup>30</sup>

In Part II, we focus on *Dobbs* and women's political exclusion, delving more deeply into the status of women's participation as voters and officeholders up until 1973 as we interrogate the history and tradition of state laws regulating women's reproduction. For now, the key point is that the Constitution and its amendments did not rest on the assent of the full people but rather sweeping political exclusions. Substantively, those exclusions impacted both provisions directly affecting women and people of color as well as all other institutions.

Further, the set of people interpreting the Constitution rested on political exclusions as well. Few women or nonwhites served as judges, at any level,

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27. KEYSSAR, *supra* note 7, at 43–49, 315 tbl. A.4. For example, Maryland permitted freeborn Black people (but not those emancipated after 1783) to vote until 1802. David S. Bogen, *The Annapolis Poll Books of 1800 and 1804: African American Voting in the Early Republic*, 86 MD. HIST. MAG., Spring 1991, at 57, 57–58. The 1790 census counted some 697,000 slaves and only 59,000 non-white free persons. BUREAU OF THE CENSUS, A CENTURY OF POPULATION GROWTH: FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH, 1790–1900, at 47 tbl. 7 (1909). “[E]ven in the free states the property and special qualifications were barriers to a general participation by free [African Americans] in the exercise of the suffrage.” Charles H. Wesley, *Negro Suffrage in the Period of Constitution-Making, 1787–1865*, 32 J. NEGRO HIST. 143, 148 (1947).

28. On the limited expansion of women's suffrage prior to the Nineteenth Amendment, see generally REBECCA J. MEAD, *HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868–1914* (2004).

29. Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 100 (2015); BUREAU OF THE CENSUS, RACE OF THE POPULATION OF THE UNITED STATES, BY STATES: 1960, at 1 (1961) (stating that 59.9% of American Black people lived in the South, and 56.1% of the overall nonwhite population resided in the South).

30. See JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002*, at 538 app. B (2d ed. 2003) (listing all amendments and their ratification dates).

until the late twentieth century.<sup>31</sup> The federal government's leading interpreter of the Constitution, the U.S. Supreme Court, did not include a person of color until 1967 and did not include a woman until 1981,<sup>32</sup> no woman or racial minority has ever served as Chief Justice.

Some might note that many women and people of color deeply shaped broader processes of constitutional reform through their activism.<sup>33</sup> While that is true, those actors' political resistance or participation through other forms of politics does not ameliorate the broad-based exclusion of their groups from direct participation and direct influence via voting and office-holding.

The Constitution, its interpretation, and meta-decisions about how to interpret and implement it via particular institutions and governance processes all rest on deep denials of democracy.

2. *Ignoring the Glaring Gaps in "We the People."*—Even as the nation has achieved formal constitutional democracy post-1965, interpreters have not satisfactorily addressed the exclusions that shaped and continue to shape our legal institutions. Constitutional theory remains a field made up of predominantly white men, even in the present, particularly at the most elite levels.<sup>34</sup> Perhaps not coincidentally, many theorists have glossed over these

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31. On the federal courts' overall composition, see generally Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92 (2016). As to state courts, see *infra* notes 191–93 and accompanying text.

32. Ethel Payne, *Supreme Court Opens Its New Term with Ceremony*, CHI. DAILY DEF., Oct. 3, 1967, at 2; Fred Barbash, *O'Connor Confirmed as First Woman on Supreme Court*, WASH. POST (Sept. 22, 1981), <https://www.washingtonpost.com/archive/politics/1981/09/22/oconnor-confirmed-as-first-woman-on-supreme-court/3cbd6784-6827-400d-a0e8-74d7c17d03e3/> [<https://perma.cc/U5QJ-WQCW>].

33. For histories of popular movements challenging and shaping constitutional meaning, see generally DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016); FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007); PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* (2009); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Darlene Clark Hine, *An Angle of Vision: Black Women and the United States Constitution, 1787–1987*, MAG. HIST., Winter 1988, at 7. The claim of diverse participation in constitutional reforms is even stronger if focused on what William Eskridge and John Ferejohn term the "small 'c'" constitution, which encompasses core statutes that brought about enduring change in national institutions like the Social Security Act and the Civil Rights Act of 1964. WILLIAM N. ESKRIDGE JR. & JOHN FEREOH, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 1, 9, 16 (2010).

34. For example, among the fifty most-cited law scholars (a list that heavily represents constitutional law), no woman appears until Catherine MacKinnon at the 40th spot; Akhil Amar

deep problems of exclusion and how they still distort our current institutions and processes of legal change.<sup>35</sup>

Debates over constitutional methodology sometimes acknowledge these issues but usually in passing and without recognizing their full extent and implications. Apart from those acknowledgments, judges and scholars often write about the constitutional past as if it were in fact democratic, as if “the people” in fact participated in constitutional decision-making (or as if the referenced “people” included all Americans), and as if America’s legal traditions enjoy sweeping democratic legitimacy.<sup>36</sup>

The primary site for acknowledgment of the actual nondemocratic past is in discussions of the Reconstruction Amendments, particularly the Fourteenth Amendment. Yet even in interpreting those Amendments, the problem of the Constitution’s procedural and substantive illegitimacy remains underacknowledged and undertheorized.

The most famous constitutional theory addressing political exclusion is relatively superficial. In the Court’s famed footnote four in *United States v. Carolene Products Co.*,<sup>37</sup> the Justices suggested that “prejudice against discrete and insular minorities may be a special condition, which tends

(18) and Richard Delgado (30) are the only persons of color. Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1602 tbl.1 (2021). THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION, published in 2015, was edited by Mark Tushnet, Mark Graber, and Sanford Levinson. The forty-eight chapters include fifty-one contributors, comprised of 75% men (38/51), 94% white (48/51), and 69% white men (35/51). The chapters by non-white authors include “Racial Rights,” “Interpretation,” and “Native Americans.” THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION v–xi (Mark Tushnet et al. eds., 2015). To take another illustrative example, a recent prominent book on constitutional theory by Jack Balkin cites the following contributors in the first chapter: Mark Tushnet, Keith Whittington, Randy Barnett, Jack Balkin, Philip Bobbitt, Antonin Scalia, Kenneth Dam, Lawrence Solum, and John Hart Ely. JACK M. BALKIN, *LIVING ORIGINALISM* 341–43 nn.1–20 (2011). The first citation to a female author occurs at endnote 12 of the third chapter, citing a co-authored piece by Balkin and Reva Siegel. *Id.* at 349 n.12. See also Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561, 563, 566–68 (1984), which describes white male authors’ dominance among the most-cited civil rights scholars and the resulting distortions within that scholarship.

35. Relatedly, as Jill Hasday has noted, existing doctrine protecting women’s equality has not entered the constitutional canon, while “a sense that women are central to private life, but not to public stories about America’s constitutional principles” endures. Jill Elaine Hasday, *Women’s Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1729.

36. *E.g.*, *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”); *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them . . . .”); *Alden v. Maine*, 527 U.S. 706, 759 (1999) (“In choosing to ordain and establish the Constitution, the people insisted upon a federal structure . . . .”). The habit is very old. *E.g.*, *Cohens v. Virginia*, 19 U.S. 264, 389 (1821) (“The people made the constitution, and the people can unmake it.”).

37. 304 U.S. 144 (1938).

seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” of legislation.<sup>38</sup> But the Court failed to acknowledge how America’s political processes and institutions had already been distorted insofar as they were designed under nondemocratic conditions by political representatives who lacked incentives to account for the interests of all Americans.

John Hart Ely built upon footnote four to suggest that courts could in fact play a useful role in purifying the democratic political process, clearing obstructions that might otherwise block democratic reform.<sup>39</sup> Yet Ely’s “political process” theory similarly fails to scrutinize the legitimacy of the constitutional choices made in shaping all of America’s governance processes. Political process theorists often remain content to merely enforce democracy on a prospective basis, working through numerous institutions designed and entrenched against change during a period of democratic exclusion.<sup>40</sup>

Courts and scholars do foreground America’s ugly past in equal protection doctrine in analyzing whether particular groups require greater judicial protection from potential discrimination. In *Frontiero v. Richardson* and subsequent decisions, courts accepted footnote four’s invitation to determine whether particular groups constitute suspect classes in need of heightened judicial protection via strict scrutiny for laws that target them.<sup>41</sup> The *Frontiero* framework examines histories of discrimination as well as ongoing political and legal marginalization.<sup>42</sup>

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38. *Id.* at 152 n.4.

39. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (building on footnote four to argue for a participation-oriented, representation-reinforcing approach to judicial review).

40. Cf. Marcossou, *supra* note 15, at 469–70 (critiquing Laurence Tribe for defending the Article V amendment process without acknowledging that its “significant barriers to amendment can be seen as the Framers’ insurance policy against the possibility that then-excluded groups, including women, slaves and free blacks, could one day change the power structure the Founders had erected”). Tribe notably was a critic of political process theory. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1064 (1980).

41. 411 U.S. 677, 684, 686, 688 (1973) (plurality opinion).

42. *Id.* at 684–88 (relying upon the nation’s “long and unfortunate history of sex discrimination,” including exclusion from voting, and present-day “pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and perhaps most conspicuously in the political arena” as the basis for heightened scrutiny of gender classifications). Despite the promise of the *Frontiero* framework, an increasingly conservative Court has refused to deploy it toward egalitarian goals. Cf. Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 *CALIF. L. REV.* 323, 325–26 (2016) (noting that the Court has used the *Frontiero* analysis “only to deny suspect class status to new groups”).

But in the sister domain of due process jurisprudence, interpreters rarely consider how widespread democratic exclusion might affect our understanding of that set of constitutional protections.

Recent decades have seen increased attention to how due process rights may help subordinated groups achieve equal status but usually without linking that issue to underlying problems of legitimacy in the Constitution itself. At times courts have fused equality and substantive due process principles in protecting particular rights, especially the privacy and intimacy rights of LGBTQ people in modern times.<sup>43</sup> The “due process revolution” of earlier decades, which strengthened procedural protections for threatened losses of government entitlements, contributed to equality by giving new rights to poor and working-class people reliant upon state supports.<sup>44</sup>

Nonetheless, the Constitution’s democratic illegitimacy is the glaring elephant in the room for modern constitutional methodology. In Part III, we argue that constitutional interpreters must actively address and account for that illegitimacy if we are to salvage the Constitution rather than scrapping it. Whether processes of constitutional interpretation can redeem the Constitution sufficiently to achieve full democratic inclusion is an open question, but improving interpretation at least may help to set us on that path.<sup>45</sup> By interrogating one area of constitutional jurisprudence and considering how interpretation may ameliorate its exclusions, we hope to catalyze that much larger discussion.

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43. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 818–19 (2014); *see also* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1508–10 (2002) (discussing the blending of liberty and equality concepts in voting rights and interstate travel cases); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1186 (2000) (observing that both originalist judges and judges who take a normative rather than historical view of justice are unlikely to distinguish between the Due Process and Equal Protection Clauses); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 475 (2002) (describing cases that treat due process and equal protection as “different verbal formulations that produce essentially identical results”); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 136 (2007) (noting that the Court in *Lawrence v. Texas* drew on themes of equal citizenship to justify a decision resting on substantive due process); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (examining the Court’s doctrine surrounding what Yoshino terms “hybrid equality/liberty claims”).

44. *See* Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 15–17, 22–23 (1997) (describing the shifts in due process law, as well as factors that limited their impact).

45. Ideally, methods of constitutional interpretation might help bring about an inclusive polity to a degree that we could trust that any new Constitutional convention would rest on full, egalitarian participation, giving rise to a more legitimate and sustainable set of institutions for the long term. *See infra* subpart III(C).

The next subpart begins that project by tracing the evolution of unenumerated rights doctrine under the Due Process Clause. It highlights the recent origins of the Court's current history and tradition approach as well as the Court's inattention to how its methodology (under any incarnation) might interact with the Constitution's democratic flaws.

*B. The Jurisprudence of Unenumerated Rights*

In *Dobbs*, the Supreme Court did not simply overrule *Roe v. Wade*<sup>46</sup> and the subsequent line of cases affirming women's abortion rights. The *Dobbs* Court's methodology also swung due process jurisprudence back in time.

For much of the twentieth century, the Court interpreted the Due Process Clause to encompass certain unenumerated substantive rights. Government intrusion on those rights deemed "fundamental" required strong justifications, a form of review eventually termed "strict scrutiny." The Court never settled on a clear or uncontroversial means of discerning which interests fell within the scope of protected liberty rights. Many Justices feared repeating the mistakes of the "*Lochner* era," when the Court struck down progressive legislation in the name of an unwritten right to freedom of contract.<sup>47</sup> Even so, until the late twentieth century, the Court referenced broad notions of enduring American freedoms and institutions, framed at a high level of generality and allowing evolution in the scope of unwritten rights over time.

Beginning in the late 1980s, a conservative set of Justices attempted to restrain the method. They proposed a stricter set of requirements for uncovering fundamental rights which required a more meticulous tracing of historical practices (particularly laws concerning the right in question) and a very specific definition of the interest in question.<sup>48</sup>

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46. 410 U.S. 113 (1973).

47. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 760–61 (1997) (Souter, J., concurring in judgment) (discussing the *Lochner* era's "deviant economic due process cases"); see also *Lochner v. New York*, 198 U.S. 45, 53, 62 (1905) (overturning a state maximum hour law because it "necessarily interferes with the [due process] right of contract between the employer and employes, [sic] concerning the number of hours in which the latter may labor in the bakery of the employer"). For additional cases in which the Court overturned laws under the liberty of contract theory, see, for example, *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 610 (1936); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415 (1926); *Adkins v. Child.'s Hosp.*, 261 U.S. 525, 559 (1923); *Coppage v. Kansas*, 236 U.S. 1, 13–14 (1915); *Adair v. United States*, 208 U.S. 161, 172 (1908); *Allgeyer v. Louisiana*, 165 U.S. 578, 588–93 (1897).

48. E.g., *Glucksberg*, 521 U.S. at 710–14, 721–23; *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269, 271 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986).

A majority backing that approach did not, however, truly coalesce. Justices Kennedy and O'Connor argued that greater room for evolution in the scope of unenumerated rights was needed, even as they sometimes joined the conservative Justices in particular decisions.<sup>49</sup> In *Planned Parenthood v. Casey*,<sup>50</sup> *Lawrence v. Texas*,<sup>51</sup> and *Obergefell v. Hodges*,<sup>52</sup> Justice Kennedy in particular voiced his unwillingness to follow a more static and conservative method, one that would have prevented the recognition of rights to reproductive autonomy and gay intimacy.<sup>53</sup> Kennedy, of course, subsequently left the Court, along with other Justices that formed part of his majority in those cases.<sup>54</sup>

1. Dobbs' "History and Tradition" Method.—In *Dobbs*, the Court announced its adherence to that older, restrictive methodology from the 1990s, undoing both abortion rights and the broader understanding of unenumerated rights that lay behind it. Justice Alito emphasized in his majority opinion that any unenumerated right “must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’” if it is to be deemed fundamental and thereby accorded the highest level of constitutional protection.<sup>55</sup>

The majority implemented that history and tradition inquiry in three specific steps. First, the Court defined the right at a high degree of specificity. The right in question was not a broader “right to privacy” or “to make ‘intimate and personal choices’ that are ‘central to personal dignity and autonomy’” but only the right to abortion, standing alone.<sup>56</sup>

Second, the Court painstakingly traced laws concerning abortion from thirteenth century English common law through American states’ regulation

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49. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992) (plurality opinion); *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring).

50. 505 U.S. 833 (1992).

51. 539 U.S. 558 (2003).

52. 576 U.S. 644 (2015).

53. See *Casey*, 505 U.S. at 869; *Obergefell*, 576 U.S. at 663–64; *Lawrence*, 539 U.S. at 579.

54. *Justices 1789 to Present*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/3RXE-92T7>] (listing the dates that individual Justices’ service ended).

55. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

56. *Id.* at 2257–58 (quoting *Casey*, 505 U.S. at 851) (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973)). The Court justified its refusal to link abortion to broader rights of privacy or autonomy in part by distinguishing abortion as involving the destruction of “potential life” or “the life of an ‘unborn human being.’” *Id.* at 2258 (first citing *Roe*, 410 U.S. at 159; and then citing *Casey*, 505 U.S. at 852).



of abortion up until *Roe*.<sup>57</sup> The Court termed this “a careful analysis of the history of the right at issue” in order to discern “what the *Fourteenth Amendment* means by the term ‘liberty.’”<sup>58</sup> By examining only legal restrictions rather than other evidence of American traditions, the majority trained its focus on a very constrained set of historical sources, reflecting a set of actors that excluded groups comprising the majority of Americans.

Third, the Court rejected the idea that evolving norms or increased recognition of women’s equality interests might play a role in its constitutional reasoning; the history of legal restrictions alone supplied the answer.<sup>59</sup> The majority explained that its method served the democratic goal of ensuring that legislation would not be overturned by “judicial policymaking” by imposing objectivity and constraint on judicial reasoning.<sup>60</sup>

The *Dobbs* majority’s refusal to define the right at a greater level of generality or to look beyond the nation’s past laws restricting the right in question harkened back to a prior era in the Court’s substantive due process jurisprudence. But that era itself (one defined in opinions written by Justices Rehnquist and Scalia) represented a shift from earlier modes of due process decision-making in which the Court defined liberty at high degrees of abstraction without meticulously tracing past legal restrictions and with room for evolutive change.

2. *The Recent Origins of Dobbs’ “History and Tradition” Approach.*—Early twentieth-century cases characterized unwritten rights in the most general terms with sparse sourcing. Two parental rights cases exemplify that approach. In *Meyer v. Nebraska*,<sup>61</sup> the Court invalidated a state law that barred instruction in any language but English prior to eighth grade, upholding “the right of parents to engage [a German teacher] to instruct their children.”<sup>62</sup> Justice McReynolds described “the right of the individual . . . to marry, establish a home and bring up children.”<sup>63</sup> He further specified that a parent had both a “right of control” and a “natural duty . . . to give his children education suitable to their station in life.”<sup>64</sup> For these propositions, McReynolds relied upon “privileges long recognized at common law” and

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57. *Id.* at 2248–53.

58. *Id.* at 2246, 2248 (italics in original).

59. *Id.* at 2245–46, 2258–61.

60. *Id.* at 2248.

61. 262 U.S. 390 (1923).

62. *Id.* at 400.

63. *Id.* at 399.

64. *Id.* at 400.

several Supreme Court precedents including the *Slaughterhouse Cases*;<sup>65</sup> the longstanding views of “[t]he American people”; the Northwest Ordinance of 1787; “natural duty”; and states’ compulsory education laws.<sup>66</sup> Two years later in *Pierce v. Society of Sisters*,<sup>67</sup> the Court struck down an Oregon law mandating that all children attend public schools through age sixteen.<sup>68</sup> McReynolds cited *Meyer*, longstanding views, and “[t]he fundamental theory of liberty upon which all governments in this Union repose.”<sup>69</sup>

In decisions after *Meyer* and *Pierce*, the Court continued to use sweeping, abstract language as it assessed claims that individual rights explicitly protected against federal intrusion under the Bill of Rights were also protected against state and local government incursions by the Fourteenth Amendment’s Due Process Clause. Justice Cardozo, in two decisions rejecting criminal defendants’ procedural claims under the Fourteenth Amendment, offered grand rhetorical formulations for determining which rights should prevail. In *Snyder v. Massachusetts*,<sup>70</sup> Cardozo indicated that each state was free to shape its own procedural protections “unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>71</sup> In *Palko v. Connecticut*,<sup>72</sup> the Court ruled that the right against double jeopardy was not “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” nor was it among those rights “of the very essence of a scheme of ordered liberty.”<sup>73</sup>

In *Snyder* and *Palko*, Cardozo did not offer any detailed explanation of how such inquiries into “the traditions and conscience of our people” should proceed or even a careful historical analysis as to the rights in question. Nonetheless, the language of those decisions—the concept that the Fourteenth Amendment protects only those rights “of the very essence of a scheme of ordered liberty” and “so rooted in the traditions and conscience of

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65. 83 U.S. (16 Wall.) 36 (1873).

66. *Meyer*, 262 U.S. at 399–400.

67. 268 U.S. 510 (1925).

68. *Id.* at 530, 534–35.

69. *Id.* at 534–35.

70. 291 U.S. 97 (1934).

71. *Id.* at 105. Cardozo rejected the defendants’ claimed right to be present at a viewing of the alleged crime scene. *Id.* at 103, 121–22.

72. 302 U.S. 319 (1937).

73. *Id.* at 325 (quoting *Snyder*, 291 U.S. at 105); see also *Rochin v. California*, 342 U.S. 165, 169 (1952) (describing the test for due process in state criminal proceedings as “whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses” (quoting *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring))).

our people as to be ranked as fundamental”—remains a core part of the Court’s current due process standard.<sup>74</sup>

An updated approach to these formulations emerged in Justice Harlan’s dissent in *Poe v. Ullman*.<sup>75</sup> In *Poe*, a plurality of the Court rejected a constitutional challenge to Connecticut’s criminalization of contraceptives on justiciability grounds.<sup>76</sup> Reaching the constitutional question in dissent, Harlan argued that the extent of the Due Process Clause was not limited to procedural protections nor the written safeguards of the Bill of Rights.<sup>77</sup>

Harlan emphasized that due process’s meaning could not be rendered wholly objective or predetermined: “Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . [I]t has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”<sup>78</sup> Tradition could serve as a guide and constraint while not being static, Harlan suggested: “The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”<sup>79</sup> The liberty protected by the Due Process Clause thus required a careful reading of “history and purposes” rather than parsing text alone, and it allowed for the possibility that judges would protect some rights as fundamental precisely because they broke with settled but unprincipled traditions.<sup>80</sup>

Applying a broad, tradition-focused approach, Harlan identified significant liberty interests in the “privacy of the home” and “the marital relation” which were invaded by the state’s criminalization of contraceptive use.<sup>81</sup> He rooted those interests in the Court’s own precedents, “common understanding throughout the English-speaking world,” and the nature of “the institution of marriage, an institution which the State . . . always and in every age . . . has fostered and protected.”<sup>82</sup>

Harlan did not offer a long history of contraceptive use or its legal regulation. Instead, he referenced more general ideals such as home and

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74. *E.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

75. 367 U.S. 497 (1961).

76. *Id.* at 508–09 (plurality opinion).

77. *Id.* at 540–42 (Harlan, J., dissenting).

78. *Id.* at 542.

79. *Id.*

80. *Id.* at 542–43.

81. *Id.* at 548, 554.

82. *Id.* at 548–53.

marriage, along with the Constitution and Court's protections against particular types of intrusions on the home. In balancing the individual's interest against the government's intrusion, Harlan did cite "the utter novelty" of the State's decision to criminalize "use" of contraceptives (rather than sale or distribution)—an approach taken by no other state or even nation.<sup>83</sup>

Harlan's stance, if not his methodology, won the day four years later in *Griswold v. Connecticut*<sup>84</sup> when the Court invalidated the state's prohibition on married couples' contraceptive use.<sup>85</sup> Harlan refused to join Justice Douglas's majority opinion, which found a right to privacy in the "penumbras" of the First, Third, Fourth, and Fifth Amendments.<sup>86</sup> Instead, Harlan rested on his *Poe* dissent's approach, writing that the statute "violates basic values 'implicit in the concept of ordered liberty.'"<sup>87</sup>

Harlan's flexible approach would prove to be a flashpoint in later debates among the Justices over the appropriate approach to unenumerated rights. In *Roe v. Wade*, Justice Blackmun similarly rested on *Palko*'s language—just as Harlan had—in describing the scope of the privacy right: "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy."<sup>88</sup> And, Blackmun concluded, the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>89</sup> At risk for her were medical harms, unwanted children, possibly "a distressful life and future," and harms to her mental health.<sup>90</sup> Notably, Blackmun did not attempt to ground the woman's right in the history he had already reviewed, one that included varying regulations and legal prohibitions on abortion dating from ancient times through the present.<sup>91</sup>

The Court's post-*Roe* decisions built on the ideal of privacy while articulating the rights involved at similarly high levels of generality. Only some of those decisions explicitly rested on tradition (and those did so without careful historical inquiries). For example, in *Cleveland Board of*

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83. *Id.* at 554–55 & nn.15–16 (emphasis omitted).

84. 381 U.S. 479 (1965).

85. *Id.* at 485.

86. *Id.* at 484–85.

87. *Id.* at 500 (Harlan, J., concurring in judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

88. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citation omitted) (quoting *Palko*, 302 U.S. at 325).

89. *Id.* at 153.

90. *Id.*

91. *Id.* at 130–41.

*Education v. LaFleur*<sup>92</sup> the Court struck down a school board policy mandating unpaid maternity leave for pregnant teachers.<sup>93</sup> Justice Stewart's opinion relied upon precedent, not tradition: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."<sup>94</sup>

In contrast, in *Moore v. City of East Cleveland*,<sup>95</sup> a plurality reasoned that Cleveland's ordinance disallowing a grandmother from living with her grandson violated her substantive due process rights.<sup>96</sup> Relying on Harlan's dissent in *Poe*, Justice Powell explained that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."<sup>97</sup> While modern families might tend toward nuclear ones, "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, . . . supports a larger conception of the family."<sup>98</sup>

If the path of caselaw through the 1970s suggested the Court would gradually expand the boundaries of substantive due process using a relatively abstract and generous reading of history and tradition, precedent took a different turn under the Rehnquist Court. From the late 1980s through the end of the 1990s, conservative majorities decided a series of substantive due process cases using a more restrictive methodology: *Bowers v. Hardwick*,<sup>99</sup> *Michael H. v. Gerald D.*,<sup>100</sup> *Cruzan v. Director*,<sup>101</sup> *Reno v. Flores*,<sup>102</sup> and *Washington v. Glucksberg*.<sup>103</sup> Justices Rehnquist and Scalia wrote four of the

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92. 414 U.S. 632 (1974).

93. *Id.* at 651.

94. *Id.* at 639–40.

95. 431 U.S. 494 (1977).

96. *Id.* at 499 (plurality opinion).

97. *Id.* at 501–03.

98. *Id.* at 505.

99. 478 U.S. 186, 189 (1986) (rejecting a gay man's challenge to Georgia law criminalizing sodomy).

100. 491 U.S. 110, 130 (1989) (plurality opinion) (rejecting a natural father's challenge to California law presuming fatherhood of natural mother's husband). Justice Scalia wrote only for a plurality in *Michael H.*, *id.* at 113, with Justice Stevens providing the fifth vote but concurring only in the judgment, *id.* at 132 (Stevens, J., concurring in judgment).

101. 497 U.S. 261, 265 (1990) (rejecting a family's challenge to Missouri law requiring clear and convincing evidence of incompetent patient's wish to end lifesaving treatment).

102. 507 U.S. 292, 315 (1993) (rejecting an immigrant youths' challenge to federal regulation limiting their release from detention).

103. 521 U.S. 702, 705–06 (1997) (rejecting a terminally ill patient's challenge to Washington law banning assisted suicide).

decisions, with *Bowers* written by Justice Byron White.<sup>104</sup> Each decision rejected the claimed right.<sup>105</sup>

In *Washington v. Glucksberg*, the last of those decisions, a majority signed onto Justice Rehnquist's description of the Court's substantive due process methodology.<sup>106</sup> The method, he wrote, required "examining our Nation's history, legal traditions, and practices."<sup>107</sup> That historical inquiry was aimed at discerning whether a claimed "fundamental right[]" was "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"<sup>108</sup> Further, Justice Rehnquist continued, "we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."<sup>109</sup>

A differently worded requirement regarding specificity had failed to garner a majority years earlier. In *Michael H.*, Justices O'Connor and Kennedy refused to sign onto Justice Scalia's footnote six.<sup>110</sup> There, Scalia wrote that, in analyzing history and tradition to find evidence of a fundamental right, "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."<sup>111</sup> Justice O'Connor wrote separately to object that decisions like *Loving v. Virginia*<sup>112</sup> had failed to identify the relevant traditions at "the most specific level"—because, of course, there was no deeply rooted American legal tradition of protecting the right to interracial marriage.<sup>113</sup> She therefore "would not foreclose the unanticipated by the prior imposition of a single

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104. *Bowers*, 478 U.S. at 187; *Michael H.*, 491 U.S. at 113 (plurality opinion by Justice Scalia); *Cruzan*, 497 U.S. at 265 (opinion by Chief Justice Rehnquist); *Flores*, 507 U.S. at 294 (opinion by Justice Scalia); *Glucksberg*, 521 U.S. at 705 (opinion by Chief Justice Rehnquist).

105. In *Cruzan*, the majority assumed that "a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition" but did not term it fundamental and refused to view an incompetent person's right to avoid such treatment as substantively infringed by what it termed Missouri's "procedural safeguard" (the clear and convincing evidence standard). 497 U.S. at 279–80.

106. 521 U.S. at 704.

107. *Id.* at 710, 721.

108. *Id.* at 720–21 (citations omitted) (first quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

109. *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

110. 491 U.S. 110, 112 (1989).

111. *Id.* at 127 n.6; see also Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 34–35 (1992) (criticizing Justice Scalia for failing to justify his choice regarding the level of generality).

112. 388 U.S. 1 (1967).

113. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring).

mode of historical analysis.”<sup>114</sup> Yet in *Glucksberg*, O’Connor and Kennedy agreed that “a ‘careful description’ of the asserted” right was needed, apparently deeming it a less absolutist approach to specificity than Scalia had outlined in *Michael H.*<sup>115</sup>

Although they joined the conservative majority in *Glucksberg*, Justices Kennedy and O’Connor had been, and would continue to be, inconsistent adherents to the method. In *Planned Parenthood v. Casey*, they, joined by Justice Souter, affirmed the ongoing validity of *Roe*’s abortion right.<sup>116</sup>

The *Casey* plurality rejected any theory that unenumerated rights could be limited to practices that were not prohibited at the time of the Fourteenth Amendment’s enactment.<sup>117</sup> Interracial marriage, they noted, had long been barred, but *Loving* correctly deemed restrictions upon it as violations of the Equal Protection Clause’s protection for liberty—so too with many of the Court’s decisions regarding family life and procreation.<sup>118</sup> “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>119</sup> Rather, Justice Harlan’s dissent in *Poe* provided the appropriate path, one of “reasoned judgment” as they put it.<sup>120</sup> Under that approach, the autonomy to make “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” which the Court describes as “choices central to personal dignity and autonomy,” was “central to the liberty protected by the Fourteenth Amendment.”<sup>121</sup> A woman’s decision to abort her pregnancy fell within that sphere of liberty as well.<sup>122</sup>

Justice Scalia’s response to their position was simple, presaging the Court’s eventual majority position in *Dobbs*: abortion could not be an unenumerated right protected as part of due process “liberty” because “the longstanding traditions of American society have permitted it to be legally

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114. *Id.*

115. *Glucksberg*, 521 U.S. at 704, 721 (quoting *Flores*, 507 U.S. at 302).

116. 505 U.S. 833, 843, 846 (1992).

117. *Id.* at 847 (rejecting the idea “that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified”).

118. *Id.* at 847–48.

119. *Id.* at 848.

120. *Id.* at 849.

121. *Id.* at 851.

122. *Id.* at 852–53.

proscribed.”<sup>123</sup> For Scalia, older legal prohibitions provided a direct answer and could not be trumped by broader, evolving notions of liberty.

In subsequent decades, Justice Kennedy even more explicitly rejected the conservative Justices’ demand to confine substantive due process within the bounds of enduring tradition or narrowly articulated versions of the rights at stake. Kennedy authored the majority opinions in *Lawrence v. Texas*, invalidating a ban on same-sex sodomy, and *Obergefell v. Hodges*, invalidating a prohibition on same-sex marriage.

In *Lawrence*, Kennedy scathingly rejected the narrow definition of the right that the *Bowers* Court had relied upon (“a fundamental right [of homosexuals] to engage in consensual sodomy”).<sup>124</sup> That description, he wrote, “demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>125</sup> Rather, the claim involved “the most private human conduct, sexual behavior, and in the most private of places, the home” and “a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”<sup>126</sup>

Kennedy acknowledged but questioned the relevance of “centuries” of moral and religious condemnation of homosexuality while characterizing the history of U.S. legal prohibitions as “complex.”<sup>127</sup> He reasoned that “our laws and traditions in the past half century are of most relevance,” and those laws and traditions manifested “an emerging awareness” that liberty encompasses adults’ private, consensual decision-making about sex.<sup>128</sup> Due process thus protected petitioners’ “private sexual conduct” from state intrusion, Kennedy concluded.<sup>129</sup> In so ruling, Kennedy endorsed the necessity of an evolving interpretation of the Constitution’s principles: The Framers, he argued, drafted a broadly phrased document because “[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”<sup>130</sup>

Justice Kennedy spoke even more clearly in *Obergefell*. Again quoting Justice Harlan’s *Poe* dissent, he wrote that due process decisions could not be “reduced to any formula” and that “[h]istory and tradition guide and

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123. *Id.* at 980 (Scalia, J., concurring in part and dissenting in part).

124. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

125. *Id.*

126. *Id.*

127. *Id.* at 568–71.

128. *Id.* at 571–72.

129. *Id.* at 578.

130. *Id.* at 579.



discipline this inquiry but do not set its outer boundaries.”<sup>131</sup> Kennedy expressly limited *Glucksberg*’s mandate of a “careful description” of claimed fundamental rights. If *Glucksberg*’s method was to insist that “liberty under the Due Process Clause . . . be defined in a most circumscribed manner, with central reference to specific historical practices,” the approach was “inconsistent” with the Court’s decisions regarding key fundamental rights including those involving intimate and family life.<sup>132</sup> Tradition, read too narrowly, would entrench past injustice. “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”<sup>133</sup>

Marriage was a central, timeless aspect of human history, one also long understood to be “a union between two persons of the opposite sex.”<sup>134</sup> But marriage—as an exercise of individual autonomy, a form of intimate association, a protective institution for families and children, and a foundation of the social order—held equivalent meaning for gay couples.<sup>135</sup> Excluding them from that fundamental right on the basis of a tradition of exclusion could not be upheld.<sup>136</sup>

Chief Justice Roberts, in dissent, described *Glucksberg* as “effectively overrule[d].”<sup>137</sup> Seven years later, *Dobbs*, of course, represented a return to *Glucksberg*—and whatever the Court’s protestations to the contrary, was itself an apparent effective overruling of *Obergefell*’s methodology. The majority, in striking down abortion rights, refused to consider the broader freedoms of privacy and autonomy that Justice Kennedy had outlined in *Obergefell* and earlier decisions.

3. *Inattention to Exclusion.*—The *Dobbs* Court even more emphatically rejected the idea that women’s equality interests had any role to play in the

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131. *Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). A contrary approach would risk “allowing the past alone to rule the present.” *Id.*

132. *Id.* at 671.

133. *Id.*

134. *Id.* at 657.

135. *Id.* at 665–70.

136. *Id.* at 671–72.

137. *Id.* at 702 (Roberts, C.J., dissenting).

jurisprudence of unenumerated rights.<sup>138</sup> In that respect, though, the *Dobbs* majority was not unique.

As a historical matter, the Court had not used its due process methodology to consider whether unenumerated rights were justified as a means to address a group's subordination and past democratic exclusion. Even past decisions that worked with "history and tradition" at a more abstract, principle-driven level, did not squarely grapple with past democratic flaws. Nor did the Court express special solicitude for politically marginalized groups in its older due process decisions. Instead, the Court spoke of the traditions and conscience of our people as if Americans were a unified, homogeneous, and inclusive community whose views could easily be characterized. Thus, for example, *Pierce* and *Meyer*'s protections for the rights of parents (and those decisions' broader rhetoric regarding marriage, home, and childrearing) sounded not at all in concerns about religion, national origin, gender, or women's unequal status.

As the Court began to consider more novel rights claims in the 1960s, including women's right to reproductive autonomy, the Court still did not foreground women's equality interests, much less the specific problem of their long-term exclusion from constitutional decision-making. For example when the Warren Court struck down a state prohibition on contraceptive sales as applied to married couples, the Court grounded its analysis once again in rhetoric about marriage and the home without focusing on women's autonomy.<sup>139</sup> Justice Douglas's opinion sought protection for contraception in the "penumbras" of various constitutional amendments, rather than as an unenumerated, fundamental right encompassed by due process itself.<sup>140</sup> In *Griswold*, any "strong concerns about group subordination were visible in the background"—not in the Court's reasoning.<sup>141</sup>

In *Roe*, Justice Blackmun described women's liberty interests in reproductive choice in a very limited way, without acknowledging the impact upon their equal status. Instead, Blackmun evaluated a woman's unenumerated right in exercising such decision-making by listing all the harms that a woman might suffer in going through with an unwanted

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138. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46, 2276–77 (2022) (rejecting any role for equal protection concerns in analyzing abortion bans, as well as any cognizable reliance interest for women in "[t]he ability . . . to participate equally in the economic and social life of the Nation . . . [due to] their ability to control their reproductive lives" (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 856 (1992)) (first alteration in original)).

139. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

140. *Id.* at 482–85.

141. Karst, *supra* note 43, at 125.

pregnancy.<sup>142</sup> Scholars and activists, including eventual-Justice Ruth Bader Ginsburg herself, rightly challenged even the more liberal Justices' failures to fully address the problem of reproductive autonomy and its connection to equal citizenship.<sup>143</sup>

Later decisions in the field of unenumerated rights increasingly acknowledged the equality interests at stake for women and for LGBTQ people in decisions like *Casey*, *Lawrence*, and *Obergefell*. In *Casey*, the plurality opinion by Justices Kennedy, O'Connor, and Souter squarely addressed that aspect in one sentence, in a section focused on the reliance interests that might support retaining *Roe* as precedent: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>144</sup>

Carving out new constitutional ground, *Lawrence* and *Obergefell* treated LGBTQ people's equal status as inherently interwoven with their autonomy in matters of intimacy, sexuality, and marriage. The stigma of criminalizing their sexual choices diminished gay and lesbian people's equal membership, Kennedy explained in *Lawrence*, illustrating the inherent connection between due process and equal protection.<sup>145</sup> In *Obergefell*, Kennedy grounded same-sex couples' marriage rights not simply in the fundamental right to marry, protected by due process, but also in the Equal Protection Clause.<sup>146</sup> Prohibiting them from marrying "abridge[d] central precepts of equality . . . Especially against a long history of disapproval of their relationships."<sup>147</sup>

The Court nonetheless did not probe the tension between a jurisprudence resting on tradition and one that sought to provide democratic inclusion for those heretofore denied equal political status (and with it, equal textual rights). The Court only partially addressed the links between women's reproductive control and their political participation or between

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142. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

143. *E.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83 (1985).

144. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part) (charging that "the liberty and equality of . . . millions of women" was at stake in the conflicts over *Roe*); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (asserting that the "promise" of "a certain private sphere of individual liberty . . . largely beyond the reach of government" is one that "extends to women as well as to men").

145. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

146. *Obergefell v. Hodges*, 576 U.S. 644, 672–75 (2015).

147. *Id.* at 675.

queer people's liberty and their full democratic membership. And the Court has only implicitly broached the question of whether its own methodology of interpreting the Constitution must address and ameliorate the document's historical exclusions. Justices Kennedy, O'Connor, and others have identified the need to allow tradition to evolve given that it might otherwise entrench past injustice.<sup>148</sup> However, neither the Court nor commentators have fully excavated the links between the democratic flaws of the Constitution and the institutions it creates, and the Court's interpretive methodology. The next Part turns to that problem.

## II. Interrogating "History and Tradition"

The Court's recent due process analyses frequently begin with the refrain: "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"<sup>149</sup> On the surface the emphasis on history and tradition appears logical. In relying on precedent and applying the doctrine of *stare decisis*, courts typically look to past decisions to inform current ones. But the history and tradition that the Supreme Court has relied upon in its due process jurisprudence is not merely its own precedent. In fact, sometimes it uses history and tradition to counter its own precedent.<sup>150</sup> The sources of history and tradition that the Court references include treatise writers, English common law, and (most prominently) state legislative and common law decisions.<sup>151</sup>

Further, the Court does not employ the history and tradition methodology to merely derive the original intent or application of liberty. The history and traditions examined in most due process cases both pre-date and post-date the adoption and ratification of the Fourteenth Amendment and therefore cannot properly be considered evidence of original intent or application.<sup>152</sup>

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148. *E.g.*, *Obergefell*, 576 U.S. at 664 ("The nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

149. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted) (first quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

150. *See, e.g.*, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe* and *Casey* because the right to an abortion is not "deeply rooted in this Nation's history" (quoting *Glucksberg*, 521 U.S. at 720–21)); *Lawrence v. Texas*, 539 U.S. 558, 567–68 (2003) (overruling *Bowers* noting that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter").

151. *See supra* Part I.

152. *See supra* Part I.

Instead, the conservative Justices rely upon a non-originalist but narrowly construed use of history and tradition out of a voiced desire to avoid the mistakes of *Lochner v. New York* and its progeny. That starting point helps to explain and justify the Court's methodology which several Justices have indicated is intended to restrain judicial review and confine due process rights to those that have a robust historical pedigree. According to several leading scholars, principles of democracy and theories about the wisdom of the crowds provide the strongest justifications for the Court's use of history and tradition to derive fundamental rights.<sup>153</sup>

We begin by tracing those justifications, then challenge their adequacy through a qualitative and quantitative assessment of America's exclusionary past. From that foundation, we explore what the exclusionary past means for attempts to justify the history and tradition method based on tradition's purported links to democracy and collective, enduring wisdom.

#### A. *Justifying the Methodology*

In what has come to be known as the *Lochner* era, the Supreme Court used the Due Process Clause's protection of liberty to strike down laws that it viewed as violating the fundamental, unenumerated right to contractual freedom.<sup>154</sup> But since the New Deal, both the Court and scholars have consistently repudiated the *Lochner* Court's jurisprudence.<sup>155</sup>

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153. See *infra* note 167 and accompanying text.

154. In a series of cases in the late nineteenth and early twentieth century that included *Lochner v. New York*, the Court interpreted the Due Process Clause to include a liberty of contract and invalidated many federal and state laws regulating the economic marketplace. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (overturning a state maximum hour law because it "necessarily interferes with the [due process] right of contract between the employer and employes [sic], concerning the number of hours in which the latter may labor in the bakery of the employer"). In several other cases that followed, the Court overturned laws under the liberty of contract theory. E.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 610 (1936); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415 (1926); *Adkins v. Child's Hosp.*, 261 U.S. 525, 562 (1923); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915); *Adair v. United States*, 208 U.S. 161, 180 (1908). But see *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a state law limiting the working hours of women in the laundry industry); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 973 & n.84 (2009) (noting that "far more regulation was actually upheld during the so-called laissez-faire period than was struck down").

155. Dissenting Justices criticized *Lochner*-era majorities for importing their own political philosophies into the interpretation of the Constitution and acting contrary to the Court's constitutional role in a democracy. See *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (urging that the Court should not impose its preferred economic theory as a limit on democratic decision-making). Political backlash followed, leading to judicial retrenchment and a change in judicial philosophy. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 350 (describing a period of intense criticism in the 1930s).

Following that repudiation, those unwilling to abandon all substantive due process jurisprudence have faced a pressing question: how can unenumerated rights be justifiably derived from the Constitution in a manner consistent with the judicial role? For many, the legacy of *Lochner* made clear that the Court should look beyond its members' subjective preferences and values to ascertain the fundamental liberties entitled to constitutional protection.<sup>156</sup> But other external sources used to derive constitutional rights were of questionable utility for deriving unenumerated rights. Neither the text nor the Framers' deliberations shed sufficient light on the content of unwritten liberties.<sup>157</sup>

As Part I described, since the twentieth century, the Court has frequently relied upon some version of what it labels "history and tradition" to evaluate whether a claimed right deserves protection as a fundamental liberty under the Due Process Clause.<sup>158</sup> In applying the history and tradition methodology,

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emanating from the political branches and directed toward the Supreme Court); Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 344 (1995) (explaining how the political backlash to the Court's *Lochner*-era jurisprudence resulted in the Court's shift toward a more deferential attitude in its subsequent due process jurisprudence). The Court eventually abandoned the liberty of contract and claimed the philosophical mantle of judicial restraint. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (holding that a prohibition of interstate shipment of filled milk was a constitutional exercise of the power to regulate interstate commerce).

156. *See* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that it was not appropriate for the Court to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions"); *Roe v. Wade*, 410 U.S. 113, 116 (1973) ("Our task . . . is to resolve the issue by constitutional measurement, free of emotion and of predilection.").

157. Unlike enumerated rights, unenumerated rights by their nature cannot be derived from the text of the Constitution. Moreover, while the Framers of the Constitution deliberated on the intent and meaning of enumerated rights, their deliberations are not as useful a source of authority for unenumerated rights. Even as the Framers acknowledged the Bill of Rights did not include all the rights entitled to constitutional protection, they did not elaborate on the intent and meaning of all the other rights potentially protected as they could not be expected to know or anticipate what all those rights might be. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"); 1 ANNALS OF CONGRESS 439 (1789) (Joseph Gales ed., 1834) (statement of James Madison) (explaining that the Ninth Amendment guards against the concern "that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration").

158. Some Justices have also taken a purposive approach, examining what protecting a liberty, or a failing to do so, would mean for the individual, their lives, and their relationships. For example, in *Eisenstadt v. Baird*, the Court in justifying its recognition of the right of non-married individuals to use contraceptives explained, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453 (1972) (emphasis omitted). In the case recognizing the right to same-sex marriage as a

however, the Justices have said remarkably little about what justifies the method for deriving fundamental liberties other than as a means of judicial restraint.<sup>159</sup> A typical opinion quotes earlier decisions regarding the need to derive fundamental liberties from the Nation's history and tradition and then applies the methodology without further explanation. Legal scholars thus have had to make sense of the Court's methodology. The primary explanation for how the history and tradition methodology reinforces judicial restraint is through the methodology's command of judicial deference to the past.

Courts and scholars have argued deference to the past to be appropriate for two primary reasons. First, they claim that past constitutional and statutory decisions are more democratic than a single court's rights determination can be. Decisions made by "the people" in their ratification of state constitutions and by their representatives in state legislatures have an obviously greater democratic pedigree, they argue, than decisions made by nine unelected and unaccountable members of the Supreme Court. When those decisions are aggregated across states and over time, their democratic pedigree is further enhanced.<sup>160</sup> Like the American Constitution and its

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fundamental liberty, *Obergefell v. Hodges*, the Court also employed several functionalist or purposivist justifications. Those included the importance of marriage to a relationship and its function as a safeguard for children and families. *Obergefell v. Hodges*, 576 U.S. 644, 665–67 (2015).

159. See, e.g., Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 179 (1993) ("The traditionalists have not told us why the actions or decisions of people long dead should determine the resolution of present-day constitutional inquiries."); Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 311 (2011) ("Political arguments defending tradition . . . often seem premised on the assertion that preserving tradition is important for no other reason than that the tradition is a tradition."). Justice Scalia developed a defense of the history and tradition methodology that is grounded in democracy. In dissent in *Lawrence*, Scalia argued that the Court should have deferred to the state's history and tradition of criminalizing homosexual acts because "it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best." *Lawrence v. Texas*, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting); see also *Obergefell*, 576 U.S. at 714 (Scalia, J., dissenting) (criticizing the majority's failure to properly account for the history and tradition of banning same sex marriage declaring that the majority had "rob[bed] 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."); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 412 (1999) ("Justice Scalia's theory of tradition defers to legislation as a source of tradition, reflecting his commitment to the centrality of democracy in the American constitutional scheme."); Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1561 (2008) (explaining that Justice Scalia has argued for traditionalism in democratic terms "suggesting that consultation of specific traditions ensures that judges will remain faithful to 'the society's views'" (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion))).

160. See, e.g., Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 92 (2006) ("[T]he theory of historical tradition is in relative harmony with the principle of

amendments—theoretically ratified through a supermajoritarian process in the states—the decisions reflected in several state constitutions and statutes are asserted to be evidence of “the people’s will” regarding a right’s entitlement to legal protection.

Second, some argue that the cumulative record of past decisions has greater epistemic value than a court’s rights determination. That justification for the history and tradition methodology is drawn primarily from the political philosophy of Edmund Burke and the mathematics and philosophy of Nicolas de Condorcet. Burke, a conservative English philosopher who opposed the French Revolution, advanced a defense of tradition and incremental political change against abstract theory and revolutionary innovation.<sup>161</sup> “The science of government,” Burke explained, is “a matter which requires experience, and even more experience than any person can gain in his whole life.”<sup>162</sup> It is therefore “with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or of building it up again, without having models and patterns of approved utility before his eyes.”<sup>163</sup>

For Burke, tradition’s advantage was that it emerged from many more minds with collectively greater capacity for reasoning than individuals or groups of people in any one particular generation. He explained that we should be “afraid to put men to live and trade each on his own private stock of reason[] because we suspect that this stock in each man is small.”<sup>164</sup> Instead, “individuals would do better to avail themselves of the general bank and capital of nations, and of ages.”<sup>165</sup>

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majoritarian self-government because it protects liberties that, over time, have been recognized, approved, and maintained by the American people and by their elected representatives.”).

161. See generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT (1790) (critiquing the French Revolution and advancing the political philosophy of traditionalist conservatism).

162. *Id.* at 90.

163. *Id.*

164. *Id.* at 129.

165. *Id.* Several legal scholars have embraced Burkean traditionalism and its bias towards continuity as central to legal development. See, e.g., Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066–68 (1990) (urging the adoption of Burke’s “custodial attitude” regarding history); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 683 & n.96 (attributing the idea that “prudent statesmen are guided by experience rather than idealistic speculation” to Burke); Pritchard & Zywicki, *supra* note 159, at 521 (applying Burke’s views on tradition to their model of constitutionalism). Burkean traditionalism also has several critics. See, e.g., David Luban, *Legal Traditionalism*, 43 STAN. L.



Five years before Burke's essay, Nicolas de Condorcet advanced a mathematical theorem supporting Burke's argument from tradition. According to Condorcet's jury theorem, if voters are competent in that they are more likely to be right than wrong about an issue (meaning the probability of being right is greater than 0.5) and the voters' decisions are independent from each other, then as the number of voters increases, the probability the majority's decision will be right will tend towards certainty.<sup>166</sup>

Legal scholars, relabeling the Condorcet jury theorem as the "many minds" argument, have used it to justify the Court's history and tradition methodology.<sup>167</sup> Assuming the competence of the average voter or decider

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REV. 1035, 1055 (1991) (criticizing Burkeanism for failing to account for the part of the intergenerational social contract that permits us "to shake ourselves free of our heritage as the need arises, just as they shook themselves free of the traditions that their ancestors bequeathed to them"); Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 269 (1996) (criticizing Burkean traditionalism and asking "[i]s it not the case that we each have a sense that sometimes at least our own judgment on matters of right and politics is to be preferred to that of our intellectual inheritance?"); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 404 (2006) (criticizing Burkeanism because of its lack of evaluative standard for differentiating good from bad traditions).

166. MARQUIS DE CONDORCET, *ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION-MAKING* (1785), reprinted in CONDORCET: *SELECTED WRITINGS* 33, 48–49 (Keith M. Baker ed., 1976). As an illustration of the theorem, substitute voters for a coin and posit that the probability that the coin lands on heads is 0.51 and that heads represents the right answer. If the person flips the coin one time, it might land on tails since there is a 0.49 probability that it will do so. And if a person flips the coin ten times, it might land on tails more than heads. But as the number of coin flips increases, the aggregate result of the coin flips will tend towards it landing on heads 51% of the time. And if heads on a coin represents the right answer, then under a system of majority rule, the right answer becomes increasingly certain with the increase in the number of coin flips. For other articulations of the theorem, see DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 223–25 (2008); Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, in *INFORMATION POOLING AND GROUP DECISION MAKING* 173, 176–77 (Bernard Grofman & Guillermo Owen eds., 1986); Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567, 569–70 (1988); and Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 4–5 (2009).

There is extensive debate and disagreement about what the independence condition in the Condorcet jury theorem requires. Compare Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 621 (1992) (arguing that the independence assumption is undermined whenever one individual influences the vote of another), with ROBERT E. GOODIN & KAI SPIEKERMANN, *AN EPISTEMIC THEORY OF DEMOCRACY* 68 (2018) (arguing the no-outside-influence account of independence is too strict and not necessary for the Condorcet jury theorem to hold). We do not take a position on the independence condition and instead assume that it holds for the past decisions that the Court relies on in its application of the history and tradition methodology.

167. Cass Sunstein and Adrian Vermeule are two of the most prominent adopters of the "many minds" frame for understanding Burkean traditionalism in the legal academy. See, e.g., Sunstein, *supra* note 165, at 369 (describing Burke's support for traditions built over long periods by "many

and that individuals vote or decide independently from each other, as more people vote or decide it becomes more and more likely that the right answer will emerge from past majoritarian processes.

The many minds argument offers a different justification for the current Court's history and tradition methodology than the one based on democracy. For the many minds argument, what matters is whether the decisionmakers satisfy the theorem's competence and independence conditions. That perspective justifies the Court's reliance both on past democratic decisions, such as state legislative enactments and constitutional ratifications, as well as non-democratic decisions, such as judicial common law determinations and treatise writers' legal summaries and opinions.<sup>168</sup>

According to the many minds argument, a tradition and history that includes many marginally competent voters and decision-makers across multiple institutions over varying time periods is more likely to get to the right answer than a smaller number of even highly competent voters or decision-makers. The Supreme Court is justified in adhering to history and tradition under this account because the past decisions of many minds are more likely to be right than the current decisions of fewer democratic minds or, worse yet, the decision of nine or fewer Justices.

Scholars, including Ronald Dworkin, have questioned the application of the Condorcet Jury Theorem to value choices for which there are no clear right or wrong answers.<sup>169</sup> Other scholars question whether decisions, particularly sequential decisions, can ever be considered independent due to so-called information cascades.<sup>170</sup> Both are important and crippling critiques for the theory that we do not focus on here.

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minds"); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1489 (2007) (associating Burkeans with precedent and tradition that "embody the contributions of many minds").

168. See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 64 (1998) ("If we want to know how the Constitution is interpreted, it is best to look at all of those who have an official role in interpreting it, or in displaying our popular understanding of the document . . .").

169. Ronald Dworkin, *Looking for Cass Sunstein*, N.Y. REV. BOOKS, Apr. 30, 2009, at 30 ("[N]othing in any plausible explanation of how people form moral convictions . . . provides the slightest ground for assuming that people generally are more likely than not to form correct convictions about controversial moral issues.").

170. Informational cascades occur when members of one institution vote and members of other institutions follow by voting in the same way, not on the basis of an independent judgment, but rather because those who voted before them voted in that way. This herd mentality undermines the value of many minds participating in a decision-making process. See, e.g., Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 90 (1999) (describing "group stagnation" as a potential effect of informational cascades); Vermeule, *supra* note 166, at 31 (describing increased

Instead, we raise a key problem with the democracy and epistemic-based justifications for the history and tradition methodology that scholars have largely neglected. That flaw arises from America's exclusionary past which undermines the democratic pedigree of past decisions and creates serious doubts about the competence and independence of past voters and decision-makers. In the next subpart, we add some missing details about America's exclusionary past, focusing on the irredeemable maleness of past decision-makers in state legislatures and courts.

*B. Quantifying America's Exclusionary History*

As described in Part I, the Court has used variations on the history and tradition methodology for over a century. But it was not until the joint dissent in the 2022 case of *Dobbs v. Jackson Women's Health* that some Justices called out an obvious and egregious problem with the methodology.<sup>171</sup> In response to the majority's reference to the people ratifying the Fourteenth Amendment, the joint dissenters explained "'people' did not ratify the Fourteenth Amendment. Men did."<sup>172</sup>

The Court's frequent reliance on the "Nation's history and tradition" in its due process jurisprudence ignores America's exclusionary past, as the *Dobbs* joint dissenters highlighted.<sup>173</sup> It ignores the fact that women, people of color, LGBTQ persons, and other marginalized groups were sidelined in the Constitution's adoption and ratification processes at the Founding and during Reconstruction. It also ignores the fact that, for most of America's past, those historically marginalized groups were also excluded from the legislative and judicial decision-making bodies from which the current Court derives much of its evidence about this Nation's history and tradition. Those members of marginalized groups who have been the primary beneficiaries of unenumerated rights—such as the right to abortion, contraception, interracial and same-sex marriage, and same-sex intimacy—could not freely participate

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diversity and increased emotional intensity as countervailing forces in cascades); GOODIN & SPIEKERMANN, *supra* note 166, at 153 (providing a simple example of the cascade problem). Party-line voting within legislatures is another reason to question lawmakers' independence. See James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 193, 198–99 (2000) (finding significant party influence on Congress members' roll call voting); James Coleman Battista & Jesse T. Richman, *Party Pressure in the U.S. State Legislatures*, 36 LEGIS. STUD. Q. 397, 406 (2011) (finding party to be "a significant factor on many votes" in state legislatures).

171. 142 S. Ct. 2228, 2324 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

172. *Id.*

173. *Id.* at 2242 (majority opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

in deciding whether those rights should be regulated or protected in legislatures or courts.

America's history and tradition that the Court relies upon is thus a white man's history and tradition. Looking to that history and tradition will yield results that fail to fully account for the historical and traditional wants, needs, and values of other Americans, thereby raising profound doubts about the democratic legitimacy and wisdom of those decisions.

Although the Justices have mostly failed to acknowledge the relationship between America's exclusionary past and the Court's preferred history and tradition methodology, some scholars have alluded to it as part of their critique of that methodology.<sup>174</sup> However, those scholarly critiques fail to offer a comprehensive response to the most sympathetic justificatory accounts of the Court's history and tradition methodology.

In this subpart, we make America's exclusionary past more concrete by detailing the composition of the state legislatures and courts that have made the decisions that the Court uses as evidence of the Nation's history and tradition. In response to the *Dobbs* decision, we focus on the degree to which women have been excluded from or significantly underrepresented in those political and judicial decision-making bodies during the timeframe from which the Court draws its history and tradition—from the Constitution's founding to the mid-twentieth century. We also note the aggravated exclusion of Black women and other women of color, who historically have borne and still bear the gravest burdens from denials of reproductive choice.

Elizabeth Cox wrote an invaluable book listing all the women legislators in each state for every year from 1895–1995.<sup>175</sup> The book, however, did not sum the data to provide the number and percentage of women legislators in each state for each of the years examined. We therefore converted Cox's list of names into a dataset from which we draw the number and percentage of women in state legislatures between the first year of the study and the year the Court decided *Roe v. Wade* in 1973.<sup>176</sup>

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174. See, e.g., Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 103 (2002) (noting how the typically “white, straight, wealthy, male jurists will rely on a white, straight, wealthy, male history and historical perspective” in their history and tradition analysis); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. 1127, 1136 (2023) (criticizing the Court in *Dobbs* for “defining women’s constitutionally protected liberties in terms of laws enacted in the mid-nineteenth century, a time when women were without voice or vote in the political process”).

175. ELIZABETH M. COX, *WOMEN STATE AND TERRITORIAL LEGISLATORS, 1895–1995* (1996).

176. Dataset on Women in State Legislatures (1895–1972) [hereinafter Dataset] (attached as a supplement to this Article).

1. *An Overview of America's Exclusionary Past.*—For most of this country's history, Americans treated formal politics as a separate sphere reserved exclusively for men. A combination of misogyny and paternalism kept women out of formal politics for much of this nation's history.<sup>177</sup>

Women were denied the vote in most states prior to 1920 and were excluded or grossly underrepresented in state legislatures and courts.<sup>178</sup> Black women living in many Southern states continued to be denied the vote until the 1960s.<sup>179</sup>

It was not until 1894 that a woman was elected to a state legislature.<sup>180</sup> In the years between 1895 and 1920, women were excluded from state legislatures in thirty-six of the forty-eight states in the Union.<sup>181</sup> In nine of the twelve states in which women participated as lawmakers, they comprised on average less than 0.5% of the legislature each year.<sup>182</sup> In the other three states, women remained an insignificant presence comprising only 1.46% (Utah), 2% (Colorado), and 3.7% (Arizona) of the legislatures.<sup>183</sup> In total, women comprised on average 0.18% of state legislators annually in the twenty-five-year period.<sup>184</sup>

Despite their lack of formal power, women resisted their second-class political status through informal movement politics, including organized

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177. See, e.g., Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780–1920*, 89 AM. HIST. REV. 620, 629 (1984) (describing how so-called women's attributes such as "physical weakness, sentimentality, purity, meekness, piousness . . . were said to disqualify her for traditional public life"); 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 1077 (1944) (describing the strong male belief through the early twentieth century that confining women to their "place" in the home "did not act against the[ir] true interest[s]").

178. See Holly J. McCammon & Karen E. Campbell, *Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866–1919*, 15 GENDER & SOC'Y 55, 56 fig.1 (2001) (identifying the states in which women were granted full suffrage prior to the ratification of the Nineteenth Amendment).

179. See Martha S. Jones, *For Black Women, the 19th Amendment Didn't End Their Fight to Vote*, NAT'L GEOGRAPHIC (Aug. 7, 2020), <https://www.nationalgeographic.com/history/article/black-women-continued-fighting-for-vote-after-19th-amendment> [<https://perma.cc/3N77-FGJT>] (describing how the combination of poll taxes, literacy tests, grandfather clauses, intimidation, and violence kept Black women from voting after ratification of the Nineteenth Amendment until the adoption of the Voting Rights Act in 1965).

180. COX, *supra* note 175, at 66 (describing the three women elected to the Colorado legislature in 1894, the first women ever elected to state office in the United States).

181. Dataset, *supra* note 176.

182. *Id.*

183. *Id.*

184. *Id.*

political protests and lobbying.<sup>185</sup> The adoption and ratification of the Nineteenth Amendment, which eliminated formal barriers to political participation for women, was a product of a powerful movement led and dominated by women.<sup>186</sup>

Informal barriers to participation, however, persisted to significant effect after the Nineteenth Amendment's ratification. Negative societal attitudes about women in politics, the maldistribution of home responsibilities, and men's continued control over levers of political power kept women out of politics.<sup>187</sup> The informal barriers had their most important effect on women's participation as legislators and judges. In the fifty-two years between the ratification of the Nineteenth Amendment and the Supreme Court's decision in *Roe v. Wade*, women remained grossly underrepresented in state legislatures. On average, women made up 2.8% of the legislators annually in the fifty states.<sup>188</sup> They comprised less than 2% of the legislators on average in twenty-seven states and less than 1% of the legislators on average in eight of those states.<sup>189</sup> In only six states did women make up more than 5% of the legislators annually with Connecticut having the greatest average annual representation of women at nearly 11%.<sup>190</sup>

In state high courts, the representation of women was even lower. A woman first joined a state supreme court in 1922 (after the same person, Florence Allen, had become the first woman to preside on a court of general jurisdiction just two years earlier).<sup>191</sup> By the time *Roe* was decided, only four

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185. See Baker, *supra* note 177, at 640–42 (labeling informal movement politics the “domestication of politics” and describing how it ultimately secured the passage of the Nineteenth Amendment).

186. See Ellen DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, FEMINIST STUD., Autumn 1975, at 63, 63 (accounting for the role of radical feminism in the suffrage movement); Anne Firor Scott, *After Suffrage: Southern Women in the Twenties*, 30 J.S. HIST. 298, 298 (1964) (describing the pivotal role of southern women in the suffrage reform movement).

187. See, e.g., Susan Welch, *Women as Political Animals? A Test of Some Explanations for Male-Female Political Participation Differences*, 21 AM. J. POL. SCI. 711, 711–12 (1977) (setting forth primary explanations for the lack of participation of women in politics including socialization, disparate family responsibilities, and absence from networks in “highly educated parts of the community”); M. Kent Jennings & Norman Thomas, *Men and Women in Party Elites: Social Roles and Political Resources*, 12 MIDWEST J. POL. SCI. 469, 490–91 (1968) (identifying the socialized gender-role expectations that “inhibit[ed] the woman’s quest” for public office and “den[ie]d the venture when made”).

188. Dataset, *supra* note 176.

189. *Id.*

190. *Id.*

191. Beverly Blair Cook, *Women Judges: The End of Tokenism*, in WOMEN IN THE COURTS 84, 85–86 (Winifred L. Hepperle & Laura Crites eds., 1978). The same woman, Florence Allen, was

women were serving on the fifty states' and DC's courts of last resort, and only seven women had ever served as federal judges.<sup>192</sup> No woman of color had served on a state's highest court by 1973, and very few served on state courts overall.<sup>193</sup>

Because the Court's history and tradition analysis is focused on state legislative and judicial decisions, it is not capturing the history and traditions of "the people" in any real sense. Rather, it is capturing the history and traditions of a subsegment of "the people," white men, who maintained control over political power to the exclusion of others. That narrow construct of "the people" infected the history and tradition analysis in *Dobbs*.

2. *Who Participated in Past Abortion Decisions?*—In two appendices to his opinion in *Dobbs*, Justice Alito included lists with abortion ban descriptions and years of enactment in the fifty states, territories, and the District of Columbia. For Alito, this was definitive proof that the right to abortion was not "deeply rooted in this Nation's history and tradition."

In this analysis, however, Alito omitted important details about the political basis and composition of those legislatures that banned abortion.

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the first woman appointed to the federal courts in 1934 (to the Sixth Circuit Court of Appeals). *Id.* A second woman was appointed in 1949 (Burnita Matthews to the District of Columbia district court). *Id.* Until 1960, of 1,337 federal judges ever confirmed, there were "1,333 White males, two White females, one African American male, and one Asian American male." Stubbs, *supra* note 31, at 109. From 1960 through Nixon's resignation in 1974, five more women (four white and one Black) and twenty-five people of color (seventeen Black men, two Asian American men, six Latino men, and one Black woman) were appointed to federal judgeships. *Id.* at 111 tbl.2.

192. Beverly B. Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573, 608–10 app. 1 (1984); Stubbs, *supra* note 31, at 109, 111 tbl.2.

193. A Black woman did not serve on a state's highest court until 1988, though one woman had served on DC's court of last resort by 1975. MART MARTIN, *THE ALMANAC OF WOMEN AND MINORITIES IN AMERICAN POLITICS* 116, 202 (1999) (describing Juanita Kidd Stout's appointment to Pennsylvania's supreme court in 1988); Walter J. Walsh, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 291, 291–92 (1997) (describing Julia Mack's appointment to the DC Court of Appeals). The first Latina state high court justice was appointed in 1985, and the first Asian American woman in 1989. See Charles Z. Smith, *Women of Color in the Judiciary: An American Dream*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 109, 112 (1995) (noting Rosemary Barkett's appointment to the Florida Supreme Court and Joyce Luther Kennard's appointment to the California Supreme Court).

A Black woman did not serve as a judge at any level until 1939; the first Black woman to serve on a federal district court was appointed in 1966. See Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 HOW. L.J. 645, 666–68 (2010) (describing Jane Bolin's appointment to New York City's Domestic Relations Court in 1939); *id.* at 669–71 (describing Constance Baker Motley's appointment to the U.S. District Court for the Southern District of New York in 1966). An Asian American woman did not join the Article III courts until 1998. SUSAN OKI MOLLWAY, *THE FIRST FIFTEEN: HOW ASIAN AMERICAN WOMEN BECAME FEDERAL JUDGES* 1 (2021).

Women could not vote for or against any of the legislators that first adopted abortion prohibitions, save in a single state and two territories. In *Dobbs*, Alito emphasized that “[b]y 1868, . . . three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.”<sup>194</sup> Women could not vote in any of those states when the abortion bans were adopted.<sup>195</sup> Nor could women vote in any of the territories that had barred abortion by 1868.<sup>196</sup>

In fact, of the thirty-six states, thirteen territories, and District of Columbia which Alito cited as having passed abortion bans by 1919, only the Utah Territory and the New Mexico Territory allowed women to vote when their bans were enacted.<sup>197</sup> The final state to adopt an abortion ban was Mississippi in 1952, rendering it the only state that allowed women the vote at the time of the ban’s adoption.<sup>198</sup>

Women were not only disenfranchised from voting at the time forty-seven of the fifty states and territories adopted the abortion bans cited in *Dobbs*, they were also excluded from participation as lawmakers in forty-nine of those fifty state and territorial legislatures that decided on the bans. In only Mississippi did women participate in the legislature that adopted a ban. In that legislature, women were extremely underrepresented, making up only five out of the 174 lawmakers (2.87%) eligible to vote on the abortion ban.<sup>199</sup> Those women legislators were all white; a Black woman did not join the Mississippi state legislature until more than four decades later.<sup>200</sup>

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194. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2252–53 (2022).

195. See *id.* at app. A (listing state abortion bans and their years of enactment); KEYSSAR, *supra* note 7, at 368 tbl.A.20 (listing states and territories where women could vote prior to the Nineteenth Amendment—Wyoming was the first, in 1869 while it was still a territory, and also became the first state to enfranchise women when it acquired statehood in 1890); MEAD, *supra* note 28, at 35–52 (describing women’s suffrage battles in the western territories in “the context of Reconstruction, territorial, and statehood politics”).

196. See *Dobbs*, 142 S. Ct. at app. B (listing territory abortion bans and their years of enactment); KEYSSAR, *supra* note 7, at 368 tbl.A.20 (identifying Wyoming as the first territory where women could vote—in 1869). See generally MEAD, *supra* note 28 (describing the interaction between suffrage and statehood movements).

197. *Dobbs*, 142 S. Ct. at 2252–53, apps. A & B; KEYSSAR, *supra* note 7, at 368 tbl. A.20. See generally MEAD, *supra* note 28 (describing early suffrage victories in certain western territories).

198. *Dobbs*, 142 S. Ct. at app. A.

199. See Dataset, *supra* note 176; *infra* Appendix A.

200. Mississippi did not elect a Black state legislator again after Reconstruction until 1967. Byron D’Andra Orey, *Black Legislative Politics in Mississippi*, 30 J. BLACK STUD. 791, 794 (2000). A Black woman, Alyce Clarke, was first elected in 1985. *Id.* at 797 tbl.1.





Alito's majority opinion in *Dobbs* also cited as evidence in its history and traditions analysis a 1961 study of past abortion laws.<sup>201</sup> In that study,

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201. *Dobbs*, 142 S. Ct. at 2253 n.33 (citing Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 435–37, 447–520 (1961)).

the author catalogued all the abortion laws that state legislatures had passed through 1960.<sup>202</sup> According to that study, all fifty states approved abortion restrictions between the year women were granted the vote and 1960.<sup>203</sup> Although the evidence from the study was not central to the history and tradition analysis employed in *Dobbs*, the study might be used to counter critiques of the Court's analysis insofar as the Court focused on laws from a period in which women were disenfranchised. But that claim runs into the problem that even after women gained the vote in 1920, their numbers among the state legislatures that passed and maintained abortion restrictions were vanishingly small. And insofar as the argument from history and tradition relies on the decisions of lawmaking bodies as evidence, the composition of those lawmaking bodies is important even if women could vote.

The lawmaking bodies that passed abortion restrictions between 1920 and 1960 are notable for their extreme underrepresentation of women. In those legislatures, women, on average, made up only 3.27% of the legislators in the year each ban was passed.<sup>204</sup> In thirty-five of the fifty-four legislatures that passed abortion restrictions, women made up less than 3% of the legislators, in twenty-three of those legislatures, they made up less than 2%, and in fifteen of those legislatures, they made up less than 1% of the state lawmakers.<sup>205</sup> In four of the legislatures that passed abortion restrictions between 1920 and 1960, women had no representation.<sup>206</sup>

While we are limited in our ability to quantify the women legislators of color, it is notable that Black and Latina women did not have any members in state legislatures till the 1930s. A Latina woman first joined a state legislature in 1930, but Latinas lacked representation in any state senate until 1978.<sup>207</sup> A Black woman joined a state legislature for the first time in 1938 and a state senate in 1952.<sup>208</sup>

Our account of the composition of state lawmaking bodies demonstrates that the people did not pass legislation banning or restricting abortions, white men overwhelmingly did. In the next Part, we assess whether the democracy and wisdom justifications for the Court's history and tradition methodology

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202. Quay, *supra* note 201, at app. A.

203. *Id.*

204. *See infra* Appendix A.

205. *Id.*

206. *Id.*

207. MARTIN, *supra* note 193, at 201 (stating that Fedelina Lucero Gallegos of New Mexico was the first Latina to join a state legislature in 1930, while Polly Baca of Colorado was the first Latina state senator in 1978).

208. *Id.* at 168 (stating that Crystal Bird Fauset was first Black woman to join a state legislature in 1938, and Cora M. Brown was first to join a state senate in 1952).

can withstand the evidence of America's exclusionary past. Can the Court's history and tradition methodology be democratically legitimate or wise when it is predominantly a white man's history and tradition?

*C. Challenging the Justifications for History and Tradition*

The Court cannot simply label past laws, constitutions, and the common law (along with treatises and political philosophers' works) as "the Nation's" history and traditions. Many individuals and groups who have been a part of the Nation since its founding had little role in the construction of the history and traditions that the Court cites, especially insofar as the Justices focus exclusively on laws and judicial decisions. Their histories and traditions are all too invisible, going unrecorded and unaccounted for in the Nation's decision-making processes that are the focal point of the Court's history and tradition methodology. Do those facts require that the methodology be rejected as undemocratic and lacking epistemic value?

*1. Democracy?*—It might seem painfully obvious that the methodology's democratic justification fails in the context of abortion rights, given women's exclusion during the enactment of abortion laws, first as voters and then as lawmakers. Women did not formally consent to any of the abortion bans that were passed prior to their enfranchisement and after their enfranchisement the views of women could be easily ignored due to their low numbers in decision-making bodies.<sup>209</sup> Despite those glaring democratic distortions, a theory of representation connected to the Nation's founding, virtual representation, might offer an alternative justification from democracy.

In defending the U.S. House of Representatives as a democratic institution in the Federalist Papers, James Madison offered several arguments to win public support for the Constitution. Madison, for example, claimed that the House of Representatives would be democratic because there would be no distinction between the rich and poor in terms of voting, ignoring the fact that eleven out of the thirteen states required the possession of property to vote, thereby depriving many poor Americans of their right to vote for

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209. Professors Melissa Murray and Katherine Shaw criticize the narrow view of political power focused on the opportunity to vote and turnout, arguing that a better measure of a group's political power is the extent to which a group is represented in political bodies. Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 127 HARV. L. REV. (forthcoming 2024) (manuscript at 41–45) (on file with authors).

House members.<sup>210</sup> Another defense was grounded in long-standing democratic theory. Madison claimed that the House of Representatives would be restrained from enacting oppressive measures because members “can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society.”<sup>211</sup> Without naming it as such, Madison thus offered a democratic defense of the House of Representatives based on the theory of virtual representation.

According to the theory of virtual representation, those who cannot vote are nonetheless represented because those elected to office will share their interests in and burdens from the laws passed.<sup>212</sup> The propertied male classes

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210. In response to criticisms that the House of Representatives violated the principles of republican government, Madison asked rhetorically “Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.” THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961). That was true insofar as the text of the U.S. Constitution did not contain any voter qualifications. But the Constitution delegated to states the authority to set voter qualifications for federal elections. U.S. CONST. art. I, § 2. And most states at the time of the Constitution’s ratification maintained property qualifications for voting. Bertrall L. Ross II, *Becoming Fundamental: The Constitutional Right to Vote in the Text, History, and Tradition of Republican Government*, 109 IOWA L. REV. (forthcoming 2024) (manuscript at 37) (on file with authors).

211. THE FEDERALIST NO. 57, *supra* note 210, at 352. Justice Scalia offered a modern reframing of Madison’s defense of virtual representation when he argued that the Equal Protection Clause “requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.” *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

212. See JOHN PHILIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50 (1989) (defining virtual representation). Madison argued the full and equal operation of laws on lawmakers and constituents “creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.” THE FEDERALIST NO. 57, *supra* note 210, at 352–53. Madison’s theory is related but not entirely aligned with Edmund Burke’s theory of representation that he proffered in the years before the Revolution. Burke argued that “Parliament is not a congress of ambassadors from different and hostile interests . . . [but rather] a deliberative assembly of one nation, with one interest, that of the whole.” Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 1 THE FOUNDERS’ CONSTITUTION 391, 392 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis omitted). Both theories, in their suggestion that people do not need to vote or have representatives from their class in elected office, were broadly criticized. See, e.g., JOHN ADAMS, THOUGHTS ON GOVERNMENT 9–10 (1776) (arguing that the Representative Assembly “should think, feel, reason, and act like” the people at large; “it should be an equal representation, or in other words equal interest among the people should have equal interest in it”); Thomas Jefferson, *Notes on Proceedings in the Continental Congress* (1776), in 1 THE PAPERS OF THOMAS JEFFERSON 309, 325 (Julian P. Boyd ed., 1950) (arguing that since “it is interest alone” that “govern[s] the councils of men, . . . the interests within doors should be the mathematical representative of the interests without doors”); Brutus, No. 3, N.Y. J., Nov. 15, 1787 (“The very term, representatives, implies, that the person or body chosen for this purpose, should resemble those who appoint them—a representation of the people of America, if it be a true one, must be like the people.”).

that controlled the vote and elected office embraced the theory of virtual representation until protests and mass movements from the propertyless and women compelled its repudiation.<sup>213</sup> But for women, other barriers to participation mostly kept them out of elected office even after they acquired the vote.<sup>214</sup>

A version of virtual representation as a defense of almost entirely male legislatures is therefore necessary. Even though women were dramatically underrepresented in legislative bodies, the theory of virtual representation suggests that their interests are nonetheless represented by male elected officials who would share the burdens of any laws passed.<sup>215</sup> As an earlier male theorist wrote, “[w]omen have not a share in government, but yet by their strict connexion with the other sex, all their liberties are as amply secured as those of the men, and it is impossible to represent the one sex, without the other.”<sup>216</sup>

However, when the sexes are differently positioned in the exercise of liberty, the democratic theory of virtual representation obviously fails as a justification for judicial reliance on the history and tradition of America’s exclusionary past. The right to an abortion is the clearest example of a gender-differentiated liberty.

State bans or regulations of abortion burden women and men differently. As the Court recognized in *Roe*, it is women who uniquely experience the physical harm of pregnancy and childbirth.<sup>217</sup> It is women who disproportionately bear the brunt of the psychological harm from childrearing that “may force upon [a] woman a distressful life and future.”<sup>218</sup> And it is women, far more than men, who will suffer the “difficulties and continuing stigma” associated with “unwed motherhood” and motherhood more generally.<sup>219</sup> Because women and men are burdened differently, it is extremely difficult to argue that men virtually represented women in their past regulation of abortion. Instead, the risk when a law burdens lawmakers

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213. See KEYSSAR, *supra* note 7, at 13–21 (describing efforts to end property requirements); *id.* at 163–64 (describing the women’s suffrage movement).

214. See *supra* text accompanying note 187.

215. See, e.g., John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917, 934 (2008) (defending the idea that men virtually represented women at the time of the adoption of the original Constitution).

216. REID, *supra* note 212, at 58 (quoting A Letter from a Plain Yeoman, PROVIDENCE GAZETTE, May 11, 1765, reprinted in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 71, 76 (Edmund S. Morgan ed., 1959)).

217. 410 U.S. 113, 153 (1973) (“Specific and direct harm medically diagnosable even in early pregnancy may be involved.”).

218. *Id.*

219. *Id.*

differently from some of their constituents is that it is designed to oppress the excluded instead of protecting their interests.<sup>220</sup>

Our challenge to the democratic underpinnings of virtual representation is not new.<sup>221</sup> It is the same challenge that motivated the American Revolution and served as the genesis of an American theory of government grounded in republican consent. Prior to the revolution, American colonists who were unable to vote for members of, or hold office in, the English Parliament resisted taxes that that legislative body imposed on them. The English claimed that the Americans consented to the taxes through their virtual representatives in Parliament.<sup>222</sup> The American colonists, however, rejected those claims because those members of Parliament who were said to represent them did not suffer the same burdens from the imposition of the taxes.<sup>223</sup> For the American colonists, taxes on the unrepresented were a form

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220. As Reva Siegel has shown, the nineteenth-century campaign to criminalize abortion was aimed in part at reinforcing traditional gender roles. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281, 302 (1992); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY* 23 (Vintage Books 2d ed. 2017) (1997) (“The social order established by powerful white men was founded on two inseparable ingredients: the dehumanization of Africans on the basis of race, and the control of women’s sexuality and reproduction.”).

221. Several American colonists and English allies to Americans attacked the theory of virtual representation in the controversy over the Stamp Tax that the English parliament imposed on the American colonists. See DANIEL DULANY, *CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES* 10 (1765) (describing that a tax imposed in America would not affect any current British electors); JOSEPH PRIESTLEY, *AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY* 22 (1771) (stating that people without the vote “have reason to fear, because an unequal part of the burden may be laid upon them”); EDWARD BANCROFT, *REMARKS ON THE REVIEW OF THE CONTROVERSY BETWEEN GREAT BRITAIN AND HER COLONIES* 97–99 (1769) (“[I]mmense is the Difference between a Nation but imperfectly represented, and a People who have no Representation.”); JAMES WILSON, *CONSIDERATIONS ON THE NATURE AND THE EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT* 18 (1774) (stating that the incentives legislators have to protect the welfare of the people of Britain “may have a contrary operation with regard to the Colonies” given their lack of representation).

222. See, e.g., THOMAS WHATELY, *THE REGULATIONS LATELY MADE CONCERNING THE COLONIES, AND THE TAXES IMPOSED UPON THEM, CONSIDERED* 109 (1765) (“All British subjects are really in the same; none are actually, all are virtually represented in Parliament . . .”); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 174 (1998 ed.) (“What made this concept of virtual representation intelligible . . . was the assumption that the English people, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, were essentially a unitary homogenous order with a fundamental common interest.”).

223. See, e.g., DULANY, *supra* note 221, at 10 (noting that “not a single actual Elector in England, might be immediately affected by a Taxation in America, imposed by a Statute which would have a general Operation and Effect, upon the Properties of the Inhabitants of the Colonies”); see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 167–68

of oppression.<sup>224</sup> The Americans' resistance to taxation without representation ultimately contributed to a revolution, independence, and a reformation of republican government—ostensibly along the lines of popular sovereignty and consent as stipulated in the phrase “We the People.”<sup>225</sup>

That original American resistance to the theory of virtual representation as applied to those differently burdened by laws raises doubts about the democratic legitimacy of the Court's history and tradition methodology as applied to liberties uniquely exercised by those who were excluded from “We the People.”<sup>226</sup> Just as the English could not legitimately say they virtually represented the Americans in their imposition of taxes on them, men cannot legitimately say they virtually represent women in their regulation of women's reproductive choices. The Court's history and tradition methodology is democratically flawed insofar as it relies upon the products of past exclusionary governance to ascertain whether rights uniquely exercised by politically excluded Americans are entitled to protection.

In highlighting women's past exclusion, we do not mean to claim that women, had they voted and participated as legislators, would have voted against abortion restrictions en masse. That counterfactual is impossible to reconstruct in any way that is useful for present-day interpretation. To make it meaningful, it would be necessary to imagine a society without starkly unequal citizenship for women and then ask what women inhabiting that idealized world would have done in relation to abortion. The answer is unknowable. Our point is simply that we cannot draw upon old laws and policies as evidence of what society has settled on when the people being regulated have not had a voice in those laws or policies. Only if we deem “society” to be a term of art that excludes anyone who is not yet politically enfranchised at the time could we legitimately equate laws with the views of society. To adopt that definition, though, would be at complete odds with our democratic identity and commitments.

Might those past decisions nonetheless be justifiably relied upon for their wisdom? We turn in the next section to a re-assessment of the

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(50th anniversary ed. 2017) (explaining how the English argument for virtual representation “was met at once with flat and universal rejection, ultimately with derision” in the colonies as the argument lost any force “[o]nce a lack of natural identity of interests between representatives and the populace was conceded”).

224. See, e.g., PRIESTLEY, *supra* note 221, at 22 (“[I]n all cases, when those who lay the tax upon others exempt themselves, there is *tyranny* . . .”).

225. U.S. CONST. pmb1.

226. Historian Gordon Wood noted that Americans “never decisively repudiated the conception of virtual representation itself,” but, for the theory to operate, it had to meet certain conditions. Certain people from the society “could justly speak for the whole” if “their interests were identical with the rest.” WOOD, *supra* note 222, at 176.

justificatory argument for the history and tradition methodology based on the wisdom of the crowds.

2. *Wisdom?*—The “many minds” or “wisdom of the crowd” justification for the Court’s reliance upon history and tradition does not depend on the democratic inclusion of all Americans in past decision-making processes or their virtual representation in past decision-making bodies. Instead, as originally articulated in Condorcet’s jury theorem and as recapitulated in scholarly accounts, what matters is the size and competency of the crowd involved in the decision, not its representativeness. History and tradition, according to this account, provides epistemic rather than democratic value.

Elaborating on that perspective, the argument would be that the many minds justification can be made to fit comfortably with America’s exclusionary past. Decision-making processes involving abortion which were limited to men are fine so long as there were many men involved in the different processes. When it comes to abortion, the Court has relied on the decisions and opinions of many men in past legislatures and courts, as well as several male treatise writers.<sup>227</sup> In relying upon those sources, the Court has not voiced any doubt about their epistemic value. It seems to presume the wisdom of many male minds regarding the regulation of a woman’s body.

The many minds argument applied in this way, however, is oversimplified to the point of being misleading. It captures only one side of Condorcet’s theorem and assumes without question that the theorem inherently tends towards truth or right answers. Specifically, those who seek to justify the Court’s history and tradition methodology assume that past decision makers were, on average, more likely than not to be right ( $> 0.5$  probability) in their decision-making processes. And that therefore the more persons involved in the decision, the more certain that the majority results in the aggregate of those decision-making processes were the right ones.<sup>228</sup>

But what if the decision-makers were less likely to be right than would occur from random chance (i.e., each was more than fifty percent likely to err)? The result would then be that the more people involved in the decision,

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227. See, e.g., *Dobbs v. Jackson Women’s Health*, 142 S. Ct. 2228, 2249–54 (2022) (first citing HENRICI DE BRACON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 279 (Sir Travers Twiss ed., 1879); then citing EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 50–51 (1644); then citing MATTHEW HALE, PLEAS OF THE CROWN: A METHODICAL SUMMARY 53 (P.R. Glazebrook ed., photo. reprt. 1982) (1678); and then citing Matthew Hale, 1 HISTORY OF THE PLEAS OF THE CROWN 433 (1736)).

228. In this context, we assume that “right” might be interpreted in different ways but would encompass some combination of justice, human rights, and the public good.



the more certain that the majority result from the aggregate of decision-making processes will be wrong.<sup>229</sup>

Why would the average decision-maker be more likely than random chance to be wrong? Condorcet himself proffered an answer to that question. Condorcet explains: “[w]hen the probability of the truth of a voter’s opinion falls below 1/2, . . . [the] reason can only be found in the prejudices to which this voter is subject.”<sup>230</sup> Those prejudices can arise from the fear of the unknown that can morph into hatred towards others. Or they can arise from ignorance about the unknown that can lead to generalization and stereotypes about others.<sup>231</sup> They can also derive from acceptance and internalization of existing social hierarchies. In whatever form, prejudice prevents individuals from incorporating the experiences of others into their decision-making algorithm. And as a result, prejudice can act as an impediment that diminishes below random chance the probability that a person will produce the right answer.

Recently, scholars have emphasized an antidote to prejudice that can increase the probability that individuals, or the average of the community, will produce right answers. In a seminal article, Lu Hong and Scott Page derived from a formal mathematical model that a functionally diverse group with less competence outperforms a homogenous group with more competence.<sup>232</sup> A probable reason for this remarkable result is that diversity in perspective and ways of thinking is more important to group performance

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229. To see how this would play out, we can again convert votes to coin flips and posit that the probability that the coin will land on tails is .51 and that tails represents the wrong answer. If the person flips the coin one time, it might land on heads since there is a .49 probability that it will. And if a person flips the coin ten times, it might land on heads more than tails. But as the number of coin flips increases, the aggregate result of the coin flips will tend toward certainty that it will land on tails 51 percent of the time. And if tails represents the wrong answer, then under a system of majority rule the likelihood that the coin will land on tails in a majority of coin flips will tend towards certainty as the number of coin flips increases. As Jeremy Waldron explains, “[t]he theorem does not make group competence an increasing function of average member competence for any value of the latter”; instead, “[t]he same reasoning that yields Condorcetian optimism about the general will also yields the conclusion that if average competence dips below .5, majority competence tends toward zero as group size increases.” David Estlund, Jeremy Waldron, Bernard Grofman & Scott Feld, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1322 (1989) (emphasis omitted); see also Vermeule, *supra* note 166, at 26 (“[M]ore minds can be worse minds—not by happenstance, but because an increase in the number of minds itself causes a reduction in the quality of each mind.”).

230. Condorcet, *supra* note 166, at 62.

231. See ESTLUND, *supra* note 166, at 229 (“Systematic individual biases and errors are . . . very common, and they represent one kind of challenge that needs to be met before individual competence could be assumed to be at least random.”).

232. Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT’L ACAD. SCI. 16385, 16386–89 (2004).

than ability.<sup>233</sup> Other social scientists have built from, and offered explanations for, Hong and Page's model's conclusion. Political scientist H  l  ne Landemore argues that cognitive diversity is necessary to ensure the epistemic value of decisions from many minds.<sup>234</sup> She defines cognitive diversity as "the variety of mental tools that human beings use to solve problems or make predictions in the world," including "different perspectives, interpretations, heuristics, and predictive models."<sup>235</sup>

Cognitive diversity, in at least some contexts, will be linked to other forms of diversity including gender and racial diversity since different gender and racial groups are likely to bring different perspectives, interpretations, heuristics, and predictive models to decision-making processes that impact these groups differently.<sup>236</sup> There are at least two mechanisms by which cognitive diversity increases the likelihood that the average of a group will have a better than random chance to produce right answers. First, cognitive diversity creates opportunities for right answers to cancel out wrong answers in a deliberative process.<sup>237</sup> If votes are negatively correlated, that "guarantees that where one voter makes a mistake, another is likely to get it right, and vice versa."<sup>238</sup> As a result, mistakes in the aggregate "cancel each other not randomly but systematically."<sup>239</sup>

Cognitive diversity can also disrupt the "group think" that is more likely to arise in homogenous groups. Such group think diminishes the independence of decision-making that is a crucial underpinning of the Condorcet jury theorem.<sup>240</sup> Cognitive diversity can change this dynamic "not just by adding different perspectives to the group but also by making it easier for individuals to say what they really think."<sup>241</sup>

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233. As Hong and Page explain: "[t]he diversity of an agent's problem-solving approach, as embedded in her perspective-heuristic pair, relative to the other problem solvers is an important predictor of her value and may be more relevant than her ability to solve the problem on her own." *Id.* at 16389.

234. H  L  NE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY 3* (2013).

235. *Id.* at 89.

236. *See id.* at 103 (noting that when "cognitive diversity is correlated with other forms of diversity, such as gender or ethnic diversity, . . . affirmative action and the use of quotas might be a good thing not just on fairness grounds but also for epistemic reasons").

237. Landemore explains: "Cognitive diversity ensures that votes (or predictions) are not independent but, on the contrary, negatively correlated." *Id.* at 160.

238. *Id.*

239. *Id.*

240. As scholar-journalist James Surowiecki surmises, an "obvious cost of homogeneity is . . . that it fosters the palpable pressures toward conformity that groups often bring to bear on their members." JAMES SUROWIECKI, *THE WISDOM OF CROWDS 38* (Anchor Books 2005) (2004).

241. *Id.* at 39.

Recent scholarly contributions to the Condorcet jury theorem can be boiled down to a phrase: crowds are often wiser when they are diverse. And those recent contributions directly implicate the Court's application of its history and tradition methodology to liberties exercised by those excluded from past decision-making processes.

Focusing on our case study of abortion, the crowd of decision-makers in America's exclusionary past has been far from diverse in the ways that matter. Abortion is a decision in which cognitive diversity will necessarily map onto gender, race, and class diversity. In ways we have described, women differ from men in their experience with abortion and its regulation. Therefore, as a general matter, women are likely to bring different perspectives, interpretations, heuristics, and predictive models to the decision-making process.

Due, however, to America's exclusionary past, women were either not involved or were an insignificant presence in those past decision-making processes that the Court has relied upon. As a result, the epistemic value of the aggregate decisions regulating abortion are more likely than not to fall to nil as there is no antidote to the prejudice that likely plagued past decisions.<sup>242</sup> Women were not a significant part of the deliberation process that would have created opportunities for right answers to counteract wrong answers. And women were not a significant enough presence to disrupt any group think that would undermine the independence of a homogenous decision-making process.

We concede that there is no way to know for certain whether the average of the homogenous group of decision-makers regarding past abortion regulations was more likely to be wrong than right, or "wise" in the ways that matter. However, the absence of cognitive diversity in those decisions raises considerable doubt that the men making decisions about women's reproductive rights were competent to do so.<sup>243</sup> Those doubts should at least lead the Court to question the epistemic value of the history and tradition that it relied upon in *Dobbs*.

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242. See Siegel, *supra* note 220, at 346–47, 362, 366 (noting that unspoken assumptions about women's gender roles, as well as class and race, will lead modern regulators "to underestimate the impact of fetal-protective regulation on women's lives, and offer physiological justifications for imposing costs on women that the community is in fact capable of sharing").

243. See, e.g., Marianne Githens, *Women and State Politics: An Assessment*, in *POLITICAL WOMEN: CURRENT ROLES IN STATE AND LOCAL GOVERNMENT* 41, 41 (Janet A. Flammang ed., 1984) (stating that after the late 1960s "the insensitivity of public policy to women" as well as "many male politicians' obliviousness to women's needs" fueled the goal of electing more women officeholders).

The history and tradition methodology that the Court employed in *Dobbs* only served to exacerbate the exclusions from the Constitution's drafting process. The democratic pedigree and epistemic value of the interpretive methodology are highly questionable to say the least.

Yet those who support a restrictive approach to history and tradition often juxtapose their preferred interpretive approach against judicial willfulness and subjective value determinations.<sup>244</sup> Without the constraint of history and tradition, they argue, judges are more likely to decide the Constitution's meaning based on their own values.<sup>245</sup> Methodologies that look to current consensus or morality, they assert, are so malleable and indeterminate that the necessary result is that judges will use their own subjective determinations to decide cases.<sup>246</sup> Insofar as judges are unelected and unaccountable, such judge-made law will have less of a democratic foundation than the law made by the elected institutions in America's exclusionary past.<sup>247</sup>

Acknowledging America's exclusionary past, proponents of the history and tradition methodology might also argue that the Supreme Court as an institution has been even more exclusionary than past democratic bodies. Until the mid-1960s, not a single woman or person of color served on the Court.<sup>248</sup> Even if we shift our focus to the current day, out of the 116 Justices to have served on the Supreme Court, only six have been women and only four have been people of color.<sup>249</sup>

Furthermore, from the perspective of the Condorcet jury theorem, the Supreme Court lacks the numbers and diversity to give its decisions more epistemic value than those made by a compilation of state legislators, state courts, and political and legal theorists. In contrast to the thousands of mostly white male state legislators, judges, and theorists who have made decisions

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244. See, e.g., Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 708 (1994) (arguing that any alternative to "looking to the traditions that are established by majorities . . . would necessarily invoke either some form of abstract theory or simply the subjective preferences of the judge").

245. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925–26 (1996) (arguing that a judge who follows history and tradition in the form of precedent is "significantly limited in what she can do," preventing her from "imposing [her] own will").

246. See generally, ELY, *supra* note 39 (criticizing the different constitutional interpretive methodologies in part on the basis of their indeterminacy and malleability).

247. See McConnell, *supra* note 165, at 682 (stating that a government in which Justices "base decisions on their own moral and political opinions . . . would no longer be a government of the people").

248. Barbash, *supra* note 32; Payne, *supra* note 32, at 2.

249. Stacy M. Brown, *Supreme Court Justice Jackson Proclaims: 'We've Made It. All of Us,'* WASH. INFORMER, Apr. 14–20, 2022, at 14.

and expressed views on questions like the right to an abortion, the mostly white male Supreme Court Justices who have been involved in abortion-related decisions number in the double digits.<sup>250</sup> Assuming individuals are more likely than not to be right, the jury theorem says that the aggregate decisions of a thousand people are more likely to be right than those of a dozen.

Responding to those arguments from democracy and wisdom, we ask: Is there a method of constitutional interpretation that can overcome the flaws of the history and tradition approach and even ameliorate America's exclusionary past? We turn our attention to that question in the next Part.

### III. Ameliorative Judicial Review

In this Part, we begin by identifying ways in which the history and tradition methodology might be improved to ameliorate the exclusions in America's past while still retaining the method's potential advantages over pure discretion.<sup>251</sup> We then consider a more radical approach to history and tradition, one that asks judges to help move the nation toward a more democratic present. We conclude by addressing the question of when we might be able to move beyond America's exclusionary past.

#### A. *Broadening History and Tradition*

1. *Abstracting and Equalizing the Right in Question.*—In the due process cases, a point of major controversy in the Court's examination of history and tradition was the level of generality at which rights or liberties should be

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250. See, e.g., *Roe v. Wade and Supreme Court Abortion Cases*, BRENNAN CTR. FOR JUST. (Sept. 28, 2022), <https://www.brennancenter.org/our-work/research-reports/roe-v-wade-and-supreme-court-abortion-cases> [https://perma.cc/CU3B-SSNM] (listing the fifteen abortion cases that the Supreme Court has decided from *Roe v. Wade* to *Dobbs v. Jackson Women's Health*, with several Justices involved in multiple cases). Although the federal judiciary includes many more than the nine Justices, the fact that the Court exercises hierarchical decision-making control over lower courts suggests that the collective number of judges could not be counted in assessing any application of the "many minds" claim to the judiciary.

251. We engage in the project of trying to improve the Court's history and tradition methodology because we are sympathetic to those who have identified some positive values from a search of history and tradition. See, e.g., Strauss, *supra* note 245, at 894 (arguing for a tradition-based analysis due to the limits of human capacity: "[p]eople do not have the resources, intellectual and otherwise, to consider every question anew with any hope of consistently reaching the right result"); Friedman et al., *supra* note 168, at 58 (arguing that interpretations on the basis of history and tradition can serve the proper goal of identifying "a set of commitments more enduring and less transient than immediate popular preference"); Forde-Mazrui, *supra* note 159, at 309 (identifying consequentialist and deontological benefits from preserving tradition). We are also being pragmatic in recognizing that the Court will probably continue to apply this methodology for the foreseeable future.

understood.<sup>252</sup> Should the right in *Dobbs* be understood in the specific way that the majority described it, as the right of a woman to obtain an abortion? Or should it be understood as a more general right to reproductive autonomy? Should we broaden out even further to understand it as the right to privacy or bodily integrity, as some have characterized the right? The level of generality matters significantly; it can determine the results from the Court's application of the history and tradition methodology. Our history and tradition, for example, might be one in which the right to abortion was widely restricted but other privacy rights were robustly protected.

How should the Court decide which level of generality applies? As we discussed in Part I, Justice Scalia in *Michael H. v. Gerald D.* argued that rights should be understood at the most specific level of generality.<sup>253</sup> According to those instructions, the Court should examine the history and tradition of abortion, not privacy; same-sex marriage, not marriage; and same-sex sodomy, not sex. Justice Scalia justified his demand for that level of specificity based upon the need for judicial restraint.<sup>254</sup> He suggested that characterizing the liberty in question at the most specific level would restrain judges from engaging in subjective value determinations and thus protect democratic decision-making.<sup>255</sup> There are, however, two related bits of irony in those arguments. First, the choice about the level of generality is itself a subjective value determination that is derived from no other source than the minds of the Justices.<sup>256</sup>

Second, that subjective value determination will entrench America's undemocratic past in cases involving the exercise of liberties unique to historically excluded classes. A focus on abortion, same-sex marriage, and sodomy, for example, will result in the Court examining a history and tradition of decisions that disproportionately burdened those excluded from past decision-making processes. Those decisions were undemocratic as the

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252. See, e.g., Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1162 (2020) (describing the dimensions of the level of generality question).

253. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

254. *Id.*; see also Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1388 (1991) ("Insistence on narrow rather than broad understandings of the general clauses of the Constitution, in Scalia's mind, is the surest way to protect against . . . the judicial tyranny of judges acting as super-legislators in pursuit of their own political values rather than justice.").

255. See, e.g., Sunstein, *supra* note 167, at 384–85 (describing how characterizing liberties at the most specific level of generality restrains judges from making "normative arguments of their own").

256. See, e.g., Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices.").

women and LGBTQ persons burdened by those laws were neither actually nor virtually represented in the decision-making process.<sup>257</sup> Moreover, those decisions have dubious epistemic value as they were not the product of diverse decision-makers. Women and LGBTQ persons could not add their cognitive diversity derived from their different experiences with the laws into the decision-making process, thereby reducing the likelihood that the homogenous group of decision-makers got it “right.”

The democracy and epistemic values of the history and tradition methodology can be better promoted through a level of generality analysis that accounts for America’s exclusionary past. It would do so by characterizing the right at the level of generality at which both the included and excluded are equally benefited or burdened by laws passed protecting or regulating the right. The easiest example arises in *Obergefell v. Hodges*. The dissenters in that case characterized the liberty at stake as same-sex marriage.<sup>258</sup> That characterization involved the dissenting Justices in an analysis of the history and tradition of laws that only burdened the historically excluded class of LGBTQ persons.<sup>259</sup> The straight or closeted lawmakers and other persons making those decisions did not suffer the burdens from the bans on that type of marriage.

Under an ameliorative judicial review approach, the better characterization of the liberty at stake in *Obergefell* is simply marriage. That characterization enhances the democratic and epistemic value of past decisions. Any past regulations of marriage will have burdened equally those included in the decision-making process (participants in opposite-sex marriages) and those excluded from the decision-making process (same-sex couples). The lawmakers could, therefore, be considered virtual representatives of those excluded from the lawmaking process thus bolstering the democratic basis of past decisions.<sup>260</sup>

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257. On the political exclusion of LGBTQ people, see NeJaime & Siegel, *supra* note 16, at 1923, which explains that until recently, “far-reaching criminal law and searing public condemnation of homosexuality meant that most gays and lesbians could not publicly identify themselves” or participate fully in democratic politics. *See also id.* at 1931 (noting that no openly gay people served as elected officials or federal judges in 1970); *id.* at 1935 (describing the legal disabilities imposed on gay people); *id.* at 1941 & n.195 (describing the disparity in LGBTQ elected representation).

258. *See Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) (characterizing the right at issue in the case as the right to same-sex marriage).

259. *Id.* at 689–92.

260. An alternative approach suggested by Nelson Tebbe and Deborah Widiss is to infuse equal protection principles into the analysis and sidestep the level of generality question. They propose a two-step process in which the Court would first assess whether “an interest in state-sponsored

Further, a broader characterization of that right is likely to help courts rely upon past decision-making processes that had much greater cognitive diversity. Whereas past decision-makers that are the focal point of the Court's history and tradition methodology either had no, or no revealed, experience with same-sex relationships that could culminate in marriage, they did have diverse experiences with opposite-sex relationships that could and did culminate in marriage. That greater diversity of perspectives vis-à-vis the institution, broadly understood, diminishes the likelihood that prejudice motivated the decision and increases the likelihood that the average decision-maker had a greater than random chance to be right.<sup>261</sup> The epistemic value of history and tradition in this example is therefore better ensured through the broader characterization of the liberty.

The ameliorative approach does not suggest that the Court characterize the right at its broadest possible level. The broader the characterization of the right, the more unwieldy and indeterminate the history and tradition are likely to be. Instead, it suggests that the Court characterize the right at the level of generality at which those included and excluded would be equally, or close to equally, benefited or burdened by the relevant laws or common law decisions.

2. *When Generalization Fails.*—This ameliorative strategy will not, however, work for all rights. As already noted, same-sex marriage can be recharacterized as marriage and same-sex sodomy can be recharacterized as sex. In its due process analysis in *Loving v. Virginia*, the Court's analysis embraced the right to marry, rather than analyzing the specific right to interracial marriage.<sup>262</sup> And in *McDonald v. City of Chicago*,<sup>263</sup> the Court characterized the right at issue as the right to bear arms, against a history in which the right of African Americans to bear arms was heavily restricted.<sup>264</sup>

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marriage . . . is of fundamental importance" and then "whether excluding gay and lesbian couples from civil marriage can be justified." Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1426–27 (2010). Although we are sympathetic to the proposed approach, we are also concerned about the discretion it would give to the Court at the second step. We think the question of whether such exclusion can be justified will require a greater subjective value determination than our suggested approach of generalizing the right to equate to that which is exercised by the historically white male decision-makers.

261. See *supra* notes 232–41 and accompanying text.

262. 388 U.S. 1, 12 (1967) (finding marriage to be "one of the 'basic civil rights of man,' fundamental to our very existence and survival" (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

263. 561 U.S. 742 (2010).

264. *Id.* at 772–75; cf. Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 77–80 (2022) (critiquing the Court's "partial history" and its inattention to the role that gun restrictions might play in protecting Black lives, in both the past and present).



Such characterizations result in both the included and excluded equally (or close to equally) benefiting or being burdened by the relevant laws or common law decisions.

The right to abortion, however, is different. The Court in *Dobbs* focused on the right's uniqueness insofar as the abortion decision ends potential life.<sup>265</sup> The right is also unique in terms of its lack of generalizability, meaning that those included in past decision-making could not have borne equal or close to equal benefits or burdens from the regulation of abortion.<sup>266</sup>

Recharacterizing the right to abortion as the right to reproductive autonomy does not get us as far as one might think. That characterization cannot change the fact that only women bear the substantial physical burdens of reproduction, which can be life-altering and even life-ending. The intangible burdens are also deeply gendered. Past men making decisions about reproductive autonomy were therefore not equally or close-to-equally burdened as historically excluded women by those choices; even if the men faced the risk of unwanted offspring, they could not face the risks of pregnancy, childbirth, and those processes' aftermath.<sup>267</sup>

Recharacterizing the right to abortion even more generally as the right to privacy might get us closer to an ameliorative history and tradition methodology. But that risks extreme indeterminacy.<sup>268</sup> Throughout American history, legislatures and courts have both regulated and protected different forms of privacy in different ways. For example, as the Court has found, individuals' privacy rights concerning abortion, contraceptives, and sodomy have been subject to regulation, whereas certain privacy rights involving

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265. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2258 (2022) ("What sharply distinguishes the abortion right" is that "[a]bortion destroys what [*Roe* and *Casey*] call 'potential life.'").

266. Some have suggested broadening the scope of the liberty to include freedom from forced physical sacrifices for others, including family members, as American law does not generally authorize such impositions. *Cf.* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1583–87 (1979) (arguing that burdens like pregnancy and childbirth are of a type that U.S. law generally does not impose on unwilling individuals, including discussion of forced organ donation). While that point is strong evidence that lawmakers impose unique burdens on women's reproductive autonomy, we do not think the analogy captures the full scope of the liberties at stake in the abortion context since the physical imposition is merely one of the wide-ranging consequences for those forced to carry a pregnancy to term.

267. *See* Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 852 (2007) ("[P]rohibitions on abortion require women, unlike men, to surrender their bodies to the state for the purpose of bearing children, sometimes while risking their lives and health.").

268. *See, e.g.,* Young, *supra* note 244, at 704 ("Allowing traditions defined at a high level of generality . . . means that 'the Constitution never fails to protect tradition, no matter what the Supreme Court decides.'" (quoting Balkin, *infra* note 286, at 1625)).

police searches and seizures, data, and health often have been protected.<sup>269</sup> When rights have been both regulated and protected in the past, there is no clear method available for the Court to use to decide whether the right being asserted is entitled to protection other than through a more specific characterization of the right in question. And as we have just argued, a more specific characterization of the right can undercut the democratic and epistemic value of the history and tradition analysis by requiring reliance on past decisionmakers who bore no democratic or practical link to the liberty interest at stake.

A different ameliorative approach is therefore necessary when rights are so uniquely exercised by historically excluded groups such that a change in the level of generalization will not contribute to the history and tradition methodology's democratic or epistemic value.

3. *Broadening the Sources of "History and Tradition."*—Beyond attempting to generalize freedoms protected by and for politically privileged white men, another means of improving reliance on tradition as a source for unenumerated freedoms would be to map a more diverse set of traditions.

In related debates over originalism, scholars have challenged interpreters to conceive of the public more expansively and draw upon a broader set of materials in defining original "public meaning." Critiquing originalism's assumption of a cohesive public that understands constitutional meaning in a unified way, James Fox proposes the notion of "counterpublics" as a corrective.<sup>270</sup> Social theorists developed the concept of counterpublics to describe oppositional discourse by groups marginalized within dominant public discourse.<sup>271</sup> Fox urges originalists to acknowledge the public as plural and "investigate a range of public and counterpublic" meanings, such as those of nineteenth century Black political activists and feminists.<sup>272</sup>

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269. Compare *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986) (pointing to the extensive past state regulation of sodomy); *Dobbs*, 142 S. Ct. at 2249–54 (cataloguing the historical laws regulating abortion); Martha J. Bailey, "Momma's Got the Pill": How Anthony Comstock and *Griswold v. Connecticut Shaped US Childbearing*, AM. ECON. REV., March 2010, at 98, 104–07 (2010) (detailing the history of Comstock laws regulating the sale and distribution of contraceptives), with 50-State Survey of Health Care Information Privacy Laws, SEYFARTH (2021), <https://www.seyfarth.com/a/web/77459/50-State-Survey-of-Health-Care-Information-Privacy-Laws.pdf> [<https://perma.cc/V2QM-MMM9>] (surveying the state laws protecting health information data); William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 261 (1966) (accounting for laws protecting privacy for associational ties and against police intrusions into the home).

270. Fox, *supra* note 14, at 714–15.

271. *Id.* at 716.

272. *Id.* at 718–21.

Similarly, Christina Mulligan suggests that originalists seeking “actual public meanings” should attempt to ascertain how “lower-class Americans, black Americans, German-speakers, or women” understood the Constitution’s text by looking to a wider array of historical sources.<sup>273</sup>

As with originalism, the methodology of history and tradition would be improved by introducing the views of a more representative range of people. The notion that there is a singular set of traditions that adequately represents the entire democratic people’s views is inaccurate. And looking exclusively to legal sources in an attempt to discover such coherent traditions worsens the problem by relying upon an extremely narrow slice of the public as we documented above.<sup>274</sup> Given how unrepresentative lawmakers have historically been, correcting for this bias while continuing to focus upon “history and tradition” would mean seeking evidence outside of law.

In the case of abortion prohibitions for example, one might consult women’s voices. Reva Siegel has noted that nineteenth century feminists did not lobby for abortion access, but they did argue for reproductive choice, specifically that women should be empowered to refuse sex to their husbands.<sup>275</sup> Further, some authors in that period justified abortion as a response to “forced motherhood” and other conditions of women’s lives, for which they charged men with culpability.<sup>276</sup> Contemporaneous feminists’ challenges to forced reproduction potentially counter any claim that abortion statutes represented a consensus view among the actual public. They nonetheless cannot fully resolve the bias built into the history and tradition method, nor provide a path to discerning which unwritten fundamental rights deserve recognition.

The difficulty lies partially in the limits of historical investigation. As Fox and Mulligan recognize in their challenges to originalism, excavating the understandings of a truly diverse public is a complex enterprise. Mulligan acknowledges the distortions built into available historical records which overrepresent the elite, usually exclude the illiterate entirely, and may not reveal an author’s demographic identity at all.<sup>277</sup> Nineteenth century feminists, in the case of the initial abortion bans, were hardly representative

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273. Mulligan, *supra* note 15, at 413.

274. *See supra* subpart II(B). Fox makes this point relative to originalism: “Once originalists make the choice to focus on and privilege legal texts and meanings, they necessarily perpetuate the historical exclusions.” Fox, *supra* note 14, at 714.

275. Siegel, *supra* note 220, at 304–05 (citing LINDA GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 108–11 (1976)).

276. *Id.* at 307 & nn.184–85, 311–12 (citing *Child Murder*, *REVOLUTION*, Apr. 9, 1868, at 217; and then citing *Woman and Motherhood*, *REVOLUTION*, Sept. 2, 1869, at 138).

277. Mulligan, *supra* note 15, at 413–15.

of women overall, much less of the disenfranchised public more broadly. Fox more optimistically argues that source materials may well be available, but interpreters will have to read them as political–social texts, rather than parse them for precise legal meaning.<sup>278</sup>

No matter how rich the historical archives might prove to be in reflecting popular understanding of any particular liberty, attempts to diversify our understanding of tradition are likely to result in impasse. To the extent the current Court’s methodology seeks objectively enduring tradition as reflecting a single public’s view, shifting that approach by diversifying sources would introduce interpretive complexity and uncertainty—which is all to the good. But it will be unlikely to resolve difficult cases unless we introduce a thumb on the scale for preferring one group’s views over another’s. Even doing that would not resolve the problem of pluralism *within* groups, since women and African-Americans, for example, were overlapping groups with great levels of internal diversity. Because those groups were excluded from political participation for so long, there is no mechanism like that of lawmaking that we might view as a fair means of aggregating and identifying the most commonly held views among those communities.

As a result, improving upon the history and tradition approach by generalizing the right or broadening the scope of evidentiary sources will not suffice as a means to determine which unenumerated rights claims that involve liberties uniquely affecting a marginalized group deserve validation. Instead, the inquiry itself must be reshaped.

### B. *Flipping “History and Tradition”*

In evaluating unenumerated rights claims that involve liberties uniquely affecting a marginalized group, the Court might account more directly for America’s exclusionary past by changing how it draws upon history, rather than shifting how it characterizes the right in question or the sources it draws upon.

An alternative history and tradition analysis from equal protection’s past can guide the way. Over the course of a thirty-year period between the 1960s and 1980s, the Court, using the framework that crystallized in *Frontiero v. Richardson*, looked to history to ascertain whether members of a group were entitled to special judicial protection from discriminatory laws under the Equal Protection Clause.<sup>279</sup> Much like the history and tradition methodology

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278. Fox, *supra* note 14, at 720–21.

279. See Ross & Li, *supra* note 42 at 330–35 (describing the evolution of the Court’s suspect class doctrine that considers the history of discrimination as part of its analysis); see also Ian Haney

under the Due Process Clause, the Court looked to past laws, regulations, judicial decisions, and other state actions to ascertain the class's entitlement to special judicial protection.<sup>280</sup> But unlike the history and tradition methodology under the Due Process Clause, the Court did not consider past state infringements of the class's right to be free from arbitrary discrimination as evidence that the class *did not* have a constitutional right to protection from such discrimination.<sup>281</sup> Instead, it treated that history as evidence that the class *did* have a constitutional right to protection from discrimination.<sup>282</sup>

The Court has not explained why it has approached history and tradition so differently in the due process and equal protection contexts. But those disparities most likely stem from the Justices' differing assumptions about the source and nature of past laws in the two settings. In the due process context, the Court seems to assume that past laws or decisions regulating asserted liberties are the product of a democratic or otherwise legitimate process and that they advance the public good. However, in the equal protection context, the Court appears to assume that past laws or decisions discriminating against a historically excluded class derive from a prejudiced process designed to oppress.<sup>283</sup>

The Court's default assumption of benign motives is flawed when past laws regulating asserted liberties also function to discriminate against a historically excluded class. When a class uniquely exercises liberties and the state regulates or bans the exercise of those liberties, it has effectively singled

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López, *Intentional Blindness*, 87 NYU L. REV. 1779, 1796–97 (2012) (making a similar argument that the Court applied “contextual intent” as “a historical and sociological inquiry into the legitimacy of the challenged government action” in its equal protection jurisprudence during that period).

280. See *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (examining a variety of sources to find that women suffered from a history of discrimination).

281. *Id.* at 685–88; see also Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) (distinguishing the uses of tradition under the Due Process and Equal Protection Clauses based on the two Clauses' distinct purposes); Yoshino, *supra* note 43, at 781 (describing the contrasting results from the use of history and tradition under the Court's due process versus equal protection framework).

282. See *Frontiero*, 411 U.S. at 685 (finding, in part on the basis of statute books “laden with gross, stereotyped distinctions between the sexes,” that women were entitled to constitutional protection against discrimination).

283. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” of legislation).

out and discriminated against that class.<sup>284</sup> Thus, for example, and contra the Court's past rulings to the contrary, curtailing reproductive autonomy in ways that uniquely burden women functions as a form of sex discrimination.<sup>285</sup>

Therefore, when the class exercising a liberty has been historically excluded from the lawmaking or other decision-making processes regulating or banning that liberty, the Court should no longer assume the process is democratic or legitimate. Nor should it assume that those laws and decisions advance the public good. Instead, the Court should assume, as it does in the equal protection context, that those past laws and decisions were the product of a prejudiced process designed to oppress.<sup>286</sup> The history and tradition of regulating or banning those liberties uniquely exercised by a historically excluded class should then be treated as evidence that those exact liberties are ones entitled to special judicial protection.

In the abortion context, the fact that the right to an abortion has been regulated or banned in the past should not be treated as evidence that the right lacks entitlement to protection as fundamental. Instead, since women uniquely exercise the liberty and have been excluded from past lawmaking processes regulating or banning the liberty, that history and tradition should instead be treated as evidence of abortion's likely entitlement to constitutional protection. Such abortion regulations or bans should be

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284. Cf. Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 900–01 (2016) (outlining the comparative conception of discrimination, which determines whether discrimination has occurred by looking at the treatment one group or individual received as compared to the treatment of another group or individual).

285. Cf. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 & n.20 (1974) (refusing to view pregnancy as a sex-based classification).

286. Several scholars have recognized the potential for bad traditions. See, e.g., ELY, *supra* note 39, at 61 (describing America's two conflicting traditions, one good and one bad, regarding "the use of racial discrimination to disfavor minorities" (emphasis omitted)); Brown, *supra* note 159, at 203 ("The disquieting truth is that at any level of generality one might choose to identify the relevant culture, . . . there are traditions that all would agree are worthy of being perpetuated, traditions that all would agree are reprehensible and better buried, and traditions that would garner no agreement whatsoever."); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1618 (1990) ("There are good and bad traditions, and one must choose between them."). David Strauss is the only scholar we have found who has proposed a method for addressing the problem of bad traditions. He argues that constitutional decision makers should be given the discretion to depart from bad traditions. Strauss, *supra* note 245, at 897 ("[I]f, on reflection, we are sufficiently confident that we are right, and if the stakes are high enough, then we can reject even a longstanding tradition."). That, of course, raises the question of whether the constitutional decision-maker will have the competence or capacity to distinguish between good traditions and bad. This is a question most adherents to the history and tradition methodology are likely to answer in the negative.

presumed the product of a prejudiced process designed to oppress until proven otherwise.

In practice, that would mean litigants could make a two-part showing to sustain a claim that a particular unwritten right qualifies as fundamental and deserves strict scrutiny: first, that the right in question cannot be adequately generalized because its exercise is unique in important ways to a particular group; and second, that the group has historically been excluded from equal participation in the processes that have curtailed that exact liberty. Following such a showing, the burden would be on the government to prove that the regulations in question are narrowly tailored to serve compelling goals.

By flipping history and tradition in this way, courts would expressly acknowledge that the nation's legal traditions are tainted by its long-running democratic failures, which have affected laws and institutions far beyond those directly classifying or explicitly discriminating against a marginalized group. Such an ameliorative approach could help the judiciary begin to reckon with America's exclusionary past.

### C. *A Stronger Response: Democratic Inclusion*

Ultimately, we do not believe that any interpretive method can fully redeem that undemocratic past which continues to distort the Constitution and undermine the people's equal membership in our polity. The most robust approach of all would ask *all* our national institutions to participate in steps toward rectifying those flaws.

The end goal should be to secure equal citizenship for all of us. Nearly fifty years ago, Kenneth Karst placed equal citizenship at the core of the Fourteenth Amendment, defining it as a principle "which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member" and "forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant."<sup>287</sup>

The path toward that goal is not as simple as calling for a constitutional convention to adopt a new Constitution reflecting all people's interests. We cannot yet assume that existing protections would assure a fair and equal voice for all parts of the citizenry. American democracy is not so perfected that we can expect a new constitutional drafting—or any existing political process—to yield equal citizenship as things currently stand.

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287. Kenneth L. Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4, 6 (1977).

Below, we first consider the obstacles to equal citizenship in the context of the legislatures that currently draft abortion regulations. We then broaden our scope to ask how all branches of government (and the people) may construct and implement ameliorative readings of the Constitution as a means to overcome ongoing flaws in our democratic self-governance.

*1. American Democracy and the Case of Abortion.*—To illustrate some of the existing flaws that bedevil democratic processes, let us return to *Dobbs*. How close are we to a world in which we might think abortion regulations reflect women’s exercise of equal citizenship?<sup>288</sup>

It is true that America’s democracy now is much different than it was in the past. Women make up over 50% of the voting population.<sup>289</sup> In the decision-making institutions where most contests over abortion rights take place, women comprise nearly a third of state legislators, and over a third of state judges.<sup>290</sup> While it is encouraging that women vote more than men,<sup>291</sup> equal exercises of suffrage rights have not yet translated into equal exercises of political power. The fact that women now represent a third of lawmakers and judges is promising, but not close to equality. And extreme disparities persist across the country, with women comprising less than a quarter of lawmakers in ten states.<sup>292</sup>

The underrepresentation of women in office raises doubts about the democratic and epistemic value of lawmaking decisions even in the present. The process by which abortion laws have been passed in states over the last five years tends to confirm those doubts.

Since 2018, sixteen states have passed laws banning abortions entirely or with limited exceptions, or have prohibited abortions after six weeks of

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288. See Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in Dobbs*, 46 HARV. J.L. & GENDER 81, 101 (2023) (“Whether relying on legislatures is more democratic than courts, as the *Dobbs* Court contends, depends in part on a just and properly functioning legislative and political process.”).

289. *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Apr. 2021) [hereinafter 2020 Voting Data], <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> [<https://perma.cc/KT9H-4FQ6>] (download Table 1 to access voting data) (showing that women make up a greater proportion of the voting-age population, registered voters, and reported voters in the 2020 election).

290. See *infra* Appendices B.1 & B.2 (state legislatures); 2022 *US State Court Women Judges*, NAT’L ASS’N OF WOMEN JUDGES, <https://www.nawj.org/statistics/2022-us-state-court-women-judges> [<https://perma.cc/Y6P8-M3XA>] (state courts).

291. 2020 Voting Data, *supra* note 289.

292. *Women in State Legislatures 2023*, CTR. FOR AM. WOMEN AND POL. (2023), <https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2023> [<https://perma.cc/CH84-3DA3>].



gestation, before the time at which most women know they are pregnant.<sup>293</sup> In those state legislatures, less than 22% of the lawmakers were women.<sup>294</sup> Of those female lawmakers, less than 43% of them supported the abortion restrictions.<sup>295</sup> Men, in contrast, comprised the overwhelming majority of lawmakers supporting the abortion restrictions (86%).<sup>296</sup>

Aliza Forman-Rabinovici and Olatunde Johnson recently tested whether women's representation within state legislatures has affected abortion restrictions, controlling for partisan identity and other factors. Their empirical analysis shows "a very significant relationship between women's presence in the legislature and the degree of permissiveness of abortion policy."<sup>297</sup> As they conclude, this evidence strongly suggests that "women's descriptive presence [as state legislators] is an important determinant of the representation of women's interests."<sup>298</sup>

The abortion restrictions of the present thus look a lot like those of the past to the extent that a minority of democratically overrepresented men who do not bear the burdens of reproduction have imposed their preferences on a majority of democratically underrepresented women who do.

There is some evidence of progress, however. In the same period, eleven states passed laws enhancing access to abortion.<sup>299</sup> In those state legislatures, over 37% of the lawmakers were women, and nearly 77% of those female lawmakers supported the abortion liberalization laws.<sup>300</sup> Those female lawmakers comprised nearly half of all lawmakers that supported abortion liberalization laws (46%), proving pivotal to their passage.<sup>301</sup> Those liberalization laws passed in more diverse lawmaking bodies, and supported overwhelmingly by women who would be uniquely burdened by abortion restrictions, also comported with the preferences of most Americans.<sup>302</sup>

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293. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Aug. 29, 2023), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [https://perma.cc/L5JF-FAXT].

294. *See infra* Appendix B.1.

295. *Id.*

296. *Id.*

297. Forman-Rabinovici & Johnson, *supra* note 288, at 116.

298. *Id.*

299. *See infra* Appendix B.2.

300. *Id.*

301. *Id.*

302. *See, e.g., Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [https://perma.cc/2P2U-TZ5P] ("Currently, 61% say abortion should be legal in all or most cases, while 37% say it should be illegal in all or most cases."); Zoha Qamar, *Americans' Views on Abortion Are Pretty Stagnant. Their*

America is slowly moving past its exclusionary past, but we have not yet reached the point where we can leave issues that uniquely impact the historically excluded to “the people’s” representatives. Instead, there remains an important role for the judiciary in protecting unenumerated rights to secure equal citizenship for the historically excluded.

2. *Unenumerated Rights and Democratic Equality.*—*Roe* reflected an ameliorative reading of the Constitution. That decision—arrived at by a court of nine men, with one recently arrived Black Justice—found in the Constitution an unwritten right that no history or tradition ever had robustly protected in any such specific sense or in such scope. If our existing Constitution is to have any legitimacy, then such ameliorative readings are necessary.<sup>303</sup> But they should be justified explicitly as such.

As theorists and activists have long noted, women’s equal participation in the polity, the economy, and other spheres of public life becomes feasible only in the context of reproductive choice, along with shared responsibility and support for childrearing and other aspects of familial reproduction.<sup>304</sup> For gay, lesbian, and other queer people, it was long evident that they could not assume equal citizenship while their identity-honoring choices and relationships were prohibited and stigmatized. Under such pressures, limiting their ability to speak and live freely much less lobby for their own interests, they could not achieve equal participation in political expression and decision-making.

Beyond the interpretive methodology that we have suggested for courts evaluating unenumerated rights claims by marginalized groups, we would

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*Views on the Supreme Court Are Not*, FIVETHIRTYEIGHT (July 1, 2022, 6:00 AM), <https://fivethirtyeight.com/features/americans-views-on-abortion-are-pretty-stagnant-their-views-on-the-supreme-court-are-not/> [<https://perma.cc/CH6Z-L2XK>] (finding on the basis of multiple surveys that 58% of Americans think abortion should be mostly or always legal, while 39% of Americans think abortion should be mostly or always illegal).

303. Interpreters do not in fact derive their legitimacy solely from the Constitution, but in significant part from the extent to which they can imbue the document with greater democratic credentials than it currently possesses. Cf. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973) (indicating that the Court “derives its authority” solely from the document).

304. E.g., Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 419, 424–28 (1995) (arguing that “abortion rights are a precondition of full citizenship” or “first-class citizenship” for women); Balkin, *supra* note 267, at 844 (“In the particular world we live in today, with its technological limitations and expectations about economic life and family structure, women must possess a right to abortion as a necessary but not sufficient condition for securing their equal citizenship under the Fourteenth Amendment.”); Siegel, *supra* note 220, at 370, 376–77 (noting the role that state-compelled reproduction plays in reinforcing women’s subordinate social status).

argue that more work remains for all branches of government to similarly protect the variety of rights needed for egalitarian participation. The courts, Congress, and the executive should all cooperate in constructing the rights of equal citizenship to a far greater degree than the legal framework currently does.

We cannot fully define which rights are necessary to equal citizenship in this paper nor elaborate a precise rule for discerning them.<sup>305</sup> But those asking whether particular unenumerated rights are necessary for political inclusion should evaluate whether the denial of the right has served to cement a group's marginalization and whether exercising the right bears a close connection to its members' ability to participate in political life. To us, certain choices deemed "intimate" ones, such as the rights to abortion and same-sex intimacy, bear an obvious connection to participation in public life, evidenced in both history and logic. While constitutional interpreters would need to exercise reasoned judgment in determining which additional rights operate analogously, we do not view this as an avoidable cost, or one that can be willed away by purportedly more "neutral" methodologies.

We align with John Hart Ely in seeing a role for courts in protecting democratic processes to prevent the politically powerful from entrenching their own power and thereby maintain fluid pathways for change and responsiveness. However, the flaws in American democracy are more far-reaching than Ely acknowledged. Formal equality papers over the ways in which past laws and institutions have cemented the exclusion of the past such that people formerly excluded still do not exercise equal citizenship. Thus, a more robust political process theory would call upon courts and other institutions to help ensure actual equality of political opportunity. The current legal framework cannot simply be taken at face value—given its exclusionary origins—but must be propelled in the right direction, read in ways that acknowledge the taint of the past and endeavor to correct it.

The ideal end point, in considering how to respond to the Constitution's exclusions, would be to propel social and legal reforms that bring about substantively equal citizenship over time. At that point, a new constitutional drafting, undertaken on that stronger foundation, might in fact bring us a formal text that truly embodies the interests and choices of all the people, channeled and aggregated through an egalitarian process.

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305. We also withhold judgment on the question of whether any "positive" rights might be encompassed within their scope, as Frank Michelman once argued that Ely's notion of representative democracy would require. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 684.

Until that point, however, we endorse an ecumenical approach toward achieving the conditions of equal citizenship. That approach encompasses activism by the people themselves, along with change via political institutions. But, as we have said, it also calls upon courts to contribute insofar as political institutions, rights, and processes are themselves flawed and exclusionary by design. Courts have a role in opening up those institutions and directing them toward greater democratic responsiveness.

Because the Constitution sits atop a long history of democratically illegitimate processes, interpreting the document poses a choice for courts. They may adopt methods which lean into those past democratic exclusions, or they may fashion ones that ameliorate the past and bring the polity closer to equal citizenship and constitutional legitimacy.

It is unlikely that any interpretive methodology can fully redeem the constitutional framework, given that nearly all of its structural, rights, and change-authorizing provisions were crafted under undemocratic conditions in which most Americans' interests went uncounted. But the judiciary may play a salutary role in ameliorating governance processes such that it is more-nearly possible for all Americans to participate in the initiation of constitutional reform.

### Conclusion

When can the courts leave America's exclusionary past behind? At what point might the judiciary say we have ameliorated the past such that courts should defer to present democratic majorities on issues like abortion, same-sex marriage, and sodomy? The Supreme Court in *Dobbs*, by removing itself from any protection of abortion rights, suggested that the time is now.

Our view is that the nation has a significant way still to travel. For many reasons, among them the value of truth-telling, the Court should begin by explicitly recognizing that past exclusions have warped our constitutional framework and its legitimacy in ways that were not and cannot be addressed through grants of formal, prospective equality like those of the Reconstruction or Nineteenth Amendments, at least as they have been interpreted to date.

The Court should also recognize that its interpretive methodologies may worsen the problem. In the case of unenumerated rights, relying on a restricted set of sources to produce a history and tradition that reiterates past exclusions only doubles down on the past. We have argued that the Court can and should adopt approaches that ameliorate past exclusions rather than reproducing them.

It is no answer to say that the courts, in refusing to uphold constitutional rights claims, simply allow democracy to do its work. Just as it is highly problematic when courts cite the product of past undemocratic processes as if they were intrinsically legitimate, so too current political processes cannot be assumed to be fully democratic and thus legitimate.

Instead, the courts should bring a more skeptical lens to claims that history and tradition support the denial of rights to marginalized groups. They should endeavor to understand those rights and related institutions at a level of generality that equalizes their burdens and benefits to levels historically enjoyed by white men, as well as read the sources of history and tradition much more inclusively to incorporate resistant and subaltern voices. When those methods fail, they should borrow from equal protection law and treat histories and traditions that deny particular liberties to politically marginalized groups as evidence suggesting those rights are, in fact, fundamental ones entitled to judicial protection. Finally, all branches of government should endeavor to construct a far more robust foundation of equal citizenship rights to secure inclusion in governance for all Americans.

Some scholars and theorists, many responding to other challenges than the ones we highlight, argue that the Constitution's flaws require a new start—significant revisions or a new document altogether.<sup>306</sup> Others argue that the nation's politics are so tainted that any attempt at a cure would produce still-worse results or is infeasible for other reasons, so our only choices lie outside of constitutional law altogether.<sup>307</sup>

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306. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 9 (2006) (arguing for a new constitutional convention based on the Constitution's "insufficiently democratic" enactment and "significantly dysfunctional" structural provisions); Hasbrouck, *supra* note 15, at 900–03, (criticizing the Constitution on a variety of bases including "the constant campaign mode brought on by changing out our legislators every two years," the "fiction" of pre-Founding state sovereignty, and the lack of constraints on judicial review).

307. See, e.g., Louis Michael Seidman, *America's Racial Stain: The Taint Argument and the Limits of Constitutional Law and Rhetoric*, AM. J.L. & EQUALITY, Sept. 2022, at 165, 165–66 (2022) (outlining dilemmas for courts and political activists in attempting to overcome the pervasive role of racism in the U.S. Constitution and the nation's history).

The choice may not be quite so binary. The judiciary still might play a role in achieving a more inclusive polity of all the people—and eventually, a more legitimate constitutional framework. Current constitutional interpretation should help to provide us with the substantive democratic foundation that can support the eventual redrafting of a more perfect Constitution that represents all of us. In that vision, the courts aid in the transition toward a new founding. To do so, though, the courts must grapple with the true American past and their own role in the nation's twisting, uncertain path toward full democracy.

## APPENDICES

**Appendix A: Female Representation in State Legislatures Restricting Abortion Since 1920**

State	Abortion Regulation	Year	Number of Women in State Legislature	Total Number of State Legislators	Percent Women
Alabama	Ala. Code tit. 14, § 9	1940	1	140	0.71%
Arizona	Ariz. Rev. Stat. Ann. §§ 13-212, 13-213	1956	10	108	9.26%
Arkansas	Ark. Stat. Ann. §§ 41-301, 41-302	1947	1	135	0.74%
California	Cal. Pen. Code § 276	1957	2	120	1.67%
Colorado	Colo. Rev. Stat. Ann. § 40-2-23	1953	3	100	3.00%
Connecticut	Conn. Gen. Stat. Rev. §§ 53-29, 55-30	1958	46	280	16.43%
Delaware	Del. Code Ann. Tit. 11, §§ 301, 302	1953	1	62	1.61%
Florida	Florida Stat. Ann. §§ 782.09, .10, 797.01, .02, 782.16	1944	1	120	0.83%
Florida	Florida Stat. Ann. § 458.12	1952	1	120	0.83%
Georgia	Ga. Code. Ann. § 26-1101-06	1933	3	236	1.27%
Hawaii	Hawaii Rev. Laws §§ 309-3-5, 60-9, 64.7	1955	3	45	6.67%

Idaho	Idaho Code Ann. §§ 18-603, 19-2115, 18-303	1948	5	126	3.97%
Illinois	Ill. Rev. Stat. Ch. 38, §§ 3-6	1959	9	236	3.81%
Indiana	Ind. Ann. Stat. § 10-105	1956	8	150	5.33%
Indiana	Ind. Ann. Stat. §§ 10-2803, -2804	1960	5	150	3.33%
Iowa	Iowa Code §§ 701.1; 725.5, .6, 147.56, 205.1, .2, .3	1946	1	150	0.67%
Kansas	Kan. Gen. Stat. Ann. §§ 21- 409, -410, -421, -437, -1101	1959	4	165	2.42%
Kentucky	Ky. Rev. Stat. Ann. §§ 435.040, 436.020, .030	1955	3	138	2.17%
Louisiana	La. Rev. Stat. Ann. §§ 14:87, :88, 37-1285	1950	1	143	0.70%
Maine	Me. Rev. Stat. Ann. Ch. 134, §§ 9-11	1954	7	186	3.76%
Maryland	Md. Ann. Code art. 27, § 3; art. 43, Sec. 94	1957	6	139	4.32%
Massachusetts	Mass. Gen. Laws Ann. Ch. 272, §§ 19-22	1959	8	280	2.86%
Michigan	Mich. Comp. Laws §§ 750.14, .15, .24, .40, .150	1931	0	148	0.00%



Michigan	Mich. Stat. Ann. §§ 14, 15	1935	0	148	0.00%
Michigan	Mich. Stat. Ann. §§ 28.554, .555	1954	2	148	1.35%
Minnesota	Minn. Stat. Ann. §§ 617.18-22, .25-.26	1953	2	201	1.00%
Mississippi	Miss. Code Ann. §§ 2222-23, 2289, 8893	1952	5	174	2.87%
Missouri	Mo. Rev. Stat. §§ 559.090, .100	1949	4	197	2.03%
Montana	Mont. Rev. Code Ann. §§ 94- 401, -402	1947	1	150	0.67%
Nebraska	Neb. Rev. Stat. §§ 28-404, -405	1956	1	43	2.33%
Nevada	Nev. Rev. Stat. §§ 200.210, .220, 201.120-.150	1959	2	63	3.17%
New Hampshire	N.H. Rev. Stat. Ann. § 585:12-14	1955	49	424	11.56%
New Jersey	N.J. Rev. Stat. Ann. §§ 2A:87-1, :170-76	1953	8	81	9.88%
New Mexico	N.M. Stat. Ann. §§ 40-3-1, -2, -3	1953	2	112	1.79%
New York	N.Y. Pen. Law §§ 80, 81, 81-a, 82, 1050	1942	4	201	1.99%
North Carolina	N.C. Gen. Stat. §§ 14-44, -45	1953	1	170	0.59%

North Dakota	N.D. Rev. Code §§ 12-2501, -2502, -2503, -2504	1943	1	147	0.68%
Ohio	Ohio Rev. Code Ann. § 2901.16	1953	6	170	3.53%
Oklahoma	Okla Stat. Ann. Tit. 21, §§ 861-63, 714	1958	0	147	0.00%
Oregon	Ore. Comp. Laws Ann. Ch. 9, art. I, §§ 54-901, -931; Ore. Com. Laws Ann. § 23-408	1940	3	90	3.33%
Oregon	Ore. Rev. Stat. §§ 163.060, 677.010, .190	1959	10	90	11.11%
Pennsylvania	Pa. Stat. Ann. Tit. 18, §§ 4718-4720, 4525	1945	3	253	1.19%
Rhode Island	R.I. Gen. Laws Ann. §§ 11-3-1-4	1956	4	150	2.67%
South Carolina	S.C. Code §§ 16-82, -83, -84	1952	1	170	0.59%
South Dakota	S.D. Code §§ 13,3101-3103	1960	3	105	2.86%
Tennessee	Tenn. Code Ann §§ 39-301, -302	1955	3	132	2.27%
Texas	Tex. Pen. Code Ann. Ch. 9, arts. 1192-94	1960	3	181	1.66%
Utah	Utah Code Ann. §§ 76-2-1, -2	1953	4	100	4.00%
Vermont	Vt. Stat. Ann. Tit. 13, §§ 101, 104	1959	44	276	15.94%

Virginia	Va. Code Ann. §§ 18.1-62, -63	1960	3	140	2.14%
Washington	Wash. Rev. Code §§ 9.02.010	1951	7	147	4.76%
West Virginia	W. Va. Code Ann. § 5923	1955	3	134	2.24%
Wisconsin	Wis. Stat. Ann. § 940.04	1958	0	154	0.00%
Wyoming	Wyo. Stat. Ann. §§ 6-77, -78	1957	2	90	2.22%
Total			310	8265	
Average Overall					3.27%
	Legislatures with <3% Women	35			
	Legislatures with <2% Women	23			
	Legislatures with <1% Women	15			
	Legislatures with No Women	4			

**Appendix B.1: Abortion Restrictions Passed Since 2019**

Abortion Ban	Women Legislators Favoring Ban	Total Women in Legislature	Total Legislators Favoring Ban	Total Legislators	Percent of Women Legislators Favoring Ban	Percent Women in Legislature	Source
Alabama - House Bill 314 (2019)	7	23	99	140	30.43%	16.43%	<a href="https://legiscan.com/AL/bill/HB314/2019">https://legiscan.com/AL/bill/HB314/2019</a>
Arkansas - Senate Bill 149 (2019)	20	33	101	135	60.61%	24.44%	<a href="https://legiscan.com/AR/bill/SB149/2019">https://legiscan.com/AR/bill/SB149/2019</a>
Georgia - House Bill 481 (2019)	14	72	124	236	19.44%	30.51%	<a href="https://legiscan.com/GA/bill/HB481/2019">https://legiscan.com/GA/bill/HB481/2019</a>
Kentucky - House Bill 148 (2019)	13	32	101	138	40.63%	23.19%	<a href="https://legiscan.com/KY/bill/HB148/2019">https://legiscan.com/KY/bill/HB148/2019</a>
Louisiana - Senate Bill 184 (2019)	16	22	110	144	72.73%	15.28%	<a href="https://legiscan.com/LA/bill/SB184/2019">https://legiscan.com/LA/bill/SB184/2019</a>
Mississippi - Senate Bill 2116 (2019)	11	24	110	174	45.83%	13.79%	<a href="https://legiscan.com/MS/bill/SB2116/2019">https://legiscan.com/MS/bill/SB2116/2019</a>
Missouri - House Bill 126 (2019)	22	47	132	197	46.81%	23.86%	<a href="https://legiscan.com/MO/bill/HB126/2019">https://legiscan.com/MO/bill/HB126/2019</a>
Ohio - Senate Bill 23 (2019)	10	36	75	132	27.78%	27.27%	<a href="https://legiscan.com/OH/bill/SB23/2019">https://legiscan.com/OH/bill/SB23/2019</a>
Tennessee - Senate Bill 1257 (2019)	9	20	94	132	45.00%	15.15%	<a href="https://legiscan.com/TN/bill/SB1257/2019">https://legiscan.com/TN/bill/SB1257/2019</a>
Idaho - Senate Bill 1385 (2020)	19	33	76	105	57.58%	31.43%	<a href="https://legiscan.com/ID/bill/S1385/2020">https://legiscan.com/ID/bill/S1385/2020</a>

South Carolina - Senate Bill 1 (2021)	13	29	104	170	44.83%	17.06%	<a href="https://legiscan.com/SC/bill/S0001/2021">https://legiscan.com/SC/bill/S0001/2021</a>
Texas - House Bill 1280 (2021)	13	48	100	181	27.08%	26.52%	<a href="https://legiscan.com/TX/bill/HB1280/2021">https://legiscan.com/TX/bill/HB1280/2021</a>
Indiana - Senate Bill 1 (2022)	14	35	90	150	40.00%	23.33%	<a href="https://legiscan.com/IN/bill/SB0001/2022/X1">https://legiscan.com/IN/bill/SB0001/2022/X1</a>
Oklahoma - Senate Bill 1503 (2022)	16	31	108	148	51.61%	20.95%	<a href="https://legiscan.com/OK/bill/SB1503/2022">https://legiscan.com/OK/bill/SB1503/2022</a>
West Virginia - House Bill 302 (2022)	12	18	99	134	66.67%	13.43%	<a href="https://legiscan.com/WV/bill/HB302/2022/X3">https://legiscan.com/WV/bill/HB302/2022/X3</a>
Wyoming - House Bill 92 (2022)	10	16	67	90	62.50%	17.78%	<a href="https://legiscan.com/WY/bill/HB0092/2022">https://legiscan.com/WY/bill/HB0092/2022</a>
Total	219	519	1590	2406	42.20%	21.57%	
Average Overall					46.22%	21.28%	

**Appendix B.2: Abortion Access Liberalization or Ban Repeals Passed Since 2019**

Abortion Access Liberalization	Women Legislators Favoring Access	Total Women in Legislature	Total Legislators Favoring Access	Total Legislators	Percent of Women Legislators Favoring Access	Percent Women in Legislature	Source
Illinois - Senate Bill 25 (2019)	46	64	100	177	71.88%	36.16%	<a href="https://legiscan.com/IL/bill/SB0025/2019">https://legiscan.com/IL/bill/SB0025/2019</a>
New York - Senate Bill 240 (2019)	57	69	133	213	82.61%	32.39%	<a href="https://legiscan.com/NY/bill/S00240/2019">https://legiscan.com/NY/bill/S00240/2019</a>
Rhode Island - House Bill 5125 (2019)	34	42	66	113	80.95%	37.17%	<a href="https://legiscan.com/RI/bill/H5125/2019">https://legiscan.com/RI/bill/H5125/2019</a>
Vermont - House Bill 57 (2019)	58	72	130	180	80.56%	40.00%	<a href="https://legiscan.com/VT/bill/H0057/2019">https://legiscan.com/VT/bill/H0057/2019</a>
New Mexico - Senate Bill 10 (2021)	36	49	65	112	73.47%	43.75%	<a href="https://legiscan.com/NM/bill/SB10/2021">https://legiscan.com/NM/bill/SB10/2021</a>
Delaware - House Bill 31 (2021)	17	19	41	62	89.47%	30.65%	<a href="https://legiscan.com/DE/bill/HB31/2021">https://legiscan.com/DE/bill/HB31/2021</a>
Washington - House Bill 1851 (2022)	47	62	85	147	75.81%	42.18%	<a href="https://legiscan.com/WA/bill/HB1851/2021">https://legiscan.com/WA/bill/HB1851/2021</a>
California - Constitutional Amendment 10 (2022)	31	39	87	120	79.49%	32.50%	<a href="https://legiscan.com/CA/bill/SCA10/2021">https://legiscan.com/CA/bill/SCA10/2021</a>

Colorado - House Bill 1279 (2022)	37	45	60	100	82.22%	45.00%	<a href="https://legiscan.com/CO/bill/HB1279/2022">https://legiscan.com/CO/bill/HB1279/2022</a>
Connecticut - House Bill 5414 (2022)	43	64	112	187	67.19%	34.22%	<a href="https://legiscan.com/CT/bill/HB05414/2022">https://legiscan.com/CT/bill/HB05414/2022</a>
New Jersey - Senate Bill 49 (2022)	26	42	69	120	61.90%	35.00%	<a href="https://legiscan.com/NJ/bill/S49/2020">https://legiscan.com/NJ/bill/S49/2020</a>
Total	432	567	948	1531	76.19%	37.03%	
Average Overall					76.87%	37.18%	
					Percent Women Across B1&B2	27.76%	
					Percent Men Supporting Ban (B1)	0.86226415	
					Percent Women Supporting Access (B2)	0.4556962	