DOBBS, DEMOCRACY, AND DYSFUNCTION

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Few recent decisions of the Supreme Court have received as much popular attention as *Dobbs v. Jackson Women's Health Organization*. In this Essay, we focus on one important aspect of the *Dobbs* decision: its emphatic claim to be returning questions of abortion access to "the people" or to democracy. *Dobbs*'s invocation of democracy has obvious intuitive appeal, but it is a deeply problematic claim. It ignores systemic distortions in state legislatures caused by gerrymandering and other factors. And more specifically, in the abortion context, it overlooks the very old laws that pre-date *Roe* and *Roe*/*Casey*-era "messaging" bills never thought likely to go into effect—both of which *Dobbs* has revived across the country. These laws, which often instantiate draconian bans on abortion access, are dubious measures of contemporary public opinion, but they may end up remaining in effect for a long time because of what we call "burdens of inertia" and "blind spots" in state legislative processes. Given these intertwined dysfunctions, *Dobbs* is far from a pro-democratic decision. Such a claim would be more plausible if (a) issued in a context where the Court was also taking the sources of democratic dysfunction (such as partisan gerrymandering) seriously; and (b) issued in a way that showed sensitivity to the distortions in the democratic process surrounding abortion, many of which were caused by the Court's own interventions. As well, since the dysfunctions identified on the abortion issue are difficult to eliminate, a decision that took democracy seriously may have required the Court to continue to oversee abortion regulation nationwide with a regime similar to its current approach in *Casey*—or at the very least to issue a quite different remedy that delayed the effect of overruling *Casey*, or did so only prospectively, while making clear that existing laws inconsistent with *Casey* had no force or effect. The hollowness of the celebratory reference to democracy in *Dobbs* raises the question of whether it was sincere, or instead a cynical fig leaf that threatens to further erode the significance of U.S. democracy.

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INTRODUCTION

After months of speculation, in *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court of the United States finally delivered its verdict, holding that the Due Process and Equal Protection Clauses do not protect a right of access to abortion.[2]

The decision was controversial on almost every level. It overturned decades long precedents in *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] It went against suggestions by current justices during the Supreme Court confirmation process that they would respect these and other precedents.[5] It raised questions about the security of rights of access to abortion, contraception, and same-sex marriage.[6] And it left millions of Americans subject to draconian restrictions on abortion of a kind not seen in the U.S. in decades—or in almost any other constitutional democracy worldwide.[7]

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1. 142 S. Ct. 2228 (2022).

2. *Id.* at 2284. For a description of the process leading up to its publication, including the leak of the draft majority opinion, see Adam Liptak, *A Supreme Court in Disarray After an Extraordinary Breach*, N.Y. TIMES, https://www.nytimes.com/2022/05/03/us/politics/supreme-court-leak-roe-v-wade-abortion.html (June 24, 2022).

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

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

5. *See* Editorial Board, *The Ruling Overturning* Roe *Is an Insult to Woman and the Judicial System*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html.

6. *See* Kenji Yoshino, Opinion, *Is the Right to Same-Sex Marriage Next?*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html.

7. *See* Quoctrung Bui, Claire Cain Miller & Margot Sanger-Katz, *How Abortion Bans Will Ripple Across America*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/interactive/2022/06/24/upshot/dobbs-roe-abortion-driving-distances.html.

How did the Court justify this outcome? At times, it spoke in a language we have come to expect from the current Court, namely: the language of history and tradition.[8] But reliance on nineteenth century practices was uniquely unpersuasive in the abortion context. The Fourteenth Amendment was adopted at a time when women could not vote, be admitted to the bar, or make almost any decisions about the shape of their lives.[9]

Unsurprisingly, the Court therefore sought to justify its decision in ways that went beyond an appeal to the 1860s.[10] In particular, it repeatedly cited *democracy* as a rationale for its decision to remand questions of reproductive rights access to state legislatures.[11] What are we to make of this claim that the regulation of abortion is best left to the democratic process? The claim has intuitive normative appeal in a context in which there is such widespread social and political disagreement.[12] Public opinion polling would also suggest that, in most states in the U.S., remanding the issue to democratic politics should lead to at least some level of legal access to abortion.[13]

But there are two reasons to be wary of trusting unregulated state legislative processes to resolve these disagreements or reflect democratic majority attitudes. First, many state legislative processes are subject to systemic pathologies of the kind John Harty Ely long ago suggested were sufficient grounds for judicial intervention.[14] That is, they are subject to forms of vote dilution and partisan gerrymandering that make a strong case for judicial oversight of the political process, but the Supreme Court declined to exercise that oversight in *Rucho v. Common Cause*[15] and in many other cases.[16] Second, state legislative processes are also subject to

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

9. *See* Susan Milligan, *Timeline: The Women's Rights Movement in the U.S.*, U.S. NEWS & WORLD REP. (Mar. 10, 2023, 3:53 PM), https://www.usnews.com/news/the-report/articles/2017-01-20/timeline-the-womens-rights-movement-in-the-us.

10. For a discussion of the origins of the democracy argument in civil society, following, but not immediately, after *Roe*, see also Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 127 HARV. L. REV. (forthcoming 2024) (manuscript at 11–20) (on file with authors).

11. *Dobbs*, 142 S. Ct. at 2243, 2257, 2259, 2265, 2279, 2284.

12. *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

13. *See, e.g.*, *Abortion*, GALLUP, http://www.gallup.com/poll/1576/abortion.aspx [https://perma.cc/H5P8-8A9Y?type=image].

14. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) [hereinafter DEMOCRACY AND DISTRUST].

15. 139 S. Ct. 2484 (2019).

16. *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 143 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004); *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

broader forms of dysfunction that go beyond what Ely noted in *Democracy and Distrust,* including what one of us has referred to as persistent democratic "blind spots" and "burdens of inertia."[17]

Many of these dynamics are familiar to U.S. constitutional scholars.[18] But as Melissa Murray and Katherine Shaw also point out, their relevance and applicability in the abortion context is notable.[19] The states that are most likely to restrict abortion access are also some of those most likely to be subject to distortions in the form of partisan gerrymandering.[20] And as we will show, many of the anti-abortion laws taking effect across the country have a dubious democratic pedigree. Some pre-date *Roe* and yet have been revived by default after lying dormant for fifty years. Even before *Roe*, anti-abortion laws were often enforced very sporadically.[21] Another group of laws were passed during the *Roe* regime, but nonetheless in a very different political context, where legislators could afford to send appeasing messages to pro-life groups by issuing laws that the public did not expect to go into effect. Because of legislative inertia, it is likely that many of these laws will remain in effect for a long time, despite being out of step with popular sentiment in their own states.

What does this mean for *Dobbs*? Most obviously, a Court that is unwilling to deal with broader sources of state legislative dysfunction, such as partisan gerrymandering, should not have overruled *Casey* and instead should have continued to uphold a reading of the Due Process Clause that protects rights to liberty and national democratic majority attitudes on the scope of that liberty right.[22] And if the Court were to have adjusted the framework in *Casey*, this Essay suggests it should have done so by adopting remedies aimed at promoting greater democratic dialogue. For example, one possibility could have been to adopt a suspended declaration or delayed remedy that would take effect after a period of time, rather than immediately. Suspended declarations have rarely been used in the U.S. but are now commonplace in other

17. ROSALIND DIXON, RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE 2 (2023).

18. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 29 (1994); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

19. *See also* Murray & Shaw, *supra* note 10.

20. *See, e.g.*, *id.* (manuscript at 42–43) (citing Wisconsin's 1849 abortion ban and noting that "Wisconsin is subject to one of the worst gerrymanders in the country").

21. Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1795 (1991).

22. *See* Murray & Shaw, *supra* note 10.

constitutional democracies worldwide.[23] And if used correctly, they offer one method for prompting renewed democratic attention to an issue. In this case, such a remedy would have involved a suspended decision to overrule *Casey* (rather than laws challenged under it), or even more creatively, a decision to overrule *Casey* only prospectively, while making clear that existing laws that were inconsistent with *Casey* were invalid.

A final question is whether the Court's reliance on the language of democracy should be taken at face value as a sincere attempt to defend the outcome in *Dobbs*. One possibility is that the Court's paean to democracy in *Dobbs* is sincere but misplaced. Another possibility is that it is a fig leaf for a Court with different motives. Elsewhere, we have noted the dangers of this kind of stylized "democratic talk," both inside and outside of the United States.[24] Using the language of democracy to erode liberal democratic norms and guarantees is not just bad for liberalism, it can be bad for democracy. It can contribute to a gradual loss of faith on the part of voters in democracy as an ideal worth defending.[25] And the more voters lose faith in democracy, the more vulnerable it is to erosion. This, at least, is the experience of many other countries that have witnessed the "abusive" use of democratic constitutional ideas.[26]

The remainder of the Essay is divided into six parts. Part I explores the reliance by the Court in *Dobbs* on the language of democracy, as well as the support for that discourse in broader debates. Part II explains how this reliance fails to account for obvious sources of dysfunction in state legislative processes, including pervasive partisan gerrymandering, and explores the implications of this point for judicial review. Part III explores other sources of democratic dysfunction in state legislative politics surrounding abortion, including problems of inertia and blind pots surrounding decades-old, newly revived laws and messaging laws that we suggest were never intended to take full effect. Part IV considers the degree to which these various sources of dysfunction could be ameliorated by Congress or state-level popular initiatives. It suggests that these routes (particularly the second) may be partial solutions at best. Part V therefore suggests that the relevant sources of dysfunction have

23. *See, e.g.*, *Suspended Declaration*, CTR. FOR CONST. STUD. (July 4, 2019), https://www.constitutionalstudies.ca/2019/07/suspended-declaration/#ednref1 [https://perma.cc/CZG2-VGQ5].

24. ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 3–11, 18 (2021).

25. *See id.* at 28–30 (explaining that, while there is tension between liberalism and democracy, "often attacks on liberalism also end up being attacks on democracy").

26. *See id.* at 3, 20–22; David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

implications for the nature and scope of judicial review over abortion, both in terms of *how* a decision like *Dobbs* should be written and *whether* it should have been written at all. Part VI concludes by considering the degree to which the language of democracy in *Dobbs* should be considered as sincere, or instead as a fig leaf that approaches what we have elsewhere called "abusive constitutional borrowing."[27]

I. *DOBBS* AND DEMOCRACY

Several of the key opinions in *Dobbs* are heavily laden with references to democracy. The majority opinion opens by stating that for 185 years after adoption of the Constitution, "each State was permitted to address this issue in accordance with the views of its citizens."[28] *Roe*, the opinion suggests, interrupted this chain of democratic decision making and instead erroneously constitutionalized the right to abortion, while *Casey* perpetuated the error.[29] *Dobbs*, the majority states, will "return the issue of abortion to the people's elected representatives," a formula that the opinion would return to throughout the opinion.[30] Quoting Justice Scalia's dissent in *Casey*, the majority asserts that abortion would now be decided "like most important questions in our democracy: by citizens trying to persuade one another and then voting."[31] Later in the opinion, when asserting while *Roe* and *Casey* should be overruled despite the doctrine of stare decisis, the Court asserts that *Roe* represented a grave error—one in which the Court "usurped the power to address a question . . . that the Constitution unequivocally leaves for the people" and "short-circuited the democratic process" by closing off avenues for anti-abortion politicians and voters to act.[32]

The majority opinion also makes two other, more specific references to democracy. First, in a passing, sparsely supported argument to comparative constitutional law, it asserts that *Roe* and *Casey* left the "[s]tates less freedom to regulate abortion than the majority of western democracies enjoy."[33] Second, toward the end of the opinion, the Court

27. Dixon & Landau, *supra* note 24, at 3.

28. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022).

29. *See id.* at 2265.

30. *Id.* at 2243. *See also id.* at 2279 ("[T]he authority to regulate abortion must be returned to the people and their elected representatives."); *id.* at 2284 ("We . . . return that authority to the people and their elected representatives.").

31. *Id.* at 2243 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).

32. *Id.* at 2265. *See also id.* (asserting that *Roe* "wrongly removed an issue from the people and the democratic process").

33. *Id.* at 2270.

gestures at a political process argument. The majority notes that its decision would "return[]" abortion to "legislative bodies," which "allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office."[34] The Court also emphasizes that "[w]omen are not without electoral or political power," a point that it emphasizes by noting that the percentage of women who register and vote is "consistently higher" than the percentage of men who do the same, including in the state that had passed the abortion law at issue, Mississippi.[35] The Court suggests here that there is no breakdown in the political process that would require solicitude or intervention from the judiciary. This recalls Ely's own well-known criticism of *Roe*.[36]

Justice Kavanaugh's concurrence is also heavily saturated with the language of democracy. He argues that under the majority's approach, the Constitution is "neutral" on abortion, and therefore that the decision "properly leaves the question of abortion for the people and their elected representatives in democratic process," where "the people and their representatives may decide to allow or limit abortion."[37] He adds that the Constitution "authorizes the creation of new rights" not contained in it, through "processes of democratic self-government" such as state and federal legislation, or state and federal constitutional amendments.[38] Indeed, several times towards the end of his concurrence, Justice Kavanaugh repeats that the Court was taking a neutral position when it had previously improperly taken sides on the abortion issue, and that it was returning "difficult moral and policy questions" to the "people and their elected representatives."[39] However, he suggests a slightly different conception of which democratic processes would deal with the abortion issue. While the majority refers repeatedly to the "States," Justice Kavanaugh references the "democratic process in the States or Congress," suggesting that legislative (or constitutional amendment) struggles could occur at either level of government.[40]

Interestingly, the dissent by Justices Breyer, Sotomayor, and Kagan—although scathing on many other points—does not take aim at the majority and concurrence's uses of democracy. The dissent asserts, that, properly understood, the Constitution creates a right to abortion,

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34. *Id.* at 2277.

35. *Id.*

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

37. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

38. *Id.* at 2306 (Kavanaugh, J., concurring).

39. *See id.* at 2309 (Kavanaugh, J., concurring).

40. *Id.* (Kavanaugh, J., concurring).

and moreover that the criteria for overruling stare decisis have not been met.[41] This leads it to a posture that abortion is a right that should be *insulated* from the democratic process, and it does not really interrogate the question of what that democratic process might look like. "[W]hen it comes to rights," the dissent argues, "the Court does not act 'neutrally' when it leaves everything up to the States," but instead acts neutrally by "protect[ing] the right against all comers."[42]

The focus on democracy in the majority (and concurring) opinions in *Dobbs* is consistent with the discourse among commentators who have justified the decision. For example, Helen Alvaré, Professor and Associate Dean at the Antonin Scalia Law School at George Mason University, referred to *Dobbs* as a "win for democracy."[43] Likewise, former Republican congressmember and current talk show host Trey Gowdy attacked President Biden's critique of the *Dobbs* decision by stating that *Dobbs* had returned the issue to "state legislators and therefore, to the people and the ballot," and asking "are the people not also capable of drawing a careful balance on a complex matter?"[44] Attorney and Heritage Foundation staffer Hans von Spakovsky similarly argued that "*Roe* was one of the most anti-democratic court decisions in the past 100 years," and that *Dobbs* had "upheld the democratic process" by leaving the decision up to "the people and their elected representatives."[45] He noted that liberal states like New York and California would likely make very different choices on abortion than conservative states like Mississippi and Texas.[46] Further, Senate Majority Leader Mitch McConnell celebrated the *Dobbs* decision by stating, "Now the American people get their voice back."[47] McConnell also argued that the decision allowed U.S. states to restrict abortions in ways similar to

41. *See id.* at 2333–35 (Breyer, Sotomayor & Kagan, JJ., dissenting).

42. *Id.* at 2328 (Breyer, Sotomayor & Kagan, JJ., dissenting).

43. Helen Alvaré, Opinion, *Dobbs Decision Shows US Can Be Both Powerful and Humane*, THE HILL (June 26, 2022, 8:00 AM), https://thehill.com/opinion/civil-rights/3537176-dobbs-decision-shows-us-can-be-both-powerful-and-humane/ [https://perma.cc/JV9X-3JNC].

44. *Trey Gowdy Tells Biden: Let the People Debate the Right to Life at the Ballot Box*, FOX NEWS (July 10, 2022, 9:04 PM), https://www.foxnews.com/media/trey-gowdy-biden-let-people-debate-right-life-ballot-box [https://perma.cc/5XS5-KS2H].

45. Hans A. von Spakovsky, *Supreme Court Upholds Democracy in Dobbs Abortion Decision*, HERITAGE FOUND. (July 5, 2022), https://www.heritage.org/life/commentary/supreme-court-upholds-democracy-dobbs-abortion-decision [https://perma.cc/3KYT-SFXE].

46. *Id.*

47. John McCormack, *McConnell:* Dobbs *Decision 'Courageous and Correct*,*'* NAT'L REV. (June 24, 2022, 11:32 AM), https://www.nationalreview.com/corner/mcconnell-dobbs-decision-courageous-and-correct/ [https://perma.cc/B4SU-U63W].

those found in other Western democracies, such as "France or Germany."[48]

Some commentary celebrating *Dobbs* took a more complex view of the decision's democratic resonance. Professor Teresa Collett of the University of St. Thomas noted that although "returning" the issue "to the people . . . as a general rule is a good thing," in this case "neither side is really pleased with that outcome."[49] She also described *Dobbs* as an "imperfect resolution" until anti-abortion legislators were able to pass either federal legislation or a constitutional amendment banning abortion nationwide.[50]

II. *DOBBS*, GERRYMANDERING, AND DEMOCRATIC PROCESS FAILURES

The meanings of democracy in the *Dobbs* decision are deceptively nuanced. On the surface, the claim is simple—the Court is, as Justice Scalia argued in his dissent in *Casey*, taking itself "out of this area" and leaving the issue to the "political forum."[51] The claim reduces, in a sense, to Scalia's argument for textualism—judicial self-restraint, with democratic resolution as the default.[52] Put that way, the framing is formalist in nature—the democratic sphere is the default for the resolution of conflicts in society. As the majority's argument goes, since there is no right to abortion in the U.S. Constitution, the issue is returned to the "people," without any representations about how the political process will perform.[53]

But this is not, we think, the only or even best way to characterize the references to democracy in and around *Dobbs*. Democracy is not, in this discourse, just a default or background condition for settling disputes, it is a process with a set of characteristics that make those results good or just. Justice Scalia, in *Casey*, referred to the advantages posed by a "fair hearing and an honest fight."[54] Justice Kavanaugh's concurrence in *Dobbs* notes that in the process of "creating new rights,

48. *See id.*

49. *See* Kevin J. Jones, *Why Dobbs is a Better Precedent Than Roe*, CATH. NEWS AGENCY (July 7, 2022, 12:06 PM), https://www.catholicnewsagency.com/news/251739/why-dobbs-is-a-better-precedent-than-roe [https://perma.cc/6AYC-N8ZX].

50. *Id.*

51. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 979, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

52. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182–85 (1989).

53. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

54. *Casey*, 505 U.S. at 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments."[55]

In these statements, democracy is not simply a default or background condition. Rather, the justices are making a set of assumptions about the nature of the democratic process—minimally, a fair one, perhaps in a more maximalist way, in Justice Kavanaugh's telling, a vibrant resort to processes of "democratic self-government."[56] These assumptions, however, are deeply problematic when one considers the realities of democratic politics and representation in state legislatures, especially in states where abortion is currently most restricted. These include problems of formal and informal modes of disenfranchisement and pervasive patterns of partisan gerrymandering.[57] As Miriam Seifter has recently argued, state legislatures are often countermajoritarian institutions that are the least democratic branch of state government.[58]

A. Democracy and Deep Dysfunction: The Problem of Partisan Gerrymandering

A partisan gerrymander refers to the practice of drawing district lines in legislative elections in ways that are designed to maximize the seats won by one party, at the expense of other parties. The literature on partisan gerrymandering—in both law and political science—is immense. We do not seek to fully summarize it here. But we do note a few important conclusions. The first is that political actors, aided by new technology, have become "better" at partisan gerrymandering in recent cycles.[59] That is, they have become better at drawing gerrymanders that maximize gains while minimizing risks to the party conducting the gerrymander.

Second, gerrymandering in the last two cycles has raised concerns about asymmetry, with Republicans benefitting more than Democrats. There is little question about this in the prior cycle (sparked by the 2010 census), where Republicans used their unified control over a number of

55. *Dobbs*, 142 S. Ct. at 2306 (Kavanaugh, J., concurring).

56. *Id.*

57. *See* Murray & Shaw, *supra* note 10 (manuscript at 48–56).

58. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

59. *See, e.g.*, Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/.

right-wing and swing states to instantiate aggressive partisan gerrymanders.[60] Coupled with other voting measures with debated effects on partisan turnout, the aggressive gerrymanders of the 2010 cycle raised concerns that Republicans were tilting the electoral playing field heavily in their favor, essentially making outcomes in many states (and nationally) less responsive to popular will.[61]

The redistricting that followed the 2020 census was somewhat more even, as Democrats were in a slightly stronger position to gerrymander some states themselves and to limit Republican gerrymandering of some swing states.[62] In Michigan, for example, Democrats leveraged control of the governorship to limit partisan gerrymandering.[63] But in other states, such as Ohio, Georgia, and Texas, the new gerrymander remains as or more extreme than the previous one.[64]

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60. *See* LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUST., EXTREME MAPS 1–2 (2017), https://www.brennancenter.org/media/245/download [https://perma.cc/JVM5-E2MN] (finding that this decade's maps are "consistently biased in favor of Republicans," and that this is closely linked to "single-party control of the redistricting process").

61. *See id*. *See also* Matt Vasilogambros, *Republican Wave of Voting Restrictions Swells*, STATELINE (Mar. 25, 2021, 12:00 AM), https://stateline.org/2021/03/25/republican-wave-of-voting-restrictions-swells/ [https://perma.cc/SN6A-VVEE] (describing how recent Republican-backed voting measures make it more difficult for certain demographics, including communities of color and disabled voters, to vote).

62. *See* Andrew Prokop, *How Democrats Learned to Stop Worrying and Love the Gerrymander*, VOX (Apr. 14, 2022, 7:00 AM), https://www.vox.com/22961590/redistricting-gerrymandering-house-2022-midterms [https://perma.cc/ETU5-5NJT].

63. *See* David Lieb, *Michigan Legislature Flip Shows Impact of Gerrymandering*, FOX 2 DETROIT (Nov. 22, 2022), https://www.fox2detroit.com/news/michigan-legislature-flip-shows-impact-of-gerrymandering [https://perma.cc/YXF4-35EM]; *Redistricting Report Card: Michigan 2021 Commission Final Congressional Map*, GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/redistricting-report-card?planId=recMi1jMpBPGdsYUq [https://perma.cc/T8BG-CH2Q] (July 19, 2023) (grading partisan fairness in Michigan electoral maps as "A").

64. *Redistricting Report Card: Ohio 2022 Latest Draft Congressional Map*, GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/redistricting-report-card?planId=recYVt3NqPYEZsTtz [https://perma.cc/CV4Q-EUFZ] (Mar. 10, 2022) [hereinafter *Redistricting Report Card: Ohio*] (grading partisan fairness in Ohio electoral maps as "F"); *Redistricting Report Card: Georgia 2021 Final Republican Congressional Map*, GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/redistricting-report-card?planId=recZwpVm5Uz1GESnV [https://perma.cc/C9VJ-CTWW] (July 19, 2023) [hereinafter *Redistricting Report Card: Georgia*] (grading partisan fairness in Georgia electoral maps as "C"); *Redistricting Report Card: Texas 2021 Final Congressional Plan C2193*, GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/redistricting-report-card?planId=recL5EF85h0ILukMA [https://perma.cc/GH3B-K7TT] (July 19, 2023) (grading partisan fairness in Texas electoral maps as "F"). *See also* Michael Wines, *Maps*

A third point is about the effects of partisan gerrymandering. Political science scholarship finds that an increase in measures of gerrymandering in state legislatures is associated with significant shifts in the identity of the median legislator and policy outcomes.[65] In other words, gerrymandering has an important impact on both the composition of state legislatures and on the outcomes produced by those legislatures.

Empirically, high levels of partisan gerrymandering are often correlated with draconian—and anti-majoritarian—restrictions on access to abortion.[66] There is legitimate debate about how levels of gerrymandering should be judged, especially in a system such as the U.S. that does not rely on proportional representation.[67] But there are various attempts to measure the extent of the problem.[68] On one of these measures, as Table 1 shows, the vast majority of states that have total or near total bans on access to abortion also have laws governing redistricting processes that create an "extreme" or "high" risk of partisan

in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyways, N.Y. TIMES (Aug. 8, 2022), https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html ("[J]udges in Alabama, Georgia, Louisiana and Ohio have found that Republican legislators illegally drew those states' congressional maps along racial or partisan lines, . . . [b]ut . . . all four states are using the rejected maps . . . ."); Eric Griffey, *A Brief History of Texas Gerrymandering*, SPECTRUM NEWS 1 (Oct. 14, 2022, 2:25 PM), https://spectrumlocalnews.com/tx/south-texas-el-paso/election/2020/10/06/a-brief-history-of-texas-gerrymandering- ("A seven-year legal battle over Texas's legislative maps largely ended in May when the Supreme Court rejected almost all claims that Republican lawmakers in the state had drawn electoral districts to intentionally dilute minority voters' influence . . . .").

65. *See, e.g.*, Devin Caughey, Chris Tausanovitch & Christoper Warshaw, *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. 453, 455 (2017) (finding that a one standard deviation shift in a measure of gerrymandering has a bigger impact on policy than a change in the party of the state's governor).

66. *See, e.g.*, *id.* at 458–61 (reporting findings that majority Republican control of state government increases state policy conservatism, including on abortion); Devin Caughey, Christoper Warshaw & Yiqing Xu, *Incremental Democracy: The Policy Effects of Partisan Control of State Government*, 79 J. POL. 1342 (2017); Ian Vandewalker & Mira Ortegon, *A Vocal—and Wealthy—Minority Is Controlling Abortion Access*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/vocal-and-wealthy-minority-controlling-abortion-access [https://perma.cc/6YPV-WB27].

67. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) ("We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years.").

68. *See, e.g.*, JACK NOLAND, ALLY MARCELLA, ANH-LINH KEARNEY, LEIF MAYNARD & NICOLAS HEIDORN, REPRESENTUS, GERRYMANDERING THREAT INDEX (2021), https://represent.us/wp-content/uploads/2021/05/Gerrymandering-Threat-Index-May-6.pdf [https://perma.cc/TXQ6-WZMY] (acknowledging various studies on the problem) [hereinafter GERRYMANDERING THREAT INDEX]; *supra* notes 63–64.

gerrymandering, based on who draws maps, how they are drawn, and how they may be challenged in state courts. Thirty-five of fifty states are in those categories nationally, and nineteen of twenty-three in the sample of states with significant abortion restrictions or prohibitions.

Of the four states with significant abortion restrictions whose processes create a lower risk of gerrymandering, Idaho and Arizona have longstanding independent commissions.[69] Ohio and Michigan passed very recent reforms to their redistricting processes that were not in effect for the last cycle, where Republicans carried out aggressive gerrymanders.[70] Ohio nonetheless ended up with an egregious set of gerrymandered maps that were used in the 2022 election, despite the new process and state Supreme Court decisions holding the gerrymanders to be unconstitutional.[71]

Table 1. Abortion Bans and Threat of Partisan Gerrymandering by State.

State	Abortion ban	Gerrymandering threat level rating[72] Ranges from Minimal (1) to Extreme (5)
Alabama	Yes (near total)[73]	Extreme (5)
Arizona	Pre-*Roe* total ban currently blocked but may revive, pending legal proceedings[74]	Minimal (1)

69. *See Idaho*, ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/state/idaho/?cycle=2020&level=Congress&startdate=2021-11-12 [https://perma.cc/QBB7-YULR]; *Arizona*, ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/state/arizona/ [https://perma.cc/T2U7-KDEY].

70. The Schwarzenegger Institute for State and Global Policy ranked the Michigan gerrymander the fourth worst nationally for state legislatures during the 2010 redistricting cycle, and the Ohio gerrymander the sixth worst. CHRISTIAN R. GROSE, JORDAN CARR PETERSON, MATTHEW NELSON & SARA SADHWANI, U.S.C. SCHWARZENEGGER INST. FOR STATE & GLOB. POL'Y, THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES, http://schwarzeneggerinstitute.com/theworstpartisangerrymanders (May 6, 2021) [https://perma.cc/SWP4-GM23] [hereinafter PARTISAN GERRYMANDERS].

71. *Redistricting Report Card: Ohio*, *supra* note 64 (grading partisan fairness in Ohio electoral maps as "F").

72. GERRYMANDERING THREAT INDEX, *supra* note 68, at 10–11 (ranking states by gerrymandering threat levels using a 1–5 scale).

73. ALA. CODE § 26-23H-4 (2023).

74. *See* ARIZ. REV. STAT. ANN. § 13-3602 (2021); ARIZ. REV. STAT. ANN. § 36-2322 (2023) (current law prohibiting abortion after fifteen weeks); *Arizona Court to Review Ruling That Abortion Doctors Can't Be Charged Under Pre-Statehood Law*, AP,

State	Abortion ban	Gerrymandering threat level rating
Arkansas	Yes (near total)[75]	Extreme (5)
Florida	Yes (gestational ban post-6 weeks passed after *Dobbs*, pending state supreme court decision)[76]	High (4)
Georgia	Yes (gestational ban post-6 weeks)[77]	Extreme (5)
Idaho	Yes (near total)[78]	Minimal (1)
Indiana	New near total ban passed after *Dobbs*[79]	Extreme (5)
Kentucky	Yes (total ban)[80]	Extreme (5)
Louisiana	Yes (near total)[81]	Extreme (5)
Michigan	Pre-*Roe* total ban reversed by Nov. 2022 ballot initiative[82]	Minimal (1)

https://apnews.com/article/abortion-arizona-doctors-old-law-fe8b903e49472f2e3c6b4d28bd18ffb7 [https://perma.cc/YXF9-ZWCH] (Aug. 23, 2023, 4:59 PM).

75. ARK. CODE ANN. §§ 5-61-304, -404 (2023).

76. FLA. STAT. § 390.0111 & n.1 (2023).

77. GA. CODE ANN. § 16-12-141 (2023).

78. IDAHO CODE § 18-622 (2023).

79. IND. CODE § 16-34-2-1 (2023). The August 2022 bill enacting the near-total abortion ban was recently recertified as constitutional. *See* David Gay, *Indiana Supreme Court Denies Abortion-Related Rehearing in Preliminary Injunction, Certifies June Decision*, FOX 59, https://fox59.com/indiana-news/indiana-supreme-court-denies-abortion-related-rehearing-in-preliminary-injunction-certifies-june-decision/ [https://perma.cc/5U4Q-LE6X] (Aug. 21, 2023, 5:20 PM).

80. KY. REV. STAT. ANN. §§ 311.7704, .7706, .772 (West 2023).

81. LA. STAT. ANN. § 1061.1.5 (2023).

82. 2023 Mich. Pub. Acts 2 (repealing MICH. COMP. LAWS §§ 750.14–.15 (1931)). *But see* MICH. COMP. LAWS § 750.232 (2023) ("Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such

State	Abortion ban	Gerrymandering threat level rating
Mississippi	Yes (near total)[83]	Extreme (5)
Missouri	Yes (near total)[84]	High (4)
North Dakota	Yes (near total)[85]	Extreme (5)
Ohio	Gestational ban post-6 weeks, under temporary injunction[86]	Lower (2)
Oklahoma	Yes (near total)[87]	High (4)
South Carolina	Gestational ban post-6 weeks invalidated by state Supreme Court, reissued[88]	Extreme (5)
South Dakota	Yes (near total)[89]	Extreme (5)
Tennessee	Yes (total ban)[90]	Extreme (5)
Texas	Yes (civil penalties, with near total ban trigger law recently taking effect)[91]	Extreme (5)

child . . . shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter.").

83. MISS. CODE ANN. § 41-41-45 (2023).

84. MO. REV. STAT. § 188.017 (2023).

85. N.D. CENT. CODE §§ 12.1-19.1-01 to -03 (2023).

86. OHIO REV. CODE ANN. § 2919.195 (LexisNexis 2023). *See also* Kathleen Maloney, *State Appeals Hold on 'Heartbeat Act*,*'* CT. NEWS OHIO (Sept. 19, 2023), https://www.courtnewsohio.gov/cases/2023/SCO/previews/0926-27/0926-27.asp [https://perma.cc/2DMU-2M6L] (indicating that the Ohio Supreme Court will hear oral arguments on the temporary injunction starting in September 2023).

87. OKLA. STAT. tit. 21, § 861 (2023).

88. *See* Gen. B., 125th Gen. Assemb., Reg. Sess. (S.C. 2023) (to be codified at S.C. CODE ANN. §§ 44-41-630(B), -640(A), -650(A), -660(A) (2023)) (prohibiting abortions after a fetal heartbeat is detected, with exceptions to protect the life of the mother, for rape or incest, or fetal anomaly).

89. S.D. CODIFIED LAWS § 22-17-5.1 (2023).

90. TENN. CODE ANN. § 39-15-213 (2023).

91. TEX. CODE ANN. §§ 170A.002–.007 (2023).

State	Abortion ban	Gerrymandering threat level rating
Utah	Yes (total ban, temporarily blocked by injunction)[92]	Extreme (5)
West Virginia	Yes (new near-total ban passed in September 2022)[93]	Extreme (5)
Wisconsin	Yes (near total)[94]	Extreme (5)
Wyoming	Yes (near total)[95]	Extreme (5)

Table 1 is somewhat suggestive, but we do not want to push the correlation too far. The threat measure is a measure of the risks posed by a state's legal system of a gerrymandered outcome; it does not measure the severity of gerrymandering directly, which changes cycle to cycle. As well, as we explain in more detail in the next Part, gerrymandering may interact with several different factors to produce distorted outcomes. In some cases, a gerrymandered legislature may have produced a recent restriction; in others, a gerrymandered legislature may inhibit change from a status quo that already includes such a restriction, or both. Finally, our point is not that majority support for banning abortion is necessarily lacking across *all* the states in which it is currently banned: in some very right-wing states, there may be such a majority. But as we explain below, polling certainly suggests that the restrictions that *Dobbs* revived in many states are unpopular.

B. Implications for the Court and Judicial Review

What does this mean for the Court's decision in *Dobbs*, or the role of the Court more generally? At the very least, it suggests that if the

92. UTAH CODE ANN. § 76-7a-201 (LexisNexis 2023); *Parenthood Ass'n of Utah v. State of Utah*, ACLU, https://www.aclu.org/cases/planned-parenthood-association-of-utah-v-state-of-utah [https://perma.cc/AHN5-FY49] (May 31, 2023) ("A state trial court blocked enforcement of the [abortion ban] while the litigation proceeded. The State of Utah appealed that temporary injunction. That appeal, which the ACLU's State Supreme Court Initiative joined as counsel, remains pending.").

93. W. VA. CODE. §§ 16-2R-3(a)(1) to (3), 61-2-8 (2023).

94. WIS. STAT. § 940.15 (2021–22).

95. WYO. STAT. ANN. §§ 35-6-123 to -126 (2023).

Court is to reconsider *Casey*, it should also reconsider other recent decisions, such as *Rucho v. Common Cause*,[96] which declined to impose constitutional limits on the scope for partisan gerrymandering in congressional and state legislative redistricting processes.[97]

Doing so would help clear the "channels of political change," in ways that would increase the actual legitimacy of decision making by state legislatures on these questions.[98] And it would allow us to get a better sense of how, and to what extent, state majority attitudes differ from national majority opinion. It would also accord with the classic understanding of judicial review as representation-reinforcing, or process-based theories of judicial review.

Gerrymandering, to be clear, is an across-the-board problem with political process—it may impact policy outcomes across a very wide range of issues. But we think the salience of gerrymandering to judicial review should increase in areas, like this one, where there are significant liberty and equality implications, and where the Court had previously recognized a fundamental right.

The most well-known account of process theory is that developed by John Hart Ely in *Democracy and Distrust*, drawing off *Carolene Products*'s[99] famous Footnote 4, which stated that courts might have to take representation reinforcement measures to aid "discrete and insular" minorities and clear the channels of political change.[100]

As noted above, the Court in *Dobbs* explicitly invoked Ely's ideas.[101] The reference is oddly placed, at a point of the opinion where the majority is rejecting the idea that reliance interests should prevent *Roe* from being overturned.[102] But the majority nonetheless relies on Ely-like reasoning to discard the idea that women are a "discrete and insular minority" in need of protection by the judiciary, as support for its core

96. 139 S. Ct. 2484 (2019).

97. *See id.* at 2506–07. *See also* Theunis Roux, *What Does the US Supreme Court's Decision in Dobbs Tell Us About the Virtues of Australia's Approach to Protecting Fundamental Rights?* AUSTRALIAN PUB. L., (Jul 4. 2022), https://www.auspublaw.org/blog/2022/07/what-does-the-us-supreme-courts-decision-indobbs-tell-us-about-the-virtues-of-australias-approach-to-protecting-fundamental-rights [https://perma.cc/2AUJ-4TLD] ("The glow of the *Dobbs* majority's democratic-credentials-burnishing, in other words, is somewhat dulled by the recognition that, in the case of many Republican-controlled states, the regulation of abortion is only debatably being returned to 'the people' for decision.").

98. *See* DEMOCRACY AND DISTRUST, *supra* note 14, at 172; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

99. 304 U.S. 144.

100. *Id.* at 153 n.4.

101. Murray & Shaw, *supra* note 10 (manuscript at 69).

102. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276–77 (2022).

proposition that *Roe* should be overturned.[103] Instead, the majority argues that women have significant political power because they make up more than half of voters in most elections.[104] The majority envisions a process in which women on "both sides" will be able to influence the legislative process in numerous ways, including "lobbying . . . , voting, and running for office."[105] In other words, the majority again envisions a "fair fight." It reaches this conclusion by emphasizing only one piece of a well-functioning political process (the absence of a "discrete and insular" minority) while ignoring several other key aspects of such a process.

A similar claim was embedded in Ely's own critique of *Roe*.[106] In a comment on *Roe* in 1973, Ely articulated what he saw as errors in the majority's reasoning, arguing that the right could not be derived from standard modes of interpretation—text, original intent, structure, or values.[107] He then briefly discussed *Carolene Products*, arguing that judicial protection should be "reserved for those interests which, as *compared with the interests to which they have been subordinated*, constitute minorities unusually incapable of protecting themselves" in the political sphere.[108] Ely argued that "[c]ompared with men, women may constitute such a 'minority'; compared with the unborn, they do not."[109]

Ely returned to the issue in *Democracy and Distrust*. Here he stated that classifications based on sex were difficult applications of his theory.[110] He raised both statistical points similar to those suggested by the majority in *Dobbs*, as well as sociological arguments to cast doubt on a classification as a "discrete and insular minority."[111] Nonetheless, he also noted obvious historical justifications in favor of such classification, including longstanding prohibitions in voting and political participation rights.[112] Ultimately, Ely hedges a bit, arguing that historical classifications should be reviewed with great scrutiny, but expressing more skepticism about judicial intervention of contemporary laws.[113] He argued that *Roe* is difficult to "defend in process terms," because "the

103. *See id.* at 2277.
104. *Id.*
105. *Id.*
106. *See* Murray & Shaw, *supra* note 10 (manuscript at 68–69).
107. *Wages*, *supra* note 36, at 935–36.
108. *Id.* at 934.
109. *Id.* at 934–35.
110. *See* DEMOCRACY AND DISTRUST, *supra* note 14, at 164–70.
111. *See id.*
112. *See id.* at 164–67 (acknowledging that "there remains something that seems right in the claim that women have been operating at an unfair disadvantage in the political process").
113. *See id.* at 169.

genuine source of trouble in the abortion context is not that the issue is peculiarly unsuited to democratic decision but rather that democratic decision quite consistently generates value choices with which many of us, myself included, rather fervently disagree."[114]

The issue is more complex than either Ely's analyses or the Court's brief political process analysis in *Dobbs* would imply. It is true that women do not readily meet the description of a "discrete and insular minority."[115] But the limitations on the scope of equal protection implied by Ely's theory have been subject to criticism.[116]

Not all groups that experience social, economic and political disadvantage are statistical minorities. Women have long been subject to constraining social role expectations, legal and economic discrimination, and political disenfranchisement, even while being a statistical majority in many countries.[117] Not every historically disadvantaged or subordinated group is politically powerless or isolated: women in many countries again have important electoral influence. LGBTQIA+ activists have formed powerful coalitions with other civil rights groups. Older voters and those with disabilities have formed similar electoral coalitions. But this does not erase the fact that gender, sexuality, age, and disability remain potential sites of ongoing exclusion and disadvantage, and social stigma or unfair stereotyping.[118]

There is also a close relationship between access to abortion and promoting social, economic, and political inclusion and equality for women.[119] Without access to abortion, women will have limited choice

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114. *Id.* at 248 n.52.

115. *See* Ruth Bader Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUM. RTS. 1, 4 (1977) (detailing the arguments against women constituting a discrete and insular minority).

116. *See, e.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 734–36 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064, 1072–73 (1980); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

117. *Despite Progress, World's Most Marginalized Still Left Behind — UN Development Report*, UN NEWS (Mar. 21, 2017), https://news.un.org/en/story/2017/03/553642 [https://perma.cc/6MDJ-89WM].

118. *See, e.g.*, Reva B. Siegkarsel, *Memory Games:* Dobbs's *Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1138, 1194, 1203 (2023) (arguing that *Dobbs* limits rights in ways that harm historically marginalized groups).

119. *See Gonzalez v. Carhart*, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting). *See also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Reva B. Siegel, *Sex Equality*

but to play the role of mother and caregiver.[120] They will often face significant additional obstacles in engaging in paid employment and be limited in their capacity to plan and seek out electoral office.[121] Limiting decisional autonomy in this context undermines a claim to equal dignity, including the dignity of making decisions about one's own body, health, and life-path.[122] It further requires pregnant people to engage in an extremely intensive and invasive form of bodily labor.[123] In a broader vein, NeJaime and Siegel have recently argued that Ely misunderstood the Supreme Court's modern substantive due process jurisprudence. They argue that properly understood, the broad sweep of this jurisprudence is consistent with *Carolene Products*' focus on democratic rights of minorities, who are often asserting these rights at the grassroots via social movements in ways that prove to be deeply democracy-promoting.[124]

Drawing off of *Carolene Products*, Ely in *Democracy and Distrust* famously identified two sources of democratic dysfunction: first, the tendency for legislative majorities to overlook the interests of discrete and insular minorities; and second, the tendency of majorities to entrench themselves by clogging up the channels of political change.[125] The majority's analysis in *Dobbs* touches on the first argument, but it says nothing about the second, which deals with problems of political self-entrenchment that make elections fundamentally unfair as tests of popular will.

Ely's own analysis suggested that *Roe* could not be defended on the self-entrenchment prong of political process theory either. But Ely was

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Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 EMORY L.J. 815, 815–16 (2007).

120. *See* Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 35 (1992) ("[W]e may speculate that an abortion is seen as a killing rather than a failure to allow conscription only because of the perceived naturalness of the role of women as child-bearers, whether they seek that role or not.").

121. *Cf.* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 24–25 (1977) ("The Supreme Court's insistence upon the removal of obstacles to aliens' membership in the bar and employment in the state civil service promotes the principle of equal citizenship in part by promoting this interest in participation.").

122. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1735–36 (2008); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971) (discussing the importance of decision-making regarding childbirth and personal well-being).

123. *See* Thomson, *supra* note 122.

124. *See* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2021).

125. *See supra* notes 14–17 and accompanying text.

writing around the time *Roe* was decided. Changes in the U.S. political system have made self-entrenchment a more significant problem, in part due to the Court's own jurisprudence.

Across a series of cases, the Supreme Court was asked to adjudicate claims that extreme partisan gerrymanders violated the Constitution; in each case, the Court declined to hold the gerrymander unconstitutional, generally citing justiciability concerns such as standing or the political question doctrine.[126] In the 2019 *Rucho* opinion, the Court finally ruled conclusively that partisan gerrymandering claims were political questions that fell outside judicial competence.[127] They made these rulings despite valiant efforts by plaintiffs to find a manageable standard for adjudication.[128] There is also concern that the Supreme Court may be retreating from its position to adjudicate racial gerrymandering under the U.S. Constitution and the Voting Rights Act, further limiting its willingness to police this area.[129]

The majority in *Rucho* suggested there were other avenues through which partisan gerrymandering could be dealt with, thus rendering federal judicial intervention less necessary.[130] Yet this reasoning flies in the face of the reality of redistricting practice. While the federal government has considerable power over districting in elections,[131] this power has largely lain dormant and its exact contours are unclear.[132] At the state level, state constitutions, state courts, and independent redistricting commissions form another potential layer of relief, although they are scattered and deployed unevenly across states.[133]

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126. *See Davis v. Bandemer*, 478 U.S. 109, 113, 143 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); *League of United Lat. Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006); *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018).

127. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

128. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 839, 849 (2015) (summarizing the "Sisyphean efforts of gerrymandering plaintiffs" after *League of United Latin American Citizens v. Perry*).

129. *See, e.g.*, Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 52 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/07/Hasen-The-Supreme-Court%E2%80%99s-Pro-Partisanship-Turn.pdf [https://perma.cc/7TP2-N86P].

130. *See Rucho*, 139 S. Ct. at 2507–08.

131. *See* U.S. CONST. art. I, § 4, cl. 1.

132. *See, e.g.*, Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 112–13 (2013).

133. As a particularly bizarre example, in 2022, the Ohio Supreme Court twice ruled state legislative maps to be illegal partisan gerrymanders under the state constitution, but because of closeness to the election, a federal court held that they should be used in the 2022 midterm elections anyway. *Federal Court Implements Statehouse Maps Twice Declared Unconstitutional by Ohio Supreme Court*, OHIO CAP. J., (May 27, 2022, 5:40 PM), https://ohiocapitaljournal.com/2022/05/27/federal-court-implements-

In other words, the Court's actions on other issues dealing more directly with the democratic process work against the celebratory democracy-based reasoning the Court relied on in *Dobbs*. Put more bluntly, the question is: what kind of democracy is the Court returning the issue of abortion to?

III. BEYOND ELY: BROADER SOURCES OF DEMOCRATIC DYSFUNCTION

A recent spate of neo-Elyian work, much of it comparative, has identified a broader range of forms of democratic dysfunction, demonstrating how Ely's analysis did not actually capture all of the ways in which democracy might fail.[134] One of us has referred to in prior work to democratic "blind spots" and "burdens of inertia" as two factors that commonly undermine the responsiveness of political decision-making.[135] Both are significant problems in the abortion context.

Legislative blind spots arise where legislators do not foresee the full range of ways in which laws may affect constitutional rights or interests, where they fail to appreciate the experiences or perspectives of those most directly affected by laws, or where they fail to see opportunities for accommodating rights or interests at little cost to the relevant legislative objective.[136] These blind spots may result from a number of different factors, including time constraints, constraints on representativeness and foresight, and limits on expertise.[137]

Burdens of inertia refer to situations where legislative decision making fails to adjust to popular will because legislation is not updated.[138] Inertia can arise as a result of competing legislative priorities, which causes some issues to be deprioritized.[139] Or, it can stem from issues that divide political parties in ways that give them an incentive to avoid

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statehouse-maps-twice-declared-unconstitutional-by-ohio-supreme-court/ [https://perma.cc/XT4X-9S3Y].

134. *See* DIXON, *supra* note 17, at 1–2; Manuel José Cepeda Espinosa & David Landau, *A Broad Read of Ely: Political Process Theory for Fragile Democracies*, 19 INT'L J. CONST. L. 548, 554–55 (2021); Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT'L J. CONST. L. 1429 (2020).

135. *See* DIXON, *supra* note 17, at 2.

136. *Id.* at 82–83. Dixon calls these blind spots of "application," "perspective," and "accommodation," respectively. *Id.*

137. *Id.*

138. *See id.* at 87.

139. *Id.* at 84. *See* CALABRESI, *supra* note 18, at 127 ("Leaving the same law undisturbed may, instead, mean that the dubious parts of the statute will only be reviewed if a strong inertial burden is overcome.").

confronting those issues.[140] Inertia in the legislative branch can also compound sources of bureaucratic inertia, which undermine the capacity of the state to deliver on commitments to constitutional and legal rights.[141]

In this Part we examine two sources of democratic dysfunction that have particular bite in the abortion context. In different ways, the Court *contributed* to each of these problems. First, we highlight the problem of old laws in the abortion context: the *Dobbs* decision resulted in the potential revival of statutes that predated *Roe*. Second, we highlight the problem of messaging bills passed while the *Roe* regime was in effect without a clear intent of going into effect, but which are now likewise operational because of *Dobbs*.

A. Old Laws and Inertia

Some of the state laws that currently threaten to limit access to abortion are very old laws that remain on the books, and that *Dobbs* may have revived.[142] Consider a few examples. In Wisconsin, a statute dating from before the mid-nineteenth century may have been revived by the *Dobbs* decision. The statute provides that "[a]ny person, other than the mother, who intentionally destroys the life of an unborn child" is guilty of a felony.[143] The law makes no exception, other than for a "therapeutic abortion" that is "necessary . . . to save the life of the mother."[144] In 1849, the law initially criminalized abortion after "quick[ening],"[145] but in 1858 it was revised to include all abortions, although it penalized abortion after "quickening" more harshly.[146]

In the mid- to late nineteenth century, these laws reflected the most common approach nationally—a prohibition on all abortions, with an exception only to save the life of the mother.[147] The common law

140. *See* DIXON, *supra* note 17, at 85; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 38–39 (1993).

141. *See* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Review Revisited*, 5 INT'L J. CONST. L. 391, 403 (2007); David Landau, *Aggressive Weak-Form Remedies*, 5 CONST. CT. REV. 244, 255 (2014).

142. For a comprehensive account of abortion laws in the United States prior to *Roe*, and their effects, see LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 (2d ed. 2022).

143. WIS. STAT. §§ 940.04(1)–(2) (2021–22).

144. WIS. STAT. § 940.04(5)(b) (2021–22).

145. WIS. STAT. ch. 133, § 11 (1849).

146. WIS. STAT. ch. 164, § 11 (1858).

147. *See, e.g.*, Buell, *supra* note 21, at 1784.

reference to "quickening" was also abandoned in virtually all states.[148] Over time, a relative equilibrium developed where these laws often remained on the books but were rarely enforced, and doctors were permitted to make liberal use of the therapeutic exception.[149] Abortion was relatively common nationally.[150] Some legislative reform activity occurred in the 1960s, but these efforts were effectively superseded by *Roe* itself.[151]

In Wisconsin, the legislature has also enacted several new laws bearing on abortion since *Roe*. A 1985 law criminalized abortion after the point of "viability," with exceptions for the "life or health" of the woman involved.[152] Another law prohibits abortion after twenty weeks (where the law assumes the fetus is "capable of experiencing pain"), but with an exception for "medical emergency."[153] There are also Wisconsin laws on the books requiring that doctors performing abortions have admitting privileges to a hospital within thirty miles, as well as requiring a mandatory waiting period of twenty-four hours before the abortion can be obtained in most cases.[154]

The nineteenth century Wisconsin law banning virtually all abortions sits uneasily—indeed bizarrely—with any reasonable measure of contemporary popular will. Even in the late nineteenth and early twentieth centuries, it should be read in light of common national patterns forbearing from enforcement. The series of laws passed since *Roe* also suggest a very different orientation towards abortion, albeit one influenced by the existence of *Roe* itself. Whether the law will ultimately be revived to prohibit abortion within Wisconsin is unclear, since the state's Democratic Attorney General, and others, have brought a lawsuit seeking it declared unenforceable because of its conflict with the more recent laws.[155] But the mere possibility of revival of a law written in a

148. *See id.* ("By the end of the nineteenth century, every state had criminalized abortion by statute and, with three exceptions, had prohibited it during all phases of pregnancy.").

149. *See id.* at 1795.

150. *See, e.g.*, MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE RIGHTS 42 (1996) (citing estimates that at least one in five pregnancies ended in abortion between 1900 and 1970).

151. *See* Buell, *supra* note 21, at 1796–99.

152. Assemb. B. 510, 1985–86 Legislature, 87th Reg. Sess. (Wis. 1985) (codified at WIS. STAT. §§ 940.15(2)–(3) (2021–22)).

153. WIS. STAT. §§ 253.107(3)(a)–(b) (2021–22).

154. WIS. STAT. § 253.095(2) (2021–22); WIS. STAT. § 253.10(3)(c)(1) (2021–22) (requiring a twenty-four hour waiting period as of the 1995 amendment).

155. *See* Todd Richmond, *Wisconsin's Democratic Attorney General Sues to Block State's Abortion Ban*, PBS WIS. (June 28, 2022), https://pbswisconsin.org/news-item/wisconsins-democratic-attorney-general-sues-to-block-states-abortion-ban/ [https://perma.cc/7FTK-HM4U]; Joe Kelly, *Wisconsin Judge Advances Lawsuit to*

completely different historical context—one rendered unenforceable for fifty years because of *Roe* itself—is startling.

If the courts do not block enforcement of the nineteenth-century prohibition, legislative action appears unlikely. Wisconsin government is divided between a Republican state legislature (both chambers) and a Democratic governor.[156] The gubernatorial administration is challenging implementation of the old law, while the Republican legislative leaders are the defendants in the lawsuit asking that the law be held unenforceable.[157] The Speaker of the House, Robin Vos, has said that he would defend the nineteenth century law, and that new legislation to add exceptions for rape and incest were unlikely, although he personally supported those exceptions.[158] A report by the Schwarzenegger Institute for State and Global Policy at the University of Southern California found that the Wisconsin state legislature is the second worst gerrymander in the United States during the current cycle.[159] It noted that in 2018, Republicans won only 44.7% of the vote, but nonetheless won 64.6% of seats in the lower house of the state legislature.[160] In a recent poll, 58% of Wisconsin residents said that abortion should be legal in all or most cases, while only 11% believed it should be illegal in all cases.[161]

The situation in Wisconsin is not an anomaly. Eight other states also had pre-*Roe* abortion bans on the books that were not repealed by the

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Repeal State Abortion Ban, COURTHOUSE NEWS SERV. (July 7, 2023), https://www.courthousenews.com/wisconsin-judge-advances-lawsuit-to-repeal-state-abortion-ban/#:~:text=The%20judge%20found%20the%20Badger,which%20are%20not%20legally%20synonymous [https://perma.cc/UVW7-NPB4] ("Days after the U.S. Supreme Court upended Roe v. Wade last summer, . . . Democratic Wisconsin Attorney General Josh Kaul, with the blessing of Democratic Governor Tony Evers, sued to toss the state's 1849 law making it a felony to perform an abortion, with no exceptions for rape or incest, except if necessary to save the mother's life.").

156. *Party Control of Wisconsin State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Wisconsin_state_government [https://perma.cc/S7HD-XC97].

157. Nick Viviani & Michelle Baik, *Evers, Kaul File Lawsuit to Block Wisconsin's Abortion Law*, WMTV, https://www.nbc15.com/2022/06/28/evers-kaul-file-lawsuit-block-wisconsins-abortion-law/ [https://perma.cc/A8WY-78ZP] (June 28, 2022, 6:51 PM).

158. *See* Matt Smith, *Vos Says Legislation Adding Exceptions for Rape or Incest to State's Abortion Ban 'Unlikely*,*'* WISN 12, https://www.wisn.com/article/vos-says-legislation-adding-exceptions-for-rape-or-incest-to-states-abortion-ban-unlikely/40657215 [https://perma.cc/5J6Y-876Z] (July 19, 2022, 6:58 PM).

159. *See* PARTISAN GERRYMANDERS, *supra* note 70.

160. *Id.* at 3 tbl.1.

161. *See Marquette Law School Poll: June 14 - 20, 2022*, MARQ. UNIV. L. SCH. https://law.marquette.edu/poll/wp-content/uploads/2022/06/MLSP70Toplines.html#Q27:_Abortion_legality [https://perma.cc/RC7J-CLWA] (findings in Poll Question 27, Abortion Legality).

time *Dobbs* was issued: Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, and West Virginia.[162] These laws are generally written in a similar way to the Wisconsin law, containing only an exception for the life of the mother.[163] This was, as noted above, the standard abortion law in the late nineteenth and early twentieth centuries, although it was usually paired with patterns of forbearance from enforcement.[164]

In Michigan, a 1931 law with this shape[165] was temporarily enjoined by a state trial judge, but the state legislature sought to appeal that decision.[166] Additionally, several county prosecutors said they were not bound by the decision and would bring charges under the law anyway.[167] As in Wisconsin, the governor sought to prevent the ban from coming into effect, while state legislative leaders led the charge to defend the 1931 law, including by intervening and seeking to file an appeal against the temporary injunction.[168] Like Wisconsin, Michigan's state legislative gerrymander has been rated by the Schwarzenegger Institute as one of the worst in the country—the fourth most egregious, with Republicans winning majorities in both houses in 2018 despite winning less than forty-eight percent of the vote.[169] However, as we analyze below, in Michigan the popular initiative procedure ultimately served as a corrective: in November 2022, voters decisively approved an amendment putting abortion rights into the state constitution, thus mooting the 1931 law.[170]

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162. *See Abortion Policy in the Absence of Roe*, GUTTERMACHER INST., https://states.guttmacher.org/policies/abortion-policies [https://perma.cc/2EMS-KJBE] (Oct. 3, 2023).

163. ALA. CODE § 26-22-3(a) (1975); ARIZ. REV. STAT. § 13-3602 (2021); ARK. CODE ANN. § 5-61-102 (2023); MICH. COMP. LAWS § 750.323 (1931); MISS. CODE ANN. § 97-3-3(1) (1971); OKLA. STAT. tit. 21, § 21-861 (1961); TEX. REV. CIV. STAT. ANN. art. 4512, § 1 (West 1925); W. VA. CODE § 61-2-8(a) (2020).

164. *See* Buell, *supra* note 21.

165. MICH. COMP. LAWS § 750.14 (1931) (repealed 2023).

166. Jonathan Oosting, *Michigan Legislature Joins Abortion Fight to Defend 1931 Ban*, BRIDGE MICH. (June 7, 2022), https://www.bridgemi.com/michigan-government/michigan-legislature-joins-abortion-fight-defend-1931-ban [https://perma.cc/R4HQ-PTYB].

167. *See* Brittany Shammas, *Two Michigan Prosecutors Say They'll Enforce 1931 Abortion Ban Despite Injunction*, WASH. POST (June 29, 2022, 9:18 PM), https://www.washingtonpost.com/nation/2022/06/29/michigan-abortion-ban/.

168. *See* Melissa Quinn, *Whitmer Says "With the Current Legislature I Have, There Is No Common Ground" on Abortion*, CBS NEWS (June 26, 2022, 12:30 PM), https://www.cbsnews.com/news/gretchen-whitmer-michigan-legislature-no-common-ground-abortion/ [https://perma.cc/C6HX-G8M9].

169. *See* GROSE, PETERSON, NELSON & SADHWANI, *supra* note 70, at 2–5.

170. *See* Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO, https://www.politico.com/news/2022/11/09/michigan-

In Arizona, a very similar prohibition that dates from at least 1901 (before Arizona was a state) had been enjoined since shortly after *Roe* came down, but the Republican Attorney General of the state, Mark Brnovich, brought suit to revive it.[171] A key question is whether a March 2022 law banning abortions after fifteen weeks superseded the 1901 law.[172] Other Republican elected officials in the state have disputed the attorney general's interpretation.[173] One poll found that most voters opposed reinstatement of the 1901 law;[174] other polls have found that a near majority of voters in Arizona want abortion to be legal in all or most cases.[175] In December 2022, the intermediate Arizona appellate court held that the criminal prohibitions in the 1901 law could not be enforced because of the intervening legislative developments, effectively making the fifteen-week ban the law in Arizona.[176]

Unlike Wisconsin, Michigan, and Arizona, which are swing states,[177] Alabama, Arkansas, Mississippi, Oklahoma, Texas, and West Virginia are right-wing states (to varying degrees) and are all under unified Republican control.[178] In these states, laws that appear to totally ban abortion from the moment of conception, with exceptions only for the life of the mother, have faced varying fates in the courts. Several of these laws may have relatively little practical effect, since they have been

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abortion-amendment-results-2022-00064778 [https://perma.cc/2MJ8-A5LP] (Nov. 9, 2022, 3:43 AM).

171. *See* Associated Press, *Arizona's Attorney General Says a Pre-1901 Abortion Ban Is Enforceable*, NPR (June 30, 2022, 8:13 AM), https://www.npr.org/2022/06/30/1108871251/arizonas-attorney-general-says-pre-1901-abortion-ban-is-enforceable [https://perma.cc/2C7E-PVA5].

172. S.B. 1164, 55th Leg., 2d Reg. Sess. (Ariz. 2022). *See also* Ollstein, *supra* note 170.

173. *See* Associated Press, *supra* note 171.

174. *See Voting Impact of Supreme Court Ruling on Abortion in Arizona*, NOBLE PREDICTIVE INSIGHTS, (July 25, 2022), https://www.noblepredictiveinsights.com/post/voting-impact-of-supreme-court-ruling-on-abortion-in-arizona [https://perma.cc/LX7Q-PEBK?type=image] (finding that 89% of residents favor legal abortion in at least some cases, and 52% oppose the *Dobbs* ruling).

175. In a 2014 Pew Research poll, 49% of Arizonans thought abortion should be legal in all or most cases, while 46% thought it should be illegal in all or most cases. https://www.pewresearch.org/religion/religious-landscape-study/state/arizona/views-about-abortion/ [https://perma.cc/BTP7-BKZ5].

176. *See Planned Parenthood Ariz., Inc. v. Brnovich*, 524 P.3d 262, 268–69 (Ariz. Ct. App. 2022).

177. U.S. MISSION THAI., *What Swing States Are and Why They're Important*, U.S. EMBASSY & CONSULATE IN THAI., https://th.usembassy.gov/swing-states-importance/ [https://perma.cc/FP7C-BND4].

178. *2023 State & Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 24, 2023), https://documents.ncsl.org/wwwncsl/About-State-Legislatures/Legis_Control_2023_8-24-23.pdf [https://perma.cc/6J9Z-5DUZ].

superseded by so-called "trigger laws" passed since *Roe*.[179] In Alabama, for example, a pre-*Roe* prohibition remains in effect, but the state also has a 2019 trigger law that similarly bans virtually all abortions from the moment of conception, although with a slightly broader list of exceptions.[180] In Oklahoma, a 1910 law went back into effect after *Dobbs* but was superseded in August 2022 by a similar ban passed earlier that year.[181]

One key question is why so many pre-*Roe* abortion bans were never repealed in the 1970s, after the decision constitutionalizing a right to abortion came down. It is likely that in some cases, this can be explained by priority-driven legislative inertia: repealing inoperative laws was not seen as taking priority over more pressing legislative priorities.[182] Addiontally, non-repeal may be understood as reflecting potential blind spots of application: no legislator at the time may have foreseen a day when *Roe* would be completely overturned, such that these old laws would be fully revived.

At present, the more pressing question is the fate of these prohibitions. If legislative change were frictionless and state political systems perfectly functioning, there would be little need to worry—bans would be swiftly adjusted to something closer to contemporary popular will. But this is not the world we live in. Prospects for rapid legislative change would probably be highest in blue states under unified Democratic control; in such states it seems quite unlikely that pre-*Roe* bans would long survive, should their revival be attempted at all. But note that no such laws exist in deep blue states. In states under divided government, like Wisconsin, prospects for short-term legislative change in any direction seem limited, so the settlement of the status quo is likely to prove very important. In these states, the fate of state-level adjudication establishing the fate of these very old laws is likely to prove extremely important, and strangely may be more significant than shifts in

179. *See* Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html.

180. *See, e.g.*, Brian Lyman, *Supreme Court's* Roe v. Wade *Decision Ends Legal Abortion Services in Alabama*, MONTGOMERY ADVERTISER, https://www.montgomeryadvertiser.com/story/news/2022/06/24/alabama-legal-abortion-roe-vs-wade-supreme-court-overruling/7702719001/ [https://perma.cc/JF99-CDKM] (June 24, 2022, 12:36 PM).

181. *See* Dana Branham, *Two More Oklahoma Abortion Laws Face Challenges from Reproductive Rights Groups, Providers*, OKLAHOMAN https://www.oklahoman.com/story/news/2022/07/01/abortion-rights-groups-sue-over-2-oklahoma-laws-including-pre-roe-law/7789019001/ [https://perma.cc/8VFG-NLBU] (July 1, 2022, 1:52 PM).

182. *See* Buell, *supra* note 21, at 1806–08.

contemporary popular opinion. From the limited evidence so far, state courts often seem wary of allowing pre-*Roe* laws to revive,[183] but the issues are shrouded in a welter of state specific doctrines and interpretations.

The battle over revival of these very old laws is based on a hodgepodge of doctrines based largely on state, rather than federal, law. Concepts like desuetude, and the interpretation of the old laws in light of newer ones, are playing out in state courts. The deployment of these doctrines, and their interaction with politics, suffers from a kind of randomness, depending on details of institutional design. In Wisconsin, for example, Democrats won a statewide 2023 election to gain control of the state supreme court for the first time in years, largely off of the abortion issue.[184] This in turn greatly lessens the chance of the old law going back into effect. But the availability of these chances for democratic input depends heavily on the details of context—for example, the length of judicial terms, and even the existence of elections for state supreme court justices.

B. Messaging Bills: Blind Spots and Inertia

The prior section noted that one effect of *Dobbs* was to restore pre-*Roe* laws in some states. In addition, of course, many states passed laws dealing with abortion after *Roe* went into effect. Some of these laws were intended to test the limits of permissible regulation, which became particularly important after *Casey* developed the "undue burden" standard,[185] which left significant uncertainty in the scope of permissible restrictions on abortion that fell short of prohibitions. Legislatures and courts wrestled with questions of whether provisions like waiting periods, ultrasound requirements, hospital admission requirements, and many other kinds of regulations were permissible.[186]

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183. *See* Shefali Luthra, *Pre-Roe Abortion Bans Are Cutting Off Access—Even Laws That Aren't Supposed to Be in Effect*, THE 19TH (July 6, 2022, 5:00 AM), https://19thnews.org/2022/07/abortion-bans-before-roe-confusion-restricted-access/ [https://perma.cc/D9ZT-TRQG] ("In Michigan, a state court has temporarily blocked its pre-Roe bans. Arizona's pre-Roe ban was blocked by a court.").

184. Sara Burnett, Todd Richmond & Harm Venhuizen, *Abortion Drives Liberal's Win in Wisconsin Election*, AP (Apr. 5, 2023, 3:54 PM), https://apnews.com/article/wisconsin-supreme-court-election-150afe90d311e9fef2209128155ff1e4 [https://perma.cc/3XYC-3PX8].

185. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878–79 (1992).

186. *See, e.g.*, Lauren Paulk, *What Is an "Undue Burden"? The* Casey *Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN'S L.J. 71 (2013); Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional*

State legislatures also passed many restrictions that were in evident contradiction with the *Roe* and *Casey* regimes. Legislators passing these laws knew that they were likely to get struck down, but they passed them anyway to send a message to groups and voters affiliated with the anti-abortion movement. In doing so, they engaged in a classic example of what Tushnet has called the "judicial overhang"—the tendency of political bodies to pass unconstitutional laws (or parts of laws) despite, and sometimes because, they know that the courts will likely later strike down the bill on constitutional review.[187]

Yet when *Dobbs* was issued, these laws indeed took effect. This creates a complex problem of democratic will. The kinds of laws that legislators will pass, and voters will tolerate, as messaging bills may look very different from the kinds of bills that would get passed if it was widely understood that they would turn into actual, functioning legislation. In passing messaging bills virtually certain to get struck down, legislators could afford to play a game where they curried favor with anti-abortion activists and voters with intense preferences, while limiting damage to other groups who were paying less close attention because they understood that the constitutional right enshrined in *Roe* was intact. The danger is that state legislatures would pass more draconian measures than they otherwise would, thinking that these laws would stand as symbols but would never take concrete effect.

There is no exact demarcation between what we have called a messaging bill and legislation seriously intended to take effect. In some cases, the line between an attempt to test *Casey*'s undue burden standard and an attempt to pass a law that political officials understood was very likely to be struck down is murky. There is also a temporal dimension to the problem—in recent history the likelihood of *Roe* being reversed became so high that anti-abortion legislation could only be understood as a serious attempt to impact public policy. It is difficult to pinpoint this date exactly, but one key moment was the death of Justice Ruth Bader Ginsburg and her replacement with Justice Amy Coney Barrett in late 2020.[188] Even then, the fate of *Roe* was not completely clear, and both

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Jurisprudence, 94 COLUM. L. REV. 2025 (1994); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016).

187. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57–58 (1999).

188. *See* David G. Savage, *The Four Key Turning Points That Led to the Fall of Roe vs. Wade*, L.A. TIMES (June 24, 2022, 7:38 AM), https://www.latimes.com/politics/story/2022-06-24/the-four-key-turning-points-that-led-to-the-fall-of-roe-vs-wade ("When Barrett took [Ginsburg's] seat in November, the Supreme Court for the first time had a majority prepared to overturn Roe vs. Wade.").

oral arguments in the *Dobbs* case in December 2021 and the leak of the draft opinion in May 2022 were also significant markers.[189]

Without pinpointing the line with exact precision, it is sufficient to note that at least some laws in this area were passed without there being a clear sense that they would ever go into effect. Nor do we think that the common legislative approach of enacting so-called "trigger laws," which made clear that a law would go into effect with *Roe*'s reversal, really resolves the problem. These laws make clear a legislative intent—at the time of enactment—to take effect in the event that *Roe* were to be overturned, but they tell us nothing about the intent of legislators or voters as to whether and when they actually expected *Roe* to be overturned.

Around 2018 and 2019, many Republican states introduced, and some passed, bills that banned most abortions after a fetal heartbeat is detected on an ultrasound, which usually occurs after about five or six weeks of pregnancy, before many women know they are pregnant.[190] The bills were inevitably struck down, and a 2019 article noted that not one of these bills had actually gone into effect.[191] Steven Aden, the general counsel for the anti-abortion group Americans United for Life, noted that the court decisions striking down these laws were "predictable" but that the bills nonetheless demonstrated a "commitment to life" and served as an educational tool to "teach everyone that there is a beating heart at very early stages" of pregnancy.[192] These bills went into effect in 2022 after *Dobbs* was issued.

For example, in 2019 the Ohio legislature passed, and the governor signed, a fetal heartbeat bill, which only includes an exception after that point for a "serious risk of the substantial and irreversible impairment of

189. Jessica Glenza, *Conservative US Supreme Court Justices Signal Support for Restricting Abortion in Pivotal Case*, GUARDIAN (Dec. 1, 2021, 1:56 PM), https://www.theguardian.com/world/2021/dec/01/oral-arguments-mississippi-abortion-case-begin-supreme-court [https://perma.cc/SFT4-WDTC]; Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/T59B-TMDV] (May 3, 2022, 2:14 PM).

190. K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html (May 29, 2019) ("Georgia, Kentucky, Louisiana, Missouri, Mississippi and Ohio pass[ed] so-called heartbeat bills that effectively prohibit abortions after six to eight weeks of pregnancy, when doctors can usually start detecting a fetal heartbeat.").

191. Jessica Ravitz, *Courts Say Anti-Abortion 'Heartbeat Bills' Are Unconstitutional. So Why Do They Keep Coming?*, CNN, https://www.cnn.com/2019/01/26/health/heartbeat-bills-abortion-bans-history [https://perma.cc/4EBP-6424] (May 16, 2019, 9:28 AM).

192. *Id.*

a major bodily function of the pregnant woman."[193] When Ohio passed this law, virtually identical laws had already been struck down in other states, and the head of the Ohio ACLU stated that the law was "blatantly unconstitutional."[194] The prior governor (John Kasich) had twice vetoed such laws, arguing in part that they would be expensive to defend and would have little chance of standing up in court.[195] During a previous attempt to pass such a law in 2016 (which was vetoed), the president of Ohio Right to Life himself said that the bill was likely to be struck down and it was better to take an "incremental" approach;[196] a Republican state senator noted that the bill "demonstrates our commitment to protecting the children of Ohio at every stage of life."[197] Indeed, the 2019 bill was blocked by a federal judge before it ever went into effect, although the injunction was lifted after *Dobbs*.[198]

Georgia is a similar story: in May 2019, the state legislature passed a fetal heartbeat bill that was widely expected to be struck down,[199] and indeed was enjoined before ever going into effect.[200] Upon signing the bill, the state's governor, Brian Kemp, acknowledged that the law would face stiff legal challenges but also called the bill "a declaration that all life has value."[201] In effect, he acknowledged that the will was designed to have symbolic not practical effect, yet this practical effect is exactly what the legislation now has, post *Dobbs*.

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193. OHIO REV. CODE ANN. § 2919.195 (West 2019).

194. Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NPR (Apr. 11, 2019, 6:37 PM), https://www.npr.org/2019/04/11/712455980/a-bill-banning-most-abortions-becomes-law-in-ohio [https://perma.cc/M67B-TNBD].

195. Associated Press, *Ohio Governor's Veto of Heartbeat Abortion Bill Survives—But That Could Change*, NBC NEWS (Dec. 28, 2018, 9:11 AM), https://www.nbcnews.com/news/us-news/ohio-governor-s-veto-strict-heartbeat-abortion-bill-survives-attempted-n952661 [https://perma.cc/B4CE-3JVR].

196. Jason Hanna, Dominique Debucquoy-Dodley & Max Blau, *Ohio Passes 'Heartbeat' Abortion Bill; Leader Cites Trump's Election*, CNN, https://www.cnn.com/2016/12/07/politics/ohio-abortion-bill/index.html [https://perma.cc/3Y8V-3DNP] (Dec. 7, 2016, 2:50 PM).

197. *Id.*

198. Maloney, *supra* note 86.

199. H.R. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019).

200. Jeff Amy, *Federal Judge Voids Georgia 'Heartbeat' Abortion Restriction*, AP (July 13, 2020, 4:29 PM), https://apnews.com/article/6bdf1fc85ade3abaf1ac10eb94d60c29 [https://perma.cc/ZRF9-N5U9].

201. Alanne Orjoux, Jessica Ravitz & Jason Hanna, *Georgia's Governor Signs a Controversial Abortion Bill into Law*, CNN, https://www.cnn.com/2019/05/07/health/georgia-abortion-bill [https://perma.cc/2FC8-ZPNX] (May 7, 2019, 6:53 PM).

A final example is the Texas Heartbeat Act, passed in May 2021.[202] The bill likewise prohibits abortion at any time after a fetal heartbeat is detected.[203] However, it became most noteworthy for its unusual enforcement scheme, which relied on private actors to bring civil lawsuits, rather than state or criminal enforcement, and which allowed those private actors to collect statutory damages of $10,000 per abortion.[204] Observers noted that the bill was carefully structured to evade judicial review, a difficulty that played out as challenges to the law were actually brought.[205] The statute also provided that Texas had never appealed its draconian 1925 ban on abortion, which like other statutes of the same era, contained only an exception for the life of the mother.[206] Further, it provided that in the event the law were enjoined, providers could still be sued later in the event the injunction were overturned.[207]

The environment in which the Texas law was passed is a complex one. By 2021, with Justice Barrett having arrived on the Court, there was a sense among anti-abortion groups that the time might be ripe to reverse *Roe v. Wade*. At the same time, the evasive enforcement procedures themselves seem to suggest that backers had significant doubts about eventual judicial rulings on the merits of the legislation, and that they had structured the bill to delay those adjudications and to maximize the chilling effect of the law while it remained in effect. The bizarre nature of the enforcement mechanisms themselves seem to raise questions about whether they were ever actually intended to be implemented, as opposed to simply having a chilling effect on abortion providers and causing chaos until challenges were resolved.

The heartbeat bill was joined by another 2021 bill, a so-called "trigger law" scheduled to take affect if *Roe* was overturned and which bans all abortion with the exception of those performed under circumstances where the mother is at risk of death or "serious risk of substantial impairment of a major bodily function."[208] That law provides

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202. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

203. *Id.*

204. *Id. See also* Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html.

205. Zernike & Liptak, *supra* note 204. *See also, e.g.*, *Whole Woman's Health v. Jackson*, 595 U.S. 30, 35 (2021) (allowing the possibility of a pre-enforcement challenge against some defendants, but not state court judges).

206. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021). The Texas Supreme Court subsequently held that some provisions of the 1925 law could go into effect, after *Dobbs* was issued. *In re Paxton*, No. 22-0527, 2022 WL 2425619 (Tex. July 1, 2022).

207. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

208. Human Life Protection Act of 2021, H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

criminal penalties for abortion as well as a $100,000 civil penalty.[209] A June 2022 poll found that only thirty-seven percent of Texas voters supported the state's trigger law, with fifty-four percent opposed.[210]

We do not suggest that unpopular bills will never pass in a democracy—obviously in some circumstances a concentrated minority that feels strongly about an issue can (and perhaps should) be able to push through legislation.[211] But the magnitude of the gap does suggest to us that in part these bills were passed precisely because they were not in effect at the time they were issued.

Again, now that *Dobbs* has been issued, legislative inertia may become a key problem. The positions staked out in the Ohio, Georgia, and Texas bills, and others like them, seem unlikely to face at least rapid backtracking, even if they may not have been enacted as a matter of first instance in the post-*Dobbs* political climate. Legislative actors in Texas have suggested that, rather than paring back existing legislation, they would expand it.[212] This may reflect the way that abortion prohibitions interact with internal Republican politics. Once broad bans like this are in place, they seem difficult for Republican-held institutions to roll back, for fear of angering base voters and facing primary challenges.

The effects of blind spots and inertia are also amplified by problems of gerrymandering. In Ohio, a June 2022 poll found that 53% of Ohio voters wanted to protect abortion rights in the state, while 39% wanted restrictions on abortion.[213] In a poll issued just over a year after the heartbeat law had been passed, a similar 51.3% to 38.4% majority believed abortion should be legal all or most of the time.[214] Perhaps some

209. *Id.*

210. Jim Henson & Joshua Blank, *New UT/Texas Politics Project Poll: Share of Texans Saying State is on the Wrong Track Reaches New High, While Majority Still Oppose Banning Abortion*, TEX. POLS. PROJECT AT THE UNIV. OF TEX. AT AUSTIN (July 6, 2022), https://texaspolitics.utexas.edu/blog/new-uttexas-politics-project-poll-share-texans-saying-state-wrong-track-reaches-new-high-while [https://perma.cc/N556-QG8V].

211. *See Wages*, *supra* note 107, at 935 n.89 ("[T]here is nothing unusual, and I was not aware there was anything wrong, with an intense minority's compromising on issues about which it feels less strongly in order to garner support on those it cares most about.").

212. Karen Brooks Harper, *Texas Abortion Foes Use Legal Threats and Propose More Laws to Increase Pressure on Providers and Their Allies*, TEX. TRIB. (July 18, 2022, 12:00 PM), https://www.texastribune.org/2022/07/18/texas-abortion-laws-pressure-campaign/ [https://perma.cc/LA6F-8N9K].

213. *Poll Shows Ohio Voters Want Abortion Rights Protected*, SUFFOLK UNIV. (June 6, 2022), https://www.suffolk.edu/news-features/news/2022/06/06/15/41/suffolk-poll-shows-ohio-voters-want-abortion-rights-protected [https://perma.cc/UFR4-8L5H].

214. Laura Hancock, *Despite Ohio Laws Limiting Abortion, Majority of Voters Think Abortion Should Remain Legal, Poll Shows*, CLEVELAND.COM, https://www.cleveland.com/open/2020/10/despite-ohio-laws-limiting-abortion-majority-

of the reason for this mismatch, again, stemmed from gerrymandering: the Ohio state legislature was the sixth most egregious gerrymander in the United States in the prior cycle, according to the Schwarzenegger Institute report, with Republicans winning 58.8% percent of seats in the state Senate despite taking only 47.2% percent of votes in 2018.[215] The maps used in the 2022 election are also severe partisan gerrymanders in favor of Republicans, particularly in the lower chamber.[216]

In Georgia, a recent poll, taken in July 2022 after the measure had been revived by a federal appellate court, found that 54% of Georgia residents opposed the heartbeat bill, while only 36% supported it.[217] As Democrats have rapidly gained strength in Georgia, incumbent Republicans responded with a gerrymander intended to preserve Republican dominance in the state, and which took effect for the 2022 election.[218]

IV. DEMOCRATIC CURES FOR DYSFUNCTION: CONGRESS AND STATE REFERENDA?

Can Congress or state referenda provide a partial cure to the sources of dysfunction in state legislatures identified in the last two parts? The *Dobbs* majority focuses on state legislatures as the arena for policymaking, but this is an incomplete picture. As Murray and Shaw note, democracy in this context comprises a much denser set of institutions beyond state legislatures.[219] This includes Congress, but also state executive branch officials, state courts, and voters themselves. Justice Kavanaugh was alone among the justices in the majority in explicitly acknowledging this (*i.e.*, that policymaking could occur at both

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of-voters-think-abortion-should-remain-legal-poll-shows.html [https://perma.cc/U8VD-TYKB] (Oct. 13, 2020, 10:59 AM); Maggie Prosser, *DeWine Signs Heartbeat Bill into Ohio Law. ACLU Promises Lawsuit*, AKRON BEACON J., https://www.beaconjournal.com/story/news/politics/state/2019/04/11/dewine-signs-heartbeat-bill-into/5461638007/ (Apr. 11, 2019, 3:50 PM).

215. PARTISAN GERRYMANDERS, *supra* note 70, at 2, 5 tbl.2.

216. *Redistricting Report Card: Ohio*, *supra* note 64 (grading partisan fairness in Ohio electoral maps as "F").

217. Maya T. Prabhu, *AJC Poll: Most Voters Oppose Restrictions on Abortion, Georgia's New Ban*, ATLANTA J.-CONST. (July 28, 2022), https://www.ajc.com/politics/ajc-poll-most-voters-oppose-restrictions-on-abortion-georgias-new-ban/T3NZRD6HEVEE7PLGHKKQ4Y7H4Y/ [https://perma.cc/Q9HH-SJUK].

218. *See* Mac Brower, *Redistricting Rundown: Georgia*, DEMOCRACY DOCKET (Dec. 2, 2021), https://www.democracydocket.com/news/redistricting-rundown-georgia/ [https://perma.cc/8XEK-RGBD]; *Redistricting Report Card: Georgia*, *supra* note 64 (grading partisan fairness in Georgia electoral maps as "C").

219. Murray & Shaw, *supra* note 10 (manuscript at 2).

the state and federal levels, and through a variety of different means including not only legislatures but also state courts, executive actions, and popular initiatives).[220]

Democracy also includes commitments to rights and deliberation, including at the state level. We bracket here judicial fights about the meaning of state constitutional provisions, although this has been and will continue to be an important avenue.[221]

We focus instead on two different alternative avenues for democratic policymaking: (1) federal lawmaking; and (2) citizens' initiatives at the state level. Do these alternatives, both of which we think will prove important battlegrounds in coming years, ameliorate the problems in state legislative process? We think that in the first case (federal intervention), the answer is a pretty clear no; in the second, our answer is a more guarded "maybe," although only in a partial way.

There is no question that Congress has substantial power over abortion-related issues. Using existing Commerce Clause doctrine, it seems likely that Congress has the power to either legalize or prohibit abortion nationally.[222] Short of this, of course, Congress could take innumerable actions that would impact abortion policy. At the federal level, there will be attempts at new lawmaking, new executive actions, and questions about the extent to which existing laws or regulatory actions preempt state abortion restrictions.

But the political process failures we have identified at the state level also seem likely to inhibit federal congressional action. The partisan gerrymandering problem in state legislatures is replicated in the U.S. House of Representatives, and the Senate has a natural malapportionment that overrepresents rural voters who have an increasingly strong tendency to vote Republican.[223] The inertial problem at the federal level is also very strong. The filibuster, an internal Senate rule that has no counterpart in most of the states, effectively means that most legislation requires

220. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2306 (2022) (Kavanaugh, J., concurring).

221. *See, e.g.*, *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 975 N.W.2d 710, 716 (Iowa 2022) (reversing earlier rulings and holding that there is no right to abortion under the Iowa state constitution).

222. *See* Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301, 323–26 (2006); Daniel Conkle, Opinion, *A Grand Compromise on Abortion*, POLITICO (June 30, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/30/grand-abortion-compromise-00043313 [https://perma.cc/EL4M-E3A2].

223. Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html.

three-fifths approval rather than a simple majority to pass.[224] Some abortion regulations may be passable via procedures that bypass the filibuster, such as reconciliation, but others do not fit into the arcane rules of the reconciliation procedure.[225] The federal legislative process, unsurprisingly, seems unlikely to be a panacea for the state-level process problems that we identify. This seems true even though a significant majority of citizens nationally oppose the *Dobbs* decision.[226]

The citizens' initiative process that exists in many states could act as an alternative to clogged or unresponsive state legislatures. Where "revived" old laws or messaging laws are out of step with popular sentiment, and where gerrymandered legislatures decline to make changes, the popular initiative may be a plausible workaround. The potential use of the initiative here seems somewhat similar to its recent use to force Medicaid expansion across several states, in accordance with strong popular will and despite resistance from Republican-held legislatures.[227] In short, abortion debates seem like a battleground that will shed some light on the positive aspect of direct democracy as one significant tool in a modern democratic system. In several states, the power of the popular initiative has already proven decisive. In Kansas, for example, voters rejected an attempt to remove any protections for abortion in the state constitution;[228] in Michigan, voters approved new state constitutional protections for abortion after a popular initiative campaign;[229] California and Vermont also added new protections for

224. *See* Tim Lau, *The Filibuster Explained*, BRENNAN CTR. FOR JUST. (Apr. 26, 2021), https://www.brennancenter.org/our-work/research-reports/filibuster-explained [https://perma.cc/G7PL-6FPD].

225. For a discussion of abortion and reconciliation procedures, see Hugh Jackson, Commentary, *What Congressional Democrats Can't Do to Protect Abortion Rights—and What They Can*, NEV. CURRENT (June 30, 2022, 8:41 AM), https://www.nevadacurrent.com/2022/06/30/what-congressional-democrats-cant-do-to-protect-abortion-rights-and-what-they-can/ https://perma.cc/GDF9-TLFA].

226. *See, e.g.*, Philip Bump, *Overturning Roe is Unpopular — and Viewed as Largely Political*, WASH. POST (June 27, 2022, 10:46 AM), https://www.washingtonpost.com/politics/2022/06/27/overturning-roe-is-unpopular-and-viewed-largely-political/.

227. *See Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (Sept. 22, 2023), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/X5MM-H5CZ].

228. Alice Miranda Ollstein, *Kansas Voters Block Effort to Strip Abortion Protections from State Constitution*, POLITICO, https://www.politico.com/news/2022/08/02/kansas-voters-block-effort-to-ban-abortion-in-state-constitutional-amendment-vote-00049442 [https://perma.cc/YJU4-CWPU] (Aug. 3, 2022, 6:30 PM).

229. *See* Veronica Stracqualursi, Devan Cole & Paul LeBlanc, *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives Across the US*,

abortion via referendum;[230] Kentucky and Montana rejected attempts to remove any protection for abortion from state constitutions.[231]

That said, these processes are not a panacea. As Justice Kagan pointed out in her dissent in *Rucho*, in more than half of the states, these mechanisms do not exist (or exist only in a form that requires legislative approval), and so no workaround will be available.[232] Of the states discussed extensively above, for instance, voters have pathways to legislative or constitutional referendums in Arizona, Michigan, and Ohio, but not in Georgia, Texas, or Wisconsin.[233] Procedures also differ widely in their requirements and thus feasibility. In Florida, where initiatives require sixty percent approval to become part of the state constitution, the legislature in 2020 enacted changes that made the signature-gathering process more onerous, helping to stymie a recent attempt at Medicaid expansion.[234]

Citizen initiatives also have important downsides. Two are standard in the literature: concerns about an absence of deliberation and concerns about the impact of a highly majoritarian procedure on minority groups.[235] Both are relevant here as elsewhere, although some characteristics of abortion debates might lessen them. The deliberation concern might have particular bite in the context of highly complex questions like Brexit;[236] abortion policy can also be quite complex, but

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CNN, https://www.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms/index.html [https://perma.cc/MGA4-5N4F] (Nov. 9, 2022, 12:53 PM).

230. *Id.*

231. *Id.*

232. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting). The states that do have initiative procedures vary in whether they can be used for legislation, constitutional amendments, or both, and whether they go directly to the people or instead require prior legislative action. *See Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states [https://perma.cc/5N2C-9W2B] (Mar. 15, 2023).

233. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 232.

234. *See* Jeffrey Schweers, '*Slower, Longer, More Expensive': Tougher Slog Coming for Constitutional Amendments in Florida*, TALLAHASSEE DEMOCRAT, https://www.tallahassee.com/story/news/local/state/2020/11/13/tougher-slog-coming-proposed-constitutional-amendments-florida-citizen-initiatives-statewide-ballot/6234151002/ [https://perma.cc/7QF7-89VD] (Nov. 15, 2020, 6:19 PM); *Florida Medicaid Expansion Initiative (2022)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Medicaid_Expansion_Initiative_(2022) [https://perma.cc/2FGD-B9EM].

235. Portia Pedro, Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959, 967–71 (2010).

236. Stuart White & Rosemary Bechler, *Taking Deliberation Seriously: 'Considered Judgment' from the Brexit Referendum to the Pandemic*, OPENDEMOCRACY (Mar. 22, 2020, 9:14 AM), https://www.opendemocracy.net/en/can-europe-make-

the stakes may also be easier for voters to comprehend. The impact on minorities, which was a significant concern, for example, during the period in which same-sex marriage was a state-level issue,[237] may also be ameliorated because women affected by abortion restrictions probably do not meet the traditional definition of a "discrete and insular" minority, as both Ely and the *Dobbs* majority emphasized.[238]

There is also a third concern, more specific to the U.S. context where voting is not mandatory: one should be concerned by how differential turnout affects referendum results. This will also be impacted by the technical design and scheduling of these referendums, which vary from state to state. Kansas, for example, held its abortion referendum during its party primary, which has very different turnout from a general election.[239] Differential turnout could reflect legitimate factors, such as intensity of preferences, but it could also reflect factors with a murkier democratic resonance, such as interest group mobilization and differences in resources. These factors do not clearly cut against the use of initiatives in the abortion context, but they do raise concerns.

The broad point is that the various alternatives to state legislative action do not fully mitigate the political process problems we identified in Part III above. So we must ask what a judicial response that took those concerns seriously—as *Dobbs* did not—might look like.

V. DEMOCRATIC DYSFUNCTION AND JUDICIAL REVIEW: *DOBBS* REVISITED

We have suggested above that one implication for judicial review is that a court acting in areas with a high risk of political process failure, like abortion, should attend to the sources of political process failure, and therefore to questions like partisan gerrymandering.[240] Yet, as numerous scholars of election law have pointed out, the opposite is true. The Supreme Court is indeed anti-*Carolene* in its current jurisprudence.[241]

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it/taking-deliberation-seriously-considered-judgment-from-the-brexit-referendum-to-the-pandemic/ [https://perma.cc/2VC9-6DWD].

237. *See, e.g.*, William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution For?*, 98 CALIF. L. REV. 1235 (2010).

238. *See supra* notes 99–114 and accompanying text.

239. *See* Nate Cohn, *Kansas Result Suggests 4 Out of 5 States Would Back Abortion Rights in Similar Vote*, N.Y. TIMES (Aug. 4, 2022) https://www.nytimes.com/2022/08/04/upshot/kansas-abortion-vote-analysis.html.

240. *See supra* Part IV.

241. Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111.

A. Reaffirming Casey

Even a Supreme Court that did take problems of political process seriously would probably not be able to fix the myriad problems that plague the democratic process on the abortion question. And this is an area, as we have detailed, that raises significant liberty and equality interests.

Given this, we think that the most obvious answer lies in a reaffirmation of the Court's decision in *Casey*. The "undue burden" test set out by the Court in *Casey* provided a framework that allowed states to impose a range of restrictions on access to abortion at all stages of pregnancy, providing they did not impose an undue burden on access.[242] It permitted states to impose an even wider range of restrictions after viability, subject to the requirement that access be permitted to protect women's life and health.[243] In that sense, it allowed legislatures to protect and promote fetal life.

Casey was a decision that construed the Due Process and Equal Protection Clauses in a manner roughly in line with national democratic opinion on the question of access to abortion. Public opinion polls show consistent national majority support for abortion being legal in certain circumstances. According to a Gallup poll, today, as when *Casey* was decided, only a minority of Americans support a total ban on access to abortion (13% in May 2023; 14% in January 1992), while a more considerable minority support the idea of abortion being legal in all circumstances (34% in May 2023; 31% in January 1992).[244] The majority supports abortion being legal under certain circumstances (51% In May 2023; 53% in January 1992).[245] This also accords with the recent result in a state referendum in Kansas (a substantially Republican state), where voters voted fifty-nine to forty-one against an amendment seeking to remove the right to abortion from the state constitution.[246]

There can be legitimate debate about what exactly these attitudes mean in concrete settings, or how they relate to specific restrictions on access to abortion. And to that extent, there might be room to adjust the framework in *Casey*, perhaps allowing states somewhat more flexibility. The South Carolina Supreme Court's recent decision invalidating the

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242. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877–79 (1992).

243. *Id.* at 879.

244. GALLUP, *supra* note 13.

245. *Id.*

246. Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html.

state's six-week ban might illustrate one reasonable alternative approach.[247] Invoking the state constitutional right to privacy, it stated that any legislative restrictions on abortion "must be reasonable and . . . must be meaningful in that the time frames imposed must afford a woman sufficient time to determine she is pregnant and to take reasonable steps to terminate that pregnancy."[248] The six-week ban, the court reasoned, was far too rapid to meet this test, but the court also declined (unlike *Casey*) to pick a particular point up to which the state legislature must protect abortion.[249]

At any rate, the basic doctrinal framework in *Casey* is consistent with the text of the Due Process Clause, prior precedents in this area, *and* national public opinion. Prior precedents make clear that "ordered liberty" is to be understood in light of past historical practice, but that practice can be viewed as evolving, and characterized at various levels of generality.[250] Decisions such as *Griswold*[251] also make clear that it is *national* and not state majority opinion that is controlling in a due process context.[252]

Consideration of political process therefore deepens the sense that *Dobbs* was a mistaken opinion and that *Casey* (or something close to it) should have been left in place. Intuitively, the Court should not have rejected a right that it has recognized for fifty years, thereby leaving the issue to the mercy of deeply dysfunctional legislative processes that are almost certain to produce strange, countermajoritarian results out of step with public opinion. *Casey* did a better job of approximating public opinion surrounding abortion access.

B. A More Responsive Remedy

If the Court were nonetheless inclined to adjust the doctrinal framework set out in *Casey*, the most promising path would also have been to focus on various forms of remedial innovation to promote democracy. The Court would have needed to pay greater attention to the risks of democratic inertia and blind spots in the subsequent democratic

247. *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770 (S.C. 2023) (rehearing denied). However, after the court's only female justice reached the mandatory retirement age, the court upheld a nearly identical ban less than eight months later. *See Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121 (S.C. 2023).

248. *Planned Parenthood S. Atl.*, 882 S.E.2d at 786.

249. *Id.* at 785–86.

250. *See, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

251. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

252. *Id.* at 484–86. *See also* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 875–76 (2009) (noting that Connecticut's law in *Griswold* was an "outlier" by the time the case was decided).

resolution of questions of access to abortion. U.S. constitutional law offers relatively few precedential resources for employing the kind of remedial creativity that we have in mind, although they are common in other liberal democracies worldwide.[253]

If the Court truly wishes to promote a process whereby "people's voices are heard" in debates over the regulation of access to abortion, it should adopt remedies that help promote this result. And the most obvious way to do this is to use a remedy that is relatively novel in the United States, but common in many other constitutional democracies: a "suspended declaration of invalidity" where the judicial order would be delayed for some period of time to allow democratic processes to play out.[254]

Delayed remedies have a problematic history in the United States, given their use in *Brown I*[255] and *II*[256] in a manner that slowed desegregation.[257] The Court sought to allow support for desegregation to increase over time, but scholarship now tends to view this approach as contributing to long-term non-implementation of desegregation.[258] However, the devil may have been in the details: "all deliberate speed"[259] is a formula that lacks the concrete timeframe, and threat of coercive monitoring and oversight, associated with suspended declarations of invalidity in many other countries around the world.[260]

There is precedent for a more concrete form of delayed implementation in the U.S., in cases such as *Northern Pipeline*

253. *See, e.g.*, CONSTITUTIONAL REMEDIES IN ASIA (Po Jen Yap ed., 2019).

254. *See* ROBERT LECKEY, BILLS OF RIGHTS IN THE COMMON LAW 137–42, 158, 173 (2015) (discussing usage of the suspended declaration of invalidity by Canada and South Africa); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 43–58 (2016) (same); Po Jen Yap, *New Democracies and Novel Remedies*, 2017 PUB. L. 30 (discussing usage of the delayed declaration of invalidity in Hong Kong and South Africa); Kent Roach, *Dialogic Remedies*, 17 INT'L J. CONST. L. 860 (2019) (discussing usage of the suspended declaration of invalidity in Canada, Germany, South Africa, the UK, Australia, and New Zealand).

255. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

256. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

257. *Id.* at 301 (remanding cases to the district courts to "enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed"). *See also* Walter Goodman, *Brown v. Board of Education: Uneven Results 30 Years Later*, N.Y. TIMES (May 17, 1984), https://www.nytimes.com/1984/05/17/us/brown-v-board-of-education-uneven-results-30-years-later.html.

258. *See* Goodman, *supra* note 257.

259. *Brown II*, 349 U.S. at 301.

260. CTR. FOR CONST. STUD, *supra* note 23 (noting that courts in France "may suspend a declaration for a short period of time: typically six months to a year"); Delaney, *supra* note 254.

Construction Co. v. Marathon Pipe Line Co.,[261] which delayed the implementation of a decision striking down broad jurisdiction for federal bankruptcy courts for three months so that Congress could act.[262] There are two advantages of this more concrete variant of delayed remedy. First, the timeframe set out in such a remedy can provide a "focal point" for legislators, in ways that encourage an affirmative legislative response to a court decision.[263] This can help to create legislative dialogue while also promoting constitutional responsibility by legislators. Second, delaying the effect of judicial invalidation can give legislators the opportunity to consider an issue without needing to overcome the burdens of inertia often associated with changing the legal status quo.[264] Given a suspended declaration, the legal status quo is clearly identified as the need for change.

In the specific context of *Dobbs*, this would have meant announcing the judgment but delaying implementation for a period of time in order to allow for legislative changes, citizens' initiatives, and other democratic forms of response. How much time is of course an unclear and context-dependent question, but we would suggest an appropriate response would have at least spanned an election cycle, and possibly longer, to encourage popular input and legislative deliberation.

There may also have been other forms of remedial creativity that would have been helpful responses to the dysfunctions littering democracy in this area, particularly those caused in part by the Court's own interventions. The breadth of the Court's reasoning in *Roe* meant that following the decision, state legislatures had little incentive to repeal or amend restrictive abortion laws that were rendered inoperable.[265] As well, the persistence of *Roe* and *Casey* encouraged states to pass "messaging" laws never truly likely to operate.[266]

One possible response to these problems would have been to issue *Dobbs*, but also to create a clean slate by wiping away legislation on the books that was inconsistent with the prior *Casey* framework. This would be, in effect, an (admittedly rather unique) form of prospective overruling of precedent, something the Court sometimes does in a

261. 458 U.S. 50 (1982).

262. *Id.* at 88. *See also* Delaney, *supra* note 254, at 16 n.68 (analyzing the delayed remedy in the case).

263. *Cf.* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2015) (discussing how the game theory concept of "focal points" can be applied to law and legislation).

264. DIXON, *supra* note 17, at 17.

265. *See supra* Section III.A.

266. *See supra* Section III.B.

different form elsewhere, such as in its criminal law jurisprudence.[267] Thus the new *Dobbs* regime would not have the retroactive effect of validating preexisting legislation, but legislatures would be able to pass new laws regulating abortion and reflecting democratic deliberation in the changed legal environment.[268] A Georgia state trial court issued a decision along these lines, holding that the state's six-week "heartbeat" ban was unenforceable because it had been unconstitutional at the time it was enacted in 2019, but the Georgia Supreme Court quickly put that ruling on hold and allowed the six-week ban to go into effect.[269]

The key point is not to advocate strongly for any one solution, but rather to point out that remedial creativity would be a way to make a ruling like *Dobbs* more responsive to democracy. It would not eliminate the problems of democratic dysfunction, but it would at least make an attempt to lessen them. Instead, the Court's ruling showed no democratic responsiveness at all.

CONCLUSION: THE CORROSIVE EFFECTS OF CYNICAL USES OF DEMOCRACY

This Essay shows that the Supreme Court's invocations of democracy in *Dobbs* are deeply problematic, given the highly dysfunctional context into which the Court returned the issue. One possibility is that the Court's invocations were sincere but deeply mistaken, based on a romanticization of democracy rather than its current reality. Another possibility is that the majority in *Dobbs* was never sincere about its commitment to remanding the issue to democratic politics, or rather was indifferent to what its celebratory references to democracy meant in practice.

This insincerity would fit with the Court's far less flattering account of democracy in cases like *Rucho*. Luis Fuentes-Rohwer and Guy-Uriel Charles have recently argued that the conservative majority in *Rucho* viewed "democracy as—rightly or inevitably—partisan, unfair, and

267. *See, e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 637–40 (1965) (citations omitted) (holding that the exclusionary rule for tainted evidence created by *Mapp v. Ohio*, 367 U.S. 643 (1961), did not apply retroactively to convictions occurring before the decision was issued).

268. *See* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902 (1993) (arguing that laws unconstitutional under *Roe*, but validated by *Casey*, in some circumstances, should not revive).

269. Associated Press, *Georgia's Highest Court Reinstates Ban on Abortions After 6 Weeks*, NPR (Nov. 23, 2022, 2:41 PM), https://www.npr.org/2022/11/23/1139039767/georgia-supreme-court-reinstates-abortion-ban [https://perma.cc/6X5X-43SJ].

dirty."[270] The fig leaf view would also potentially accord with the openly originalist and pro-life, religious views of many proponents and supporters of the outcome in *Dobbs*. For instance, many defenders of *Dobbs* praised it as a "triumph of responsible originalist jurisprudence."[271] And religious leaders openly welcomed the decision as providing overdue "moral and legal protection" for fetal life.[272] Some supporters of the decision did so reluctantly, seeing it not as a real return to the democratic process but rather as a halfway house on the road to full constitutional or legislative prohibition of abortion nationwide.

What are the implications of such an insincere, cynical invocation of democracy? Perhaps legal reasoning does not matter much, since relatively few people engage with the reasoning—as opposed to the outcome—of even major Supreme Court decisions. But the democratic justification for *Dobbs* was also rooted in the discourse surrounding the decision, and invoking the name of democracy in aid of an illiberal outcome gives democracy a bad name. Doing so in circumstances where there is patent democratic dysfunction can only breed further disenchantment. If people lose faith in democracy as a system of government, its foundations become fragile.

In recent work, we have defined abusive judicial review as the use of judicial review, an institution paradigmatically associated with liberal democracy, to undermine the minimum core of democratic constitutionalism rather than to bolster it.[273] *Rucho* may offer an example of a weak form of the phenomenon, although the Court recently steered away from stronger abuse when it rejected a broad application of the independent state legislature doctrine to overturn state judicial review of redistricting.[274] In its own way, *Dobbs* may be another example of abusive judicial review, given the cynical, corrosive invocation of democracy for an illiberal purpose in a way that frustrates, rather than serves, democratic values.

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270. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in* Rucho v. Common Cause, *in* AM. CONST. SOC'Y, SUPREME COURT REVIEW 2018–2019, at 293, 315 (Steven D. Schwinn, ed., 3d ed. 2019).

271. *See* Justin Peters, *How Fox News Reacted to the End of* Roe v. Wade, SLATE (June 24, 2022), https://slate.com/business/2022/06/roe-v-wade-overturned-abortion-fox-news.html [https://perma.cc/DZ2A-9P6P].

272. *See* Morgan Rousseau, *Massachusetts Catholic Leaders Respond to the Overturning of Roe v. Wade*, BOSTON.COM (June 24, 2022), https://www.boston.com/news/local-news/2022/06/24/massachusetts-catholic-leaders-respond-to-the-overturning-of-roe-v-wade/ [https://perma.cc/H6YU-7YQ5] (quoting Cardinal-Archbishop of Boston, Seán Patrick O'Malley).

273. *See* David Landau and Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2020).

274. *See Moore v. Harper*, 143 S. Ct. 2065 (2023).

The response to *Dobbs* is far from over. There is still the chance that democratic processes can restore abortion rights in line with national and state majority opinion. We show, however, that the chances are slimmer than the majority in *Dobbs* would have led us to believe.