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Failures in the “Laboratories of Democracy” and Democratic Due Process as Constitutional Guardrails

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FAILURES IN THE “LABORATORIES OF DEMOCRACY” AND DEMOCRATIC DUE PROCESS AS CONSTITUTIONAL GUARDRAILS

Matthew C. Clifford & F. Paul Bland, Jr.*

ABSTRACT

In Dobbs v. Jackson Women’s Health Organization, the Supreme Court reversed decades of precedent supporting a substantive due process right to abortion under the Fourteenth Amendment, and purported to return the question of reproductive autonomy to the “democratic process” in the states. Justice Thomas, writing in concurrence, militated for reconsidering all of the Court’s substantive due process precedents. In today’s era of democratic backsliding, these are dangerous pronouncements with grave, if not existential, implications for democracy in the United States. The Dobbs majority hazardously asserted that state-level abortion legislation would, in fact, be the result of a democratic process. Further, because the law of democracy draws extensively from substantive due process, including where the Fourteenth Amendment “incorporates” textually enumerated constitutional rights against the states, the broader threat to substantive due process in the Dobbs majority opinion and Justice Thomas’s concurrence is also a direct threat to democracy itself.

Although the literature on democracy and the literature on substantive due process are both individually voluminous, there is surprisingly limited scholarship focused specifically on both as interrelated topics. Building from democratic theory and John Hart Ely’s political process theory of judicial review, this Article seeks to begin elaborating on the important connections between democracy and substantive due process that help explain the legal and practical importance of each to the other. In doing so, it also attempts to lay the groundwork for an approach to substantive due process rooted in the Federal Constitution’s vision of democratic self-government for a diverse society.

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I. INTRODUCTION

STATES, it has long been said, serve as “laboratories of democracy.”¹ That coinage is attributed to Justice Louis Brandeis, who, writing nearly a century ago, extolled the vast and pluralist possibilities of the American experiment in each of its many states: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²

1. See Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2187, 2189 n.4 (2022) (observing that the “laboratories” account has been used in thousands of academic works).

2. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Justice Brandeis himself did not use the term “democracy” in describing such experimentation. That term was likely appended to his metaphor as a shorthand for how “novel social and economic experiments” would come about: as the product of the democratic process.³ Justice Brandeis may have had no intention of speaking to states’ political experiments *in* democracy—the form of state government, distribution of the franchise, and other policies affecting individuals’ and groups’ participation at various levels of the democratic process. Yet states have widely engaged in just this sort of experimentation as well. Justice Brandeis aptly understood that states are laboratories *of* democracy—but he may have overlooked the reality that states are laboratories *for* democracy, as well.⁴

Particularly in recent times, the experiments have not gone well.⁵ Today, evident failures abound: from voting laws and the management of elections that make the ballot less accessible for some than others (or just plain inaccessible), to state legislatures gerrymandered to such an extent that the party winning a minority of the statewide vote can obtain a sizeable majority in the statehouse; from politicizing education to attacks on the free press; and from protecting anti-protestor violence and forcing private companies to host hate speech in online fora to new (and renewed) attacks on minorities’ identities and full membership in the political community. One might still ask “what’s the matter with Kansas?”⁶ (Or today, perhaps Florida or Wisconsin). But these troubling phenomena are neither exclusive to a limited coterie of states, nor easily containable at state borders.⁷

Against this backdrop of democratic backsliding,⁸ the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* is deeply

3. Cf. *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1160 (2023) (minority opinion of Gorsuch, J., joined by Thomas and Barrett, JJ.) (“In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant ‘political and economic’ costs and benefits for themselves, and ‘try novel social and economic experiments’ if they wish.” (internal citation omitted) (quoting *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting))); *Taylor v. Northam*, 862 S.E.2d 458, 471 (Va. 2021) (noting that “[d]emocracy is inherently dynamic” in that “[v]alues change and public policy changes too”).

4. Justice Brandeis did, however, have strong feelings about functional democratic practice, see *infra* Part II.B, perhaps indicating that he took state-level democracy for granted, rather than overlooked it.

5. See *infra* Part II; but see Jeffrey Rosen, *America is Living James Madison’s Nightmare*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351> [<https://perma.cc/TL22-R7T7>] (“States, which Louis Brandeis called ‘laboratories of democracy,’ are proving to be the most effective way to encourage deliberation at a time when Congress acts only along party lines.”).

6. See generally THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004).

7. See *infra* Part II.C.

8. See INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *THE GLOBAL STATE OF DEMOCRACY 2022: FORGING SOCIAL CONTRACTS IN A TIME OF DISCONTENT* iv–v (2022), <https://www.idea.int/democracytracker/sites/default/files/2022-11/the-global-state-of-democracy-2022.pdf> [<https://perma.cc/WL5Q-CKV9>] (defining “backsliding” as “a term that should not always be taken to mean a clean reversion to an earlier pre-democratic era; it can also mark a move towards a novel form of anti-democratic politics”). We use the term similarly here.

troubling.⁹ In *Dobbs*, a majority of the Court overruled the constitutional right to abortion and sent the issue back to states for the “democratic process” to play out.¹⁰ That analysis ignored the present reality of “democratic processes” in states throughout the country—a dangerous omission. The Court’s analysis presupposes that state policy on abortion *is* or *would be* the result of a democratic process. Whether it is or is not may be a fair question in any given case¹¹—but, as we explain below, we believe due process requires that inquiry. The majority and concurrences failed to engage in it, as did the dissent.¹² Perhaps, following in the footsteps of Justice Brandeis, the Court overlooked (or took for granted) democracy itself.¹³

The Court’s complete lack of attention to contemporary democratic deficits in the states is all the more worrying because *Dobbs* also contained a broad threat to democracy itself. In a concurrence that raised alarms throughout the country, Justice Thomas suggested that the Court should examine all of its substantive due process precedents.¹⁴ We do not intend to be alarmist, but we agree with Justice Thomas that this is the door that *Dobbs* opened—and that it has substantial, even existential, implications for democratic practice. Over the years, substantive due process has been crucial in placing constitutional guardrails on states’ experiments in democracy.¹⁵ As we explain further below,¹⁶ penumbral privacy rights¹⁷ are not the only substantive due process rights that are on the cutting block—so, too, is the fundamental right to vote, protest, and petition the government, as well as the right to free speech, a free press, and political association. Although it seems unlikely at present that the Supreme Court (even with its current composition) will strip away all of these guardrails, the jurisprudence underlying the *Dobbs* decision plainly allows for those sorts of outcomes, even if it does not require them.

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

10. *Id.* at 2265.

11. Other contemporary scholarship challenges *Dobbs*’s invocation of democracy on just this basis. See Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 127 HARV. L. REV. (forthcoming 2024); Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in Dobbs*, 46 HARV. J. L. & GENDER 81 (2023); Miranda McGowan, *The Democratic Deficit of Dobbs*, LOY. UNIV. CHI. L.J. (forthcoming 2023); David Landau & Rosalind Dixon, *Dobbs, Democracy & Dysfunction* (FSU Coll. of L., Pub. L. Working Paper, 2022), <https://dx.doi.org/10.2139/ssrn.4185324> [<https://perma.cc/9CQZ-F42N>].

12. The dissent made two oblique references to political participation, but did not expound on that idea. See *Dobbs*, 142 S. Ct. at 2344 (Breyer, J. dissenting).

13. A minority of the Court recently admitted as much in *Ross*. See *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1160 (2023) (minority opinion of Gorsuch, J., joined by Thomas and Barrett, JJ.) (“In a *functioning* democracy” (emphasis added)).

14. See *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring).

15. Cf. *Harper v. Hall*, 886 S.E.2d 393, 450 (N.C. 2023) (Earls, J., dissenting) (stating that “constitutional guardrails” are required to prevent one “party’s indefinite political domination”).

16. See *infra* Part III.A.

17. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (identifying a constitutional right to privacy in the “penumbras” emanating from the First, Third, Fourth, Fifth, and Ninth Amendments).

With democracy and substantive due process each in dire straits, clarifying the connections between the two may serve to strengthen them both. Those connections—both in the real world and in the Constitution—suggest not only that democracy has long been a part of substantive due process jurisprudence, but also that democracy provides the best animating (and organizing) principle for what many scholars and members of the Court have long recognized (or lamented) is an open-ended judicial analysis in search (or need) of guidance.¹⁸

Part II examines failures in democratic self-government in state laboratories. Drawing from democratic theory, we identify breakdowns in the formal political process—voting, election management, redistricting—that implicate serious questions about minority rule and separation of powers (Part II.A). We also consider failures beyond what most conceive of as the “political process”: the legitimization of violence against public protest, breakdowns in interpersonal and intergroup public discourse, misinformation and limiting access to information, and the otherization of certain individuals based on civic status (Part II.B). Although state laboratories, in Justice Brandeis’s account, were hermetically sealed off from each other, we explain that laboratory controls to prevent cross-contamination are woefully inadequate. We conclude that a federal solution is necessary to place guardrails on state-level experiments in democracy, both to maintain democratic self-government in that state, and in others (Part II.C).

Part III seeks to begin laying the groundwork for a democratic jurisprudence of substantive due process. As a practical matter, substantive due process places substantial guardrails on state action that affects the democratic process (Part III.A). The problem is that this result does not seem to flow directly, if at all, from the Supreme Court’s current constitutional standard for protected liberty interests under the Fourteenth Amendment. While that standard recognizes the political-philosophical nature of the inquiry, it remains intractably abstract and unworkable (Part III.B). Instead, courts could assess protected liberty interest with reference to the Constitution’s

18. See, e.g., Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999) (“Substantive due process asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due process has not been reduced to any formula . . .”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (observing that the Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended”); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (same); *McDonald v. City of Chicago*, 561 U.S. 742, 800 n.7 (2010) (Scalia, J., concurring):

I accept as a matter of *stare decisis* the requirement that to be fundamental for purposes of the Due Process Clause, a right must be “implicit in the concept of ordered liberty.” But that inquiry provides infinitely less scope for judicial invention when conducted under the Court’s approach, since the field of candidates is *immensely* narrowed by the prior requirement that a right be rooted in this country’s traditions. Justice Stevens, on the other hand, is free to scan the universe for rights that he thinks “implicit in the concept,” etc. (internal citations omitted); *id.* at 811 (Thomas, J., concurring) (understanding plurality opinion’s resort to history as an “effort to impose principled restraints on” the “Court’s substantive due process doctrine”).

vision for the relationship between individuals and states. We think the Constitution's "guarantee" of a "Republican Form of Government"¹⁹ is the best lens through which to examine asserted liberty interests under the Fourteenth Amendment. Although the Guarantee Clause draws substance from the Constitution's other commitments to individuals versus the states, the Reconstruction Congress also believed that its definition of "republican government" was dynamic, and would change over time with U.S. society (Part III.C). Because the Reconstruction Congress proposed the Fourteenth Amendment against this backdrop, courts have good reason to draw on democratic theory in their analysis, especially that which has expanded the view of democratic self-government itself. We think looking to democracy as an organizing principle for substantive due process analysis also ameliorates perhaps the most persistent criticism of substantive due process: by considering the importance of an asserted liberty interest in terms of how it materially impacts the democratic process, courts can go further to avoid imposing their own "extraconstitutional value preferences";²⁰ they can instead seek to recognize rights that meaningfully interfere with a constitutional commitment to a "Republican Form of Government" for the states. Drawing on the work of John Hart Ely, we argue that judicial intervention based on the principle of democratic self-government is both permissible and necessary. In addition to applying his observations to substantive due process jurisprudence, we also take it to its logical normative conclusion with regards to judicial review. The Due Process Clause of the Fourteenth Amendment requires that courts closely scrutinize the political process where it affects liberty interests. Instead of forcing courts into the rigid tiers of scrutiny,²¹ we think a "hard look" approach calibrated to the importance and nature of the asserted liberty interest could help provide more meaningful review of state action, more accessible public dialogue, and a form of judicial review that is more responsive to the constitutional text (Part III.D).

II. EXPERIMENTAL FAILURES IN THE LABORATORIES OF DEMOCRACY

The Supreme Court's decision to overturn *Roe v. Wade*²² in *Dobbs v. Jackson Women's Health Organization*, where it disclaimed any federal constitutional right to abortion,²³ largely reads as a broadside attack on judicial

19. U.S. CONST. art. 4, § 4.

20. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2271 (2022).

21. E.g., Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J.F. 108, 110 (2019) (noting that "tiers of scrutiny constitutionally embody a 'single-axis' race-or-gender logic" and such "either/or logic becomes readily apparent upon asking which tier of scrutiny is applicable to remedial projects that target Black women").

22. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

23. *Dobbs*, 142 S.Ct. at 2242.

“usurp[ation]” of the “democratic process.”²⁴ The *Dobbs* majority attacked *Roe* on the basis that it had “removed an issue from the people” by judicially “short-circuit[ing] the democratic process.”²⁵ In its view, that process is superior to the “freewheeling judicial policymaking”²⁶ and “raw judicial power”²⁷ of substantive due process. Quoting Justice Scalia’s partial concurrence and partial dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁸ the Court echoed his sentiment that “[t]he permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade each other and then voting.”²⁹ Purporting to “heed the Constitution,”³⁰ the Court styled itself as “return[ing] the issue of abortion to the people’s elected representatives.”³¹ Justice Kavanaugh’s concurrence reads even more like a paean to the “democratic process.”³² Like the majority, Justice Kavanaugh decried the notion that courts have “constitutional authority to override the democratic process.”³³ His concurrence also emphasized what that democratic process is all about: “democratic *self-government*.”³⁴

There are several problems with the invocation of “democracy” in *Dobbs*. In a forthcoming article, Professors Melissa Murray and Kate Shaw trace the “provenance of the democratic deliberation argument,” finding that it only materialized years after *Roe* was decided, and even then as a result of a concerted effort to overturn *Roe*.³⁵ Professors David Landau and Rosalind Dixon have observed that contemporary state-level abortion laws, many of which were passed before *Roe* or were enacted during *Roe*’s existence as “messaging” bills designed to reflect hardline policies that were then unconstitutional, hardly reflect the majority will of those states today, but rather represent historical inertia.³⁶ We go further: the Court’s mere assertion of universal “democratic processes” in the states by which “important questions in our democracy” will be resolved is a damaging legal fiction that not only fails to capture reality, but dangerously distorts it.³⁷

24. *See id.* at 2265.

25. *Id.*

26. *Id.* at 2248.

27. *Id.* at 2265 (quoting *Roe*, 410 U.S. at 222 (White, J., dissenting)).

28. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

29. *Dobbs*, 142 S. Ct. at 2243 (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part)).

30. *Id.* at 2243; *cf. id.* at 2301 (Thomas, J., concurring) (“‘[S]ubstantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’” (quoting *Johnson v. United States*, 576 U.S. 591, 608 (2015) (Thomas, J., concurring))); *see also infra* Part II.C.

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

32. *See id.* at 2305–10 (Kavanaugh, J., concurring) (using the phrase “democratic process” eight times); *see also* Melissa Murray & Kate Shaw, *One of the Most Brazen Republican Schemes Around Abortion Is Happening in Ohio*, N.Y. TIMES (Aug. 7, 2023), <https://www.nytimes.com/2023/08/07/opinion/abortion-democracy-ohio.html> [https://perma.cc/D3MH-N4WT] (referring to majority opinion as a “paean to democracy”).

33. *Id.* at 2305 (Kavanaugh, J., concurring).

34. *See id.* at 2305–06 (Kavanaugh, J., concurring) (emphasis added).

35. *See* Murray & Shaw, *supra* note 11.

36. *See* Landau & Dixon, *supra* note 11.

37. *See Dobbs*, 142 S. Ct. at 2243.

As a starting point, consider that *Dobbs* leaves a critical question unresolved: to *whom* did the Court “return” the issue of abortion?³⁸ Was it returning it to the people,³⁹ as the quoted language from Scalia’s *Casey* opinion suggests?⁴⁰ Or was it returning it to elected officials in state legislatures?⁴¹ As we explain below, this is no minor distinction.⁴² The majority’s apparent conflation of the people with their “representatives”⁴³ is, on the one hand, completely understandable; after all, such is the theory of representative government. But that theoretical assumption does not fare well against the litmus test of current realities.⁴⁴ The majority not only ignored this difference, but papered over it in a dangerous (if unsurprising⁴⁵) fashion.

Nearly a century after Justice Brandeis first (inadvertently) introduced the term “laboratories of democracy” into our federalism lexicon, it has become evident that the experiments *in* democracy long conducted in many state laboratories have fared poorly—and there is a fair argument to be made that some have failed entirely.⁴⁶ Put another way, states have widely engaged in *anti*-democratic experimentation.

38. *See id.* at 2243.

39. *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *see also Dobbs*, 142 S. Ct. at 2245 (rejecting Ninth Amendment basis identified in *Roe* for protecting the right to abortion).

40. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The permissibility of abortion . . . [is] to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”).

41. *See Dobbs*, 142 S. Ct. at 2243 (“It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

42. *See infra* Part II.A.

43. *See Dobbs*, 142 S. Ct. at 2243.

44. Nor does it fare well against the historical record. *See* Jamelle Bouie, *The Real Threat to Freedom is Coming from the States*, N.Y. TIMES (May 26, 2023), <https://www.nytimes.com/2023/05/26/opinion/freedom-states-rights.html> [<https://perma.cc/J2B6-CY46>];

That it is states, and specifically state legislatures, that are the vanguard of a repressive turn in American life shouldn’t be a surprise. Americans have a long history with various forms of subnational authoritarianism: state and local tyrannies that sustained themselves through exclusion, violence and the political security provided by the federal structure of the American political system.

45. For all its invocations of “democracy,” the Court’s recent record of supporting it is not strong. *See, e.g.,* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding partisan gerrymandering nonjusticiable in federal court); *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013) (invalidating preclearance regime in the Voting Rights Act); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371–72 (2010) (invalidating campaign-spending limits on corporations); *Bush v. Gore*, 531 U.S. 98, 110–11 (2000) (halting contest proceedings in Florida to determine statewide winner of the 2000 presidential election); *but see* *Allen v. Milligan*, 143 S. Ct. 1487, 1516–17 (2023) (upholding § 2 of the Voting Rights Act and affirming three-judge lower court’s decision that challengers were likely to succeed in proving a racial vote dilution claim against Alabama).

46. James Madison lauded “the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America,” but also warned against too much experimentation in the structure of government, observing that “the experiments are of too ticklish a nature to be unnecessarily multiplied.” THE FEDERALIST NO. 49 (James Madison).

For observational purposes, we use Justice Kavanaugh’s “democratic self-government” lens,⁴⁷ which aligns with democracy’s etymological definition: “rule of the people,” from the Greek *demos* (people) and *kratia* (rule).⁴⁸ Our focus is also narrowly targeted on the realm of experimentation which Justice Brandeis imagined: “a policy space where states are autonomous—where federal law and federal officials may not intrude.”⁴⁹

Because the Constitution empowers the federal government to regulate certain facets of state-level democratic practice, preemptive federal action also defines the parameters of the policy space in which states can experiment with democracy. Notably, Congress has expanded and protected access to the ballot,⁵⁰ and federal courts have provided constitutional floors for the state-level political process.⁵¹ The federal “floor” provided by statutes

47. See *Dobbs*, 142 S. Ct. at 2305–06 (Kavanaugh, J., concurring). We use “democracy” as a shorthand.

48. Astra Taylor, *Who, the People?*, BAFFLER (Jan. 2019), <https://thebaffler.com/salvos/who-the-people-taylor> [<https://perma.cc/UW34-CVSL>].

49. Tyler & Gerken, *supra* note 1, at 2189–90.

50. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 52 U.S.C. §§ 10101, 20701–20706); Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702); Voting Accessibility for the Elderly and Handicapped Act (VAEHA), Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 52 U.S.C. §§ 20101–20107) (states must make voting accessible to individuals with disabilities); Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 52 U.S.C. §§ 20301–20311) (states must allow otherwise-eligible voters living overseas to vote by absentee ballot); National Voter Registration Act of 1993 (NVRA or “Motor Voter Act”), Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511) (states must provide opportunities to register for federal elections through the mail and when individuals apply for or receive a driver’s license or other specified government services, and must comply with federal rules for maintaining voter registration lists); Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C. §§ 20901–21145) (providing minimum federal standards for the administration of federal elections). Although Congress may not directly regulate state elections under the Elections Clause, see U.S. CONST. art. I, § 4, cl. 1, Congress has acquired some functional power to do so. Since Congress standardized the day for all congressional elections in 1872 all but five States have “aligned their elections with federal elections as a cost- and time-saving measure.” Paul Braun, Ryland Barton, Joe Hernandez, Ben Paviour, Mallory Noe-Payne & Acacia Squires, *Why These 5 States Hold Odd-Year Elections, Bucking the Trend*, NPR (Nov. 4, 2019), <https://www.npr.org/2019/11/04/767959274/why-these-5-states-hold-odd-year-elections-bucking-the-trend> [<https://perma.cc/HZ38-DZJG>]; see also Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 229 (2020) (“Certainly many, if not most, states chose to do so if for no other reason than administrative convenience . . .”). Of course, Congress’s authority under the Elections Clause, does not extend to key aspects of state government and elections, including the use of multi-member and flatorial districts. See Michael T. Morley & Franita Tolson, *Common Interpretation*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/750> [<https://perma.cc/JDJ8-ABVG>]. And “[a] State may choose to regulate state and national elections differently, which is its prerogative under the [Elections] Clause.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 819 n.25 (2015). Yet there is evidence that at least two of the States which have opted to hold off-year elections, Mississippi (in 1817) and Kentucky (in 1850), did so in order to evade federal regulation. See Braun et al., *supra*.

51. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 665–66 (1944) (holding political party primaries are state action within the Fifteenth Amendment and therefore must not be racially discriminatory); *Terry v. Adams*, 345 U.S. 461, 470 (1953) (same for private political party primaries); *Baker v. Carr*, 369 U.S. 186, 234–37 (1962) (holding redistricting issues are justiciable); *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (holding state legislatures must be apportioned according to population).

and the Constitution has done much to safeguard and enhance democratic practice at the state level. Some states have also taken meaningful steps to improve democratic practice on their own accord⁵²: take public campaign financing⁵³ or open primaries.⁵⁴ But within their own laboratories, states have, on balance, far less to show than the federal government in terms of

52. Federal legislation has also placed limits on democratic experiments that may also potentially enhance it, such as the use of multi-member districts for federal elections. See Mikayla Foster, Note, “*Gobbledygook*” or *Unconstitutional Redistricting?: Floterial Districts and Partisan Gerrymandering*, 98 B.U. L. REV. 1737, 1747, 1760 (2018); see U.S. CONST. art. I, § 4, cl. 1; see sources cited *supra* note 50 and accompanying text. Multi-member districts with ranked-choice voting are not inherently salubrious or regressive for democratic practice. See Richard G. Niemi, Jeffrey S. Hill & Bernard Grofman, *The Impact of Multimember Districts on Party Representation in U.S. State Legislatures*, 10 LEG. STUD. Q. 441, 454 (1985) (“Multi-member districts do not inherently, or even generally, underrepresent the statewide minority party in state legislative elections.”). This electoral structure may be abused by the party in power. See *White v. Regester*, 412 U.S. 755, 766 (1973) (observing that the use of multi-member districts in Texas state races was not “in [itself] improper nor invidious,” but “enhanced the opportunity for racial discrimination”); David Martin Davies, *How Texas Used Multi-Member Districts to Weaken Minority Voting Power*, TEX. PUB. RADIO (Oct. 8, 2021, 12:40 PM), <https://www.tpr.org/podcast/texas-matters/2021-10-19/how-texas-used-multi-member-districts-to-weaken-minority-voting-power> [<https://perma.cc/SH4Z-CCJE>]. But it can also, in the right circumstances, potentially help legislatures become more representative. See Reiner Eichenberger & Patricia Schafer, *On Curing Political Diseases: The Healing Power of Majoritarian Elections in Multi-Member Districts*, HOMO OECONOMICUS (2022), <https://link.springer.com/content/pdf/10.1007/s41412-022-00131-w.pdf?pdf=button> [<https://perma.cc/5JSJ-E25V>]. Federal law has also placed limits on the use of floterial districts, see Foster, *supra*, at 1760, which could arguably enhance democratic practice in the States, but may also be used to further partisan gerrymandering. See *id.* at 1759; see also Mikayla Clara Foster, *How to Maintain One-Party Control: A Case Study of the Political Strategies Used by New Hampshire Republicans 4* (March 22, 2013) (B.A. thesis, Bates College), <https://scarab.bates.edu/cgi/viewcontent.cgi?article=1088&context=honorsthesis> [<https://perma.cc/2VCQ-FSXN>].

53. See, e.g., *Public Financing of Campaigns: Overview*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 6, 2023), <https://www.ncsl.org/elections-and-campaigns/public-financing-of-campaigns-overview> [<https://perma.cc/64WD-NZXY>] (providing list of states with public campaign financing programs); *Public Campaign Financing: Why It Matters*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/reform-money-politics/public-campaign-financing> [<https://perma.cc/8YFD-ZVW9>] (observing that New York City’s public campaign finance system “has helped reduce the influence of special interests and empower average voters, and the idea is gaining traction across the country”); BRIAN J. McCABE & KENAN DOGAN, GEO. UNIV., *EXPANDING DONOR PARTICIPATION IN THE DISTRICT: AN ANALYSIS OF THE FAIR ELECTIONS PROGRAM IN WASHINGTON, DC* (2021), https://mccourt.georgetown.edu/wp-content/uploads/2022/02/DC_Fair_Elections_Report_Sept2021_ACCESSIBLE.pdf [<https://perma.cc/U7UG-CLST>] (assessing impact of DC’s public campaign financing program on local candidates in 2020 election cycle).

54. See *State Primary Election Types*, NAT’L CONF. OF STATE LEGISLATURES (June 22, 2023), <https://www.ncsl.org/elections-and-campaigns/state-primary-election-types> [<https://perma.cc/PZ7P-EHAD>] (listing States using different types of open primaries). Somewhat counterintuitively, open primaries exist in states where democracy is backsliding, but has not been utilized by voters to meaningfully impact election outcomes. See Michael Hardy, *Minority Rule: How 3 Percent of Texans Call the Shots for the Rest of Us*, TEX. MONTHLY (Nov. 2022), <https://www.texasmonthly.com/news-politics/how-3-percent-of-texans-call-shots-for-texas> [<https://perma.cc/NBJ3-NPB3>].

Texas is one of just eighteen states that holds so-called open primaries with nonpartisan registration. Voters can participate in either party’s primary—no matter how they voted in the past, and no matter how they intend to vote in the November general election. Voting rights groups have tried for years to encourage more people to participate in these crucial primary contests, but with limited success.

voluntary improvements to democratic practice⁵⁵—and much to show to the contrary.

Ultimately, one must ask, is the reality of state-level “democratic processes” one that can be entrusted with safeguarding liberty interests that themselves deeply relate to the success, or failure, of the democratic process?⁵⁶ For reasons we will now explain, we think not.⁵⁷

A. FORMAL FAILURES

Many contemporary failures are evident in the structure of the formal political process at the state level. This includes who gets the right to vote, the conditions under which they vote, how votes translate into representation, and how legislative misrepresentation can essentially eviscerate a tripartite system of government.⁵⁸

1. Voting and Election Management

Almost everyone—including the Supreme Court⁵⁹—recognizes that voting is *the* quintessential right of political participation.⁶⁰ Yet voter suppression is not yet “a thing of the past.”⁶¹ Much to the contrary, as Michael Klarman outlined in a sweeping foreword to a recent volume of the *Harvard Law Review*, today’s suppression, often referred to as “Jim Crow 2.0,”⁶² is very much alive. It encompasses a variety of tactics designed to

55. In this sense, federal law has provided a different sort of “democracy ratchet” for states’ experimentation. Cf. Derek T. Muller, *The Democracy Ratchet*, 94 *IND. L.J.* 451 (2019) (describing federal courts’ critical evaluation of rollbacks to state election laws as “the Democracy Ratchet”).

56. See *infra* Part III.

57. For other recent observations of democratic backsliding in the states, see Forman-Rabinovici & Johnson, *supra* note 11, at 22–32; Shapiro, *supra* note 50, at 214–27; Miriam Seifter, *State Institutions and Democratic Opportunities*, 72 *DUKE L.J.* 275, 304–27 (2022).

58. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151–52 (Thomas Nugent trans. rev. ed., 1899); John Adams, *Thoughts on Government*, in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 196, 197 (Bruce Frohnen ed., 2002) (“A representation of the people in one assembly being obtained, a question arises, whether all the powers of government, legislative, executive, and judicial, shall be left in this body? I think a people cannot be long free, nor ever happy, whose government is in one assembly.”); *THE FEDERALIST* No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.”).

59. See *infra* Part III.A.

60. But see MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT, FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 28, 32 (2013).

61. Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 *HARV. L. REV.* 1, 46 (2020).

62. E.g., Keith G. Bentele & Erin E. O’Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 *PERSPS. ON POL.* 1088, 1088 (2013); Richard Mejia, *Senate Bill 202: Election Integrity Act of 2021*, 15 *J. MARSHALL L.J.* 216, 217 (2021); Noelle N. Wyman, *Native Voting Power: Enhancing Tribal Sovereignty in Federal Elections*, 132 *YALE L.J.* 861, 863 (2023); Jason Morgan Ward, *Georgia’s Voter Law Is Called “Jim Crow 2.0” for a Reason*, *N.Y. TIMES* (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/opinion/georgia-voting-law.html> [<https://perma.cc/BK9Q-2STM>]; Gillian Brockell, *Some Call Voting Restrictions Upheld by Supreme Court “Jim Crow 2.0.” Here’s the Ugly History Behind That Phrase.*, *WASH. POST* (July 2, 2021), <https://www.washingtonpost.com/history/2021/07/02/jim-crow-voting-restrictions-supreme-court/> [<https://perma.cc/P8UM-87RR>].

effectively, if not nominally, disenfranchise voters: voter identification laws that “have an adverse impact on Democratic-leaning voter populations—people of color, young people, and the poor”;⁶³ purging voter rolls, which “disproportionately impact[s] people of color, the poor, and young people—all of whom are relatively more transient”;⁶⁴ attacking voter registration groups;⁶⁵ suppressing the youth vote;⁶⁶ paring back early voting periods, especially in ways that provide unequal opportunity to vote early based on the political leaning of the electoral district;⁶⁷ and providing different electoral resources depending on a voting district’s political leaning, culminating in substantially greater waiting times in Democratic strongholds.⁶⁸ In the leadup to the 2022 election, some Republican-controlled states even refused to permit federal election monitors to enter polling places.⁶⁹ As explained further in the following sections, dire as the democratic deficits in ballot access may be, they are only the tip of the democratic-deficit iceberg.

2. *Partisan Gerrymandering, Minoritarian Legislatures, and Disproportional Legislative Outcomes*

In line with the quintessential importance of the vote to democracy, a related core concept of representative self-government is that the *demos* may choose their elected officials—and not the other way around.⁷⁰ Yet, as Miriam Seifter has explained, the geographic clustering of similarly

63. Klarman, *supra* note 61, at 48–51.

64. *Id.* at 51–55. Recently, more than a few Republican-controlled states have also departed from the Electronic Registration Information Center (ERIC), “an interstate cooperative that seeks to maintain accurate voter registration rolls.” See Matt Vasilogambros, *Why Are GOP-Led States Leaving Voter Registration Group ERIC?*, GOVERNING THE FUTURE OF STATES AND LOCALITIES (May 23, 2023), <https://www.governing.com/politics/why-are-gop-led-states-leaving-voter-registration-group-eric> [https://perma.cc/9E5H-37ER]. “Election security experts worry the move is part of a larger trend away from nonpartisan election administration, potentially leading to inaccurate voter databases.” *Id.*

65. Klarman, *supra* note 61, at 55–56.

66. *See id.* at 56–58.

67. *See id.* at 58–60.

68. *See id.* at 60 (observing failures in Ohio and Florida); *see also* HANNAH KLAIN, KEVIN MORRIS, MAX FELDMAN & REBECCA AYALA, BRENNAN CTR. FOR JUST., WAITING TO VOTE: RACIAL DISPARITIES IN ELECTION DAY EXPERIENCES 4–5 (2020), <https://www.brennancenter.org/media/5927/download> [https://perma.cc/TJD3-BDW5]. Against this backdrop, the purpose of recently-enacted state laws criminalizing the provision of water and food to voters is crystal clear. See Sarah Wiik, Comment, *Water & Pizza: What Would Alexander Hamilton Think?*, 50 FORDHAM URB. L.J. 933, 934 (2023) (“These attacks are part of a larger movement to lessen the measures that guarantee the right to vote across the country; attacks on the Voting Rights Act (VRA), regulations restricting voting access across the country, and regulation of line-warming activities have become commonplace.”).

69. *See* Andrew Prokop, *Why Florida and Missouri Republicans Won’t Let Federal Observers in Polling Places*, Vox (Nov. 8, 2022, 3:45 PM), <https://www.vox.com/policy-and-politics/2022/11/8/23447711/midterm-elections-2022-florida-missouri-doj-observers> [https://perma.cc/C7VN-3M39].

70. *See* Klarman, *supra* note 61, at 47 (“In general, democracy means that a majority of voters enjoys at least a majority of the political power.”); *see also* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (noting that “voters should choose their representatives, not the other way around”).

oriented political groups,⁷¹ and the inertia of a historical preference for single-member “winner-take-all” legislative districts,⁷² has enabled grotesque manipulation of electoral district lines by the party in power—also known as gerrymandering.⁷³ The effect of such manipulation is clear, as Justice Elena Kagan explained in *Rucho v. Common Cause*, dissenting from

71. Although there are many explanatory factors for these groupings, one that cannot be ignored is government policies’ effect on segregating communities based on race. See, e.g., Ryan Best & Elena Mejia, *The Lasting Legacy of Redlining*, FIVETHIRTYEIGHT (Feb. 9, 2022, 6:00 AM), <https://projects.fivethirtyeight.com/redlining> [<https://perma.cc/RZC9-RY4T>] (“The redlining maps are like the Rosetta stone of American cities . . .”); *id.* (“Formerly redlined zones in the Northeast and Midwest are among the most segregated areas in the country.”). It remains a statistical fact, whatever the explanation, that political preferences *do* have racial correlation. See, e.g., Perry Bacon Jr., *American Politics Now Has Two Big Racial Divides*, FIVETHIRTYEIGHT (May 3, 2021, 6:00 AM), <https://fivethirtyeight.com/features/american-politics-now-has-two-big-racial-divides> [<https://perma.cc/3JDP-NMAV>] (observing that the 2020 election “was basically like every recent American presidential election,” in which “[t]he Republican candidate won the white vote (54 percent to 44 percent, per CES), and the Democratic candidate won the overwhelming majority of the Black (90 percent to 8 percent), Asian American (66 percent to 31 percent) and Hispanic (64 percent to 33 percent) vote”). Both before and after the U.S. Supreme Court held that political gerrymanders are nonjusticiable, see *Rucho*, 139 S. Ct. at 2508, some voiced concern that race and party are sufficiently correlated that intentional partisan gerrymandering may serve to immunize state legislatures from claims of racial gerrymandering. See Sara Tofighbakhsh, Note, *Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party*, 120 COLUM. L. REV. 1885, 1886 (2020) (“*Rucho* therefore leaves judicial review of redistricting suspended in a state where racial gerrymandering is unconstitutional at the same time that partisan gerrymandering is nonjusticiable, leaving federal courts in the cumbersome position of splitting a stubborn atom: race or party?”); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1840–41 (2018); see also Olga Pierce & Kate Rabinowitz, “Partisan” Gerrymandering is Still About Race, PROPUBLICA (Oct. 9, 2017, 6:48 PM), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race> [<https://perma.cc/Q2QE-47NW>] (“[R]ace remains an integral element of redistricting disputes, even when the intent of those involved was to give one party an advantage.”). In its 2022 electoral maps, Florida “wiped away half of the state’s Black-dominated congressional districts, dramatically curtailing Black voting power in America’s largest swing state.” Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law*, PROPUBLICA (Oct. 11, 2022, 6:00 AM), <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme> [<https://perma.cc/T975-GAWW>]. Voting rights experts describe the splitting of one district with a 46% Black voting-age population into four majority-white districts as “the first instance they’re aware of where a state so thoroughly dismantled a Black-dominated district.” *Id.* If Florida is successful in combatting legal challenges to its map, it “will have forged a path for Republicans all over the country to take aim at Black-held districts.” *Id.*

72. See Douglas J. Amy, *Winner-Take-All Elections: A Formula for Unfair Representation*, SECOND-RATE DEMOCRACY, <https://secondratedemocracy.com/winner-take-all-elections> [<https://perma.cc/4A2V-4ULH>]. For further discussion of the impact of the urban–rural divide and single-member districts on representative democracies, see JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN–RURAL POLITICAL DIVIDE* 23 (2019). For a recent proposal on how multi-member districts and ranked-choice voting can help make state legislatures more representative of their constituents, see Paul A. Diller, *Towards Fairer Representation in State Legislatures*, 33 STAN. L. REV. 135 (2022).

73. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1759–62 (2021). For a detailed account of the interplay between geographic clustering and partisan gerrymandering in Wisconsin, see John Johnson, *Why Do Republicans Overperform in the Wisconsin State Assembly? Partisan Gerrymandering vs. Political Geography*, MARQ. UNIV. L. SCH. (Feb. 11, 2021), <https://law.marquette.edu/facultyblog/2021/02/why-do-republicans-overperform-in-the-wisconsin-state-assembly-partisan-gerrymandering-vs-political-geography> [<https://perma.cc/7CFA-JMUD>].

the Court's decision that partisan gerrymandering is nonjusticiable under the federal constitution: "By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer."⁷⁴ In other words, gerrymandering can flip the democratic process on its head: "voters should choose their representatives, not the other way around."⁷⁵

Justice Kagan highlighted specific redistricting "perversions" in four States' congressional districts: North Carolina, Maryland, Pennsylvania, and Ohio.⁷⁶ But that list is by no means exhaustive—and does not come close to embracing the full scope of the problem. The Schwarzenegger Institute at the University of Southern California concluded that, as of 2019, "[six] states ha[d] *minority rule* in one or both of their legislative chambers thanks to partisan calculations made by legislative mapmakers: Michigan, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. The total population of these states is 59.2 million people."⁷⁷ The Institute defined "minority rule" as "the party with the minority of votes in the most recent election nevertheless controlling the majority of seats in the state legislature subsequent to that election."⁷⁸ That means roughly one out of every six people in the United States was subject to state legislative rule by the party than won *fewer* votes statewide following the 2018 election cycle. Professor Seifter has concluded that between 1968 and 2016, thirty-eight states had at least one "manufactured majority" in their state senate, and forty had one in their state house; only ten states did not experience this in

74. *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting). Justice Kagan also aptly noted that technological advances have also enhanced entrenched majorities' ability to gerrymander:

[T]oday's mapmakers can generate thousands of possibilities at the touch of a [computer] key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

Id. at 2513; see also Grant Geary, *Partisan Gerrymandering: Maryland's Attempt at Reform and Steps Towards Proportional Representation*, 86 UMKC L. REV. 443, 443 (2017) ("In the years since Governor Gerry's innovative political maneuver, the practice has become a much more scientific process driven by technology that can draw 'precise and impregnable' lines.").

75. *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015)).

76. *Id.* at 2510–19.

77. CHRISTIAN R. GROSE, JORDAN CARR PETERSON, MATTHEW NELSON & SARA SADHWANI, USC SCHWARZENEGGER INST. FOR STATE & GLOB. POL'Y, *THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES* 6 (2019) (emphasis added); see also Corey Robin, *Republicans are Moving Rapidly to Cement Minority Rule. Blame the Constitution.*, POLITICO (Jan. 5, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/01/05/democracy-january-6-coup-constitution-526512> [<https://perma.cc/66H2-H8UB>].

78. See GROSE ET AL., *supra* note 77, at 2; see also Seifter, *supra* note 73, at 1756 ("An elected body is not majoritarian unless the candidate or party receiving the most votes wins. When the candidate or party that prevails received fewer votes than another candidate or party, the body is minoritarian, a term this Article uses synonymously with countermajoritarian."). We use the term similarly here.

their state senate, and only eight were free of it in their state house.⁷⁹ This is no trivial or fleeting occurrence.

Although state constitutional law has in some cases stepped up to plug the holes left by *Rucho*,⁸⁰ gerrymandering appears to be going strong where it has not. Because state legislatures redraw electoral maps every ten years based on the decennial U.S. census, an entrenched party’s control can become even more magnified relative to voting share over successive redistricting cycles.⁸¹

Wisconsin, where state law has not (yet) plugged the *Rucho* hole, is a striking example. When Republicans controlled all three branches of state government in 2011, the party used its power to redraw state legislative districts, causing Wisconsin to become one of the most gerrymandered states in the country.⁸² In recent years, Wisconsin voters have favored Democratic candidates over Republicans in nearly all statewide elections,⁸³ including the election of Democratic Governor Tony Evers, who won a statewide majority in 2018 and 2022. Yet the majority-Republican legislature’s 2021 redistricting map, ultimately adopted by the majority-Republican state supreme court over Governor Evers’s veto,⁸⁴ is even more skewed in favor of outsized Republican representation than the 2011 map.⁸⁵ Gerrymandering,

79. See Seifter, *supra* note 73, at 1764.

80. See Yuriy Rudensky, *Status of Partisan Gerrymandering Litigation in State Courts*, STATE CT. REP. (July 31, 2023), <https://statecourtreport.org/our-work/analysis-opinion/status-partisan-gerrymandering-litigation-state-courts> [<https://perma.cc/V333-XKCH>].

81. This is especially so when the Supreme Court makes a landmark ruling on election law between redistricting cycles. See *Rucho*, 139 S. Ct. at 2508 (holding partisan gerrymandering nonjusticiable in federal court); see Tofighbakhsh, *supra* note 71, at 1886.

82. See GROSE ET AL., *supra* note 77, at 2 (ranking Wisconsin in second-place in the list of “worst states for legislative partisan gerrymanders after the 2018 elections”); SIMON JACKMAN, *ASSESSING THE CURRENT WISCONSIN STATE LEGISLATIVE DISTRICTING PLAN 63* (2015), https://campaignlegal.org/sites/default/files/Jackman-WHITFORD%20V.%20NICHOL-Report_0.pdf [<https://perma.cc/KN9J-VJYY>] (concluding that the way in which the Republican-controlled state government asymmetrically “packed” Democrats into certain districts to diminish their voting power across the state was “virtually without historical precedent”).

83. See, e.g., Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CT. FOR JUST. (June 9, 2023), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/NXU3-VA7L>] (“[I]n 2018, Democrats in Wisconsin won every statewide office and a majority of the statewide vote . . .”).

84. See *Johnson v. Wis. Elections Comm’n*, 972 N.W.2d 559, 565 (Wis. 2022).

85. See Matthew DeFour, *Wisconsin’s Assembly Maps are More Skewed Than Ever. What Happens Now?*, WIS. WATCH (Dec. 6, 2022), <https://wisconsinwatch.org/2022/12/wisconsin-assembly-maps-are-more-skewed-than-ever-what-happens-now> [<https://perma.cc/ZT2V-UB5L>] (“In the latest round of redistricting, in which rulings from the conservative state and U.S. supreme courts allowed Republican legislative maps to prevail . . . Wisconsin’s Assembly skew only got worse,” making it one of the most lopsided in the nation last decade.); Ari Berman, *How Democracy Nearly Died in Wisconsin*, MOTHER JONES (Feb. 2023), <https://www.motherjones.com/politics/2022/12/how-democracy-nearly-died-in-wisconsin-republican-gerrymandering-evers> [<https://perma.cc/6CGB-LURJ>];

If the redistricting maps drawn in secret by Republican staffers and passed by the GOP-controlled legislature in 2011 were unfair, the maps adopted by Republicans in 2021, over Evers’s[s] objections, were even more one-sided. As a result, the number of GOP-leaning seats increased to 63 out of 99 in the state Assembly and to 23 out of 33 in the state Senate. That meant that—according to calculations by Marquette University Law School research fellow John Johnson—Democrats would have to win the 2022 statewide vote by 12

as some have observed, is a “race to the bottom.”⁸⁶ Absent constitutional guardrails in many states, it is hardly surprising that gerrymandering efforts did not hit bedrock in the 2011 redistricting cycle—and that even the 2021 redistricting may not represent the outer limits of political opportunism.

3. *Disproportional Electoral Outcomes and Mechanisms of Popular Involvement in the State Lawmaking Process*

Gerrymandering can also grossly skew partisan representation in the legislature even where it does not “manufacture”⁸⁷ a bona fide minoritarian legislature.⁸⁸ This has been the case in Wisconsin since the 2022 state legislative elections, in which Republican candidates across the state received more votes than their Democratic rivals, but obtained a disproportionately high number of seats in the legislature based on their share of the popular vote⁸⁹—a near supermajority in the Assembly⁹⁰ and a supermajority in the Senate.⁹¹ Assessing such “[d]isproportional [o]utcomes,” the Schwarzenegger Institute found that there were six states following the 2018 election cycle where “the statewide partisan competition was fairly high, yet the winning party received at least 15 percentage points more seats than the popular vote for the same party.”⁹²

Disproportional outcomes in winning legislative seats can have an outsized impact on democratic governance even where a legislature is not minoritarian because they allow the entrenched party to thwart the will of voters in at least three ways: by effectively reducing the legislative threshold required to overcome the governor’s veto on legislation, strip statewide officeholders of power, and remove statewide elected officials from office.⁹³

points just to get to 50 seats in the Assembly, while Republicans could garner a majority with only 44 percent of the vote.

86. Adam Serwer, *Make Wisconsin a Democracy Again: Badger State Republicans Can't Bear Having to Compete for Power*, THE ATLANTIC (Apr. 8, 2023), <https://www.theatlantic.com/ideas/archive/2023/04/wisconsin-republican-two-third-majority-gerrymandering/673659> [<https://perma.cc/J4JG-ECRJ>].

87. See Seifter, *supra* note 73, at 1762–67.

88. See *id.* at 1767–68.

89. See *Canvass Results for 2022 General Election*, WIS. ELECTIONS COMM’N (Nov. 8, 2022, 6:00 AM), https://elections.wi.gov/sites/default/files/documents/Statewide%20Summary%20Results_1.pdf [<https://perma.cc/PB8U-9MPJ>].

90. Hope Karnopp, *Did Wisconsin Republicans Achieve a Veto-Proof Supermajority in the Legislature in the 2022 Election?*, WIS. WATCH (Nov. 14, 2022), <https://wisconsinwatch.org/2022/11/did-wisconsin-republicans-achieve-a-veto-proof-supermajority-in-the-legislature-in-the-2022-election> [<https://perma.cc/Y2CX-FD88>] (“Legislative Republicans will hold about 64% of the seats in the Assembly and 67% in the Senate in 2023.”).

91. Sam Levine, *Wisconsin Senate Supermajority Win Gives Republicans Impeachment Power*, THE GUARDIAN (Apr. 5, 2023, 11:24 AM), <https://www.theguardian.com/us-news/2023/apr/05/wisconsin-senate-supermajority-impeachment-power> [<https://perma.cc/KB42-3PYU>] (noting that special election win by Republican that gave Republicans control of 22 of the 33 seats in the state senate created a partisan two-thirds supermajority).

92. GROSE ET AL., *supra* note 77, at 7.

93. Cf. Seifter, *supra* note 73, at 1759 (noting that the “legislative actions of greatest concern” are “those in which the legislature acts alone: as a litigant, through committees with the power to revise or strike down executive action, or as a veto point against new legislation.”). We propose that impeachment is a critical addition to this list—especially as it pertains to elected judges, who may better reflect majoritarian preferences than gerrymandered

Although the governor’s veto may not be fundamental to state government where the state constitution makes no provision for bicameralism *and* presentment,⁹⁴ it is, at the very least,⁹⁵ a fundamental part of state government’s architecture where the state constitution does so provide.⁹⁶ And every state constitution today gives the governor a veto over a bill that has been approved by the state legislature.⁹⁷ As Professor Seifter has explained, “states turned to at-large election of governors and judges in part *because* of the perceived majoritarian failings of state legislatures.”⁹⁸ Unlike state legislatures, which have long been subject to fear that they may obstruct self-government through minoritarian rule,⁹⁹ state governors are elected by a popular statewide vote.¹⁰⁰ Notwithstanding the royal pedigree of the bicameralism and presentment requirement in state governments,¹⁰¹

legislatures. *See id.* at 1771–73; *see also* Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. 18, 18–20 (2022) (noting federal constitutional deficiencies in safeguarding majoritarian state judiciaries). We do not further address the impact of a gerrymandered legislature’s role as *litigant* except to note that disproportional outcomes in state legislative races may create legislative standing to litigate a case that would not exist but for substantial disproportionality between votes and seats. *See Raines v. Byrd*, 521 U.S. 811, 823 (1997) (describing *Coleman v. Miller*, 307 U.S. 433 (1939), as standing “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified”); *cf. id.* at 829–30 (holding individual members of Congress do not have standing to challenge Line Item Veto Act while “attach[ing] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action”); *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 802 (2015) (holding that the Arizona State Legislature had standing to challenge the independent state redistricting commission as an “institutional plaintiff asserting an institutional injury” because “it commenced [its legal] action after authorizing votes in both of its chambers”).

94. *See State v. Kline*, 93 P. 237, 239 (Or. 1907) (“The fundamental laws of Delaware, North Carolina, Ohio, and Rhode Island do not confer the veto power on the Governors of those states.”).

95. *See VanSickle v. Shanahan*, 511 P.2d 223, 244 (Kan. 1973) (holding Guarantee Clause of the Federal Constitution requires separation of powers).

96. *See, e.g., Johnson v. Walters*, 819 P.2d 694, 710 (Okla. 1991) (Opala, C.J., concurring in part and dissenting in part) (referring to “the Governor’s fundamental-law privilege to veto bills”); *Perry v. Decker*, 457 A.2d 357, 362 (Del. 1983) (“The fundamental constitutional requirement of agreement on an entire piece of legislation between the House and Senate and the Governor is necessary” (quoting Opinion of the Justices, 306 A.2d 720, 723–24 (Del. 1973))); *State ex rel. Dickson v. Saiz*, 308 P.2d 205, 211 (N.M. 1957) (“[T]he power of [the Chief Executive’s] veto is written into our fundamental law.”).

97. *See* 53 COUNCIL OF STATE GOV’TS, *THE BOOK OF THE STATES* 71 tbl.3.16, 114 tbl.4.4 (2021), <https://www.nga.org/wp-content/uploads/2022/10/CSG-book-of-the-states-2021.pdf> [<https://perma.cc/SUU3-RLHF>].

98. Seifter, *supra* note 73, at 1756.

99. *See id.* at 1776 (noting that delegates at state constitutional conventions in the early twentieth century were concerned that “special interests might secure the passage of legislation that was favorable only to them, but rather that these interests might prevent the passage of laws that were beneficial to the general public”).

100. State elections for governor are distinguishable from federal elections for president because they reflect the popular preference, rather than the preference of an “antimajoritarian” electoral college. *Id.* at 1737 (noting that governors elected in popular statewide races “might come closer” to being the “voice of the people” in a meaningful sense than state legislatures).

101. *See, e.g., John A. Fairlie, The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 473 (1917) (“[H]istorically what is called the veto power of American executives is derived from the legislative power of the British Crown.”). The executive veto has also long

the adoption of *popular* statewide elections for governors was an intentional move to place a democratic check on legislative action: if the winner of the popular statewide vote disagreed with a majority of the legislature, it would take something *more* from the legislature to turn the bill into law.¹⁰²

Disproportional outcomes in legislative seats can, and do, threaten the core of this traditional configuration of power by making it easier for non-representative legislatures to enact legislation over the popularly elected governor's veto. In the vast majority of states, the legislative supermajority required to overcome a veto is two-thirds or three-fifths (of those present or elected).¹⁰³ But the supermajority component of this traditional structure loses all meaning when it takes only a bare majority of the popular vote for state legislators, or perhaps even a *minority*, to check the chief executive—who *was* elected by popular vote. After the 2018 election cycle, Republicans in Wisconsin won a near supermajority (two-thirds) of the state house seats (64.6%) with a minority of the popular vote (44.7%); Republicans in Kentucky gained almost complete control over the state senate (89.5%) without garnering even a supermajority of the vote (57.9%).¹⁰⁴ Supermajority requirements in these circumstances become, at the very least, strongly diluted, if not outright eviscerated. In practical effect, this deprives the *demos* of an intentionally democratic mechanism constitutionally hard-wired into state government.

This is bad enough where one party controls both the legislature and the executive; the governor may be more in touch with public preferences than a minoritarian legislature, and a diluted supermajority threshold to overcome their veto still functions to deprive the *demos* of a democratic guarantee provided by their state constitution. But the problem is usually

been discussed in the United States purely as a matter of republican philosophy. *See, e.g.,* THE FEDERALIST No. 51 (James Madison) (“An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed.”); *see* Adams, *supra* note 58, at 197:

But shall the whole power of legislation rest in one assembly? Most of the foregoing reasons apply equally to prove that the legislative power ought to be more complex; to which we may add, that if the legislative power is wholly in one assembly, and the executive in another, or in a single person, these two powers will oppose and encroach upon each other, until the contest shall end in war, and the whole power, legislative and executive, be usurped by the strongest.

The judicial power, in such case, could not mediate, or hold the balance between the two contending powers, because the legislative would undermine it. And this shows the necessity too, of giving the executive power a negative upon the legislative, otherwise this will be continually encroaching upon that. *cf. Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring):

If, then, a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.

102. This is true even in the handful of states where there is no supermajority requirement for overcoming the governor's veto: The legislature must still pass the bill *again* over the popularly-elected executive's veto.

103. *See* THE BOOK OF THE STATES, *supra* note 97, at 71 tbl.3.16.

104. *See* GROSE ET AL., *supra* note 77, at 7–9.

worse: minoritarian legislatures strongly correlate with a partisan split between the legislature and the executive.¹⁰⁵ Badly gerrymandered Wisconsin and Kentucky—the same two states highlighted in the preceding paragraph for their disproportional outcomes in state legislative seats in favor of Republicans—both have Democratic governors. In such circumstances, a weakened supermajority requirement for the legislature to overcome the governor’s veto is probably the mildest form of democratic backsliding.

There are more extreme options, too. After all, the bills that a state legislature can pass over a governor’s veto need not concern only matters of public policy, but also relate to the powers of the governor and other popularly elected officials. In our era of political polarization and hyper-partisanship,¹⁰⁶ there may even be strong incentives for the entrenched party to take more extreme measures where statewide-elected officials are part of the other political party.¹⁰⁷ After the 2016 election of the Democratic candidate in the North Carolina race for governor, the Republican-dominated state legislature worked with the outgoing Republican governor to pass several bills stripping power away from the governorship before the incoming Democrat could take office.¹⁰⁸ Scholars have described this as

105. See Seifter, *supra* note 73, at 1766.

106. See Drew DeSilver, *The Polarization in Today’s Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades> [<https://perma.cc/TUX8-NXAW>] (“[O]n average, Democrats and Republicans are farther apart ideologically today than at any time in the past 50 years.”); Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 18, 2022), <https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190> [<https://perma.cc/573G-RMY3>] (“[T]he United States is the only advanced Western democracy to have faced such intense polarization for such an extended period. The United States is in uncharted and very dangerous territory.”); Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization* 11 (Nat’l Bur. of Econ. Rsch., Working Paper No. 26669, 2021), https://www.nber.org/system/files/working_papers/w26669/w26669.pdf [<https://perma.cc/5QUN-8ZY6>] (“[T]he U.S. experienced the most rapid growth in affective polarization over this period among the twelve OECD countries we consider . . .”); Yascha Mounk, *The Doom Spiral of Pernicious Polarization*, THE ATLANTIC (May 21, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/us-democrat-republican-partisan-polarization/629925> [<https://perma.cc/VYM7-AXJ4>].

107. See MAXWELL A. CAMERON, *POLITICAL INSTITUTIONS AND PRACTICAL WISDOM: BETWEEN RULES AND PRACTICE* 121–40 (2018) (observing that excessive political polarization can weaken democracy by making impossible the sort of deliberation required for compromise in legislative bodies); YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* 295–310 (2018) (observing that “elite polarization is a reality” even if “there is less consensus about whether the electorate is as highly polarized, or has been polarizing at all”).

108. See Marti Maguire, *North Carolina Republicans Try to Strip Powers from Incoming Democratic Governor*, REUTERS (Dec. 15, 2016, 11:20 AM), <https://www.reuters.com/article/us-north-carolina-politics/north-carolina-republicans-try-to-strip-powers-from-incoming-democratic-governor-idUSKBN1442BA> [<https://perma.cc/TRN8-BJF6>] (“North Carolina’s Republican-dominated legislature is moving to strip powers from the state’s incoming governor, Democrat Roy Cooper, three weeks before he is to succeed a Republican in the executive mansion.”); Allison Thoet, *What North Carolina’s Power-Stripping Laws Mean for New Gov. Roy Cooper*, PBS NEWS HOUR (Jan. 3, 2017), <https://www.pbs.org/newshour/politics/north-carolinas-power-stripping-laws-mean-new-gov-roy-cooper> [<https://perma.cc/K6CZ-RKG9>]. North Carolina has “become a playbook for [Republican legislatures] across the country” facing incoming Democratic governors, including in recent years those

a “lame-duck power grab.”¹⁰⁹ But with veto-proof legislative supermajorities, a legislatively entrenched majority party need not limit such power-stripping to occasions when it retains the governorship during a lame-duck session. Republicans lost their legislative supermajority in North Carolina following the 2018 midterms. But after State Representative Tricia Cotham, who was elected as a Democrat in 2022, switched parties in April of 2023, Republicans regained a supermajority in the North Carolina state legislature—meaning that they could “go back to obstructing [Democratic Governor Roy] Cooper’s priorities” at any time, should they so desire.¹¹⁰

And, of course, a gerrymandered supermajority also makes it easier for the legislature to impeach and remove a governor, as well as other state executive and judicial officers, from office.¹¹¹ This is so even though a governor, or other statewide elected officials, may have won a higher percentage of the popular vote than the party that won a legislative supermajority in the last election. A popular electoral majority might ask: Why even bother voting for governor under these circumstances?¹¹² For certain offices, state law may provide an answer by designating acting officials where the person elected has been removed from office.¹¹³ Thus, if the Republican-supermajority statehouse in Wisconsin impeached and convicted Governor Evers on party lines,¹¹⁴ the Democratic lieutenant governor would take his place.¹¹⁵ Although the governorship is the office that probably has the greatest protection in this regard under state law, it is worth recalling that,

in Wisconsin and Michigan. See Tara Golshan, *North Carolina Wrote the Playbook Wisconsin and Michigan are Using to Undermine Democracy*, Vox (Dec. 5, 2018, 1:10 PM), <https://www.vox.com/policy-and-politics/2018/12/5/18125544/north-carolina-power-grab-wisconsin-michigan-lame-duck> [<https://perma.cc/XTR7-8865>].

109. Seifter, *supra* note 57, at 336, 348; Shapiro, *supra* note 50, at 219 (discussing how such “recent post-election conduct of legislators in heavily gerrymandered states” reflects the “antidemocratic consequences of extreme partisan gerrymandering”).

110. Ellen Ioanes, *A North Carolina Democrat Left the Party—and Shifted the Balance of Power*, Vox (Apr. 9, 2023, 4:45 PM), <https://www.vox.com/2023/4/9/23674306/north-carolina-tricia-cotham-republican-party-switch> [<https://perma.cc/V7S9-99YX>]. The week before Representative Cotham switched parties, Republicans were able to overcome Governor Cooper’s veto on a bill relating to handgun pistol permits because of her and several other Democrats’ absence. See “*Still the Same Person*”: *Tricia Cotham Avoids Policy Specifics in Announcing Flip from Dems to GOP*, ABC 11 (Apr. 5, 2023), <https://abc11.com/tricia-cotham-north-carolina-nc-house-rep/13086628> [<https://perma.cc/P7T4-X3ZP>]; *Senate Bill 41/SL*, N.C. GEN. ASSEMBLY, <https://ncleg.gov/BillLookup/2023/S41> [<https://perma.cc/UUK9-CZV6>].

111. See THE BOOK OF THE STATES, *supra* note 97, at 122 tbl.4.8.

112. One poll prior to the 2021 redistricting cycle already found that one of the most common reasons that many Americans do not consistently vote is that they believe “no matter who wins, nothing will change for people like me,” with roughly twenty-five percent of non-voters believing “the system is too broken to be fixed by voting.” See *Barriers to Voting Exist for All Types of Voters*, Ipsos (Oct. 26, 2020), <https://www.ipsos.com/en-us/news-polls/538-non-voter-poll-2020> [<https://perma.cc/3E6W-XZUV>].

113. See THE BOOK OF THE STATES, *supra* note 97, at 122 tbl.4.8.

114. Sam Levine, *Wisconsin Senate Supermajority Win Gives Republicans Impeachment Power*, THE GUARDIAN (Apr. 5, 2023), <https://www.theguardian.com/us-news/2023/apr/05/wisconsin-senate-supermajority-impeachment-power> [<https://perma.cc/S4J9-TCE7>] (noting Senate supermajority gives Republicans power to “impeach [and convict] statewide officials, including the state’s Democratic governor and potentially state supreme court justices” on a party-line basis).

115. See THE BOOK OF THE STATES, *supra* note 97, at 122 tbl.4.8 (specifying lieutenant governor becomes governor in Wisconsin if governor is impeached).

where the state law specifying acting officials is statutory rather than constitutional, these protections may also be unilaterally negated by a manufactured legislative supermajority.

Even under current state law, the safeguards that protect the public against losing some officials without an immediate replacement do not extend to all offices—including, most notably, state high court judges. Judge Janet Protasiewicz’s election to the Wisconsin Supreme Court, the product of one of the most hotly contested and expensive judicial elections in U.S. history,¹¹⁶ altered the court’s partisan balance for the first time in fifteen years.¹¹⁷ Republicans will not have the opportunity to regain a majority on the court until 2025.¹¹⁸ But with the power of impeachment at their fingertips—and their gerrymandered decennial electoral map at risk¹¹⁹—will they be willing to wait that long? In answering that question, it is worth recalling that the partisan composition of the Wisconsin Supreme Court could be leveled out by impeaching a *single* Democratic justice. Assuming party-line votes from the bench on the issues which featured prominently in the recent judicial election,¹²⁰ the legislature could thus essentially handicap judicial review of its most contested legislation with only a bare majority (or even, perhaps, a minority) of the popular vote.¹²¹

Disproportional outcomes in legislative seats also undercut democracy directly by undercutting direct democracy.¹²² Fourteen states provide for

116. See Scott Bauer, *Spending in Wisconsin Supreme Court Race Tops \$42 Million*, AP (Apr. 3, 2023, 12:19 PM), <https://apnews.com/article/wisconsin-supreme-court-abortion-spending-82a3481a75665110e6d4b3d503ee2a24> [<https://perma.cc/2VWK-UPPW>] (spending by both candidates was nearly triple the previous record for a court race).

117. See Shawn Johnson, *Janet Protasiewicz Takes High-Stakes Supreme Court Election, Flipping Wisconsin Court’s Balance of Power*, WISC. PUB. RADIO (Apr. 4, 2023, 10:25 PM), <https://www.wpr.org/wisconsin-supreme-court-election-results-janet-protasiewicz-wins> [<https://perma.cc/F6WV-QU9Z>].

118. See *id.*

119. See Bridgit Bowden, *What the Wisconsin Supreme Court Race Could Mean for the State’s Republican-Drawn Redistricting Maps*, WISC. PUB. RADIO (Mar. 21, 2023, 5:45 AM), <https://www.wpr.org/wisconsin-supreme-court-april-race-state-legislature-redistricting-maps> [<https://perma.cc/R4RG-NQJF>] (“[The Wisconsin Supreme Court] could also consider a challenge to the state’s political district maps, which have been described as among the most gerrymandered in the country.”); Megan O’Matz, *Wisconsin’s Republicans Went to Extremes in Gerrymandering. Now They’re Scrambling to Protect That Power.*, PROPUBLICA (Sept. 23, 2023), <https://www.propublica.org/article/wisconsin-gop-gerrymander-elections-janet-protasiewicz> [<https://perma.cc/DWF5-3PUM>]; *Fighting Partisan Gerrymandering in Wisconsin (Clarke v. Wisconsin Elections Commission)*, CAMPAIGN LEG. CTR. (Aug. 2, 2023), <https://campaignlegal.org/cases-actions/fighting-partisan-gerrymandering-wisconsin-clarke-v-wisconsin-elections-commission> [<https://perma.cc/NP3H-PF9Z>].

120. See Bowden, *supra* note 119 (“[T]he new court will be asked to weigh in on any number of pivotal issues, including, most prominently, whether to strike down the state’s abortion ban.”).

121. Indeed, since the initial drafting of this Article, Republican state legislators have threatened to impeach Justice Protasiewicz. See O’Matz, *supra* note 119. Under Wisconsin law, if the state assembly were to impeach her, but the state senate did not take up the matter for a vote, Justice Protasiewicz would be “sidelined, unable to carry out her duties until acquitted.” *Id.*

122. For a discussion of how the Federal Constitution can be understood to restrict certain experiments in state-level direct democracy, see Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582 (2014). Without drawing a categorical line in the sand, Professor Smith has raised concerns that popular initiatives may be

direct ballot initiatives,¹²³ which allow members of the *demos* to place proposed state legislation on the ballot for a popular vote after collecting a required number of signatures.¹²⁴ Twenty-two states also provide for “citizen petition” referenda, which allows the *demos* to request a vote on legislation being considered by the legislature after obtaining a required number of signatures.¹²⁵ Both of these mechanisms allow popular majority opinion to play a more direct role in lawmaking. Indeed, the Supreme Court has explained that both initiatives and referenda serve, in essence, a course-correcting function for legislatures: “the initiative allows the electorate to adopt positive legislation, [and] the referendum serves as a negative check ‘The initiative [thus] corrects sins of omission’ by representative bodies, while the ‘referendum corrects sins of commission.’”¹²⁶

The overwhelming majority of these mechanisms were adopted during the Progressive Era of the early twentieth century.¹²⁷ Like the adoption of popular statewide elections for governor during that time,¹²⁸ these mechanisms also evidence longstanding concerns with unrepresentative legislatures.¹²⁹ All but four states with ballot initiatives adopted them more than

unconstitutional under both the Due Process Clause and the Guarantee Clause. In his view, because the historical record “suggest[s] that majoritarian deliberative bodies were viewed as an important component of republican government,” no state government “may deprive a person of life, liberty, or property through a law enacted in derogation of [the Guarantee Clause.]” *Id.* at 645, 649. Others drawing from the same historical record have concluded otherwise. See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“Republican government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms.”). For reasons explained below in Part II.C, our analysis differs from that of Professors Smith and Amar in that we do not focus our understanding of the Guarantee Clause, U.S. CONST. art. IV, § 4, on a Founding Era “view of republican form [that still] reverberated in the decades leading up to Reconstruction,” Smith, *supra*, at 644, but rather on the view of the Reconstruction Congress. In any event, current constitutional jurisprudence supports these forms of direct democracy. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808–09 (2015) (“[W]e see no constitutional barrier to a State’s empowerment of its people by embracing [the initiative] form of lawmaking.”); see also *id.* at 808 (recognizing different contextual meanings of the word “legislature” in the Federal Constitution); *id.* at 813–14 (finding contemporaneous definitions of “legislature” sufficiently capacious to include popular legislative initiative); *Eastlake v. Forest City Enters, Inc.*, 426 U.S. 668, 672 (1976) (“In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”).

123. See THE BOOK OF THE STATES, *supra* note 97, at 240 tbl.6.9. Two of those states use both direct and indirect initiatives, whereby the legislature must decide to place the measure on the ballot after its petition has received a sufficient number of signatures, and six other States use only indirect initiatives. *Id.* We do not include ballot initiatives for constitutional amendments. See *infra* Part IV.

124. See THE BOOK OF THE STATES, *supra* note 97, at 252–53.

125. See *id.* at 240–41, 258–61.

126. *Arizona State Legislature*, 576 U.S. at 794 (alteration in original) (internal citations omitted).

127. See *Initiative and Referendum Processes*, NAT’L CONF. OF STATE & LOCAL GOV’TS (Jan. 4, 2022), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/AT9V-HZ2F>]; see also *Arizona State Legislature*, 576 U.S. at 794.

128. See generally Seifter, *supra* note 57.

129. See Elaine S. Povich, *Lawmakers Strike Back Against Voter-Approved Ballot Measures*, STATELINE (July 28, 2017, 12:00 AM), <https://stateline.org/2017/07/28/>

a century ago, and the same is true for referenda for all but two states.¹³⁰ Although these mechanisms for popular participation in the lawmaking process are nothing new, their contemporary use and structure help illuminate recent democratic backsliding in many states.

“I do not believe that the founding fathers of the [initiative] process [in North Dakota] could have ever imagined that the Legislature would simply disregard a majority vote of the general election.”¹³¹ So said one North Dakota state senator after the legislature repealed a voter-approved ballot initiative that would have implemented a public campaign financing program, capped political donations, and created a state campaign ethics commission.¹³² Yet that is precisely what the North Dakota legislature did. And that was not an isolated incident; several other legislatures around the country have also recently repealed or failed to implement policies approved by a majority of voters in the state.¹³³ The mismatch between popular support for the initiative and popular support for the party entrenched in the legislature have many potential explanations, but as a metric it demonstrates not only growing non-responsiveness (where the legislature repeals an earlier voter-approved initiative) but growing nonrepresentativeness in our purportedly representative lawmaking bodies—in a word, backsliding.¹³⁴

At a time when popular majorities in many states see the opportunity to instruct their legislatures on public preferences for specific issues,¹³⁵ the changes to the initiative process currently proposed by many state legislators also reflect another form of intentional backsliding: making it harder to get initiatives on the ballot, and to ultimately approve them once they are on the ballot.¹³⁶ There has been a dramatic rise in the number of bills

lawmakers-strike-back-against-voter-approved-ballot-measures [https://perma.cc/YY5X-2B9L] (“The intent of progressives in initiating initiatives and referenda [historically] was to circumvent legislatures that were not doing the people’s will . . .” (alteration in original)).

130. *See id.*

131. *Id.*

132. *See id.*

133. *See id.* (noting legislative overrides of voter-approved initiatives in South Dakota, Maine, and Florida); Chris Melody Fields Figueredo, *Why Some States are Moving to Restrict Ballot Initiatives*, DEMOCRACY DOCKET (Mar. 30, 2022), <https://www.democracydocket.com/opinion/why-some-states-are-moving-to-restrict-ballot-initiatives> [https://perma.cc/EMF3-T7WY] (noting legislative overrides in Florida and Missouri); Seifter, *supra* note 57, at 314 (discussing legislative override in Missouri).

134. *See* Emma Olson Sharkey & Zachary P. Morrison, *Republicans Aim to Weaken Ballot Measure Process After Progressive Victories*, SALON (Mar. 15, 2023, 5:32 AM), <https://www.salon.com/2023/03/15/aim-to-weaken-ballot-measure-process-after-progressive-victories> [https://perma.cc/R7YV-M5F5].

135. *See, e.g.*, David Leonhardt & Ian Prasad Philbrick, *A Winning Streak*, N.Y. TIMES (Aug. 9, 2023), <https://www.nytimes.com/2023/08/09/briefing/ohio-election-abortion-rights.html> [https://perma.cc/S86Z-3XHM] (“At least for now, ballot initiatives—as opposed to ousting otherwise popular Republican politicians—appear to be one of the few ways for advocates to expand abortion access in conservative states.”).

136. Sharkey & Morrison, *supra* note 134:

In Missouri, House Republicans passed a bill that would require 60% support to approve voter-initiated constitutional amendments, rather than a simple majority. Florida Republicans have introduced a bill to further raise the threshold to pass constitutional amendments from 60% to nearly 67%. And Ohio Republicans seek to not only require a 60% threshold to pass constitutional

introduced in state legislatures over the past several years that would make it harder to petition for, and pass, a ballot initiative.¹³⁷ The message from these legislatures is clear: we can approve legislation with less than a majority of popular support, but you, the *demos*, must meet an actual supermajority requirement.¹³⁸

* * *

Although democratic backsliding is perhaps most visible in these regards, democracy does not begin with the vote. As we explain in the following section, it also extends to broader activity in society that happens before district lines are drawn and ballots are cast. Regrettably, in that realm, too, democracy is struggling.

B. INFORMAL FAILURES

Democracy is more than a set of electoral structures that stop at the state line, and the practice of democratic self-government depends on what happens long before direct participation in the formal aspects of the political process—as through petitioning the government or voting. This principle has informed Founding Era thought,¹³⁹ Supreme Court decisions,¹⁴⁰ and contemporary political philosophy. One such contemporary philosopher, Robert Dahl, has succinctly explained that there are several democratic criteria that precede voting equality: “equal and effective opportunities

amendments, up from 50%—but also require petition signatures from all 88 Ohio counties instead of the current requirement of 44 counties.

See also Figueredo, *supra* note 133 (“This is happening all across the United States.”); *Lawmakers Look to Restrict Ballot Initiative Process in Florida, Missouri and Ohio*, DEMOCRACY DOCKET (Jan. 13, 2023), <https://www.democracydocket.com/news-alerts/lawmakers-look-to-restrict-ballot-initiative-process-in-florida-missouri-and-ohio> [<https://perma.cc/W6BU-9ZTP>]; Monica Potts, *Why Republican Voters Support Ballot Initiatives Their Red States Do Not*, FIVETHIRTYEIGHT (Aug. 30, 2022, 6:00 AM), <https://fivethirtyeight.com/features/why-republican-voters-support-ballot-initiatives-their-red-states-do-not> [<https://perma.cc/T9BR-6PCU>]; Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html> [<https://perma.cc/ULC2-JKJ2>]; Abigail Tracy, “They’re Afraid of the Majority”: *Republicans are Pushing a Quiet Assault on Direct Democracy*, VANITY FAIR (May 19, 2023), <https://www.vanityfair.com/news/2023/05/abortion-bans-ballot-initiatives> [<https://perma.cc/9RQW-WV8G>]; Max Burns, *Missouri GOP’s Dark Vision for the Future Puts Democracy on the Back-Burner*, MSNBC (May 2, 2023, 1:03 PM), <https://www.msnbc.com/opinion/msnbc-opinion/missouri-republicans-vs-progressive-ballot-initiatives-rena82404> [<https://perma.cc/28NJ-ECJW>]; Ed Kilgore, *Republicans Race to Block Access to Ballots for Abortion-Rights Initiatives*, INTELLIGENCER (Mar. 20, 2023), <https://nymag.com/intelligencer/2023/03/republicans-race-to-block-abortion-rights-ballot-measures.html> [<https://perma.cc/SB4B-2BGB>]; Alice Miranda Ollstein & Megan Messerly, *Abortion on the Ballot? Not if These Republican Lawmakers Can Help It*, POLITICO (Mar. 19, 2023), <https://www.politico.com/news/2023/03/19/abortion-on-the-ballot-not-if-these-republican-lawmakers-can-help-it-00087688> [<https://perma.cc/K22P-DBGH>].

137. Figueredo, *supra* note 133 (noting a 500% increase in the introduction of such bills between the 2017 and 2021 legislative sessions).

138. See *id.* (making similar observation).

139. See *infra* Part II.B.2 (discussing James Madison’s views on “public discourse” as a core function of democratic self-government).

140. See *infra* Part III.B (discussing cases recognizing that certain free speech and free press rights are critical to a functioning democracy).

[for members of the *demos*] for making their views known to other members” (“effective participation”); “adequate opportunities to learn about [public] matters . . . by inquiry, discussion, and deliberation” (“enlightened understanding”); and that members of the *demos* “should have the full rights” implied by the other criteria (“inclusion”).¹⁴¹

Because we intend here to identify failures in democratic practice that are preconditions to meaningful participation in the formal political process, we draw from Dahl’s framework, but do not apply it directly. Rather, we seek to illuminate the “levels” of democratic practice that are often hidden underneath the veneer of the formal political process—and which, to some extent, also obscure each other through overlap. Whereas Dahl considers the exchange of viewpoints between members of the *demos* in two regards—being able to effectively convey one’s viewpoint to others and to effectively understand others’ viewpoints in turn—we assess both jointly at the level of public discourse between members of the *demos* on a non-individual scale. Indeed, members’ receptivity to certain viewpoints conditions the opportunities other members have to effectively convey them. We also extricate access to information from Dahl’s notion of “enlightened understanding” as another level of democratic practice. After all, receptivity to certain viewpoints may not only be affected by public discourse itself, but by the information to which members of the *demos* have access prior to or while engaging in discourse. Finally, we expand on Dahl’s notion of inclusion by examining how civil status in the *demos* can both engender feelings of inclusion or exclusion, and effect inclusion or exclusion of different groups. Thus, we proceed in this part to identify democratic deficits at three levels: (1) public discourse; (2) access to (mis)information; and (3) inclusion in the *demos*.

Our observational framework, like Dahl’s conceptual framework, does not escape the issue of overlapping criteria (or levels) of democratic practice. Democracy, admittedly, is a messy and complicated affair. Indeed, although public discourse and access to information may be useful labels to help identify democratic deficits that carry more the flavor of one than the other, the line between the two is sufficiently blurry that we treat upon them jointly below.¹⁴² The work of the free press, for example, provides access to information on matters of public importance, and also injects viewpoints into public discourse. In similar fashion, state laws prohibiting social studies teachers from engaging in classroom discussions of the United States’s history of slavery and racism impact students’ access to that information and their ability to learn how to talk about those difficult and important topics with their classmates. The point is that we can perceive these failures at both levels, even when they stem from the same source, and our observational framework provides a lens designed to identify deficits wherever they occur.

141. See ROBERT A. DAHL, ON DEMOCRACY 37–39 (Ian Shapiro ed., 2020).

142. See *infra* Part II.B.1.

1. *Public Discourse and Access to Information*

The importance to our democracy of robust public discourse by a *demos* with relatively broad access to information on matters of public importance dates back to the Founding. James Madison considered public opinion to be “the essence of popular self-government.”¹⁴³ In his view, the quality of public opinion determined the nature of popular sovereignty.¹⁴⁴ And the quality of public opinion, in turn, was the product of a process of public discourse by the *demos*.

In the Madisonian mindset, “[a] robust public sphere was . . . necessary in order to make the *public mind* better informed (as well as the sovereign).”¹⁴⁵ This required public discourse between citizens, as well as information diffusion through a free press—not simply a high-level debate by a select few informed representatives. Indeed, Madison’s emphasis on the importance of a free press in our public discourse cannot otherwise be sensibly construed: the importance of a free press would be difficult to explain if members of Congress, with access to all public information, were the only parties that needed to be informed.¹⁴⁶ But Madison viewed elected representatives “solely as a medium for what really matter[ed] to [him]: effective public opinion.”¹⁴⁷

We generally agree with those scholars who conclude that Madison believed public opinion was effective where it furthered the pursuit of common goods.¹⁴⁸ Regardless of the philosophical lens one applies to that pursuit,¹⁴⁹ Madison’s public discursive project implies a certain *sine qua non*: discourse between groups and individuals must be such that they can convince each other to lend their support in *some* form of pursuing the common good or common goods.¹⁵⁰

Madison, of course, did not think that *effective* public discourse was inevitable. Much to the contrary, he was deeply preoccupied with the danger

143. ROBERT W. T. MARTIN, *GOVERNMENT BY DISSENT: PROTEST, RESISTANCE, AND RADICAL DEMOCRATIC THOUGHT IN THE EARLY AMERICAN REPUBLIC* 134 (2013); *see also id.* at 145 (recognizing Madison as the first to make public opinion “the core element of democratic theory”).

144. *See id.* at 130.

145. *Id.* at 135 (emphasis added).

146. *See id.* at 135–36.

147. *Id.* at 135.

148. *See, e.g.,* William W. Clohesy, *Democracy as Trust in Public Discourse*, F. ON PUB. POL’Y 1, 7 n.10 (2003); Colleen Sheehan, *The Politics of Public Opinion: James Madison’s “Notes on Government”*, 49 WM. & MARY Q. 609, 609 (1992).

149. Madison’s approach is equally intelligible under both the Lockean and Hobbesian traditions of political liberalism. In the former, the pursuit of common goods can be construed as an attempt to reach some sort of rational consensus on an ordered hierarchy of good; in the latter, it may be understood as a *modus vivendi* approach designed to maximize different groups’ abilities to each pursue their own version of the good life. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 118–19 (1971) (explaining ordered hierarchy approach); JOHN GRAY, *TWO FACES OF LIBERALISM* 27–28, 105 (2000) (explaining *modus vivendi* approach and distinction between political liberalism’s two philosophies).

150. *See* Alan Gibson, *Veneration and Vigilance: James Madison and Public Opinion, 1785–1800*, 67 REV. POL. 5, 24 (2005) (“[Madison] recognized the strategic importance of persuading ‘respectable names,’ ‘men of weight,’ and ‘the right sort’ of men who, in turn, would pull along the other enfranchised members of the community.”).

of factions.¹⁵¹ Madison understood factions as pernicious both because they have interests adverse to the public (common) good,¹⁵² and because they may often be motivated by a “common impulse of passion.”¹⁵³ These were salient concerns for Madison. In his *Vices of the Political System of the United States*, published one month before the start of the Constitutional Convention of 1787, Madison “lament[ed] that groups of ‘individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets.’”¹⁵⁴ Madison did not think disempowering a majority, in such circumstances, was feasible in republican governments.¹⁵⁵ Instead, he sought a structural solution: if individual’s consciences would “revolt” against factious majorities, then what was needed was an “opportunity for individual reflection before popular decision.”¹⁵⁶ His structural solution was representative government.¹⁵⁷

There is good reason to think that the promise of this “cooling” function of representative government has not materialized in practice.¹⁵⁸ Madison’s reliance on a cooling function presupposes that individuals would, in fact, have the conscience to vote contrary to their passions after a pause for reflection. His reliance on the cooling function also overlooks another factor critical to such decision-making: empathy. Indeed, Madison’s understanding that passions could impel voters to legislate against others in ways that they would not wish to be legislated against themselves, and his insistence that “conscience” could have them do otherwise, looks a lot like John Rawls’s “original position,” which asks how individuals would structure a rights-based society if they did not know the role that they would assume

151. See THE FEDERALIST No. 10 (James Madison).

152. See *id.* (defining faction, in part, as “a number of citizens . . . adversed to the rights of other citizens”).

153. *Id.*

154. MARTIN, *supra* note 143, at 129.

155. See *id.*

156. *Id.* at 129; see also *id.* at 130 (“[Madison] stress[ed] the need to temper the public mind so that it might be more reflective and thus more just.”).

157. *Id.* at 130. This is not the only structural feature of the federal government that has been described as having the function of cooling passions. George Washington (apocryphally) told Thomas Jefferson that the U.S. Senate performs a similar function. See TOM DASCHLE & CHARLES ROBBINS, THE U.S. SENATE: FUNDAMENTALS OF AMERICAN GOVERNMENT 32 (2013) (“[W]e pour legislation [from the House of Representatives] into the senatorial saucer to cool it.”).

158. See, e.g., Rosen, *supra* note 5; Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 937 (2016) (“[T]heories of Supreme Court decisionmaking that look to the people or elected officials to engage in constitutional deliberation must too be updated to take into account party polarization.”); Katie Woodruff & Sarah C.M. Roberts, “My Good Friends on the Other Side of the Aisle Aren’t Bothered by Those Facts”: U.S. State Legislators’ Use of Evidence in Making Policy on Abortion, 101 CONTRACEPTION 249, 249 (2019) (finding that factual evidence does not drive legislative decision-making on abortion policy); CAMERON, *supra* note 107. Of course, legislative debate conceptions of democracy are not mutually exclusive with popular sovereignty conceptions. See Tabatha Abu El-Haj, *How the Liberal First-Amendment Under-Protects Democracy*, 107 MINN. L. REV. 529, 530–31 (2022). The problem is simply that the legislative debate conception remains, at least today, almost entirely theoretical.

in it.¹⁵⁹ Madison seems to be suggesting that conscience could lead to the same result in real time. But, without a “veil of ignorance” that obscures how any given policy might impact the decision-maker,¹⁶⁰ we think conscience is unlikely to reach the sorts of results Madison hoped for absent empathy for those who would be affected.¹⁶¹

Recognizing the importance of empathy in Madison’s approach to public discourse also emphasizes that factious *discourse*—indeed, perhaps even more than factions, *per se*—strongly impacts democratic practice. Vitriolic political speech by “[m]en of factious tempers”¹⁶² reduces both empathy between diverse camps and opportunities to reclaim it—it directly reduces empathy in its target audience by demonizing or otherizing those who disagree, and erects high barriers to cultivating greater empathy for those who disagree by disincentivizing public discourse between camps. To the extent that camps are “factious” because they are adverse, Madison seemed to contemplate that they could reconsider their positions. But reconsideration or persuasion seems unworkable if those who disagree are unable to place themselves in each other’s shoes.

Thus, while we recognize that Madison was predominantly focused on interrogating possible federal structural solutions,¹⁶³ we think that his approach to public discourse makes clear that, since the Founding Era, our intellectual tradition has recognized public discourse—both the ideas expressed and the way in which they are communicated—as a core realm of democratic practice.¹⁶⁴

Public discourse also depends not just on how discourse occurs between individuals, but on the information individuals have which informs their discourse. As Madison long ago explained, “[a] popular Government, without population information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern

159. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* § 6 (Erin I. Kelly ed., 2001); see also JOHN RAWLS, *POLITICAL LIBERALISM* § 4 (1993); JOHN RAWLS, *A THEORY OF JUSTICE* §§ 3–4 (1971).

160. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 159, §§ 3–4.

161. Cf. Jennifer W. Reynolds, *Talking About Abortion (Listening Optional)*, 8 TEX. A&M L. REV. 141, 145 (2020) (“Without respect, it is difficult to reduce the tension between people in conflict and develop solutions that they would be willing to accept.”).

162. THE FEDERALIST NO. 10 (James Madison).

163. Madison was also deeply preoccupied during the Founding Era with perceive failures of state governments. Indeed, his *Vices of the Political System of the United States* treated broadly on the dangers of faction in state governments. See James Madison, *Vices of the Political System of the United States (1787)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-madison-vice-of-the-political-system-of-the-united-states-1787> [<https://perma.cc/6YE9-XY4X>] (“Injustice of the laws of the States.”).

164. REDISH, *supra* note 60, at 32:

One contemporary democratic theorist, Professor Robert Post, has gone so far as to conclude, the essence of democracy lies predominantly in the individual’s ability to participate in public discourse, rather than in exercise of the vote, which he considers “merely a mechanism for decision-making,” rather than the most basic exercise of democratic self-government, because it is this participation that allows the individual to recognize herself as self-governing or to attain a sense of “democratic legitimacy.”

ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹⁶⁵

Our focus on Founding Era thought in discussing public discourse by a *demos* with access to information on matters of public importance should not suggest that we think its dimensions are temporally locked in the 1780s. The importance of an informed citizenry remains an idea often invoked.¹⁶⁶ And the philosophy of public discourse, and its roll in our democracy, continues to evolve.¹⁶⁷ What we do seek to emphasize is that public discourse by a *demos* with robust access to information has long been understood not just to impact, but to be a core part of, democratic practice—not just by contemporary political philosophers like Dahl.

This is also the realm of democratic practice where breakdowns and backsliding have been most visible in recent years. Political polarization has cleaved the United States into two camps with distinct partisan labels: Democrats and Republicans.¹⁶⁸ This “us versus them” mindset is widely observable, “from the rise of highly partisan media to the decline in Americans’ willingness to marry someone from the opposing political party.”¹⁶⁹ This stark divide has, unsurprisingly, led to a “breakdown in civility” between the two camps.¹⁷⁰

165. 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910); *see also, e.g.*, Franklin Delano Roosevelt, *Combatting the 1937–1938 Recession* (Apr. 14, 1938), in FDR’s FIRESIDE CHATS 111, 118 (Russell D. Buhite & David W. Levy eds., 1992) (“Therefore, the only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over its government.”). Robert Dahl attributes the origin of this concept to the Athenian leader Pericles, who stated in 431 B.C.E. that “[o]ur ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; . . . and instead of looking on discussion as a stumbling block in the way of action, we think it an indispensable preliminary to any wise action at all.” DAHL, *supra* note 141, at 39 (omission in original).

166. *See, e.g.*, DAHL, *supra* note 141, at 37, 39; Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J. 111, 111 (2010) (“Political scientists concur that a knowledgeable citizenry is necessary for effective and gratifying democratic governance.”); AL GORE, *THE ASSAULT ON REASON: HOW THE POLITICS OF BLIND FAITH SUBVERT WISE DECISION-MAKING* 16 (2006) (“The ‘well-informed citizenry’ is in danger of becoming the ‘well-amused audience.’”).

167. *See, e.g.*, REDISH, *supra* note 60, at 29–74 (comparing and critiquing Alexander Meiklejohn’s and Robert Post’s democratic theories of free speech).

168. *See Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/SGE8-3ZAD>].

169. Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 18, 2022), <https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190> [<https://perma.cc/6YRJ-XFHJ>]; *see also* Wendy Wang, *Marriages Between Democrats and Republicans are Extremely Rare*, INST. FAM. STUD. (Nov. 3, 2020), <https://ifstudies.org/blog/marriages-between-democrats-and-republicans-are-extremely-rare> [<https://perma.cc/L8SP-3R5X>] (share of “politically mixed” married couples fell from 30% to 21% and share of Democrat-Republican couples fell from 9% to 3.6% between 2016 and 2020).

170. *See* Andrew Downs, *Aiming for Deliberation, Civility at the End of the Session*, IND. CAP. CHRON. (Mar. 22, 2023, 7:00 AM), <https://indianacapitalchronicle.com/2023/03/22/civility-at-the-end-of-the-session> [<https://perma.cc/A9KJ-B6HZ>] (based on observations of debates in the Indiana General Assembly).

This breakdown coincides with sharp rises in hate speech¹⁷¹ (and fear speech),¹⁷² especially in online fora;¹⁷³ hate crimes;¹⁷⁴ and political violence.¹⁷⁵ Although political polarization has occurred on both the left and the right, it has been more pronounced on the right,¹⁷⁶ and the negative effects stemming from it largely materialize from that end of the political spectrum.¹⁷⁷ Those effects are mirrored, and enhanced, by state policies spearheaded by Republican legislatures (including those with manufactured majorities).¹⁷⁸

171. We do not refer to “hate speech” as a legal category, but rather as expressive conduct that “attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are.” *What Is Hate Speech?*, U.N., <https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech> [https://perma.cc/EXG8-H885] (emphasis omitted). Although conduct falling within that definition is protected by the First Amendment in many instances, it nonetheless has negative implications for public discourse.

172. See Punyajoy Saha, Kiran Garimella, Narla Komal Kalyan & Animesh Mukherjee, *On the Rise of Fear Speech in Online Social Media*, 120 PROCS. NAT’L ACAD. SCI. 1, 1 (2023) (describing “fear speech” as a new and highly effective variant of hate speech designed to evade content moderation controls for hate speech).

173. See, e.g., Yonatan Lupu, Rocjard Sear, Nicolas Velasquez, Rhys Leahy, Nicholas Restrepo, Beth Goldberg & Neil Johnson, *Offline Events and Online Hate*, 18 PLoS ONE 1, 4 (2023) (67% increase in social media posts containing hate speech between June 2019 and December 2020); *Report: Online Hate Increasing Against Minorities, Says Expert*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Mar. 23, 2021), <https://www.ohchr.org/en/stories/2021/03/report-online-hate-increasing-against-minorities-says-expert> [https://perma.cc/HT9V-GACS].

174. See *FBI Releases Supplement to the 2021 Hate Crime Statistics*, U.S. DEP’T OF JUST. (Mar. 28, 2023), <https://www.justice.gov/crs/highlights/2021-hate-crime-statistics> [https://perma.cc/8J9G-DV5H] (“Nationally, reported hate crime incidents increased 11.6%—from 8,210 in 2020 to 9,065 in 2021. This data reflects the reports of 14,859 law enforcement agencies representing 91.1% of the U.S. population.”).

175. See, e.g., Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160–61 (2021); Rachel Kleinfeld, *The Rise in Political Violence in the United States and Damage to Our Democracy*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 31, 2022), <https://www.justsecurity.org/wp-content/uploads/2023/03/Rachel-Kleinfeld-Expert-Statement.pdf> [https://perma.cc/HU8B-ATYK] (testimony before the Select Committee to Investigate the January 6th Attack on the United States Capitol); Isabel Fattal, *Is Political Violence on the Rise in America?*, THE ATLANTIC (Jan. 19, 2023), <https://www.theatlantic.com/newsletters/archive/2023/01/political-violence-america-new-mexico-shootings/672787> [https://perma.cc/C4YY-TZGT].

176. See Shapiro, *supra* note 50, at 216 n.193 (“There is evidence that our current polarization is asymmetric in that Republicans have moved further to the right than Democrats have moved to the left and that, along with that shift, Republicans are less willing to compromise than are Democrats.”).

177. See *id.* at 239, 239 n.332 (“[A]s democracy scholars have demonstrated, the current threats to our democratic republic are disproportionately emerging from the political right.”); Susan Benesch, *Incendiary Speech that Spurs Violence is Rising in U.S., but Tools Exist to Shrink It*, JUST SEC. (Nov. 21, 2022), <https://www.justsecurity.org/84209/incendiary-speech-that-spurs-violence-is-rising-in-us-but-tools-exist-to-shrink-it> [https://perma.cc/LF9T-ZRWP] (observing that “incendiary speech that spurs violence” has “recently ballooned in American discourse, . . . overwhelmingly, on the right”); Aaron Belkin, *Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball*, 2019 PEPP. L. REV. 19, 25, 26 n.19 (2019) (observing that even “mild-mannered” Republicans “tend[] to govern as radicals”).

178. See Seifter, *supra* note 57, at 304; Shapiro, *supra* note 50, at 234 (“[S]cholars describe a Republican party, many of whose members are set on entrenching power in a [W]hite minority, which . . . would be ‘profoundly antidemocratic.’” (quoting DANIEL ZIBLAT & STEPHEN LEVITSKY, *HOW DEMOCRACIES DIE* 207 (2018))); Klarman, *supra* note 61, at 45–66 (describing

As one example, consider the rise of vehicle-ramming attacks against protestors in recent years. The most high-profile case occurred in 2017, when a neo-Nazi from Ohio deliberately drove his truck into a crowd counterprotesting the “United the Right” rally in Charlottesville, Virginia, killing one woman and injuring dozens.¹⁷⁹ But this attack was far from an isolated event. Between May and October 2020 alone, there were over 100 incidents of vehicle-ramming attacks, half of which were deliberate.¹⁸⁰ One expert who studies the troubling rise in attacks has observed that “[t]he online environment that encourages far-right ideology also encourages this tactic,” and that “the far-right deploys memes that normalize the tactic by arguing protestors in the street are giving up their rights.”¹⁸¹ The man behind the vehicle-ramming attack in Charlottesville shared two such memes on social media in the two months before the attack.¹⁸² But the online far-right is not alone in supporting radical violence against protestors—Republican state legislatures are also placing their stamp of approval on these attacks. The high-profile murder in Charlottesville may have depressed Republican appetites for adopting driver-immunity legislation introduced after the Black Lives Matter protests of 2015,¹⁸³ but that hesitation was short-lived. Since the protests over George Floyd’s murder in 2020, several Republican-dominated states have adopted legislation conferring broad civil—and, in one state, even *criminal*—immunity for vehicle-ramming attacks, and more are considering them.¹⁸⁴ Iowa enacted one such bill in 2021; in 2022, a driver plowed his truck into a peaceful protest against the *Dobbs* decision.¹⁸⁵ Although the Iowa bill may not actually shield that driver from liability, “the bill’s detractors . . . argued that it could send a dangerous message

Republican party’s “assault on democracy”); Bertrall L. Ross II, *Partisan Gerrymandering as a Threat to Multiracial Democracy*, 50 SW. L. REV. 509, 510–11 (2022) (arguing that “the Republican Party has embraced whiteness as central to its identity” and that “the real threat to democracy arises from redistricting in Republican-controlled states”).

179. See Alex Pareene, *The Right to Crash Cars into People*, NEW REPUBLIC (Apr. 24, 2021), <https://newrepublic.com/article/162163/republicans-anti-riot-laws-cars> [https://perma.cc/AJB4-UQG7].

180. Tess Owen, *Florida “Anti-Rioting” Law Will Make It Much Easier to Run Over Protesters with Cars*, VICE (Apr. 19, 2021, 12:17 PM), <https://www.vice.com/en/article/88n95a/florida-anti-rioting-law-will-make-it-much-easier-to-run-over-protesters-with-cars> [https://perma.cc/D7VN-XT6X].

181. Ari Weil, *Protesters Hit by Cars Recently Highlight a Dangerous Far-Right Trend in America*, NBC NEWS (July 12, 2020, 7:03 AM), <https://www.nbcnews.com/think/opinion/seattle-protester-hit-car-latest-casualty-dangerous-far-right-trend-ncna1233525> [https://perma.cc/JE3S-NUKE].

182. Cameron Peters, *State-Level Republicans are Making It Easier to Run Over Protestors*, VOX (Apr. 25, 2021), <https://www.vox.com/2021/4/25/22367019/gop-laws-oklahoma-iowa-florida-floyd-blm-protests-police> [https://perma.cc/3PBL-HKZS].

183. See *U.S. Current Trend: Bills Provide Immunity to Drivers Who Hit Protestors*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/post/analysis/bills-provide-immunity-to-drivers-who-hit-protestors> [https://perma.cc/5DP7-YY5S]; Weil, *supra* note 181.

184. *U.S. Current Trend*, *supra* note 183 (“Three driver liability bills have been enacted in Oklahoma, Iowa, and Florida, and eight are still pending either as stand-alone bills or as part of larger legislation addressing ‘rioting’ or obstructing traffic.”).

185. See Noah Y. Kim, *Driver Rams Truck into Abortion Rights Protestors in Iowa*, MOTHER JONES (June 25, 2022), <https://www.motherjones.com/politics/2022/06/truck-collision-abortion-roe-cedar-rapids-womens-rights-protestors-iowa> [https://perma.cc/GW26-XRLV].

to nefarious actors,” as well as have a “chilling effect” on protestors’ free speech.¹⁸⁶ Although driver-immunity laws are distinctive in that they represent state sanction of a form of violent extremism, they are also entirely compatible with other efforts by Republican state legislatures to target protest and dissent.¹⁸⁷

Other examples of similar dynamics abound. Consider the rise of online hate speech,¹⁸⁸ which also appears disproportionately from the right.¹⁸⁹ In recent years, both Florida and Texas have enacted laws curbing private online companies’ ability to moderate content¹⁹⁰—essentially providing public sanction for the sort of hate-filled online environment ushered in at Twitter under Elon Musk.¹⁹¹ Or consider recent efforts to politicize social studies, from primary through university education, by removing facts about the role and extent of racism in American history and erasing literature and history relating to entire communities (such as the LGBTQ

186. *Id.*

187. See, e.g., Giulia Heyward, *Democrats Fear GOP Targeting Racial Justice Protests*, POLITICO (Apr. 21, 2021, 7:20 PM), <https://www.politico.com/states/florida/story/2021/04/21/democrats-fear-gop-targeting-racial-justice-protests-1376910> [<https://perma.cc/Q8SA-SWJK>]; Peters, *supra* note 182 (“The Republican Party is doing its best to criminalize protest.”); Nitish Pahwa, *Why Republicans are Passing Laws Protecting Drivers Who Hit Protesters*, SLATE (Apr. 25, 2021, 2:33 PM), <https://slate.com/business/2021/04/drivers-hit-protesters-laws-florida-oklahoma-republicans.html> [<https://perma.cc/L2WE-TNUD>] (“Since 2016, hundreds of state laws cracking down on various forms of dissent have been proposed, and 45 states have tabled these proposals; 68 of these bills are currently pending. This is the largest number of concurrently considered anti-protest laws at any point in American history.”).

188. See *supra* note 171 and accompanying text.

189. See, e.g., Rashawn Ray & Joy Anyanwu, *Why Is Elon Musk’s Twitter Takeover Increasing Hate Speech?*, BROOKINGS INST. (Nov. 23, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/11/23/why-is-elon-musks-twitter-takeover-increasing-hate-speech> [<https://perma.cc/5B88-7NPJ>];

Twitter saw a nearly 500% increase in use of the N-word in the 12-hour window immediately following the shift of ownership to Musk. Within the following week, tweets including the word “Jew” had increased fivefold since before the ownership transfer. Tweets with the most engagement were overly antisemitic. Likewise, there has also been an uptick in misogynistic and transphobic language. This surge in hateful language has been accredited to various trolling campaigns on sites like 4chan and the pro-Trump forum “The Donald.”

190. VALERIA C. BRANNON, CONG. RSCH. SERV., LSB10748, FREE SPEECH CHALLENGES TO FLORIDA AND TEXAS SOCIAL MEDIA LAWS 2–4 (Sept. 22, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10748> [<https://perma.cc/Z288-3LHC>]; Brian Fung, *Supreme Court Delays Considering Florida and Texas Laws that Force Social Media Platforms to Host Content*, CNN (Jan. 23, 2023, 12:23 PM), <https://www.cnn.com/2023/01/23/politics/supreme-court-delay-texas-florida-social-media-laws/index.html> [<https://perma.cc/5QDH-QVU4>];

In 2021, Texas and Florida passed separate laws that made it illegal for tech platforms to block or demote content that might otherwise run afoul of their terms of service, allowing individual users in some situations to sue the companies for alleged political censorship. The Texas law, for example, makes it illegal to “block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.”

191. See Ray & Anyanwu, *supra* note 189; see also Karen Gullo, *Court’s Decision Upholding Disastrous Texas Social Media Law Puts the State, Rather than Internet Users, in Control of Everyone’s Speech Online*, ELEC. FRONTIER FOUND. (Oct. 6, 2022), <https://www.eff.org/deep-links/2022/10/courts-decision-upholding-disastrous-texas-social-media-law-puts-state-rather> [<https://perma.cc/TJ2Z-KQA4>] (criticizing the Fifth Circuit’s decision upholding the Texas law on the basis that the free speech right to private content moderation “helps the internet grow and provide diverse forums for speech”).

community), which threaten to perpetuate the uncivil *status quo*.¹⁹² Although social studies classrooms, and history textbooks, have long had a role in perpetuating false narratives of the Civil War, the institution of slavery, and White supremacy,¹⁹³ recent efforts seem particularly anachronistic in light of our societal development. And, by culling important parts of our common history from common curricula, Republican state legislatures are not only depriving students of a common factual record to inform their discourse, but also depriving students of the opportunity to practice discussing important societal issues with each other in a regulated learning environment.¹⁹⁴ Regrettably, in surveying the contemporary landscape of state-level Republican policy-making, one unavoidable conclusion is that these policies appear designed not to stymie but rather to *further* the factionalist politics Madison decried centuries ago: the pursuit of adverse interests, rather than the common good, through arousing passions against a demonized other.¹⁹⁵

2. Civic Status

Civic status is also central to democratic practice.¹⁹⁶ Parity and disparity between groups with different status identities leads to different degrees

192. See Akilah Alleyne, *Book Banning, Curriculum Restrictions, and the Politicization of U.S. Schools*, CTR. FOR AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/book-banning-curriculum-restrictions-and-the-politicization-of-u-s-schools> [https://perma.cc/TU5C-TFTB].

193. See, e.g., DONALD YACOVONE, *TEACHING WHITE SUPREMACY: AMERICA’S DEMOCRATIC ORDEAL AND THE FORGING OF OUR NATIONAL IDENTITY* (2022) (excerpt available at <https://news.harvard.edu/gazette/story/2022/09/how-nations-schools-taught-white-supremacism>) [https://perma.cc/Y84B-KK3M] (providing a detailed historical survey of textbooks and how their authors “passed on ideas of [W]hite American identity from generation to generation”); Chara Bohan, Wade H. Morris & Lauren Bradshaw, *The Mint Julep Consensus: An Analysis of Late 19th Century Southern and Northern Textbooks and Their Impact on the History Curriculum*, 44 J. SOC. STUD. RSCH. 139, 147 (2020) (concluding, based on narrative and content analyses, that “Southerners succeeded in changing the Northern version of the war” in Northern history textbooks).

194. Historian Jill Lepore has warned that “[w]hen serious historians abandon the study of the nation, when scholars stop trying to write a common history for a people, nationalism doesn’t die. Instead, it eats liberalism.” Michael Lind, *Jill Lepore Argues for American Patriotism*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/books/review/jill-lepore-this-america.html> [https://perma.cc/9N5U-UYCR] (quoting JILL LEPORE, *THIS AMERICA: THE CASE FOR THE NATION* (2019)). The same result obtains when our common history is exorcised from classrooms.

195. Cf. THE FEDERALIST NO. 10 (James Madison); see also Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 315 (1972): Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (white, rich and poor) that have little else in common than their antagonism for the racial minority. Race prejudice, in short, provides the “majority of the whole” with that “common motive to invade the rights of other citizens” that Madison believed improbable in a pluralistic society.

(quoting THE FEDERALIST NO. 61 (Alexander Hamilton)); see also Shapiro, *supra* note 50, at 234 (describing Republican Party members “set on entrenching power in a [W]hite minority”).

196. See DAHL, *supra* note 141, at 37–38 (explaining that all adult members of the *demos* should have an equal opportunity to effectively explain their views to other members).

of inclusion or exclusion within the larger political community.¹⁹⁷ This includes groups that have the right to vote and those that do not; the public discourse that affects political outcomes is not limited to that occurring exclusively between voters. Even between diverse groups with equal franchise, a sense of belonging in the larger political community appears to affect political engagement and participation.¹⁹⁸

Much as it is difficult to conceptually disentangle “public discourse” and “information access,” so, too, is there substantial conceptual overlap and interconnection between those two concepts and civic status. Civic status can enhance or diminish opportunities to engage with other members of the community. Especially against a backdrop of non-engagement, a lack of information, or exposure to misinformation, civic status can substantially prejudice one group against another. So, too, can discursive or oratorical demonization or otherization. Democratic practice, much as we might like to slice it into neat phases, does not readily lend itself to such categorization. But civic status is certainly a key component of any larger equation—especially where it is not only a *result* of, but also a factor *affecting*, public discourse.

Consider the former criminalization of private homosexual activity between consensual partners. Prior to the Supreme Court’s decision in *Lawrence v. Texas*,¹⁹⁹ states could, and did, criminalize homosexual conduct.²⁰⁰ How could such criminalization *not* affect (and deeply so) public discourse? In addition to serving as a public policy reaffirmation of a common prejudice²⁰¹—raising the barrier that advocates for same-sex liberty

197. See Claudia Zilla, *Defining Democratic Inclusion from the Perspective of Democracy and Citizenship Theory*, 29 DEMOCRATIZATION 1518, 1532 (2022) (identifying gender, identity, and religion as civic statuses that create “inequality in the chances of the[] articulation and advancement” of preferred policies); see also Nira Yuval-Davis, *Belonging and the Politics of Belonging*, 40 PATTERNS OF PREJUDICE 197, 204 (2006) (applying Benedict Anderson’s concept of “imagined communities” to perceptions of the “boundaries of the political community of belonging”).

198. See, e.g., Patti Tamara Lenard, *Belonging, Political Participation and Ethno-Cultural Minorities*, 12 CAN. FOREIGN POL’Y J. 53, 53–64 (2011) (low rates of political participation by ethnic minorities in the United States demonstrate a sense of exclusion from the political community); Angela X. Ocampo, Karam Dana & Matt A. Barreto, *The American Muslim Voter: Community Belonging and Political Participation*, 72 SOC. SCI. RSCH. 84, 84–88 (2018) (“[P]ositive experiences of belonging in America afford Muslim Americans with greater political and social capital that foment a stronger sense of internal efficacy and desire to engage politically.”); Angela X. Ocampo, *The Politics of Inclusion: A Sense of Belonging to U.S. Society and Latino Political Participation* (2018) (Ph.D. dissertation, UCLA) (“[F]eelings of belonging, social membership and inclusion are fundamental to political incorporation and subsequent political participation.”); Zheng Wu & Vivien W. Y. So, *Ethnic and National Sense of Belonging in Canadian Society*, 58 INT’L MIGRATION 233, 233 (2019) (“[I]ncreases in ethnic belonging significantly predicted increases in national belonging, both for ethno-racial minorities and Whites, after controlling for demographic variables.”).

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

200. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (“[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

201. Recent empirical research has found that “the law can indeed send signals about societal values and that people can infer group hierarchies based solely on legal regimes, even when evaluating an abstract, decontextualized society with unfamiliar social groups” and that study participants “who are told that [a particular form of] discrimination is illegal

would have to overcome in convincing others through discourse—criminalization also directly impacted would-be advocates’ ability to advocate at all. On a practical level, trying to persuade others to support same-sex relations potentially meant exposing oneself not just to prejudice, but to criminal sanction. Indeed, effective public discourse requires some level of interaction with those who hold different beliefs, and would-be advocates might on that basis be deprived of a valuable tool in attempting to persuade others because they could be reluctant to reveal themselves as someone engaging in criminalized conduct.

Today, civic status-based exclusion and prejudice remain constants in the traditional realms—gender, race, ethnicity, national origin, religion—especially as incorporated into public policy and reflected in public discourse. The recent concerted attack on the rights of transgender people (including attacks that question their very existence²⁰²) is yet another battleground about whether all are welcome to participate in our democracy.²⁰³

C. CONTROL FAILURES AND CROSS-CONTAMINATION

In Justice Brandeis’s view, state laboratories were walled off from each other: they could “try novel social and economic experiments” in containment “without risk to the rest of the country.”²⁰⁴ That may be true in many cases.²⁰⁵ But it is a fanciful notion when applied to experiments *in* democracy. Laboratory control failures are widespread in this regard, and cross-laboratory contamination is an inevitable result.²⁰⁶ Contrary to Justice Brandeis’s laboratories account, these (failed) experiments in democracy are no minor “risk to the rest of the country,” but an existential one that goes to the heart of democratic self-government.²⁰⁷

report less prejudicial attitudes than those who are led to believe such discrimination is legal.” Sara Emily Burke & Roseanna Sommers, *Reducing Prejudice Through Law: Evidence from Experimental Psychology*, 89 U. CHI. L. REV. 1369, 1377–78 (2022).

202. See John Hanna, *States’ Push to Define Sex Decried as Erasing Trans People*, AP (Feb. 15, 2023), <https://apnews.com/article/politics-kansas-state-government-arkansas-health-8f2edaa40b962e5642e108b83bc14246> [https://perma.cc/DS3Q-BU4G]; see also James Esseks, *The Trump Administration is Trying to Erase Trans People, but the Law Clearly Protects Them*, ACLU (Oct. 22, 2018), <https://www.aclu.org/news/lgbtq-rights/trump-administration-trying-erase-trans-people-law-clearly> [https://perma.cc/R4DD-X33M] (discussing federal action during the Trump administration).

203. See *Over 120 Bills Restricting LGBTQ Rights Introduced Nationwide in 2023 So Far*, ACLU (Jan. 19, 2023), <https://www.aclu.org/press-releases/over-120-bills-restricting-lgbtq-rights-introduced-nationwide-2023-so-far> [https://perma.cc/8WVK-78MH]; Solcyre Burga, *Tennessee Passed the Nation’s First Law Limiting Drag Shows. Here’s the Status of Anti-Drag Bills Across the U.S.*, TIME (Apr. 3, 2023, 12:03 PM), <https://time.com/6260421/tennessee-limiting-drag-shows-status-of-anti-drag-bills-u-s> [https://perma.cc/FT4A-RLHQ].

204. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

205. For example, the policy experiment in *Ross* does not present such a risk, even if it may affect decision-making by certain businesses. See *Nat’l Pork Producers Council v. Ross*, 143 S.Ct. 1142, 1160–61 (2023) (minority opinion of Gorsuch, J., joined by Thomas and Barrett, JJ.) (invoking “laboratories” concept).

206. See Shapiro, *supra* note 50, at 240 (“[S]tates’ governments do not operate in political vacuums.”).

207. See *New State Ice Co.*, 285 U.S. at 311.

Failed experiments in institutional configurations, like elections and the formal political process, may appear to stop at the state line. After all, one state cannot directly force its preferences as to elections or the structure of government upon another state.²⁰⁸ But there is also an unavoidable indirect contamination: democratic failures in the states also affect who they send to Congress and the White House. As discussed above, federal legislation *defines* the realm of state-level democratic experimentation.²⁰⁹ Whether or not bills like the John R. Lewis Voting Rights Advancement Act²¹⁰ or the Freedom to Vote Act²¹¹ ever become law has an enormous impact on state-level democratic practice.²¹²

Cross-contamination is even more direct, and more difficult to prevent, when it occurs in areas of democratic practice that are one step removed from the formal institutions of voting and government. In a day and age where airplanes move passengers from New York to Texas in a matter of hours, and ideas traverse the Internet at close to the speed of light, experimental failures of these sorts in one laboratory of democracy can quickly contaminate the experiments in other laboratories as well.

Formative experiences in one state, especially through public education, travel with individuals when they relocate. These experiences are predicated upon the information to which individuals are exposed, or to which they have access, and opportunities to learn how to discuss controversial issues with persuasion rather than demonization. Although interstate migration in the United States has been trending downward since the turn of the century, over four million people changed their state of residency in 2020.²¹³ Public discourse, especially in the age of the Internet, does not stop at state borders. And how individuals become informed (or not) and learn to engage in productive public discourse (or not), can affect online

208. Although, regrettably, many states purposefully adopt “failed” democratic experiments from other states. *See* Kaplan, *supra* note 71 (gerrymandering); Golshan, *supra* note 108 (stripping popularly-elected governors of power). As some have observed, “a state often has little reason to pioneer new policies when it can simply copy successful ones from other jurisdictions at a fraction of the cost.” Tyler & Gerken, *supra* note 1, at 2190, 2190 n.7; *see also* Shapiro, *supra* note 50, at 222–23 (“We live in an era of easy and rapid legal borrowing and transplantation across jurisdictions Bad ideas can spread as quickly as good ones Democratic erosion is one example of this.” (omissions in original) (quoting TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 73 (2018))).

209. *See supra* Part II.

210. H.R. 4, 117th Cong. (2021); *see also* Andrew Garber, *Debunking False Claims About the John Lewis Voting Rights Act*, BRENNAN CTR. FOR JUST. (Jan. 13, 2022), <https://www.brennancenter.org/our-work/research-reports/debunking-false-claims-about-john-lewis-voting-rights-act> [<https://perma.cc/QB4Q-PFZA>].

211. S. 2747, 117th Cong. (2021); *see also* Wendy R. Weisler, Daniel I. Weiner & Emil Mella Pablo, *Breaking Down the Freedom to Vote Act*, BRENNAN CTR. FOR JUST. (Sept. 23, 2021), <https://www.brennancenter.org/our-work/research-reports/breaking-down-freedom-vote-act> [<https://perma.cc/KM76-K6RK>].

212. *See sources cited supra* note 50 and accompanying text.

213. *CPS Historical Migration/Geographic Mobility Tables*, U.S. CENSUS BUREAU (Nov. 2021), <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/historic.html> [<https://perma.cc/7C52-XD2D>] (Table A-1. Annual Geographic Mobility Rates, By Type of Movement: 1948–2021).

interactions with other individuals *anywhere* in the United States (or, indeed, the world).

Civic status-based prejudice is also not so easily contained. Prejudicial experiences acquired in one state are reflected in online perspectives that reach the entire Internet, and carried with individuals when they relocate. So, too, may a sense of lack of belonging in one state’s political community continue to pervade an individual experience, even in a state where most similarly-situated individuals feel a stronger sense of belonging.

We are not the first to observe how antidemocratic activity in one state can bring antidemocratic repercussions in others. Focusing on just the formal aspects of state government, Carolyn Shapiro observes substantial “spillover” effects, arguing that state-level democratic deficits not only “affect the makeup of Congress,” but also produce “more subtle—and ultimately more dangerous—effects.”²¹⁴ In her analysis, democratic backsliding in one state can create an “antidemocratic spiral” that “is not limited to one state,” but rather “is contagious,”²¹⁵ and “[s]tates might well be unable to protect themselves from the effects of their neighbors’ abandonment of republicanism,”²¹⁶ as when a manufactured legislative supermajority essentially negates tripartite government’s separation of powers.²¹⁷ As Shapiro further explains, this phenomenon is inconsistent with the Constitution’s guarantee of a “Republican Form of Government” for the states,²¹⁸ and with the “central value[s] of federalism” itself.²¹⁹

Federalism—like democracy, a structural component of the Constitution—has spawned a “complex judge-made constitutional law of federalism.”²²⁰ “Given the equivalent (at least) importance of democracy to the constitutional structure,” and, indeed, its importance to federalism, “there is no reason why a body of substantive constitutional doctrine could not be forged as well that defines and protects the robust, egalitarian self-government at the structural heart of the Constitution.”²²¹ As explained in the following section, we think the Fourteenth Amendment militates for

214. Shapiro, *supra* note 50, at 187.

215. *Id.*

216. *Id.* at 195.

217. See *supra* Part II.A.3.

218. U.S. CONST. art. IV, § 4; Shapiro, *supra* note 50, at 193–94 (observing that the Constitution “promised to protect the states from each other” and that “such promises were essential if the states were going to open their borders to each other”); *id.* at 197 (“The Clause is thus a federal promise to ensure that the states maintain politically compatible forms of self-government.”).

219. See Shapiro, *supra* note 50, at 222–25 (identifying problems including the “contagious nature of antidemocratic tactics,” disparity between states’ power caused by “distort[ions] [of] their relative power nationally by means of state-level entrenchment,” stymying policy development, distorting the roles states play in “implementing, challenging, and developing” national policy, and potentially even a federal constitutional convention “on terms dictated by only one party and without the widespread democratic support that any such changes should enjoy”).

220. See Burt Neuborne, *Felix Frankfurter’s Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 606 (2011).

221. *Id.* at 608.

just such a jurisprudence, and propose the minimum of what a democratic jurisprudence of substantive due process should entail.

III. A DEMOCRATIC JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS

As explained above, we believe that *Dobbs* erred in presuming that “democratic self-government” would resolve controversial issues involving unenumerated rights.²²² But that was not its only error in invoking “democracy”—and may not even have been its worst. The Court’s reasoning in *Dobbs* logically points towards the potential erasure of broad swathes of substantive due process,²²³ threatening to remove even the “guardrails” that substantive due process presently imposes on state-level anti-democratic experimentation.²²⁴ These are not errors that truly democracy-minded individuals should accept—especially when there is a better answer.

A. SUBSTANTIVE DUE PROCESS AS CONSTITUTIONAL GUARDRAILS

The critical guardrails on states’ democratic experimentation *are* substantive due process. The Constitution does not textually enumerate any right to vote.²²⁵ Yet, the Court has invoked just such a right as “fundamental.”²²⁶

222. We do not mean to suggest that giving states free rein (or reign?) to decide public policies concerning abortion cannot also invigorate the democratic process in certain regards. *See, e.g.*, Ashley Kirzinger, Audrey Kearney, Alex Montero, Liz Hamel & Mollyann Brodie, *How The Supreme Court’s Dobbs Decision Played in 2022 Midterm Election: KFF/AP VoteCast Analysis*, KAISER FAMILY FOUND. (Nov. 11, 2022), <https://www.kff.org/other/poll-finding/2022-midterm-election-kff-ap-votecast-analysis> [<https://perma.cc/F7CC-9AW3>] (reporting that “many voters, including in key voting blocs and in some highly competitive races, said they were motivated to turn out by the recent Supreme Court decision overturning *Roe v. Wade*”); Klarman, *supra* note 61, at 259 (“Millions of Americans have been stunned to watch President Trump and his Republican enablers assault one democratic norm after another and have responded by organizing extraordinary political resistance, which produced a huge Democratic victory in the 2018 midterm elections.”). But invigorating even a popular majority in support of an unenumerated liberty interest may not be sufficient to safeguard, for example, privacy rights that are themselves critical to our contemporary democratic practice. *See supra* Part I.A.; *see also* Jeet Heer, *The War Against Abortion is also a War Against Democracy*, NATION (Mar. 27, 2023), <https://www.thenation.com/article/politics/abortion-democracy-voter-initiatives> [<https://perma.cc/R7S6-P72Y>] (“Since *Dobbs*, we’ve had a test case for how the democratic process deals with abortion. And the results of that test give the lie to the claim that *Dobbs* was an affirmation of democracy.”).

223. *See* Brief for Constitutional Law Scholars Lee C. Bollinger et al. as Amici Curiae Supporting Respondents at 6, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (rejecting “*Roe* and *Casey*’s application of tradition and history” in favor of the “narrow application of such principles” advocated by Mississippi “would call into question the Court’s Due Process precedent, undermining a host of other fundamental rights long acknowledged by the Court”).

224. *Cf.* *Harper v. Hall*, 886 S.E.2d 393, 450 (N.C. 2023) (Earls, J., dissenting) (“constitutional guardrails” are required to prevent one “party’s indefinite political domination”).

225. *See* Jonathan Soros, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY (2013), <https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote> [<https://perma.cc/N5NM-97XD>].

226. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964):

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any

So, too, the right to protest and petition the government, as well as the right to free speech, a free press, and political association. The concept that the First Amendment (and any other amendment in the Bill of Rights) is “incorporated” against the states depends on the doctrine of substantive due process. And, through substantive due process, fundamental rights place guardrails on anti-democratic state action. If Justice Thomas’s concurrence in *Dobbs*, suggesting that the Due Process Clause may never be given substantive content, were to become law, states would, simply put, be unrestrained from the limitations of the U.S. constitution if they wanted to adopt laws that sharply restrict the freedom of speech, press, or petition, among other rights.

As Professor Erwin Chemerinsky explained some years ago, the application of an article of the Bill of Rights to a state cannot be anything *but* substantive due process. Examining the Supreme Court’s decision in *Griswold v. Connecticut*, he noted that Justice Douglas, writing for the majority, identified a right to privacy within the “penumbras” of the Bill of Rights.²²⁷ And “[how] was the Bill of Rights applied to state and local governments?” he asked.²²⁸ “Through the [D]ue [P]rocess [C]lause of the Fourteenth Amendment. Justice Douglas used substantive due process even though at the time he denied that was what he was doing.”²²⁹ Other members of the Court have been more forthcoming since.²³⁰

alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

See also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [the political franchise of voting] is regarded as a fundamental political right, because preservative of all rights.”); *but see* *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”). To the extent that the right to vote is part of free speech rights incorporated against the states, it is also a substantive due process right. See *infra* Part II.A; see also Armand Derfner & J. Gerald Hebert, *Voting is Speech*, 34 *YALE L. & POL’Y REV.* 471, 471–73 (2016); El-Haj, *supra* note 158, at 530; *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (considering whether a state “prohibition on write-in voting unreasonably infringes upon its citizens’ [speech] rights under the First and Fourteenth Amendments”).

227. See Chemerinsky, *supra* note 18, at 1506–07.

228. *Id.* at 1508.

229. *Id.* at 1508; see also *id.* at 1508 n.27.

230. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 n.* (Thomas, J., concurring) (“Since *Griswold*, the Court, perhaps recognizing the facial absurdity of *Griswold*’s penumbral argument, has characterized the decision as one rooted in substantive due process.”); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (“Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’” (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))); *id.* at 811 (Thomas, J., concurring) (noting the plurality opinion makes an “effort to impose principled restraints on” the “Court’s substantive due process doctrine”); *id.* at 861, 871 (Stevens, J., dissenting) (noting “[t]his is a substantive due process case” and that “substantive due process analysis generally requires us to consider the term ‘liberty’ in the Fourteenth Amendment, and that this inquiry may be informed by, but does not depend upon, the content of the Bill of Rights”).

This explanation precludes any serious doctrinal argument that the Court's pivot towards a so-called incorporation doctrine might alter the calculus; incorporation is simply what we call substantive due process when the interest at issue is protected against the *federal* government by the Bill of Rights.²³¹ Consider this: does mechanical “applica[tion]”²³² of the First Amendment to the states even do any work? The First Amendment only prohibits conduct by one federal government actor: “*Congress* shall make no law . . . abridging the freedom of speech”²³³ Something more is required to make the leap in applying a *free speech interest*—not just the First Amendment—against the states under the Fourteenth Amendment. As Justice Stevens explained, dissenting in *McDonald v. City of Chicago*:

[T]he term “incorporation,” like the term “unenumerated rights,” is something of a misnomer. Whether an asserted substantive due process interest is explicitly named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is “comprised within the term liberty.”²³⁴

With this understanding in mind, what sort of threat does *Dobbs* contain for democracy? Justice Thomas's concurrence suggested that the Court should examine *all* its substantive due process precedents that are not textually enumerated.²³⁵ Although he specifically mentioned privacy rights, this threat logically extends to *all* substantive due process—including so-called incorporated rights. It is far from clear that the majority opinion carries a substantially lesser threat. Although the majority sought to cabin its holding to *just* the right to abortion,²³⁶ the dissent explained the illogic of such limitations based on the Court's jurisprudential path to overturning *Roe*.²³⁷ Should the majority's emphasis of the right to abortion's lack of historical pedigree give us comfort? We think not.²³⁸ The historical record, as this Court has demonstrated, is, at best, a malleable construct.²³⁹ Although

231. See *Dobbs*, 142 S. Ct. at 2246 (“[T]his Court has held that the Due Process Clause of the Fourteenth Amendment ‘incorporates’ the great majority of those rights and thus makes them equally applicable to the States.”).

232. *Id.* at 2246.

233. U.S. CONST. amend. I (emphasis added).

234. *McDonald*, 561 U.S. at 864–65 (Stevens, J., dissenting).

235. See *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring).

236. *Id.* at 2277–78 (“[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

237. See *id.* at 2330–32 (Breyer, J., dissenting).

238. Cf. *id.* at 2331 (“Should the audience for these too-much-repeated protestations be duly satisfied? We think not.”).

239. See Saul Cornell, *History and Tradition or Fantasy and Fiction: Which Version of the Past will the Supreme Court Choose in NYSRPA v. Bruen?*, 49 HASTINGS CONST. L.Q. 145, 145–46 (2022) (“The Court must distinguish between pseudo-historical arguments that are part of an invented historical tradition, one that can be traced to modern gun rights activism, and the actual history of gun regulation, a tradition that extends over more than four centuries of English and American legal history.”); Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095, 1111 (2009) (“All of these critiques echo the standard charge that the Supreme Court's handling

Justice Thomas surely intended otherwise, his statement in *New York State Rifle & Pistol Ass’n v. Bruen* that “not all history is created equal,” is both an apt truism and an appropriate criticism of historical methodologies.²⁴⁰ Moreover, it is far from clear what sort of pedigree a right must evidence to be “deeply rooted.”²⁴¹ It is also far from clear that a jurisprudence that only values law that was generated hundreds of years ago will adequately protect our modern democracy against uniquely modern threats.²⁴² Although it seems unlikely at present that the Supreme Court (even with its current composition) will strip away the full panoply of constitutional guardrails for state-level democracy, as Justice Thomas’s concurrence threatens, pulling at individual threads of substantive due process has the potential to start unravelling the entire democratic sweater.²⁴³

of historical materials is often amateurish and prone to ideological manipulation.”); Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1072–73 (2006):

[S]o many people were involved in drafting and ratifying the Constitution and its amendments that it is possible to find historical quotations supporting either side of almost any argument. The debate over the Second Amendment powerfully illustrates this, as both sides make strong arguments based on the original understanding of the provision.

Compare Brief for Amici Curiae Professors of History and Law in Support of Respondents at 28, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (“If history and tradition bear on whether New York’s law is constitutional, the Court should conclude that it is.”), *with Bruen*, 142 S. Ct. at 2127, 2138 (holding that the appropriate test for Second Amendment claims is whether the government “affirmatively prove[s] that its firearms regulation is part of the historical tradition,” without any means-ends scrutiny, and concluding that respondents “have failed . . . to identify an American tradition justifying New York’s proper-cause requirement”). *See also* Andrew Koppelman, *Why Do (Some) Originalist Hate America?*, 63 ARIZ. L. REV. 1033, 1034 (2021) (observing lack of stability in the law as, “[w]ith new discoveries, bodies of established law are unexpectedly invalidated and discarded”); *Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 2 (2023) (statement of Prof. Eric Ruben, SMU Dedman School of Law) (“Though *Bruen* purported to constrain judicial decisionmaking through historical analogy, the post-*Bruen* case law highlights the risk that, in fact, the opinion has enabled judicial subjectivity, obfuscation, and unpredictability.”).

240. *See Bruen*, 142 S. Ct. at 2136.

241. *See Dobbs*, 142 S. Ct. at 2319 (Breyer, J., dissenting) (“The lone rationale for what the majority does today is that the right to elect an abortion is not ‘deeply rooted in history’ . . .”).

242. *See* ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* 116 (2022) (“[O]ur world is vastly different from that which existed at the nation’s beginning. There are . . . countless constitutional questions for which originalism can provide no answer.”); Joshua Zeitz, *The Supreme Court’s Faux “Originalism”*, POLITICO (June 26, 2022, 7:00 AM), <https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417> [<https://perma.cc/93Y8-ERVY>] (“Should a 21st century society really interpret its Constitution by the standards of 1787—an era before the introduction of semi-automatic weaponry, steam power, penicillin, automobiles, trains, electric lights and indoor plumbing?”); *see* sources cited *supra* note 74 and accompanying text.

243. *Cf.* Shapiro, *supra* note 50, at 224 (“These outcomes may not be likely, but they are certainly plausible, and those who study democracy warn against ignoring the unlikely but plausible.”); *id.* at 239–40 (“Democracy scholars’ warnings of a piecemeal and gradual descent make clear that waiting until antidemocratic harms reach a certain level may well mean waiting too long.”).

B. SUBSTANTIVE DUE PROCESS AS POLITICAL PHILOSOPHY

Substantive due process has always had a strong political-philosophical streak. Indeed, focused on questions of “liberty,” how could it not?²⁴⁴ As the Court first explained more than a century ago in *Yick Wo v. Hopkins*, the “political franchise of voting . . . is regarded as a fundamental political right, because [it is] preservative of all rights.”²⁴⁵ Since the Court’s decision in *Reynolds v. Sims*,²⁴⁶ the “fundamental” nature of that right to democratic self-governance has been repeatedly reaffirmed (if less so in recent years).²⁴⁷

Similarly, in the Court’s early free speech cases involving state action, one also cannot miss the Court’s emphasis on the political philosophy of state government.²⁴⁸ In *Gitlow v. New York*, Justice Holmes and Justice Brandeis adopted the free speech philosophy, formerly applied against the federal government,²⁴⁹ that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [*the State*] has a right to prevent.”²⁵⁰ Concurring in *Whitney v. California*, Justice Brandeis wrote:

244. See generally JOHN STUART MILL, ON LIBERTY (1859); ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).

245. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

246. *Reynolds v. Sims*, 377 U.S. 533, 561–62:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

See also *id.* at 555 (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

247. See *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966); *Williams v. Rhodes*, 393 U.S. 23, 38 (1968); *Oregon v. Mitchell*, 400 U.S. 112, 241 (1970) (“The right to vote has long been recognized as a ‘fundamental political right, because preservative of all rights.’” (quoting *Yick Wo*, 118 U.S. at 370)); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote”); *City of Mobile v. Bolden*, 446 U.S. 55, 115 (1980) (Marshall, J., dissenting) (describing *Yick Wo* as “recogniz[ing] the elementary proposition upon which our structure of civil rights is based”); see also *Shelby Cnty. v. Holder*, 570 U.S. 529, 566 (Ginsburg, J., dissenting) (describing the vote as “the most fundamental right in our democratic system”); *Schutte v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 366 (2014) (Sotomayor, J., dissenting) (“Few rights are as fundamental as the right to participate meaningfully and equally in the process of government. That right is the bedrock of our democracy, recognized from its very inception.” (internal citation omitted)); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1865 (2018) (Sotomayor, J., dissenting) (“Our democracy rests on the ability of all individuals . . . to exercise their right to vote.”).

248. The Court has also recognized the core connection between voting and free speech rights. See *Williams v. Rhodes*, 393 U.S. 23, 38–39 (1968) (“The rights of expression and assembly may be ‘illusory if the right to vote is undermined.’” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))).

249. See *Schenck v. United States*, 249 U.S. 47, 51–52 (1919).

250. *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting) (second alteration in original) (emphasis added) (quoting *Schenck*, 249 U.S. at 52).

[W]ithout free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that *public discussion is a political duty*; and that this should be a *fundamental principle of the American government*.²⁵¹

In *Near v. Minnesota ex rel. Olson*, the Court explained that the importance of the freedom of the press was, in addition to culminating in grievances being brought against public officials as a form of political participation, also part of a Madisonian ideal of public discourse: “the advancement of truth, science, morality, and arts in general . . . its ready communication of thoughts between subjects, and its consequential promotion of union among them . . .”²⁵² On that basis, the Court recognized comparable rights of information-diffusion in *Lovell v. City of Griffin*.²⁵³ In *Grosjean v. American Press Co.*, the Court invoked Judge Thomas Cooley’s censorship test: “The evils to be prevented were . . . any action of the government by means of which it might prevent such free and general discussion of public matters as seems *absolutely essential to prepare the people for an intelligent exercise of their rights as citizens*.”²⁵⁴ And in *De Jonge v. Oregon*, the Court held that “[t]he very idea of a government, *republican in form*, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”²⁵⁵ “Therein lies,” the Court explained, “the very foundation of constitutional government.”²⁵⁶

Considering courts’ longstanding recourse to political-philosophical considerations in assessing protected liberties under the Fourteenth Amendment, the Court’s contemporary test for substantive due process is, unsurprisingly, explicitly focused (at least in part) on political-philosophical considerations. As iterated in *Dobbs*, the question is whether the asserted interest is “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”²⁵⁷ The problem with this test is not that it emphasizes political-philosophical considerations—judges deal with those sorts of issues all the time.²⁵⁸ As the following section will elucidate, the

251. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

252. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 717 (1931).

253. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

254. *Grosjean v. American Press Co.*, 297 U.S. 233, 249–50 (1936) (emphasis added).

255. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (emphasis added) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

256. *Id.* at 365.

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

258. Even at the highest level of judicial decision-making—which theory of jurisprudence to apply in light of courts’ role in the constitutional architecture—judges are called upon to make philosophical calls. For a more concrete example, consider the Court’s federalism jurisprudence. See Neuborne, *supra* note 220, at 606 (“[I]n the absence of clear textual guidance, the Court has forged a complex judge-made constitutional law of federalism. Federalism ground rules, to put it mildly, do not jump out of the [C]onstitution’s text.”); Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENTARY 227, 227 (1990):

issue is that the formulation of the constitutional standard for recognizing liberty interests is itself problematic.

Since the “implicit in the concept of ordered liberty” component carries a stronger whiff of political philosophy, we begin there. Over the years, this component has been restated in various ways: in ascertaining whether an asserted liberty interest falls within the sweep of the Fourteenth Amendment’s Due Process Clause, the Court has asked whether asserted interests are among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”;²⁵⁹ “basic in our system of jurisprudence”;²⁶⁰ “fundamental to the American scheme of justice”;²⁶¹ or “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”²⁶² This list is not exhaustive. And while the philosophical component has remained intractably abstract over the years, the test which the Court applies today does not, by its own terms, appear to allow for the recognition of *any* substantive protections.

What does it mean for a liberty interest to be implicit in the concept of ordered liberty? The phrase is subject to numerous interpretations, and its application to any particular case is always going to be the subject of disagreement. After all, what is the *concept* of ordered liberty? And what does it mean for something to be *implicit* in a concept? Even without the final qualifier often historically appended to this construction—“such that neither liberty nor justice would exist if they were sacrificed”²⁶³—the inquiry is plainly intractable. As Professor Adam Kolber has helpfully explained by way of analogy:

When judges or lawyers speak of the value of federalism, they generally picture the national government and the states engaged in a tug-of-war for power . . . [C]ontroversies revolve[] around real and palpable tensions between the demands of a national and centralized authority and the prerogatives of local and decentralized state institutions. The tensions are aptly captured in the concept of state “sovereignty,” the central concept underlying legal notions of federalism.

See also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 S. CT. REV. 341, 346 (1985) (arguing that political philosophy originated the concept of sovereignty); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1355–60 (1994); see also *Federalism*, STAN. ENCYCL. OF PHIL. (Nov. 2, 2022), <https://plato.stanford.edu/entries/federalism> [<https://perma.cc/6LHX-XVZ6>] (“Federalism is the theory or advocacy of federal principles for dividing powers between member units and common institutions.”); see generally Robert Schütze, *Political Philosophy of Federalism* (Eur. Rsch. Council, Working Paper No. 312304, 2016), https://www.federalism.eu/assets/2017/09/wp_3_16.pdf [<https://perma.cc/ES6T-8ZE4>].

259. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

260. *In re Oliver*, 333 U.S. 257, 273 (1948).

261. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

262. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

263. Adam Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 151 (2018). Can any right be so “implicit in the concept of ordered liberty” to the extent that “neither liberty nor justice”—now, there’s another liberty, distinct from the *asserted* liberty right under the Fourteenth Amendment and the concept of that other *ordered* liberty—“would exist if they were sacrificed?” See *id.* (quoting *Glucksberg*, 521 U.S. at 720–21).

Suppose I told you to bring any bread for lunch that is implicit in the concept of healthy bread. Would whole wheat bread satisfy the request? I don’t think so. While whole wheat bread might be a kind of healthy bread, nothing about whole wheat is implicit in the *concept* of healthy bread. If, for example, the medical community univocally determined that whole wheat is unhealthy, we’d still have a concept of what healthy bread is; it simply wouldn’t include whole wheat bread in the category. If whole wheat bread is a healthy bread, it is a contingent nutritional fact, not something implicit in the concept of healthy bread. And just as no particular bread is implicit in the concept of healthy bread, there is quite possibly no particular liberty implicit in the concept of ordered liberty.²⁶⁴

Quite so. How can courts and litigants apply a test, and how can observers of the judicial process understand it, when the test has such evident logical deficiencies?

Somewhat awkwardly, in light of this analysis, courts have, of course, identified liberty interests that are subsumed within this nebulous cloud of philosophical jargon. And, in purporting to solve the riddle the substantive due process standard entails, courts evidence that this philosophical inquiry is both rudderless and meaningless. Indeed, if lower court judges applying it cannot make sense of it, they will be left to reason by analogy from decisions by higher courts that *have* found such liberties to exist under its framework.²⁶⁵ Could this, perhaps, explain why judges have long been concerned that substantive due process constitutes an “unrestrained imposition of [their] own extraconstitutional value preferences?”²⁶⁶ As explained below, regardless of whether that concern has merit or not, we think it misses the point.²⁶⁷ But that concern also derives, at least in part, from the way the Court has long structured (or rather, not) the substantive due process standard.²⁶⁸

264. *Id.* at 152 (emphasis in original).

265. As Chief Judge Tymkovich of the Tenth Circuit has explained:
The Court’s [substantive due process] caselaw is . . . contradictory, imprecise, and sometimes impossible to understand. The inferior courts are left surveying the battlefield with little to guide them

. . . .
All this leaves courts adrift. It is not just that the substantive due process doctrine is messy. It is that judges don’t know what to do with a newly asserted claim of substantive due process.

Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1963 (2020).

266. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2271 (2022); see *supra* note 20 and accompanying text.

267. See *infra* Part III.D.1.

268. Robert Post has argued that it is “no accident that strict scrutiny doctrine is framed in terms that are opaque to common usage.” Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 58 (2003). This approach means “[t]he Court can shape . . . controversies . . . by manipulating the definition of a ‘compelling’ state interest or by construing the meaning of ‘narrow tailoring.’” *Id.*

The other component of the Court's current substantive due process test—whether a liberty interest is “deeply rooted in our Nation's history”—fares no better on political-philosophical grounds. As an initial matter, it reflects a predetermined choice of judicial philosophy.²⁶⁹ But, as others have explained, choosing to look to constitutional-historical principles that were established before the Reconstruction Amendments as a limiting principle on judicial discretion fails to honor the principles set forth in the Reconstruction Amendments.²⁷⁰ Put another way, if those amendments altered the constitutional vision for state-level democracy, why does it make sense to look at hoary principles from earlier eras lacking any of the vital attributes of post-Reconstruction democracy?²⁷¹ For reasons we explain below, we think that presupposing an ossified historical view of constitutional text is particularly erroneous when it comes to assessing the liberty interests covered by the Due Process Clause of the Fourteenth Amendment and the constitutional vision which it reflects and channels.

C. GROUNDING SUBSTANTIVE DUE PROCESS IN DEMOCRATIC THEORY

1. Looking Through “Liberty” to the Guarantee Clause

Notwithstanding a century of efforts to formulate a workable test for substantive due process,²⁷² the current standard remains an abstract question of philosophy coupled with a freeform, legal-historical analysis.²⁷³ Not only does this abstraction present problems for judges and litigants

269. See *McDonald v. City of Chicago*, 561 U.S. 742, 800 n.7 (2010) (Scala, J., concurring) (arguing that a “historical approach to the Constitution . . . restrain[s] judicial invention”).

270. See, e.g., Brandon Hasbrouck, *The Antiracist Constitution*, 102 B. U. L. REV. 87, 106–07 (2022); CHEMERINSKY, *supra* note 242, at 75, 93 (explaining that “the Framers likely did not want their views to control constitutional interpretation” and, observing that the Constitution was written in the 18th century for an agrarian society with slavery and limited franchise, that “[i]t makes no sense to say that the Constitution is limited to the understandings at the time of its drafting,” or even at the time of the Reconstruction Amendments); Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, THE ATLANTIC (Sept. 6, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334> [<https://perma.cc/BBM9-4LMK>]; Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999) (discussing consent-based critique of originalism because “the framers and ratifiers of the U.S. Constitution represented only [W]hite males, not the People, and therefore could not legitimately bind those who were not parties”).

271. This critique has taken on increasing salience as the Court seems to have recently collapsed the political-philosophical and historical inquiries into one in “incorporation” cases. See *McDonald*, 561 U.S. at 776 (“Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.”); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127–30 (2022) (holding that the Court of Appeals’ consensus “two-step approach,” involving historical *and* means-ends analyses, “is one step too many,” and that state action must be “consistent with the Nation's historical tradition of firearm regulation”). Practically speaking, the historical inquiry has eclipsed the political-philosophical one in “substantive due process” cases, as well.

272. *But see* Chemerinsky, *supra* note 18, at 1515 n.75.

273. See *Bruen*, 142 S. Ct. at 2126.

seeking to apply this framework in practice, it also has little to do with the Constitution itself. Does the Constitution tell courts to assess liberties in terms of abstract philosophy? Does it instruct them to emphasize the historical record in their analysis? If it does, we see no signposts. These are interpretative decisions.²⁷⁴ The Constitution itself has more direct answers.

The Constitution communicates a great deal about its vision for the individual “liberty” that would define the relationship between people and states. As Justice Fortas noted in *Fortson v. Morris*, the Court’s voting rights cases do not exist in a vacuum, but rather draw substance from a panoply of constitutional provisions which give meaning to the Constitution’s democratic commitment. Dissenting from the Court’s decision that Georgia law could route popular gubernatorial elections to the malapportioned state legislature if no candidate won an outright majority,²⁷⁵ he explained,

Perhaps this Court’s voting rights cases could not so easily be nullified. Their meaning and thrust are perhaps deeper than the mechanics of the tally. They are, one may hope, not merely much ado about form. They represent, one has been led to believe, an acknowledgment that the *republican form of government guaranteed by the Constitution, read in light of the General Welfare Clause, the guaranties of equal protection of the laws and the privileges and immunities of citizens of the United States, requires something more than an adherence to form.* This Court’s apportionment and voting rights decisions soundly reflect a deepening conception, in keeping with the development of our social, ethical, and religious understanding, of the meaning of our great constitutional guaranties. As such, they have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full statute of our constitutional ideal.²⁷⁶

Though expansive, Justice Fortas’s view is also incomplete.²⁷⁷ In any event, there is ample constitutional text that gives *substance* to the individual “liberty” in relation to state action—but the substantive due process test remains divorced from it.

Of all the facets of the Constitution that *do* give meaning to individual “liberty” in this relationship, the Guarantee Clause—the lens through which Justice Fortas understood other political-philosophical aspects of the constitutional vision for the state-individual relationship—is both the central one and the most illuminating. The Guarantee Clause provides that “[t]he United States shall guarantee to every State in this Union a

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

275. *Fortson v. Morris*, 385 U.S. 231, 244 (1966) (Fortas, J., dissenting) (“A majority of the legislators in Georgia’s legislature may represent a minority of the voters. But the Court today concludes that despite the fact that it has branded the legislature as apportioned in violation of the Constitution of the United States, it may nevertheless select the Governor.”).

276. *Id.* at 249 (emphasis added).

277. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

Republican Form of Government.”²⁷⁸ The Reconstruction Congress, filled with “northern ‘radical republicans,’”²⁷⁹ had a powerful idea of what that entailed. As one of Reconstruction’s great architects, Senator Charles Sumner of Massachusetts explained,

[A]t the present time, under the words of the Constitution of the United States declaring that the United States shall guaranty to every State a republican form of government, it is the bounden duty of the United States by act of Congress to guaranty complete freedom to every citizen, and immunity from all oppression, and absolute equality before the law. No government that does not guaranty these things can be recognized as republican in form according to the theory of the Constitution of the United States²⁸⁰

As Arthur Bonfield long ago observed, the Reconstruction Congress had not only a muscular vision of what a republican form of government entailed, but also a *dynamic* one.²⁸¹ Whatever the meaning of the Guarantee Clause at the time of the Founding,²⁸² the Reconstruction Congress rejected any fixed definition of republican government because “definitions advance,” and “the definition of a republican form of government, which was perhaps contemplated when that clause was put in the Constitution, is not now regarded as the definition of a republican form of government either in the Constitution or out of it.”²⁸³ As expressed by Representative

278. U.S. CONST. art. IV, § 4. The Guarantee Clause is also sometimes referred to as the Republican Form Clause.

279. Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 537 (1962).

280. CONG. GLOBE, 38th Cong., 2d Sess. 1067 (1865) (statement of Sen. Sumner) (emphasis in original). As indicated by Senator Sumner’s statement, the Reconstruction Congress understood the word “States” in the Guarantee Clause as referring to the people. The Supreme Court shortly thereafter agreed. *See Texas v. White*, 74 U.S. 700, 720 (1868); *see also* Bonfield, *supra* note 279, at 545.

281. *See* Bonfield, *supra* note 279, at 541 n.126 (observing that the italics in Sumner’s statement reproduced in the Congressional Globe indicate “a dynamic construction of ‘republican’”); *id.* at 542 (“[A] majority [of the Reconstruction Congress] contended that the requisites of republican government were dynamic”); Shapiro, *supra* note 50, at 205 n.31; *cf. Fortson*, 385 U.S. at 249 (Fortas, J., dissenting) (referring to “our Constitution’s dynamic provisions with respect to the basic instrument of democracy—the vote”). As Professor Bonfield also noted, however, this does not mean that the Reconstruction Congress agreed on what constituted “unrepublican” government, or the lengths Congress could go to prevent or cure it. *See* Bonfield, *supra* note 279, at 546–47. Those were interpretative questions for another day.

282. *See, e.g.*, Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 603–12 (2018) (assessing the meaning of the Guarantee Clause as an eighteenth-century treaty-law term of art limited to unilateral guarantees between sovereigns). *But see* Shapiro, *supra* note 50, at 183, 235 (responding to Williams’s original meaning argument).

283. CONG. GLOBE, 41st Cong., 2d Sess. 1254 (1870) (statement of Sen. Morton); *see also* Bonfield, *supra* note 279, at 543 (observing those members of the Reconstruction Congress who maintained an ossified view of the Guarantee Clause were a minority). This should not suggest that history was entirely irrelevant to the inquiry. Senator Sumner invoked the principles he saw in the Declaration of Independence—“first, that all men are equal in rights; and, secondly, that just government stands only on the consent of the governed”—and maintained that “[w]henver Congress is called to maintain a republican government, it must be according to these universal, irreversible principles.” CONG. GLOBE, 41st Cong., 2d Sess. 1358 (1870) (statement of Sen. Sumner).

Ulysses Mercur of Indiana, “in any construction of the standard imposed by [the Guarantee Clause], the ‘genius, ruling ideas, progress, and existing sentiments of the great masses of the people’ must be accorded great deference.”²⁸⁴ Professor Bonfield has additionally observed that “the content of ‘republican’ government was to be dictated not only by the changed condition of the federal constitution, but also by the prevailing theories of natural justice.”²⁸⁵ Suffice to say, the Reconstruction Congress did not have an ossified view of republican state government, nor the “liberty” that would inhere in it. Indeed, if there is a “living” part of the Constitution, we think it is the Guarantee Clause.²⁸⁶

Whether or not the Reconstruction Congress thought the “power to fix the definition of [republican] government”²⁸⁷ under the Guarantee Clause was one they shared with the judiciary, they certainly had the Guarantee Clause in mind when they enacted the Fourteenth Amendment, complete with its express protection of liberty interests against state deprivations.²⁸⁸ And when we look through the “majestic generalities”²⁸⁹ of the language of the Due Process Clause—“No state shall . . . deprive any person of life, liberty, or property, without due process of law”²⁹⁰—the Guarantee

284. Bonfield, *supra* note 279, at 542 n.133 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 1290 (1867) (statement of Rep. Mercur)).

285. *Id.* at 543.

286. Even then-Justice Rehnquist might have agreed in light of the Reconstruction Framers’ dynamic understanding of the Guarantee Clause. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (“The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live.”).

287. CONG. GLOBE, 41st Cong., 2d Sess. 1358 (1870) (statement of Sen. Sumner); see also CONG. GLOBE, 38th Cong., 1st Sess. app. 83 (1864) (statement of Rep. Davis) (“[The Guarantee Clause] places in the hands of Congress the right to say what is and what is not . . . inconsistent . . . with the permanent continuance of republican government . . .”). Representative Henry Davis of Maryland also made clear his view of the Guarantee Clause, stating, [The Guarantee Clause] vests in the Congress of the United States a plenary, supreme, unlimited, political jurisdiction, paramount over courts, subject only to the judgment of the people of the United States, embracing within its scope every legislative measure necessary and proper to make it effectual; and what is necessary and proper the Constitution refers in the first place to our judgment, subject to no revision but that of the people. It recognizes . . . the judgment of no court . . . [The Guarantee Clause] places in the hands of Congress the right to say what is and what is not . . . inconsistent . . . with the permanent continuance of republican government.

Id. at 82. Representative Davis, of course, was facing a recalcitrant Supreme Court who could determine the constitutionality of his proposed Wade-Davis Bill of 1864; his thoughts on the non-reviewability of Guarantee Clause legislation are substantially more muscular than the Supreme Court has ever announced, and it seems likely that his view was precisely calibrated towards the passage of the Bill, which was Congress’s “earliest attempt to utilize [the Guarantee Clause] as authority to ‘reconstruct’ the southern states.” Bonfield, *supra* note 279, at 538.

288. See CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner) (“It is a clause which is like a sleeping giant in the Constitution, never until this recent war awakened, but now it comes forward with a giant’s power. . . . There is no clause which gives to Congress such supreme power over the States as that clause.”); see generally Bonfield, *supra* note 279 (explaining the Reconstruction Congress principally look to the Guarantee Clause for constitutional authority before the enactment of the Fourteenth Amendment).

289. Rehnquist, *supra* note 286, at 694 (quoting *Fay v. New York*, 332 U.S. 261, 282 (1947)).

290. U.S. CONST. amend. XIV, § 1.

Clause—and through it, a dynamic, muscular, constitutional vision of democratic self-government for a diverse society²⁹¹—is what we should see.²⁹² Instead of grounding (if we can call it that) the substantive due process analysis in abstract philosophy and judicial historiography, why not ground it in that *constitutional* vision?²⁹³ Instead of asking whether an asserted interest is “implicit” in a “concept of ordered liberty” ossified in time, why not ask how it *matters* for that robust, dynamic form of republican liberty which the Reconstruction Framers envisioned and which, unfulfilled as that visions may be, we live and breathe today?²⁹⁴ Although the Reconstruction Amendments may have drawn attention away from the promises of the Guarantee Clause,²⁹⁵ its “core commitments and insights remain vital today,”²⁹⁶ and the liberty interests protected by the Due Process Clause of the Fourteenth Amendment cannot be fully—or intelligibly—understood without them.

291. Much has been made of late of the lexical distinction between “democracy” and “republic.” See, e.g., Bernard Dobski, *America is a Republic, Not a Democracy*, 80 HERITAGE FOUND.: FIRST PRINCIPLES 1 (2020), <https://www.heritage.org/sites/default/files/2020-06/FP-80.pdf> [<https://perma.cc/F8WU-898K>]; Mike Lee, *Of Course We’re Not a Democracy*, MIKE LEE U.S. SENATOR FOR UTAH (Oct. 20, 2020), <https://www.lee.senate.gov/2020/10/of-course-we-re-not-a-democracy> [<https://perma.cc/Y35U-8CKJ>]. We do not engage in this debate—and for good reason. “‘Democracy’ has long included representative democracy as well as direct democracy, and ‘Republic’ was used to refer to regimes that were not representative.” Eugene Volokh, *The U.S. is Both a Republic and a Democracy*, VOLOKH CONSPIRACY (Jan. 19, 2022, 8:31 AM), <https://reason.com/volokh/2022/01/19/the-u-s-is-both-a-republic-and-a-democracy> [<https://perma.cc/R6CF-QB4E>] (“I thought I’d repost this item of mine from several years ago, since I keep seeing the issue come up.”); see also DAHL, *supra* note 141, at 16–17 (noting that there was no “scheme of representation” in the Roman and Venetian “republics” and that “the two terms were used interchangeably in the United States during the eighteenth century”); *id.* at 17 (“[T]he plain fact is that the words *democracy* and *republic* did not (despite Madison) designate differences in types of popular government. What they reflected, at the cost of later confusion, was a difference between Greek and Latin, the languages from which they came.” (emphasis in original)); Shapiro, *supra* note 50, at 189 n.28; MARTIN, *supra* note 143, at 128 (“[T]he distinction between a democracy and a republic—which is generally seen to capture Madison’s antipopulist views—exists almost entirely in *Federalist* 10, 14, and 48, and nowhere else.” (emphasis in original)); *id.* at 129 (“Democracy, then, in the sense of ‘the rule of the people,’ was Madison’s central concern.”).

292. We think the constitutional interpretation of the Reconstruction Congress should also be given special weight because of success in passing amendments.

293. See generally Shapiro, *supra* note 50.

294. Burt Neuborne has similarly observed that “[u]nder existing constitutional ground rules, American judges, confronted by a hard constitutional case with implications for democracy, are not required—indeed, they may not even be permitted—to ask whether the outcome is good or bad for democracy.” Neuborne, *supra* note 220, at 605. And others have noted that when the Court considers judicial intervention to supervise the political process, it “is not asking whether judicial engagement would be good for the political process—in fact, it eschews that inquiry—it is asking whether judicial engagement is bad for the Court.” Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 258 (2018).

295. See Shapiro, *supra* note 50, at 186 (observing that, as a result of the Reconstruction Amendments “creat[ing] individual rights enforceable in federal court[,] . . . academics, politicians, courts, and lawyers have not focused on the structural protection of our commitment to popularly elected government provided by the Guarantee Clause.”); *id.* at 208 (similar).

296. Shapiro, *supra* note 50, at 234.

2. *Dispelling Justiciability Concerns*

Before discussing what a democratic jurisprudence of substantive due process grounded in that constitutional vision might look like, we address some potential justiciability concerns. Traditional wisdom holds that the Guarantee Clause itself is nonjusticiable under the political question doctrine.²⁹⁷ Despite this, potential justiciability concerns arising out of grounding the substantive due process analysis in the Guarantee Clause are unavailing for three reasons.

In the first place, as scholars have explained time and time again, the better argument is that the Guarantee Clause should be justiciable.²⁹⁸ We believe this proposition to be true. Some have even thought the day when courts recognize the justiciability of the Guarantee Clause might soon arrive.²⁹⁹ That recognition seems unlikely at present, but it is also beside the point for one simple reason: assessing substantive due process rights with reference to the Guarantee Clause is not the same thing as defining the Guarantee Clause itself.³⁰⁰

Apart from being distinct provisions, the constitutional powers (and duties) conferred under the Guarantee Clause and the Due Process Clause of the Fourteenth Amendment are also not the same. Under the Guarantee Clause, Congress may provide a *definition* for a government that is “republican” in form; it may create *affirmative* obligations, regardless of whether any individual rights are actively implicated.³⁰¹ Yet, despite its power,

297. See Williams, *supra* note 282, at 604 (“The roots of this somnolence are conventionally traced to the Supreme Court’s 1849 decision in *Luther v. Borden*, which has long been construed as requiring that all constitutional challenges based on the Clause be treated as involving nonjusticiable political questions.”).

298. See JACK M. BALKIN, *LIVING ORIGINALISM* 242–43 (2011); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COL. L. REV. 849, 849–52 (1994); Amar, *supra* note 122, at 753–54; ELY, *supra* note 274, at 118 n.*; see also James R. Brakebill, *Gerrymandering, Entrenchment, and “The Right to Alter or Abolish”: Defining the Guarantee Clause as a Judicially Manageable Standard*, 44 W. NEW ENG. L. REV. 211, 211–14 (2022); Williams, *supra* note 282, at 604–05, 605 n.13 (listing additional authorities); Shapiro, *supra* note 50, at 185 n.3 (listing additional authorities). Scholars have similarly invoked the Guarantee Clause as supporting a wide range of individual rights, including free universal education. See Williams, *supra* note 282, at 606 n.23 (listing authorities).

299. ELY, *supra* note 274, at 118 n.* (“In fact, it seems likely that this unfortunate doctrine—that all Republican Form cases are necessarily cases involving political questions—will wholly pass from the scene one of these days.”); see also *New York v. United States*, 505 U.S. 144, 185 (1992) (“[T]he Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”).

300. Professor Christopher Elmendorf has similarly posited that an “effective accountability norm” could be based, in part, on the Guarantee Clause, without applying it to litigation directly. See Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1084–86 (2010).

301. Compare U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”) with U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). In arguing for the justiciability of the Guarantee Clause, Professor Chemerinsky has argued that it “is best understood as being fundamentally about individual rights and thus very much an area where judicial review is appropriate.” Chemerinsky, *supra* note 298, at 865. Although Carolyn Shapiro understands the Guarantee Clause as providing rights to states rather than individuals, she agrees that Congress has broader discretion to legislate under the Clause than courts have to enforce it, including taking “proactive and prophylactic

Congress has no enforceable obligation under the Guarantee Clause³⁰²—and, as a matter of fact, has basically abdicated the field.³⁰³ In contrast, the federal judiciary may make no such positive impositions upon states under the Due Process Clause; the Fourteenth Amendment is framed in negative-power terms. Under the Due Process Clause, courts *prevent* states from taking certain actions against *individuals*.³⁰⁴ And, unlike the hands-off approach Congress has taken to the Guarantee Clause, the judiciary *must* make sense of the Due Process Clause in its role of interpreting the Constitution. Even if the Court is correct that the Constitution textually commits the question of whether a state government is “republican in form” to Congress,³⁰⁵ the Reconstruction Congress created a judicially enforceable Due Process Clause,³⁰⁶ responsive to the evolving nature of republican government and its implications for individual “liberty” against state power.³⁰⁷ In doing so, they made a textual commitment of power to the judiciary to police that boundary as well.

Moreover, in many ways, the Court has already tied Congress’s hands in legislating a vision of republican government because it has already essentially told it, through adjudicating liberty interests under the Due Process Clause,³⁰⁸ what a republican form of government is *not*—or, rather, what sort of political process needs to occur for a state to constitutionally work deprivations of liberty interests upon individuals. Consider *Reynolds v. Sims*, where the Court held the “one person, one vote” principle to govern

measures when necessary,” Shapiro, *supra* note 50, at 230; *see also id.* at 231–32 (identifying the sorts of legislation Congress could enact to respond to deficits in state-level democracy).

302. Chemerinsky, *supra* note 298, at 876 (“[T]here certainly is nothing that requires Congress to address violations of the Guarantee Clause.”).

303. *See id.* at 874–78. Professor Bonfield referred to his own investigation of the Guarantee Clause as “A Study in Constitutional Desuetude.” *See Bonfield, supra* note 279, at 513.

304. U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person . . .”).

305. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917) (“As has been decided repeatedly, the question whether this guaranty [sic] has been violated is not a judicial but a political question, committed to Congress, and not to the courts.”).

306. *See Shapiro, supra* note 50, at 186 (“The constitutional amendments and other federal actions to protect and expand voting rights, however, unlike the Guarantee Clause, create individual rights enforceable in federal court.”).

307. *See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 55, 58 (1988).

308. Others have argued that the Court has sidestepped the (non)justiciability of the Guarantee Clause by adjudicating cases under the Equal Protection Clause. *See Chemerinsky, supra* note 298, at 871 (“[T]he Court could just as easily have found the rule of ‘one-person one-vote’ [in *Reynolds v. Sims*] under the Guarantee Clause as under equal protection.”); Amar, *supra* note 122, at 753 (“[T]his vision [of republican government in the Guarantee Clause] is indeed justiciable—though the Court in the landmark case of *Reynolds v. Sims* repackaged these Republican Government issues as ‘equal protection’ issues.”); Arthur E. Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245, 251 (1962) (“[T]he same issue may be justiciable if raised under the [E]qual [P]rotection [C]lause, and nonjusticiable if raised under the guarantee.”). We do not disagree, but as we explain below, the heightened scrutiny that determined the outcome in cases like *Reynolds* derived from the fact that a “fundamental” substantive due process right was implicated.

state redistricting.³⁰⁹ Concededly, the Court styled *Reynolds* as an equal protection case,³¹⁰ and explicitly rejected any curtailment of the Guarantee Clause.³¹¹ But, as Professor Ely noted,

Friend and foe alike have come to recognize the obvious, that although the various state voting rights cases decided by the Warren and Burger Courts have been styled as equal protection decisions, they cannot comfortably be understood without a strong injection of the view that the right to vote in state elections is a rather special constitutional prerogative, a view that cannot be teased out of the language of equal protection alone and in textual terms is most naturally assignable to the Republican Form Clause.³¹²

We agree with Professor Ely, with one addition: although the right to vote in state elections certainly implicates the dimensions of the Guarantee Clause, the Court was drawing upon substantive due process in recognizing the fundamental right to vote in state elections.³¹³ Indeed, although *Reynolds* speaks of a “rational” basis review that applies to “divergences from a strict population standard,”³¹⁴ the Court was plainly applying a heightened level of judicial review. Rational-basis review does not usually exclude grounds of reasoning like history, or “economic or other sorts of group interests.”³¹⁵ In contrast, the Court applies strict scrutiny to equal protection violations where a fundamental right is at issue.³¹⁶ Thus, although it may draw upon the Guarantee Clause (and be styled as an equal protection case), *Reynolds* is also a substantive due process case because it implicitly recognized that the right to vote is a fundamental liberty interest under the

309. *Reynolds v. Sims*, 377 U.S. 533, 558, 568 (1964).

310. *See id.* at 566 (“[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.”).

311. *See id.* at 575 (“This does not necessarily mean that [the Alabama Legislature districting] plan is irrational or involves something other than a ‘republican form of government.’”).

312. ELY, *supra* note 274, at 118 n.*.

313. *Reynolds*, 377 U.S. at 561–62 (“the right of suffrage is a fundamental matter”; referring to “the political franchise of voting’ as ‘a fundamental political right’”).

314. *Id.* at 579.

315. *Id.* at 579–80.

316. *See Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (“*San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.”); *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 402 (2006) (“When strict scrutiny did appear in Equal Protection Clause litigation, it was confined to cases which involved legislation that burdened fundamental interests. Strict scrutiny did not appear in equal protection racial discrimination cases until 1978.”). *Murgia* and *Rodriguez* were both decided after *Reynolds*, but the *Murgia* Court cited to *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), in support of this proposition. There, the Court assessed whether the Oklahoma Habitual Criminal Sterilization Act violated equal protection. *Id.* at 536. Noting that legislatures “may mark and set apart the classes and types of problems according to the needs and as dictated by experience,” it explained that “if we had here only a question as to the State’s classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised” under the Equal Protection Clause. *Id.* at 540. But in striking down the Oklahoma statute, the Court held that “strict scrutiny of the classification which a State makes in a sterilization law is essential” because such legislation “involves one of the basic civil rights of man.” *Id.* at 541.

Fourteenth Amendment. Moreover, in defining the limits of a state's ability to weigh votes differently, the Court explicitly left open the possibility that its pronouncement *would* be binding on Congress, providing external limitations, at least on a practical level, for legislation under the Guarantee Clause.³¹⁷

Reynolds, instructive as it may be as an example, is far from the only incidence of the Court imposing limits on Congress's effective authority under the Guarantee Clause. Consider the Court's full panoply of formal due process cases—both substantive and procedural—involving state action, including those decided under the “incorporation” label.³¹⁸ If these rights are “implicit in the concept of ordered liberty,” could there be a republican form of government without them? Or, at least, could a purportedly republican government that did not afford them comport with due process such as to effect deprivations of life, liberty, and property interests?³¹⁹ Whether intending to or not, the Court long ago crossed into what Representative Henry Davis of Maryland called Congress's “plenary, supreme, unlimited, political jurisdiction, paramount over courts,” to legislate under the Guarantee Clause.³²⁰ In this sense, the Court waded into the proverbial “political thicket”³²¹ long before *Baker v. Carr*³²² was ever even filed.

Nor is this the only area of arguable textual commitment to a coordinate branch where the Court has reserved power. The Constitution gives a textually unqualified treaty power to the President and Senate: “[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur”³²³ Yet, in *Missouri v. Holland*, Justice Holmes explained that:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made *under the authority of the United States*. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply

317. Recall that the Court did not say “this *does not* mean” that the Alabama Legislature did not comport with the Guarantee Clause, but rather that “this does not *necessarily* mean.” *Reynolds*, 377 U.S. at 575.

318. See *McDonald v. Chicago*, 561 U.S. 742, 765 (2010) (“Only a handful of the Bill of Rights protections remain unincorporated.”); see also *id.* at 765 n.13.

319. See Smith, *supra* note 122, at 582.

320. CONG. GLOBE, 38th Cong., 1st Sess. app. 82 (1864) (statement of Rep. Davis). It is also worth noting that the Court has provided Congress with a substantial amount of flexibility in defining a republican form of government. See, e.g., *White v. Regester*, 412 U.S. 755, 765 (1973) (holding that “multimember districts are not per se unconstitutional”); *Fortson v. Morris*, 385 U.S. 231, 236–37 (1966) (holding that a state legislature may constitutionally select a governor where no candidate wins a majority).

321. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (“Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”).

322. *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding legislative malapportionment claims justiciable).

323. U.S. CONST. art. II, § 2, cl. 2.

that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.³²⁴

The Court has since clarified that treaties are “[s]ubject . . . to the Constitution’s guarantees of individual rights.”³²⁵ But some members of the Court have also more recently called into question the *content* of what a textually unqualified Treaty Power may provide.³²⁶

The Court’s historical treatment of the General Welfare Clause is even more on point. Article I provides, “*The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .*”³²⁷ That is a powerful textual commitment to Congress. Yet, in *Helvering v. Davis*, the Court held that there *is* a judicially enforceable line between “one welfare and another, between particular and general.”³²⁸ While also recognizing “a middle ground or certainly a penumbra in which discretion is at large,” and holding that discretion “belongs to Congress,” it also placed limits on even that discretionary realm: it would uphold Congress’s decision “unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”³²⁹ Nearly forty years later, in *Buckley v. Valeo*, the Court maintained the view that there is a “scope” of power granted to Congress under the General Welfare Clause, rather than a plenary one beyond judicial review.³³⁰ In deference to Congress, the Court “decline[d] to find [the legislation before it] without the grant of power in [the General Welfare Clause],” but did not disclaim its authority to do so.³³¹ Looking back on *Buckley* a decade later, the Court opined in *South Dakota v. Dole* that “[t]he level of deference to the congressional decision is such that the Court has . . . questioned whether ‘general welfare’ is a judicially enforceable restriction at all.”³³² But again, *Buckley* did not actually disclaim judicial authority to cabin Congress’s conception of the “general Welfare.”³³³ Although the Court may be loath to *define* the term, and has yet to do so, it has not ever said that it will not draw lines only within which Congress may enact valid spending legislation.³³⁴ To the contrary, it appears

324. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (emphasis added).

325. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 n.9 (2003).

326. *Bond v. United States*, 572 U.S. 844, 882–84 (2014) (Thomas, J., concurring) (suggesting that the Treaty Power is a “limited federal power” and highlighting “structural and historical evidence suggesting that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs”).

327. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

328. *Helvering v. Davis*, 301 U.S. 619, 640 (1937)

329. *Id.*

330. *Buckley v. Valeo*, 424 U.S. 1, 90 (1976).

331. *Id.* at 91.

332. *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987).

333. *See also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 632 (2012) (Ginsburg, J., concurring) (observing that *Dole* requires that “conditions placed on federal grants to States must . . . promote the ‘general welfare’”).

334. Consider an historical counterfactual: Suppose that during the 116th Congress, when Democrats held majorities in both chambers of Congress and the White House, Congress passed a bill to spend \$1 billion renovating President Biden’s private home. Does that seem like something the Supreme Court would have let slide?

to have maintained that authority still—and is unlikely to give it up any-time soon.³³⁵

Plainly, the Guarantee Clause is not the exclusive realm of potential interbranch conflict. But it is, we think, unique among similar examples in two regards. As we have explained above, the Court has already essentially entered the domain that it has held (maybe)³³⁶ to be Congress's exclusive purview. More importantly, however, the constitutional configuration between the Guarantee Clause and the Due Process Clause provides the Court with a unique “pressure release valve” in the event of actual interbranch conflict. If the Court were to ground its substantive due process jurisprudence in the Guarantee Clause, it could—at its discretion, of course—find that the subsequent congressional legislation under the Guarantee Clause that gives meaning to “a Republican Form of Government” requires a reassessment of due process rights identified according to an earlier definition of the term (or against the backdrop of congressional inaction). This may create some temporary uncertainty but is far from the “multifarious pronouncements” of purportedly equal authority with which the political question doctrine has historically been concerned.³³⁷ Moreover, if there is any realm of the Constitution where a robust, public, and adversarial discussion should be had between Congress and the judiciary, surely it lies in what democratic self-government means to us as a nation.³³⁸

For these reasons, potential concerns with encroaching upon Congress's authority under the Guarantee Clause—concerns that remain largely speculative after two centuries during which the “sleeping giant” has slumbered³³⁹—are no barrier to grounding substantive due process

335. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) (“[T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself.” (emphasis in original)); see also Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 635 (2023).

336. As John Hart Ely explained in *Democracy and Distrust*, the “generalization” that the Guarantee Clause is nonjusticiable “is rooted in a category of mistake.” ELY, *supra* note 274, at 118 n.*. Ely explained,

The early case of *Luther v. Borden*, 7 How. 1 (1849), involving an attempt to get the Court to decide under the Republican Form Clause which of two contending governments was the “real” government of Rhode Island, did involve a situation whose political tangle the Court probably was wise to leave to Congress. It was, however, a gross mistake of logic to infer, as subsequent cases did, that all cases brought under the Republican Form Clause must therefore also present political questions.

Id.; accord Chemerinsky, *supra* note 298, at 873 (“A court deciding a Guarantee Clause case usually can impose a specific remedy and avoid the *Luther* Court’s fear that an entire government would be invalidated.”); Amar, *supra* note 122, at 753 (“[T]he hoary case said to establish the general nonjusticability of the Clause, *Luther v. Borden*, in fact establishes no such thing . . .”).

337. See Chemerinsky, *supra* note 298, at 874 (addressing concerns of “multifarious pronouncements” in political question doctrine and concluding such pronouncement are “extremely unlikely under the Guarantee Clause because the other branches of government do not act pursuant to the provision”).

338. See *infra* Part III.D.3.

339. CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner) (“It is a clause which is like a sleeping giant in the Constitution, never until this recent war awakened . . .”).

jurisprudence in its constitutional vision of democratic self-government for a diverse society.³⁴⁰

D. A POLITICAL PROCESS THEORY OF SUBSTANTIVE DUE PROCESS

1. *John Hart Ely’s Political Process Solution for Identifying Protected Liberty Interests*

In 1980, Professor John Hart Ely published his seminal work on judicial review, *Democracy and Distrust: A Theory of Judicial Review*, in which he outlined a theory of judicial review rooted in the Warren Court’s emphasis on reinforcing political representation and the logic of the famed *Carolene Products* footnote 4.³⁴¹ The *Carolene Products* footnote provides the basis for the modern tiers of scrutiny, which calibrate the vigor of judicial review to instances where, under the *Carolene Products* footnote and Ely’s theory, there is reason to believe the democratic process culminating in state action is “malfunctioning.”³⁴² Like many others, Ely understood the second paragraph of the footnote to be focused on defects in the formal structure of government, especially voting, as well as impermissible curtailments in the free marketplace of ideas: “[I]t is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and

340. See Chemerinsky, *supra* note 298, at 874 (“[L]egislative or executive action to enforce the Guarantee Clause has been almost completely nonexistent and is likely to remain that way.”). In his canonical *Youngstown* framework for assessing executive action vis-à-vis congressional action, Justice Robert Jackson reasoned that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Because the Guarantee Clause commits these issues to Congress (if not exclusively) and the Due Process Clause commits them to the judiciary, Congress’s abdication of responsibility militates for the sort of judicial review that characterized the Warren Court and the voting rights cases Justice Fortas invoked in his *Fortson* dissent. See *Fortson v. Morris*, 385 U.S. 231, 243–49 (1966); see generally Bonfield, *supra* note 279.

341. ELY, *supra* note 274; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [Citing cases concerning “restrictions upon the right to vote,” “restraints upon the dissemination of information,” “interferences with political organizations,” and “prohibition of peaceable assembly.”].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

342. See ELY, *supra* note 274, at 103.

communication are kept open.”³⁴³ He understood the third paragraph to be focused on prejudicial attitudes towards minorities and how that affected the political process, especially opportunities for public discourse and inter-group persuasion,³⁴⁴ and read it as suggesting that “the Court should also concern itself with what majorities do to minorities, particularly mentioning laws ‘directed at’ religious, national, and racial minorities and those infected by prejudice against them.”³⁴⁵ The result was a theory of judicial review that eschewed questions of “fundamental values” and instead was attentive to the political process, from top to bottom.³⁴⁶ That “representation-reinforcing approach,” Ely maintained, “unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the Americans system of representative democracy.”³⁴⁷

Professor Ely also, and (in)famously, was not a fan of substantive due process. Although not the first to emphasize its purported “oxymoronic” quality, Ely is generally credited with popularizing the notion that substantive due process is a “contradiction in terms—sort of like ‘green pastel redness.’”³⁴⁸ Ely emphatically believed that it was not an “appropriate constitutional task” for courts to “preserve[] fundamental values”;³⁴⁹ in his view, that was a job for the elected branches of government.³⁵⁰ His theory is not without internal tension, then, in that the core of it depends on the judiciary rigorously safeguarding certain representation-reinforcing rights against state action, especially the right to vote and multifaceted free speech rights—and those rights, at least when affording protection from state action under the Fourteenth Amendment, *are* substantive due process.³⁵¹ Instead of focusing on values that were *somehow* “fundamental,”³⁵² Ely instead calibrated his approach towards identifying rights that were critical to a functional political process.³⁵³ In his view, there was only *one*

343. *Id.* at 76.

344. *See id.* at 135:

Of course, the pluralist model does work sometimes, and minorities *can* protect themselves by striking deals and stressing the ties that bind the interests of other groups to their own. But sometimes it doesn't, as the single example of how our society has treated its black minority (even after that minority gained every official attribute of access to the [formal political] process) is more than sufficient to prove.

(emphasis in original); *see also id.* at 153:

[P]rejudice is a lens that distorts reality. We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist.

345. *Id.* at 76.

346. *See id.* at 135 (“Of course, the pluralist model does work sometimes . . .”).

347. *Id.* at 88.

348. *Id.* at 18; *see also* Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 269–70 (2016).

349. ELY, *supra* note 274, at 88.

350. *But see generally* Seifter, *supra* note 73.

351. *See supra* Part III.A.

352. *See infra* note 365 and accompanying text.

353. *See* ELY, *supra* note 274, at 136.

fundamental value: political participation in the process of democratic self-government.³⁵⁴

Coincidentally, although Ely was generally dismissive of substantive due process, his political process theory provides a narrow way to assess asserted liberty interests that avoids substantive due process’s loudest criticism.³⁵⁵ Courts need not engage in “unrestrained imposition of [their] own *extraconstitutional* value preferences”³⁵⁶ as part of ascertaining whether a liberty interest is covered by the Due Process Clause; they need only assess how the asserted liberty interest affects the process of democratic self-government. As Professor Jamal Greene has explained, “it is easy to see how due process may be conceptualized along a loose (and perhaps overlapping) spectrum from what we tend to see as its procedural to its substantive elements.”³⁵⁷ But the simple fact is that the spectrum exists, and contains *all* liberty interests within it. While Ely’s theory made great strides in solving one false dichotomy,³⁵⁸ it seems to have manufactured, or concretized, another in the process: a categorical distinction between “[b]enefits . . . that are . . . essential to political participation or explicitly guaranteed by the language of the Constitution” and “constitutionally gratuitous” to others.³⁵⁹ But, taking Ely’s political process theory to its logical conclusion, how can we ignore the fact that virtually every liberty interest, in some way, shape, or form, affects the process of democratic self-government in potentially meaningful ways?³⁶⁰ If so, why not evaluate them on that basis?

This approach flips the conventional story on its head. In the political process theory of substantive due process which we begin to develop here, courts assess the value of an asserted interest with regards to the process

354. *See id.* at 88.

355. Ely thought that substantive due process was an exercise of the “rival value-protecting” approach towards judicial review. *See id.* at 88. Yet, at the same time, he seems to have considered “representative democracy” as a first-order value in a politically liberal rights-based hierarchy; essentially, *this is the one value on which we can, or should, all agree.* *See id.* In this sense, we situate his theory within the Lockean brand of political liberalism. But we think his approach is equally amenable to being understood as part of the Hobbesian tradition of political liberalism, in which the first-order value is calibrated towards avoiding conflict between different groups, to the extent that Ely may have prized representative democracy as a way of avoiding intergroup conflict. The approach we propose herein is also intelligible in either school of thought.

356. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2271 (2022) (emphasis added) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

357. Greene, *supra* note 348, at 260.

358. ELY, *supra* note 274, at vii (identifying as the monograph’s core premise the “false dichotomy” between interpretivist and non-interpretivist methods of judicial review).

359. *Id.* at 136. Professor Greene appears to agree with us. *See* Greene, *supra* note 348, at 259 (“On this view, substantive due process is not, as Ely would have it, a mandate to review the ‘merits’ of governmental action but is instead a mandate to determine which of a long menu of procedural boxes fits a particular kind of state deprivation.”).

360. *See* Reva Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1153 (2023) (“Because Ely failed to grapple with the ways that women’s equal participation rights were at stake in decisions about abortion, he failed to appreciate the many ways in which the right *Roe* recognized was democracy-promoting.”).

of democratic self-government.³⁶¹ This is categorically distinct from the “unrestrained imposition of [judges’] own *extraconstitutional* value preferences”³⁶² decried in *Dobbs*—or, indeed, even by Ely.³⁶³ Tellingly, it would also be nothing new. As the Court explained in *Reynolds*:

While the *result* of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the *judicial focus* must be concentrated upon ascertaining whether there has been any *discrimination against certain of the State’s citizens which constitutes an impermissible impairment of their constitutionally protected right to vote*.³⁶⁴

In the laundry list of important propositions for which *Reynolds* stands, perhaps the most critical is that courts need not prize certain interests over others as a matter of extraconstitutional preferences—but they *do* need to assess how asserted liberty interests enhance or diminish democratic self-government. Even if the Court may have concerns about considering matters of pure *moral* philosophy,³⁶⁵ it is abdicating its judicial role under the Fourteenth Amendment when it fails to even consider the same matters in terms of *political* philosophy. What is required is not necessarily “common-good constitutionalism,”³⁶⁶ but a common-sense approach to substantive due process that recognizes how liberty interests that may not, at first blush, appear “political” can be very deeply so.

361. Professor Tabatha Abu El-Haj has posited that a similar result may be reached by embracing a democracy-oriented view of the First Amendment. See generally El-Haj, *supra* note 158. Whereas Professor El-Haj approaches the problem from the perspective of First Amendment jurisprudence, we focus on substantive due process generally; as such, we incorporate her argument that free speech jurisprudence has substantially underserved democracy, and particularly emphasize the incoherence of that tradition as it applies to “liberty” interests under the Fourteenth Amendment Due Process Clause.

362. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2271 (2022) (emphasis added) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

363. See ELY, *supra* note 274, at 88.

364. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (emphasis added).

365. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2390 (2020) (Alito, J., concurring):

[T]he objection raised by the employers in *Hobby Lobby* “implicate[d] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.”

(quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014)); *McDonald v. City of Chicago*, 561 U.S. 742, 800 (2010) (Scalia, J., concurring) (“Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment . . .”); *Obergefell v. Hodges*, 576 U.S. 644, 703 (2015) (Roberts, C.J., dissenting):

The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that ‘it would disparage their choices and diminish their personhood to deny them this right.’ Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.

(citation omitted).

366. See generally ADRIAN VERMEULE, *COMMON-GOOD CONSTITUTIONALISM* (2022).

We do not even begin to propose in this Article where, or how, courts should draw lines in this analysis. But wherever lines might ultimately fall, the right to abortion, in addition to however else it may be understood, is plainly a deeply political liberty.³⁶⁷ As Reva Siegel has explained, “Just as Ely understands decisions protecting rights to voting, speech, and school integration as integral to membership in a democracy, so too are decision about intimate and family relations.”³⁶⁸ At the most basic level of inclusion in the *demos*, “[t]he right the Court abrogated in *Dobbs* is like the [other substantive due process rights] the *Dobbs* decision discredits: They signal who counts among We the People.”³⁶⁹ And the effects don’t stop there. As the Court recognized in *Casey* (and retrospectively denied its authority to recognize in *Dobbs*³⁷⁰), “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”³⁷¹ That ability has also allowed them to participate more fully, if at all, at various levels of the democratic process. Having a child can be an enriching experience, but parenthood also creates substantial responsibilities.³⁷² Particularly for the most vulnerable individuals seeking to terminate a pregnancy,³⁷³ these responsibilities can meaningfully impact those individuals’ opportunities to run for office³⁷⁴—or even to merely engage directly in the political process and become involved in community activity and public discourse as an individual. Unexpected parenthood also has a strong impact on access to educational opportunities,

367. See generally Siegel, *supra* note 360; see also Silvia Henriquez & Sarita Gupta, *In the Wake of Roe, a Resurgent Fight for Reproductive Justice*, FORD FOUND. (Jan. 19, 2023), <https://www.fordfoundation.org/news-and-stories/stories/posts/in-the-wake-of-roe-a-resurgent-fight-for-reproductive-justice> [<https://perma.cc/CGU7-R9GZ>] (“[A]ccess to abortion is not only a fundamental human right, but a key pillar of democracy.”); Rebecca Goldman, *Abortion Legislation is a Democracy Issue*, LEAGUE OF WOMEN VOTERS (Mar. 21, 2023), <https://www.lwv.org/blog/abortion-legislation-democracy-issue> [<https://perma.cc/C243-VFEY>] (“Without the ability to make reproductive decisions for one’s own body, women and those who can become pregnant cannot participate equally in our democracy.”).

368. 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, 1946 (2021); see *id.* at 1944–49 (explaining how intimate and family life affects democratic participation); see Siegel, *supra* note 360, at 1194–96.

369. Siegel, *supra* note 360, at 1195–96.

370. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276 (2022).

371. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). Justice Breyer’s dissent in *Dobbs* makes two references to “participat[ing] fully and equally in the Nation’s political, social, and economic life.” *Dobbs*, 142 S. Ct. at 2344 (emphasis added); see *id.* at 2330. Yet, it does not elaborate further on the political dimension in particular.

372. See, e.g., Brief for National Women’s Law Center et al. as Amici Curiae Supporting Respondents at 3, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“Being forced to continue a pregnancy jeopardizes people’s health and results in substantial economic, educational, and professional burdens.”).

373. See Brief for Organizations Dedicated to the Fight for Reproductive Justice et al. as Amici Curiae Supporting Respondents at 34, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“People forced to carry unwanted pregnancies to term are . . . nearly 400% more likely to have a household income below the poverty level, and 300% more likely to be unemployed.”).

374. See Forman-Rabinovici & Johnson, *supra* note 11, at 126–28 (describing barriers to women “hav[ing] the same opportunities to participate in the political process as political candidates and elected officials as men have”).

both directly³⁷⁵ and indirectly, through enhancing economic opportunity.³⁷⁶ And, at the most basic level of democratic practice, forcing someone to carry a pregnancy to term can also lead to their permanent exclusion from the political community through pregnancy- or childbirth-related mortalities.³⁷⁷ Pregnancy and childbirth in the United States is 1.5 times more likely to kill you than a traffic accident.³⁷⁸ Police officers are less likely to be killed on the job than people are to die as a result of pregnancy.³⁷⁹ At every level of democratic practice, the liberty of controlling one's reproductive health has an undeniable effect on one's ability to fully participate, if at all, in our democracy.³⁸⁰ Suffice to say, were a court inclined to assess the right to abortion in terms of its impact on individual political liberty, it would have no small number of opportunities to explain why that right is critically important.

We do not suggest that a political process approach to substantive due process claims need be the exclusive one. Indeed, our theory does not require that courts should disavow, for example, natural rights theories.³⁸¹

375. See Brief of Amici Curiae Economists in Support of Respondents at 11, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) ("Studies show that in addition to impacting births, abortion legalization has had a significant impact on women's wages and educational attainment, with impacts most strongly felt by Black women.").

376. See Jennifer Ludden, *Women Who Are Denied Abortions Risk Falling Deeper Into Poverty. So Do Their Kids.*, NPR (May 26, 2022), <https://www.npr.org/2022/05/26/1100587366/banning-abortion-roe-economic-consequences> [<https://perma.cc/ZGW7-HSED>] (strengthening individuals' "economic prospects" through abortion access "allow[s] them, in turn, to obtain more education").

377. See Brief for National Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondent at 5, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) ("Not just pregnant women's physical liberty is at stake, but their right to life: A Washington, D.C. judge ordered a pregnant woman to undergo cesarean surgery without her consent knowing that the operation might kill the woman. Neither she nor her baby survived.").

378. See K. S. Joseph, Amelie Boutin, Sarka Lisonkova, Giulia M. Muraca, Neda Razaz, Sid John, Azar Mehrabadi, Yasser Sabr, Cande V. Ananth & Enrique Schisterman, *Maternal Mortality in the United States*, 137 *OBSTETRICS & GYNECOLOGY* 763, 763–71 (2021), <https://pubmed.ncbi.nlm.nih.gov/33831914> [<https://perma.cc/4332-N5CT>] (noting that there are 174 deaths per 100,000 pregnancies annually); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *TRAFFIC SAFETY FACTS: 2020 DATA* (2022), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813369> [<https://perma.cc/L4QR-47GF>] (noting that there are 11.78 deaths per 100,000 people driving).

379. See U.S. BUR. OF LAB. STAT., *INJURIES, ILLNESSES, AND FATALITIES: FACT SHEET* (Nov. 8, 2021), <https://www.bls.gov/iif/factsheets/fatal-occupational-injuries-police-2018.htm> [<https://perma.cc/5VHA-6ET7>] (noting that there are 13.7 police fatalities per 100,000 officers in 2018).

380. The Court's statement in *Dobbs* that its decision "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," is, perhaps, facially true. *Dobbs*, 142 S. Ct. at 2277. But while "[w]omen are not without electoral or political power," the Court's decision in *Dobbs* appears destined to affect participation at different levels of democratic practice. See *id.*

381. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–50 (1936); Shapiro, *supra* note 50, at 192 (observing that some of the Framers of the Federal Constitution thought that "[n]o government could be republican that did not respect the natural rights that derived from the law of God") (alteration in original); R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 *ST. MARY'S L.J.* 973, 997–98 (2021) (observing that two of the factors which the Supreme Court has used to decide whether to apply heightened standards of review are rooted in natural law theory); Peter Brandon Bayer, *Deontological Originalism: Moral Truth*,

It simply recognizes that, whatever else the Reconstruction Framers had in mind, a guarantee of republican political liberty was surely part of it.

Nor does our proposal directly implicate substantive due process rights against the federal government under the Fifth Amendment. Although the Court has long held that “incorporated” fundamental rights apply in the same regard under the Fifth and Fourteenth Amendments,³⁸² we posit, among good company on the Court,³⁸³ that such an approach also serves to undermine more context-specific inquiries; it may be tidier for courts to conflate the two, but we think that there are salient distinctions— theoretical and practical—between state governments and the federal government,

Liberty, and Constitutional Due Process: Part II—Deontological Constitutionalism and the Ascendency of Kantian Due Process, 43 T. MARSHALL L. REV. 165, 165 (2017) (“[B]oth the Founders of this Nation and the Reconstruction Congress properly believed in natural rights derived from principles of natural law. Accordingly, they sought to enforce through the Constitution, the natural rights philosophy set forth in the Declaration of Independence.”); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423, 423 n.51 (2010) (noting that the “vested rights” approach to substantive due process originated in natural law concept). *But see* Mattei Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 VILL. L. REV. 247, 272–73 (2009) (explaining natural law criticisms of substantive due process cases).

382. *See, e.g.*, *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964); *Ker v. California*, 374 U.S. 23, 30–35 (1963); *Griffin v. California*, 380 U.S. 609, 609–15 (1965); *Baldwin v. New York*, 399 U.S. 66, 67–74 (1970); *Williams v. Florida*, 399 U.S. 78, 82–84 (1970); *Ballew v. Georgia*, 435 U.S. 223, 229–30 (1978); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780, 780 n.16 (1978); *Crist v. Bretz*, 437 U.S. 28, 30–32 (1978); *Burch v. Louisiana*, 441 U.S. 130, 132–39 (1979).

383. Over the years, several members of the Court have specifically argued for a dual standard for substantive due process as applied to the states or the federal government. *See* *Roth v. United States*, 354 U.S. 476, 503 (1957) (Harlan, J., concurring in part and dissenting in part); *Ker*, 374 U.S. at 44–46 (Harlan, J., concurring); *Williams*, 399 U.S. at 143–45 (Stewart, J. concurring in part and dissenting in part); *Duncan v. Louisiana*, 391 U.S. 145, 173–83 (1968) (Harlan, J., dissenting); *Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (Fortas, J., concurring); *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring); *Crist v. Bretz*, 437 U.S. 28, 40–49 (1978) (Powell, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 290–94 (1976) (Rehnquist, J., concurring in part and dissenting in part); *Bellotti*, 435 U.S. at 822–28 (Rehnquist, J., dissenting); *see also* *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due process has not been reduced to any formula . . .”). This group is predominantly dominated by conservatives, with the exception of Justice Fortas. But a dual approach to due process is not a conservative idea. For example, the Warren Court in *Reynolds* expressly iterated a principle for state senates that does not apply to the U.S. Senate; there, the Court found the “federal analogy inapposite and irrelevant to state legislative districting schemes,” observing that state subdivisions’ relationships with States “could hardly be less analogous” to States’ relationship with the federal government. *Reynolds v. Sims*, 377 U.S. 533, 573, 575 (1964). *Reynolds*, although cloaked in the garb of equal protection jurisprudence, was plainly dependent on substantive due process. *See id.* at 560 (“[F]undamental principle of representative government . . .”); *id.* at 561–62 (“[T]he right of suffrage is a fundamental matter in a free and democratic society.”); *id.* at 564 (“[F]undamental ideas of democratic government . . .”); *id.* at 565 (“[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”); *see also* ELY, *supra* note 274, at 118 n*. Scholars have also argued in favor of a bifurcated approach, to various ends. *See* Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA L. REV. 447, 529 (2022) (stating that “theoretical commitments of Public Meaning Originalism are most consistent” with the view that the “meanings of the two [Due Process] Clauses are independent of one another” and that “the communicative content of the two Clauses does not interact”); *see generally* Williams, *supra* note 381 (questioning the assumption that the Due Process Clauses of the Fifth and Fourteenth Amendments should be construed identically and arguing that substantive due process is only afforded by the Due Process Clause of the Fourteenth Amendment).

and the relationship of each with individuals subject to them. It is beyond the scope of this Article to meaningfully dissect those distinctions. However, as one example, if Justice Stevens were correct in his *Heller* dissent that the adoption of the Second Amendment “was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States,”³⁸⁴ then it would make little sense, at least on that basis, to have a uniform jurisprudence of the Second Amendment that applies to both states and the federal government.³⁸⁵

Of course, a political process theory of Fourteenth Amendment substantive due process jurisprudence could also have implications for how we understand substantive due process under the Fifth Amendment. The Court’s “reverse incorporation” of the Fourteenth Amendment’s Equal Protection Clause against the federal government demonstrates as much.³⁸⁶ Indeed, we are not sure that the Fifth Amendment is less sensitive to democratic considerations than the Fourteenth Amendment, although it may be sensitive to different ones.³⁸⁷ The Federal Constitution does not by its own terms guarantee a republican form of *federal* government—just the system of government it provides.³⁸⁸ Yet, on the tailcoats of the ratification of the Federal Constitution, the Supreme Court explained how the principle

384. *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting) (“The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia.”).

385. Indeed, some have argued that the Fourteenth Amendment essentially negated the purpose of state militias, and the purpose of the Second Amendment along with them, by legitimizing a national draft and a standing national army. *See, e.g.*, David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 638–47 (2000).

386. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”); *see generally* Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004). Ely referred to reverse incorporation through the Fifth Amendment as “gibberish both syntactically and historically,” and posited that “[h]ope for responsible application of an equal protection concept to the federal government may . . . lie, if anywhere, in that old constitutional jester, the Ninth Amendment” ELY, *supra* note 274, at 32–33.

387. Consider *Hurtado v. California*, 110 U.S. 516 (1884), where the Court held that due process protections provide “bulwarks . . . against arbitrary legislation,” but concluded that individuals do not have a liberty interest to indictment by a grand jury because it is separately enumerated in the Fifth Amendment, and that meaning controls. *Hurtado*, 110 U.S. at 532–34. *See also supra* note 383 and accompanying text (discussing uniform application of substantive due process under the Fifth and Fourteenth Amendment).

388. Or, as Benjamin Franklin referred to it, a “republic, if you can keep it.” Josh Levy, “A Republic if You Can Keep it”: Elizabeth Willing Powel, Benjamin Franklin, and the James McHenry Journal, LIBR. OF CONG. BLOGS (Jan. 6, 2022), <https://blogs.loc.gov/manuscripts/2022/01/a-republic-if-you-can-keep-it-elizabeth-willing-powel-benjamin-franklin-and-the-james-mchenry-journal> [https://perma.cc/H5S7-2GWM]; *see generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); ZIBLATT & LEVITSKY, *supra* note 178.

of democratic self-government that undergirds it may apply similarly. As Justice Samuel Chase wrote for the Court in *Calder v. Bull*, government was established to protect personal liberty, and that “apparent and flagrant abuse[s] of legislative power . . . to take away that security for personal liberty . . . cannot be considered a rightful exercise of legislative authority” where it is “contrary to the great first principles of the social compact.”³⁸⁹ In his view, the nature of legislative power was based on that “express compact, and on republican principles,” and the suggestion that something more was required to restrain legislative authority was “a political heresy, altogether inadmissible in our free republican governments.”³⁹⁰ Although we express no opinion here on how those “principles of the social contract” should be understood in the context of the relationship between individuals and the federal government, suffice to say that there is ample opportunity to deploy a similar, if somewhat different, analysis under the Due Process Clause of the Fifth Amendment.³⁹¹

Ultimately, what we propose is nothing shockingly new. Courts will still need to identify which asserted liberty interests trigger heightened scrutiny.³⁹² And, as discussed above,³⁹³ the Court has a developed (albeit highly inconsistent) track record of being responsive (notwithstanding the abstraction and intractability of the constitutional standard) to democratic considerations in identifying important liberty interests—like the right to vote (and have your vote weigh the same as others), freedom of speech, freedom of the press, freedom of political association, and so forth. And yet, at the same time, looking to the constitutional vision of democratic self-government has the capacity to reinvigorate substantive due process jurisprudence while limiting the margin for the sort of “unrestrained imposition of [judges’] own extraconstitutional value preferences” decried by its critics.³⁹⁴ At a time when democracy and substantive due process both appear to be in peril, could it be that they have had the power to save each other all along?

2. Taking a “Hard Look” at the Political Process

Much as the Supreme Court in *Dobbs* papered over the dangerous democratic deficits in state political processes, so, too, has the Court’s rigid

389. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

390. *Id.* at 388–89.

391. See also Williams, *supra* note 381, at 466–67 (concluding that Justice Curtis’s opinion for the Court in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), “reflected an unambiguously ‘substantive’ conception of due process rights”).

392. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1316–17 (2007).

393. See *supra* Part III.C.1.

394. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2271 (2022) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

approach to a tiered system of judicial review unfortunately obscured what should be a central role for democratic self-government in that analysis.³⁹⁵

Substantive due process and strict scrutiny go hand in hand. Some substantive due process rights may be truly absolute and inviolable. But most are simply subject to heightened scrutiny (strict or otherwise)—indeed, *because* they are recognized as having substantive force.³⁹⁶ Recall that Ely's apparently favorable stance towards certain unenumerated rights, like voting, did not reflect any similar feeling about substantive due process, but was because he thought that state action should be subject to heightened scrutiny where it compromises the political process.³⁹⁷ Essentially, Ely described substantive due process in terms of judicial review. In this Article, we endeavor to lay the groundwork for a different view of those interrelated concepts: judicial review as (sometimes) substantive due process.

The language of the Due Process Clause encompasses two different sorts of claims, along the dimensions of what we think of as “substantive” and “procedural” due process: “A due process violation requires that the asserted life, liberty, or property interest pass some threshold of importance and that it be deprived without crossing some other threshold of regularity or consistency with the way in which meaningfully similar rights are deprived.”³⁹⁸ The nature of the liberty interest also affects the type of process that is required to deprive someone of it. Thus, the potential deprivation of certain liberty interests “triggers” heightened review, under strict scrutiny or other demanding standards.³⁹⁹ Understood in this way as a sort of “sliding scale” approach to evaluating state action,⁴⁰⁰ we think the Due

395. Cf. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163–65 (1984) (explaining Justice Thurgood Marshall's and Justice Stevens's critique of the “multi-level system as obscuring what in reality is a more unitary standard of review”); *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 92–102 (1972); Craig v. Boren, 429 U.S. 190, 211–14 (1976) (Stevens, J., concurring). In so noting, we take a page from Ely, who observed that “[f]or all its notoriety and influence, the *Carolene Products* footnote,” the origin of tiers of scrutiny, “has not been adequately elaborated.” John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 455 (1978).

396. *See* Fallon, *supra* note 392, at 1316–17.

397. Although Ely might have emphasized the impermissible *ends* of certain legislation under the Equal Protection Clause rather than defective *processes* leading up to it, he also was critical of the Court's reverse incorporation of equal protection into the Fifth Amendment's Due Process Clause. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Thus, so far as Ely thought the federal government should be subject to heightened scrutiny where it used racial classifications, the basis his work provides for that proposition is that some political processes themselves are highly defective.

398. Greene, *supra* note 348, at 262.

399. *See* Fallon, *supra* note 392, at 1316–17.

400. *See* R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 167 (2014); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 J. CONST. L. 225, 242 (2002); Leslie Friedman Goldstein, *Between the Tiers: The New(est) Equal Protection and Bush v. Gore*, 4 J. CONST. L. 372, 392–93 (2002) (attributing “sliding scale” approach to Justice Marshall in *San Antonio v. Rodriguez* and Justice Stevens in *Craig v. Boren*).

Process Clause actually provides *one* substantive right: the right to robust judicial review of the political process culminating in state action that deprives individuals of life, liberty, and property interests.⁴⁰¹

We can conceive that there are certain liberty interests so critical to democratic self-government that there may be *no* process that can affect their deprivation.⁴⁰² The Court, on at least one occasion, seems to have agreed in principle with this view.⁴⁰³ And the “one person, one vote” principle it announced in *Reynolds* is the paradigmatic example of where it has done so: state legislative districts cannot be of uneven population regardless of the political process leading to that result.⁴⁰⁴ In other cases, where *some* deprivation may permissibly occur in light of the right’s relative importance to democratic self-government, the question becomes whether the political process culminating in the deprivation is sufficiently “due.”

The strict scrutiny standard that applies when courts review government action targeting “fundamental” liberty interests does not assess the process directly, resorting instead to proxy questions of whether state action is supported by an (often abstract) “compelling interest” and is “narrowly tailored” to it. In contrast, the text of the Due Process Clause does not explicitly ask about “compelling interests” and “narrow tailoring.” These *may* be good proxy questions for ferreting out illicit motives,⁴⁰⁵ but the Due Process Clause inquires as to whether the “process of law” was “due.” We propose that courts could better honor the Due Process Clause by more closely evaluating the actual process resulting in state action as measured against what is “due” under the Guarantee Clause’s vision of republican government.

This reading of the Due Process Clause is not, we think, inconsistent with an originalist perspective.⁴⁰⁶ Ryan Williams has explained that,

[Although] the pre-constitutional and Founding-era evidence regarding the meaning of “due process of law” strongly suggests that that phrase most likely would have been viewed in 1791, at the time of the Fifth Amendment’s ratification, as guaranteeing either that duly enacted law would be followed or that certain requisite procedures would be observed in connection with criminal or civil proceedings,⁴⁰⁷

401. See Shaman, *supra* note 395, at 174 (“All constitutional adjudication, regardless of the structure through which it is accomplished, necessarily entails a balancing or comparative evaluation of governmental and individual interests.”).

402. Greene, *supra* note 348, at 260–61.

403. See *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (holding Due Process Clause “protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986))).

404. See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

405. See Fallon, *supra* note 392, at 1309 (identifying Professor Ely as “the most famous defender of a motive-based interpretation of strict scrutiny” and observing that “the narrowly-tailored-to-a-compelling-interest test and its doctrinal precursors may well have functioned to unmask forbidden motives” in some cases).

406. See also Greene, *supra* note 348, at 277–78 (“Originalism does not, per se, support the view that substantive due process is contradictory.”).

407. Williams, *supra* note 381, at 416.

the phrase took on new meaning in the period leading up to Reconstruction:

Between 1791 [when the Fifth Amendment was ratified] and 1868, when the Fourteenth Amendment was ratified, due process concepts evolved dramatically through judicial elaboration of due process and similar provisions in state constitutions, and through invocations of substantive due process arguments by both proslavery and abolitionist forces in connection with debates concerning the expansion of slavery in the federal territories. As a result, by 1868 “due process of law” had developed additional, well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws.⁴⁰⁸

In other words, by the time the Fourteenth Amendment was proposed and ratified, “process of law” was understood to encompass the sorts of things that legislatures, for any number of reasons,⁴⁰⁹ could or could not do.⁴¹⁰ Against this backdrop, we think that the term “process of law” was opened up to include not just the *judicial* process by which a liberty interest could be deprived, but also the *legislative* process leading up to it. This understanding is also consonant with the Court’s decision in *Arizona Independent Redistricting Commission*, where it found that the term “legislature,” as used in the Elections Clause, broadly referred to Arizona’s “power that makes laws,” and thus upheld a state constitutional amendment establishing an independent redistricting commission that was enacted by popular ballot initiative.⁴¹¹ If we can understand the term “legislature” as referring to the people’s lawmaking power, then why not understand the term “process of law” as referring to the entire process culminating in a deprivation of an asserted liberty interest?

Understood in this fashion, the question becomes what sort of political process is “due” when the state seeks to deprive individuals of certain liberty interests? As one piece of originalist scholarship explains, “In the context of the Fifth Amendment, the word ‘due’ simply means ‘owed’ according to the ‘law of the land’”⁴¹² Even assuming that view carried forth to the Reconstruction Congress and was incorporated in the Fourteenth Amendment, the original meaning of that text is consistent with our proposed analysis. The Federal Constitution provides the “law of the land.”⁴¹³ Thus, as applied to the federal government, the process of law that is “due” is that which results from the processes outlined in the Constitution.⁴¹⁴ The

408. *Id.*

409. See *Grosjean v. American Press Co.*, 297 U.S. 233, 249–50 (1936).

410. See Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 487–89 (1985) (discussing pre-Fourteenth Amendment cases where courts struck down legislative acts on substantive due process grounds).

411. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 813–14 (2015).

412. Andrew T. Hyman, *The Little Word “Due”*, 38 AKRON L. REV. 1, 4 (2005).

413. U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land . . .”).

414. *But see* Hyman, *supra* note 412, at 3 n.6 (noting limited exceptions).

Constitution does not guarantee to the people a republican form of *federal* government—it guarantees only the form of government that it outlines, whether we may think that “republican” or not. In stark contrast, however, the Federal Constitution does provide a “law of the land” that is *superior* to state law: it guarantees to the people a republican form of *state* government.⁴¹⁵ When assessing what sort of *state* process of law is due under the Federal Constitution, it must be measured against that constitutional commitment. So, even an originalist construction of the meaning of the Due Process Clause is amenable to robust judicial review ensuring that process is “due” according to the federal guarantee of a republican form of government.⁴¹⁶

In practice, this could look like “put[ting] flesh upon”⁴¹⁷ a proportionality⁴¹⁸ or arbitrariness⁴¹⁹ assessment. But we think the best answer—is a contextualized hard look at the political process leading up to any threatened deprivation. In the administrative law context, courts regularly scrutinize the processes of government action, and we are not the first to suggest applying that scrutiny to state legislative processes in areas that implicate democratic practice.⁴²⁰ Under this approach, courts would assess every

415. As Professor Chemerinsky has explained, the Guarantee Clause also presents the ultimate power-grab for state courts, which may invoke the power of the Federal Constitution, but are free from Supreme Court review by virtue of the Clause’s (purported) nonjusticiability. See Chemerinsky, *supra* note 298, at 873–74. Of course, federal courts may, both under current practice and under our proposal, step in to prevent state action *resulting* from a state court’s interpretation of the Guarantee Clause when it would work an impermissible deprivation of a life, liberty, or property interest in violation of the Due Process Clause.

416. At least one scholar seems to agree with this approach. Writing before the Supreme Court’s decision in *Arizona Independent Redistricting Commission (AIRC)*, Professor Fred Smith suggested that state action by ballot initiatives cannot work any deprivation under the Due Process Clause because it does not comport with the Guarantee Clause. See Smith, *supra* note 122, at 582. The Court’s decision in *AIRC* undercut that notion, but fully supports ours. See *Ariz. Indep. Redistricting Comm’n*, 576 U.S. at 813–14 (understanding the term “legislature” as used in the Elections Clause to encompass popular ballot initiative).

417. *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

418. See Chemerinsky, *supra* note 18, at 1501 (“Substantive due process asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”).

419. See *Hurtado v. California*, 110 U.S. 516, 536 (1884) (recognizing appropriateness of “excluding, as not due process of law . . . legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation” because “[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law”); see also Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process*, 76 SMU L. REV. 613 (2023); Rosalie Berger Levinson, *Reining in Abuses of Executive Powers Through Substantive Due Process*, 60 FLA. L. REV. 519, 579 (2008) (“Traditional substantive due process analysis, however, has always permitted the challenger, even in the absence of a fundamental right, to prove the total arbitrariness of the government conduct.”); Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1119 (2019) (“In America, due process of law came to be understood as a guarantee against *all* arbitrary government action, whether initiated by the executive or the legislature.” (emphasis in original)).

420. See John J. Martin, *Danger Signs in State and Local Campaign Finance*, 74 ALA. L. REV. 415, 473–74 (2022) (arguing for “hard look” review of legislative determinations of campaign contribution limits); see also Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 498 (2013) (discussing the “institutional-analysis” approach).

level of the political process for democratic deficits—from prejudice⁴²¹ to presentment. Even Ely, loath as he was to recognize the salience of what he deemed non-political rights, perceived democratic deficits at even the most basic and informal levels of the political process.⁴²² We envision that a thorough examination of the political process would also subsume the two questions that currently figure into tiers of scrutiny analysis: what is the government interest and how is the proposed state action related to, or tailored, to achieve that end? But it would require courts to conduct their analysis from the ground up in a way that talismanic terms like “compelling interests” and “narrow tailoring” certainly allow, but can also be invoked to obfuscate; strengthen courts’ ability to reason their way to a decision “without resorting to preconceived labels” and only later “fit[ting] [decisions] into the tiers,” almost as an afterthought;⁴²³ and, by doing so, avoid the tiers’ effect of limiting courts’ ability to use “analogical reasoning” in appropriate circumstances.⁴²⁴ We do not suggest that this need look completely distinct from how many decisions are written today, but rather that the rigid tiers may be less conducive to identifying important democratic deficits, especially at the lower levels of the political process.

Although it is beyond the scope of this Article to elaborate a detailed typology of the sorts of political processes that might invalidate laws depriving individuals of different sorts of liberty interests, we can readily identify a few types of processes that courts might do well to view with a critical eye. In the aftermath of *Dobbs*, courts might consider whether laws enacted before women could vote which specifically affect women’s rights comport with the principle of democratic self-government.⁴²⁵ Courts might make a similar assessment where gerrymandered legislative supermajorities allow for the state legislature to collapse tripartite government by enacting laws over the governor’s override, or evading meaningful judicial

421. In the federal constitutional project, Madison was concerned with how to mitigate with the effects of factionalism at the national level. But we think the Fourteenth Amendment does not preclude considering how various public policies can restrain, or unbridle, the pernicious effects of factionalism at the state level, as well. Madison, as you will recall, was substantially wary of the democratic capacity of state legislatures. See Madison, *supra* note 163. Factionalism, in his view, required a response: “The friend of popular governments . . . will not fail . . . to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for [the violence of faction].” THE FEDERALIST NO. 10 (James Madison). Indeed, Madison contemplated that future action might be necessary: “[I]t would be an unwarrantable partiality, to contend that [the valuable improvements made by the American constitutions on popular models] have as effectually obviated the danger on this side, as was wished and expected.” *Id.*

422. See ELY, *supra* note 274, at 135 (“[T]he pluralist model does work sometimes.”).

423. Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1045–46 (2004); see also Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. REV. 99, 138 (2007) (“[Justice Marshall] was right [in his *San Antonio Independent School District v. Rodriguez* dissent that the tiers no longer described the Court’s practice], but the categories survived, ornamenting opinions even though decisions were reached in the manner that Marshall had described.”).

424. Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 419 (2018).

425. See generally Landau & Dixon, *supra* note 11.

review by the state courts.⁴²⁶ In line with a “hard look” in the administrative law context, courts might also inquire whether legislatures took into account contrary facts and arguments when developing legislation, especially where those facts and arguments implicate the precision, or overbreadth, of state action.⁴²⁷ The “narrowly tailored” prong does not disavow such considerations; but, at the very least, it appears to place emphasis on whether the ultimate legislation *is* narrowly tailored. Courts might also seek to “unmask forbidden motives” by examining prejudicial attitudes at the most basic level of the political process, and not only the sanitized purposes put forth by legislators.⁴²⁸ Suffice to say, if courts took a “hard look” at these processes, we trust they could, if so inclined, see a more complete picture of anti-democratic activity culminates in state action.

3. *Discretion, Democracy, and Discourse*

Our proposed form of analysis is not entirely mechanical. It will require courts to draw difficult lines, thereby inevitably engaging in acts of discretion in, at least, elaborating doctrine.⁴²⁹ But that is not “freewheeling judicial policymaking”;⁴³⁰ that is what judges do. Judging means saying what the law is.⁴³¹ Umpires, too, use judgment when they “call balls and strikes.”⁴³² And it is far from clear that history, which the Court has embraced as a way of cabining its own discretion,⁴³³ provides a more meaningful limiting factor,⁴³⁴ or greater stability.⁴³⁵ The alternative, disclaiming judicial authority, may have the same result as denying a claim on the merits.

On the other hand, what is the risk of embracing a more democracy-oriented approach to due process? If the product of the analysis we propose is *too much* democracy, that is surely the most tolerable excess under

426. See *supra* Part I.A.3; see generally *VanSickle v. Shanahan*, 511 P.2d 223 (Kan. 1973).

427. See generally *Woodruff & Roberts*, *supra* note 158.

428. See *Fallon*, *supra* note 392, at 1309.

429. See *Neuborne*, *supra* note 220 and accompanying text; cf. *Chemerinsky*, *supra* note 298, at 871 (“[I]f the Court decided cases under the Guarantee Clause, judicial standards would emerge.”).

430. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022).

431. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

432. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit); see also Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 *CATH. U. L. REV.* 683, 692 (2016) (“Judges are not robots, and neither are umpires or referees.”); William Blake, *Umpires as Legal Realists*, 45 *POL. SCI. & POLITICS* 271, 272 (2012):

Former Mets pitcher Ron Darling . . . once quipped: “I can’t really describe what a strike is, but I know it when I see it.” This statement echoes [J]ustice Potter Stewart [in *Jacobellis v. Ohio*] when he said that he could not define hard-core pornography, “[b]ut I know it when I see it.” Whether the object is a twelve-to-six curveball or a racy movie, umpires and judges often cannot formalistically apply rules.

(alteration in original).

433. See *Blake*, *supra* note 432, at 272.

434. See generally *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

435. See *Koppelman*, *supra* note 239, 1034.

the Court's esteemed view of democracy in *Dobbs*.⁴³⁶ Indeed, putting a thumb on the scale in favor of democratic self-government could provide a meaningful counterweight to some of the many attacks our democracy confronts today. For example, more representative congressional delegations to Congress might allow for course-corrective legislation under the Guarantee Clause or the Reconstruction Amendments. And even just the credible threat of robust judicial intervention “hang[ing] above the legislatures like the sword of Damocles”⁴³⁷ may incentivize course-correction in state legislative action without any substantial intervention whatsoever.

Whether courts agree with the approach we begin to outline here or not, the minimum way that they can afford a proper place for democracy in the substantive due process analysis is in something we can all understand: the decision's effect on the practice of democratic self-government. We think this properly reflects a commitment to, and expansion of, the political process school of judicial review. It also democratizes the discussion of fundamental rights in ways that might make them more accessible. As Professors Douglas NeJaime and Reva Siegel explain in a recent article, even the act of judicially reviewing substantive due process claims, regardless of the outcome, can have a democracy-enhancing effect.⁴³⁸ By assessing asserted liberty interests in terms of their impact on the political process, courts can expand on this effect by creating a broader democratic dialogue. Asserted liberty interests are among some of the most cherished (and reviled, and complicated, and important) rights we have (or do not have). But most people are not philosophers who can make abstract assessments about liberty (even if there *is* an answer to the constitutional standard); nor are they historians poring through dusty toms. What they are is participants in the democratic process. And the effects of state action on democratic practice is something virtually all of us, whether we know it or not, have experienced firsthand. A conversation about barriers to, and deficits in, democratic self-government is one that more of us can understand, and one in which more of us can take part. And when we do, that enhances the democratic process, too.⁴³⁹ Cases involving the adjudication of constitutional liberties are themselves an important part of public discourse—and if there is any facet of judicial work in which courts should endeavor to include the people, it is in the evolving conversation of the rights that inhere to our constitutionally guaranteed republican state governments.⁴⁴⁰

436. See *infra* Part II.

437. STEPHEN ANSOLABEHRE & JAMES M. SNYDER JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 18 (2008).

438. See generally NeJaime & Siegel, *supra* note 368; see also Hershkoff & Resnik, *supra* note 419.

439. See *supra* Part II.B.2.

440. As Justice Frankfurter explained in his *Baker v. Carr* dissent, harkening back to Alexander Hamilton's famous pronouncement on the judiciary, “[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.” 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). Frankfurter, of course, disavowed that judicial intervention in “political entanglements” would engender public confidence. *Id.* But that has not necessarily proven to be the case. See Shapiro, *supra* note 50, at 210; Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67

IV. CONCLUSION

The Constitution is amenable to a reading that provides for robust political process judicial review of state government action, including the recognition that there are some liberty interest sufficiently substantial to participation at every level of the democratic process that there may be no process that can compromise them.⁴⁴¹ Although the Reconstruction Framers might not have thought that courts would fulfill this vision of the due process clause, the Framers were considerably more radical than the Supreme Court of that era. Would they not appreciate that we can see in their work a certain genius in its capacity to evolve to still suit our modern times?⁴⁴² To them, the idea that courts would fulfill a robust vision of republican state government may have been farfetched, but in our times, it has become a necessity.⁴⁴³

Our embattled democracy faces severe threats. We believe that a majority of people in this country still believe in fair play⁴⁴⁴—for example, voters have recently adopted independent redistricting commissions⁴⁴⁵ and

ALA. L. REV. 485, 535 (2015) (observing that *Baker's* progeny, *Reynolds v. Sims*, “is widely considered a triumph of judicial intervention in the face of severe democratic pathologies.”). In any event, we think our proposed method of analysis may have greater capacity to generate the sort of public confidence underlying the Warren Court’s voting rights cases than the Court’s present contorted moral-historical approach to substantive due process.

441. See Greene, *supra* note 348, at 260–61; *Collins v. Harker Heights*, 503 U.S. 115, 122–30 (1992).

442. Cf. *Missouri v. Holland*, 252 U.S. 416, 433 (1920):

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

443. Carolyn Shapiro argues that, in the wake of the Court’s holding in *Rucho v. Common Cause*, that partisan gerrymandering is nonjusticiable in federal court, “[t]he ball is unmistakably in Congress’s court.” Shapiro, *supra* note 50, at 188. It’s hard to argue with that logic. Yet, at the same time, Shapiro also recognizes that democratic deficits at the state level also “affect the makeup of Congress,” which in turn may make the very solution she proposes—democracy-affirming congressional legislation under the Guarantee Clause—extremely difficult, if not a virtual impossibility. See *id.* at 187. Similarly, Michael Klarman has noted that “expecting Republican Justices to intervene against Republican assaults on democracy is Panglossian,” but still recognizes that “basic principles of democracy do not permit parties to stack the political deck in their favor by suppressing votes, purging voter rolls, gerrymandering legislative districts, and so forth,” and argues that “[i]t would be nice if Supreme Court Justices, regardless of ideology or partisan affiliation, would defend democracy when it is threatened in such a fashion.” Klarman, *supra* note 61, at 231. Indeed, Klarman views the Court as “part of an interlocking system” that “cannot be excluded from a democracy-entrenching reform effort,” and thus argues that “entrenching democracy in America will probably require Supreme Court reform.” *Id.* at 243; see also *id.* at 242–53 (discussing reforms).

444. Cf. Shapiro, *supra* note 50, at 186 (“American identity is intimately connected to a belief in democracy, a word that today unambiguously encompasses representative government.”). Some scholars have understood this identity as reflecting a form of civic nationalism. See Yael (Yuli) Tamir, *Not So Civic: Is There a Difference Between Ethnic and Civic Nationalism?*, 22 ANN. REV. POL. SCI. 419, 423–24 (2019) (ascribing this view to John Rawls and Jürgen Habermas, among others).

445. See Shapiro, *supra* note 50, at 210, 210 n.156.

nonpartisan primaries⁴⁴⁶—and we applaud those heroic collective efforts. But, in many cases, the people lack direct mechanisms to meaningfully improve, or even maintain, the democratic *status quo*. Only sixteen states allow for the people to directly propose amendments to their state constitutions.⁴⁴⁷ Whether judges may or may not be those best qualified to develop standards for democratic practice,⁴⁴⁸ democracy-enhancing judicial intervention—the sort of which we think the Reconstruction Congress would

446. See *Alaska Better Elections Implementation*, ALASKA DIV. OF ELECTIONS, <https://www.elections.alaska.gov/RCV.php> [<https://perma.cc/DK3X-JSU2>] (“In the 2020 General Election, voters approved an initiative to establish a Nonpartisan Pick One Primary Election system”); Richard Barton, *An Antidote for Our Ultra-Polarized Politics*, GOVERNING (May 4, 2023), <https://www.governing.com/politics/an-antidote-for-our-ultra-polarized-politics> [<https://perma.cc/3ZYZ-Y3WP>] (“Three states—Alaska, California and Washington—have done this in one form or another for all state and federal elections. And Nevada voters could make their state the fourth nonpartisan-primary state through an initiative on the ballot next year.”); Patricia A. Kirkland & Alexander Coppock, *Candidate Choice Without Party Labels: New Insights from Conjoint Survey Experiments*, POL. BEHAVIOR, June 16, 2017, at 1, https://alexandercoppock.com/kirkland_coppock_2018.pdf [<https://perma.cc/W3CS-JYZ3>] (“The primary result of these experiments indicates that when voters cannot rely on party labels, they give greater weight to candidate experience.”). But see Lacie Pierson, *Nonpartisan Label Doesn’t Sanitize Campaign Process*, AP (Nov. 4, 2018), <https://apnews.com/article/6cc538e55ba14f87b9e8309b9d454fca> [<https://perma.cc/9WJG-W8NM>] (“The West Virginia Legislature in 2015 passed a law making judicial elections, from magistrates all the way to the state’s highest court, nonpartisan on voters’ ballots. But nonpartisan judicial races on a ballot haven’t translated to nonpartisan campaigning for a judicial position”).

447. See THE BOOK OF THE STATES, *supra* note 97, at 240 tbl. 6.9; see also Amar, *supra* note 122, at 749 (“What [Republican Government] does require is that the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them.”).

448. Compare Seifter, *supra* note 73, 348–52 (arguing there are good reasons to believe that courts may be better situated than countermajoritarian legislatures to be responsive to majoritarian concerns), with Neuborne, *supra* note 220, at 609 (“Where, [Justice Felix Frankfurter] asked [in his *Baker v. Carr* dissent], would unelected judges functioning as armchair political scientists find the judicially manageable standards needed to guide their decisions about whether a particular legislative apportionment is consistent with democratic political theory?”). Many “constitutional commentators from Alexander Hamilton to Alexander Bickel” have argued “that it makes some sense to give the final—or nearly final—say over the barrier between state and individual to the ‘least dangerous branch,’ the one that possesses neither purse nor sword.” Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 714 (1975). Ely, of course, made an even stronger argument for judicial intervention in the political process. As he explained the Court’s heightened scrutiny of state action targeting minorities, “[t]he whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. [We would add: or have an active interest in negatively targeting.] If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.” ELY, *supra* note 274, at 151; see also *id.* at 136 n.* (emphasizing a “distrust of the self-serving motives of those in power” as “animat[ing]” this theory of judicial review). Richard Pildes has similarly noted that “the power to design and revise the ground rules of democracy must reside somewhere,” but that “[a]s long as some of that power rests with self-interested political actors, as it almost inevitably will, electoral accountability will be fragile.” Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 1, 14–15 (2004). Drawing on Ely’s work, Pildes posits that “the vitality of democracy depends upon external institutions that can contain” the pathology of entrenchment, such as independent electoral commissions. *Id.* at 15. He concludes that because “the American system generally lacks these intermediate institutions . . . constitutional law, almost by default, has come to fill this role.” *Id.* With regards to individual political rights, Erwin Chemerinsky has argued in favor of judicial intervention under the Guarantee Clause because there is no “reason to believe that the judiciary is substantially less able than other branches of the federal government to interpret and enforce [the] constitutional provision.” Chemerinsky, *supra* note 298, at 852.

approve—is badly needed. Courts need not foist their own value preferences upon the states, or even values of which the disapprove; but the fact that such imposition might result does not free courts from their obligation to patrol the democratic process itself.⁴⁴⁹ Courts do not “short-circuit” that process when they ensure that it is operating correctly.⁴⁵⁰ Although we have offered some amendments to his theory, at the end of the day, Ely still said it best: our proposal, like his, “is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the Americans system of representative democracy.”⁴⁵¹

Rather, “the judiciary’s political insulation makes it well-suited to uphold the Constitution.”
Id. at 865.

449. See *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

450. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022).

451. ELY, *supra* note 274, at 88.

