THINLY ROOTED: *DOBBS*, TRADITION, AND REPRODUCTIVE JUSTICE

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In Dobbs v. Jackson Women's Health Organization, *the Supreme Court overruled* Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey. *These two cases held that the Due Process Clause of the Fourteenth Amendment encompassed a right of women to terminate a pregnancy.* Roe *reflected over 60 years of substantive due process precedent finding and reaffirming a constitutional right of privacy with several animating themes, including bodily integrity, equality, and dignity. The Court's substantive due process doctrine had established that the analysis in such cases would involve multiple points of inquiry, such as tradition, contemporary practices, and the closeness of the newly asserted interest to previously recognized fundamental rights.* Dobbs *does not follow this precedent but instead applies a narrow and exclusively backward-looking tradition analysis that, if applied consistently, would imperil many other important rights, including contraception, sexual intimacy, and same-sex marriage. After analyzing these concerns, this Article examines the influence of precedent, politics, and ideology on the content of constitutional law and argues that pro-choice advocates must utilize the political process to restore abortion as a fundamental right. The political process can lead to legislation, executive action, and court doctrines that expand privacy rights. As an alternative to the analysis in* Dobbs, *this Article recommends a more democratic approach to substantive due process that incorporates perspectives of historically marginalized voices. A new democratic approach could justify expanding rights to protect the most vulnerable members of society and move beyond the narrow conception of reproductive freedom as a negative liberty interest.*

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INTRODUCTION

Abortion remains one of the most contested political issues.[1] Pro-choice and pro-life activism on abortion has involved numerous important political and social institutions, including social movement organizations and media.[2] Because

1. Danny Osborne, et al., *Abortion Attitudes: An Overview of Demographic and Ideological Differences*, 43 POL. PSYCH. 29, 31 (2022).

2. Deana Rohlinger, *Friends and Foes: Media, Politics, and Tactics in the Abortion War*, 53 SOC. PROBS. 537, 541 (2006) (discussing abortion social movement media tactics).

most social movements seek to change policy, abortion-related activism has substantially impacted law and election politics in the United States.[3] In 1973, the Supreme Court decided *Roe v. Wade*[4] and held that women had a fundamental right to decide whether or not to terminate a pregnancy.[5] *Roe* eventually became the primary symbol that proponents and opponents of abortion rights invoked to frame their advocacy.[6] *Roe*'s prominence in political discourse continued even after the Court's 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[7] weakened the precedent. *Casey* held that states could regulate abortion throughout the pregnancy, so long as the laws did not impose an undue burden on women seeking to terminate a previable fetus.[8]

Nearly 50 years after *Roe*, the Court has issued a ruling feared by pro-choice activists and lauded by pro-life advocates. The case, *Dobbs v. Jackson Women's Health Organization*,[9] overturns *Roe* and *Casey* and holds that the Constitution does not confer upon women a right to terminate a pregnancy.[10] Predictably, *Dobbs* has ignited a wave of political commentary and protests, much of it directed toward the Court.[11]

Dobbs resulted from a multiyear conservative political mobilization. In the late-1970s, conservatives founded the Family Values movement, consisting of religious individuals and churches, politicians, and social movement organizations, to oppose cultural and legal changes that altered traditional conceptions of family and gender.[12] Specifically, social conservatives mobilized against abortion, gender equality, and a budding movement for LGBTQA rights.[13] The Republican Party capitalized on social conservatives' distaste for progressive politics of gender and

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3. Barbara Norrander & Clyde Wilcox, *Public Opinion and Policymaking in the States: The Case of Post-Roe Abortion Policy*, 27 POL'Y STUD. J. 707, 718 (1999) ("Our results suggest that public opinion and interest groups do influence abortion policy in the states.").

4. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

5. *Roe*, 410 U.S. at 153 (holding the right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

6. Jane Maslow Cohen, *Comparison-Shopping in the Marketplace of Right*s, 98 YALE L.J. 1235, 1237 (1989) (observing that "*Roe* has become the governing metaphor of the abortion conflict").

7. 505 U.S. 833 (1992) (plurality opinion).

8. *Id.* at 878–79.

9. 142 S.Ct. 2228 (2022).

10. *Id.* at 2279 ("We therefore hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

11. Natasha Ishak, *In 48 Hours of Protest, Thousands of Americans Cry Out for Abortion Rights*, VOX (June 26, 2022, 4:00 PM), https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-Roe-overturned-protests [https://perma.cc/6R85-UZBE].

12. Seth Dowland, *"Family Values" and the Formation of a Christian Right Agenda*, 78 CHURCH HIST. 606, 607 (2009) (discussing formation of Family Values movement).

13. *Id.* (arguing the Family Values movement believes "that abortion, feminism, and homosexuality represented a multifaceted attack" on the family).

sexuality by making opposition to abortion, LGBTQA rights, and sex equality central themes of its political platform.[14] Republicans had already captured most southern White voters who were disenchanted by the Democratic Party's increasingly liberal positions on civil rights.[15] This "Southern Strategy,"[16] together with Family Values, helped to solidify pro-life politics as a partisan issue for Republicans. Meanwhile, Democrats increasingly became pro-choice, capturing liberals, persons of color, and LGBTQA voters.[17] *Dobbs* strikingly demonstrates how ideology and partisanship influence judging and constitutional law. Each justice in the *Dobbs* majority was appointed by a Republican president, while the three dissenters joined the bench during Democratic presidential administrations.[18]

While the multiple opinions in *Dobbs* align with the justices' ideological commitments, the Court has consistently held that careful legal analysis, rather than personal values, must shape judicial outcomes.[19] Assertions of legal purity are particularly prominent in substantive due process analysis—the doctrine that identifies fundamental rights.[20] Concerns about judicial ideology have permeated substantive due process debates since the early twentieth century, when the Court first utilized this doctrine to invalidate state economic and social welfare legislation. *Lochner*-era decisions striking down popular regulations generated sharp criticism.[21] During the midcentury, the Court repudiated this doctrine, settling on a

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14. *Id.* at 631 (arguing that "Christian right leaders made 'family values' an essential element in the Republican agenda").

15. Tim Galsworthy, *Carpetbaggers, Confederates, and Richard Nixon: The 1960 Presidential Election, Historical Memory, and the Republican Southern Strategy*, 52 PRES. STUDS. Q. 260, 261–62 (2022) (discussing southern White disenchantment with Democratic Party due to civil rights and racial justice).

16. *Id.* at 261 (discussing Republican Party decision to capture White southern voters).

17. Edward Carmines et al., *How Abortion Became a Partisan Issue: Media Coverage of the Interest Group-Political Party Connection*, 38 POL. & POL'Y 1135, 1136 (2010) (discussing evolution of abortion into a partisan issue for Democrats and Republicans).

18. President Trump appointed Justices Gorsuch, Kavanaugh, and Barrett. President Obama appointed Justices Sotomayor and Kagan. President George W. Bush appointed Chief Justice Roberts and Justice Alito. President Clinton appointed Justice Breyer. President George H.W. Bush appointed Justice Thomas. *See Current Members*, in *About the Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/9KCV-ZUZJ] (last visited Feb. 14, 2023).

19. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) ("We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly.").

20. *See, e.g.*, *id.* at 2242–48 (discussing the issue of judicial usurpation of political process in substantive due process cases).

21. Rebecca L. Brown, *Activism Is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1262 (2002) ("Common critiques of Lochner are twofold—the Court imposed an economic theory of government not contained in the Constitution and it recognized rights—economic rights—that should not have been protected so vigorously.").

deferential rational basis review for ordinary economic regulations.[22] Although the Court adopted a deferential analysis of economic regulations against claims of due process deprivation, it exercised more robust scrutiny when certain personal liberties were at stake.[23] The judicial protection of personal liberties cohered around the right of privacy, first announced in *Griswold v. Connecticut*,[24] which invalidated a state prohibition of contraceptive use as applied to married couples.[25] After *Griswold*, the Court has consistently affirmed the existence of a constitutional right of privacy.[26]

The Court has not articulated a single test to determine when a liberty interest qualifies as a fundamental right.[27] Nonetheless, several defining themes have emerged in precedent. The Court has rejected substantive due process theories that would make recognition of fundamental rights extraordinarily difficult. In this vein, the Court has held that fundamental rights are not limited to rights explicitly mentioned in the Constitution or to rights that existed when the Fourteenth Amendment was ratified, defined as narrowly as possible.[28] In other words, the Court has not required present-day due process claimants to identify a historical mirror equivalent of the interests they contend are fundamental rights. The Court, however, has held that liberty interests that are "deeply rooted in the nation's history and traditions" or "implicit in the concept of ordered liberty" constitute fundamental rights.[29] This tradition-based standard explicitly looks to past practices.

Dobbs departs sharply from precedent and applies a markedly rigid analysis.[30] Drawing heavily from the ruling in *Glucksberg v. Washington*,[31] *Dobbs* centralizes the "deeply rooted" formulation above all other doctrinal descriptions of fundamental rights.[32] The Court also interprets the "deeply rooted" test in a more rigid fashion than precedent requires.[33] Furthermore, despite finding that the history

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22. United States v. Carolene Prod. Co., 304 U.S. 144, 153 (1938) (discussing rational basis review).

23. In *Carolene Products*, the Court intimated applying a higher level of scrutiny when certain constitutional rights or forms of discrimination were at issue. *See Carolene Prod. Co.*, 304 U.S. at 153 n.4.

24. 381 U.S. 479 (1965).

25. *Id.* at 485–86.

26. Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015) (discussing privacy precedent).

27. *See* discussion *infra* Part I.A.

28. Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 847 (1992) ("It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view."); *id.* ("It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law.").

29. *See* Kerry v. Din, 576 U.S. 86, 93 (2015).

30. *Infra* Part I.A.2.

31. 521 U.S. 702, 735–36 (1997) (finding no right to physician-assisted suicide for terminally ill patients).

32. *Infra* Part I.A.

33. *Infra* Part I.A.2.

of abortion regulations includes legal access and criminalization, the Court discounts the record of legalization and treats criminalization as eclipsing a history of sometimes lawful use.[34] The Court has never held that historical analysis must reveal a pattern of unlimited enjoyment of a liberty interest before it can qualify as a fundamental right.[35] Such a theory of due process could justify invalidation of many fundamental rights. When faced with a tradition containing a mixture of criminalization and legalization, the Court has found that the history of regulation affects the scope of the right, not its existence altogether.[36]

Although the immediate concern in *Dobbs* is abortion, the Court's methodology could have far-reaching results. The Court's narrow and backward-looking tradition analysis is inconsistent with doctrinal approaches the Court utilized in cases finding fundamental rights to sexual privacy, same-sex marriage, and contraceptive use.[37] While the majority disclaims an interest in overturning these precedents, its effort to distinguish these rights from abortion is unconvincing.[38] *Dobbs* also portends the continuation of the Court's limited and formalistic conception of equal protection. The Court summarily dismisses arguments couching abortion restrictions in gender-equality terms on the grounds that pregnancy discrimination does not constitute gender discrimination.[39] *Dobbs* also finds that women can use their electoral majority to change abortion laws in the political process.[40] This reasoning fails to take into account the physical, emotional, mental, and economic burdens of pregnancy, childbirth, and child-rearing on women.[41] Moreover, the Court's political process analysis could justify applying rational basis review to claims of gender discrimination.[42] This result would render governmental gender discrimination presumptively constitutional.[43]

Advocates of reproductive choice cannot effectuate an immediate reversal of a Court ruling on constitutional law. This will require years of social movement activity and political mobilization that lead to a more ideologically balanced Court.[44] Looking into that future, a doctrinal approach that centers the experiences of subordinate voices from history could provide an alternative to the limited doctrine in *Dobbs* that focuses exclusively on an era during which women and other marginalized groups lacked the political power to obtain legal protection of interests they viewed as essential to liberty.[45]

This Article contains three main parts. Part I discusses *Dobbs*'s retreat from flexibility in substantive due process cases in favor of a rigid approach that imperils existing rights and the recognition of new fundamental interests. This Part also

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34. *Infra* Part I.A.3.
35. *Infra* Part I.A.4.
36. *Infra* Part I.A.5.
37. *Infra* Part I.B.
38. *Infra* Part II.A.
39. *Infra* Part II.B.
40. *Infra* Part II.B.2.
41. *Infra* Part II.B.1.
42. *Infra* Part II.B.2.
43. *Infra* Part II.B.2.
44. *Infra* Part III.A.
45. *Infra* Part III.B.

criticizes the Court's exclusive reliance upon and misinterpretation of *Glucksberg* and its failure to follow precedent that applies a more flexible analytical framework. Part II analyzes the far-reaching implications of *Dobbs*, including the reality that the Court's reasoning could justify invalidation of fundamental rights related to same-sex marriage, sexual privacy, and contraception, and for lowering gender to a rational basis category in equal protection litigation. Part III discusses the post-*Dobbs* reality for pro-choice social movements and women's access to abortions, by offering a realistic analysis of the difficult and slow process required to shape and change constitutional law. This Part also proposes a new democratic traditionalism analysis for use in substantive due process cases. A more democratic evaluation of tradition would not reinforce and validate historical subordination by centralizing only those liberty interests deemed important by the powerful classes that created legal institutions and traditions of the past. A more pluralistic accounting of tradition would also include contemporary thought regarding tradition. This forward-looking approach that incorporates the views of poor women and women of color could justify a more robust conception of due process—securing both negative rights against state intrusion, and positive rights to state protection and funding of reproductive decisions.

I. SUBSTANTIVE DUE PROCESS DEVOLUTION

Dobbs involves a challenge to Mississippi's Gestational Age Act, which prohibits abortion after 15 weeks of pregnancy, except in the case of a medical emergency or severe fetal abnormality.[46] Because the statute prohibits abortion prior to fetal viability, it violated constitutional requirements set forth in *Roe* and *Casey*.[47] Applying the Court's abortion precedent, the district court and the Fifth Circuit permanently enjoined enforcement of the legislation.[48] In a historic ruling, the Court overrules *Roe* and *Casey*, applies rational basis review, and holds that the statute does not offend constitutional requirements.

Dobbs presents many issues for academic inquiry—substantive due process methodology being the most important doctrinal concern. Although *Dobbs* has all the trappings of a standard substantive due process opinion, the Court's analysis departs significantly from precedent.

A. Dobbs *Incorrectly Applies Substantive Due Process Methodology*

The Court has utilized multiple standards to determine whether liberty interests qualify for protection as fundamental rights. Court doctrine first seeks to determine whether an interest enjoyed protection historically.[49] The Court recognizes as fundamental rights those liberty interests that are "implicit in the concept of ordered liberty" or "deeply rooted in the nation's history and

46. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (citing Miss. Code Ann. §41-41-191 (2018)).

47. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869–71 (1992) (holding that pre-viability abortion prohibitions violate the Constitution).

48. *Dobbs*, 142 S. Ct. at 2244.

49. Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 536–37 (2012) (discussing historical analysis of substantive due process).

traditions."[50] The Court, however, also engages in a forward-looking analysis, considering whether "emerging" understandings of liberty warrant recognition of new fundamental rights that lack an explicit tradition of protection.[51] When applying the substantive due process doctrine, the Court has resisted treating liberties in isolation from one another.[52] Instead, the Court examines the reasons certain liberties received protection historically; it then determines if a newly asserted interest fits within this broadened framing of tradition.[53] Although the Court has adjudicated many substantive due process cases and used several tests for identifying fundamental rights, *Dobbs* relies almost exclusively on one precedent—*Washington v. Glucksberg*[54]—and one doctrinal test—"deeply rooted."[55] The Court's heavy reliance on *Glucksberg* and its interpretation of the case raise numerous concerns.

1. Glucksberg *Does Not Bar a Flexible Substantive Due Process Analysis*

In *Glucksberg*, the Court held that terminally ill patients did not have a fundamental right to physician-assisted suicide.[56] Many scholars have argued that *Glucksberg* represents a more conservative application of precedent because the Court held that substantive due process requires a narrow or "careful" description of tradition and because the opinion does not formally endorse a forward-looking

50. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

51. Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'") (citation omitted). In substantive due process cases, Justice Harlan popularized this approach. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that "tradition is a living thing").

52. *See Poe*, 367 U.S. at 543 (Harlan, J., dissenting) (describing Fourteenth Amendment liberty as a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints" rather than "a series of isolated points").

53. This style of analysis links liberties that lack a history of protection, like same-sex marriage, to existing fundamental rights—like marriage and family. Obergefell v. Hodges, 576 U.S. 644, 665 (2015) (explaining that the Court looks for commonality between traditionally recognized and new liberties). *See infra* Part I.B.2.

54. 521 U.S. 702 (1997).

55. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2246–48, 2260 (2022) (discussing *Glucksberg* and deeply rooted standard).

56. *Glucksberg*, 521 U.S. at 728 (holding that "our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause").

approach.[57] Instead, *Glucksberg* emphasized the backward-looking "deeply rooted" and "implicit in the concept of ordered liberty" formulations of fundamental rights.[58]

The specific facts of *Glucksberg* could explain or justify use of a less flexible framework. The Court based its ruling on an uninterrupted tradition: throughout U.S. history, every state criminalized assisting a suicide and suicide.[59] While policy regarding suicide became more liberal over time,[60] suicide remained disfavored.[61] The historical approach to assisting suicide, however, never evolved. Assisting a suicide remained a crime in every state until Oregon legalized it in 1994.[62] Although *Glucksberg* did not formally discuss emerging traditions, the Court considered contemporary trends but found tradition stagnant.[63] *Glucksberg* even analyzed contemporary practices in other countries and found a mixed picture that weighed against judicial recognition of such a right in the United States.[64] These observations suggest that academics and judges construing *Glucksberg* as a necessarily restrictive case might have overstated the position.[65]

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57. *Id.* at 720–21 (summarizing substantive due process doctrine). For scholarly treatment, see Yale Kamisar, *Foreword: Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1456 (2008) ("*Glucksberg* had insisted, as had *Bowers*, that in order for a right or liberty to come within the substantive reach of the Due Process Clauses it had to be (1) deeply rooted in this Nation's history and tradition and "implicit in the concept of ordered liberty and (2) susceptible of a careful description . . . . Although the *Lawrence* Court did conclude that the historical grounds relied on by the *Bowers* majority were somewhat doubtful, it could not, and did not, claim that the right or liberty at issue was deeply rooted in this Nation's history and tradition.") (internal quotations and citation omitted); Erwin Chemerinsky, Washington v. Glucksberg *Was Tragically Wrong*, 106 MICH. L. REV. 1501, 1504 (2008) ("In *Glucksberg*, Chief Justice Rehnquist's majority opinion formulated an approach to identifying fundamental rights that is at odds with the Supreme Court's approach in its earlier privacy cases. Chief Justice Rehnquist wrote that 'we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.' Further, he gave decisive weight to history and tradition . . . .") (internal quotations and citation omitted).

58. *Glucksberg*, 521 U.S. at 720–21.

59. *Id.* at 711.

60. *Id.* at 713.

61. *Id.* at 713.

62. *Id.* at 715–18.

63. *Id.* at 715–19. The Court also considered similarities between assisting a suicide and the right to refuse medical treatment. *Id.* at 722–26. The Court distinguished the two using an action–inaction analysis. The Court also held that assisting a suicide presented far more risks than refusing medical treatment, including exploitation of the elderly, poor, and persons with mental illnesses. *Id.* at 731–36.

64. *Id.* at 718 n.16 (discussing foreign law regarding assisting suicide).

65. *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) (justifying ruling finding antisodomy law unconstitutional and finding that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere"); *id.* at 598 (Scalia, J., dissenting) ("The Court's discussion of . . . foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'") (citation omitted).

Regardless of how *Glucksberg* is characterized, the substantially distinct historical treatment of abortion and assisting suicide provide a legitimate basis for the Court cabining its reliance on *Glucksberg*. Examining the history of abortion regulations reveals a much more complex record than assisted suicide. As *Roe* finds and *Dobbs* acknowledges, abortion was partly legal and illegal at the common law; legality depended upon the stage of pregnancy.[66] And while states began prohibiting abortion altogether in the 1870s, many of these statutes contained exceptions for the patient's life, thus making the procedure legal under certain, albeit very limited, conditions.[67] Abortion rights also experienced a liberalizing trend during the twentieth century, with 30% of states legalizing abortion by the time the Court decided *Roe*.[68] In *Roe*, the Court attempted to replicate the common-law approach by establishing viability as the point when states could ban abortion altogether, so long as the laws included exceptions to preserve the life or health of the patient.[69]

2. Overly Rigid Interpretation of Glucksberg

In *Dobbs*, the Court construes *Glucksberg* as mandating a narrow traditionalism analysis.[70] The opinions of several justices in the *Glucksberg* majority, however, suggest that *Dobbs* makes an erroneous or disingenuous interpretation of that precedent. The *Glucksberg* majority included Justices Kennedy and O'Connor (in addition to Chief Justice Rehnquist and Justices Scalia and Thomas). Justices Kennedy and O'Connor did not endorse narrow traditionalism. For example, Justice Kennedy authored *Lawrence*, which developed and employed the emerging awareness framework, requiring a forward-looking analysis of tradition.[71] Justice Kennedy also authored *Obergefell*, and the ruling resulted from a dynamic analysis that considered history and contemporary trends.[72] Moreover, Justices Kennedy and O'Connor authored the joint opinion in *Casey*, which not only reaffirmed *Roe* but also rejected an exclusively backward-looking exposition of liberty.[73] This portion of *Casey*, which garnered support from a majority of the

66. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 ("At common law, abortion was criminal in at least some stages of pregnancy . . . .); *id.* at 2249 ("We begin with the common law, under which abortion was a crime at least after "quickening"); Roe v. Wade, 410 U.S. 113, 138–39 (1973), *overruled by Dobbs*, 142 S.Ct. 2228 (2022) (discussing common law tradition of legal abortion before quickening).

67. *Roe*, 410 U.S. at 129–39 (discussing abortion prohibitions).

68. *Id.* at 139–40.

69. *Id.* at 162–66.

70. *Dobbs*, 142 S. Ct. at 2247–48.

71. Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) ("In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'") (Kennedy, J., concurring) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

72. *See* Obergefell v. Hodges, 576 U.S. 644, 664 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries. 'That method respects our history and learns from it without allowing the past alone to rule the present.'") (quoting *Lawrence*, 539 U.S. at 572)).

73. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992).

Court, states emphatically: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[74] Additionally, in *Michael H. v. Gerald D.*,[75] Justices O'Connor and Kennedy joined the plurality, except for footnote 6, in which Justice Scalia contended that judges must describe liberty "at the most specific level" of generality possible.[76] O'Connor's concurrence, joined by Kennedy, rejected this view as being "somewhat inconsistent"[77] with substantive due process precedent. O'Connor also cited Justice Harlan's forward-looking theory of tradition, elaborated in *Poe v. Ulman*,[78] as the governing doctrinal framework.[79] Finally, O'Connor explained that by writing separately, she hoped to avoid an opinion that creates a singular perspective on tradition.[80]

Examining the broader jurisprudence of Justices Kennedy and O'Connor makes it clear that they did not have the same view of tradition that *Dobbs* articulates. This leaves only a three-justice plurality of the *Glucksberg* majority who support narrow traditionalism: Chief Justice Rehnquist and Justices Thomas and Scalia. Their endorsement of a doctrine that locks liberty to mid-nineteenth century traditions is abundantly clear.[81] The *Dobbs* Court, however, erroneously treats their narrow view as *the* standard to use.[82]

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74. *Id.*

75. 491 U.S. 110, 127–32 (1989) (plurality opinion) (sustaining state law presumption of paternity of husbands of married women, regardless of biology, over a substantive due process claim).

76. *Id.* at 127 n.6 ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

77. *Id.* at 132 (O'Connor, J., concurring) ("This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area.").

78. 367 U.S. 497 (1961) (dismissing litigation challenging state regulation of contraceptives after finding that the dispute was unripe). *See infra* Part I.B.2 (analyzing Harlan's substantive due process methodology).

79. *See Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring) (citing *Poe*, 367 U.S. at 542, 544 (Harlan, J., dissenting)).

80. *Id.* ("I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.").

81. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 951 (1992) (Rehnquist, C.J., concurring in part, dissenting in part) (arguing that only the "deeply rooted" and "implicit in the concept of ordered liberty" tests govern substantive due process and omitting forward-looking view); *Michael H.*, 491 U.S. at 127 n.6 (plurality opinion) (positing narrow traditionalism theory). Justice Thomas has argued that substantive due process is an illegitimate doctrine altogether. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("The resolution of this case is thus straightforward. Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion.") (citation omitted).

82. *Supra* text accompanying notes 70–71.

3. The "Deeply Rooted" Standard Does Not Require Narrow and Backward-Looking Analysis

The Court cites *Glucksberg* as the source for its analysis of deeply rooted traditions.[83] *Glucksberg*, however, is not the first substantive due process opinion that contains the deeply rooted formulation. That occurred in *Moore v. City of East Cleveland*.[84] In *Moore*, the Court held that a municipal ordinance limiting "occupancy of a dwelling unit to members of a single family"[85] violated the Constitution, although a majority did not agree on reasoning.[86] Four members of the Court conducted a substantive due process analysis,[87] while a concurring justice argued that the law was an unlawful taking of property.[88] Moore shared her home with a son and two grandsons.[89] One of the grandsons was the child of her son who resided in the home.[90] The other boy was a cousin, who moved into the home after his mother died.[91] The ordinance prevented this living arrangement because the boys were cousins, rather than brothers.[92] Justice Powell, who authored the plurality opinion, addressed the city's argument that the fundamental right to family autonomy does not extend beyond a traditional nuclear family.[93] Justice Powell

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83. *Dobbs*, 142 S. Ct. at 2242 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (The Fourteenth Amendment "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'").

84. 431 U.S. 494, 503 (1977) (plurality opinion) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

85. *Id.* at 495–96.

86. *Id.* at 506 ("[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

87. *Id.* at 499 ("When a city undertakes such intrusive regulation of the family . . . . the usual judicial deference to the legislature is inappropriate. 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'") (citation omitted).

88. *Id.* at 520 (Stevens, J., concurring in the judgment) (arguing that "East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation").

89. *Id.* at 496 (plurality opinion).

90. *Id.*

91. *Id.* at 496–97.

92. *Id.* at 489–99 (arguing that the ordinance "makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here"); *id.* at 520 (Stevens, J., concurring) ("The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins.").

93. *Id.* at 500 (plurality opinion) (stating that the city attempts to distinguish family privacy cases from Moore's claim because that precedent does not confer to "grandmothers any fundamental rights with respect to grandsons"); *id.* (summarizing city's argument as "suggest[ing] that any constitutional right to live together as a family extends only to the nuclear family essentially a couple and their dependent children"). Justice Stewart made a similar argument in his dissent. *See id.* at 537 (Stewart, J., dissenting) ("The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous

rejected this narrow traditionalism approach. Although Moore's claim did not involve a nuclear family as in other substantive due process precedent,[94] Powell argued for a flexible analysis of history, following Justice Harlan's evolutionary theory of tradition elaborated in *Poe*.[95] Justice Harlan's flexible approach does not conceive of fundamental rights as "a series of isolated points."[96] Instead, Harlan described liberty as "a *rational continuum* which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[97] Operating within the deeply rooted standard, Powell argued that extended families have a fundamental right to privacy because they support the same values that led the Court to recognize family privacy:

> [U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.[98]

The *Moore* plurality refused to cabin family privacy by limiting it solely to the type of family arrangement historically given protection. Instead, Powell contended that the reasons justifying protection of nuclear family privacy apply with equal force to extended families.[99] Powell also observed that history includes a lived tradition of "close relatives . . . draw[ing] together and participat[ing] in the duties and the satisfactions of a common home."[100] Although the specific tradition of family privacy did not include extended families, due process was broad enough to encompass these family arrangements.

By contrast, *Dobbs* construes the deeply rooted formulation as compelling rigid traditionalism. Specifically, the Court holds that "[w]e must . . . exercise the *utmost care* whenever we are asked to break new ground in this field, lest the liberty

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rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.").

94. *Id.* at 500–01 (plurality opinion) (recognizing that family rights precedents "were immediately concerned with freedom of choice with respect to childbearing . . . or with the rights of parents to the custody and companionship of their own children . . . or with traditional parental authority in matters of child rearing and education") (citation omitted).

95. Poe v. Ullman, 367 U.S. 497, 507–09 (1961) (dismissing litigation challenging state regulation of contraceptives after finding that the dispute was nonjusticiable).

96. *See id.* at 543.

97. *Moore*, 431 U.S. at 502 (plurality opinion) (emphasis added) (citing *Poe*, 367 U.S. at 542–43).

98. *Id.* at 501. In *Poe*, the Court dismissed the case after holding that it was nonjusticiable. *See Poe*, 367 U.S. at 507–09. Harlan dissented on the justiciability question and discussed the fundamental rights claim. *Id.* at 522–55 (Harlan, J., dissenting). The Court subsequently followed Harlan's approach both explicitly and implicitly. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848–53 (1992) (discussing Harlan's approach and demonstrating how privacy doctrine reflects his broad and flexible conception of liberty).

99. *Moore*, 431 U.S. at 504 (plurality opinion) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

100. *Id.* at 505.

protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[101] While this language could mean several things, the analysis in *Dobbs* confirms that the Court construes deeply rooted as requiring narrow traditionalism—a position contrary to *Moore*, the first substantive due process case to employ this standard.[102]

4. Historical Constraints on a Liberty Interest Do Not Preclude Finding It Deeply Rooted

In *Dobbs*, as in other abortion precedent, the Court confronts a liberty interest with a mixed history of criminalization and legalization. Substantive due process caselaw, however, does not explicitly instruct courts how to resolve such a situation. Nevertheless, a history mixed with legal access and criminalization need not bar fundamental rights status for a liberty interest. As a threshold matter, such a rule would conflict with the foundational legal principle that "no right is absolute."[103] Because states can impose limits on fundamental rights,[104] courts should not require that plaintiffs demonstrate a record of unlimited exercise of a liberty interest as a precondition for finding it deeply rooted in history and tradition.

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101. Dobbs v. Jackson Women's Health Org., 142 U.S. 2228, 2247–48 (2022) (emphasis added) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

102. Other scholars have made similar observations. *See generally* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1225 (2004) (discussing flexible outcomes in deeply rooted analysis); Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 416–20 (2006) (discussing broad framing of tradition within deeply rooted framework); Katharine T. Bartlett, *Tradition As Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 556–61 (2012) (discussing dynamic application of deeply rooted test); Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2338 (2001) (book review) (observing that "the 'deeply rooted' test can be quite flexible"). *See also* Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177, 185–88 (2002) (discussing precedent applying a "broader, more generalized" assessment of tradition within deeply rooted analysis).

103. Orient Ins. Co. v. Daggs, 172 U.S. 557, 566 (1899) ("It would be idle and trite to say that no right is absolute.").

104. Lawrence v. Texas, 539 U.S. 558, 565 (2003) (observing that *Roe* held abortion "rights were not absolute"); Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("A parent's rights with respect to her child have thus never been regarded as absolute . . . ."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–75 (1992) (plurality opinion) (observing that *Roe* did not recognize an absolute right to abortion); Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) ("The privacy right involved, therefore, cannot be said to be absolute."); Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997) ("[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint.") (citation omitted) (bracketed text in original); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 270 (1990) (observing that the right to refuse medical treatment is not absolute); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 60–61 (1976) (noting that abortion right is not absolute).

Moreover, analyzing substantive due process precedent and, by analogy, incorporation cases, reveals that the Court currently recognizes several fundamental rights that historically were heavily regulated, criminalized, or unavailable to large demographic groups.

a. Substantive Due Process and Historically Regulated Rights

Abortion is the most relevant example of a liberty interest the Court has recognized as a fundamental right despite a tradition of criminalization. *Roe* discussed this complicated history[105] and did not find that it precluded holding that abortion rights are fundamental.[106] Although *Dobbs* rejects *Roe*, other fundamental rights were substantially restricted historically. Consider family privacy, specifically, the fundamental right of parents and guardians to direct the upbringing and education of children in their custody.[107] Historically, states have placed broad limits on parental rights. Even if parents disagree, states can: make education compulsory for children;[108] ban parental abuse and neglect;[109] order medical treatment for children;[110] terminate parental rights;[111] prohibit children from

105. *Roe*, 410 U.S. at 133–36, 138–41 (discussing legalization and criminalization of abortion).

106. *Id.* at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

107. Pierce v. Soc'y of the Sisters, 268 U.S. 510, 534–35 (1925) (recognizing "liberty of parents and guardians to direct the upbringing and education of children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing right to "establish a home and bring up children").

108. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.").

109. *See* Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 41–60 (2001) (discussing history of child protection from nineteenth century to the present).

110. *See, e.g.*, Parham v. J. R., 442 U.S. 584, 630–31 (1979) (Brennan, J., concurring in part, dissenting in part) (citing Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (per curiam)); In re Sampson, 65 Misc. 2d 658, 676 (N.Y. Fam. Ct. 1970), *aff'd*, 37 A.D.2d 668 (N.Y. App. Div. 1971), *aff'd*, 278 N.E.2d 918 (N.Y. 1972); State v. Perricone, 181 A.2d 751 (N.J. 1962)).

111. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 427 (1983) ("The most common [reasons for foster care] are a parent's mental or physical illness, child neglect or abuse, abandonment, parental inability to provide child care, and child behavior problems."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (termination of parental rights permissible upon showing of unfitness).

working;[112] and require inoculations.[113] Regardless of parental preferences, incest[114] and polygamy[115] are widely criminalized. Parental rights are also limited because courts often balance a parent's autonomy against competing interests of children. For example, under common law rules or statutes, minors can seek emancipation from their parents before the age of majority.[116] Additionally, minors can exercise several rights over a parent's objection.[117]

Beyond family privacy, many other fundamental rights were historically regulated or forbidden. These include contraceptive use,[118] interracial marriage,[119] sodomy,[120] same-sex marriage,[121] marriage for incarcerated persons,[122] and procreation.[123] Many of these interests were completely unavailable to large

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112. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.").

113. *See generally* Zucht v. King, 260 U.S. 174 (1922) (upholding ordinance mandating vaccines for children, as a prerequisite for school attendance, over the objection of parent); Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 604 (2016) ("[E]very court to consider challenges to compulsory vaccination laws has upheld the statutes.").

114. Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1504 (1998) ("From the earliest colonial times until the present, Incest has been codified as an offense in every United States jurisdiction.").

115. John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy over Polygamy*, 64 EMORY L.J. 1675, 1682 (2015) (observing that "polygamy is still a crime in every state in the United States").

116. Dana F. Castle, *Early Emancipation Statutes: Should They Protect Parents As Well As Children?*, 20 FAM. L.Q. 343, 356 (1986) ("In family relations law the term emancipation is used to indicate the freeing of the child from the custody of, and the obligation to render services to, the parent. The reciprocal rights and duties of the parent are usually extinguished also. In its broadest sense, emancipation encompasses any termination of the parent-child relationship. Generally, however, it is used to signify attaining adulthood at majority age and, increasingly, the granting of adult status before majority age.") (internal quotation marks and citations omitted).

117. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (holding that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults" and invalidating state ban on distribution of contraceptives to minors under the age of 16). Prior to *Dobbs*, minors had a constitutional right to terminate a pregnancy. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."). Now, the extent of a minor's ability to receive an abortion is largely a product of state law.

118. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

119. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

120. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

121. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

122. *See generally* Turner v. Safley, 482 U.S. 78 (1987).

123. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942); Buck v. Bell, 274 U.S. 200 (1927).

demographic groups. Enslaved persons could not marry whatsoever.[124] They also lacked reproductive autonomy.[125] Enslaved women were subject to sexual assault from White "owners" in order to expand the number of slaves they possessed.[126] Slavers also increased their assets by forcing Black men to "breed."[127] Despite this history of coerced reproduction and unlawful marriage for a large demographic, roughly 13% of the population,[128] both contraceptive use and marriage are fundamental rights. The mixed criminal and legal status of other fundamental rights undermines *Dobbs*'s reductionist analysis of abortion criminalization to rationalize overruling *Roe*.

b. Incorporation and Historically Regulated Liberties

The Court applies the incorporation doctrine to determine whether the historical importance of a liberty interest contained in the Bill of Rights qualifies that right for protection against state governments through the Due Process Clause of the Fourteenth Amendment.[129] Many incorporated rights were subject to limitation historically, and states continue to impose restraints.[130] This is true, even though the incorporation doctrine involves *enumerated* constitutional rights. To

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124. Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 51, 81 (2005) (observing that "enslaved blacks were not allowed to legally marry") (citations omitted).

125. Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 YALE J.L. & FEM. 1, 3 (2007) ("[T]he law denied black female slaves any socially or legally protected autonomy or agency over their own bodies. This system ensured that slave women held no property interest in their own bodies or in their own offspring.").

126. *Id.* (discussing rape of enslaved Black women).

127. Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1473 (2015) (citing Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. SEX. 445, 455 (2011)) ("[F]orced breeding had the particularly dehumanizing effect of labeling [Black male slaves] as stock men or bulls. As part of forced breeding, Black males were coerced to rape Black women.") (internal quotation marks omitted).

128. Peter Karsten, *Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and '50s*, 58 AM. J. LEGAL HIST. 291, 315 (2018) ("There were approximately 4 million slaves in the years before the Civil War . . . ."); *Introduction* to POPULATION OF THE U.S. IN 1860 at vii (1860), https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf [https://perma.cc/3ZBZ-AX7T] (last visited Feb. 24, 2023).

129. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1210 (2006) (discussing incorporation).

130. Kovacs v. Cooper, 336 U.S. 77, 85 (1949) ("Of course, even the fundamental rights of the Bill of Rights are not absolute."); McDonald v. City of Chicago, 561 U.S. 742, 802 (2010) (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character."); *id.* at 899 (Stevens, J., dissenting) ("[A]lthough it may be true that Americans' interest in firearm possession and state-law recognition of that interest are 'deeply rooted' . . . it is equally true that the States have a long and unbroken history of regulating firearms. The idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right.") (citation omitted).

determine whether a right is incorporated, the Court applies similar tests to evaluate the historical significance of liberty interests in a substantive due process framework.[131] Incorporation cases demonstrate that interests can qualify as fundamental rights even if they have been subject to substantial restraint historically. *District of Columbia v. Heller*[132] and *McDonald v. City of Chicago*,[133] two important Second Amendment rulings, illustrate this point. In *Heller*, the Court, for the first time, held that the Second Amendment confers an individual right to bear arms for self-defense at home.[134] Because *Heller* involved a challenge to a Washington, D.C. statute, the right recognized in the case was not immediately incorporated and enforceable against state governments.[135] In *McDonald*, however, the Court incorporated the right to bear arms.[136] The *McDonald* Court did not base its ruling on the fact that the Second Amendment is an enumerated right. Indeed, the Court noted that it had previously declined to incorporate several liberty interests contained in the Bill of Rights.[137] Furthermore, Court precedent had rejected the theory of total incorporation, which posits that each interest in the Bill of Rights is automatically incorporated because the framers of the Fourteenth Amendment intended that result.[138] The Court therefore considered "whether the right to keep and bear arms is fundamental to our scheme of ordered liberty" or "whether this right is 'deeply rooted in this Nation's history and tradition.'"[139]

McDonald held that history and tradition warranted incorporation of the individual right to bear arms.[140] The Court held that the right was deeply rooted even though many aspects of gun possession were traditionally regulated and criminalized[141] and despite not having recognized such a right until it decided *Heller*

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131. Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 378 (2009) ("Because the Court's selective incorporation doctrine is just its fundamental rights doctrine applied in the Bill of Rights context, the analysis is predictably the same.").

132. 554 U.S. 570 (2008).

133. 561 U.S. 742 (2010).

134. *Heller*, 554 U.S. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

135. *McDonald*, 561 U.S. at 759 ("We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.").

136. *Id.* at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

137. *Id.* at 760 ("While it was 'possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action,' the Court stated, this was 'not because those rights are enumerated in the first eight Amendments.'" (citing Twining v. New Jersey, 211 U.S. 78, 99 (1908))).

138. *Id.* at 763 ("[T]he Court never has embraced Justice Black's 'total incorporation' theory.").

139. *Id.* at 767 (citations omitted).

140. *See id.* at 791.

141. In *Heller*, the Court acknowledges the many restraints on gun possession and holds that its ruling would not preclude such regulations. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (stating that "nothing in our opinion should be taken to cast

in 2008.[142] When the Fourteenth Amendment was ratified, Blacks were prohibited from possessing firearms regardless of context.[143] Generally, gun possession, like terminating a pregnancy, was lawful at times and unlawful at others. The complex nature of gun rights, however, did not prevent Justice Alito, who wrote opinions for the Court in both *Dobbs* and *McDonald*, from concluding that the individual right to bear arms is deeply rooted in tradition.[144] By contrast, in *Dobbs*, Alito ignores the complexity of abortion regulations and finds that "*an unbroken tradition of prohibiting abortion* on pain of criminal punishment persisted from the earliest days of the common law until 1973."[145] This finding misstates the mixed history of abortion regulations, in which legality often depended upon the timing and the patient's health.[146] Even with an accurate framing of abortion regulation as a mixture of lawfulness and criminalization, the Court could still recognize abortion as a fundamental right, because the deeply rooted test does not require a showing of unlimited historical enjoyment of the liberty interest.

First Amendment caselaw is also instructive. The Court has incorporated the First Amendment,[147] even though a long tradition of restrictions on speech and assembly exists. The Court has identified numerous categories of unprotected speech, including obscenity; libel; defamation; incitement; child pornography; perjury; intimidation or threats; and negligent or intentional infliction of emotional distress.[148] Other restrictions pertain to fighting words; speech connected to criminal conduct; and speech that causes grave or imminent threat to government.[149] The Court also permits imposition of narrowly tailored and content-neutral time, manner,

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doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms"); *McDonald*, 561 U.S. at 899 (Stevens, J., dissenting).

142. *Heller*, 554 U.S. at 595.

143. *McDonald*, 561 U.S. at 771–78 (discussing prohibition of ownership of guns by Blacks following the Civil War). Even before the Civil War, however, free and enslaved Blacks could not own guns. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 929 (2001) ("Before the Civil War, Slave Codes regularly prohibited free blacks and slaves from possessing guns."); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 245 (1983) (discussing prohibition of gun ownership by free and enslaved Blacks).

144. *McDonald*, 561 U.S at 778.

145. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253–54 (2022) (emphasis added).

146. *See id.* (discussing the complex history of abortion regulation).

147. Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1603 (1995) (discussing incorporation of First Amendment).

148. Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 679–80 (2010) (discussing restrictions on speech).

149. Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer & Rahel Boghossian, *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in A Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 89 (2017) (discussing restrictions on speech).

and place restrictions on speech.[150] Furthermore, the commercial speech doctrine substantially limits the exercise of First Amendment rights.[151] Additionally, large segments of the population were historically deprived of speech rights altogether. Laws made it a crime to teach enslaved Blacks how to read or write; they also restricted rights of assembly for all Blacks.[152] States and the federal government also banned speech advocating abolition of slavery.[153] Despite all these limitations, speech remains a fundamental right.

5. Restrictions Can Shape the Scope of the Right

A careful analysis of precedent demonstrates that historical restraints on a liberty interest, including abortion, do not render the right unsuitable for protection within a substantive due process framework. Accordingly, the mixed tradition of prohibiting and permitting abortion could, if anything, determine the scope of the right, not whether it satisfies the deeply rooted test. The Court utilized this approach with gun rights in *McDonald*. Justice Stevens argued in his dissent that an individual right to bear arms was not deeply rooted because states had imposed substantial restraints on this liberty historically.[154] In his concurring opinion, Justice Scalia rejected this contention, explaining that "[t]he traditional restrictions [on gun possession] go to show the *scope of the right, not its lack of fundamental*

150. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 711 (2003) ("The time/place/manner restriction doctrine gives a First Amendment break to content-neutral speech restrictions only if they are narrowly tailored (under a fairly relaxed standard) to a substantial government interest, and leave open ample alternative channels for the speaker to convey the speech that he wants to convey.").

151. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985) ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'") (citation omitted).

152. Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 624 (1993) ("Criminal laws prior to the Civil War punished anyone who taught slaves to read or write and forbade slaves from meeting together for 'mental instruction.'") (citation omitted); Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1800 (2015) ("During the antebellum era, policymakers in southern states recognized the significance of free assembly to public opinion and routinely prohibited its exercise among slaves and free blacks.").

153. Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 209 (2018) ("It would become a crime punishable by death, for instance, to preach against slavery or to 'write, print, publish, or distribute abolitionist literature' in some states . . . ."); Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1120–23 (1997) (discussing suppression of speech related to abolition).

154. *See* McDonald v. City of Chicago, 561 U.S. 742, 899 (2010) (Stevens, J., dissenting).

character."[155] Despite a long history of gun restrictions, *McDonald* found that an individual right to bear arms was deeply rooted.[156]

The dual tradition of criminalizing and permitting abortion could also determine the breadth of the right—not its fundamental nature.[157] *Roe* respected the complex tradition of abortion by balancing the patient's interest in abortion against the state's interest in protecting fetal life.[158] *Dobbs*, by contrast, departs from precedent and finds that historical criminalization of abortion requires overturning of *Roe*.

B. Beyond Glucksberg

The Court's exclusive reliance upon *Glucksberg* also raises problems because it makes light of or ignores precedent that utilizes a flexible and evolutionary substantive due process framework. Even if the *Dobbs* majority has correctly interpreted *Glucksberg*, precedent decided after and before the case substantially undermines it. These cases include *Griswold*, *Loving*, *Zablocki*, *Lawrence*, and *Obergefell*.

1. Glucksberg *Is Inapplicable to Privacy Cases*

Although *Dobbs* finds *Glucksberg* controlling, subsequent precedent cabins its relevance. In *Obergefell*, for example, the Court specifically held that *Glucksberg* does not alter fundamental rights cases that apply a broader conception of tradition:

> *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), *it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.*[159]

The Court's refusal to adhere to *Obergefell*'s cabining of *Glucksberg* is deeply troubling and underscores *Dobbs*'s tenuous connection to precedent.[160]

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155. *Id.* at 802 (Scalia, J., concurring) (emphasis added).

156. *Id.* at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'") (citation omitted).

157. *Cf.* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 432 (2014) (observing that in *McDonald*, Scalia argued that a "dual tradition" of legalization and regulation "was no reason to evade incorporation" of the Second Amendment).

158. Roe v. Wade, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

159. Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (emphasis added); *id.* (distinguishing assisted suicide from marriage, family, and sexual intimacy cases).

160. *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 138 (1989) ("It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents.").

When pressed by the dissent to distinguish abortion from other privacy rights, the majority focuses on the abortion procedure:

> The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.[161]

In one respect, this analysis from *Dobbs* is beyond dispute: outside of the abortion precedents, other substantive due process rights do not involve abortion—or destruction of potential life. But this truism proves far less than the majority believes it does. Courts can distinguish every fundamental right by merely describing the liberty interest it involves.[162] Legal analysis, however, identifies *material* distinctions. Differentiating liberties by specific content alone makes abortion and potentially every other interest unique. By summarily placing *Roe* and *Casey* in a special box, the Court avoids seriously discussing the similarities between abortion and protected liberty interests, such as procreation, families, and sexual intimacy. The next Subsection examines these linkages.

2. Forward-Looking Substantive Due Process Standards: Emerging Awareness and Continuum of Rights

Prior to *Dobbs*, substantive due process precedent typically followed Justice Harlan's analysis in *Poe*.[163] Harlan did not view liberty interests as "isolated points" but as a "rational continuum."[164] That an asserted liberty interest differed facially from a protected one did not end the analysis. Instead, the Court considered whether it could rationally connect newly asserted interests to existing ones.[165] This methodology avoids arbitrary and unprincipled limitations on liberty.[166]

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161. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022).

162. The following exercise demonstrates why material distinctions are more helpful in this context. Contraceptive use by married couples is not contraceptive use by unmarried individuals or minors. Heterosexual marriage is not same-sex marriage. Establishing a home with a woman and her two grandsons who are cousins is not sending a child to a religious school or having that child receive instruction in a foreign language. Sexual intimacy is not interracial marriage. And none of these things is an abortion. Taking this analysis to a logical conclusion would make all these rights unique and render substantive due process unprincipled and arbitrary.

163. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961); *supra* text accompanying notes 50–53.

164. *Poe*, 367 U.S. at 543.

165. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (rejecting city's invitation to "cut[] off any protection of family rights at the first convenient, if arbitrary boundary, the boundary of the nuclear family"); Carey v. Population Servs. Int'l., 431 U.S. 687, 692 (1977) (rejecting distinction between minors and adults with respect to procreative decisions); Lawrence v. Texas, 539 U.S. 558, 565–68 (2003) (overturning precedent that arbitrarily excluded LGBTQA individuals from sexual privacy and intimacy); Roe v. Wade, 410 U.S. 113, 152–55 (1973) (analyzing link between abortion and right of privacy).

166. *Moore*, 431 U.S. at 503 (rejecting arbitrary boundaries around rights).

Courts have identified several interests that place abortion within the Fourteenth Amendment realm of liberty. In *Roe*, privacy in reproductive decisions provided the major link between abortion and other fundamental rights.[167] Precedent involving marriage, procreation, contraception, and parental autonomy relate closely to the abortion decision due to the issue of childbirth and family planning.[168] The procreation and contraception cases provide the closest connection because they rest on the Court's holding that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[169] *Casey* recognizes privacy,[170] bodily integrity,[171] gender equality,[172] and procreative decisions[173] as principles secured by the Fourteenth Amendment and situates *Roe* within this cluster of interests.[174] *Dobbs*, however,

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167. *Roe*, 410 U.S. at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

168. *Id.* (discussing cases).

169. Eisenstadt v. Baird, 405 U.S. 428, 453 (1972); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."). Although *Roe* turns on privacy, the opinion contains seeds of an argument regarding bodily integrity and gender equality, preferred by many scholars in this field. *See Roe*, 410 U.S. at 153 ("The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent . . . . Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").

170. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992) (linking abortion with contraceptive cases because they "involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it"); *id.* at 926–27 (Blackmun, J., concurring) (discussing right of privacy).

171. *Id.* at 853 (plurality opinion) ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."); *id.* at 927 (Blackmun, J., concurring) (arguing that "compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm").

172. *Id.* at 896–99 (plurality opinion) (invalidating spousal notification provision in antiabortion statute because it rests on outmoded gender stereotypes and patriarchal conceptions of marriage); *id.* at 925 (Blackmun, J., concurring) (discussing women's equality).

173. *Id.* at 851 (plurality opinion) (discussing decision to "bear or beget a child") (citation omitted); *id.* at 927–28 (Blackmun, J., concurring) (arguing that an abortion restriction "deprives a woman of the right to make her own decision about reproduction and family planning" and that a "decision to terminate or continue a pregnancy has no less an impact on a woman's life than decisions about contraception or marriage").

174. *Id.* at 851–53 (plurality opinion) (connecting abortion to Fourteenth Amendment liberty). For literature on this subject, see, for example, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving*

unnecessarily holds that the destruction of potential life precludes finding a fundamental right to abortion. Other rational outcomes exist. Rather than excluding abortion from the list of protected liberties, the reality of potential life instead could mean that the state has countervailing interests.[175] *Dobbs* follows a more extreme approach and treats potential life as eclipsing all interests women have in personal autonomy and bodily integrity. The Court has not followed this approach in other fundamental rights cases. *Roe* and *Casey* both recognized a state's interest in potential life.[176] In *Cruzan*, the Court did not distinguish the refusal of life-sustaining medical treatment from other rights. Instead, because exercising this liberty interest would result in death, the Court weighed the state's interest in human life against the individual right to autonomy in medical decisions.[177] Although abortion involves termination of fetal life—or killing an unborn child—this alone does not justify subordinating the woman's interest in bodily autonomy throughout a pregnancy. Compelling childbirth forces women to undergo the profound physical, emotional, and economic hardships of pregnancy. To exclude abortion from fundamental rights altogether makes women subordinate to fetuses. The worthiness of this outcome is not self-evident, and the Court does not attempt to justify it.

II. RIGHTS AND GENDER EQUALITY DOCTRINE AFTER *DOBBS*

Dobbs represents a dramatic shift in substantive due process methodology. Although the Court attempts to limit its reach by distinguishing abortion from other fundamental rights, narrow traditionalism could certainly justify invalidation of other rights. The opinion implicates the equality doctrine as well. The Court's analysis of the relationship between abortion and gender equality rests on a limited conception of equal protection that devalues the substantive impact of state action on the actual lives of subordinate groups.

A. Narrow Traditionalism and Fundamental Rights

Dobbs utilizes a conservative traditionalism approach that rejects emerging awareness and that makes arbitrary distinctions among liberty interests, rather than seeing rights as a continuum. This doctrinal approach directly contradicts methodology commonly employed in substantive due process cases.[178] This raises a

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Constitutional Expression, 56 EMORY L.J. 815, 818 (2007) (arguing that "the sex equality approach to reproductive rights views control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class"); Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 401 (2004) ("At least three distinct values—sex equality, bodily integrity, and procreative control—have been offered to justify a woman's right to choose an abortion."); Beth Packman Weinman, *Freedom from Pain Establishing a Constitutional Right to Pain Relief*, 24 J. LEGAL MED. 495, 524 (2003) ("Over the past 70 years, the United States Supreme Court has interpreted and expounded upon a common law right to privacy and bodily integrity that protects from arbitrary state interference such rights as the right to procreate, to use contraception, to have an abortion, and to hasten death by refusing unwanted medical treatment.").

175. *Roe* and *Casey* engaged in this type of balancing. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

176. *See id.* at 2236.

177. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 280–81 (1990) (discussing need to balance state's interest in life against patient's "choice between life and death").

178. *See supra* text accompanying notes 162–76.

critical issue regarding the future of fundamental rights doctrine. If the Court adheres to this approach, it could lead to the invalidation of many existing fundamental rights. In particular, *Dobbs* leaves rights of marriage equality, sexual privacy, and contraception tenuous and vulnerable.

1. Marriage Equality

In *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment confers a fundamental right to same-sex marriage.[179] *Obergefell* was the product of decades of social movement organizing, liberalization of LGBTQA law in state and local governments, and recognition of sexual orientation as an arbitrary basis for discrimination in federal and state courts.[180] *Obergefell* explicitly rejected narrow traditionalism as a required doctrinal framework. The Court applied an evolutionary approach that considered changing social norms regarding sexual orientation:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[181]

Obergefell also situated same-sex marriage within the historical treatment of marriage as a special relationship favored by law. Even though marital privacy cases traditionally involved opposite-sex couples,[182] this historical fact did not limit the Court. Instead, the Court invoked a line of decisions that focus on the essence of a right, rather than its specific content.[183] In other words, only material distinctions could determine whether an asserted right closely resembles an existing fundamental right.[184] Same-sex marriage qualified for designation as a fundamental right because the reasons the Court recognized marriage as a fundamental right did not depend upon the gender of the couple. The Court identified individual autonomy, the importance of the marital union, stability for children and families, and marriage being central to social order as reasons to extend special recognition and protection

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179. *See generally* Obergefell v. Hodges, 576 U. S. 644 (2015).

180. *Id.* at 660–63 (discussing societal evolution on sexual orientation, marital equality, and marriage).

181. *Id.* at 664.

182. *Id.* at 665 ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners.").

183. *Id.* ("This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.").

184. *See supra* text accompanying notes 155–58 (discussing material distinctions in law).

to marriage[185] and found no rationale for excluding same-sex couples from this tradition.[186]

An even stronger demonstration of the important differences between *Dobbs* and *Obergefell* involves the analysis of *Glucksberg*. In *Dobbs*, the Court relies extensively on *Glucksberg* to justify a narrow traditionalism framework that justifies overturning *Roe* and *Casey*.[187] *Obergefell* declined to follow *Glucksberg*, however, and reached a conclusion that did not turn solely on historical treatment of the asserted liberty interest.[188] Three justices who dissented in *Obergefell* remain on the Court, and one of those, Justice Thomas, openly embraces overturning *Obergefell* in his *Dobbs* concurrence.[189] All of these factors justify concerns regarding the vulnerability of *Obergefell* to judicial invalidation.[190]

2. Sexual Privacy

Adherence to the doctrinal methodology utilized in *Dobbs* would also support the overruling of *Lawrence* in a case with similar facts.[191] Like *Obergefell*, *Lawrence* was decided after *Glucksberg*. Prior to *Lawrence*, the Court upheld a Georgia sodomy statute in *Bowers v. Hardwick*.[192] *Bowers* tightly framed the liberty interest as a "right of homosexuals to engage in sodomy,"[193] although the challenged statute was gender neutral.[194] After canvassing history and finding a tradition criminalizing sodomy, the Court upheld the statute.[195]

Lawrence criticized the historical analysis in *Bowers* as inaccurate.[196] The decision, however, also turned on the Court's application of a forward-looking

185. *See Obergefell*, 576 U.S. at 665–71 (discussing reasons for protecting marriages).

186. *See id.* at 670–71 ("The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.").

187. *See supra* Part I.A.2.

188. *See supra* text accompanying note 159 (discussing *Obergefell*'s limitation of *Glucksberg*).

189. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.") (internal citations omitted).

190. *Id.* at 2319 (Breyer, J., dissenting) (arguing that *Dobbs* places *Griswold*, *Lawrence*, and *Obergefell* in jeopardy).

191. *Lawrence* held that a Texas same-sex sodomy statute violated the Due Process Clause. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

192. 478 U.S. 186, 196 (1986).

193. *Id.* at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").

194. *Id.* at 188 n.1 (text of challenged Georgia statute).

195. *Id.* at 192–94 (discussing sodomy prohibitions).

196. *Lawrence*, 539 U.S. at 567–71 (discussing history of sodomy prohibitions).

analysis of tradition.[197] *Lawrence* took notice of "emerging" traditions and values favoring equal dignity for sexual intimacy among gays, lesbians, and bisexuals.[198] The Court then situated sexual privacy within the constellation of rights previously recognized as fundamental. Specifically, *Lawrence* held that the Fourteenth Amendment establishes autonomy for individuals in their "private lives in matters pertaining to sex."[199] The Court connected sexual privacy to a broad interest in individual autonomy[200] and to liberalizing precedent regarding sexual orientation discrimination decided since *Bowers*.[201] Although *Lawrence* did not address *Glucksberg* specifically, Justice Scalia invoked the precedent in his dissent to make an argument similar to the reasoning applied in *Dobbs*. Scalia contended that *Glucksberg* weakened *Roe* and *Casey* and limited fundamental rights only to those interests that are deeply rooted in a backward-facing conception of tradition.[202] The majority refused to apply this constrained methodology, however, and by implication, cabined the reach of *Glucksberg*.

3. Contraception

Dobbs could also justify the overturning of precedent recognizing a right to use contraception. The most important precedent on this subject includes *Griswold*,[203] *Eisenstadt*,[204] and *Carey*.[205] These cases are particularly vulnerable after *Dobbs* because they provide the foundation for *Roe* and utilize a similar doctrinal framework. Furthermore, these cases clearly turn on the use of a broad framing of liberty and tradition that *Dobbs* rejects.

Together, *Griswold*, *Eisenstadt*, and *Carey* establish a right of privacy with respect to contraceptive use.[206] The Court has not limited the right to contraception. Instead, it is a much broader right, that includes individual autonomy to decide

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197. *Id.* at 572 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (altered text in original) (citation omitted).

198. *Id.* ("These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

199. *Id.*

200. *Id.* at 573–74 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

201. *Id.* at 574–75 (discussing Romer v. Evans, 517 U.S. 620 (1996)).

202. *Id.* at 588 (Scalia, J., dissenting) ("I do not quarrel with the Court's claim that [*Romer*] 'eroded' the 'foundations' of Bowers' rational-basis holding. But *Roe* and *Casey* have been equally 'eroded' by [*Glucksberg*], which held that only fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational-basis scrutiny under the doctrine of 'substantive due process.'").

203. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception for married couples).

204. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception for unmarried couples).

205. *See generally* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraception for minors).

206. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 331 (2007) (discussing contraception precedent).

"whether to bear or beget a child."[207] *Roe* is a part of this line of cases,[208] because abortion, like contraception, allows people to determine whether or not they want to have children. The overruling of *Roe* renders other privacy cases vulnerable. The logic applied in *Dobbs* could justify overturning contraceptive cases because contraceptive use was historically criminalized;[209] the right of privacy is a broad conception of tradition;[210] and unmarried individuals[211] and minors[212] are distinct from married couples.[213] If the Court follows *Dobbs* in subsequent cases, narrow traditionalism analysis could easily justify overturning privacy cases regarding contraceptives.

B. Equal Protection and Gender

In *Dobbs*, various amici assert that abortion restrictions violate the Equal Protection Clause, but this issue receives scant attention.[214] The Court quickly disposes of the question because it found that no intentional gender discrimination exists when lawmakers restrict abortion.[215] The Court's discussion of gender equality concerns rests on the application of a constrained doctrine that does not address material inequality or subordination.

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207. *Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

208. Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341, 1354 (2004) (discussing "*Griswold* and its three principal progeny," *Eisenstadt*, *Roe*, and *Carey*).

209. Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2035–36 (2021) (analyzing gender and racial motivation behind policies to ban abortion and contraception); Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 840–41 (2021) ("The professionalization of medicine and a growing commercial contraceptive market provided both an impetus and a means for increased criminalization and regulation of contraceptives and abortion."); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 318 (1992) (analyzing "gender, ethnicity, and class" underpinnings of the movement to criminalize contraceptives).

210. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

211. *Eisenstadt*, 405 at 444–45 (invalidating contraception ban for unmarried persons).

212. Carey v. Population Servs. Int'l., 431 U.S. 678, 694 (1977) (invalidating law that banned distribution of contraceptives to minors).

213. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invalidating contraception ban for married individuals); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) (making facial distinction between abortion and other privacy rights).

214. *Dobbs*, 142 S. Ct. at 2245–46 (discussing equality arguments).

215. *Id.* (discussing equality arguments).

1. Pregnancy, Stereotypes, and Subordination

Dobbs uncritically follows *Geduldig v. Aiello*,[216] which upheld a state disability insurance program that excluded coverage for pregnancy-related conditions.[217] *Geduldig* found the policy gender neutral because it treated all workers evenly.[218] Rather than improperly dividing workers by sex, the policy permissibly distinguished pregnant and nonpregnant persons.[219] The Court observed that, while the group of pregnant persons consisted only of women, nonpregnant workers included women and men.[220] Hence, the policy could not discriminate against women, because men and women were part of the privileged class.[221]

Had the Court conducted more than a "cursory analysis"[222] of the policy, it might have discovered that gender stereotypes lead to policies that burden pregnancy and that these practices detrimentally affect women.[223] Instead, *Geduldig* applied a limited conception of inequality that searches for explicit or conscious discrimination on the basis of a prohibited category, such as gender.[224] The Court's formalistic approach does not reflect the contemporary understanding that discrimination can result from stereotypes, implicit bias, or social dominance orientation.[225] The antidifferentiation framework also fails to address practices that reinforce inequality or subordination, regardless of the policymakers' intent.[226] *Geduldig* and similar precedent employ what Reva Siegel describes as

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216. 417 U. S. 484 (1974).

217. *Id.* at 496–97 ("There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.").

218. *Id.* ("There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.").

219. *Id.* at 496 n.20.

220. *Id.*

221. *Id.* ("The fiscal and actuarial benefits of the program thus accrue to members of both sexes.").

222. *Id.* ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis.").

223. *Geduldig* has received wide criticism. *See* Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) ("Criticizing *Geduldig* has since become a cottage industry."); Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 608 (1992) ("The Court's decisions in *Geduldig* and [similar precedent] have been subjected to harsh criticism and even ridicule for their assertion that a distinction directly targeting a biological characteristic that only women possess and thus disadvantaging only women does not constitute a sex based distinction.").

224. *See* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371, 407–08 (2022) (discussing formal equality).

225. *See id.* (discussing equality theories that do not focus on intentional discrimination).

226. *See* Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 359 (1991) (arguing the *Geduldig*'s critics should focus on the underlying constitutional principle that requires a showing of discriminatory intent).

"physiological naturalism"—or the assumption that "legislative judgments about real sex differences that categorically distinguish men and women are based on facts and free of sex-role assumptions."[227] Far from an inherently neutral category, pregnancy has historically subjected women to marginalization.[228] Actual or potential pregnancy has justified gender subordination ranging from denial of suffrage[229] to loss of employment opportunity.[230] Social scientists have documented a wide range of commonly held stereotypes regarding pregnancy,[231] including that pregnant women are "less competent and committed"[232] and "overly emotional, often irrational, physically limited, and less than committed to their jobs."[233] This research offers a more accurate and nuanced elaboration of pregnancy and its relationship to gender inequality than the Court's cramped analysis in *Geduldig*. Subsequent Court decisions map out the beginning of a more thoughtful discussion of pregnancy and workplace discrimination.[234] In light of developments in scholarship and precedent after *Geduldig*, the Court should have done more than "briefly address"[235] the important equality dimensions of abortion restrictions in *Dobbs*.

Antidiscrimination scholars have demonstrated that abortion restrictions harm women and rest on stereotypes.[236] Historically, abortion restrictions reinforced social constructs of women as mothers and homemakers.[237] The policies also treated

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227. Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19TH AMEND. ED. GEO. L.J. 167, 201 (2020).

228. *Id.* ("Judgments about pregnant women are shaped by social roles."); Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 142 (1991) ("Laws governing pregnancy have traditionally served to enforce the public and private subordination of women to men's authority.").

229. Courtni E. Molnar, *"Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163, 165–66 (2005) ("Opponents of suffrage also considered pregnancy in their arguments . . . .").

230. Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1151 (1986) ("Two important lessons from history are that women have not been treated the same as men, and that women have lost their jobs and benefits due to pregnancy.").

231. Siegel, *supra* note 227, at 201 ("Volumes of social science report that 'people, especially men, tend to hold negative stereotypes about pregnant women.'") (quoting Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369 (2008)).

232. *Id.*

233. *Id.*

234. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729 (2003) (discussing stereotypes regarding women and domesticity that impact employment practices).

235. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) ("[W]e briefly address one additional constitutional provision that some of respondents' amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause.").

236. *See generally* Siegel, *supra* note 209, at 262.

237. *Id.* at 293 ("Antiabortion tracts repeatedly asserted that women had a duty to bear children. This duty to reproduce entailed more than an obligation to protect particular embryos and fetuses; it was a duty that derived, implicitly or explicitly, from the obligations of marriage.").

women paternalistically, by purporting to save them from abortions that they might later regret.[238] Abortion restrictions also impose a unique burden on women's bodily autonomy, because in order to protect fetuses or unborn children, the state coerces only women to commit their bodies to the production of life.[239] The unquestionable assumption that women must fulfill this duty reflects longstanding stereotypes about women and their natural destiny as mothers.[240] Also, pregnancy is a healthcare issue on its own due to the physical and mental changes that it imposes upon women.[241] Pregnancy comes with risks of additional harm due to medical complications, but abortion restrictions limit a woman's ability to seek care only to circumstances involving imminent death or an extreme health problem.[242] Abortion restrictions are particularly harmful for individuals burdened by racism, economic injustice, and other forms of inequality. Black women, for example, have the highest rate of maternal mortality, due to systemic racial and gender hierarchies.[243] The rates of maternal mortality for Black women increase substantially following the enactment of abortion restrictions.[244] Pregnancy also increases women's vulnerability to intimate partner violence.[245] Poor women, especially those who are unmarried, make

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238. Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 394–95 (2011) (discussing paternalism underlying abortion restrictions). *See also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1719 n.81 (2008) (listing numerous sources countering idea of abortion trauma).

239. Siegel, *supra* note 209, at 341 (discussing women's loss of bodily autonomy).

240. *Id.* (discussing gender stereotypes concerning motherhood).

241. Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 343 (2010) ("Every pregnancy has the potential to become a complicated pregnancy over the course of nine months of dramatic physiological changes. The mere fact of pregnancy increases a woman's chances of death and long-term detriment to health. Once pregnancy has begun, abortion is statistically safer than carrying to term until well into the second trimester.").

242. Siegel, *supra* note 209, at 364–65 (discussing "sex-role assumptions" associated with life or medical emergency exceptions and arguing that these policies demonstrate "that the state is willing to subordinate the welfare of the unborn to that of the pregnant woman, but only when women will sustain physical injuries in bearing children").

243. *See, e.g.*, Evelyn J. Patterson et al., *Gendered Racism on the Body: An Intersectional Approach to Maternal Mortality in the United States*, 41 POP. RSCH. & POL'Y REV. 1261, 1262–63 (2022); *Working Together to Reduce Black Maternal Mortality*, CDC (Apr. 6, 2022), https://www.cdc.gov/healthequity/features/maternal-mortality/index.html [https://perma.cc/AM9G-67AU] ("Black women are three times more likely to die from a pregnancy-related cause than White women.").

244. Patterson et al., *supra* note 243, at 1285–86 (discussing impact of state abortion policies on maternal mortality).

245. Yvonne Lindgren, *The Doctor Requirement:* Griswold, *Privacy, and At-Home Reproductive Care*, 32 CONST. COMMENT. 341, 363 (2017) ("Violence by intimate partners increases in pregnancy both in frequency and in intensity."); Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 WASH. L. REV. 333, 347 (2019) ("Pregnancy is a time of heightened abuse and onset of serious physical violence, and intimate partner violence occurs with greater frequency when there are children in the home."); Michele Bratcher Goodwin, *Precarious Moorings: Tying Fetal Drug Law Policy to*

up a disproportionate amount of people who receive abortion care.[246] Abortion restrictions impose additional and often insurmountable obstacles on their autonomy and economic status.[247] The history of coerced reproduction for enslaved Black women[248] and forced sterilization of poor and disabled women provide even stronger evidence of how depriving women of reproductive autonomy has historically enforced gender domination.[249] This history also demonstrates the importance of viewing reproductive choice through the lens of race, class, gender, and other forms of disempowerment.[250] Meaningful reproductive choices require a social structure that does not compel poor women—and poor women of color disproportionately—to seek abortions.[251]

Social Profiling, 42 RUTGERS L.J. 659, 674 (2011) (observing that "the risk of domestic violence increases by 400% when a pregnancy is unintended or unwanted").

246. Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html [https://perma.cc/7XK5-QP9H] ("The typical [abortion] patient, in addition to having children, is poor; is unmarried and in her late 20s; has some college education; and is very early in pregnancy.").

247. Dan Keating et al., *Abortion Access Is More Difficult for Women in Poverty*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/ [https://perma.cc/9AA4-E4P4] ("Women living below the federal poverty level are being disproportionately affected by tightening antiabortion regulations, particularly as clinics across the country have been closing in recent years.").

248. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22–55 (2d ed. 2017) (discussing reproductive control of Black women during slavery); Murray, *supra* note 209, at 2035 (2021) (discussing reproductive control of enslaved persons and observing that "because the use of contraception and abortion to control reproduction had profound implications for property interests, slave owners sought to deter and punish efforts to prevent or terminate pregnancies"); Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice as Resistance to the State's Property Interest in Black Women's Reproductive Capacity*, 31 YALE J.L. & FEMINISM 35, 43 (2019) (centering Black women in abortion debates and linking reproductive control of enslaved persons with present-day abortion restrictions); Pamela D. Bridgewater, *Un/re/dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE J. OF CIV. RTS. & SOC. JUST. 11, 27 (2001) ("Although the prevalence of self-imposed abortions among female slaves can never be fully assessed, a number of historians believe that many female slaves engaged in this practice as a form of resistance. Abortions were also performed by informal mid-wives in the slave community.").

249. The purpose of this Article is not to engage in an exhaustive analysis of pregnancy, abortion, and equality. Instead, it is to demonstrate the insufficiency of the Court's treatment of the issue in *Dobbs*.

250. *See* Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1049 (2021) (book review) ("Marginalized black people understand the social, economic, political, and interpersonal constraints under which they operate—constraints that likely contributed to their being saddled with an unintended and unwanted pregnancy in the first instance—and conclude that it is best not to carry the pregnancy to term.").

251. *See id.* at 1049–50 ("Black people's abortion rates reflect racism because structural racism has led black people to face higher rates of unintended and unwanted

2. Women and Political Power

Another section of *Dobbs* relates to equal protection, though not explicitly. The Court expresses confidence that, once the question of abortion becomes a matter for states to decide, women can use their electoral majority to seek changes in state law.[252] While this discussion does not relate directly to equal protection, the implications for equality doctrine are concerning. The Court's reasoning could provide the basis for applying rational basis review to sex discrimination claims because political power is one of the established reasons for utilizing strict and heightened scrutiny in equal protection cases.[253] If women are viewed as politically powerful, then they do not require judicial solicitude to redress the improper influence of bias in the political process.[254] Women can fend for themselves. *Dobbs* validates this reasoning.

While the idea that the Court could reduce sex discrimination to a non-suspect classification might seem implausible, many commentators thought the same of *Roe*'s fate.[255] Justice Scalia, who embraced the ideological commitments of the *Dobbs* majority, made such an argument when he dissented in *United States v. Virginia*.[256] To make his point, Scalia used language that was strikingly similar to

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pregnancies. . . . Structural racism has led people of color to bear a disproportionate share of poverty—leading them to have to rely on governmental programs and public benefits for their economic and physical survival.").

252. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) ("Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.").

253. *See* Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 987–89 (2014) (discussing political powerlessness and equal protection).

254. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) (finding that plaintiff's class with mental disabilities do not constitute a quasi-suspect class because they do not lack political power).

255. *See generally* Robert A. Sedler, *The Supreme Court Will Not Overrule* Roe v. Wade, 34 HOFSTRA L. REV. 1207 (2006); *see also* Anthony Dutra, Note, *Men Come and Go, but* Roe *Abides: Why* Roe v. Wade *Will Not Be Overruled*, 90 B.U. L. REV. 1261, 1261 (2010); Robert A. Sedler, *A Different Take on the Roberts Court: The Court as an Institution, Ideology, and the Settled Nature of American Constitutional Law*, 54 WAYNE L. REV. 1033, 1053 (2008) ("Since the Supreme Court will not overrule *Roe v. Wade*, cases like *Gonzales*, involving the constitutionality of abortion regulation, will have no significant impact on a woman's constitutional right to have a safe and legal abortion."); Dawn Johnsen, *"TRAP"ing* Roe *in Indiana and A Common-Ground Alternative*, 118 YALE L.J. 1356, 1358 (2009) ("The 2008 election thus reinforced the prevalent view that women's right to decide whether to continue a pregnancy is essentially secure: the political system will defend the right from serious infringement, and the Court will not overrule *Roe*.").

256. United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (arguing that if the Court were to reconsider the level of scrutiny for sex discrimination, rational basis would be the better argument because "[i]t is hard to consider women a 'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon,' when they *constitute a majority of the electorate*") (emphasis added).

Justice Alito's.[257] Additionally, in a 2011 interview with *California Lawyer*, Justice Scalia made his views on sex discrimination even more explicit:

> Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws.[258]

Given the similarities between Scalia's logic and the reasoning of the *Dobbs* majority, the idea that the Court, as currently constituted, might lower gender discrimination to a non-suspect category is more plausible than not. *Dobbs*'s assessment of women's political power, however, misses many important facts. Despite having an electoral majority, economic inequality and discrimination disempower women. Justice Brennan's opinion for the plurality in *Frontiero v. Richardson*[259] understood that structural barriers impeded women's access to the political process, as indicated by their underrepresentation as elected officials.[260] This lack of representation is particularly relevant for abortion regulations because social scientists have found an inverse relationship between the number of women in a legislature and the likelihood of that legislature enacting restrictive abortion regulations.[261] *Dobbs* also fails to consider the racial and economic status of women. In Mississippi, women of color receive most of the abortions performed in the state.[262] In 2019, Blacks received 74% of the abortions performed in the state; Whites received 20%; and Latinx persons were 3% of abortion patients.[263] With

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257. *Compare id.* (arguing that if the Court reconsidered the level of scrutiny for gender discrimination, women would not qualify for heightened scrutiny because they "constitute a majority of the electorate"), *with Dobbs*, 142 S. Ct. at 2277 ("Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.").

258. Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS NEWS (Jan. 4, 2011), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/ [https://perma.cc/HW76-8T7L].

259. 411 U.S. 677 (1973).

260. *Id.* at 686 n.17 ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decision-making councils.").

261. Rebecca Kreitzer, *Politics and Morality in State Abortion Policy*, 15 STATE POLS. & POL'Y Q. 41, 58 (2015) ("State partisan politics, especially Democratic governors and Democratic women in the state legislature, decrease the probability of anti-abortion rights policies but focus on some specific policies more than others."); Barbara Norrander & Clyde Wilcox, *supra* note 3, at 719 ("Legislatures with more women members produce more liberal abortion policy, and are more likely to resist passing parental consent laws.").

262. *See, e.g.*, Fabiola Cineas, *Black Women Will Suffer the Most Without* Roe, VOX (June 29, 2022), https://www.vox.com/2022/6/29/23187002/black-women-abortion-access-roe [https://perma.cc/4BHZ-P8PS].

263. *Abortion Surveillance—United States, 2019*, CDC (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm#T6 [https://perma.cc/4PWA-EHV9].

respect to voting, Mississippi has a high level of racial polarization.[264] For example, in the 2020 presidential election, 81% of White voters supported Trump, while 94% of Black voters picked Biden.[265] Generally, the degree of racially polarized voting is highest in southern states.[266] These states also tend to have the most stringent abortion restrictions and the highest population of Blacks.[267] Racial polarization in voting, however, prevents Black women from forming coalitions with White women to elect Democrats, who tend to support abortion rights.[268] Due to racial divisions, discrimination, and economic injustice, population or electoral size is not an accurate measure of women's ability to effectuate changes in legislation regarding abortion.

III. RESTORATION OF RIGHTS

Dobbs has caused a lot of worry among persons who support reproductive choice and doctors whose patients require abortions for life-saving or health-preserving treatment.[269] One news story that has generated extensive media coverage in the aftermath of *Dobbs* involves a ten-year-old rape victim who could not receive a legal abortion in her home state of Ohio.[270] In order to abort the

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264. David Schultz, *Minority Rights and the Electoral College: What Minority, Whose Rights?*, 55 GA. L. REV. 1621, 1645–46 (2021) (discussing racially polarized voting).

265. *Id.*

266. Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 76 (2020) (observing that "racially polarized voting remains strong, especially in jurisdictions like Mississippi that were once covered by the preclearance provisions of the Voting Rights Act"); Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1352–53 (2016) (discussing racially polarized voting in southern states).

267. Cineas, *supra* note 262 ("The 13 states with trigger bans—locations where abortion will be prohibited within 30 days of [Dobbs] are mostly located in the South, where nearly half of the country's Black population resides.").

268. *See* Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J. F. 512, 532 (2020) (observing that "racially polarized voting, especially in the South, rendered 'women' and 'men' virtually meaningless as electoral categories"); *supra* text accompanying notes 12–18 (discussing partisanship and abortion).

269. Selena Simmons-Duffin, *Doctors Weren't Considered in* Dobbs*, but Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-*Dobbs*-but-now-theyre-on-abortions-legal-front-lines [https://perma.cc/7BN5-RJM4] ("We're trying to be very, very careful . . . . Especially as things are evolving, I'm sure that I have made a mistake. And it is so scary to me to know that I'm not only worrying about my patients' medical safety, which I always worry about, but now I am worrying about their legal safety, my own legal safety . . . . The criminalization of both patients and providers is incredibly disruptive to just normal patient care . . . .") (quoting an obstetrician); Ellie Silverman et al., *Protests Erupt in D.C., Around the Country as* Roe v. Wade *Falls*, WASH. POST (June 24, 2022), https://www.washingtonpost.com/dc-md-va/2022/06/24/supreme-court-abortion-protests-Roe/ [https://perma.cc/VT8J-6QWR].

270. *See* Shari Rudavsky & Rachel Fradette, *Patients Head to Indiana for Abortion Services as Other States Restrict Care*, INDIANAPOLIS STAR (July 14, 2022), https://www.indystar.com/story/news/health/2022/07/01/indiana-abortion-law-*Roe*-v-wade-overturned-travel/7779936001/ [https://perma.cc/7CMT-77Z3] (discussing plight of 10-year-old rape victim who could not receive abortion care in her home state).

pregnancy, she had to travel to Indiana.[271] This led to controversy and debate regarding the harshness of post-*Dobbs* regulations,[272] especially after President Biden condemned Ohio's law.[273] Thirteen Republican-dominated state legislatures had already passed "trigger laws" set to be enforced if *Roe* were ever overturned.[274] These laws severely limit the time and circumstances under which pregnant individuals can have abortions.[275] The rapidly changing situation has led many pro-choice supporters to demand that public officials do more to mitigate harm.[276] The options for accomplishing this goal nationwide in the immediate future are probably not as broad as many pro-choice activists assume or prefer.[277] The remainder of the discussion in this Article will examine why the restoration of abortion rights nationwide will not happen quickly, if ever. It will also describe a democratic vision of substantive due process that can revitalize fundamental rights doctrine when it becomes ideologically feasible.

A. Dobbs *Did Not Occur Overnight*

Constitutional law changes because social movements, activists, politicians, and members of the public collectively make claims about the meaning of the Constitution and seek to legalize these perspectives through legislation,

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271. *Id.*

272. Michelle Goldberg, *A 10-Year-Old Endures the Predictable Result of an Abortion Ban*, N.Y. TIMES (July 14, 2022), https://www.nytimes.com/2022/07/14/opinion/10-year-old-abortion.html (discussing debate). After attacking the initial story as a hoax, pro-life politicians and activists have directed their anger toward the doctor. *See* Sheryl Gay Stolberg & Ava Sasani, *An Indiana Doctor Speaks Out on Abortion, and Pays a Price*, N.Y. TIMES (July 28, 2022), https://www.nytimes.com/2022/07/28/us/politics/abortion-doctor-caitlin-bernard-ohio.html?smid=url-share ("Dr. Bernard, 37, has been criticized across right-wing media, faced harassment and is the subject of an investigation by the Indiana attorney general. She's landed at the center of a post-*Roe* clash that the medical community has been dreading—one in which doctors themselves are the focus of political and legal attacks.").

273. Mariana Alfaro, *Biden Decries Case of 10-Year-Old Rape Victim Forced to Travel for Abortion,* WASH. POST (July 8, 2022), https://www.washingtonpost.com/politics/2022/07/08/biden-abortion-10-year-old-rape-victim/ [https://perma.cc/TEC4-QJKG].

274. Jesus Jiménez & Nicholas Bogel-Burroughs, *What Are Trigger Laws and Which States Have Them?*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/25/us/trigger-laws-abortion-states-Roe.html [https://perma.cc/P5GS-ANVN].

275. Amy Morona, *What Are Trigger Laws? Examining States' Preemptive Legislative Bans on Abortion*, PBS WASH. WEEK (Mar. 26, 2019), https://www.pbs.org/weta/washingtonweek/blog-post/what-are-trigger-laws-examining-states-preemptive-legislative-bans-abortion [https://perma.cc/LU8Y-J7AV] (discussing trigger laws).

276. Alexandra Hutzler, *Abortion Rights Activists Protest at White House, Urge Biden to Do More*, ABC NEWS (July 9, 2022), https://abcnews.go.com/US/abortion-rights-activists-protest-white-house-urge-biden/story?id=86525963 [https://perma.cc/VFE8-AU76].

277. *See* Jordan Fabian, *Biden, Democrats Lack Options to Do Much on Abortion Access*, BLOOMBERG (June 24, 2022), https://www.bloomberg.com/news/articles/2022-06-24/biden-democrats-lack-options-to-do-much-on-abortion-access-vows [https://perma.cc/LU8Y-J7AV] (discussing constraints due to Senate rules and limits on executive action).

litigation, and executive action.[278] *Dobbs* exists because since *Roe* was decided, more Supreme Court vacancies have arisen during Republican presidential administrations. The Republican Party's strategy of courting social conservatives along with White southerners who abandoned the Democratic Party due to the party's support of civil rights has helped the GOP achieve electoral success in state and federal elections.[279] Although abortion did not begin as a partisan political issue, beginning in the 1980s, both parties have gravitated to opposite sides, with Republicans supporting pro-life causes[280] and Democrats being home to supporters of choice.[281] We can observe the influence of politics on constitutional law by simply examining the party affiliation of the presidents who appointed the current members of the Court. Republican presidents appointed all of the justices who voted to overturn *Roe*.[282] Democratic presidents appointed all of the justices who dissented.[283] This is not a coincidence. Presidents appoint justices who share their personal ideology and the ideology of the president's political party.[284] And because the parties have politicized the topic, abortion politics shaped judicial appointments. The journey from *Roe* to *Dobbs* took nearly 50 years. Like all rulings, *Dobbs* can be overturned, but doing so would require sustained victories by Democratic candidates in federal elections. Long-view responses to the immediate issue of abortion and women's health will likely ring hollow to many supporters of choice,[285] but it is the sobering reality of constitutional law.

In terms of immediate policy, executive and legislative actions have occurred (and will likely continue) at the state and federal levels.[286] In many states,

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278. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 31 (2005) (discussing relationship among social movements, elections, and constitutional law).

279. *See supra* text accompanying note 15.

280. *See supra* text accompanying note 16.

281. *See supra* text accompanying note 17.

282. *See supra* text accompanying note 18.

283. *See supra* text accompanying note 18 (discussing abortion and partisan politics). By contrast, when the Court decided *Roe*, "abortion was not a partisan issue: *Roe*'s seven-Justice majority included five Republican-appointed Justices." Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 44 (2015).

284. Balkin, *supra* note 278, at 31.

285. Christian Paz, *Why Democrats Keep Saying "*Roe *Is on the Ballot,"* VOX (June 27, 2022), https://www.vox.com/23184192/democrats-abortion-*Roe*-*Dobbs*-strategy-vote-midterms-crisis [https://perma.cc/P2VD-Q3M4] (reporting anger over Democratic Party messaging that promoting voting as a response to *Dobbs*).

286. Zoë Richards and Lauren Egan, *Biden Signs Executive Order to Protect Abortion Access*, NBC NEWS (July 8, 2022), https://www.nbcnews.com/politics/white-house/biden-sign-executive-order-protect-abortion-access-rcna37226 [https://perma.cc/7M79-UPR2]; Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 9, 2022), https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html (reporting the success of voter initiatives to constitutionalize abortion rights in Michigan, California, and Vermont); Abby Phillip & Joanna Suarez, *Kansas Democrats Delivered a Surprise Win on Abortion Rights*, CNN (Oct. 15, 2022), https://www.cnn.com/2022/10/15/politics/kansas-

Dobbs has not lessened the availability of abortion, because laws provided the same or greater protection on this matter than *Roe* and *Casey*.[287] Several of these states are still expanding access.[288] Litigation over the scope of abortion rights is also occurring in state courts.[289] Corporations have publicly announced policies to compensate women who need to travel to other states for abortion care.[290] Congressional Democrats sponsored a bill that would have codified the *Roe* standard, but it stalled due to Senate rules that require a supermajority to move matters to a vote.[291] If passed, the bill would still face the prospect of judicial review, and it is not clear if the Court would uphold such a law. Some commentators have recommended changes to the structure of the Supreme Court—including limiting terms for justices,[292] expanding the size of the Court,[293] and stripping the Court of

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governor-abortion-rights-laura-kelly/index.html [https://perma.cc/9TGS-JYRF] (recording success of voter initiative to preserve state constitutional right to abortion); Deborah Yetter, *Proposed Kentucky Constitutional Amendment to End Right to an Abortion Defeated in Vote*, LOUISVILLE COURIER J. (Nov. 9, 2022), https://www.courier-journal.com/story/news/politics/elections/2022/11/08/midterm-election-2022-abortion-kentucky-amendment-2-results/69509956007/ [https://perma.cc/5GB3-TZ55] (reporting defeat of voter initiative to eliminate right to abortion in state).

287. Kierra B. Jones, *Expanding Access and Protections in States Where Abortion Is Legal*, CTR. FOR AM. PROGRESS (June 25, 2022), https://www.americanprogress.org/article/expanding-access-and-protections-in-states-where-abortion-is-legal/ [https://perma.cc/73KD-9N8Z].

288. *Id.*

289. Michelle Boorstein, *Clerics Sue over Florida Abortion Law, Saying It Violates Religious Freedom*, WASH. POST (Aug. 2, 2022), https://www.washingtonpost.com/dc-md-va/2022/08/01/florida-abortion-law-religion-desantis/ [https://perma.cc/Q2SC-64A3]; *Georgia Judge Overturns State Ban on Abortion After 6 Weeks*, CBS NEWS (Nov. 15, 2022), https://www.cbsnews.com/news/georgia-abortion-ban-overturned-fulton-county-superior-court/ [https://perma.cc/ZAD3-ETXG].

290. Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/article/abortion-companies-travel-expenses.html [https://perma.cc/H6P5-HAP4].

291. Libby Cathey, *Senate Republicans Block Bill That Would Codify* Roe v. Wade *Abortion Rights*, ABC NEWS (May 11, 2022), https://abcnews.go.com/Politics/senate-republicans-block-bill-codify-Roe-wade-abortion/story?id=84627147 [https://perma.cc/5T6P-7GWH].

292. Adam Chilton et. al., *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 3, 4 (2021) (arguing that the "unequal influence . . . presidential elections have on the composition of the Court . . . has created disparities in the influence of political parties on the Court," leading to "at least a half dozen distinct proposals . . . to institute term limits for Supreme Court Justices").

293. Tara Leigh Grove, *Sacrificing Legitimacy in A Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1557 (2021) (arguing that Court "[c]ritics have questioned the Court's legitimacy and called for structural reforms that would have been almost unthinkable a few years ago, including 'packing' the Court with additional members").

jurisdiction.[294] Regardless of their merit, these proposals do not seem feasible, given the deeply partisan character of Congress and questions regarding legality.[295]

The involvement of the political process in the appointment of judges means that restoring abortion and any other constitutional rights the Court invalidates will require broad and long-term action. Unless the Court experiences sudden ideological or structural change, multiple gaps in abortion care will exist: a wealth gap that impedes access for indigent persons; a geographical gap that limits abortion to states with liberal legislatures; and a constitutional gap, in which constitutional law does not reflect the values shared by most of the country.[296]

B. Bringing Past and Emerging Traditions of the Oppressed into Substantive Due Process Analysis

This last Section considers how substantive due process doctrine might look in a Court that is receptive to expansion of liberty.

1. Democracy and Tradition

As *Dobbs* demonstrates, traditional societal practices influence the Court's decision to recognize fundamental rights.[297] Some scholarship substantiates the use of tradition by contrasting due process, which is arguably backward-looking, from equal protection, which marks a break from the past.[298] Legal scholars, however, have also criticized tradition-based analysis, arguing that history is malleable, indeterminate, and susceptible to judicial bias.[299] Many scholars assert that tradition-based analysis preserves systemic inequality. The societal practices that past generations enshrined with legal protection—thus making them deeply rooted traditions—inevitably reflect the preferences of historically empowered classes.[300]

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294. CHRISTOPHER JON SPRINGMAN, JURISDICTION STRIPPING AS A TOOL FOR DEMOCRATIC REFORM OF THE SUPREME COURT, WRITTEN TESTIMONY FOR THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (Aug. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf [https://perma.cc/KT3Q-M8ZE]; Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1808–18 (2020) (arguing that Congress has broad authority to alter the Court's jurisdiction).

295. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 863 (2006) (proposing term limits for justices but concluding that statutory limits would violate the Constitution).

296. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-Roe-v-wade/ [https://perma.cc/RUF4-EQBT].

297. *See supra* text accompanying notes 49–54.

298. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170–78 (1988) (distinguishing due process and equal protection).

299. Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1549–54 (2008) (analyzing how systemic bias shapes tradition).

300. *Id.* at 1554 ("Suppose that traditions reject a certain right—say, the right to racial intermarriage, to same-sex relations, or to physician-assisted suicide. If those who create the tradition are systematically biased, the tradition lacks epistemic credentials.");

Reliance upon tradition solidifies inequality by rendering the perspectives and practices of historically subjugated groups irrelevant to constitutional deliberation.[301]

Because abortion restrictions limit women's autonomy and legislatures that impose them remain predominately male, reproductive rights litigation can bring discussions of biased and undemocratic tradition into focus.[302] The *Dobbs* dissenters challenge the majority's analysis by linking traditions criminalizing abortion with the historical domination of women by men.[303] The majority's privileging of this history preserves the subordination of women:

Ronald Kahn, *The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in* Lawrence *(2003),* Windsor *(2013) &* Obergefell *(2015)*, 75 MD. L. REV. 271, 307 (2015) ("A long-term tradition of inequality is not a reason to continue the tradition."); Tucker Culbertson, *Arguments Against Marriage Equality: Commemorating & Reconstructing* Loving v. Virginia, 85 WASH. U. L. REV. 575, 604 (2007) ("A fundamental rights jurisprudence anchored to tradition understood as static, particular cultural practices, or state institutions renders the Constitution unable to ever apprehend, let alone redress, let alone prevent subordination that seems traditional . . . ."); Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 115 (2002) ("[I]n a nation whose history is riddled with oppression, relying on tradition often only reinforces such injustice. In other words, resorting to tradition in assessing fundamental rights usually works to ratify prior discrimination. It perpetuates racism, classism, and misogyny, among other forms of discrimination, a result that nullifies the counter-majoritarian purpose of the Fourteenth Amendment."); Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1353 (1990) ("The [F]ourteenth [A]mendment was meant to protect minorities from oppression by the majority. Justice Scalia's approach, because it focuses solely on whether a claimed liberty interest finds support in the most narrow relevant tradition, is conceptually at odds with this goal."); Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 307 (2005) ("Fundamental rights status, under the Bowers test, hinges entirely on whether the practice in question is synchronous with our nation's history and traditions, regardless of whether that history and those traditions are themselves heavily tainted by prejudice or bias."). *See also* Fred Smith, *The Other Ordinary Person*s, 78 WASH. & LEE L. REV. 1071, 1076 (2021) (encouraging constitutional interpretative model that includes ideas of "previously dehumanized and wrongly excluded persons").

301. *See* Smith, *supra* note 300, at 1076–78.

302. Numerous studies indicate that as the percentage of women in a legislature increases, abortion laws are less restrictive. *See, e.g.*, Marshall Medoff, *The Determinants and Impact of State Abortion Restrictions*, 61 AM. J. ECON. & SOC. 481, 490–91 (2002) (finding inverse relationship between restrictive abortion law and "percentage of female state legislators and percentage of Democratic female legislators"); Michele Swers, *Understanding the Policy Impact of Electing Women: Evidence from Research on Congress and State Legislatures*, 30 POL. SCI. & POLITICS 217, 218 (2001) ("[R]esearch indicates that gender exerts a significant effect on voting for specific gender-related concerns such as abortion . . . .").

303. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2324 (2022) (Breyer, J., dissenting) ("We referred there to the 'people' who ratified the Fourteenth Amendment: What rights did those 'people' have in their heads at the time? But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising

> Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.[304]

The men who established deeply rooted traditions regarding reproduction were White. Also, because reproductive controls impact women and men of color, *Dobbs* preserves historical subordination on account of both gender and race.[305]

2. Incorporating Excluded Voices in Due Process Analysis Can Expand Protection of Rights

Democratizing substantive due process by considering the traditions of marginalized groups, however, could influence how judges exercise their discretion to interpret the Constitution. The absence of a particular tradition in the mainstream of U.S. law might indicate bigotry and prejudice, rather than the rational product of a pluralistic process.[306] Adhering to that tradition would reinforce inequality. Furthermore, the historical denial of widely accepted liberties to subjugated classes could mean that past criminalization would not necessarily exclude that group from protection today. Historical prohibitions of abortion likely reflect traditions of sexism and patriarchy,[307] and it is not immediately clear that this history of bias should dictate the content of liberty for new generations. On the contrary, the Reconstruction Amendments provide a strong argument against using a traditionalism doctrine rooted in subordination.[308] Legal scholars have found

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that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.").

304. *Id.* at 2325. Other justices have offered similar critiques. Members of the Court have also criticized tradition-based arguments in substantive due process doctrine. Justice Brennan provides one of the most analyzed examples in his dissent in *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989). Brennan criticizes Justice Scalia's opinion for the plurality, which argues that in order to avoid bias, justices must define tradition at the most specific level of generality possible. *Id.* In *Michael H.*, narrow traditionalism resulted in an outcome that disallows scientific evidence of paternity, in favor of a statutory presumption rooted in marital status. *Id.* at 131. Brennan strongly disagrees with this rigid analysis, contending that it renders constitutional law obsolete and biased. *Id.* at 141 (Brennan, J., dissenting) ("The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.").

305. *See supra* text accompanying notes 125–28 (discussing reproductive control of Black women and men).

306. Sunstein, *supra* note 299, at 1554.

307. *See supra* text accompanying 247–49.

308. Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853, 876 n.2 (2003) ("The Reconstruction Amendments and the Civil Rights Act of 1964 are the most prominent examples of express prohibitions on the subordination of members of socially disfavored groups."); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 950 (2008) (contending that "the Equal

that women of color often utilized abortion during slavery for various reasons, including resistance to White supremacy.[309] Furthermore, reproductive controls were used to marginalize Black women and men.[310] This history demonstrates the importance—or deeply rooted nature—of reproduction as an instrument of oppression and liberation. The egalitarian roots of the Fourteenth Amendment justify using this marginalized history to support robust protection of reproductive liberties by courts. Examining formal policies embodied in statutes only reveals how dominant groups valued reproductive freedom.[311] The exclusion of marginalized perspectives reinforces this history of subjugation.

While emerging traditions will likely result from a more inclusive process than in the past, courts should also consider the experiences of marginalized communities when they determine whether new traditions have developed. *Obergefell* and *Lawrence* contain roots of a democratic approach to tradition. In both cases, the Court considered the impact of the discriminatory legislation on LGBTQA individuals.[312] This approach allowed the Court to humanize the litigants contesting the heterosexist laws. It also centered the perspectives of LGBTQA persons, which are not reflected in past legal practices due to subordination. The economic, dignitary, and stigmatic harms of antisodomy laws and same-sex marriage prohibitions persuaded the Court to rule in favor of LGBTQA plaintiffs.

3. Incorporating Excluded Voices in Due Process Analysis Can Support a Positive Rights Interpretation of the Fourteenth Amendment

Considering the perspectives of historical and contemporary marginalized classes could also lead to an expanded conception of due process that includes negative and positive liberty. Currently, the Court has generally held that the Fourteenth Amendment serves only as a bar to certain types of state action[313] and

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Protection Clause embodies a constitutional norm or value of anti-subordination"); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429–30 (1960) (defending desegregation rulings on ground that equal protection creates a "broad principle of practical equality for the Negro race," prohibits "any device that in fact relegates the Negro race to a position of inferiority," and because "the segregation system is actually conceived and does actually function as a means of keeping the Negro in a status of inferiority"). The discussion of tradition in this section is not meant to exclude emerging practices from consideration. Instead, emerging traditions will likely reflect a more democratic vision of rights and the input of marginalized groups.

309. Murray, *supra* note 209, at 2034 (discussing contraceptive and abortion practices among enslaved women); Bridgewater, *supra* note 248, at 27 (discussing enslaved women's use of abortion as form of resistance).

310. *See supra* text accompanying notes 125–28.

311. *See supra* text accompanying notes 306–07 (discussing antidemocratic nature of traditionalism).

312. Obergefell v. Hodges, 576 U.S. 644, 658–60 (2015) (discussing negative impact of marital inequality on plaintiffs); Lawrence v. Texas, 539 U.S. 558, 574–76 (2003) (discussing stigma and dignity harms caused by antisodomy law in order to reconsider traditional doctrines related to sexuality).

313. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The

that the Amendment does not mandate that states assist persons in the enjoyment of life, liberty, or property.[314] Applying the negative liberty view of the Constitution, the Court has upheld legislation that bars government spending for abortion services.[315] Limitations of social welfare harm people of color due to disparate poverty rates.[316] Studies also find a strong correlation between White opposition to social welfare policies and negative attitudes about Blacks being lazy and a belief that welfare only helps Blacks.[317] With respect to abortion, the withholding of government funding, combined with poverty, has made reproductive choice illusory for many women of color. Poverty contributes to high abortion rates among Black women because they lack the resources to support children and have greater difficulty accessing contraception.[318] Many cannot afford abortion services, so they suffer the physical and emotional harms of pregnancy and additional economic burdens caused by parenting.[319] Scholars such as Khiara Bridges have argued that this double bind constitutes a denial of due process.[320] Recalibrating Court doctrine

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Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.").

314. Harris v. McRae, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

315. Maher v. Roe, 432 U.S. 464, 472–75 (1977) (distinguishing abortion restrictions from denial of state funding for abortion services); *Harris*, 448 U.S. at 317–18.

316. BD. OF GOVERNORS OF THE FED. RSRV. SYS., SURVEY OF CONSUMER FINANCES, 1989-2019 (Nov. 4, 2021), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Net_Worth;demographic:racecl4;population:all;units:median;range:1989,2019 [https://perma.cc/2LZB-BJXU] (finding that in 2019, Blacks and Latinx persons had 12.7 and 19.1 percent of White wealth, respectively).

317. Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 597 (1996) (finding that a belief that "blacks are lazy" is the strongest predictor of White opposition to welfare); Rachel Watts & Robb Willer, *Privilege on the Precipice: Perceived Racial Status Threats Lead White Americans to Oppose Welfare Programs*, 97 SOC. FORCES 793, 816 (2018) (finding greater support for welfare among Blacks than Whites and finding that Whites who were informed that their demographic majority was ending opposed welfare when they thought that Blacks, but not Whites, were the primary beneficiaries).

318. Cineas, *supra* note 262 ("The [abortion racial] disparity can be explained by inequities in rates of unintended pregnancies, as well as other factors: unequal access to quality family planning services, economic disadvantage, and distrust of the medical system."); *see* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 180–87 (2017) (discussing barriers to reproduction and abortion caused by poverty).

319. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, GUTTMACHER POL'Y REV. (July 4, 2016), https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters [https://perma.cc/KGW8-V72G] (discussing studies showing that many women who want abortions are prevented or delayed by poverty).

320. BRIDGES, *supra* note 318, at 205 ("Poor women have been effectively or actually denied reproductive privacy rights because those empowered to bestow and deny

to incorporate the experiences of subordinate classes in substantive due process analysis could contribute to the development of constitutional rules that guarantee material equality and liberty.

4. Precedent: Invoking the Experience of Marginalized Groups to Justify Conservative Interpretation of the Fourteenth Amendment

This approach of centering voices of the oppressed in constitutional adjudication might sound to some like a radical departure, but the Court has examined the plight of marginalized groups in order to elaborate the scope of Fourteenth Amendment rights and liberties. In the context of gun rights, for example, political and legal efforts to counter southern dispossession of Blacks' guns persuaded the Court that an individual right to bear arms exists *and* that this right is incorporated by the Due Process Clause of the Fourteenth Amendment.[321] Similarly, in equal protection cases, the Court has identified the historical subjugation of persons of color as a central justification for applying strict scrutiny to all racial classifications—including those intended to remedy inequality.[322] If the historical marginalization of subordinate classes can justify expansion and protection of rights enjoyed by dominant classes, then this same tradition of subjugation can and should inform analysis of liberties demanded by (but previously denied to) disadvantaged classes.[323]

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those rights have made assumptions about their *dispossession* of capacities for responsibility, maturity, and judgment. Until we change those assumptions—until we reject individualist explanations of poverty—poor women and mothers will continue to be deprived of privacy rights.").

321. McDonald v. City of Chicago, 561 U.S. 742, 771–78 (2010) (discussing Black resistance to gun prohibitions and subsequent Congressional assistance as proof that gun rights are deeply rooted).

322. *See* Hutchinson, *supra* note 224, at 415 ("[T]he Court has invoked a history of racial discrimination against persons of color and precedent addressing those harms to justify applying strict scrutiny to any present-day racial classification, including those that serve remedial ends, like affirmative action"); *id.* ("[H]istorical discrimination influences the level of scrutiny courts apply in equal protection cases outside of race and gender classifications. A history of discrimination is one of several factors courts often consider when applying the suspect class doctrine.").

323. Peggy Cooper Davis has explored this theme extensively. *See, e.g.*, PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1998); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 394 (1993) ("Abortion choice is a right that we recognize because our history of slavery made vivid the intolerability of life without the liberty to be self-defining. The promise of emancipation and Reconstruction was more than freedom from ownership by a master. It was freedom to live as morally responsible agents, able to mark the social fabric. This greater freedom is nurtured in intimate communities, where families are freely formed, and wanted children absorb and reshape the mosaic of values that constitute an American culture."); Peggy Cooper Davis, *Neglected Stories and the Sweet Mystery of Liberty*, 13 TEMP. POL. & CIV. RTS. L. REV. 769, 782 (2004) ("Stories of slavery and anti-slavery enliven the justifications for structuring the social dialectic so that official constraints do not overwhelm opportunities for personal choice."). *See also* Bridgewater, *supra* note 248, at 27 (2001) (discussing control of enslaved Black women's reproduction and tradition of resistance to this form of oppression).

CONCLUSION

Dobbs will make history as one of the Supreme Court's most important rulings. Legal scholars should also create a legacy of analyzing the theoretical basis for the ruling and assessing its potential effect on constitutional law and women's autonomy. This Article engages these issues, finding that the ruling has a tenuous—or thin—connection to substantive due process precedent. The Court has chosen to ignore fundamental rights precedent that treats liberty and tradition in flexible terms, relying instead upon limited caselaw that provides some support for the proposition that *Roe* was wrongly decided. The Court's logic has implications well outside of abortion and could imperil rights related to sexual intimacy, LGBTQA equality, contraception, family privacy, and sex discrimination. Securing these rights will require a long-term vision and purposeful action with the understanding that constitutional law grows from political mobilization.

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