Does *Dobbs* Reinforce Democracy?

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ABSTRACT: In his majority opinion, Justice Alito claimed that Dobbs *would promote democracy by allowing the matter of abortion to be resolved by the people. He cited John Hart Ely, who had famously criticized* Roe *as an exercise of judicial review that was unjustified because it was unnecessary to reinforce representation. This symposium Essay interrogates one aspect of the democracy argument for* Dobbs*. Looking beyond simple majoritarianism, it explores another longstanding conception of democracy, one grounded in political equality. On that understanding, the* Dobbs *opinion actually undermined the conditions for cooperative government by allowing the structural subordination of women and pregnant persons. Without fully defending the egalitarian conception of democracy or its connection to reproductive freedom in such a short space, the Essay simply shifts the burden of proof. It concludes that Justice Alito cannot successfully claim that the* Dobbs *opinion supports democracy without confronting this competing account of cooperative government.*

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INTRODUCTION

Justice Alito believes that *Dobbs v. Jackson Women's Health Organization* promotes democracy. By eliminating the constitutional right to terminate a pregnancy, he writes in his majority opinion, the Supreme Court has

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empowered citizens to resolve this vexed moral and political question for themselves. "It is time," Alito declares several times, "[to] return the issue of abortion to the people's elected representatives."[1] Reproductive freedom is "to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[2]

Conversely, according to Alito, maintaining a constitutional right to abortion "would impose on the people a particular theory about when the rights of personhood begin."[3] And that would "short-circuit[] the democratic process by closing it to the large number of Americans who dissent[] in any respect from *Roe*."[4] That precedent, which recognized a right to terminate a pregnancy, was an error that, like *Lochner v. New York*, "wrongly removed an issue from the people and the democratic process."[5] It was an "exercise [of] 'raw judicial power.'"[6] Repeatedly, Justice Alito cites John Hart Ely for the proposition that judicial review's countermajoritarianism can be justified when it works to reinforce representation and strengthen electoral processes.[7] When it is used to protect reproductive freedom, by contrast, judicial review is unjustified and undemocratic.[8]

Here, Alito's argument coincides with a position that has attracted a following on the left—namely that the Supreme Court's exercise of judicial review is reliably antidemocratic.[9] That is true for proponents regardless of

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022); *see also id.* at 2261, 2265, 2279, 2284 (characterizing the decision as returning abortion regulation to the states).

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

3. *Id.* at 2261.

4. *Id.* at 2265.

5. *Id.*

6. *Id.* at 2279 (quoting Roe v. Wade, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

7. *Id.* at 2241 n.2, 2270.

8. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–37 (1973).

9. *Cf., e.g.*, Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161–62 (2021) (defining antidemocracy as a force that "sustain[s] social hierarchies from the spread of political equality" and then identifying "the Supreme Court today" as "the ultimate supplier of antidemocracy in this country"); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1922 (2016) (arguing that First Amendment Lochnerism is not a recent phenomenon, but that economic libertarianism might well be endemic to judicial enforcement of civil liberties); *see also id.* at 2001–02 ("[T]o the extent that critics of First Amendment Lochnerism seek to vindicate such political control [over the economy], their focus may eventually have to shift from reforming the courts to building more respected and more powerful political institutions."); Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 303 (recovering an earlier conception of civil liberties not focused on the courts); Samuel Moyn, Written Statement on The Court's Role in Our Constitutional System: Hearing Before the Presidential Comm'n on the Sup. Ct. of the U.S. 3 (June 30, 2021), https://www.regulations.gov/comment/PCSCOTUS-2021-0001-0198 [https://perma.cc/G26V-8GX5] ("The problem to solve is not that the Supreme Court has lost legitimacy, understood as the current trust of enough observers, but that it thwarts the democratic authority that alone justifies our political arrangements.").

whether the particular constitutional guarantee works to reinforce representative processes. Antidemocracy might be an inherent feature of the institution, or it might be a contingent historical pattern. But regardless, it predictably results from the justices' work, undermining the people's empowerment in a longstanding pattern of judicial practice. So lawyers and scholars on both sides of the aisle may well believe (if not remotely in equal numbers) that judicial enforcement of reproductive freedom weakens democracy.

Alito's democracy argument has drawn attention. Supporters of *Dobbs* have lauded the decision's democracy credentials, of course.[10] And critics have stepped up to defend the constitutional right to reproductive freedom as consistent with democracy.[11] Who is right? And what does our answer say about our conception of democracy?

Much might turn on the answers to these questions. Reproductive freedom is not the only right that could be subject to the democracy critique, after all—it is not even the only substantive due process right that could be. Chief Justice Roberts dissented in *Obergefell v. Hodges* and accused the majority of interrupting democratic processes in the fashion of *Lochner*.[12] Dissenting separately in *Obergefell*, Justice Alito led with the democracy critique, as well.[13] Justice Thomas

10. Richard W. Garnett, *Anti-Catholic Attacks After* Dobbs, FIRST THINGS (June 29, 2022), https://www.firstthings.com/web-exclusives/2022/06/anti-catholic-attacks-after-dobbs [https://perma.cc/S86K-42BM] ("[T]he justices have returned the abortion-regulation question to democratic processes and politically accountable actors . . . ."); Richard W. Garnett, *The Lone Ranger's Long Game*, CITY J. (June 28, 2022), https://www.city-journal.org/dobbs-ruling-vindicates-rehnquists-jurisprudence [https://perma.cc/T94C-Y35S] (arguing that *Dobbs* "is a fitting and overdue vindication of Rehnquist's understanding that our Constitution endures through the enactments of our elected and accountable legislators and the debates and votes of its people—not through the 'enlightened' updating of its federal judges"); Helen Alvaré, Dobbs *Decision Shows US Can Be Both Powerful and Humane*, HILL (June 26, 2022, 8:00 AM), https://thehill.com/opinion/civil-rights/3537176-dobbs-decision-shows-us-can-be-both-powerful-and-humane [https://perma.cc/4WRC-WJL2] ("It is a win for democracy. The Dobbs majority convincingly demonstrates that five members of the Supreme Court have no right to read their own predilections about abortion into a document that belongs to the people.").

11. Wendy Brown, *Alito's* Dobbs *Decision Will Further Degrade Democracy*, WASH. POST (June 27, 2022, 3:07 PM), https://www.washingtonpost.com/outlook/2022/06/27/alito-dobbs-decision-states-rghts [https://perma.cc/4GK2-XUCN]; David Landau & Rosalind Dixon, Dobbs, *Democracy, and Dysfunction* 9–10 (Fla. State Univ. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4185324 [https://perma.cc/2GBY-TCGB]; Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. (forthcoming 2024) (manuscript at 3–4) (on file with author).

12. Obergefell v. Hodges, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) ("Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.").

13. *Id.* at 736 (Alito, J., dissenting) ("Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.

joined both dissents. So there is considerable if not overwhelming evidence that multiple members of the Court believe that *Obergefell* also contravenes democracy. Doubtless much the same could be said for other substantive due process rights.

Here, I put aside one available response to the democracy argument, namely that it is inconsistently applied by its proponents. On this critique, supporters of *Dobbs* are perfectly willing to override popular will in other areas, including parts of constitutional law that are similarly grounded in substantive due process.[14] Hypocrisy of this sort might well be afoot, but it is not my focus here.

Similarly, I bracket another response that has been offered, namely that conservatives who support *Dobbs* have also been actively working to undermine electoral processes.[15] They have made progress in that effort, so that "returning the question to the states" will not allow "the people" to resolve the question according to their moral judgments in any straightforward way.[16] To bring the point home, notice that the Justices themselves are handing down decisions that weaken electoral democracy, even as they champion it in *Dobbs*.[17] This response too has power, but it is offered elsewhere.

Instead, I want to probe the conceptions of democracy that are implicit in the Court's argument and critics' responses. What exactly do we mean when we say that a decision like *Dobbs* either does or does not promote a system of collective self-governance and its supporting social and economic arrangements? What is the range of possible meanings that claim might carry? Majoritarianism underlies one possible conception, without a doubt. But there are others.[18] What if they conflict with one another in a particular case? Is *Dobbs* such a case?

At least two other elements could be included in any definition of democracy. One is that democratic societies are characterized not by majoritarianism, but by *political equality*. What differentiates them from

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The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State." (footnote omitted)).

14. Incorporation of the First and Second Amendments against the states is one example of a substantive due process doctrine that is strongly supported by the Roberts Court. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment against the states).

15. *See* Landau & Dixon, *supra* note 11, at 4, 12–13; Murray & Shaw, *supra* note 11, at 5–6, 30–62.

16. Landau & Dixon, *supra* note 11, at 12–16 ("[G]errymandering in the last two cycles has raised concerns about asymmetry, with Republicans benefitting more than Democrats.").

17. *Id.* at 22 ("[T]he Court's actions on other issues, dealing more directly with the democratic process, therefore work against the celebratory democracy-based reasoning the Court relied on in *Dobbs*.").

18. *See* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1910 (2021) (arguing "that democracy requires more than majoritarian procedures" and that it also "depends on the conditions in which the individual participates in the decisions of the majority").

monarchies, according to this perspective, is the absence of a hereditary nobility or any other structural stratification in public life. Collective self-governance is possible (and even entailed) because members of the society treat one another as equals rather than as members of castes or classes, some of which carry more influence than others. Membership in the political community does not require perfect economic or social parity, but it does necessitate an absence of structural subordination in public life.

Another, related conception is that citizens cannot be coerced for reasons that are inaccessible to them, or that they could never understand or accept. It is not that people must always agree with the regulations that burden them, but rather that they must be able to cognize, and contend with, the laws' purposes. Anything less treats people as unworthy of full consideration—it tells them that they must obey the sovereign's laws even when adopted on a whim, or in a private moment of divine inspiration, or as part of a faith tradition they do not share. Especially when regulations concern issues of life and death, about which people differ as a matter of conscience, they must be supported by justifications that respect all people as independent in their exercise of reason and will.

How does *Dobbs* stand up to these other conceptions of democracy? In this symposium Essay, I cannot defend any particular definition against all the others. But it is possible to look at what these other two might mean for the argument that overruling *Roe v. Wade* promotes democracy—and that it limits antidemocratic judicial review—by returning a consequential question of conscience to the people and their elected representatives.

Part I considers democracy as political equality, and it tests *Dobbs* against that standard. To the degree that the category of pregnant people overlaps with categories defined by gender and sex, the criminalization of abortion has ramifications for the stratification of women and other gender identities in society and politics. By contrast, a contention that the right to terminate a pregnancy degrades the political status of pro-life conservatives requires more strenuous argumentation.

Part II concludes that Justice Alito's decision in *Dobbs,* even if not itself grounded in religious reasoning, opens the door to legislative regulations that subject pregnant persons to criminal punishment based explicitly and exclusively on religious commitments. The danger is that such reasons treat regulated citizens as something less than political equals.

A final Part delivers the conclusion of the paper, namely that proponents of *Dobbs* must confront these alternative conceptions before they can successfully claim to be promoting democracy. Assuming a highly controversial conception of democracy, and then arguing that the decision promotes that one view, while ignoring other mainstream conceptions that not only do not support the decision but appear to be actively undermined by it, fails to meet basic standards of legal and political argumentation. It reinforces a perception that *Dobbs* is nothing more than an exercise of political will.

I. POLITICAL EQUALITY

On the model treated in this Part, democracy signifies a system in which people regard one another as political equals.[19] Citizens govern together, sharing power out of respect for the worth of every member of the community.[20] Voting for representatives under a standard of majority rule is one mechanism for doing that, but it is not the only possible one.[21] Regardless of the particular institutional arrangement that is chosen, the key feature is political equality.

A hierarchical polity is antidemocratic, on this definition. The classic example is a caste system in which some groups of people are structurally degraded. A totalitarian regime that excludes ethnic and racial minorities from political membership is another example. Concentrated economic power over politics and technocratic rule by elites could serve as further examples. Anywhere a community is stratified, so that some have greater political leverage than others simply because of their social location, it will be impossible to govern in a truly cooperative way.[22] Some people will have influence over how the community is run, simply because of their elevated position in a favored stratum. Even if such a regime enjoys majority support from the electorate, as a totalitarian government sometimes has at a given moment in history, it fails to qualify as a democracy.[23]

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19. One eloquent articulation of this conception of democracy is from Wendy Brown:

> Political equality is democracy's foundation. Everything else is optional—from constitutions to personal liberty, from specific economic forms to specific political institutions. Political equality alone ensures that the composition and exercise of political power is authorized by the whole and accountable to the whole. When political equality is absent, whether from explicit political exclusions or privileges, from extreme social or economic disparities, from uneven or managed access to knowledge, or from manipulation of the electoral system, political power will inevitably be exercised by and for a part, rather than the whole. The demos ceases to rule.

WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST 23 (2019); *see also* Bowie, *supra* note 9, at 167 ("[W]hat has historically distinguished democracy as a unique form of government is its pursuit of *political equality*."); *id.* at 168–69 ("[D]emocracy is not synonymous with majority rule . . . . [That procedure and others] are democratic only to the extent that they pursue political equality.").

20. By citizen here, I mean everyone in the political community, a meaning that is distinct from legal citizenship. *See* JEDEDIAH PURDY, TWO CHEERS FOR POLITICS: WHY DEMOCRACY IS FLAWED, FRIGHTENING–AND OUR BEST HOPE 17 (2022).

21. Another is direct democracy, a third is deliberative democracy, a fourth is devolved republicanism, a fifth is rule by supermajority, etc. Possibly we should also distinguish between majoritarianism and electoral mechanisms. The latter may fail to capture the former, as in the United States at the moment with respect to presidential elections and control of the Senate. There, a political minority is able to dominate institutions despite elections.

22. *See* Bowie, *supra* note 9, at 172–73.

23. Wendy Brown puts the point this way:

> It is possible to have clean elections in the context of a deeply antidemocratic culture, one in which political power is monopolized by concentrated economic interests and elites, and the people are ill-educated and (hence) easily manipulated.

Government imposition of structural injustice is the paradigmatic obstacle to cooperative rule by equals. When the status of a racial or religious group is degraded by official action, for instance, political parity is obviously undermined. People no longer stand before their government simply as citizens, but instead as members of socially differentiated groups.[24] Discrimination of this particular kind changes the status of people, rendering them systematically subordinate or superordinate.

Yet private action can also generate political stratification. Civil rights laws guard against nongovernmental bias for this reason: History has taught that systematic exclusion from the economy, and from important social institutions, can contribute powerfully to structural injustice.[25] And that sort of private exclusion not only impacts economic and social standing, but also—and relatedly—it engenders and reinforces *political* diminishment.[26] People subject to pervasive discrimination in employment and commerce are unable to meaningfully function as full and free participants in a democratic society. That is the teaching of the history behind the Civil Rights Act of 1964 and other basic provisions of equality law that protect against suspect kinds of exclusion by employers, retailers, and landlords.

To a significant extent, in fact, what is revolutionary about collective governance is the way it depends on a democratic society.[27] People who lack access to primary or public goods cannot meaningfully participate as citizens.[28] So while some of the rights that undergird a republic are connected to the

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> It is possible to have clean elections and accepted electoral outcomes while democratic legislation to secure the most basic political and social equality is widely rejected. It is possible to democratically elect authoritarians, plutocrats, or ethnonationalists, especially when a citizenry is duped by plutocratic interests, as the GOP "base" is today. It is possible to mobilize democratic *instruments*—courts, legislatures, assemblies, rights, and more—for profoundly antidemocratic purposes. Each of these possibilities has materialized in contemporary "democracies," including our own.

Wendy Brown & Amy Kapczynski, *Amy Kapczynski and Wendy Brown on Democracy*, LPE PROJECT (Nov. 1, 2022), https://lpeproject.org/blog/amy-kapczynski-and-wendy-brown-democracy [https://perma.cc/8Q3T-3G2T].

24. *Cf.* Town of Greece v. Galloway, 572 U.S. 565, 621 (2014) (Kagan, J., dissenting) (arguing against the constitutionality of a legislative prayer practice by explaining that in the United States "when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture," that "government she faces favors no particular religion, either by word or by deed," and that citizens "all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose").

25. Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. 803, 818–20 (2021).

26. *See* BROWN, *supra* note 19, at 27 ("[D]emocracy requires explicit efforts to bring into being a people capable of engaging in modest self-rule, efforts that address ways that social and economic inequalities compromise political equality.").

27. *Id.* (explicating the connection between justice in society and democratic government).

28. Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 970–71 (2020).

political process in an obvious way—freedom of expression, liberty of conscience, voting guarantees, etc.—others construct a democratic society less obviously but just as fundamentally. Primary goods also can be essential for ensuring that core political rights are real, not just formal. Such goods can include basic income, meaningful work, adequate housing and health care, primary and secondary education, and so forth.[29]

None of this means that courts are the best institutions to guarantee this key feature of a democracy. American history suggests they are unlikely to serve that leading role, except under highly specific circumstances.[30] So the emphasis on political equality should not be confused with exclusive reliance on the judiciary.

Nor is the language of rights necessary for this conception of cooperative government. Separating rights discourse from equality talk takes some imagination in our culture, but that effort may be worthwhile. Political equality is a commitment that ought not be reduced either to judicial review or to individual rights, though these institutions often run together under contemporary conditions. In this Part, the point has been to set out a characterization of cooperative government that turns not on majoritarianism nor on the electoral apparatuses designed to measure it—even assuming those worked perfectly—but instead on equal standing within the political community.[31]

Reproductive freedom might seem, at first glance, to be far removed from the political equality that this account views as necessary for democracy. Unlike equal protection in the race context, reproductive freedom is not explicitly concerned with ensuring that citizens regard one another as equals. Instead, it presents to some people as a pure liberty right: protecting an important activity from government burden or prohibition. Unlike freedom of speech or liberty of conscience, moreover, it is not necessarily seen as the type of right that directly reinforces democratic processes. Instead, it could appear to protect a private matter, far removed from the governance concerns of public life. So John Hart Ely could object that *Roe* did not reinforce

29. *Id.* at 976.

30. *See* NeJaime & Siegel, *supra* note 18, at 1911 ("Because democracy requires more than majoritarianism, there are circumstances in which courts can act in democracy-promoting ways.").

31. At the moment, there is a visible division within the left between people who understand democracy as majoritarianism, at its core, and those that focus on political equality. *See* Brown & Kapczynski, *supra* note 23 ("Some of the people writing about democratizing the political economy very much emphasize majoritarianism as the irreducible core of democracy. (I'm thinking here in part of work by David Grewal and Jedediah Britton-Purdy, who are both deeply influenced by Richard Tuck.) In your recent book, *In the Ruins of Neoliberalism*, you [Wendy Brown] do not define democracy through the lens of majoritarianism per se but, rather, say that 'political equality is democracy's foundation.'"). But in the context of *Dobbs*, the difference may be more theoretical than actual, insofar as the decision promotes neither majoritarianism (because of flaws in the electoral process noted above) nor political equality for women and pregnant persons.

representation and therefore was an illegitimate exercise of judicial review—much like *Lochner*.[32]

On the understanding I am exploring here, by contrast, the right to terminate a pregnancy is closely connected to political equality. Scholarship on this subject is well developed, and will not be reviewed here in any detail.[33] In broad outline, the argument holds that reproductive freedom actually is essential to political equality for all citizens; it is necessary for full participation in the economy and the broader society.[34] Understanding the centrality of democratic society to cooperative politics makes the relevance of reproductive freedom to political equality impossible to ignore.

The *Dobbs* dissenters connected these realities. They argued that "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[35] In other words, *Dobbs* will degrade membership in the polity by reversing an exercise of judicial review that was essential to its preservation. Then they explained why. Historically, people who were unable to plan their reproductive lives found that they could not participate equally in society, and that they were often relegated to private work in the home before they were able to carry out their professional plans.[36] As the dissenters put it:

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32. Ely, *supra* note 8, at 939 ("The Court continues to disavow the philosophy of *Lochner*. Yet . . . it is impossible candidly to regard *Roe* as the product of anything else." (footnote omitted)).

33. See, for instance, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 262–64 (1992); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. (NINETEENTH AMEND. SPECIAL EDITION) 167, 169–76 (2020); Serena Mayeri, *Undue-ing* Roe*: Constitutional Conflict and Political Polarization in* Planned Parenthood v. Casey, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 137, 137 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); Murray & Shaw, *supra* note 11, at 41 ("There is a powerful argument that women's full citizenship under the Equal Protection Clause of the Fourteenth Amendment, as well as the Nineteenth Amendment's right to vote, require control over their reproductive lives."); NeJaime & Siegel, *supra* note 18, at 1922–23 (describing how the claimants in cases like *Roe* were fighting against restrictions that were part of "conditions we now recognize as subordination"); and sources cited in Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, & Reva Siegel as Amici Curiae in Support of Respondents at iii–x, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072, at *iii–x [hereinafter Brief].

34. Here, I'm using the term women instead of pregnant persons, with caution.

On the concept of the social and its relationship to political equality, see BROWN, *supra* note 19, at 27 ("Situated conceptually and practically between state and personal life, the social is where citizens of vastly unequal backgrounds and resources are potentially brought together and thought together. It is where we are politically enfranchised and gathered (not merely cared for) through provision of public goods and where historically produced inequalities are made manifest as differentiated political access, voice, and treatment, as well as where these inequalities may be partially redressed. Social justice is the essential antidote to otherwise depoliticized stratifications, exclusions, abjections, and inequalities attending liberal privatism in capitalist orders and is itself a modest rejoinder to the impossibility of direct democracy in large nation-states or their postnational successors, such as the European Union.").

35. *Dobbs*, 142 S. Ct. at 2318 (Breyer, Kagan & Sotomayor, JJ., dissenting).

36. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

> As of today, this Court holds, a State can always force a woman to give birth . . . . [s]ome women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. . . . Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.[37]

The dissenters then drew a line between reproductive freedom and public standing. First, they reminded readers that American democracy has never left everything to majority rule, but instead has protected rights that are necessary to participation in public life.[38]

A reader could come away from that argument with the impression that the right to terminate a pregnancy is some kind of exception, an anomaly in an otherwise popular system of government. But the dissenters then clarified that reproductive freedom is necessary to ensure *political* equality:

> [E]qual citizenship, *Casey* realized, was inescapably connected to reproductive rights. "The ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.[39]

In other words, "women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions."[40]

37. *Id.* at 2318–19; *see also* Landau & Dixon, *supra* note 11, at 19–20 (describing the relationship between promoting inclusion and equality with allowing women to have access to abortion).

38. *Dobbs*, 142 S. Ct. at 2320 (Breyer, Kagan & Sotomayor, JJ., dissenting) ("*Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within 'the reach of majorities and [government] officials.' We believe in a Constitution that puts some issues off limits to majority rule." (alteration in original) (citation omitted) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

39. *Id.* at 2330 (citation omitted) (quoting *Casey*, 505 U.S. at 856).

40. *Id.* at 2343. Not only is reproductive freedom essential to ensure the conditions of citizenship, such as participation in the economy and society, but also it is needed to combat archaic stereotypes about women's roles. Mississippi justified its abortion criminalization based in part on a legislative finding that "'[a]bortion carries significant physical and psychological risks to the maternal patient,' including 'depression; anxiety; substance abuse; and other emotional

If there is a gap in the dissent's logic, it appears not between reproductive freedom and equal citizenship, but between equal citizenship and democracy. Although the dissenters do justify the interference with majority rule, they do not argue further that reproductive freedom may be not only *compatible* with cooperative government but also *essential* insofar as it preserves parity for women and pregnant persons. It could even be argued that *Dobbs* not only is unnecessary to avoid Lochnerism, but it actually falls into that error itself. That depends on what we mean by Lochnerism, for sure. A conventional view, adhered to by Ely among others, was that the *Lochner* Court invented a constitutional right in order to impose its own policy preferences on the people's representatives.[41] That view undergirded Ely's critique of *Roe*.

But there is another way to think about *Lochner*. On this other reading, *Lochner* wrongly constitutionalized private ordering, so that regulation that departed from it could be identified and invalidated as biased or burdensome. Constitutional rights worked against government power only, without demanding or even allowing public action against "private" power.[42] This critique means that court decision-making that reinforces private subordination can be seen as antidemocratic insofar as it frustrates political equality.[43] Then *Dobbs* can be understood as a decision that degrades the conditions for democracy by imposing political market ordering on questions of reproductive freedom, knowing that in much of the country the result will be the structural disadvantage of women and pregnant persons. Only one additional step is

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or psychological problems.'" Brief, *supra* note 33, at 17 (quoting H.B. 1510 §§ 1(2)(b)(ii), (iv), 2018 Leg., Reg. Sess. (Miss. 2018)). According to an amicus brief by legal historians, these conceptions are continuous with traditional and outdated conceptions of a women's maternal place inside the family and not in the professional workplace. *Id.* ("That unsupported assertion reflects the same stereotypical view of women's fragile, maternal psyche espoused by nineteenth-century anti-abortion advocates.").

41. *See, e.g.*, Ely, *supra* note 8, at 937 ("According to the dissenters at the time and virtually all the commentators since, the Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures.").

42. *See* Tebbe, *supra* note 28, at 997 ("[T]he *Lochner* Court promoted a political economy that frustrated, not furthered, a conception of democracy that prioritized economic belonging alongside social and economic membership. That difficulty was substantive—a matter of political and constitutional morality—rather than only institutional." (footnote omitted)); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1246 (2020) ("[T]he real source of the similarities between contemporary free speech law and *Lochner*-era freedom of contract jurisprudence is that both construe the constitutional right they vindicate as a strong but limited negative autonomy right: as a right that guarantees freedom from intentional government interference with an individual's autonomy, but one that provides almost no protection whatsoever against private interference and constraint.").

43. For instance, Cass Sunstein identified *Washington v. Davis* and *Harris v. McRae* as part of *Lochner*'s legacy, even though the Court there upheld government action. Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 902 (1987). In *Harris*, the Court denied a challenge to defunding abortions, finding that any difficulty faced by indigent women in procuring medical services was a private burden, not a government burden. Harris v. McRae, 448 U.S. 297, 316–17 (1980). There, the Court naturalized private economics, but in a context where it was denying constitutional protection, not granting it.

necessary to arrive at a conception of Lochnerism that naturalizes not just economic markets but state political markets as well, and assumes them to be free and unstratified.[44] It is this move that weakens democratic processes, not enforcement of the right to terminate a pregnancy, on this understanding.

In sum, if a constitutive feature of democracy is that people stand before one another as equals—as it is on the theory being explored in this Part—then *Dobbs* not only fails to promote collective governance, but it actively frustrates that effort, greenlighting the effective exclusion of women and pregnant persons from the social domain along lines of reproductive freedom and gender.[45] Again, this is only one possible conception of democratic political morality, but it is a prominent one. And if it is correct, then it contradicts Justice Alito's claim to democratic legitimacy for the result in *Dobbs*. Any such argument goes unrebutted in the opinion.

Could members of the majority accept this account and yet argue that actually it was *Roe* that failed to show equal regard by discounting the concerns of traditional religionists and other pro-life citizens? In other words, could the equality account of democracy be turned around and used to defend *Dobbs*?

This argument will be difficult to sustain if the two groups' political vulnerabilities are not symmetrical. Pro-life people are not coerced by reproductive freedom rights, on this response. To the contrary, they enjoy these rights as well, even if they choose to exercise them by carrying their pregnancies to term. Nor are pro-life people denigrated by such rights, according to this view. They remain free to participate fully in the political, social, and economic life of the country, or at least as free as they would be under their preferred rule. While it is true that reproductive freedom stops them from legislating, it only prevents them from regulating others, the

44. In fact, the *Lochner* Court may have acted in order to counteract what it viewed as outsized political power by unions in the state legislature. *See* David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1482 (2005) ("Bakery owners were not politically organized at this time, while the bakers' union was well-represented in Albany."). Its social Darwinism thus did not extend to state politics, where it was unwilling to simply allow the strongest parties to prevail.

45. *Dobbs*, 142 S. Ct. at 2325 (Breyer, Kagan & Sotomayor, JJ., dissenting). Originalism in the hands of the *Dobbs* majority reinforces these problems by keying constitutional meanings to a time when women were second-class citizens, not just practically but formally as well. A danger of reading the Constitution according to its original meaning, moreover, is that its framers and ratifiers "did not perceive women as equals, and did not recognize women's rights." *Id.* Consequently, reading the text that way "consigns women to second-class citizenship." *Id.*; *see also id.* at 2328 ("[T]he men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens."); NeJaime & Siegel, *supra* note 18, at 1933 ("In the modern cases, courts protecting substantive due process rights redressed deliberative blockages produced by political inequality and stigma and supported the democratic participation of marginalized groups, just as in equal protection decisions protecting racial minorities and women. Analyzed with attention to the background conditions against which the claimants struggled, we see that the Court's modern due process cases are *Carolene Products* cases warranting judicial oversight." (footnote omitted)).

argument goes. A defense of *Dobbs* on political equality grounds might be possible, but it would need responses to these points.

Another objection might be that *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* subordinated a different group, namely the citizens that would have been born if reproductive freedom were restricted. Even in a world where people are excluded from political life before a certain age, the argument could have force if it concentrated on the claims of potential adult participants in the political community. But proponents of this view would then have to balance the democratic interests of potential citizens against those of actually existing adults whose political equality would be impaired by abortion bans. Though it is far from clear how that would be done, the main point here is that it has not been attempted by Alito or any other defender of *Dobbs* on the Roberts Court.

Assume that the political equality account of democracy is convincing, and assume it supports reproductive freedom. Still, there is a further question of how it squares off against the Alito conception, which turns on voting or other forms of electoral participation. Which understanding of democracy is correct? One possibility is that the majority's understanding is simply wrong. As noted above, totalitarian regimes that are voted into power can still fail to qualify as democracies when they systematically violate fundamental rights.[46]

Another possibility is that both accounts capture aspects of what we mean when we call a government or a society a democracy. Then we would have to figure out how to resolve situations where conceptions conflict with one another. Without deciding definitively how that should be done, my conclusion here is simply that Alito's majority opinion fails to grapple with anything like that sort of complexity. Consequently, the *Dobbs* Court's attempt to claim this kind of legitimacy fails without further argument.

II. REASONS FOR REGULATING

On one influential conception, a state can fail to treat people as equals by coercing them on the basis of reasons they cannot accept or even access.[47] When citizens are regulated on the basis of reasons that they cannot evaluate, because for example they do not subscribe to the lawmakers' faith, then they are rendered outsiders to the state in one significant way. People are not governing together as equals when this happens. Instead, some are subjecting others to coercion on the basis of a system of belief with respect to which they

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46. *See supra* note 23 and accompanying text.

47. *See* CÉCILE LABORDE, LIBERALISM'S RELIGION 119 (2017) ("Official justification by the state should not appeal to reasons that actual citizens find inaccessible: that they cannot understand and discuss as reasons."); *cf.* JOHN RAWLS, *The Idea of Public Reason Revisited (1997)*, *in* JOHN RAWLS: COLLECTED PAPERS 573, 573–74 (Samuel Freeman ed., 1999) (noting that public reason is "part of the idea of democracy itself" because it specifies "what kids of reasons [citizens] may reasonably give one another when fundamental political questions are at stake").

are alien. By this act, the government renders them disregarded—not independent in their exercise of thought and assertions of will.

Divine inspiration is the paradigmatically problematic basis for lawmaking; it excludes those who do not share the belief system or experience. The problem extends to certain nonreligious reasons as well. Whenever the government regulates on the basis of beliefs that cannot be understood or evaluated by those who do not share them, it fails to satisfy a basic requirement on this conception.

Though it might not be immediately obvious, it is important to recognize that this is a condition of democracy itself, for its proponents.[48] And it is related to the condition discussed in the last Part, namely that members of the polity treat each other as equals. Coercing others' behavior on grounds to which they are strangers is not among the ways in which a cooperative government can be run defensibly.

Agreement is not required for this kind of public justification. Citizens may dispute regulations to which they are nevertheless legitimately subject. Drivers might think that a particular road should be two-way rather than one-way, but they nevertheless can be punished for driving down the street in the wrong direction. Speakers may reasonably reject the idea that incitement may be criminalized, or that their speech counts as incitement. So agreement cannot be the criterion.[49] Rather, the test according to this approach is whether people subject to a regulation could in principle assent to its rationale, or whether that rationale is outside their ken altogether. Subjecting people to laws on the basis of reasons they could never understand or evaluate undermines a basic condition of democracy.

A recent example of prohibited lawmaking was the exclusion of same-sex couples from civil marriage in many states.[50] Though in theory it was conceivable that someone could oppose marriage equality for nonreligious reasons, in practice only religious reasons drove such laws.[51] That fact was not seriously controverted, and it was reinforced when the Supreme Court rejected the states' attempts to justify their exclusions on nonreligious grounds.[52] One of

48. *See* LABORDE, *supra* note 47, at 119–20; RAWLS, *supra* note 47, at 573.

49. For another view, defended in the context of abortion, see Judith Jarvis Thomson, *Abortion: Whose Right?*, BOS. REV. (Oct. 16, 1995), https://www.bostonreview.net/forum/judith-jarvis-thomson-abortion-o [https://perma.cc/JZ5G-V8HP]. Thomson argues that a government that "wants to impose a severe constraint on liberty" must give a reason "that the constrained are unreasonable in rejecting." *Id.* In this account, preventing pregnant people from terminating their pregnancy is unjustified because they could reasonably reject the view that terminating their pregnancy is wrong.

50. Micah Schwartzman, Richard Schragger & Nelson Tebbe, Obergefell *and the End of Religious Reasons for Lawmaking*, RELIGION & POL. (June 29, 2015), https://religionandpolitics.org/2015/06/29/obergefell-and-the-end-of-religious-reasons-for-lawmaking [https://perma.cc/A22U-ZMFF].

51. *Id.*

52. *Id.*

the reasons that *Obergefell* was supportable was that it ended a practice of lawmaking on the basis of religious reasons that were not, and could not be, accepted by everyone subject to exclusion from civil marriage.[53]

In contrast, laws regulating reproductive freedom may well be supported by nonreligious reasons. While many people who believe abortion to be wrongful are motivated by religious reasons—traditional believers may make up the vast majority of people opposed to abortion, including those who are most active and motivated—they are joined by some whose views on the matter are not religious. Some people base their pro-life views on a simple belief that terminating a pregnancy entails ending a life, without relying on Roman Catholicism or any other faith, in other words.[54] Opposition to abortion is meaningfully different from opposition to marriage equality in this respect.

Yet *Dobbs* still opens the door to laws that rely on religious reasons for banning abortion. That such laws will come into effect is foreseeable, without a doubt. Importantly, this is not to say that the *Dobbs* Court itself relied on religious reasons. Instead, the suggestion here is that the Court made possible state laws that will take positions on a controversial matter that can only be resolved on the basis of reasons that will be inaccessible to some, the argument goes. And by treating other citizens as less than equal partners in cooperative governance, those state laws violate a basic condition of democracy.

For example, Florida Governor DeSantis signed into law a 2022 abortion ban—in a ceremony held in a church called the Nacion de Fe.[55] A state lawmaker thanked those "who are praying every day to end the horrific abortions that plague our country."[56] A lawsuit challenging the law claims that the speaker of the Florida house said that the purpose of the law was "to serve 'God's will.'"[57] The plaintiff maintains that the statute "codifies a singular and exclusive religious belief with no plausible secular justification."[58] When Alabama's abortion ban was enacted, to take another example, Governor Kay Ivey stated that "this legislation stands as a powerful testament to Alabamians'

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53. *Id.*

54. See, for example, the organization March for Life, a pro-life nonprofit that is not religious. March for Life v. Burwell, 128 F. Supp. 3d 116, 122 (D.D.C. 2015) ("March for Life is a non-profit, non-religious pro-life organization . . . .").

55. Michael Moline, *DeSantis Signs 15-Week Abortion Ban into Law During Quasi-Religious Ceremony*, FLA. PHOENIX (Apr. 14, 2022, 12:31 PM), https://floridaphoenix.com/2022/04/14/desantis-signs-15-week-abortion-ban-into-law-during-quasi-religious-ceremony [https://perma.cc/8VTB-YBJB]; Michelle Boorstein, *Clergy Sue to Halt Florida Abortion Law, Citing Religious Freedom*, WASH. POST (Sept. 1, 2022, 6:56 PM), https://www.washingtonpost.com/religion/2022/09/01/florida-pastor-rabbi-abortion-lawsuit [https://perma.cc/AU5K-LRYH].

56. Moline, *supra* note 55.

57. Plaintiff's Motion for Temporary Injunction at 3, Capo v. Florida, No. 2022-014374-CA-01 (Fla. Cir. Ct. Sept. 1, 2022), https://s3.documentcloud.org/documents/22273832/rev-tom-capo-pi-motion-final.pdf [https://perma.cc/8NUE-4925].

58. *Id.*

deeply held belief that every life is precious and that every life is a sacred gift from God."[59]

When a state regulates for religious and nonreligious reasons—either because a single lawmaker has multiple purposes, or because a legislature includes lawmakers who vote for different reasons—then it may be hard to tell whether religious reasons were decisive. And the Supreme Court has turned away similar challenges. For example, it held that a federal restriction on abortion funding did not violate the Establishment Clause simply because it "coincide[ed]" with the views of the Roman Catholic Church, where the law could also be supported by secular commitments.[60] But that reasoning leaves open the possibility that a law *could* violate the Establishment Clause if it were explicitly and exclusively grounded in religious reasons, so that it could not adequately be justified only on accessible grounds.

Some commentators go further today and argue that religious reasons are irrelevant, even if they provide the exclusive ground for coercion, so long as the regulated activity is secular. Douglas Laycock, for instance, was recently quoted as saying, with reference to abortion bans, that "[w]hat the legislature can't do is require you to participate in religious rituals, exercises and prayers. When it regulates secular activity, its reasons for regulating generally don't matter."[61] But there is good reason to think that a law evidently and exclusively grounded in religious reasons would still be unconstitutional, even today. And regardless of whether the Supreme Court ruled that way, such a law would violate the conception of democracy being explored.

In sum, one possible criterion of what it means for citizens to rule cooperatively with others they regard as equals is that they do not subject each other to coercive laws that are justified solely by reasons that cannot be accessed or evaluated. Criminal prohibitions on abortion certainly can be justified by beliefs that cannot be meaningfully justified to anyone who does not already share them. While they could also conceivably rest on reasons that are accessible to others, some of them invariably will not.

Alito must have foreseen that possibility, and his claim to democracy credentials for *Dobbs* cannot be sustained without further argument. Or at least that is true if this account of democracy is persuasive. And while that

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59. Kim Chandler & Blake Paterson, *Alabama Governor Invokes God in Banning Nearly All Abortions*, AP NEWS (May 16, 2019), https://apnews.com/article/health-north-america-us-news-ap-top-news-courts-7a47ddc761dc4b72a017b0836da3a87b [https://perma.cc/6CLZ-XJEQ].

60. Harris v. McRae, 448 U.S. 297, 319–20 (1980); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989) (rejecting a challenge to a state abortion restriction, where the claim was that the preamble to the law took a position on when life begins, but not in explicitly religious terms).

61. Kelsey Dallas, *Do Abortion Bans Violate the Establishment Clause?*, DESERET NEWS (July 10, 2022, 10:00 PM), https://www.deseret.com/faith/2022/7/10/23195510/do-abortion-bans-violate-the-establishment-clause-christian-nation-separation-of-church-and-state [https://perma.cc/8F7U-6K2X].

cannot be proven here, it certainly is supported by a longstanding strain of scholarship in constitutional theory and political morality.[62]

CONCLUSION

Democracy is a contested concept. To establish that the *Dobbs* opinion promotes that system of government, it is not enough to simply point to the fact that states will be able to make their own abortion laws, unfettered by a federal right. For one thing, state electoral processes may not work all that well, as others have pointed out, partly due to the Court's own decisions.[63] Beyond that, however, eliminating a right to terminate a pregnancy may compromise the ability of pregnant people to maintain equal footing in society. To the degree that our conception of democracy requires a supporting culture that is unstratified, so that people can relate to one another as political equals, that frustrates the opinion's claim to democratic legitimacy. And to the degree that we think it is important for people coerced by law to not be complete strangers to its animating rationales, for otherwise they are not being respected as citizens in the manner required in a democracy, the Court faces a related obstacle to its legitimacy claim for *Dobbs*.

It has become commonplace for conservative Justices to claim that substantive due process rights are of a piece with *Lochner*—that they interrupt the democratic process, even when it is functioning perfectly well, and remove important issues of our collective life from collective decision-making. But the cogency of this objection depends on what we take *Lochner* to represent. If the wrong of *Lochner* was that it was undemocratic not simply in the sense that it used an unwritten right to invalidate a statute, but in the deeper sense that it frustrated efforts to construct a fair society and economy, then *Roe* and *Casey* may stand on very different footing from *Dobbs*. If we accept for a moment that democracy depends on political equality as its foundation, then the conservative revolution in reproductive freedom may do more to undermine than to promote that egalitarian system of government.

62. *See, e.g.*, Leif Werner, *John Rawls*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.6 (Edward N. Zalta ed., June 2021), https://plato.stanford.edu/archives/sum2021/entries/rawls [https://perma.cc/K6ZW-PN6S].

63. *See supra* note 15.