

## ANSWERING THE *LOCHNER* OBJECTION: SUBSTANTIVE DUE PROCESS AND THE ROLE OF COURTS IN A DEMOCRACY

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*In a world in which liberals and conservatives disagree about almost everything, there is one important point on which surprising numbers of liberals and conservatives agree: They view the Court's modern substantive due process decisions as repeating the constitutional wrongs of Lochner. In this Article, we draw on the history of modern substantive due process cases to refute the Lochner objection and to show how these cases demonstrate the democratic potential of judicial review often questioned in contemporary debates over court reform.*

*In the late 1930s, the Court repudiated Lochner while affirming the importance of judicial review in securing our constitutional democracy. In *Carolene Products Footnote Four*, the Court famously staked out a continuing role for “more searching judicial inquiry” in cases where “prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” Yet our understanding of the *Carolene Products* framework dates not to the 1938 decision but instead to the 1980s. In *Democracy and Distrust*, John Hart Ely developed *Footnote Four* into a liberal theory of representation—reinforcing judicial review that endorsed decisions protecting certain rights—voting, speech, and equal protection, specifically *Brown v. Board of Education*—and repudiated decisions protecting other rights—specifically substantive due process. Ely published his attack on substantive due process in 1980, just as conservatives elected President Reagan to overturn *Roe v. Wade*.*

*With the benefit of the intervening forty years, this Article revisits and reassesses Ely's now-canonical interpretation of the *Carolene Products* framework. We answer the “Lochner objection” by showing how modern substantive due process claims were candidates for close judicial scrutiny in the *Carolene Products* framework; how the claimants' strategies of “speaking out” and “coming out” were efforts to be heard in democratic politics; and how bottom-up mobilization around courts can be democracy-promoting in ways that Ely did not imagine. In short, we show that Ely had the big idea that judicial review could be democracy-promoting, but he argued his case on faulty premises. *Democracy and Distrust* bore significant influence of the traditions and the cultural forces Ely argued against. We show what Ely missed, not because we imagine federal courts are now likely to act as they did*

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*in the 1970s, but rather because Ely's framing of these cases has become dominant and shapes the ways Americans continue to debate the role of courts. We examine the arguments of the claimants in the modern substantive due process cases—then unrepresented in positions of legal authority—and reason about their cases in light of scholarship on the ways family structures citizenship, and on the different roles of courts in a democracy, that has evolved in the four decades since Ely wrote.*

*What might this reconsideration of the modern substantive due process cases suggest about the ongoing debate over the role of federal courts in a constitutional democracy? This Article does not engage with the particulars of court reform, but it does shed light on certain fundamental premises of that debate. Our analysis rules out one commonly cited justification for reform: that judicial restrictions on legislative sovereignty are by definition antidemocratic and that the modern substantive due process cases are the classic illustration. We show the many ways in which judicial intervention in these cases was democracy-promoting. As one looks at concrete lines of cases and structural features of courts, one can ask about the democracy-promoting and democracy-inhibiting ways that courts perform and pose more discriminating questions about the goals of court reform—whether to adopt reforms that make courts more independent, less polarized, more open, and more democratically responsive, or to limit their role in all or certain areas of a democratic order.*

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INTRODUCTION

Many conservatives hold the Supreme Court’s modern substantive due process cases in contempt.<sup>1</sup> Concurring in a recent incorpora-

<sup>1</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) (“Texas Penal Code Ann. § 21.06(a) (2003) . . . imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and . . . working more than 60 hours per week in a bakery. But there is no right to ‘liberty’ under the Due Process Clause, though today’s opinion repeatedly makes that claim.”); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (“*Lawrence* is a paragon of the most anticonstitutional branch of constitutional law: substantive due process.”).

tion case, Justice Thomas criticized the approach to fundamental rights in *Obergefell v. Hodges*<sup>2</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>3</sup> as “meaningless,” declared that “the oxymoronic ‘substantive’ ‘due process’ doctrine has no basis in the Constitution,” and placed *Roe v. Wade*<sup>4</sup> side-by-side with *Dred Scott v. Sandford*<sup>5</sup> as examples of “substantive due process precedents . . . [that] are some of the Court’s most notoriously incorrect decisions.”<sup>6</sup> Of course, the public generally approves of judicial protections for a right to privacy that includes contraception,<sup>7</sup> abortion,<sup>8</sup> and same-sex sex,<sup>9</sup> rights to parental decisionmaking,<sup>10</sup> and the right to marry, including for same-sex couples.<sup>11</sup> This support became clear as early as 1987 when Judge Robert Bork’s Supreme Court confirmation was derailed by his repudiation of *Griswold v. Connecticut*, the origin point of the Court’s modern substantive due process jurisprudence.<sup>12</sup> Since Bork’s failed nomination, nominees to the Court have routinely affirmed the result in *Griswold*.<sup>13</sup>

But, as Thomas’s recent opinion suggests, this settlement is weakening. Unlike other conservatives on the Court, Justice Barrett refused to give her views on *Griswold* during her 2020 confirmation hearings, signaling widening opposition to the due process right (and to contraception).<sup>14</sup> As Justice Barrett’s unwillingness to affirm the

<sup>2</sup> 576 U.S. 644 (2015).

<sup>3</sup> 505 U.S. 833 (1992).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> 60 U.S. (19 How.) 393 (1856).

<sup>6</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring).

<sup>7</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>8</sup> See *Roe*, 410 U.S. at 113.

<sup>9</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>10</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>11</sup> See *Obergefell v. Hodges*, 576 U.S. 644 (2015). Polling shows broad-based support for the rights protected by these decisions. See, e.g., *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade*, PEW RSCH. CTR. (Aug. 29, 2019), <https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade> (indicating relatively steady support since the 1990s for legal abortion); *Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical*, PEW RSCH. CTR. (June 26, 2017), <https://www.pewresearch.org/politics/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical> (documenting the rise in support for same-sex marriage over the last decade).

<sup>12</sup> Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 320–21 (2015).

<sup>13</sup> *Id.* at 321.

<sup>14</sup> See *Barrett Confirmation Hearing, Day 3 Part 2*, C-SPAN (Oct. 14, 2020), <https://www.c-span.org/video/?476317-2/barrett-confirmation-hearing-day-3-part-2> (“As I said a number of times, I can’t express a view, yes or no, . . . A+ or F. I think that *Griswold* is very, very, very unlikely to go anywhere . . .”); Mary Ziegler & Rachel Rebouché, *Amy Coney Barrett’s Supreme Court Confirmation Jeopardizes More than Abortion*, NBC NEWS (Oct. 27, 2020), <https://www.nbcnews.com/think/opinion/amy-coney-barrett-s-supreme->

result in *Griswold* indicated, longtime critics of substantive due process now in the majority on the Court may only be constrained by principles of stare decisis—a principle to which they pay weak allegiance.<sup>15</sup> The abortion right, and much more, is on the table.<sup>16</sup> In expressing support for religious liberty, conservative Justices continue to voice hostility to same-sex marriage—raising questions about whether they will protect the rights of same-sex couples to form families.<sup>17</sup>

The constitutional objection to substantive due process is routinely captured by a single declaration: *Lochner*.<sup>18</sup> In that widely repu-

court-confirmation-jeopardizes-more-abortion-ncna1244568 (showing that advocates have blurred the distinction between abortion and contraception, strengthening justifications for restricting both).

<sup>15</sup> See Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 351 (2020) (describing Chief Justice Roberts's relationship with stare decisis in a recent case as "contingent and selective"). For expressions of Justice Barrett's views, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

<sup>16</sup> On May 17, 2021, the Court granted certiorari in *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020). Melissa Quinn, *Supreme Court Takes Up Blockbuster Case over Mississippi's 15-Week Abortion Ban*, CBS NEWS (May 17, 2021), <https://www.cbsnews.com/news/supreme-court-abortion-rights-case-mississippi>.

<sup>17</sup> See, e.g., *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (statement of Thomas, J.) ("By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have 'ruinous consequences for religious liberty.'" (quoting *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting))). Indeed, there may be a range of questions—for example, questions relating to assisted reproduction that were posed to Justice Barrett—in which judges may refuse to intervene to protect privacy rights. See *Barrett Confirmation Hearing, Day 2 Part 2*, C-SPAN (Oct. 13, 2020), <https://www.c-span.org/video/?476316-4/barrett-confirmation-hearing-day-2-part-2> ("I signed [a statement by a group opposing abortion and in-vitro fertilization] almost fifteen years ago and in my personal capacity when I was still a private citizen. . . . While I was free to express my private views at that time, I don't feel like it is appropriate . . . anymore . . .").

<sup>18</sup> *Lochner v. New York*, 198 U.S. 45 (1905); see *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) ("During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. The Court in 1937 repudiated *Lochner*'s foundations. But the Court then created a new taxonomy of preferred rights." (citations omitted)); *Obergefell*, 576 U.S. at 694 (Roberts, C.J., dissenting) ("In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) ("Indeed, *Dred Scott* was 'very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.'" (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 271 (1985) (footnotes omitted))); *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) ("As in *Lochner* . . . the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process

diated 1905 decision, the Court struck down a maximum-hours law, a progressive victory in the New York legislature, as a violation of business owners' right to liberty protected by the Fourteenth Amendment.<sup>19</sup> By the late 1930s, the Court repudiated *Lochner* and, in its famous Footnote Four in *United States v. Carolene Products*, announced a much more limited role for judicial review of economic legislation.<sup>20</sup> Even as the *Carolene Products* Court retreated from review of laws regulating "ordinary commercial transactions," it staked out a continuing role for "more searching judicial inquiry" in cases where "prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>21</sup>

Yet our way of reasoning within the *Carolene Products* framework was forged not in the wake of the 1938 decision but instead in the 1980s. In *Democracy and Distrust*, John Hart Ely read Footnote Four to focus "on whether the opportunity to participate . . . in the political processes . . . has been unduly constricted."<sup>22</sup> Ely developed this insight into a theory of representation-reinforcing judicial review that endorsed decisions protecting certain rights—voting, speech, and equal protection, specifically *Brown v. Board of Education*—and repudiated decisions protecting other rights—specifically substantive due process. *Democracy and Distrust*, published the year of President

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of deciding whether a particular state interest put forward may or may not be 'compelling.');" *Griswold v. Connecticut*, 381 U.S. 479, 524 (1965) (Black, J., dissenting) ("They would reinstate the *Lochner*, *Coppage*, *Adkins*, *Burns* line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now."); Brief for the United States as Amicus Curiae in Support of Appellants at 25–26, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379), 1985 WL 669705 (invoking *Lochner* and calling for the overruling of *Roe*); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 9–11 (1971) (invoking *Lochner* in criticizing *Griswold*).

<sup>19</sup> *Lochner*, 198 U.S. at 53.

<sup>20</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Those who repudiated *Lochner* defended New Deal legislation and opposed courts interfering with democratic efforts to protect workers and the economically vulnerable. See Howard Gillman, *De-Lochnerizing Lochner*, 85 *B.U. L. REV.* 859, 861 (2005) ("Thus, it was only after the triumph of New Deal constitutionalism that the historical *Lochner* was transformed into the normative *Lochner*—that is, into the symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law." (emphasis omitted)); see also Richard A. Epstein, Address, *Skepticism and Freedom: The Intellectual Foundations of Our Constitutional Order*, 6 *U. PA. J. CONST. L.* 657, 669 (2004) ("[*Lochner*] is so reviled in some quarters that it has become an epithet to describe an entire era, . . . which covers roughly (and for what it is worth, inaccurately) the period between 1865 and 1937, when the New Deal philosophy had consolidated its choke hold on American constitutional interpretation.").

<sup>21</sup> *Carolene Products*, 304 U.S. at 152 & n.4.

<sup>22</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77 (1980).

Ronald Reagan's election, proposed a liberal constitutional theory discrediting rights against which conservatives were politically mobilizing.<sup>23</sup>

With the benefit of the intervening forty years, this Article revisits and reassesses Ely's now-canonical interpretation of the *Carolene Products* framework.<sup>24</sup> We answer the "Lochner objection" by showing how modern substantive due process claims were candidates for close judicial scrutiny in the *Carolene Products* framework; how the claimants' strategies of "speaking out" and "coming out" were efforts to be heard in democratic politics; and how bottom-up mobilization around courts can be democracy-promoting. In short, we show that Ely had the big idea that judicial review could be democracy-promoting, but he argued his case on faulty premises. *Democracy and Distrust* bore significant influence of the traditions and the cultural forces Ely argued against.<sup>25</sup> We examine the arguments of the claimants in the modern substantive due process cases—then unrepresented in the legal academy—that Ely dismissed with evident disdain.<sup>26</sup> And we reason about their cases in light of scholarship on the ways family structures citizenship, and on the different roles of courts in a democracy, that has evolved in the four decades since Ely wrote.<sup>27</sup>

Returning to the facts that gave rise to the modern substantive due process cases illustrates the problem with formalist assumptions about democracy on which Ely and others rely—for example, that judicial review is antidemocratic because it is countermajoritarian, or that democratic participation primarily involves the question of

<sup>23</sup> See *infra* notes 55–63 and accompanying text.

<sup>24</sup> Generations of scholars have addressed *Carolene Products* in reasoning about judicial review. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). But Ely was the first to develop the reasoning of the footnote into a democratic theory of judicial review. Louis Lusky, who, as a clerk to Justice Stone, authored the opinion's famous Footnote Four, reviewed some of the commentary on the footnote in the period just after Ely published *Democracy and Distrust*. See Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1093 & n.2 (1982) (citing commentary).

<sup>25</sup> Even as Ely's account became canonical, see Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2008 (2006), its argument was subject to fierce criticism from the outset. See *infra* notes 216, 232–35, 256 (discussing criticisms leveled by Bruce Ackerman, Paul Brest, and Laurence Tribe soon after the publication of *Democracy and Distrust*).

<sup>26</sup> See *infra* note 192 and accompanying text.

<sup>27</sup> In our analysis of judicial review and democratic participation, we build on decades of literature on Ely and democracy-reinforcing theories of judicial review. See, e.g., *infra* notes 161, 184, 217–20, 249, 252 (discussing, for example, the work of Jane Schacter and James Fleming).

voting.<sup>28</sup> By engaging with the facts giving rise to the cases, we can see how courts figure both in top-down and in bottom-up stories of democratic struggle: Judges may grant rights, or, when *all* branches of government reject the claims of dominated groups, courts may provide members of those groups alternative fora in which to speak, mobilize, and break into politics. The facts giving rise to the modern substantive due process cases thus illustrate the different, and at times complementary, roles that legislatures and courts can play in restricting and in enabling democratic participation. Returning to the roots of these and other cases allows us to ask about the institutional infrastructure needed to secure the ideals of constitutional democracy in a way that should engage all those interested in reform of the federal courts—as we are.

Our first goal in this Article is thus to challenge the view shared by many liberals and conservatives that modern substantive due process cases represent *Lochner*-type judicial overreach, and to show how judicial intervention in these cases can be understood as democracy-promoting. To do so, in Part I we examine the social movement roots of the modern substantive due process cases.<sup>29</sup>

<sup>28</sup> See *infra* Part II.

<sup>29</sup> Remarkably, there does not appear to be a definitive history of the phrase “substantive due process.” Cf. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 269 (2016) (noting that “substantive due process” has been used since at least the 1920s, but that few attacked the term as oxymoronic until the 1980s). What follows is a brief provisional account. The term “substantive due process” apparently first appeared in 1928. See Note, *Constitutionality of Judicial Decisions in Their Substantive Law Aspect Under the Due Process Clause*, 28 COLUM. L. REV. 619, 619 (1928) (concluding that even if due process allows federal courts to review the substance of state legislation, the doctrine should not allow the Supreme Court to invalidate a state court’s application of state law when the Supreme Court finds the outcome substantively unfair). Toward the end of the *Lochner* era, the term was employed to discuss due process doctrines by authors critical of courts blocking legislative action. See Charles E. Clark, *Legal Aspects of Legislation Underlying National Recovery Program*, 20 A.B.A. J. 269, 272 (1934). By the late 1960s, Frank Michelman expressed an ambivalent view toward substantive due process in his famous *Foreword* on “protecting the poor through the Fourteenth Amendment.” Compare Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 n.25 (1969), with *id.* at 33 n.80. (For a positive use of substantive due process to protect the poor, see James J. Graham, *Poverty and Substantive Due Process*, 12 ARIZ. L. REV. 1, 8 (1970)). For much of the twentieth century, the debate over due process was a debate over the role of courts in a market economy. In the 1960s, the term “substantive due process” was not used to describe *Griswold*; nor in the early 1970s was it used to describe the Court’s decision in *Roe*. (For the closest usage to this effect, see Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159). It was only a few years after *Roe* that the term “substantive due process” began to be employed, as it is today, to include, if not to focus on, the Court’s due process cases concerning decisions involving intimate and family relations. For an illustration of the emergence of the modern usage, see Michael J. Perry, *Substantive Due Process Revisited: Reflections On (and Beyond) Recent Cases*, 71 NW. L. REV. 417 (1976).

We show that the modern substantive due process cases involve constitutional challenges to laws that differ from the maximum-hours law at issue in *Lochner*, brought by claimants whose circumstances differ from those of the business owners in that case. Where the maximum-hours law at issue in *Lochner* mitigated power differentials between employers and employees,<sup>30</sup> the laws at issue in modern substantive due process cases constrained the liberties of subordinated groups that were underrepresented in the political process. As we demonstrate, claimants in the modern cases endeavored to enter democratic politics to challenge these laws but confronted deliberative blockages—in the terms of *Carolene Products*, “prejudice . . . [which] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>31</sup> Because of the pervasive role of the criminal law in regulating decisions about sex and reproduction, women and LGBTQ people faced persistent stigma in seeking to transform social norms and secure legal reform. We revisit the movement roots of the modern due process cases and examine the practices of “speaking out” and “coming out” developed to combat silence and stigma that impeded participation in democratic politics. As we consider the deliberative blockages in which courts recognizing constitutional rights intervened, we see how modern substantive due process cases vindicate both liberty *and* equality values, as the decisions themselves repeatedly recognize,<sup>32</sup> and, as they enable the participation of groups both historically and structurally marginalized, can be understood as democracy-promoting as well.

Why does the leading exponent of democracy-reinforcing judicial review see the substantive due process cases as classically antidemocratic? What about courts’ response to movement practices of “speaking out” and “coming out” does Ely’s concept of democracy-reinforcing judicial review not appreciate? The mobilizations we detail in Part I lead us to question assumptions on which Ely relied and that continue to structure understandings of judicial review in a democracy.

Our second goal in this Article is to scrutinize the premises on which Ely’s view of democracy-reinforcing judicial review rests, and

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<sup>30</sup> Scholars continue to debate the *Lochner* decision and the nineteenth-century due process tradition on which it rested. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011) (challenging conventional accounts of *Lochner*); Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 796 (2009) (tying *Lochner* with views about the police power and contrasting this account with modern understanding of rights that scholars have imposed on *Lochner*).

<sup>31</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>32</sup> See *infra* Section I.B.



open a more wide-ranging conversation about the democracy-promoting and democracy-inhibiting possibilities of judicial review. The history we have examined unsettles the conventional equation of democracy with majoritarianism. Our return to the origins of the substantive due process cases reminds us of the familiar—how communities can dominate and brutalize their members, how subordinated groups can mobilize in resistance, and how, on rare occasions, courts can intervene in politics in democracy-promoting ways, at times helping to engender legislative change in the process. We draw on these accounts of constitutional change in Part II, where we critically examine Ely's conception of democracy-reinforcing judicial review. Ely elaborated his important argument—that judicial review has the potential to promote democracy—in ways that perpetuated certain assumptions and biases of his era: that the democracy-reinforcing potential of judicial review is clause bound; that democracy is predominantly about the process of voting; and that judicial review is definitionally antidemocratic because it can restrict legislative sovereignty (the “countermajoritarian difficulty”<sup>33</sup>). While Ely conceives of democratic participation as organized around voting and the public sphere, the stories of “speaking out” and “coming out” in Part I illustrate ways that norms of family and intimate life govern social—and political—standing.<sup>34</sup> Those stories also offer a rich perspective on the roles that courts can play in social mobilization—enabling us to engage with Ely's assumptions about democracy-reinforcing judicial review.

Legal scholars commonly charge judicial review with the “countermajoritarian difficulty,” yet are quick to acknowledge that democracy requires more than majoritarian procedures—it requires majoritarian procedures conducted under certain background conditions.<sup>35</sup> Democracy requires majoritarian procedures in which all adults have an equal right and an equal opportunity to participate.<sup>36</sup> Whether majority rule commands the individual's respect *as* democratic self-government depends on the conditions in which the individual participates in the decisions of the majority. As current events painfully illustrate, this respect cannot be assumed.<sup>37</sup>

<sup>33</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

<sup>34</sup> See *infra* Section II.A.

<sup>35</sup> See *infra* Section II.B.1.

<sup>36</sup> See *infra* Section II.B.1.

<sup>37</sup> See Press Release, Ipsos & Reuters, Reuters/Ipsos: Trump's Coattails (Apr. 2, 2021), [https://www.ipsos.com/sites/default/files/ct/news/documents/2021-04/topline\\_write\\_up\\_reuters\\_ipsos\\_trump\\_coattails\\_poll\\_-\\_april\\_02\\_2021.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2021-04/topline_write_up_reuters_ipsos_trump_coattails_poll_-_april_02_2021.pdf) [https://perma.cc/V9J7-UVSD] (poll reporting that sixty percent of Republicans believe the “2020 election was stolen from Donald Trump”).

Because democracy requires more than majoritarianism, there are circumstances in which courts can act in democracy-promoting ways. As *Carolene Products* recognizes and Ely demonstrates, courts can make majoritarian processes more democratic when courts grant rights that protect speech or enable the participation of marginalized or excluded groups. But as we observe, courts can function in ways that are democracy-promoting even when judges do not restrict legislative sovereignty by awarding judicially enforceable participation rights. In conditions of genuine political domination, *all* branches fail in offering redress or access. Groups that are marginalized in democratic politics may find that courts provide *alternative fora* with different institutional features that strengthen the groups' ability to communicate in democratic politics. Because courts are differently open and feature different forms of reason giving and argument, groups challenging conditions of subordination often contest social arrangements by litigating and legislating at the same time.<sup>38</sup> These concurrent strategies can work in complementary and interactive ways, aiding marginalized groups in contesting and potentially reshaping a community's understanding of its own norms.<sup>39</sup> Analyzed from this bottom-up perspective, even when judges fail to award judicially enforceable participation rights, courts offer mobilizing groups alternative fora to communicate and reshape norms and agendas in democratic politics.<sup>40</sup> That said, judicial review, even if not definitionally antidemocratic, certainly can be used in antidemocratic ways, and today too often is—for example, when it is exercised to deny members of the community the equal right and opportunity to participate or to

<sup>38</sup> See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1312–18 (2010); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1368 (2006).

<sup>39</sup> See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 968–69 (2011) (“Operating across a range of institutional settings, social movement lawyers deploy litigation as merely one of several available tactics. . . . These advocates cultivate the political potential of rights-claiming tactics by seizing on moments across the full spectrum of litigation—from filing to process to outcome, including both victory and defeat.”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1988–91, 1995–96 (2003) (describing the constitutional vision animating the feminist movement's litigation and legislative claims in the early 1970s of which the abortion legislation and litigation was an integral part); see also Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–56 (2014); Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 550 (2009). For one concrete illustration of this dynamic, see *infra* notes 94–132 and accompanying text.

<sup>40</sup> See *infra* Section II.B.2.

erode their confidence that democratic decision procedures are open to their participation.<sup>41</sup>

As we observe in the Conclusion, the question of the antidemocratic character of judicial review—and its presumed embodiment in the substantive due process cases—finds expression not only in cases before the Court but also in the debate over court reform now unfolding on the left. Many scholars and commentators have responded to conservative capture of the federal judiciary by proposing court reform,<sup>42</sup> including legislation to strip federal courts of jurisdiction over at least some legislative matters.<sup>43</sup> These proposals reach beyond extant political conditions to offer views about the role of courts in a democracy. Proponents of such reforms often frame their proposals as limits on the antidemocratic practice of judicial review and thus as democracy-promoting—within a framework that equates democracy with majoritarian politics.<sup>44</sup> In doing so, they routinely point to the modern substantive due process cases as classic examples of judicial overreach illustrating the democratic warrant for jurisdiction stripping.<sup>45</sup>

<sup>41</sup> See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); see also Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. (forthcoming 2022) (manuscript at \*3) (on file with the authors) (“Far from engaging in representation-reinforcing judicial review, the Court’s [recent] decisions contribute to ‘the ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out’ regardless of what the majority would choose.” (quoting ELY, *supra* note 22, at 103)).

<sup>42</sup> In just one term, President Trump appointed 226 judges to the federal courts, including more than 50 federal appellate judges. See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RES. CTR., Jan. 13, 2021, <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges>. The six-to-three conservative Supreme Court majority was produced in part by the Senate’s obstruction of President Obama’s nomination to replace Justice Scalia and the rush to appoint Justice Ginsburg’s successor before the end of President Trump’s term. See Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg’s Seat on the Supreme Court*, N.Y. TIMES, Oct. 15, 2020, <https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html>.

<sup>43</sup> See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) (expressing openness to systemic reforms like jurisdiction stripping).

<sup>44</sup> See, e.g., *id.* at 1735 (explaining that “disempowering reforms” operate “on the most straightforward definition of the democratic premise: that, all else equal, the people themselves should directly determine their arrangements”); Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, NEW REPUBLIC (Oct. 13, 2020), <https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power> (“Why leave open that a democratically unaccountable Supreme Court might invalidate . . . hard-won democratic political victories . . . ?”).

<sup>45</sup> See Eric J. Segall & Christopher Jon Sprigman, *Reducing the Power of the Supreme Court: Neither Liberal nor Conservative but Necessary (and Possible)*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM (2020), <https://nyujlpp.org/quorum/segall-sprigman-reducing-power->

We support court reform. As we understand it, having some fundamental conception of the role of courts in a constitutional democracy is a prerequisite to engaging the practical and political dimensions of the court reform debate. This Article does not address the pragmatics of how to implement court reform, but it does explore this first fundamental question. Through close examination of one long contested line of cases, the Article considers what it means to say that judicial review is functioning in ways that threaten or promote democracy. It asks when, if ever, might restrictions on legislative sovereignty be needed to promote democracy? Clarity about this question is needed whether one is debating the Constitution's interpretation in particular cases or arguing about proposals for court expansion or jurisdiction stripping.

No encounter with one line of cases—however hotly controverted—can address the wide-ranging questions posed by court reform. Our account of the modern substantive due process cases surely does not. But it does clarify several points. Our analysis rules out one commonly cited justification for reform: that judicial restrictions on legislative sovereignty are by definition antidemocratic and that the modern substantive due process cases are the classic illustration. Because majority rule alone does not establish a democracy, and conditions of participation matter, judicial review can *promote or inhibit* democracy.<sup>46</sup> For this reason, judicial review can enforce inequality along lines of race and class, for example by legitimating voting restrictions, and so function in antidemocratic ways.<sup>47</sup> But our analysis also shows that judicial review has the potential to function in democracy-promoting ways, affording groups marginalized in politics participation rights and alternative institutional fora in which to communicate. Considering the democracy-promoting possibilities of judi-

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supreme-court (arguing for limiting judicial review and listing due process cases—including *Dred Scott*, *Lochner*, *Roe*, and *Casey*—as “egregious Supreme Court interventions,” as “examples of overreach by the Supreme Court,” and as “unduly aggressive and disrespectful of democratic self-government”); Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <https://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> (pointing to substantive due process, and specifically *Roe* and *Obergefell*, in arguing against liberals' use of “black-robed power to enact their preferences”).

<sup>46</sup> For examples of the argument that courts have institutional biases that systematically produce democracy-inhibiting judicial review, see *infra* note 259.

<sup>47</sup> See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (invalidating the Voting Rights Act's coverage formula as unconstitutional). These antidemocratic dimensions are evident in both constitutional and statutory decisions by the Roberts Court on the Voting Rights Act. See *Brnovich v. Democratic National Committee*, No. 19-1257, slip op. at 3 (U.S. 2021) (Kagan, J., dissenting) (“What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses . . . . [T]he Court has damaged a statute designed to bring about ‘the end of discrimination in voting.’”).

cial review gives us an important criterion for evaluating current reform proposals and connects the debate over judicial review to other court reform agendas—concerning right to counsel, access to courts, and reform of regressive court-financing schemes.<sup>48</sup>

Most fundamentally, by looking at these and other concrete lines of cases, one can ask about the democracy-promoting and democracy-inhibiting ways that courts perform and pose more discriminating questions about the goals of court reform. Is the goal of reform to change the role of courts, or to minimize the role of courts? Is the aim of changes in design or personnel to make courts more independent, less polarized, more open, or more committed to enabling the participation of the marginalized? Or does one limit the reach of judicial review, and if so, which kinds of limits promote democracy?

## I

### THE DEMOCRACY-PROMOTING ROLE OF COURTS AND THE MODERN SUBSTANTIVE DUE PROCESS CASES

In the wake of New Deal struggles over judicial review, the Court's decision in *United States v. Carolene Products* accorded laws regulating "ordinary commercial transactions" a strong presumption of constitutionality, yet emphasized that courts would play a continuing and important role in cases involving individual liberties and the rights of minorities disadvantaged in the political process.<sup>49</sup> Henceforth, courts would defer to democratic decisionmaking in cases

<sup>48</sup> Judicial review can help secure a democracy in which members have the equal right and opportunity to participate and the confidence that democratic decision procedures are open to their participation. But court reform focused solely on judicial review is not sufficient to achieve these ends and would be productively joined with other ongoing efforts to expand access to the courts and to make their procedures more democratic. See Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 987, 1000, 1014–17 (2021) (identifying features of municipal courts, including "self-fund[ing] through fines and fees" and the use of nonlawyer judges, as raising concerns about the "democratic role of judging"); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015) (addressing "mandates applied to hundreds of millions of consumers and employees, obliged to arbitrate not because of choice but because public laws have constructed requirements to use private decision making in lieu of adjudication"); Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 850 (2016) (explaining how various limitations on class actions have rendered the device unavailable for some civil-rights plaintiffs); Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2263 (2013) (grounding a civil right to counsel in "the values of democratic citizenship and community participation").

<sup>49</sup> 304 U.S. at 152 & n.4 (1938) (explaining that reasons for "more searching judicial inquiry" are even greater in those cases where "prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

involving the regulation of market relations—cases like *Lochner v. New York*<sup>50</sup>—but devote “more exacting judicial scrutiny” to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>51</sup> The Court expressed particular concern with circumstances in which “prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>52</sup>

Several decades later, as the Court attempted to protect the rights of minorities in the political process, it found its decisions the locus of intense popular anger of a kind not seen since the 1930s. Scholars attacked *Brown* and the cases enforcing it as a violation of neutral principles<sup>53</sup> and as a violation of original intent,<sup>54</sup> and academics moved to defend the decisions.

In what may be the most famous of these accounts, *Democracy and Distrust*, published in 1980, the same year as Ronald Reagan’s election, John Hart Ely developed the *Carolene Products* framework into a book-length argument that judicial review, properly limited, was representation-reinforcing.<sup>55</sup> In its broadest outline, Ely’s strategy for defending the race cases against which Reagan campaigned<sup>56</sup> was

<sup>50</sup> 198 U.S. 45 (1905).

<sup>51</sup> *Carolene Prods.*, 304 U.S. at 152 n.4 (1938).

<sup>52</sup> *Id.* At the time of *Lochner*, progressives rejected the Court’s use of judicial power to strike down protective labor legislation in the name of economic liberty. *See, e.g.*, D. Grier Stephenson, Jr., *The Supreme Court and Constitutional Change: Lochner v. New York Revisited*, 21 VILL. L. REV. 217, 218 n.10 (1976) (criticizing *Lochner* for diminishing “the condition of the worker” (quoting Letter from President Theodore Roosevelt to Justice W.R. Day (Jan. 11, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT 903, 904 (Elting E. Morison ed., 1952))).

<sup>53</sup> *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *see also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1478–80, 1489–99 (2004) (contextualizing the neutral principles debate and early resistance to *Brown*).

<sup>54</sup> As *Brown* and its progeny became increasingly entrenched, critics of *Brown* relied less on stare decisis and instead increasingly challenged the decision by appeal to the intentions of the Fourteenth Amendment’s framers. *See, e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 132–45 (2d ed. 1997) (arguing that senators’ references to segregated schools at the time of passage of the Fourteenth Amendment reveal an intention to maintain segregation); Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966). For an account of the racial focus of early originalism, *see* Calvin TerBeek, “Clocks Must Always Be Turned Back”: *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism, 115 AM. POL. SCI. REV. 821 (2021).

<sup>55</sup> ELY, *supra* note 22, at 75–104.

<sup>56</sup> Reagan built the groundwork for his transformative presidency on the understanding that an appeal to “the so-called social issues” could attract to the Republican fold constituencies that historically aligned with the Democratic Party. *See* THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 141 (1991) (quoting Reagan speech to the American

to distinguish the Court's equal protection race decisions from what he saw as unconstrained forms of judicial review, in particular the substantive due process cases of the Warren and Burger Courts, which in Ely's view concerned issues properly left to democratic determination. Like Justice Frankfurter, Justice Black, and Judge Bork, Ely worried that the open-ended Due Process Clause lacked sufficient guidance to limit judicial discretion.<sup>57</sup> Ely famously dismissed "substantive due

Conservative Union in 1977 explaining realignment strategy as a reason for focusing on "so-called social issues—law and order, abortion, busing, quota systems . . . usually associated with the blue collar, ethnic, and religious groups [that] are traditionally associated with the Democratic Party"). Reagan did not directly oppose *Brown* but instead opposed race-conscious remedies (e.g., "busing, quota systems"). *See id.* The confirmation difficulties of judges who did take positions that might be construed in opposition to *Brown*—including Justice Rehnquist—persuaded political conservatives to accept *Brown*, and interpret the decision narrowly. *See* Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 389, 414–50 (2000). And so, for example, in 1984, on *Brown*'s thirtieth anniversary, William Bradford Reynolds, the head of the Civil Rights Division under Reagan, endorsed *Brown* at the same time as he reread *Brown* to state a neutral principle from which the Warren and Burger Court decisions on bussing and affirmative action represented a departure. William Bradford Reynolds, Assistant Att'y Gen., Individualism vs. Group Rights: The Legacy of *Brown*, Speech Before the Lincoln Institute Conference (Sept. 28, 1983), in 93 YALE L.J. 995, 997–98, 1002 (1984).

<sup>57</sup> Ely set up the problem *Democracy and Distrust* would address by beginning the book with an account of the debate between "interpretivists" and "noninterpretivists" about whether judges are constrained by the written Constitution or can enforce the unwritten Constitution. *See* ELY, *supra* note 22, at 1 (ascribing to interpretivists the belief that judges should enforce "norms that are stated or clearly implicit in the written Constitution" and to noninterpretivists the belief that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document"). In fact, this debate was a debate about judges' discretion in *enforcing the text of the written Constitution*. Ely observed that the provisions of the Constitution "rang[e] from the relatively specific to the extremely open-textured," such as provisions of the First Amendment. *Id.* at 13. His concern was not a lack of textual authority but instead a lack of specific textual constraints on judicial discretion posed by the open-ended language of the Ninth Amendment, the Due Process Clause, and even the Equal Protection Clause. *See id.* at 30–41 (discussing these provisions). Talk of the unwritten Constitution is thus misleading. What concerned Ely were clauses that endowed a judge with authority Ely viewed as unconstrained, even if the text was included in the Fourteenth Amendment, and rooted in natural law traditions that Ely saw as inviting judges to entrench on democratic prerogatives. *See* ELY, *supra* note 22, at 39–41 (entertaining the argument that "because natural law is the source from which the open-ended clauses of the Ninth and Fourteenth Amendments were expected to derive their content, we are justified, now that our society no longer believes in natural law, in ignoring the clauses altogether"). Ely reasoned about limiting judicial authority in the tradition of Justices Frankfurter and Black. *See* John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 400–01, 447–48 (1978) (discussing Justice Black's dissent in *Griswold*). Bork reasoned about *Griswold* in this same tradition. *See* Bork, *supra* note 18, at 9–11 (invoking *Lochner* in criticizing *Griswold* and asking, "Why is sexual gratification nobler than economic gratification? . . . Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That . . . is an inadequate basis for judicial supremacy").

process' [as] a contradiction in terms—sort of like 'green pastel redness.'"<sup>58</sup> His critique was both textual (substantive due process is oxymoronic) and structural (because the clause provides judges no interpretive guidance, judicial enforcement is antidemocratic). For Ely, the modern embrace of substantive due process in cases like *Griswold* and *Roe* reproduced the mistakes of *Lochner*.<sup>59</sup> Ely viewed other open-ended clauses of the Fourteenth Amendment as a threat to democracy, unless constrained by an interpretive theory, the project to which his book turned.<sup>60</sup>

Thus, in *Democracy and Distrust*, Ely defended the Court's race cases from attack by the Reagan administration, while joining the Reagan administration in an attack on the Court's substantive due process cases.<sup>61</sup> Indeed, he famously compared *Roe* to *Lochner*, rejecting both as unwarranted judicial intrusions into politics.<sup>62</sup> Ely

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Modern critics of substantive due process also appeal to Justice Holmes. See Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 91 & n.23 (citing OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295 (1920)); see also HOLMES, *supra* at 295 ("It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong.").

<sup>58</sup> ELY, *supra* note 22, at 18. As Jamal Greene documents, the objection to substantive due process as an "oxymoron" emerged after Ely's famous criticism, and since then, "literally hundreds of authors, including several judges in the course of opinions, have called substantive due process oxymoronic or contradictory." Greene, *supra* note 29, at 276. Judge Richard Posner appears to be the first judge to refer to substantive due process in this way in a judicial opinion. *Id.* at 277; see *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (deploying "oxymoron" language). For criticism of this particular form of objection, see Greene, *supra* note 29, at 264–65.

<sup>59</sup> See ELY, *supra* note 22, at 64 (seeing substantive judgments by courts as reproducing "natural law" reasoning of earlier era).

<sup>60</sup> See *id.* at 41 ("If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, . . . responsible commentators must consider seriously the possibility that courts simply should stay away from them . . . [T]hat is the burden of the rest of this book.").

<sup>61</sup> *Id.* at 14–15 (discussing *Lochner* and *Roe*). In *Democracy and Distrust*, Ely reasoned about the legitimacy of the modern substantive due process cases at a high level of abstraction with and without engaging their facts. Justice Douglas, writing for the majority in *Griswold*, had distinguished *Lochner* from the law criminalizing contraception at issue in the case. See *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (arguing that the legislation in *Griswold* differed from the legislation in *Lochner* by intruding into the private marital relationship). For their part, the dissenters had conflated the circumstances of the two lines of cases. See *id.* at 522, 524 (Black, J., dissenting) (arguing that enforcing the Due Process Clause "is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights" and objecting that there are no constitutional limits on "using the natural law due process philosophy to strike down any state law, dealing with any activity whatever").

<sup>62</sup> See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939–40 (1973) ("The Court continues to disavow the philosophy of *Lochner*. Yet as Justice Stewart's concurrence admits, it is impossible . . . to regard *Roe* as



identified the Court's substantive due process decisions as an illegitimate usurpation of democratic prerogatives at precisely the same time that the Reagan administration was mounting an assault on *Roe*, calling for the appointment of judges who would respect human life and traditional family values,<sup>63</sup> and nominating to the Supreme Court critics of the decisions—then-Judges O'Connor, Scalia, and Bork.<sup>64</sup>

Ely may have separated constitutional arguments about race and sexuality, but evangelicals mobilized as the Moral Majority understood debates about race and sex as interconnected.<sup>65</sup> Supporters of Bork's nomination understood him as a constitutional conservative who challenged case law vindicating affirmative action, abortion rights, sex equality, and gay rights, even as the confirmation hearing came to focus on Bork's longstanding objection that the right to privacy recognized in *Griswold* was no more constitutionally legitimate than the liberty interest recognized in *Lochner*.<sup>66</sup>

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the product of anything else. That alone should be enough to damn it. Criticism of the *Lochner* philosophy has been . . . universal and will not be rehearsed here.”); see also ELY, *supra* note 22, at 21 (categorizing both *Roe* and *Lochner* as paradigmatic examples of substantive due process cases).

<sup>63</sup> Republican Nat'l Convention, *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/273420> (last visited Aug. 5, 2021).

<sup>64</sup> See, e.g., Bork, *supra* note 18, at 11 (comparing *Griswold* to *Lochner*, arguing that “substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine”). Bork and Ely reasoned about due process in a shared tradition, descending from Holmes, Frankfurter, and Black. See *supra* note 57.

<sup>65</sup> See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2066 n.141 (2011) (“In retelling the story of the formation of the Moral Majority, Weyrich has repeatedly emphasized that the principal motivating issue was not abortion but rather the attempt by the IRS in the late 1970s to deny tax-exempt status to Christian schools that failed to comply with racial nondiscrimination mandates.” (citing WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* 173 (1996))); Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST (July 26, 2019), <https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/> (“The GOP successfully fused ideas about the role of government in the economy, women’s place in society, white evangelical Christianity and white racial grievance, in what became a ‘long Southern strategy’ that extended well past the days of Goldwater and Nixon.”); see also ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS* 8–9, 14 (2019) (arguing that the Southern strategy was positioned as a backlash against the civil rights victories of various marginalized groups and that race and gender were necessarily connected in this strategy); ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960s*, at 6–7 (2012) (same).

<sup>66</sup> Siegel, *supra* note 12; see also ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 59–61, 192 (Union Square Press 2007) (1989) (discussing the controversy over Bork’s scholarship upon his nomination to the Supreme Court). The year after Bork’s nomination was defeated, the Department of Justice published a document to guide judicial confirmation debates that presented liberal and conservative positions on sex and race cases as *questions about interpretive method*. See OFFICE OF LEGAL POL’Y, U.S. DEP’T OF JUST., *THE CONSTITUTION IN THE YEAR 2000:*

In the 1980s, *Lochner* took on new meanings in the academy and then in politics as conservatives invoked longstanding liberal opposition to *Lochner* to oppose rights to sexual privacy and abortion protected in modern substantive due process decisions like *Griswold* and *Roe*.<sup>67</sup> As Jamal Greene has observed: “The more or less sudden realization that ‘substantive’ contradicts ‘process’ in the Due Process Clause—and that this is a fatal defect—coincides with the rise of a certain kind of originalism. That rise . . . was deliberately orchestrated by conservative activists both inside and outside of the Reagan Justice Department.”<sup>68</sup> (Of course, arguments about oxymorons are not originalist; they are forms of living constitutionalism that originalists regularly employ, and decry.)<sup>69</sup> By the early 1990s, Justice Scalia was pairing *Lochner* with *Roe* to oppose the Court’s decision in *Casey*<sup>70</sup> and dismissing substantive due process as “an oxymoron,” not “a constitutional right.”<sup>71</sup>

Crying “*Lochner*” has so much force that it is often not clear what the objection itself entails.<sup>72</sup> “*Lochner*” warns federal judges to defer to a legislature’s judgments in enacting social and economic legislation. But the modern cases do not concern social and economic legislation. In modern substantive due process cases, dissenters invoke *Lochner* to express a more far-reaching objection: to warn judges

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CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION, at i, iii–v (1988) (presenting decisions on abortion, gay rights, disparate impact, and affirmative action as debates over “interpretivism vs. non-interpretivism or strict interpretation vs. liberal interpretation or commitment to original meaning vs. commitment to an evolving constitution”).

<sup>67</sup> Greene, *supra* note 29, at 256 (“*Lochner*’s anticanonicity . . . flourished in the 1980s as part of the case against sexual privacy and abortion rights. Substantive due process was a phrase largely created by its enemies and attributed to its supporters in a strategic assault on particular Court decisions.”); *id.* at 276 (“Textual arguments against the Due Process Clause gained currency in the 1980s, following Ely’s book. Since then, literally hundreds of authors, including several judges in the course of opinions, have called substantive due process oxymoronic or contradictory, and a fair number have cited Ely for that proposition.”).

<sup>68</sup> Greene, *supra* note 29, at 277. For an account of how the Republican Party employed the abortion issue to recruit Democratic voters in the Nixon and Reagan years, see generally Greenhouse & Siegel, *supra* note 65.

<sup>69</sup> See *infra* notes 310–11 and accompanying text.

<sup>70</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) (quoting CURRIE, *supra* note 18).

<sup>71</sup> *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

<sup>72</sup> See Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J.L. & LIBERTY 570, 577 (2005) (“[E]ven when used pointedly by dissenting justices against majority opinions, the snipe did not always have clear or uniform meaning.”). “‘Lochnerizing’ has become so much an epithet that the very use of the label may obscure attempts at understanding.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567 (2d ed. 1988).

against protecting “unenumerated rights” and second-guessing the decisions of democratic bodies.<sup>73</sup>

To this day, many on the left appear to agree with conservatives that substantive due process rights—at least those involving intimate relations<sup>74</sup>—are *more substantive* and more of an (illegitimate) imposition on democratic processes than are equality rights, a rare point of agreement between Chief Justice Roberts<sup>75</sup> and Professor Samuel Moyn.<sup>76</sup> A clause-based distinction between substantive due process and equal protection—reflecting the belief that judges enforcing modern substantive due process rights are enforcing rights that have little in common with rights to equal protection in cases like *Brown v. Board of Education*—continues to fuel claims about the legitimacy of judicial review.<sup>77</sup>

The textual grounds of substantive due process decisions should not determine their legitimacy. We are among many who view the decisions as grounded in the Constitution’s liberty *and* equality guar-

<sup>73</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986) (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 519 (1969) (Black, J., dissenting) (“The doctrine that prevailed in *Lochner*, . . . —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963))).

<sup>74</sup> See *infra* notes 305–19 and accompanying text.

<sup>75</sup> For recent expressions of Chief Justice Roberts’s views, see *Obergefell v. Hodges*, 576 U.S. 644, 687–88 (2015) (Roberts, C.J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)), where he asserts that the majority “seizes for itself a question the Constitution leaves to the people, . . . [a]nd it answers that question based not on neutral principles of constitutional law, but on its own ‘understanding of what freedom is and must become.’” (citation omitted); *id.* at 697 (observing that “to avoid repeating *Lochner*’s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for ‘judicial self-restraint’” (citation omitted)).

<sup>76</sup> In arguing that progressives should give up their love affair with courts and strip federal courts of jurisdiction to declare constitutional rights, Moyn singles out *Roe* and *Obergefell*, rather than, for example, the *Lochnerized* First Amendment, to illustrate the antidemocratic character of judicially enforced constitutional rights. Not only does Moyn single out substantive due process to illustrate how rights impose on democracies, but he attacks substantive due process using the language that Chief Justice Roberts does: “[L]iberals have taken a long time to give up on black-robed power to enact their preferences. This was most notable in decisions around . . . so-called ‘substantive due process.’ . . . In cases ranging from *Roe* . . . to *Obergefell* . . . liberals entered an unholy alliance with Kennedy, . . . to advance gay and women’s rights on a libertarian rationale . . .” Moyn, *supra* note 45 (emphasis added).

<sup>77</sup> See, e.g., Segall & Sprigman, *supra* note 45 (arguing for limiting judicial review, by listing due process cases—including *Dred Scott*, *Lochner*, *Roe*, and *Casey*—as “egregious Supreme Court interventions,” as “examples of overreach by the Supreme Court,” and as “unduly aggressive and disrespectful of democratic self-government”).

antees.<sup>78</sup> But the legitimacy of judicial review does not depend on the constitutional clause on which the Court intervenes. As we have argued, the Constitution's protection for liberty is explicit in the Due Process Clause.<sup>79</sup> It is "no more or less enumerated than" the guarantee of equal protection (or free speech or free exercise or grants of authority in the commerce or vesting clauses).<sup>80</sup> Yet the modern substantive due process cases have been singled out as illegitimate candidates for judicial review.

In fact, critics have specifically targeted the cases involving stigmatized sex, while saying little about other substantive due process decisions.<sup>81</sup> Such targeting out may reflect a confluence of forces: liberal repudiation of *Lochner* and the nineteenth-century "natural law" traditions on which it rested, continuing stigmatization of the criminal-

<sup>78</sup> See Douglas NeJaime & Reva B. Siegel, *Concurring Opinion* ("By focusing on the relationship between equal protection and due process, we show why this case, as well as the Court's modern substantive due process decisions, properly fall within the *Carolene Products* tradition of judicial oversight over the democratic process."), in WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID 112, 112 (Jack M. Balkin ed., 2020); Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020) [hereinafter NeJaime, *The Constitution of Parenthood*]; Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) [hereinafter NeJaime, *The Nature of Parenthood*]; Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277 (2021) [hereinafter Siegel, *Why Restrict Abortion*]; Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) [hereinafter Siegel, *Sex Equality Arguments*]; see also Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2021 WL 4340072. Other scholars have also made important connections between liberty and equality. See, e.g., Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000).

<sup>79</sup> See NeJaime & Siegel, *supra* note 78, at 117.

<sup>80</sup> See *id.*; see also James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 FORDHAM L. REV. 2885, 2895 (2007) [hereinafter Fleming, *Shrinking Constitutional Theory*] (pointing out that the contents of the Due Process Clause are no more "enumerated" than the contents of the Equal Protection Clause and concluding that "we need theories of 'equal protection' to make decisions about the contents of the Equal Protection Clause . . . just as we need theories of 'liberty' to make judgments about the contents of the Due Process Clause"); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 68 (1995) [hereinafter Fleming, *Deliberative Autonomy*] (arguing that both "First Amendment jurisprudence and substantive due process . . . are derived from 'enumerated' rights along with underlying structures").

<sup>81</sup> See *infra* notes 305–08 and accompanying text (describing other decisions decided on substantive due process grounds—including cases on incorporation of the Bill of Rights, punitive damages, and parental rights—that have not attracted the criticisms leveled at *Roe* and *Obergefell*).

ized conduct at issue in cases like *Roe* and *Lawrence*, and conservative mobilization against *Roe* and the LGBTQ rights cases.<sup>82</sup>

The *Carolene Products* framework certainly does not demand such hostility to substantive due process.<sup>83</sup> Instead, *Carolene Products* directs our attention to the background conditions that enable or impede the claimants' ability to participate in our democracy—conditions that may be relevant to both equality and liberty claims. Unlike the business owners in *Lochner*, the claimants in the modern substantive due process cases were facing “prejudice . . . [that] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>84</sup> To understand why, we go back to the social movement claims in which the modern cases are rooted.<sup>85</sup>

### A. Mobilizing Against Subordination

In this Section, we show the origins of protest practices that are today familiar—“speaking out” and “coming out”—to better understand the mobilizations out of which modern substantive due process law grew. The claimants in cases like *Griswold*, *Roe*, *Bowers*, and *Lawrence* were members of groups marginalized in the political process and who asserted liberty- and equality-based claims to engage in certain criminally banned conduct. Criminal bans on conduct contrib-

<sup>82</sup> See *supra* notes 59, 63, and accompanying text; *infra* note 203 and accompanying text.

<sup>83</sup> Indeed, Footnote Four itself approvingly cites to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)—two widely-accepted due process decisions on parental rights—immediately before its discussion of racial minorities and concerns regarding the political process. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

<sup>84</sup> *Id.* at 153 n.4. We show that the substantive due process cases arose out of conditions like those contemplated by *Carolene Products*. In their recent work, Jesse Choper and Stephen Ross integrate modern substantive process cases into the *Carolene Products* framework by allowing claimants to prove analogous circumstances. See Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process*, 20 U. PA. J. CONST. L. 983, 988 (2018). To preserve fidelity to Footnote Four, Choper and Ross argue that those bringing substantive due process claims must demonstrate “animus or prejudice” directed at a group defined by the conduct for which constitutional protection is sought. *Id.* at 1025.

<sup>85</sup> Because the discussion that follows provides a historical perspective on the origins of the substantive due process case law, we identify the claimants in ways that most accurately capture their identification at that time. Drawing on activists' own statements, we refer to “women” in conflicts over the criminalization of abortion and “gays and lesbians” or “homosexuals” in conflicts over the criminalization of same-sex sex. Of course, we recognize that persons other than those who identify as “women” become pregnant and that persons other than those who are “gays and lesbians” engage in same-sex sex, but we aim to capture understandings of gender and sexuality then at issue in the conflicts. At various points throughout this Article, where historical precision may be less critical or present circumstances are at issue, we use terms that recognize a wider range of gender- and sexuality-based experiences and identities.

uted to a wider system of inequality, animating and justifying exclusion across multiple domains. Stigmatization of the banned practices was so severe that it became difficult even publicly to discuss the practices whose criminalization claimants sought to challenge. Facing these conditions, the groups developed forms of protest to contest their criminalization. As we trace in this Section, the turn to courts was part of a strategy to cope with deliberative blockages and legislative lockout rooted in conditions we now recognize as subordination.

Since the Civil War era, a time when women had no right to vote and few juridical rights or interests separate from their husbands', federal and state laws criminalized contraception—as well as the exchange of information about it—as obscene.<sup>86</sup> In this era, states imposed criminal bans on abortion, and pervasive public condemnation drove the widespread practice of abortion underground.<sup>87</sup>

Similarly, far-reaching criminal law and searing public condemnation of homosexuality meant that most gays and lesbians could not publicly identify themselves.<sup>88</sup> The criminal law amplified the stigmatization of prohibited sexual practices and prevented discussion that might lead to reform, even during the decades in which criminal prohibitions were only intermittently enforced.<sup>89</sup>

<sup>86</sup> See e.g., Comstock Act, ch. 258, 17 Stat. 598, 599 (1873) (repealed 1909) (prohibiting any person from selling or distributing in the U.S. mail articles used “for the prevention of conception, or for causing unlawful abortion” or sending “obscene” information concerning these practices).

<sup>87</sup> See JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 171–72, 226, 239 (1978).

<sup>88</sup> See William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1011 (1997) [hereinafter Eskridge, *Law and the Constitution*] (noting that those engaging in “same-sex intimacy . . . were at the mercy of both state and private predators” and arguing that “law contributed to the construction of the *sexual closet* . . . [and the] [l]aw’s penalties pressed homosexuality toward private expression”); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703 (1997) [hereinafter Eskridge, *Privacy Jurisprudence*] (noting that the post-World War II “baby boom confirmed societal subscription to traditional heterosexual roles and . . . [m]any attracted to the same sex retreated to what soon came to be known as the closet, sometimes even marrying a member of the opposite sex”).

<sup>89</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 6 (2002) [hereinafter ESKRIDGE, *EQUALITY PRACTICE*] (finding that even after the “abandonment of antihomosexual witchhunts at both state and national levels, . . . [r]adicals made virtually no progress in petitioning the law to transform or abandon traditional institutions”); Eskridge, *Privacy Jurisprudence*, *supra* note 88, at 798 (“The vicious yet sporadic persecution of the anti-homosexual terror collaborated with the incomplete and inconsistent protection of privacy jurisprudence to make the closet problematic as a rational strategy for gay people.”). Criminal regulation relied on more than sodomy statutes. As Anna Lvovsky documents, a variety of laws, including “disorderly conduct and antisolicitation provisions that empowered policemen to arrest men who so much as sought sexual partners in public,” became key tools in “vice

But by the late 1960s, protesters devised special forms of rights-claiming to combat the stigma associated with discussing abortion and homosexuality. Women organized “speak-out[s]” about abortion, defying expectations of silence—and the criminal law—to discuss with each other and a critical public the compelling reasons why they had decided to end a pregnancy.<sup>90</sup> Speaking out constituted a way to be heard in political debates over abortion that otherwise marginalized women’s voices. In 1968, only six women were federal judges<sup>91</sup> and only twelve women served in Congress.<sup>92</sup> Not only were women barely represented on courts and legislatures, the subject of abortion was so stigmatized it was scarcely discussed in public. As women spoke about their abortions, and so exposed themselves to risk of prosecution, they asserted through these acts of civil disobedience a claim to dignity, in defiance of convention and the criminal law.<sup>93</sup>

In early 1969, a New York legislative committee held hearings on whether to reform the state’s abortion law.<sup>94</sup> The fifteen “expert[s]”

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enforcement” against gays and lesbians. ANNA LVOVSKY, VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL 5 (2021). As William Eskridge describes the status of the “homosexual” in the early 1960s: “He or she risked arrest and possible police brutalization for dancing with someone of the same sex, cross-dressing, . . . writing about homosexuality without disapproval, displaying pictures of two people of the same sex in intimate positions, operating a lesbian or gay bar, or actually having sex with another adult homosexual.” William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy*, *Nomos, and Citizenship*, 1961-81, 25 HOFSTRA L. REV. 817, 819 (1997) [hereinafter Eskridge, *Apartheid of the Closet*]. Arrests on such grounds, Eskridge explains, “meant that the homosexual might have his or her name published in the local newspaper, would probably lose his or her job, and in several states would have to register as a sex offender (assuming conviction).” *Id.* Even if sodomy laws were not enforced in a widespread manner, police did engage in surveillance operations that led to men serving significant time in prison for sodomy convictions well into the 1960s. See LVOVSKY, *supra*, at 196.

<sup>90</sup> See Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1880, 1892 (2010) (describing “public speak-out[s]” beginning in 1969). These efforts escalated in the 1980s. See, e.g., Brief for the *Amici Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* in Support of Appellees, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605); Brief for National Abortion Rights Action League et al. as *Amici Curiae* Supporting Appellees, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495).

<sup>91</sup> *Demography of Article III Judges, 1789-2020*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/gender> (last visited Aug. 14, 2021).

<sup>92</sup> *History of Women in the U.S. Congress*, RUTGERS CTR. FOR AM. WOMEN & POL., <https://cawp.rutgers.edu/history-women-us-congress> (last visited Aug. 14, 2021).

<sup>93</sup> See JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 36-37 (2003) (observing that the speakouts challenged the “prohibition against speaking publicly about sexuality” and noting that many women were unwilling to speak out because of the threat of reprisals from family, loss of jobs, or fear of prosecution for illegal abortion).

<sup>94</sup> Edith Evans Asbury, *Women Break Up Abortion Hearing*, N.Y. TIMES, Feb. 14, 1969, at 42 (describing how some committee members supported amending New York

called to testify included fourteen men and one nun.<sup>95</sup> In response, feminist activists<sup>96</sup>—“[a] group of angry women,” as the *New York Times* described them<sup>97</sup>—disrupted the hearing in an attempt to make their views audible to the legislators.<sup>98</sup> “All right, now let’s hear from some real experts—the women,” one announced.<sup>99</sup> Other activists joined in<sup>100</sup>: “What better experts are there on abortion than women?”<sup>101</sup>

In response to the protest, the legislative committee (composed of eight men) adjourned and resumed in closed session, seemingly unwilling to hear women’s claims that abortion criminalization constituted “class legislation, imposed on women by a male-supremacist society.”<sup>102</sup> One of the senators called the protesters “ladies . . . [who] are mentally disturbed and shouldn’t be allowed to have a baby.”<sup>103</sup> Women seeking to be heard understood their actions as necessary: “The only way these people will listen to us is if we disrupt their meeting.”<sup>104</sup>

Soon, some of the protesters formed activist groups that popularized abortion speak-outs. One feminist leader explained that “we will

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state law “to permit legalized abortion where pregnancy endangered the physical or mental health of the mother, created substantial risk that the child would be grossly malformed or seriously abnormal mentally or physically, or if the pregnancy was the result of rape or incest”).

<sup>95</sup> Brian Barrett & Lewis Grossberger, *Women Invade Abortion Hearing*, *NEWSDAY*, Feb. 14, 1969, at 4.

<sup>96</sup> ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967–1975*, at 141 (1989).

<sup>97</sup> Asbury, *supra* note 94, at 42.

<sup>98</sup> ECHOLS, *supra* note 96, at 141.

<sup>99</sup> Asbury, *supra* note 94, at 42.

<sup>100</sup> *Id.*

<sup>101</sup> Barrett & Grossberger, *supra* note 95, at 4.

<sup>102</sup> Ellen Willis, *The Talk of the Town: Hearing*, *NEW YORKER*, Feb. 22, 1969, at 28 (“The chairman [of the committee], State Senator Norman F. Lent, announced that the purpose of the meeting was not to hear public opinion but, rather, to hear testimony from ‘experts familiar with the psychological and sociological facts.’”). That same month at a meeting in Chicago, Betty Friedan, founder of the National Organization for Women, argued for repeal of laws criminalizing abortion as necessary for women’s “freedom, . . . equality, . . . dignity and personhood,” connecting the case for decriminalization of abortion to women’s political authority: “Women are denigrated in this country, because women are not deciding the conditions of their own society and their own lives. Women are not taken seriously as people. . . . So this is the new name of the game on the question of abortion: that women’s voices are heard.” Betty Friedan, President, Nat’l Org. for Women, *Abortion: A Woman’s Civil Right*, Address Before the First National Conference on Abortion Laws (Feb. 1969), reprinted in LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 38, 39* (2d ed. 2012), [https://documents.law.yale.edu/sites/default/files/beforeroe2nded\\_1.pdf](https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf).

<sup>103</sup> Barrett & Grossberger, *supra* note 95, at 4.

<sup>104</sup> *Id.*; see also Margie Stamberg, *The New Feminism*, *GUARDIAN*, Mar. 22, 1969, at 11.



hold our own hearing, at which women will testify about their abortions.”<sup>105</sup> She recognized the challenges the organizers faced: “About a dozen women agree to speak. Many others refuse because they are afraid of static from employers or families.”<sup>106</sup> At the speak out, held in Greenwich Village’s Washington Square Methodist Church,<sup>107</sup> women bravely discussed their abortions in detail.<sup>108</sup> While some audience members reacted with “empathy,”<sup>109</sup> others labeled the women “[l]esbians.”<sup>110</sup>

The speak-out strategy gained steam as the movement sought to reform and repeal abortion laws around the nation and to pursue its larger goals for transforming family life, of which the campaign against abortion bans was a part.<sup>111</sup> Later in 1969, a middle-aged mother of two urged the Michigan Senate to reform its abortion law by telling her own abortion story.<sup>112</sup> In 1970, a feminist group held a “Speak-out on Abortion” in a Chicago church.<sup>113</sup> Abortion speak-outs spread transnationally.<sup>114</sup> Speak-outs were not limited to abortion but reached other stigmatized subjects that affected women. The New York Radical Feminists, for instance, held a “speak-out” on the subject of rape in 1971.<sup>115</sup> The very form of the speak-out drew on a civil rights tradition, in which Black women had been “speaking out” against interracial rape.<sup>116</sup> As historian Danielle McGuire explains,<sup>117</sup> Black women were “speaking out, decades before the women’s move-

<sup>105</sup> Ellen Willis, *Up from Radicalism: A Feminist Journal*, U.S. MAG., 1969, reprinted in THE ESSENTIAL ELLEN WILLIS 5, 16 (Nona Willis Aronowitz ed., 2014).

<sup>106</sup> *Id.*

<sup>107</sup> See Susan Brownmiller, *Everywoman’s Abortions: ‘The Oppressor Is Man,’* VILLAGE VOICE, Mar. 27, 1969.

<sup>108</sup> *Id.*

<sup>109</sup> Willis, *supra* note 105, at 16.

<sup>110</sup> *Id.* at 17.

<sup>111</sup> See, e.g., Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 61 (Melissa Murray, Kate Shaw & Reva Siegel eds. 2019) (discussing legislative developments).

<sup>112</sup> *Speaking Out on Abortion*, WASH. POST, June 14, 1969, at C1.

<sup>113</sup> *Abortion Topic of ‘Speak-Out,’* CHI. TRIB., Feb. 26, 1970, at 3.

<sup>114</sup> See Reva B. Siegel, *The Constitutionalization of Abortion* (describing abortion speak-outs in France, Germany, Italy, and the United States in the early 1970s), in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1061–62 (Oxford Univ. Press 2012).

<sup>115</sup> ECHOLS, *supra* note 96, at 186, 193.

<sup>116</sup> See ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 87–88 (2013) (“African American women attempted to assert rights to ownership of their own persons in the postemancipation South. They reported assaults to the Freedmen’s Bureau, accused both white and black men of rape, turned to the state to prosecute these men, and defended their own morality in court.”); CRYSTAL N. FEIMSTER, SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING 120 (2009) (discussing how a female Black activist believed that “African Americans would have to force change not through conciliation, but with militant protest

ment,” and “[t]hese testimonies helped bring attention to the issue of sexual violence and often ignited local campaigns for equal justice and civil rights.”<sup>118</sup>

Some activists translated the forms of protest developed in abortion speak-outs into legal strategies challenging abortion restrictions in court.<sup>119</sup> As Florynce Kennedy, a Black feminist lawyer, and her colleague explained, the abortion speak-outs “‘triggered the idea’ of having ‘women testify, as women and as experts, in the federal case to attack the constitutionality of the abortion law’” in New York.<sup>120</sup> Courts provided a venue to amplify women’s voices, making audible claims that legislators failed to take seriously.

Court-based action became another form of speaking out. Women’s depositions about their abortion experiences would be given in public. Indeed, Kennedy attempted to take the depositions at the Washington Square Methodist Church—the same location of the original 1969 speak-out.<sup>121</sup> When the state’s attorneys refused to proceed, contending “that the atmosphere was more akin to a circus than a legal proceeding,” women traveled en masse to the new location: a courthouse conference room.<sup>122</sup> As historian Sherie Randolph describes, “the legal depositions became an open political tribunal and protest rally.”<sup>123</sup>

As the record in New York and Connecticut illustrates, speak-outs shaped the arguments of the first cases seeking constitutional protection for women’s decisions about abortion.<sup>124</sup> While earlier law-

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and, if necessary, violent resistance”); PATRICIA A. SCHECHTER, *IDA B. WELLS-BARNETT AND AMERICAN REFORM, 1880–1930*, at 123–24 (2001).

<sup>117</sup> DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* 30 (2010).

<sup>118</sup> *Id.*

<sup>119</sup> See Sherie M. Randolph, “*Not to Rely Completely on the Courts*”: Florynce “Flo” Kennedy and Black Feminist Leadership in the Reproductive Rights Battle, 1969–1971, 27 *J. WOMEN’S HIST.* 136 (2015) [hereinafter Randolph, *Reproductive Rights Battle*]. For a biography of this pathbreaking leader who was involved in many struggles of the civil rights era, see SHERIE M. RANDOLPH, *FLORYNCE “FLO” KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL* (2015).

<sup>120</sup> Randolph, *Reproductive Rights Battle*, *supra* note 119, at 141 (quoting DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION RAP: TESTIMONY BY WOMEN WHO HAVE SUFFERED THE CONSEQUENCES OF RESTRICTIVE ABORTION LAWS* 4 (1971)).

<sup>121</sup> *Id.* at 140–42.

<sup>122</sup> *Id.* at 142.

<sup>123</sup> *Id.* at 144; *see also id.* at 142 (“Kennedy’s involvement in the campaign to repeal New York’s restrictive abortion laws bridged litigation and movement strategies.”).

<sup>124</sup> See GREENHOUSE & SIEGEL, *supra* note 102, at 127–96 (discussing how speak-outs did not immediately shift legislation on abortion, but pushed “those seeking to overturn . . . state[] abortion laws to the courts, . . . focusing not on abortion as a policy choice but on abortion as a constitutional right”); *see also* Siegel, *supra* note 90, at 1885, 1892 (describing

suits had framed the issue on the medical model, as the right of doctors to perform abortions, the New York complaint framed the issue as a woman's right to abortion.<sup>125</sup> As one of us has written with Linda Greenhouse:

Without case law to cite in support of these equal protection claims—and at a time when only one percent of Article III judges were women—the feminist lawyers in *Abramowicz* invoked actual women as authority. The brief quoted plaintiffs' depositions and testimonies in ways that mirrored women's abortion speak-outs of the day. The brief brought women's voices into the courtroom to show how laws criminalizing abortion inflicted injuries that reflected and enforced inequalities of sex, race, and class.<sup>126</sup>

Women's claims to abortion access were intersectional, seeking relief for poor women and women of color injured by laws criminalizing abortion.<sup>127</sup> Kennedy's work, as Melissa Murray has observed, again provides a leading illustration.<sup>128</sup> Responding both to the racialized history of abortion criminalization in the United States and to masculinist Black Power arguments against abortion, Kennedy focused attention on "Black women who died or suffered from botched abortions and unwanted pregnancies"—condemning those deaths "as a form of genocide."<sup>129</sup> As Cary Franklin has documented, advocates in the early 1970s also aimed to show, in the words of a Legal Aid lawyer challenging Illinois's restrictive abortion law, "that the women who were most hurt by the statute were the poor women of Illinois."<sup>130</sup> Pamphlets distributed by advocates challenging Connecticut's abortion law emphasized that, while some "women 'can afford to travel to London or Puerto Rico for abortions'" or seek services at "private New York hospitals," "poor women . . . cannot afford the prices charged by hospitals in New York . . . nor can they afford a trip out of the country."<sup>131</sup> Women themselves made clear

how filings in the New York and Connecticut cases incorporated women's testimony on the speak-out model).

<sup>125</sup> Siegel, *supra* note 90, at 1885.

<sup>126</sup> See, e.g., Greenhouse & Siegel, *supra* note 111, at 64–65 (citations omitted).

<sup>127</sup> See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2045–47 (2021) (discussing how arguments for abortion legalization "centered the impact of abortion restrictions on marginalized groups, including communities of color"); Siegel, *supra* note 90, at 1889–90 & n.66 (showing that the equal protection argument in briefs challenging abortion laws in different states focused on how the law injured poor women and women of color).

<sup>128</sup> See Murray, *supra* note 127, at 2045.

<sup>129</sup> *Id.*

<sup>130</sup> Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 54 (2018) (citation omitted).

<sup>131</sup> *Id.* at 55.

how laws criminalizing abortion fell unequally on women along lines of race and class.<sup>132</sup>

Around the same time that feminists initiated abortion speak-outs, gays and lesbians engaged in political acts of “coming out.” Coming out was a strategy of collective action designed to combat stigma and shaming that impeded the participation of sexual minorities marginalized in democratic politics. A 1969 article urged gays and lesbians to “open up,” “[s]ay you’re gay at work, at home, church, wherever you go,” and to “[c]ome out from behind a double-life of straight at work and home, but gay at night.”<sup>133</sup> Then, in the historic Stonewall riot, a group of trans women, sex workers, and queer people fought back against the police—countering the shame and silence that so long had allowed their harassment and arrest to go unchallenged.<sup>134</sup> Queer people, in the words of one of the protesters, “have had it with oppression.”<sup>135</sup>

New organizations that formed in Stonewall’s wake advocated “being out.” For example, the Gay Liberation Front held a “Coming Out” dance<sup>136</sup> and organized a series of “out” actions like protesting and picketing.<sup>137</sup> Constituents were urged to take “[p]ride in . . . one’s homosexuality”—in contrast to the shame and stigma that society had long imposed.<sup>138</sup> The organization’s first newsletter, *Come Out!*, declared: “COME OUT FOR FREEDOM! COME OUT NOW! POWER TO THE PEOPLE! GAY POWER TO GAY PEOPLE! COME OUT OF THE CLOSET BEFORE THE DOOR IS NAILED SHUT!”<sup>139</sup>

<sup>132</sup> Franklin shows that “[c]lass-related concerns played a major role in constitutional contestation over birth control and abortion, both inside and outside the Court. Reproductive rights advocates in these years routinely argued that laws restricting access to birth control and abortion discriminated against the poor.” *Id.* at 10 (footnote omitted).

<sup>133</sup> Leo E. Laurence, *Gay Revolution*, VECTOR, Apr. 1969, at 11, 25; see also Simon Hall, *Gay Liberation and the Spirit of '68* (discussing how the gay movement was beginning to embrace “[a] more direct, confrontational style” of gay protest), in REFRAMING 1968: AMERICAN POLITICS, PROTEST AND IDENTITY 227, 227–30 (Martin Halliwell & Nick Witham eds., 2018).

<sup>134</sup> See THE STONEWALL RIOTS: A DOCUMENTARY HISTORY 126–84 (Marc Stein ed., 2019); DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 137–205 (2004).

<sup>135</sup> CARTER, *supra* note 134, at 205.

<sup>136</sup> DONN TEAL, THE GAY MILITANTS 58 (1971).

<sup>137</sup> See *id.* at 61–85 (discussing various “out” actions that were organized by the Gay Liberation Front).

<sup>138</sup> *Id.* at 75.

<sup>139</sup> Front Page, COME OUT! (Nov. 14, 1969), <https://outhistory.org/files/original/42b46f17f4fd7c6d62f105c1489d7b47.pdf> [<https://perma.cc/74HN-Y2WD>].

As in the feminist movement, “coming out” actions gained traction, especially on college campuses around the country.<sup>140</sup> Trans activists also advocated “[c]oming out,” urging others to form a public identity as trans.<sup>141</sup> Pride parades, which originated at this time, brought queer people together to, in the words of pioneering gay activist Frank Kameny, “come out into the open; hold up your head in pride.”<sup>142</sup>

LGBTQ organizations exploded in the early 1970s.<sup>143</sup> Some turned to legal action as itself a mode of coming out. As Michael Boucai has shown in his treatment of same-sex marriage cases in the early 1970s, the lawsuits were not aimed at securing marriage rights for same-sex couples but instead at performing and publicizing gay sexuality at a time of deep closeting and stigma.<sup>144</sup> Marginalized in politics, queer people could pursue court-based action to mobilize the community and to confront the public and the state. Marriage claims forced a straight society and government to see, and respond to, same-sex intimacy.

To be sure, courts were hostile to the claimants. In the Kentucky case, the trial judge sent one of the women in the plaintiff same-sex couple home because she was wearing pants: “She is a woman and she will dress as a woman in this court.”<sup>145</sup> In the Minnesota case, which the U.S. Supreme Court would eventually dismiss “for want of a substantial federal question,”<sup>146</sup> the Minnesota Supreme Court asked not a single question of the same-sex couple’s counsel.<sup>147</sup> One of the justices even turned his chair so that the couple and their lawyer could see only his back as they made their case.<sup>148</sup> But courts could not simply close their doors to the claimants; even as they easily dismissed the claims, they provided a location in which to protest the gender-

<sup>140</sup> See Brett Beemyn, *The Silence Is Broken: A History of the First Lesbian, Gay, and Bisexual College Student Groups*, 12 J. HIST. SEXUALITY 205, 222–23 (2003) (discussing the rise of more public “coming out” actions and organizations on college campuses).

<sup>141</sup> TEAL, *supra* note 136, at 210–11.

<sup>142</sup> Letter from Franklin E. Kameny to Anthony Grey (July 3, 1970), in *GAY IS GOOD: THE LIFE AND LETTERS OF GAY RIGHTS PIONEER FRANKLIN KAMENY* 221, 221 (Michael G. Long ed., 2014).

<sup>143</sup> JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 323 (2d ed. 1988).

<sup>144</sup> See Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMANS. 1, 4–5 (2015) (arguing that early same-sex marriage cases “had much more to do with gay liberation . . . than with gay marriage”).

<sup>145</sup> *Id.* at 48 (quoting Stan MacDonald, *Two Women Tell Court Why They Would Marry*, COURIER-J. (Louisville), Nov. 12, 1970, at A14).

<sup>146</sup> *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

<sup>147</sup> See WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* 16 (2020).

<sup>148</sup> *Id.*

hierarchical and heterosexual understandings of the family that excluded queer people and stigmatized their relationships.

Gays and lesbians were hardly represented in political and legal institutions. In 1970, the United States had no openly lesbian or gay elected officials or federal judges.<sup>149</sup> The murder of pioneering gay activist Harvey Milk demonstrated the potentially tragic consequences of coming out. In 1977, Milk became the first openly gay elected official in California, winning a seat on the San Francisco Board of Supervisors, but was assassinated the following year.<sup>150</sup> Before his death, Milk had connected lesbian and gay political influence to “coming out,” which was necessary to “win our rights” and to “fight the lies, the myths, [and] the distortions.”<sup>151</sup> In a famous speech, he urged “all those gays who did not come out, for whatever reasons, to do so now. To come out to all your family, to come out to all your relatives, to come out to all your friends—the coming out of a nation will smash . . . myths once and for all.”<sup>152</sup>

Yet, criminalization and stigmatization of same-sex sex made coming out especially dangerous and difficult at the time. The act of coming out identified oneself as a presumed criminal, given widespread laws prohibiting sodomy and same-sex sex.<sup>153</sup> And even outside the criminal law, coming out was, as the Supreme Court would

<sup>149</sup> See Julie Compton, *Meet the Lesbian Who Made Political History Years Before Harvey Milk*, NBC NEWS (Apr. 2, 2020, 11:09 AM), <https://www.nbcnews.com/feature/nbc-out/meet-lesbian-who-made-political-history-years-harvey-milk-n1174941> (explaining that the first openly lesbian or gay official was elected in 1974); Eric Lesh, *Making Judicial History in California and the Importance of LGBT Judges*, LAMBDA LEGAL (Dec. 21, 2012), <https://www.lambdalegal.org/blog/making-judicial-history-in-california-and-the-importance-of-lgbt-judges> (noting that the first openly gay judge in the United States was appointed in California in 1979).

<sup>150</sup> Tim Fitzsimons, *Forty Years After His Death, Harvey Milk's Legacy Still Lives On*, NBC NEWS (Nov. 27, 2018, 9:10 AM), <https://www.nbcnews.com/feature/nbc-out/forty-years-after-his-death-harvey-milk-s-legacy-still-n940356>. At the time of Milk's election, the U.S. had five openly gay elected officials—state legislators in Massachusetts and Minnesota and city council members in Ann Arbor, Michigan. See Steve Friess, *The First Openly Gay Person to Win an Election in America Was Not Harvey Milk*, BLOOMBERG (Dec. 11, 2015, 5:00 AM), <https://www.bloomberg.com/news/features/2015-12-11/the-first-openly-gay-person-to-win-an-election-in-america-was-not-harvey-milk>; Marc Stein, *Historical Landmarks and Landscapes of LGBTQ Law*, in *LGBTQ AMERICA: A THEME STUDY OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER HISTORY 19-26 to -27* (Megan E. Springate ed., 2016), <https://www.nps.gov/subjects/lgbtqheritage/upload/lgbtqtheme-law.pdf>.

<sup>151</sup> RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK 224* (1982).

<sup>152</sup> *Id.* at 250.

<sup>153</sup> See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995) (allowing removal of custody of a child from his lesbian mother in favor of the child's grandmother and explaining that the trial court had asserted “that the mother's conduct is ‘illegal,’ and constitutes a felony under the Commonwealth's criminal laws”).

eventually acknowledge, freighted with devastating consequences in the spheres of employment and the family.<sup>154</sup>

“Coming out” became even more urgent in the 1980s as the HIV/AIDS epidemic amplified the stigma and shame around homosexuality. As gay men were dying from a disease that the federal government refused to address, coming out was seen as necessary for survival; as the famous protest slogan announced, “SILENCE = DEATH.”<sup>155</sup> Gays and lesbians, often organized under the banner of ACT UP, staged “die-ins” and other protests, including at the National Institutes of Health, as they pleaded with government scientists to develop and make available drugs to treat HIV.<sup>156</sup> AIDS provoked gay men and their lesbian allies not only to protest their government but to come out to family and friends in ways that changed public understandings of homosexuality. Still, the Supreme Court upheld the constitutionality of criminal sodomy bans in the midst of the HIV/AIDS epidemic, as the government defended the laws in order to stop the “spread [of] communicable diseases or . . . other criminal activity.”<sup>157</sup>

Our attention to the practices of speaking out and coming out, which were innovated by groups facing conditions of overwhelming subordination, helps us to appreciate the mobilizations out of which modern substantive due process decisions grew. The conditions of domination that led women to conceal abortion and LGBTQ people to occupy the closet can take many forms; people of color may pass,<sup>158</sup> and undocumented individuals may attempt to hide their legal status.<sup>159</sup> Given the profound power disparities that characterize the relationship between the majority and the claimants in the modern

<sup>154</sup> See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

<sup>155</sup> See *A Call to Action* (calling attention to the oppression LGBTQ people faced in the United States and the need for action and protest), in *OUT AND OUTRAGED: NON-VIOLENT CIVIL DISOBEDIENCE AT THE U.S. SUPREME COURT* 7–8 (Nancy Alach, Karen Beetle, Laura Booth, Katherine Diaz, Eileen Hansen & Jessica Shubow eds., 1987); DOUGLAS CRIMP & ADAM ROLSTON, *AIDS DEMO GRAPHICS* 14–15 (1990).

<sup>156</sup> See JENNIFER BRIER, *INFECTIOUS IDEAS: U.S. POLITICAL RESPONSES TO THE AIDS CRISIS* 162–66 (2009) (discussing various examples of organizing under the ACT UP banner to put pressure on the U.S. government to develop treatments for HIV).

<sup>157</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting).

<sup>158</sup> See, e.g., Mark Golub, *Plessy as “Passing”*: *Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*, 39 *LAW & SOC’Y REV.* 563, 564 (2005) (focusing on “Plessy’s ability to pass for white (and his publicly staged refusal to do so)”).

<sup>159</sup> See, e.g., Fernanda Santos & Jennifer Medina, *Speak Up or Stay Hidden? Undocumented Immigrants Cautious After Court Ruling*, *N.Y. TIMES* (June 26, 2016), <https://www.nytimes.com/2016/06/27/us/speak-up-or-stay-hidden-undocumented->

substantive due process cases, it is not surprising that they eventually turned to courts. They were, in the terms of *Carolene Products*, facing “prejudice” that “curtail[ed] the operation of . . . political processes.”<sup>160</sup> From this perspective, we see that judges in modern substantive due process cases were being asked to intervene to repair deliberative blockages.

### B. Reasoning About Subordination

The claimants in the modern substantive due process cases resisted forms of domination inflicted on them through the criminal law by appeal to the Constitution’s guarantees of liberty *and* equality. In this Section, we show how prominent equality-based reasoning was in these due process cases, both in the arguments asserted by the claimants and in the decisions rendered by the Court. 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.<sup>161</sup> 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.

*Griswold* was decided in 1965, well before the Court was prepared to credit the equal protection claims of women or of LGBTQ people. Women made equality claims at the time of *Griswold*, undeterred by the absence of women on the Court, the gender-biased views of the male justices, or the Supreme Court’s failure to recognize a single sex discrimination decision under the Equal Protection Clause during the first century of the Fourteenth Amendment’s life.<sup>162</sup> In the

immigrants-cautious-after-court-ruling.html (“When you have a lot at stake . . . it takes a lot of guts to go out and say, ‘I’m undocumented.’”).

<sup>160</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>161</sup> Jane Schacter has grouped *Casey* and *Lawrence* with equal protection rulings like *United States v. Virginia* and *Romer v. Evans* under the umbrella of “horizontal democracy” cases. See Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 734 (2004) [hereinafter Schacter, *Democratic Aspirations*]. These cases, according to Schacter, are “attentive[] to the subtle ways in which democracy can be compromised by dynamics of subordination and social exclusion” and so seek to further a “democratic culture . . . structured to permit all citizens to participate meaningfully in the broad enterprise of collective self-government.” *Id.* Schacter distinguishes “horizontal democracy” from “vertical democracy,” which involves major components of the political process, such as voting. See Jane S. Schacter, *Romer v. Evans and Democracy’s Domain*, 50 VAND. L. REV. 361, 399 (1997) [hereinafter Schacter, *Democracy’s Domain*].

<sup>162</sup> See, e.g., Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 194 (2020) (“Justice Blackmun’s [*LaFleur*] notes . . . repeatedly refer[] to pregnant teachers as ‘girl[s]’ and concurred in the employer’s view of pregnant women as



face of these barriers, women asserted that the decision whether to use contraception and thus to control the timing of childbearing was vital to securing women's equal participation in the community.<sup>163</sup> As the ACLU's brief argued, "the ability to regulate child-bearing has been a significant factor in the emancipation of married women. In this respect, effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions."<sup>164</sup>

Even after the Court's due process decision in *Griswold*, constitutional litigants, whether offensively challenging criminal statutes or defending against criminal punishment, appealed to *Griswold*'s authority, but also made a variety of arguments that equality commitments required protecting the conduct at issue. In challenging abortion restrictions, women continued to assert that the right to decide whether to continue a pregnancy is a vital condition of equal citizenship.<sup>165</sup> Indeed, women advanced these arguments before the Court recognized sex discrimination claims under the Equal Protection

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'unattractive.' . . . [*Geduldig* and *Gilbert* demonstrate] 'the effects of underrepresentation on "legislative" insensitivity. Imagine what the presence of even one woman Justice would have meant to the Court's conferences.'" (quoting Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 n.304 (1977)).

<sup>163</sup> See, e.g., Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J.F. 324, 325–27 (2015) (recounting the claim of Yale Law School student Louise Trubek in *Trubek v. Ullman* that she thought access to contraception would allow her to coordinate her professional career and her marital life).

<sup>164</sup> Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae at 16, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496). In *Reed v. Reed*, 404 U.S. 71 (1971), six years after *Griswold*, the Supreme Court struck down a law under the Equal Protection Clause on the ground that it discriminated on the basis of sex, the first decision of its kind since the ratification of the Fourteenth Amendment in 1868.

<sup>165</sup> See, e.g., Greenhouse & Siegel, *supra* note 111, at 56 ("Laws criminalizing abortion denied women the authority to shape their lives . . . . The repeal of criminal abortion laws would endow women with that practical and symbolic capacity . . . ."); Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition at 25, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) ("The Georgia and Texas statutes restricting the availability of abortions deny women the equal protection of the laws guaranteed to them by the Fourteenth Amendment."). Shortly after *Roe* was decided, Laurence Tribe wrote about the case in *Harvard Law Review*, recognizing women's equality interests in the abortion decision. See Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 41 (1973) (arguing that denying women decisionmaking authority over abortion "would operate to the serious detriment of women as a class, given the multitude of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society"); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1353–59 (2d ed. 1988).

Clause or explained how this case law applied to matters involving pregnancy.<sup>166</sup>

So too did gays and lesbians challenge the criminalization of sodomy by appealing to both liberty and equality. While the litigants in *Bowers* relied extensively on the authority of *Griswold*, the brief of the Lesbian Rights Project (now the National Center for Lesbian Rights) asserted: “Criminalization of gay [and] lesbian sexual activities excuses and encourages already pervasive civil discriminations against these groups of persons. . . . Criminalization translates readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian persons in this culture, society and legal system.”<sup>167</sup> Again, in *Lawrence*, LGBTQ groups showed how sodomy laws hamper equal participation in all aspects of life:

Labeling gay people “criminal” facilitates the imposition of a variety of legal disabilities . . . . The criminality of same-sex sodomy in Texas has been invoked by those seeking to close the public library to gay groups, deny permanent residence to gay immigrants, prohibit gay men and lesbians from fostering or adopting children, ban gay and lesbian student groups on college campuses, oppose protection of gay people from discrimination in employment, and deny gay and lesbian Texans protection under proposed hate crime laws. . . . In the course of determining custody, for instance, some courts have relied on sodomy laws to conclude that gay men and lesbians are unfit parents simply because they can be presumed to be criminals. Similarly, sodomy laws have been used in court as a basis for denying public employment to gay people. . . . Just this week, a key Virginia legislator suggested that a gay person’s violations of a sodomy law could disqualify her from being a state judge.<sup>168</sup>

The connection the claimants drew between liberty and equality was so pervasive in the briefs and on the ground that over time equality reasoning made its way into the Court’s own understanding

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<sup>166</sup> See Siegel, *Sex Equality Arguments*, *supra* note 78, at 823–34 (reviewing expressions of the equality argument for reproductive rights in cases and commentary over the decades). The Court initially restricted application of equal protection law to pregnancy. See *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974) (limiting claims). In the ensuing decades, the Court began to include pregnancy under heightened equal protection scrutiny. See generally Siegel, *supra* note 162 (showing how the Court’s approach evolved and came to include pregnancy under heightened equal protection scrutiny).

<sup>167</sup> Brief Amicus Curiae for Lesbian Rights Project, Women’s Legal Defense Fund, Equal Rights Advocates, Inc., Women’s Law Project, and National Women’s Law Center at 23–24, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)

<sup>168</sup> Amicus Brief of Human Rights Campaign et al. in Support of Petitioners at 12–13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

of the due process rights at stake. The Court's due process analysis in *Casey*<sup>169</sup> and *Lawrence*<sup>170</sup> relied on different forms of equality reasoning at critical junctures. In other due process decisions, equality furnished an independent secondary ground for decision.<sup>171</sup> Indeed, some modern due process cases likely would have been decided squarely on the Equal Protection Clause had Justice Kennedy not been the swing vote.<sup>172</sup>

When the Court rejected calls to overrule *Roe* in *Casey*, it reaffirmed due process protections for women's decisions concerning abortion in terms that repeatedly recognized the sex equality values at stake, reasoning that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>173</sup> In describing the liberty interest protected, *Casey* explained that the Constitution prohibits the state from criminalizing abortion because the state cannot insist "upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."<sup>174</sup> More specifically, the only provision of the Pennsylvania law that the Court struck down in *Casey* implicated important equality interests, as the spousal

<sup>169</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); see also Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 *YALE L.J.* 1428, 1441 (2016).

<sup>170</sup> *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); *id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

<sup>171</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) ("[A]gainst a long history of disapproval[,] . . . den[ying] . . . same-sex couples . . . the right to marry works a grave and continuing harm. The imposition of this disability . . . serves to disrespect and subordinate them. . . . [T]he Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.").

<sup>172</sup> The concurring justices in *Casey*, as well as the dissenting justices in *Gonzales v. Carhart*, would have invoked equal protection. *Casey*, 505 U.S. at 912 (Stevens, J., concurring in part and dissenting in part); *id.* at 928 (Blackmun, J., concurring in part and dissenting in part); *Gonzales v. Carhart*, 550 U.S. 124, 170–72 (2007) (Ginsburg, J., dissenting) (explaining that a woman's right to terminate a pregnancy protects "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature" and citing equal protection decisions).

<sup>173</sup> *Casey*, 505 U.S. at 856.

<sup>174</sup> *Id.* at 852.

notification requirement reflected an outmoded approach to marriage that subordinated women to men.<sup>175</sup>

A similar dynamic is evident in the Court's decisions on same-sex intimacy. When the Court reversed its decision in *Bowers*<sup>176</sup> and struck down a law criminalizing same-sex sex in *Lawrence*,<sup>177</sup> it emphasized the ways in which the vindication of liberty can promote the equal standing of a historically marginalized group:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.<sup>178</sup>

The justices also often expressly accepted equal protection claims in cases largely viewed as substantive due process precedents. In her concurring opinion in *Lawrence*, Justice O'Connor agreed that the Texas "homosexual conduct" law was unconstitutional but on equal protection, rather than due process, grounds.<sup>179</sup> As she stated, "The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."<sup>180</sup> Justice O'Connor elaborated on the relationship between the criminalization of conduct and the disempowered group engaged in the conduct: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."<sup>181</sup>

In *Obergefell*, the Court rested its ruling primarily on due process grounds but also found an equal protection violation, reasoning that "[r]ights implicit in liberty and rights secured by equal protection . . . in some instances each may be instructive as to the meaning and reach

<sup>175</sup> See *id.* at 897–98 (explaining that the Court has rejected outdated views of marriage previously and invalidating notification provision).

<sup>176</sup> 478 U.S. 186 (1986).

<sup>177</sup> 539 U.S. 558, 562, 578 (2003).

<sup>178</sup> *Id.* at 575.

<sup>179</sup> *Id.* at 579, 583 (O'Connor, J., concurring).

<sup>180</sup> *Id.* at 581.

<sup>181</sup> *Id.* at 583.

of the other.”<sup>182</sup> The stigma and subordination experienced by gays and lesbians was relevant to both the equal protection and due process interests at stake:

Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.<sup>183</sup>

The justices who joined the Court’s opinion in *Obergefell* seemed more likely to reason in terms of equal protection. In fact, recent commentary from William Eskridge suggests that Justice Ginsburg was instrumental in the equal protection reasoning in *Obergefell*.<sup>184</sup>

In modern substantive due process cases, the Court was confronted with the freedom claims of those living under conditions of severe structural inequality. We can see that these conditions mattered to the Court in recognizing the claims to liberty. By showing that in responding to these claims, the Court relied on equality reasoning in its liberty analysis and that many members of the Court were prepared to recognize both liberty *and* equality claims, we see the ways in which the modern substantive due process cases implicate the kinds of concerns that justify judicial intervention in the *Carolene Products* framework. We also see the problem with drawing a strict clausal distinction—between due process and equal protection—in elaborating a theory of judicial review.<sup>185</sup>

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<sup>182</sup> *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

<sup>183</sup> *Id.* at 675.

<sup>184</sup> See William N. Eskridge, Jr. & Christopher R. Riano, *Marriage Equality and the Sex Discrimination Argument for LGBTQ+ Rights: The Legacy of Ruth Bader Ginsburg*, BALKINIZATION (Jan. 22, 2021), <https://balkin.blogspot.com/2021/01/marriage-equality-and-sex.html> (explaining that Justice Ginsburg wrote “substantial[]” portions of the equal protection sections of the *Obergefell* opinion and provided Justice Kennedy with them).

<sup>185</sup> Resisting an Ely-esque distinction between equal protection and due process, Schacter has read cases like *Lawrence* as “us[ing] the broad Fourteenth Amendment norms of equality and liberty as principles of democracy, not as principles that limit democracy.” See Schacter, *Democratic Aspirations*, *supra* note 161, at 753. Similarly, Eskridge has rejected Ely’s distinction between equal protection and due process—viewing both as involving substantive judgments—and has argued that *Lawrence* (a due process decision) and *Romer* (an equal protection decision) are both examples of judicial review that enhances democracy. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1291–92 (2005).

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Looking back at the evolution of substantive due process law, we can see that liberals have an answer to the *Lochner* objection that neither Justice Kennedy nor any other member of the Court has ever voiced.<sup>186</sup> The claimants in modern substantive due process cases turned to the courts in part because they faced forms of subordination and stigma that silenced them and impeded their democratic participation. Whatever is to be said about the conditions facing the claimants in *Lochner*,<sup>187</sup> claimants in modern substantive due process cases were facing the kind of deliberative blockages at issue in equal protection cases like *Brown*—cases understood to be paradigmatic exercises of judicial review within the *Carolene Products* framework. In the modern substantive due process cases, as in *Brown*, courts devoted “more exacting judicial scrutiny” to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”<sup>188</sup>—intervening in ways that promoted the democratic integration of persons in groups long marginalized in the political process.<sup>189</sup>

<sup>186</sup> Kennedy never responded to “*Lochner* objections” raised by dissenting justices in response to his substantive due process opinions. He may well have supported *Lochner*. Cf. *United States v. Lopez*, 514 U.S. 549, 572–74 (1995) (Kennedy, J., concurring) (surveying with approval Commerce Clause decisions from the pre-New Deal and New Deal eras permitting Congress broad authority to regulate commercial activity).

<sup>187</sup> When the *Lochner* Court struck down the wage-and-hour law protecting employees, it invalidated laws that sought to empower vulnerable individuals and unsettle dominant power relations in the workplace. See *Lochner v. New York*, 198 U.S. 45, 64 (1905); see also Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962 (2018). By contrast, in our modern substantive due process cases, the Court has invalidated laws that harmed vulnerable individuals and entrenched dominant power relations. Cf. James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147, 175 (1999) (“[W]hat was wrong with *Lochner* is unrelated to *Roe* and *Casey* because, far from evincing status quo neutrality, the cases are justified on the basis of an anti-caste principle of equality that is critical of the status quo.”); Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1383 (1991) (“What is at stake in *Roe*, for example, is not ‘privacy’ or ‘liberty,’ but the subordination of women as a class through the imposition of laws that have the effect of ‘turning women’s reproductive capacities into something for the use and control of others.’” (quoting Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31 (1992))).

<sup>188</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>189</sup> While our focus is on the commonality of values guiding intervention in the equal protection and substantive due process cases, we also observe the intersecting membership of the groups asserting claims in these cases. See, e.g., Murray, *supra* note 127, at 2044 (“Black women were especially vociferous in their desire for, and defense of, broader access to contraception and abortion.”); *supra* text accompanying notes 116–29. And, as others have shown, feminist and LGBTQ mobilization around this time drew on strategies, including legal claims, built by the civil rights movement. See, e.g., SERENA MAYERI,

One way of understanding the histories we have recounted is that the modern substantive due process cases at issue are “really” equality cases—and so within the core mandate of judicial oversight. While we understand these cases as implicating equality values, they are no less about the Constitution’s liberty guarantee—a point we think is worth emphasizing at this juncture for the following reasons. First, as Ely himself understood, the legitimacy of judicial oversight is not defined textually, by constitutional clause. Indeed, what strikes us so plainly is that courts enforce the Due Process Clause in all manner of cases not involving long-stigmatized sex<sup>190</sup> without raising the kinds of concerns we see attaching to the cases here discussed.<sup>191</sup> Second, we are concerned that the belief—shared by the left and the right, inside and outside the academy—that the “sex” cases are not legitimate exercises of constitutional law reflects the stigmatization of the underlying conduct and the claimants’ underrepresentation in places of authority, including the legal academy.<sup>192</sup> Ely may have been oblivious to the

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REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 41 (2011) (“By 1970, feminists had embraced a legal strategy based on an analogy between race and sex discrimination.”); Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 319 (2009) (analogizing between race and the civil rights movement and LGBTQ mobilization in the mid-twentieth century).

<sup>190</sup> Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973) (both implicating sex separated from procreation), with *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (all involving nonprocreative and same-sex sexual relations).

<sup>191</sup> See *infra* notes 305–19 and accompanying text.

<sup>192</sup> When Ely was teaching at Harvard in 1980, there were only two women on the tenured faculty—the first of whose tenure was significantly delayed—and no out gay members. See HARVARD LAW SCHOOL CATALOG, 1980–1981, at 9–11 (1981) (faculty list containing two tenured women); William H. Honan, *Elisabeth Owens, 79, Pioneer at Harvard Law*, N.Y. TIMES, Nov. 20, 1998, at B11 (“Tenure did not come easily for Professor Owens. Former students and faculty colleagues alike say she was denied it for years because of her sex.”). When Ely published *The Wages of Crying Wolf* in 1973, he was a member of a Yale faculty that included only one tenured woman—even as women in the student body were mobilizing against Connecticut’s criminal abortion statute and publishing scholarship on the federal Equal Rights Amendment. See BULLETIN OF YALE UNIVERSITY 7–9 (Aug. 1972) (faculty list containing one tenured woman); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 480 (2020). Ely failed to notice women’s absence on the faculty and viewed the social structure as an expression of women’s choices. Declaring that “they’re not even a minority!”, Ely concluded that, “if women don’t protect themselves from sex discrimination in the future, it won’t be because they can’t. It will rather be because for one reason or another . . . they don’t choose to.” ELY, *supra* note 22, at 164, 169. In discussing whether laws banning abortion were constitutionally suspect, Ely minimized the fact that “very few women sit in our legislatures” by declaring that “no fetuses sit in our legislatures”—without pausing to explain how all-male legislatures were constitutionally adequate to represent either. Ely, *supra* note 62, at 933. While Ely suggested that “homosexuals” may have plausible arguments for judicial review, he spoke of them in

effects of underrepresentation on legal reason, but at least one of his contemporaries raised the question.<sup>193</sup>

It may be tempting to think of the stigma confronting the claimants in the substantive due process cases as a remnant of the past, but as the contempt heaped on the rights at stake and those who exercise them illustrates, such stigma still persists and continues to shape the way we debate these questions.<sup>194</sup> If the stigma did not exist, there would be more openly LGBTQ elected officials.<sup>195</sup> If the stigma did not exist, researchers would not consistently find that LGBTQ people experience disparities in mental and physical health attributable to stressors stemming from prejudice, and young LGBTQ people would not have an alarmingly high rate of suicide attempts.<sup>196</sup> And if the stigma did not exist, we would talk about abortion rights as implicating many more people than we do. Nearly one in four women of childbearing age will have an abortion by age 45,<sup>197</sup> including mothers and Catholic women, who are just as likely as others to end a pregnancy.<sup>198</sup> Countless Americans make life decisions in the security that they could have an abortion if faced with a pregnancy, even if they

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terms that even in 1980 would have seemed insensitive: “The reason homosexuals don’t say ‘Hold it, Lester, I’m gay, and my wrist’s not the least bit limp,’ is that because of the prejudices of many of the rest of us there would be serious social costs involved in such an admission.” ELY, *supra* note 22, at 163. Ely’s attack on substantive due process implicated the situation of both women and gays and lesbians, which would have been clear to him at the time. See Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 98–100 (1980) (appendix describing law review commentary on “[c]onstitutional [p]rivacy and [s]exual [f]reedom” and discussing litigation involving contraception and sodomy). Ely’s dismissiveness suggests that he was not seriously open to the question of whether the liberty claims of women and gays and lesbians were proper subjects for judicial review.

<sup>193</sup> See Siegel, *supra* note 162 (quoting Professor Ken Karst’s *Foreword* explaining that the Supreme Court’s inability to recognize sex discrimination in pregnancy discrimination decisions of the 1970s amounted to “textbook examples of the effects of underrepresentation” because of the absence of women on the Court (quoting Karst, *supra* note 162)).

<sup>194</sup> See *supra* note 1.

<sup>195</sup> See *Out for America 2021: A Census of Out LGBTQ Elected Officials Nationwide*, LGBTQ VICTORY INSTITUTE (2021), <https://victoryinstitute.org/out-for-america-2021> [<https://perma.cc/PS2P-JC4Y>] (finding that, even though LGBTQ people represent 5.6% of the U.S. adult population, only .19% of elected officials nationwide are LGBTQ).

<sup>196</sup> See, e.g., Ilan H. Meyer, Stephen T. Russell, Phillip L. Hammack, David M. Frost & Bianca D.M. Wilson, *Minority Stress, Distress, and Suicide Attempts in Three Cohorts of Sexual Minority Adults: A U.S. Probability Sample*, 16 PLOS ONE, Mar. 3, 2021, at 1–2, 12.

<sup>197</sup> See Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1907 (2017) (finding that “an estimated 23.7% of women aged 15 to 44 years in 2014 will have an abortion by age 45”).

<sup>198</sup> Patrick T. Brown, *Catholics are Just as Likely to Get an Abortion as Other U.S. Women. Why?*, AM.: THE JESUIT REV. (Jan. 24, 2018), <https://www.americamagazine.org/>



never exercise the right. Yet almost never do public officials talk about the abortion right as if it concerned *their* family members, friends, and neighbors. This silence in our politics is the continuing legacy of criminal bans that states are now reenacting and which most expect the Supreme Court to authorize.

## II

### JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY

Rather than represent “a statement of settled principle,” *Carolene Products* Footnote Four has been a source of endless academic debate.<sup>199</sup> More than forty years after the Court’s decision in *Carolene Products*, John Hart Ely developed Footnote Four into a theory of representation-reinforcing judicial review. Over the course of decades, scholars have offered competing accounts of the *Carolene Products* framework.<sup>200</sup> But Ely’s approach has had the most significant and lasting influence on understandings of the role of courts in a democracy.<sup>201</sup>

In Ely’s account, judicial enforcement of some rights—speech, voting, and equal protection—is democracy-reinforcing,<sup>202</sup> while judicial enforcement of other rights—classically, substantive due process—falls outside the framework and is seen as an imposition on democratic self-governance—a concern that many progressive supporters of the protected rights uneasily share.<sup>203</sup> Because Ely saw the

politics-society/2018/01/24/catholics-are-just-likely-get-abortion-other-us-women-why [https://perma.cc/N748-3KAM].

<sup>199</sup> See Lusky, *supra* note 24, at 1093, 1104 (1982) (“Justice Stone’s law clerk when the *Carolene Products* case was decided” recounting genesis of footnote in ways that suggest that it is not best read “as a statement of settled principle”).

<sup>200</sup> See, e.g., Fiss, *supra* note 24; Cover, *supra* note 24; Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

<sup>201</sup> See, e.g., Michael C. Dorf, *The Coherency of Democracy and Distrust*, 114 YALE L.J. 1237 (2005); Eskridge, *supra* note 185; Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004) [hereinafter Schacter, *Ely and the Idea of Democracy*]; Choper & Ross, *supra* note 84; Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011) [hereinafter Schacter, *Ely at the Altar*]. More recently, Ely’s work has attracted attention outside the United States. See Rosalind Dixon, *Democracy and Dysfunction: Towards a Responsive Theory of Judicial Review* 6, 25–30, 39–40 (2021) (unpublished manuscript) (on file with the *New York University Law Review*) (discussing non-U.S. approaches to judicial review and commentary on Ely’s framework).

<sup>202</sup> See ELY, *supra* note 22, at 106 (“Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.”); *id.* at 117 (“[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.”).

<sup>203</sup> See, e.g., Segall & Sprigman, *supra* note 45 (“[W]e are both pro-choice, but it is also plain to us that the Constitution does not speak to the issue of abortion, at least not with the

right to vote as “central to a right of participation in the democratic process,”<sup>204</sup> he supported the Warren Court decisions restricting legislative sovereignty in order to enforce the principle of “one person, one vote.”<sup>205</sup> In cases involving matters integral to democratic participation, he understood courts as having a legitimate and democracy-reinforcing role. But in matters he did not understand as implicating democratic participation, he saw judicial intervention as an illegitimate intrusion into the domain of politics. From his first writing about *Roe*, Ely was clear that abortion, and substantive due process more generally, fell on the illegitimate side of the line.<sup>206</sup> In this way, Ely’s theory has undermined the legitimacy not only of the modern substantive due process cases but also of the authority of courts, given the centrality of the due process cases to understandings of judicial review. In this Part, we consider the assumptions about the role of courts in a constitutional democracy embedded in the ways that Ely built out the *Carolene Products* framework into a theory of representation-reinforcing judicial review.

We offer a corrective in two key respects. First, Ely recognizes that democracy requires more than the formal right to vote and sees a role for judicial review in securing equal participation in politics—what he describes as judicial enforcement of “rights of political access” and “rights of various minorities not to be treated by a set of rules different from that which the majority has prescribed for itself.”<sup>207</sup> Here is the big idea of *Democracy and Distrust*—that judicial review (in cases like *Reynolds v. Sims*<sup>208</sup> and *Brown v. Board of Education*<sup>209</sup>) can restrict legislative sovereignty and repair the infrastructure of representation and so be “democracy-reinforcing.” Yet, in our view, Ely conceives of the spheres that matter to democratic participation too narrowly. We expand the frame beyond the public sphere and, drawing on our analysis of modern substantive due process claimants and cases in Part I, show how the regulation of family and intimate life matters to democratic participation. Just as family may determine political standing, so too may other spheres of life;

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clarity that, according to the framers’ understanding of judicial review, would be necessary to support the decisions in *Roe* . . . and . . . *Casey*.”); Moyn, *supra* note 45 (“[L]iberals have taken a long time to give up on black-robed power to enact their preferences. This was most notable in decisions around the right to privacy and so-called ‘substantive due process.’ . . . [This included] cases ranging from *Roe* . . . to *Obergefell* . . .”).

<sup>204</sup> ELY, *supra* note 22, at 116.

<sup>205</sup> See *id.* at 74, 120–24.

<sup>206</sup> See Ely, *supra* note 62.

<sup>207</sup> JOHN HART ELY, ON CONSTITUTIONAL GROUND 7 (1996).

<sup>208</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>209</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

simply put, access to the ballot may be necessary but not sufficient to ensure that individuals have an equal opportunity to participate.

Second, despite the fact that Ely earned renown for showing that judicial review could be democracy reinforcing, *Democracy and Distrust* is otherwise built on the prevailing assumption that judicial review is countermajoritarian and therefore antidemocratic.<sup>210</sup> While this assumption was then and remains widespread in the legal academy, so too is the understanding that democracy requires more than majoritarianism. Democracy requires majoritarian procedures in which all adults have an equal right and an equal opportunity to participate and in which, we argue, participants recognize the deliberations and decision procedures as open to their participation. Courts can restrict legislative sovereignty in ways that are democracy-promoting or democracy-inhibiting. As we show, courts can function in ways that are democracy-promoting even when judges do not restrict legislative sovereignty by awarding judicially enforceable participation rights. In conditions of genuine political domination, *all* branches fail in offering redress or access. Groups that are marginalized in democratic politics may find that courts provide *alternative fora* with different institutional features that strengthen the groups' ability to communicate in democratic politics; courts are differently open and feature different forms of reason giving and argument.

As we write in 2021, we affirm—and reaffirm—the importance of democratic self-determination. Our experience with the 2020 election brings painfully into view the importance of practices and procedures that allow those on the losing end of political decisionmaking to nonetheless identify with the decisions of the majority. We draw on our analysis in Part I to show that judicial review is one such practice.

#### A. Spheres of Democratic Participation

Ely famously built out *Carolene Products* Footnote Four into an account of how judges could enforce (certain) constitutional rights in representation-reinforcing ways.<sup>211</sup> He depicted judicially enforced constitutional rights as democracy-reinforcing in cases where govern-

<sup>210</sup> See Schacter, *Ely and the Idea of Democracy*, *supra* note 201, at 738 (explaining that Ely “largely embraced the normative equation of majoritarianism with democracy”).

<sup>211</sup> See ELY, *supra* note 22, at 75–77 (highlighting the centrality of “participation” and arguing that the decision “ask[s] us to focus not on whether this or that substantive value is unusually important or fundamental, but . . . on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted”); see also *id.* at 102–03 (“The approach to constitutional adjudication recommended here is akin to what might be called an ‘antitrust’ as opposed to a ‘regulatory’ orientation to economic affairs—rather than dictate substantive results it

ment was obstructing channels of political change by suppressing citizen voices (e.g., speech, voting)<sup>212</sup> and in cases where the majority hinders the political participation of minorities (as with equal protection and race discrimination).<sup>213</sup> In contrast to these participation-promoting rights, Ely, a renowned critic of *Roe*,<sup>214</sup> argued that judicial enforcement of substantive understandings of due process was an illegitimate, political interference with democratic processes.<sup>215</sup> (Ely presented his theory as process-perfecting—rather than enforcing a judge’s substantive views as the due process cases did; but Paul Brest greeted the book’s publication with a review emphasizing the “[s]ubstance of [p]rocess” and showing how Ely’s supposedly neutral framework enforced views about women and gays and lesbians.<sup>216</sup>)

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intervenes only when the ‘market,’ in our case the political market, is systemically malfunctioning.”).

<sup>212</sup> See *id.* at 105–34.

<sup>213</sup> See *id.* at 135–79.

<sup>214</sup> See *id.* at 248 n.52 (identifying *Roe* as the “most obvious example” of a “value-imposition methodology”). Ely argues that “[a]ttempts to defend” *Roe* on due-process grounds “foundered, for the obvious reason that the genuine source of trouble in the abortion context is not that the issue is peculiarly unsuited to democratic decision but rather that democratic decision quite consistently generates value choices” about which many people disagree. *Id.*; see also Ely, *supra* note 62, at 935–36 (describing *Roe* as authorizing “far more stringent protection” and claiming that the decision cannot be justified by reference to “the unusual political impotence of the group judicially protected”).

<sup>215</sup> See ELY, *supra* note 22, at 18–21.

<sup>216</sup> See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 138–39 (1981); see also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”); Jack M. Balkin, *The Footnote*, 83 NW. L. REV. 275, 303 (1989) (observing that “one needs a substantive vision—of what kinds of discrimination are invidious, of what kinds of groups are deserving of judicial protection, of the substantive content of fairness, of the rights of due process—in order to determine whether the democratic process has in fact misfired”); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 785 (1991) (“Yet Ely’s hostility to fundamental rights theories of constitutional interpretation requires that he devise a *non-substantive* theory of prejudice; an unadorned condemnation of race or gender discrimination is unacceptable to Ely because it would require a substantive value judgment . . . . Ely’s ‘procedural’ theory of prejudice is riven with substantive judgments.” (footnote omitted)). Nonetheless, scholars continued to elaborate what might be viewed as process-based theories. For example, Cass Sunstein aimed to “develop interpretive principles from the goal of assuring the successful operation of a deliberative democracy”—an approach that James Fleming described “as a process-perfecting theory of securing deliberative democracy.” CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 133 (1993); Fleming, *Shrinking Constitutional Theory*, *supra* note 80, at 2888. (Rather than reject constitutional protection for abortion, Sunstein justified such protection on equal protection, not due process, grounds. See SUNSTEIN, *supra*, at 272–85.)

In our view, Ely conceives of democratic participation in unduly narrow terms. As Jane Schacter argues, Ely failed to appreciate how “social marginalization and stigmatization are *democratic* problems because these dynamics undermine disadvantaged groups in both explicitly political processes (like voting and legislative representation) and in the more diffuse social and cultural processes that inform, frame, and shape politics.”<sup>217</sup> Ely’s repudiation of substantive due process as illegitimately substantive rather than participation-reinforcing and process-perfecting vividly illustrates Ely’s inadequate grasp of the conditions of democratic participation.<sup>218</sup> The conditions of intimate and family life, the domains at issue in the substantive due process cases we examined in Part I, shape the individual’s practical ability to participate in political life and other spheres *and* shape the individual’s status in the community.<sup>219</sup>

Just as Ely understands decisions protecting rights to voting, speech, and school integration as integral to membership in a democracy, so too are decisions about intimate and family relations.<sup>220</sup> While many political theorists have devoted relatively scant attention to the family,<sup>221</sup> Susan Moller Okin famously showed how “the traditional, gender-structured family” produces gender-based inequality in politics and in the workplace.<sup>222</sup> On Okin’s account, the structure of family and other major institutions limits the ability of those responsible for social reproduction to participate equally in the society.<sup>223</sup>

Laws regulating the conditions of reproduction, sex, and family formation shape individuals’ ability to participate in politics because the nation has long organized the family sphere as a gateway to politics. For most of the nation’s history, a head of household was

<sup>217</sup> Schacter, *Ely and the Idea of Democracy*, *supra* note 201, at 746–47.

<sup>218</sup> In fact, Schacter turns to *Lawrence* and *Casey* to illustrate the paths where Ely’s insights could have led him but did not. *See id.* at 748–49.

<sup>219</sup> *See, e.g.*, Schacter, *Democratic Aspirations*, *supra* note 161, at 734 (discussing how “democracy can be compromised by dynamics of subordination and social exclusion”).

<sup>220</sup> Friendly critics of Ely have expanded the scope of realms relevant to democratic participation in ways that move beyond voting, speech, and equal protection to substantive due process. For example, in articulating his theory of “constitutional constructivism,” James Fleming built on Ely’s work but rejected its “process-perfecting” ends for “Constitution-perfecting” aims, emphasizing both “equal political liberties” necessary for deliberative democracy and “substantive liberties” that the author posits “are preconditions for deliberative autonomy.” Fleming, *supra* note 80, at 21–23, 29.

<sup>221</sup> *See, e.g.*, Véronique Munoz-Dardé, *Rawls, Justice in the Family and Justice of the Family*, 48 PHIL. Q. 335, 337 (1998) (explaining that in Rawls’s major works, “the family is both treated as a distinct and fundamental institution, and never discussed in any detail”).

<sup>222</sup> *See* SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 8 (1989).

<sup>223</sup> *See id.* at 113–14; *see also* Michael Ferguson, *Susan Moller Okin*, *Justice, Gender, and the Family*, in *THE OXFORD HANDBOOK OF CLASSICS IN CONTEMPORARY POLITICAL THEORY* (Jacob T. Levy ed., 2019).

assumed to vote for—and virtually represent—its dependent members.<sup>224</sup> Indeed, as one of us has shown, women’s suffrage claims leading up to the Nineteenth Amendment constituted claims for “democratic reconstruction of the family.”<sup>225</sup> Suffragists called for “changes in the law structuring the family, so that all adult members of the household could be recognized and participate in democratic life as equals.”<sup>226</sup>

Family continues to structure political participation in indirect and often quite direct ways. Caregivers are less likely to acquire the material and social capital to build a career in politics. Caregivers face not only resource-based challenges but also role-based limitations. Who is seen as worthy of leading the nation? What forms of infrastructure are essential for all family members to be equal participants in democratic life? Today, women seeking office still face negative stereotypes in which pregnancy is seen as inconsistent with the roles of political candidate and elected official.<sup>227</sup> Just as “workplace norms have long rested on law-backed understandings about the ideal family roles supporting workplace participation,”<sup>228</sup> so too have political norms rested on assumptions about ideal family roles. It is for this reason that it is only recently that persons openly in same-sex relationships have been appointed to serve in the Cabinet or elected to public office outside of a few select cities.<sup>229</sup> Criminalization of same-sex sexual relations and exclusion from marriage and parenthood degrade the status of LGBTQ people.

Women and LGBTQ people—the claimants in the modern substantive due process cases—drew connections between laws organizing sex and family, on one hand, and democratic participation, on the other. In the 1970 Strike for Equality, marking a half-century

<sup>224</sup> See Siegel, *supra* note 192, at 457–60 (“[W]omen, whether married or single, were represented by men.”).

<sup>225</sup> *Id.* at 452.

<sup>226</sup> *Id.*

<sup>227</sup> See, e.g., Siegel, *supra* note 162, at 188 (“The social science research shows that pregnant women are negatively stereotyped, viewed as less competent and committed, and are less likely to be hired. This negative sex-role stereotyping extends to politics.”); *id.* (explaining that in a 2018 Pew Research Center survey, a majority of respondents indicated that a woman should have children *before* seeking high political office, while almost one in five indicated that a woman seeking high political office should not have children at all).

<sup>228</sup> *Id.* at 216.

<sup>229</sup> See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 446–47 (Conn. 2008) (observing the lack of state and federal elected officials who are openly gay to support the proposition that “gay persons face unique challenges to their political and social integration”); David Shepardson, *Pete Buttigieg Becomes First Openly Gay Cabinet Secretary Confirmed by U.S. Senate*, REUTERS (Feb. 2, 2021), <https://www.reuters.com/article/us-usa-biden-transportation/pete-buttigieg-becomes-first-openly-gay-cabinet-secretary-confirmed-by-u-s-senate-idUSKBN2A22IQ>.

since the Nineteenth Amendment guaranteed women's suffrage, the women's "movement argued that equal votes do not secure equal citizenship; equal citizenship required transformation of the conditions in which women bear and rear children."<sup>230</sup> Accordingly, in addition to advocating ratification of the federal Equal Rights Amendment, the movement demanded equal opportunity in education and employment, access to abortion, and free comprehensive childcare.<sup>231</sup>

Harvey Milk's statements documented in Part I make clear that laws criminalizing and stigmatizing same-sex sex severely restricted LGBTQ mobilization and political action.<sup>232</sup> As Bruce Ackerman observed in 1985, pressures on gays and lesbians to "pass" as straight disrupted democratic processes in ways that were germane to *Carolene Products* Footnote Four. Because a gay person could hide her sexual orientation and "thereby avoid much of the public opprobrium attached to her minority status,"<sup>233</sup> this meant that gays and lesbians "confront[ed] an organizational problem," having to persuade others to reveal their sexual orientation "to the larger public and to bear the private costs this public declaration may involve."<sup>234</sup> Groups that Ely and others singled out as candidates for more stringent judicial scrutiny, Ackerman pointed out, "do not have to convince their [members] to 'come out of the closet' before they can engage in effective political activity."<sup>235</sup>

For those who risked coming out in the early 1970s, the criminalization of sodomy constrained their ability to even form advocacy organizations for the purpose of petitioning their government or challenging their treatment in court.<sup>236</sup> Criminalization also justified the removal of gays and lesbians from educational institutions and workplaces and prevented legislative enactment of affirmative protections against discrimination in education, employment, housing, and public

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<sup>230</sup> See Siegel, *supra* note 192, at 475.

<sup>231</sup> *Id.*; see also Elizabeth Sepper, *Sex Segregation, Economic Opportunity, and Roberts v. U.S. Jaycees*, 28 WM. & MARY BILL RTS. J. 489, 491 (2019) (explaining how "social movement actors, . . . understood public accommodations equality as congruent with and central to women's economic opportunity and career prospects").

<sup>232</sup> See also Ackerman, *supra* note 200.

<sup>233</sup> *Id.* at 729.

<sup>234</sup> *Id.* at 731.

<sup>235</sup> *Id.*

<sup>236</sup> Cf. *In re Thom*, 42 A.D.2d 353, 353 (N.Y. App. Div. 1973) (reversing previous decision that had rejected "application for approval as a legal assistance corporation," after receiving guidance from the state high court, but nonetheless refusing to approve organization's goal of "promot[ing] legal education among homosexuals" and thus illustrating bureaucratic obstacles facing organizers).

accommodations.<sup>237</sup> It is hard to imagine that one could be openly gay and hold elected office under such conditions. Indeed, it is not surprising that until 1983, Congress had no openly gay members.<sup>238</sup>

After decades of mobilization, the Court came to recognize how laws criminalizing reproduction and same-sex relations shaped the capacity of individuals to participate in the public sphere. As the Court recognized in *Casey*, “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>239</sup> In *Lawrence*, the Court observed that, “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>240</sup>

Responding to LGBTQ claims contesting the gender-differentiated, heterosexual, biological, marital family,<sup>241</sup> modern substantive due process decisions recognize the relationship between participation in lawful family relations and standing in the community.<sup>242</sup> In *Lawrence*, Justice O’Connor acknowledged that a criminal ban on “homosexual conduct” “‘sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”<sup>243</sup> In *Obergefell*, the Court emphasized the role of marriage as “a building block of our national community,”<sup>244</sup> before concluding: “It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”<sup>245</sup> Decriminalization of same-sex sex and access to marriage for same-sex couples can be seen as critical to the ability of LGBTQ people to participate as equals in the public sphere.

<sup>237</sup> See Eskridge, *Apartheid of the Closet*, *supra* note 89 (discussing legal environment in 1961 and subsequent changes).

<sup>238</sup> See Damien Cave, *Gerry Studds Dies at 69; First Openly Gay Congressman*, N.Y. TIMES (Oct. 15, 2006), <https://www.nytimes.com/2006/10/15/us/15studds.html>.

<sup>239</sup> 505 U.S. 833, 856 (1992).

<sup>240</sup> 539 U.S. 558, 575 (2003).

<sup>241</sup> See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (2014).

<sup>242</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (marriage); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Turner v. Safley*, 482 U.S. 78 (1987) (marriage); *Stanley v. Illinois*, 405 U.S. 645 (1972) (parent-child relationship); *Lehr v. Robertson*, 463 U.S. 248 (1983) (parent-child relationship).

<sup>243</sup> 539 U.S. at 582–83 (O’Connor, J., concurring in the judgment).

<sup>244</sup> 576 U.S. at 669.

<sup>245</sup> *Id.* at 670.



### B. *Democracy-Promoting Judicial Review*

In supporting judicial enforcement of rights that protect political participation and guarantee equal protection, Ely recognized a representation-reinforcing role for courts to ensure the proper functioning of majoritarian decisionmaking. In the absence of these participatory rights being implicated, Ely tended to view judicial review as countermajoritarian and antidemocratic. In this Section, we raise questions about the presumptions, so widely shared in the academy, that judicial review is antidemocratic because it is countermajoritarian.<sup>246</sup> As we do, we bring in alternative roles courts might play in promoting democratic ends.

First, we counter Ely's lingering tendency to equate democracy with majoritarianism.<sup>247</sup> A democracy is more than a majoritarian decision procedure, and not every restriction on legislative sovereignty is antidemocratic. As the first paragraph of *Carolene Products* Footnote Four reminds us,<sup>248</sup> our system is a constitutional democracy whose members have participation rights that determine whether majoritarian decisionmaking is respect-worthy. Whatever might be said of the founders' system of governance, today the guarantees of the First, Fourth, Fifth, Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments help secure conditions that make majoritarian decisionmaking democratic. Still more is needed as a practical matter. A system of majority-rule needs arrangements and practices that provide individuals an opportunity to participate in the decisions of the polity, which in turn provides them grounds for identification with the process, even when they do not emerge as winners in political conflict.<sup>249</sup>

Second, once we appreciate that democracy entails more than majoritarianism, we can move beyond Ely's default assumption that judicial review is antidemocratic because it restricts legislative sovereignty, and consider how courts interact with the democratic process.

<sup>246</sup> Of course, anxiety about the "[c]ounter-[m]ajoritarian [d]ifficulty" predates Ely and is traceable to Alexander Bickel. See BICKEL, *supra* note 33, at 16. On constitutional scholarship's preoccupation with the "countermajoritarian difficulty," see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 155 (2002).

<sup>247</sup> See Schacter, *Ely and the Idea of Democracy*, *supra* note 201, at 738.

<sup>248</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .").

<sup>249</sup> The participation rights and social structures necessary to legitimate majoritarianism as democratic remain hotly contested, and we do not commit to any particular configuration in this account, other than to observe that the procedures of majoritarianism itself are not sufficient to legitimate a system as democratic.

Courts may expand or obstruct participation rights; and, as we show, judicial review can generate democratic engagement in ways that judges do not wholly control. Drawing on our analysis of modern substantive due process cases in Part I, we show that social mobilization around courts can unfold as an integral part of the legislative process and in ways that open channels of communication across institutional domains, even when claimants do not prevail. This bottom-up, participatory account of adjudication attends to one, and only one, of the institutional sites in which members of the polity struggle to shape the stakes of democratic politics.

### 1. *Beyond Majoritarianism: Judicially Enforceable Participation Rights*

Democracy is not simply a mechanism for aggregating citizens' preferences.<sup>250</sup> Many democratic theories highlight the inadequacy of equating democracy with voting.<sup>251</sup> As Amy Gutmann has explained: "Majoritarian decision making may be a presumptive means of democratic rule, but it cannot be a sufficient democratic standard."<sup>252</sup> As we have observed, in constitutional democracies courts have come to play a role in enforcing participation rights that can help make majoritarianism democratically legitimate. Robert Post observes that if democracy were simply majority rule or some other set of procedures,

<sup>250</sup> See, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1097 (1981); Ronald Dworkin, *The Forum of Principle*, 56 *N.Y.U. L. REV.* 469, 518 (1981); Thomas Nagel, *The Supreme Court and Political Philosophy*, 56 *N.Y.U. L. REV.* 519, 520 (1981).

<sup>251</sup> See, e.g., Gerry Mackie, *Deliberation and Voting Entwined* (explaining that the theory of "[d]eliberative democracy arose in opposition to a reigning aggregative conception of democracy in political science, solely about voting"), in *THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY* 218 (Andre Bächtiger et al., eds., 2018); Tom Christiano, *Democracy*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE* (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/archives/fall2018/entries/democracy> (explaining that in contrast to a conception of democracy as "mere formal equality of one-person one-vote," "more robust" conceptions "includ[e] equality in the processes of deliberation and coalition building").

<sup>252</sup> Amy Gutmann, *Democracy* ("Other standards—concerning who rules, by what procedures, over what matters, within what limits, and with what degree of deliberation—have from the beginning been implicated in the ideal of democracy as rule by the people . . ."), in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 521, 521 (Goodin et al. eds., 2d ed. 2007). In legal scholarship on theories of judicial review, scholars have also emphasized the importance of meaningful deliberation and voice. See Schacter, *Democracy's Domain*, *supra* note 161, at 394 (arguing that a democracy must "ensure the fair and equal allocation of opportunities to participate in and shape collective decisions"); James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211, 218 (1993) (focusing on "securing the preconditions for *deliberative democracy*, to enable citizens to apply their capacity for a conception of justice to deliberating about . . . justice . . . and . . . securing the preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about how to live").

it would “lose[] its grounding in the principle of self-determination.”<sup>253</sup>

More is required for majoritarianism to function as self-government, in which the individual can identify with decisions of the majority as *self*-rule. Post focuses on the communicative arrangements and practices that enable individuals to relate to majoritarian decisionmaking as self-rule. Our First Amendment tradition endeavors to ensure that individuals can have a voice in the formation of majority will and can retain the ongoing possibility of dissent.<sup>254</sup> Whether those communicative arrangements “will actually establish the value of autonomous self-determination for both majority and minority is a complex and contingent question, dependent on specific historical circumstances.”<sup>255</sup>

Why does the minority submit to the rule of the majority? As present circumstances in the United States painfully show us, we cannot simply assume that all members of the polity will submit to the majority’s determination. Our democracy’s integrity requires institutional arrangements that support the participation of all members, regardless of their affiliation with the ultimate decision reached. For the law to have democratic authority, citizens must, regardless of whether they prevail in political contests, identify with the society’s collective decisionmaking processes. What gives a democracy’s decisionmaking authority in the eyes of its members is a historically contingent matter. At different junctures in American history, groups have been alienated from the decisions of the whole, and the law’s legitimacy in their eyes has suffered accordingly. From this standpoint, we can see how racial and class stratification can threaten democracy, as can many ways of organizing the family.

Once we understand that citizens’ attachments to a democratic order must be cultivated and not merely assumed, we are in a different position to understand the ways that judicial review can strengthen—and not merely threaten—constitutional democracy.<sup>256</sup>

<sup>253</sup> Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV* 163, 172 (John W. Chapman & Ian Shapiro eds., 1993).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* Even Jeremy Waldron, a renowned critic of judicial review, bases his case against judicial review on the assumption of a society in which all members are secured “political equality” and whose members are “committed to the idea of individual and minority rights.” See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1401 (2006).

<sup>256</sup> See Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577, 578 (1993) (explaining that “constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review” in light of the “countermajoritarian difficulty”); Post, *supra* note 253, at 176–77 (“It is therefore vastly

Whether majority-rule commands the minority's respect as democratic self-government depends on the conditions in which the minority participates in the decisions of the majority. Judicial decisions can obstruct or enable participation; paradoxically, they can simultaneously provoke alienation and aid the fight for democratic integration. Indeed, as litigation in the wake of the 2020 presidential election demonstrates, courts can serve as arenas in which citizens can voice their estrangement from the majoritarian process.<sup>257</sup> Courts may respond in an effort to confirm the fairness of the majoritarian process, as they did with the 2020 election, or they may amplify marginalized voices and secure basic participation rights, as they did in the modern substantive due process cases. Inevitably, court decisions aid some and estrange others, but participants are versed in contesting such decisions—often by shifting fora.<sup>258</sup> Of course, it is only in the rare case that judges employ judicial review to expand participation rights; more often, the institutional bias of courts is to the contrary.<sup>259</sup>

## 2. *The Democracy-Promoting Role of Courts: A Bottom-Up Perspective*

Critically, if a democracy's legitimacy in the eyes of its members depends on their confidence in its openness to participation, then the claimant's role in judicial review matters, as well as the judge's. From this vantage point, the practice of judicial review matters in both top-down and bottom-up ways. As we have already seen, courts exercising judicial review can enforce participation rights that help make majoritarianism democratically legitimate. Courts can, under certain historical circumstances, disentrench settled understandings and

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oversimplified to brand judicial review as antidemocratic because of the notorious 'counter-majoritarian difficulty.'" (citation omitted)). Some scholars have criticized Ely for failing to see judicial review as part of our democratic system. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225–27 (1980).

<sup>257</sup> See Rosalind S. Helderan & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 2:12 PM), [https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html); see also King v. Whitmer, No. 20-13134, 2021 WL 3771875 (E.D. Mich. Aug. 25, 2021).

<sup>258</sup> See, e.g., Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1757–63 (2017) (discussing path to same-sex marriage and religious liberty objections to its recognition).

<sup>259</sup> For arguments that judicial review functions today as it did in the era of *Lochner*, to protect elites and prevent redistribution, see, e.g., ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT'S 50-YEAR BATTLE FOR A MORE UNJUST AMERICA* (2020) (describing how the modern Court legitimated rising economic inequality since the Nixon era); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (arguing that the move towards judicial empowerment allows political and economic elites to insulate policymaking from democratic politics).

arrangements and enforce rights that integrate subordinated groups into democratic politics. But analyzed from the standpoint of the claimants, courts can play other important democracy-promoting roles.

Courts, along with representative government, are important sites of communicative exchange, as each of us has demonstrated in our work on judicial review from a social mobilization perspective.<sup>260</sup> Precisely because courts have different institutional features than legislatures, they may offer distinctive opportunities for groups mobilizing in democratic politics. Courts are differently open and employ different forms of factfinding, argument, and reasoning; they are also obliged to offer the public reasons for their decisions.<sup>261</sup> Because of these institutionally distinctive features of courts, they can amplify voices marginalized in politics and make audible claims that lawmakers and the public fail to consider.

Whereas Ely's representation-reinforcement theory of judicial review tends to focus on court decisions that repair deliberative blockages, a social mobilization perspective shows how the turn to courts can have important consequences for democratic participation even when the movement's appeal to courts does not result in judicial victories. While we often talk about judicial review as if it shuts down politics, in fact litigants' appeal to courts usually occurs concurrently as an integral part of politics.<sup>262</sup> As the histories of struggles for reproductive justice and LGBTQ rights illustrate, the claimants in substan-

<sup>260</sup> See, e.g., Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 879–80 (2013); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1748–49 (2017).

<sup>261</sup> On the openness of courts, see, e.g., Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 688 (2012) (discussing the availability of litigation in comparison to other tactics); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 648 (2009) (explaining that courts “are open as of right and can force more economically or politically powerful parties to the bargaining table”). On forms of argument and reason giving, see, for example, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (referring to the “requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978) (explaining that courts operate “within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments”). Examining federal litigation over same-sex marriage, Kenji Yoshino has shown how courts provided a venue in which factual questions were thoroughly examined and subjected to rigorous scrutiny, and this court-based action in turn shaped public understandings and political debates. See KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* (2015).

<sup>262</sup> A vast literature on legal mobilization and cause lawyering illustrates this. See, e.g., MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009).

tive due process cases were challenging unjust social structures, and claims asserted in one institutional arena reverberated across others. Contesting stigma in court could help shift norms in legislative and administrative contexts. By challenging what counts as conduct subject to criminalization, claimants also altered understandings of impermissible discrimination. As the LGBTQ movement demonstrates, developments in court can spur rights-protective developments in legislatures.<sup>263</sup>

The turn to courts, even in the absence of a successful decision, can place new questions onto the political agenda and can inject new voices and claims into the community's deliberations.<sup>264</sup> Even when courts reject the claims of subordinated groups, judicial decisions may open opportunities in other institutional arenas and constructively shape conflict in those arenas.<sup>265</sup> Courts may intervene in a variety of ways, some of which may amplify a position without fully vindicating the position the claimants are advocating. This nudging role is consistent with what William Eskridge calls "[e]quality [p]ractice."<sup>266</sup>

In the end, success in securing rights depends on transforming the majority's understanding of its own norms. Over the long run, these practices of norm contestation are critical to emancipation and social transformation.<sup>267</sup> As disempowered voices become audible and entrenched meanings are dislodged, courts may begin to respond to newly emergent views of majorities, who have come to appreciate the justice claims of the disempowered.<sup>268</sup>

Movements routinely pursue change in multiple institutional arenas at the same time.<sup>269</sup> Both courts and legislatures may be hostile. At times, courts may prove more responsive than majoritarian

<sup>263</sup> See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 *LAW & SOC'Y REV.* 151, 152 (2009).

<sup>264</sup> See, e.g., NeJaime, *supra* note 39; Siegel, *supra* note 260 at 1746–51. Litigation can amplify the voices of the disempowered, much as petitioning once did. On petitioning, see Maggie Blackhawk, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538, 1547 (2018).

<sup>265</sup> See generally NeJaime, *supra* note 39.

<sup>266</sup> ESKRIDGE, *EQUALITY PRACTICE*, *supra* note 89, at 48–50 (citing *Baker v. State*, 744 A.2d 864 (Vt. 1999), as a leading example).

<sup>267</sup> This is consistent with constitutive approaches to law elaborated in legal mobilization scholarship. See Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being So Positive . . .)*, 21 *LAW & SOC. INQUIRY* 457, 480 (1996) (“In the constitutive framework, law is not just discrete commands imposed on society from an exclusive domain above, but it instead is manifest as a pluralistic mosaic of conventions and knowledges which serve as both resources and constraints for practical action throughout society.”).

<sup>268</sup> See, e.g., Siegel, *supra* note 260, at 1746–51.

<sup>269</sup> See, e.g., Cummings & NeJaime, *supra* note 38, at 1329.

bodies.<sup>270</sup> Divergent groups advocating for the decriminalization of abortion in the 1960s produced overwhelming popular support for decriminalization—even among Catholics.<sup>271</sup> But despite rising public support, legislative reform stalled after 1970, as the Catholic Church began to organize powerful countermobilization.<sup>272</sup> As Corinna Barrett Lain explains, “a Supreme Court ruling may just *look* counter-majoritarian because the base line against which it is judged—the ostensibly majoritarian stance of the legislative and executive branches—is not majoritarian after all. Sometimes in a representative democracy, the representative branches *aren’t*.”<sup>273</sup>

Courts can articulate and enforce rights in ways that reshape politics.<sup>274</sup> For example, decriminalizing same-sex sex opened space for LGBTQ people to organize and mobilize with less fear of punitive repercussions. A decision like *Lawrence* also alters the baseline from which debates over LGBTQ people proceed. For example, rejecting the understanding of LGBTQ people as sexual outlaws makes inclusion in institutions of marriage and parenthood more plausible. Ultimately, constitutional adjudication can structure the deliberations of representative government, as the relationship between judicial decisions and civil rights legislation suggests.<sup>275</sup>

Looking at courts with attention to social mobilization shows democratic functions of judicial review that Ely, with his focus on

<sup>270</sup> See, e.g., Siegel, *supra* note 38, at 1333–34. In building on Ely’s theory of representation-reinforcing judicial review in a non-American and comparative analysis, Rosalind Dixon identifies “legislative inertia” as an important context in which judicial intervention may promote democracy. See Dixon, *supra* note 201, at 2, 71. She draws specifically on the LGBTQ context, explaining how legislatures have failed to act even in light of rising support for same-sex relationship recognition. Courts, in many countries, have played a role in helping to overcome this legislative inertia. See *id.* at 71–73.

<sup>271</sup> Greenhouse & Siegel, *supra* note 111, at 61–62, 71 (citing popular opinion data from the time).

<sup>272</sup> See *id.* at 61–62 (describing the lack of legislative success after 1970 and concluding that the “shutdown of legislative reform in the face of overwhelming popular support illustrates the ability of a mobilized minority, committed to a single issue and institutionally funded and organized, to thwart reforms that have broad popular support”); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 *Geo. L.J.* 113, 141 (2012) (showing how “the state legislative stance on abortion in the early 1970s was more a testament to the power of an intensely committed right-to-life lobby than a reflection of majority will”).

<sup>273</sup> Lain, *supra* note 272, at 116. Some scholars have persuasively challenged Ely’s assumption that the political system is necessarily democratic. See, e.g., Ackerman, *supra* note 200, at 718–19; Tribe, *supra* note 72, at 65.

<sup>274</sup> In building out an account of how courts can promote “democratic responsiveness” that draws on but challenges Ely’s theory, Dixon focuses on the ways in which judicial decisions can invite and shape legislative deliberation. See Dixon, *supra* note 201, at 8, 60–61, 119.

<sup>275</sup> See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 *J. AM. HIST.* 81, 82 (1994) (citing *Brown* as being “indirectly responsible for the transformative civil rights legislation of the mid-1960s”).

judges, fails to see. Yet, our account also views courts as less powerful than Ely supposes.

Court decisions do not always or even generally settle conflict and emancipate subordinated groups. Rather, they may provoke or escalate conflict and in this way enable political integration of subordinated groups.<sup>276</sup> Instead of shutting down politics, as Ely and many on the left imagine, judicial interventions shape and reshape political struggles.<sup>277</sup> As the movements for reproductive justice and LGBTQ rights demonstrate, if groups are effective in changing meaning and/or law, they are bound to elicit countermobilization designed to protect the status quo (“backlash”).<sup>278</sup> This movement-counter movement dynamic disciplines and hones the conditions under which groups can assert rights with the prospect of making themselves heard.<sup>279</sup>

Institutional arrangements that motivate engagement without settling conflict in categorical ways are especially important for preventing alienation and sustaining allegiance under conditions of severe polarization, as obtain today.<sup>280</sup> An architecture of decision-making that includes multiple points of contestation allows democratic conflict to continue and change shape over time.<sup>281</sup>

In observing that social mobilization around courts can play an integral part in democratic politics, we do not focus on courts only. Courts are not the primary vehicle of social change, but at various

<sup>276</sup> See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 403 (2007) (“No court, including the Supreme Court, has the capacity to rule a controversial issue ‘off-limits to politics.’ As Jon Stewart ironically reports in his discussion of *Roe*, ‘[t]he Court rules that . . . right to privacy protects a woman’s decision to have an abortion . . . ending all debate on this once-controversial issue.’” (citing JON STEWART, BEN KARLIN & DAVID JAVERBAUM, *AMERICA (THE BOOK): A CITIZEN’S GUIDE TO DEMOCRACY IN ACTION* 90 (2004))).

<sup>277</sup> See, e.g., Post & Siegel, *supra* note 276, at 399; Siegel, *supra* note 12, at 316, 319–20.

<sup>278</sup> See NeJaime, *supra* note 260, at 901; Siegel, *supra* note 38, at 1364.

<sup>279</sup> See NeJaime, *supra* note 260, at 895–96; Siegel, *supra* note 38, at 1364.

<sup>280</sup> See, e.g., Siegel, *supra* note 260, at 1757–58; *id.* at 1758 (“Citizens understand they are subject to the authority of decisionmakers whom they must persuade yet whose authority they also know how to contest. The need to persuade and the ability to contest each play a part in sustaining engagement.”).

<sup>281</sup> See, e.g., *id.* at 1757–58; NeJaime, *supra* note 39; Post & Siegel, *supra* note 276, at 374–75. These virtues of multiple decisionmakers have been observed in the law of Europe and are commonly noted in American scholarship on federalism. See, e.g., Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 326–28 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1567 (2012); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010); Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, *JUS POLITICUM*, Jan. 2017, at 209, 213; Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014).



points they offer arenas in which wrongs can be made audible to the society. The American constitutional order has a plurality of norm articulators—it is what one might call a heterarchical,<sup>282</sup> pluralist, or jurisdictionally redundant<sup>283</sup> constitutional order. Socially marginalized groups endeavor to make themselves heard in many institutions.<sup>284</sup> Courts serve as one important venue in which individuals alienated from majoritarian politics can voice their estrangement.

Courts provide one of many arenas of contestation.<sup>285</sup> We can observe the disentrenching and dialogic role of courts<sup>286</sup> without expecting courts to be a leading institution of rights enforcement. In fact, we expect representative bodies to play a central role, not only in collective self-governance, but in enforcing the Constitution. With courts as one site in a broader scene of conflict, a minority can contest and transform the majority's self-conception and hence the minority's own social position. We have seen struggles of this kind in this century with respect to rights for same-sex couples, and today we are still—once again—in the midst of such struggles in matters of race.

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In sum, we reject the view that judicial review is definitionally antidemocratic because it restricts legislative sovereignty. As numerous scholars attest, democracy requires more than majoritarian procedures. It requires majoritarianism under certain background conditions. Democracy requires majoritarian procedures in which all adults have an equal right and an equal opportunity to participate, and in which participants recognize the deliberations and decision procedures as open to their participation. We recognize that the background conditions that can make majoritarianism democratic are highly disputed—including access to the ballot and the fundamental fairness of our representative democracy as well as the power of language, citizenship, family, poverty, and carceral status to restrict participation.

It follows that not every exercise of judicial review and not every restriction on legislative sovereignty is antidemocratic. A court can invalidate a duly enacted law and enfranchise an excluded group, or enhance the participation rights of a marginalized group *and* increase

<sup>282</sup> Halberstam, *supra* note 281.

<sup>283</sup> Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 649 (1981).

<sup>284</sup> See Cummings & NeJaime, *supra* note 38, at 1329.

<sup>285</sup> See, e.g., Friedman, *supra* note 256, at 583; NeJaime, *supra* note 260; Post & Siegel, *supra* note 276.

<sup>286</sup> See, e.g., Friedman, *supra* note 256, at 581, 583.

the democratic character of the polity, as it did in *Brown* and might have done in *Minor v. Happersett*<sup>287</sup> and *Bowers v. Hardwick*.<sup>288</sup> In this way, courts can enforce the background conditions that enhance the democratic legitimacy of majoritarianism.

But judicial review does not need to be used top down, as a restriction on legislative sovereignty by awarding judicially enforceable participation rights to enhance the democratic legitimacy of a polity. Courts provide alternative fora with different institutional features that are important to groups mobilizing to participate in democratic politics. The availability of judicial fora helps groups marginalized in politics communicate and create meanings that can alter their position in politics. For this dynamic to succeed, courts do not have to be more responsive to marginalized groups than legislative branches. They only have to provide an additional arena with different opportunities for participation.

That said, judicial review, even if not definitionally antidemocratic, certainly can be used in antidemocratic ways. Indeed, that concern about the antidemocratic exercise of judicial review is a provocation for court reform—a topic we address in the Conclusion.

#### CONCLUSION

This Article responds to the *Lochner* objection so often repeated by conservative and liberal critics of the modern substantive due process cases and never answered by the decisions' defenders. We answer this objection by distinguishing *Lochner*. The modern substantive due process cases differ from *Lochner* in the simple sense that they do not involve "ordinary commercial transactions." But they differ from *Lochner* in the deeper sense that the claimants in the cases faced conditions of stigma, denigration, and inequality that impeded their democratic participation. They faced "prejudice . . . [that] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"<sup>289</sup>—such that the turn to courts can be justified within the *Carolene Products* framework. From this standpoint, the substantive due process cases can be understood as exercises of democracy-promoting review even though they are not understood on these terms by Ely and many other liberal exponents of his theory. The history we recount in this Article demonstrates the problem of conflating democracy and majoritarianism, and the mis-

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<sup>287</sup> 88 U.S. (21 Wall.) 162 (1875).

<sup>288</sup> 478 U.S. 186 (1986).

<sup>289</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

take of assuming that judicial review is intrinsically hostile to democracy because it restricts legislative sovereignty.

Under certain circumstances, judicial review can promote democracy. Addressing Ely's account, which remains central, invites us to reconsider, and possibly to reconceive, the role that courts might play in democracy-promoting judicial review in ways that incorporate scholarly and political understandings of the intervening decades. The observations we offer here amount to an invitation to others to join that project, and offer their own accounts of democracy-promoting and democracy-inhibiting judicial review.<sup>290</sup>

Our reconsideration of Ely and judicial review concerns more than the modern substantive due process cases. For example, our account invites consideration of the democracy-promoting (or democracy-inhibiting) dynamics of litigation challenging the criminalization of immigration law,<sup>291</sup> court financing schemes that deprive fines-and-fees debtors of the ability to drive<sup>292</sup> or vote,<sup>293</sup> or school financing schemes that limit children's ability to learn to read and write.<sup>294</sup>

As importantly, our reconsideration of Ely and judicial review speaks to current debates over court reform. As we observed at the outset, several leading proponents of court reform follow Ely in criticizing judicial review as antidemocratic, symbolized by the modern substantive due process cases.<sup>295</sup> As Samuel Moyn argues, pointing to *Roe* and *Obergefell*, "Even though the right turned to judicial fiat far more frequently, liberals have taken a long time to give up on black-robed power to enact their preferences. This was most notable in decisions around the right to privacy and so-called 'substantive due process.'"<sup>296</sup>

<sup>290</sup> See *supra* note 41 and accompanying text.

<sup>291</sup> See, e.g., Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82, 82 (2017) (examining "the so-called crimmigration system, in which the immigration enforcement system is integrated with the day-to-day operations of the criminal justice system" (citation omitted)); Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281 (2010).

<sup>292</sup> See, e.g., *Thomas v. Haslam*, 329 F. Supp. 3d 475 (M.D. Tenn. 2018), *vacated as moot sub nom. Thomas v. Lee*, 776 F. App'x 910 (6th Cir. 2019); William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585 (2020).

<sup>293</sup> See, e.g., *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir.), *rev'd en banc*, 975 F.3d 1016 (11th Cir. 2020); Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019).

<sup>294</sup> See, e.g., *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020).

<sup>295</sup> See *supra* notes 44–45.

<sup>296</sup> Moyn, *supra* note 45. See also Samuel Moyn, *Stop Worrying About Kavanaugh, Liberals. Start Winning the Political Argument*, WASH. POST (Aug. 8, 2018) (identifying *Roe*

Angered by judicial decisions hostile to progressive causes and the controversial ways in which a six-to-three conservative majority was built on the Supreme Court, many on the left are proposing and debating a variety of court reforms—what Ryan Doerfler and Moyn term “personnel reforms,” such as court packing, and “disempowering reforms,” such as jurisdiction stripping.<sup>297</sup> Reviving conservative proposals against judicial review made in an earlier era,<sup>298</sup> today’s proponents of “disempowering reforms” aim to diminish judicial power in favor of majoritarian decisionmaking in politics.<sup>299</sup> Proposals range from insulating particular pieces of legislation from judicial review by statute to stripping courts of jurisdiction over contentious issues, or even over all federal legislation.<sup>300</sup> Proponents of these proposals defend them on democratic grounds. Reminiscent of Ely, they equate democracy with majoritarian politics and view judicial review as antidemocratic because it runs counter to majority rule.<sup>301</sup>

This Article does not address the particulars of court reform proposals, but it does address the grounds on which we might debate and assess such proposals. Any approach to court reform should rest on a basic understanding of the history and practice of judicial review in our constitutional democracy.

We support court reform. Yet the case for court reform cannot be made by objecting to judicial review merely because it restricts legislative sovereignty, or by pointing to the modern substantive due process

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and *Obergefell* as the primary examples of the problematic “liberal turn to the courts as an alternative to the more recalcitrant body politic”); Samuel Moyn, *The Court Is Not Your Friend*, *DISSENT* (Winter 2020) (“Feminists abroad made greater strides than ever occurred in the United States without generalized recourse to judges, while there is no telling what democratic mobilization for gay rights would have gotten under its own power had not the Supreme Court intervened in *Obergefell v. Hodges* in 2015 . . .”).

<sup>297</sup> Doerfler & Moyn, *supra* note 43, at 1709.

<sup>298</sup> *See id.* at 1710.

<sup>299</sup> *See id.* at 1721.

<sup>300</sup> *Id.* at 1725–26 (collecting sources); *see also* Christopher Jon Sprigman, *Congress’s Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1859 (2020).

<sup>301</sup> *See supra* note 44; *see also* Samuel Moyn, *On Human Rights and Majority Politics*, 52 VAND. J. TRANSNAT’L L. 1135, 1164–65 (2019) (calling for enforcing human rights through politics rather than courts, a change requiring “the reimagination of human rights activism so that it is integrally related to democratic practices that are themselves focused on the acquisition and exercise of majority self-rule”); Dylan Matthews, *The Supreme Court Is Too Powerful and Anti-Democratic. Here’s How We Can Scale Back Its Influence*, *VOX* (Sept. 29, 2020, 9:10 AM), <https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler> (quoting Ryan Doerfler: “If the only way that progressives can achieve their policy goals is through an anti-democratic institution, rather than through popular majorities, that should be concerning, just as a matter of principle”); Doerfler & Moyn, *supra* note 43, at 1708 (arguing that democratizing the Supreme Court “must begin with how to diminish the institution’s power in favor of popular majorities”).

cases as antidemocratic simply because they restrict legislative sovereignty—which some proponents of court reform do.

As this Article demonstrates, democracy involves more than majoritarianism, and for that reason, not every restriction on legislative sovereignty is antidemocratic. Democracy presupposes a meaningful right to participate, even as we continue to debate the obstructions that are of constitutional consequence. In our constitutional culture, courts are an important location for this debate over the safeguards for meaningful participation in democratic life—just as legislatures are.

Proponents of court reform often argue for restricting judicial review on the grounds that, over time, legislatures have been more willing to support change that empowers marginalized groups than have courts. Even if this is true, it is not clear of what conceivable relevance this on-balance view has. It is also not clear how one could sum the relative advantages of the two institutions over all issues over all history. Even if one could measure, this kind of a measurement presupposes a static and insular view of legislative and judicial change—the kind of view against which we have been arguing. It also assesses change from the vantage point of elite institutional decisionmakers, ignoring the ways in which the turn to courts may increase the participation of marginalized groups in democratic politics and empower new forms of legislative change.

The account we offer explores the ways that those facing hostility from both lawmakers and judges often use courts, even when judges are unresponsive, in an effort to make themselves audible in democratic politics. By starkly distinguishing between courts and politics, proponents of court reform fail to appreciate how, at important junctures in our history, practices of rights-claiming and appeal to the courts have enabled and amplified voices in the community silenced by conditions of structural inequality. (It is for this reason that the court reform agenda should reach beyond judicial review to include other reforms for democratizing access to the courts.<sup>302</sup>) As we have shown, groups appealing to courts, as well as to other decisionmakers, can shape and reshape political conflict in ways that enable the groups' capacity to participate in democratic politics. This process may inform and strengthen the deliberation of majorities, even when it does not limit the exercise of majoritarian decisionmaking. To understand whether and how we need to preserve the possibility of judicial review, we need an understanding of why groups have turned to courts and the role courts have played in integrating different groups

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<sup>302</sup> See *supra* note 50 and accompanying text.

into democratic politics. This Article contributes to such an understanding.

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How is it that *Roe* and *Obergefell* have come to symbolize antidemocratic exercises of judicial review? In closing, we observe that Ely established that his approach to the exercise of judicial review was “principled” by distinguishing classes of claims that were worthy and unworthy of judicial review. Ely claimed to vindicate judicial review in cases where courts would avoid value judgments—cases that he distinguished from the inevitably value-laden field of substantive due process.<sup>303</sup> Beginning with Brest, generations of critics have pointed to Ely’s mistaken distinction between process and substance.<sup>304</sup> It so happens that the class of claims Ely disparaged concerned claimants who had no exponents in the academy or in government who could speak their case. His judgment that their claims were constitutionally illegitimate could well have been tainted by the very stigma that the claimants sought to challenge.

We observe that not every substantive due process case seems to bear the jurisprudential stigma that *Casey* and *Obergefell* do. Substantive due process is the ground on which the Bill of Rights has been incorporated against the states<sup>305</sup> and has been applied to a number of problems outside and inside the family—ranging from fines and fees<sup>306</sup> to punitive damages<sup>307</sup> to parental rights.<sup>308</sup> It is the cases that involve stigmatized sex that critics invoke when they equate substantive due process with judicial overreach. Critics struggle to imagine sexual autonomy claims as the kind of claims for which the Constitution was made and are quick to castigate judges as responding out of political “preference” rather than principle.

Standing alone, Ely’s attack on substantive due process would have had little consequence beyond the world of constitutional theory. But his attack on the abortion cases had different political salience in 1980 than it did in its first expression in 1973. For decades now, political conservatives have appealed to Ely, a liberal scholar, to validate and substantiate their attacks on abortion rights and substantive due

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<sup>303</sup> See *supra* notes 55–59 and accompanying text.

<sup>304</sup> See *supra* note 219 and accompanying text.

<sup>305</sup> See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (applying the Second Amendment to the States).

<sup>306</sup> See *Bearden v. Georgia*, 461 U.S. 660 (1983).

<sup>307</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>308</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

process more generally.<sup>309</sup> Observe that conservative justices and judges do not appeal to original meaning to criticize the Court's decisions in *Casey* and *Obergefell*. Instead, they appeal to the living Constitution, citing Ely's textualist objection, dating from 1980, that substantive due process is an oxymoron.<sup>310</sup>

It is remarkable that after all these decades the originalists on the Court have never discussed whether the Due Process Clause imposes substantive constraints on government as a matter of original understanding, nor have they acknowledged the growing body of originalist scholarship recognizing that due process has substantive meaning.<sup>311</sup> Instead, originalists on the Court employ forms of living constitutionalism to attack modern substantive due process as oxymoronic, appropriating liberal frames to attack liberal decisions<sup>312</sup>—much as conservatives have appropriated the discourse of colorblindness to attack affirmative action<sup>313</sup> and the discourse of conscience to attack reproductive rights and LGBTQ equality.<sup>314</sup>

Many on the left seem not to have noticed this conservative turn to living constitutionalism to discredit judicial decisions protecting reproductive and LGBTQ rights. Instead, today's critics of the conservative federal judiciary repeatedly use the substantive due process cases to illustrate the wrongs of judicial overreach.<sup>315</sup> There is no good

<sup>309</sup> See Greene, *supra* note 29, at 276–77; Siegel, *supra* note 192, at 479 n.123. For recent examples, see Ryan T. Anderson & Robert P. George, Opinion, *Roe v. Wade Was a Lousy Decision. The Supreme Court Should Take the Opportunity to Overturn It*, USA TODAY (Aug. 3, 2021), <https://www.usatoday.com/story/opinion/2021/08/03/abortion-appears-nowhere-constitution-roe-wade-casey/5407906001>; and Brief for Petitioners at 40, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (July 22, 2021), 2021 WL 3145936, at \*40.

<sup>310</sup> See Greene, *supra* note 29, at 276–77.

<sup>311</sup> Today, many originalists are exploring originalist understandings of substantive due process under the Fifth and Fourteenth Amendments, thereby rejecting the view espoused by Bork and Ely that due process is narrowly procedural. See, e.g., Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, J. LEGAL ANALYSIS 165, 179 (2011); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 669 (2009); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010).

<sup>312</sup> See, e.g., *supra* text accompanying note 6 (discussing *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2020) (Thomas, J., concurring in judgment)).

<sup>313</sup> See Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 40–42 (2013).

<sup>314</sup> See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

<sup>315</sup> See *supra* note 45. Drawing on these decisions, some locate polarization in the structure of judicial review rather than in democratic politics. See, e.g., JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA*

reason we can see for liberals and progressives to be singling out cases like *Roe* and *Obergefell* to illustrate the wrongs of judicial review, unless they are prepared to say that these cases pose distinctive problems of overreach. We have not yet heard them make the case that decisions like *Roe* and *Obergefell* are distinctively worse than other substantive due process decisions, like *BMW of North America, Inc. v. Gore*<sup>316</sup> or *Troxel v. Granville*,<sup>317</sup> or decisions outside the field of substantive due process cases, like *Citizens United v. FEC*<sup>318</sup> or *Shelby County v. Holder*.<sup>319</sup> We fear that progressives who make such arguments, seduced by conservatives' deployment of liberal frames to discredit liberal forms of judicial review, are ceding the courts to conservatives and allowing them to wield judicial power for their own ends.

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APART 68–69, 79–86, 124–39, 144–46 (2021) (criticizing a binary and absolutist approach to rights and arguing instead for a more fact-specific and measured approach to adjudication involving conflicting rights).

<sup>316</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>317</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>318</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>319</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).



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