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STATE AND ELECTORATE MOBILIZATION: THE MOST PROMISING PATH TO JUSTICE IN MODERN AMERICA

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With only a few exceptions in its long history, the Supreme Court has never been a protector of our nation's underrepresented. Many are calling into question whether the Court has turned its back on various historically underrepresented groups, given the Roberts Court's recent decisions. However, a historical analysis of the Court's decisions demonstrates a Court that has not been kind to a wide variety of such groups. This historical context is overshadowed by those who deem modern decisions to be a "recency bias" of the current Court rather than a continuance of the Court's historical trend of disenfranchising certain groups. This Article analyzes the Supreme Court of the United States' historical treatment of various underrepresented groups and issues of recency bias, and addresses how the Court cannot be expected to be the path to justice, but that the states and electorate might be the only avenues to provide such a resolution.

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I. INTRODUCTION

The Supreme Court of the United States has often been labeled as antimajoritarian or counter-majoritarian—going against democratically elected bodies to protect rights and liberties of the Constitution, including for those underrepresented. However, in the Court's 233 years, it has seldom done so. As examined, the current Court is less inclined to find rights and liberties for minorities, women, and the LGBTQ+ community. Arguably, this Court is perhaps more conservative than it has ever been.

One barrier that will be difficult to break in finding a path to justice is the one that goes through the Supreme Court of the United States ("SCOTUS" or "the Court") traditionally for the underrepresented, the indigent, and minorities.[1] The Court has, in its 233 years and counting,[2] seldom found that these groups should be afforded protections under the Constitution.[3] In recent years, SCOTUS has become increasingly restrictive in its determination of constitutional rights for, among others,[4] (1) Native Americans, (2)

1. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (2nd ed. 1986) ("The root difficulty is that judicial review is a counter-majoritarian force in our system …when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it…and it is the reason the charge can be made that judicial review is undemocratic.").

2. *See* U.S. CONST., art. III, § 1 (providing for a "supreme Court."). The jurisdiction of the Court and its makeup were addressed by the Judiciary Act of 1789 and first convened in 1790. *History and Traditions*, *About the Court*, SUP. CT. U.S., www.supremecourt.gov/about/historyandtraditions.aspx [perma.cc/FVA2-XJJY] (last visited Mar. 19, 2023).

3. *See* Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspective*, PRES. COMM'N SUP. CT. U.S. (June 30, 2021), www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony pdf. [perma.cc/78SW-RFW8] (stating "[f]irst, as a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status.").

4. *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2243 (2022) (no right to abortion); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022) (concurrent jurisdiction in Indian Country).

minorities in school admissions, (3) the LGBTQ+ community, and (4) women's reproductive rights.[5] When it comes to the Supreme Court, whether the group is Black people, Asian people, women, LGBTQ+, or indigent, the "arc of the moral universe is long, but it (seldom and slowly) bends toward justice."[6] Recent critiques have focused on the Court's sudden turn away from protecting various underrepresented groups in recent decisions is a matter as much of recency bias[7] as the Court having changed direction generally.

Recent SCOTUS Terms have demonstrated the restrictive view of rights for the underrepresented with the following: (1) further erosion of the Voting Rights Act,[8] (2) the issuance of *Dobbs*,[9] and (3) two recent cases, in the last two Terms, involving Native American issues.[10] During the 2022 Term, the Court will likely rein in

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5. When one looks at various "worst case" lists, one finds these groups in many of those decisions. *See, e.g.*, Casey C. Sullivan, *13 Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015), www.findlaw.com/legalblogs/supreme-court/13-worst-supreme-court-decisions-of-all-time/ [perma.cc/L657-HWJD] (providing examples).

6. Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Speech at the National Cathedral (Mar. 31, 1968) (paraphrasing 1850s preacher Thomas Parker). "I do not pretend to understand the moral universe. The arc is a long one. My eye reaches but little ways. I cannot calculate the curve and complete the figure by experience of sight. I can divine it by conscience. And from what I see I am sure it bends toward justice." *Id.*

7. Recency bias is defined in various ways, but for the purpose here, the definition is "the tendency to weigh recent events more heavily than earlier events." *Recency Bias*, SKYBRARY, www.skybrary.aero/articles/recency-bias [perma.cc/83WG-6JVC] (last visited Feb. 25, 2023).

8. *See* Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2330 (2021) (addressing Section 2 and finding no violation in Arizona); *Merrill v. Milligan*, OYEZ, www.oyez.org/cases/2022/21-1086 [perma.cc/2TVJ-YCWQ] (last accessed Apr. 9, 2023) (addressing Alabama's redistricting plan, which heard oral arguments on October 4, 2022). Justice Kagan in her dissent in *Brnovich* lamented the erosion of the Voting Rights Act, writing in part:

> If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out. Section 2, the provision at issue here, guarantees that members of every racial group will have equal voting opportunities. Citizens of every race will have the same shot to participate in the political process and to elect representatives of their choice. They will all own our democracy together — no one more and no one less than any other. If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was — and remains — so necessary.

Brnovich, 141 S. Ct. at 2350 (Kagan, J., dissenting).

9. *Dobbs*, 142 S. Ct. at 2228.

10. *See Castro-Huerta*, 142 S. Ct. at 2491 (finding federal and state authorities have concurrent jurisdiction for certain criminal cases); *Haaland v. Brackeen*, OYEZ, www.oyez.org/cases/2022/21-376 [perma.cc/UAU4-BVYCF] (last accessed Apr. 9, 2023) (considering the Indian Child Welfare Act, which was argued before the Court on Nov. 9, 2022). In *Castro-Huerta*, Justice Gorsuch dissented, writing in part, "[b]ut in time, Worcester came to be recognized as one of this Court's finer hours. The decision established a

affirmative action in college admissions.[11] The Court will hear another case involving services for websites in the LGBTQ+ community−the Court appears likely to find for the web developer, denying further opportunity to protect LGBTQ+ rights.[12] Court observers do not hold out much promise for protections for the LGBTQ+ community.[13] We can expect further attacks on same-sex marriage and other LGBTQ+ rights in the current and coming Terms.[14]

In Part II, this Article focuses on the Court's treatment of, and decisions regarding, certain underrepresented groups. Next, Part II examines various underrepresented groups and shows how the Court's arc has seldom bent towards justice when it comes to such groups. Part III discusses Congressional failings and the Court. Additionally, this part reviews some of the outliers or aberrations in the Court's history as it pertains to historically underrepresented groups. Part IV addresses how state courts and the electorate might be the imperfect solution to a path to justice and a way to break barriers, after first exploring some ideas on otherwise restricting the Court's jurisdiction or powers, as well as proposed reforms of the Court and its ethics. This Article concludes by examining how we, the people, can take steps to enshrine fundamental rights for all.

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foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise. Worcester proved that, even in the '[c]ourts of the conqueror,' the rule of law meant something." *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting).

11. *See Students for Fair Admissions v. University of North Carolina*, OYEZ, www.oyez.org/cases/2022-21-707 [perma.cc/AAK8-9W5D] (last visited Apr. 9, 2023); *Students for Fair Admissions v. President and Fellows of Harvard College*, OYEZ, www.oyez.org/cases/2022/20-1199 [perma.cc/8FSF-R29P] (last visited Apr. 9, 2023) (both arguing before the Court on October 31, 2022 and both considering overturning the precedent of *Grutter* in using race-conscious admissions practices).

12. *303 Creative LLC v. Elenis*, OYEZ, www.oyez.org/cases/2022/21-476 [perma.cc/H5FH-3C8E] (last visited Apr. 9, 2023) (arguing before the Court on December 5, 2022).

13. *See, e.g.*, Amy Howe, *Conservative justices seem poised to side with web designer who opposes same-sex marriage*, ARGUMENT ANALYSIS (Dec. 5, 2022), www.scotusblog.com/2022/12/conservative-justices-seem-poised-to-side-with-web-designer-who-opposes-same-sex-marriage/ [perma.cc/STE3-9WZJ] (noting "Chief Justice John Roberts countered that the Supreme Court has never approved efforts to compel speech that is contrary to the speaker's belief, and his five conservative colleagues signaled that they were likely to join him in a ruling for Smith.").

14. *See* John Hanna, *After Supreme Court Abortion Decision, Some Fear Rollback of LGBTQ and Other Rights*, PBS NEWS HOUR (June 24, 2022 2:16 PM), www.pbs.org/newshour/politics/after-supreme-court-abortion-decision-some-fear-rollback-of-lgbtq-and-other-rights [perma.cc/6SBY-YV3C] (quoting Jim Obergefell, "[l]et's just be clear. Today is about this horrifying invasion of privacy that this court is now allowing, and when we lose one right that we have relied on and enjoyed, other rights are at risk.").

A. The Court's Historical Role and Purpose

A starting premise to discuss the Court, its role, and how it is to decide cases, is contained in the *Federalist Papers*:[15]

> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.[16]

The Federalist Papers, although not binding, serves to give the nation a good indication of what the main proponents of the Constitution thought of various issues. The cited language provides an order of prioritization, but over the years, there has been much debate about what was "declared in the Constitution."[17] Over the Court's history, including after ratification of the Fourteenth Amendment,[18] the Court has not often found Black people or others to have particular rights.[19] There have been some instances where the Court has eventually arrived at a determination certain rights exist, but when it has done so, the Court has taken a long path to get there (and there is not a plethora of such instances).

Due to recency bias, many critique the Court as suddenly not protecting the underrepresented. This view is belied by the history of the Court in several underrepresented groups. When *Dobbs* was leaked in May 2022,[20] many asserted that the Court had never before taken away a constitutional right. For example, Senator Tammy Baldwin (D-WI) stated in a May 2022 interview around the time of the leaked opinion that, "our Supreme Court has never taken away a constitutional right and that is partly what is so shocking."[21]

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15. The Federalist Papers "is a series of 85 essays written by Alexander Hamilton, John Jay, and James Madison between October 1787 and May 1788." *Federalist Papers: Primary Documents in American History*, LIBR. OF CONG., guides.loc.gov/federalist-papers/full-text [perma.cc/V2Y6-5RRL] (last accessed Mar. 23, 2023).

16. THE FEDERALIST NO. 78 (Alexander Hamilton).

17. *Id.*

18. U.S. CONST. amend. XIV.

19. *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 25-26 (1883) (holding that the Fourteenth Amendment did not permit the federal government to prohibit discriminatory behavior by private parties, and the Civil Rights Act of 1875 was unconstitutional); Slaughterhouse Cases, 83 U.S. 36, 82 (1873) (finding the Fourteenth Amendment only banned the states from depriving Black people of equal rights). *But see*, Brown v. Board of Ed., 347 U.S. 483, 494 (1954) (determining school segregation based on race to be unconstitutional).

20. *See, e.g.*, Press Release, Supreme Court (May 3, 2022) (on file with author) ("Yesterday, a news organization published a copy of a draft opinion in a pending case.").

21. Charles Benson, *Sen. Baldwin says overturning Roe V. Wade could be slippery slope against birth control*, WTMJ-TV MILWAUKEE (May 4, 2022, 6:24

Critics and fact checkers pointed to several instances on the civil side where the Court had taken away a constitutional right. One is the *Lochner v. New York* case, in which the Court held that the freedom of contract was violated by a New York law limiting the hours bakers could work, and thus the Fourteenth Amendment's right to liberty afforded to employer and employee was violated and the law was held unconstitutional.[22] This case ushered in the "Lochner Era," a period from 1890 [23] to 1937 described as the Court having a "laissez-faire economic policy"[24] and "using a broad interpretation of due process that protected economic rights, tended to strike down economic regulations of working conditions, wages or hours."[25] The result is that those in positions of powerlessness, the *Lochner* situation, meaning women and children at the time, were not protected.

In 1937, the Court issued a 5-4 decision in *West Coast Hotel Company v. Parrish*,[26] marking the end of the Lochner Era. The Court held that the establishment of minimum wages for women was constitutional,[27] limiting the Court's Lochner Era broad view of the right to contract under the Fourteenth Amendment.[28] *West Coast Hotel* overturned a decision of the Court, *Adkins v. Children's Hospital of D.C.*,[29] which held that a Congressional minimum wage law for women and children was unconstitutional, relying on *Lochner* and the "freedom of contract."[30]

PM), www.tmj4.com/news/local-news/sen-baldwin-says-overturning-roe-v-wade-could-be-slippery-slope-against-birth-control [perma.cc/3JFU-NTWR].

22. Lochner v. New York, 198 U.S. 45, 45 (1905).

23. The era was defined by the famous case, *Lochner v. New York*, but the period goes back almost twenty years before *Lochner* was decided. *Lochner Era*, LEGAL INFO. INST., www.law.cornell.edu/wex/lochner_era [perma.cc/SVA5-3BEC] (last visited Mar. 15, 2023). The reasoning is that *Lochner* was the most famous and definitive case by the Court on the laissez-faire economic policy, but the Court had decided numerous other decisions. *Id.* Laissez-faire economic policy generally refers to free market capitalism that opposes government intervention or restrictions. *Id.*

24. *Id.*

25. *Id.*

26. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

27. *Id.*

28. *See, e.g.*, Brian T. Goldman, *The Switch in Time That Saved Nine: A Study of Justice Owen Roberts's Vote in West Coast Hotel Co. v. Parrish*, CUREJ COLL. UNDERGRADUATE RSCH. ELEC. J., UNIV. OF PA. 4, 5 (Jan. 1, 2012). The *West Coast Hotel* case is famous for the "switch in time that saved nine." *Id.* at 112. During the New Deal, the Court invalidated a number of President FDR's initiatives and laws and Roosevelt threatened to pack the Court. *Id.* at 46-47. Separate and apart from the court packing, Chief Justice Charles Evans Hughes was having conversations with Justice Owen Roberts about the rulings and analysis. *Id.* at 89. In *West Coast Hotel*, Roberts moved to the majority. *Id.* at 6; *see also* DANIEL A. COTTER, THE CHIEF JUSTICES: THE SEVENTEEN MEN OF THE CENTER SEAT, THEIR COURTS, AND THEIR TIME (Twelve Tables Press 2019) (analyzing each Chief Justice).

29. Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 561 (1923).

30. *Id.*

A second reference to the reversal of a constitutional right arose in 1990 when the Court decided *Employment Division v. Smith*, holding that two employees, who were Native American Church members that used illegal drugs for religious purposes, were not protected by the First Amendment's Free Exercise Clause.[31] In writing for the majority, Justice Antonin Scalia held that the Court had never found that an individual's religious beliefs excuse the employee from complying with otherwise valid regulations.[32]

Scholars[33] have asserted that Scalia was wrong on that front, citing the 1963 case *Sherbert v. Verner*, which held that employees have a right to religious exemptions from such laws under the Free Exercise Clause.[34]

PolitiFact, a fact-checking website that rates the accuracy of claims by elected officials and others, cited to the two examples set forth above and concluded: "[s]ince there were at least two instances in American history where the Supreme Court limited a previously outlined constitutional right, that would make Baldwin's claim off the mark."[35]

This Article does not address whether the two rights that were limited by the Supreme Court are similar to or as impactful as what was at stake with *Dobbs*, but it does suggest that the *Dobbs* decision was a bigger loss of a previously recognized right deemed to exist under the Constitution.[36]

In *Dobbs'* majority opinion, Justice Samuel Alito referenced that the Court has often overturned constitutional precedent, writing: "[o]n many other occasions, this Court has overruled important constitutional decisions."[37] "(We include a partial list in the footnote that follows.)"[38]

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31. Employment Division v. Smith, 494 U.S. 872, 874 (1990).

32. *Id.* at 878-89.

33. *See, e.g.*, *In the Shadow of Sherbert: An Understanding of Smith as Judicial Codification*, FEDERALIST SOC'Y (Sept. 20, 2021), fedsoc.org/commentary/fedsoc-blog/in-the-shadow-of-sherbert-an-understanding-of-smith-as-judicial-codification [perma.cc/LB7A-GP3U] ("That standard was first laid out in *Sherbert v. Verner*, where the Court held unconstitutional the denial of unemployment benefits to a woman whose unemployment was a result of her religious beliefs.").

34. Sherbert v. Verner, 374 U.S. 398, 399 (1963) (noting the plaintiff was a member of the Seventh-day Adventist church and fired for refusing to work on her Sabbath Day, Saturday).

35. Madeline Heim, *Baldwin Wrong that Supreme Court has Never Taken Away a Constitutional Right*, POLITIFACT (June 3, 2022), www.politifact.com/factchecks/2022/jun/03/tammy-baldwin/baldwin-wrong-supreme-court-has-never-taken-away-c/ [perma.cc/J2FH-2LBP].

36. *See* discussion *infra* Part I (discussing that the bigger point is throughout the Court's history, the Court has not often recognized identifiable and protected rights for various groups, and with the exception of a few aberrations, has not often protected those that one might think they have).

37. *Dobbs*, 142 S. Ct. at 2263.

38. *Id.* at 2263, n. 48.

A close examination of the cited cases in Alito's footnote 48[39] suggests that in almost every, if not all, instances cited by Alito, the Court found a right existed in the Constitution, expanding protections, the reverse of the decision in *Dobbs*.[40] Some of the

39. *See Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANN., constitution.congress.gov/resources/decisions-overruled/ [perma.cc/DTW9-9UCA] (last visited Feb. 25, 2023) (providing an extensive list where the Court has overruled prior precedents).

40. *Dobbs*, 142 S. Ct. at 2263, n. 48. The list in footnote 48 is a long one, and not edited to reflect the large number of cases Justice Alito references:

> *See*, *e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (right to same-sex marriage), overruling Baker v. Nelson, 409 U.S. 810 (1972); Citizens United v. Federal Election Comm'n, 558 U. S. 310 (2010) (right to engage in campaign-related speech), overruling Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and partially overruling McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003); Montejo v. Louisiana, 556 U.S. 778 (2009) (Sixth Amendment right to counsel), overruling Michigan v. Jackson, 475 U.S. 625 (1986); Crawford v. Washington, 541 U.S. 36 (2004) (Sixth Amendment right to confront witnesses), overruling Ohio v. Roberts, 448 U.S. 56 (1980); Lawrence v. Texas, 539 U.S. 558 (2003) (right to engage in consensual, same-sex intimacy in one's home), overruling Bowers v. Hardwick, 478 U.S. 186 (1986); Ring v. Arizona, 536 U.S. 584 (2002) (Sixth Amendment right to a jury trial in capital prosecutions), overruling Walton v. Arizona, 497 U.S. 639 (1990); Agostini v. Felton, 521 U.S. 203 (1997) (evaluating whether government aid violates the Establishment Clause), overruling Aguilar v. Felton, 473 U.S. 402 (1985), and School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (lack of congressional power under the Indian Commerce Clause to abrogate States' Eleventh Amendment immunity), overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Payne v. Tennessee, 501 U.S. 808 (1991) (the Eighth Amendment does not erect a per se bar to the admission of victim impact evidence during the penalty phase of a capital trial), overruling Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989); Batson v. Kentucky, 476 U.S. 79 (1986) (the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race), overruling Swain v. Alabama, 380 U.S. 202 (1965); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530 (1985) (rejecting the principle that the Commerce Clause does not empower Congress to enforce requirements, such as minimum wage laws, against the States 'in areas of traditional governmental functions'), overruling National League of Cities v. Usery, 426 U.S. 833 (1976); Illinois v. Gates, 462 U.S. 213 (1983) (the Fourth Amendment requires a totality of the circumstances approach for determining whether an informant's tip establishes probable cause), overruling Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969); United States v. Scott, 437 U.S. 82 (1978) (the Double Jeopardy Clause does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict), overruling United States v. Jenkins, 420 U.S. 358 (1975); Craig v. Boren, 429 U.S. 190 (1976) (gender-based classifications are subject to intermediate scrutiny under the Equal Protection Clause), overruling Goesaert v. Cleary, 335 U.S. 464 (1948); Taylor v. Louisiana, 419 U.S. 522 (1975) (jury system which operates to exclude women from jury service violates the defendant's

examples Justice Alito refers to in footnote 48 of the majority *Dobbs* opinion include *Obergefell v. Hodges* (right to same-sex marriage)[41] and *Lawrence v. Texas* (right to engage in consensual, same-sex intimacy in one's home).[42] In both instances, a right was found that previously had been deemed not to exist.[43] *Dobbs* is different in that respect with few other instances where a right has been lost that

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> Sixth and Fourteenth Amendment right to an impartial jury), overruling Hoyt v. Florida, 368 U.S. 57 (1961); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (the mere advocacy of violence is protected under the First Amendment unless it is directed to incite or produce imminent lawless action), overruling Whitney v. California, 274 U.S. 357 (1927); Katz v. United States, 389 U.S. 347, 351 (1967) (Fourth Amendment 'protects people, not places,' and extends to what a person 'seeks to preserve as private'), overruling Olmstead v. United States, 277 U.S. 438 (1928), and Goldman v. United States, 316 U.S. 129 (1942); Miranda v. Arizona, 384 U.S. 436 (1966) (procedural safeguards to protect the Fifth Amendment privilege against self-incrimination), overruling Crooker v. California, 357 U.S. 433 (1958), and Cicenia v. Lagay, 357 U.S. 504 (1958); Malloy v. Hogan, 378 U.S. 1 (1964) (the Fifth Amendment privilege against self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States), overruling Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (congressional districts should be apportioned so that 'as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's'), overruling in effect Colegrove v. Green, 328 U.S. 549 (1946); Gideon v. Wainwright, 372 U. S. 335 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the Sixth and Fourteenth Amendments), overruling Betts v. Brady, 316 U.S. 455 (1942); Baker v. Carr, 369 U.S. 186 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans), effectively overruling in part Colegrove, 328 U.S. 549; Mapp v. Ohio, 367 U.S. 643 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the Fourth Amendment applies to the States), overruling Wolf v. Colorado, 338 U.S. 25 (1949); Smith v. Allwright, 321 U.S. 649 (1944) (racial restrictions on the right to vote in primary elections violates the Equal Protection Clause of the Fourteenth Amendment), overruling Grovey v. Townsend, 295 U.S. 45 (1935); United States v. Darby, 312 U.S. 100 (1941) (congressional power to regulate employment conditions under the Commerce Clause), overruling Hammer v. Dagenhart, 247 U.S. 251 (1918); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law), overruling Swift v. Tyson, 16 Pet. 1 (1842).

Id.

41. Obergefell v. Hodges, 576 U. S. 644, 681 (2015).

42. Lawrence v. Texas, 539 U. S. 558, 578 (2003).

43. *See, e.g.*, Obergefell, 576 U.S. at 664-65 (stating "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution" requiring "reasoned judgment" in "identifying interests of the person so fundamental that the State must accord them its respect.").

the Court previously found to exist.[44]

The current view of recency bias stems principally from the *Dobbs* decision.[45] *Dobbs* explicitly overturned *Roe v. Wade*[46] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[47] Justice Alito scathingly wrote: "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division."[48]

Justice Alito went out of his way to try to distinguish abortion from other areas to assuage fears that other rights were in jeopardy of being erased.[49] He noted:

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.' None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.[50]

The majority opinion also dismissed the *Casey* claim urging that ratification of the Fourteenth Amendment supported not limiting individual rights:

> In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey's* claim (which we accept for the sake of argument) that 'the specific practices of States at the time of the adoption of the Fourteenth Amendment' do not 'mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.' Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.[51]

Despite Alito's attempt to reassure the nation *Dobbs* was not the first step in reversing other rights, Justice Thomas' concurrence only fueled the fear this reversal created. Justice Thomas wrote in part:

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44. *See Smith*, 494 U.S. at 874 (identifying rare instances on the civil side of reversing rights).

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

46. Roe v. Wade, 410 U.S. 113, 154 (1973), overruled by *Dobbs*, 142 S. Ct. at 2228.

47. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 844 (1992), overruled by *Dobbs*, 142 S. Ct. at 2228.

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

49. *Id.* at 2258.

50. *Id.* (first quoting *Roe*, 410 U.S. at 159; then quoting *Casey*, 505 U.S. at 852).

51. *Id.* at 2258.

> The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts . . . . Thus, I agree that '[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion.'
>
> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.[52]

The Roberts Court and current majority has often left statements such as this to be relied upon in future decisions as the law of the Court.[53]

While Justice Brett Kavanaugh concurred and provided what purported to be comfort to those worried about erosion of rights,[54] the dissent makes clear that it expects the Court in future Terms to reconsider these precedents. Justice Breyer wrote that: "[N]o one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation."[55]

After reviewing several cases on the issues of bodily integrity, familial relationships, and procreation, Justice Breyer wrote,

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52. *Dobbs*, 142 S. Ct. at 2301-02 (Thomas, J., concurring) (first quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring); then quoting Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring)).

53. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 542 (2013) (citing a previous opinion to support its decision that "we stated that 'the Act imposes current burdens and must be justified by current needs.' And we concluded that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.' These basic principles guide our review of the question before us." (quoting Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U. S. 193, 203 (2009))).

54. *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) ("*First* is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in Griswold v. Connecticut, 381 U. S. 479 (1965); Eisenstadt v. Baird, 405 U. S. 438 (1972); Loving v. Virginia, 388 U. S. 1 (1967); and Obergefell v. Hodges, 576 U. S. 644 (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.").

55. *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

"[e]ither the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[56] He then challenged the majority's treatment of *stare decisis*:

> One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off.[57]

The question raised in connection with these other cases, such as *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*, is why they are super protected and established in the "history and traditions" of our nation.[58] *Roe v. Wade* was decided January 22, 1973, just

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56. *Id.*

57. *Id.*

58. The Court has long used history and tradition to address rights under the Constitution, especially in matters of substantive due process. *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (stating "[t]he Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."). But, as Justice Stephen Breyer wrote in dissent in *Bruen*, determining what history controls and which historians to follow is an issue that is not readily addressed:

> The Court's insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

New York State Rifle & Pistol Association Inc. v. Bruen, 142 S. Ct. 2228, 2177 (2021) (Breyer, J., dissenting). "History and tradition" was also used in *Dobbs* and is used increasingly by the conservative majority in the Roberts Court. *Dobbs*, 142 S. Ct. at 2248. This history debate has long existed. *See*, *e.g.*, Philip B. Kurland, *The Origins of The Religion Clauses of The Constitution*, 27 WM. & MARY L. REV. 839, 841-42 (1987) (recognizing "history is relevant to constitutional decision" and does not contend the "Constitution should be molded by the sitting justices either to suit their own predilections" but that history "should not be expected . . . to provide specific answers to the specific problems that bedevil the Court."). Some have expressed concerns about the dangers of the "history and tradition" analysis by the Court. *See* Robert P. Jones, *This Supreme Court's dangerous vision of 'history and tradition*,*'* RELIGION NEWS SERV. (July 4, 2022), www.religionnews.com/2022/07/04/this-supreme-

missing its fiftieth anniversary when *Dobbs* was decided. Same-sex marriage, contraception, the privacy of same-sex intercourse, and other LGBTQ+ rights are more recently recognized, and it is hard to understand how these are more rooted in "history and tradition" than abortion rights. Time will tell what further rights face various erosions in the coming Terms.

The Court—rather than being a counter majoritarian court with few aberrations in its history—has not readily come to any minority communities' assistance.[59] This is because the Court views the majority as the one to determine what groups merit protection, which is demonstrated by the words of Justice Scalia:

> The whole theory of democracy … is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minority positions that deserve protection .... [Y]ou either agree with democratic theory or you do not. But you cannot have democratic theory and then say, but what about the minority? The minority loses, except to the extent that the majority, in its document of government, has agreed to accord the minority rights.[60]

II. THE COURT HAS NOT BEEN THE SAVIOR OF MINORITIES

While the Court is often considered a branch of our federal government that has, historically, been the "champion of the poor, working people, and racial minorities,"[61] that, with few exceptions, is not true.[62]

A review of the Court's treatment of various minority groups generally finds that the Court, when it has found rights, took a long

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courts-dangerous-vision-of-history-and-tradition/ [perma.cc/DNN8-UP7Y] ("We know what a euphemism like 'history and tradition' means. And we know where it will lead.").

59. *See, e.g.*, Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 50-63 (1976) (discussing examples).

60. Steven F. Hayward, *Two Kinds of Originalism*, NAT'L AFF'S. (2017), www.nationalaffairs.com/publications/detail/two-kinds-of-originalism [perma.cc/T3HE-FL7Y].

61. ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA at xx (Penguin Press 2020).

62. As Adam Cohen, a former member of the New York Times editorial board and president of Volume 100 of the Harvard Law Review, wrote:

> In American history and civics classes, the Court is generally presented as the branch of government that looks out of vulnerable minorities and ensures fairness for all. The justices have often talked of themselves in this way. In a 1940 case, the Court declared unanimously that courts are 'havens of refuse for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement.'

Id.

route to get there.[63] Some descriptions of marginalized communities used by the Court, while by no means exhaustive, includes examples such as:[64]

- "[S]avage tribes" and "uncivilized tribes;"[65]
- "[T]hree generations of imbeciles are enough;"[66]
- "[T]he infamous crime against nature," 'an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named;'"[67]
- "[C]ertain forms of sexual behavior are 'immoral and unacceptable,' *Bowers*…–the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[68]

The Court has occasionally, but not often, found protection of certain individual rights.[69] An example is the right to privacy amongst consenting adults. Beginning with *Griswold v. Connecticut*, the Warren Court[70] issued a decision subsequently used by the Court to create other privacy rights.[71]

Until 1965, the Court had not found a broad right to privacy under the Constitution for individual rights and liberties.[72] Like

63. *Compare Timeline of Events Leading to the Brown v. Board of Education Decision of 1954*, NAT'L ARCHIVES, www.archives.gov/education/lessons/brown-v-board/timeline.html [perma.cc/YPL3-L5WD] (last visited Apr. 9, 2023) (demonstrating the fifty-eight years between *Plessy* and *Brown*), with Lawrence v. Texas, 539 U.S. 558, 586 - 87 (2003) (Scalia, J., dissenting) (stating "I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*. I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine.").

64. This list is by no means exhaustive. It is just a small sampling of statements that have appeared in Court cases throughout the years.

65. DeLima v. Bidwell, 182 U.S. 1, 219 (1901) (McKenna, J., dissenting) (referencing the people of Puerto Rico).

66. Buck v. Bell, 274 U.S. 200, 207 (1927) (authorizing the sterilization of a woman).

67. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125-26 (4th ed. 1769)).

68. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (addressing and comparing other crimes to the law at issue here).

69. Cohen argues that the Warren Court is the "exception to the Court's historical role; it was a brief one." COHEN, *supra* note 61, at xxi. He does note that *Roe* and some same-sex rights have been recognized, but that there are not many examples and the Court with a new majority is unlikely to continue in that vein. *Id.* at xxi-xxii.

70. Earl Warren was the 14th Chief Justice of the United States Supreme Court, serving from 1953 to 1969. *See* COTTER, *supra* note 28, at 301-26 (addressing the Chief Justiceship of Warren).

71. *Griswold*, 381 U.S. at 479.

72. The Court, however, did find in 1923 that parents had the right to

many rights eventually deemed to exist by the Court in its history, privacy rights did not see a quick recognition by the Court. In 1890, Louis Brandeis, who eventually became an Associate Justice of the Supreme Court,[73] wrote a law review article with his partner, Samuel Warren, entitled *The Right to Privacy*.[74] While the Court would occasionally advance protections of privacy in subsequent years, it was a slow process, as evidenced by a dissent Justice Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.
>
> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.[75]

With the recent *Dobbs* decision, the line of privacy protection cases that began with *Griswold* appear, at best, stuck where they are;[76] we cannot expect the current Roberts Court to find any other privacy rights not enumerated. For many, the fear of the dissent in *Dobbs* is justified - a fear that the Court will reverse any advancements in protecting such fundamental rights for marginalized communities.

A. Women and the Court

Although the Court has found rights for some underrepresented groups, the Court has not been quick to recognize extensive individual rights for women. As recently as 1948, the

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determine if German could be taught to their young children. Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

73. Brandeis sat on the Court from 1916 to 1939. Daniel Cotter, *Brandeis, the First Jewish Justice*, CHI. DAILY LAW BULL. (Jul. 13, 2015), www.chicagolawbulletin.com/archives/2015/07/13/daniel-cotter-forum-7-13-15 [perma.cc/566A-HWM6].

74. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890).

75. Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).

76. *See supra* notes 62 - 63 and accompanying text.

Court held that there was no violation of the Equal Protection Clause of the Fourteenth Amendment[77] when a Michigan statute prohibited women from obtaining a bartender's license. *Goesaert v. Cleary*, a 6-3 Court opinion issued by Justice Felix Frankfurter, opened with:

> To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of nonowners, is one of those rare instances where to state the question is in effect to answer it.[78]

The opinion is less than three pages, and Frankfurter continued:

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives, and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic …. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.
>
> Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that, as to a defined group of females, other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition.[79]

The 1948 Court was not unique in its treatment of women. The Court, for a long period dating to at least the late nineteenth century, has not been cognizant of recognizing protected rights for women. In the 1872 *Bradwell v. The State* case, the Court found that section one of the Fourteenth Amendment did not provide any privileges or immunities to a woman seeking to be admitted to the Illinois bar.[80] The Court held:

> We agree . . . there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them. This right in no sense depends on citizenship of the United States.[81]

Several years later, Belva Lockwood sought admission to the

77. U.S. CONST. amend. XIV, § 1.
78. Goesaert v. Cleary, 335 U.S. 464, 465 (1948).
79. *Id.* at 466.
80. Bradwell v. The State, 83 U.S. 130, 139 (1872).
81. *Id.*

Bar of the Supreme Court of the United States.[82] Chief Justice Waite responded to the admission application: "[b]y the uniform practice of the Court from its organization to the present time, and by the fair construction of its rules, none but men are permitted to practice enforce it as attorneys and counselors."[83] Chief Justice Waite challenged Lockwood by noting the only way this would change was by legislation.[84] On February 15, 1879, President Rutherford B. Hayes signed such legislation.[85]

In 1927, the Court addressed the issue of a "feeble minded white woman" and whether a Virginia state law could force sterilization of such a woman after a procedural hearing.[86] In *Buck v. Bell*, Justice Oliver Wendell Holmes wrote for the Court:

> It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[87]

Buck has never been expressly overturned.

The cases cited above are not intended to be a full recitation of cases that considered the rights of women and the Constitution. Rather, they are intended to answer the question of how cases such as *Roe v. Wade* fit into the argument that the Court is not often kind to the underrepresented.[88] The path to justice for women is a long one, and there might not be a current path forward for justice before the Court.

B. Schools, Integration, and Affirmative Action

Another example of the slow, indirect arc of the Court and the treatment of an underrepresented group is with Black people, specifically with school integration and affirmative action. In *Plessy v. Ferguson*,[89] the majority favorably discussed legislation requiring

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82. *See* Daniel Cotter, *Women Before the Supreme Court*, CHI. DAILY LAW BULL. (Feb. 26, 2018), www.chicagolawbulletin.com/archives/2018/02/26/women-before-scotus-2-26-18 [perma.cc/4LVN-6YAU] (discussing Belva Lockwood).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Buck*, 274 U.S. at 205.

87. *Id.* (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

88. A full timeline and analysis, for example, would include the work of Ruth Bader Ginsburg and her efforts "on the basis of sex." Daniel Cotter, *Rest in Power, Notorious RBG*, 46 AM. BAR ASS'N HUM. RTS. MAG. 6, 9 (Dec. 13, 2020).

89. *See* Plessy v. Ferguson, 163 U.S. 537, 539 (1896) (commenting that the

segregation in schools and asserted these laws requiring "separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." [90]

Schools at all levels generally remained segregated for decades after *Plessy*. In several cases brought before the Court in the late 1930s to early 1950s, the National Association for the Advancement of Colored People ("NAACP") attacked segregation of education within higher education and professional schools, ultimately persuading the Court separate was not equal.[91] That effort culminated in *Brown v. Board of Education*.[92]

Initially, *Brown* was heard in December 1952, when Fred Vinson was the Court's Chief Justice.[93] The Court appeared to be deeply divided, with only four Justices appearing to be in favor of overturning *Plessy*.[94] The Court asked the parties to brief on particular issues and to reargue in fall 1953.[95] Chief Justice Vinson died in September 1953 and his replacement was Justice Earl Warren.[96] Associate Justice Felix Frankfurter told a former clerk, "[t]his is the first indication that I have ever had that there is a God."[97]

After the case was reargued, Chief Justice Warren worked with the Justices for a decision, asserting that while a majority opinion would do the job, a unanimous decision was desired to state the Court's views conclusively.[98] On May 17, 1954, in an unanimous decision, Chief Justice Warren wrote for the Court:

> We conclude that, in the field of public education, the doctrine of

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facts here revolved around laws mandating the segregation of train cars).

90. *Id.* at 544 (noting school segregation as the most common exercise of this police power and one that "has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.").

91. *See generally History - Brown v. Board of Education Re-enactment*, ACTIVITY RESOURCES, www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment [perma.cc/HR9R-2XFQ] (last visited Jan. 28, 2023) (describing some of the cases that led to the *Brown* decision).

92. Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

93. Daniel Cotter, *Supreme Court Makes Seismic Shift 58 Years after Plessy v. Ferguson*, CHI. DAILY LAW BULL. (June 6, 2016), www.chicagolawbulletin.com/archives/2016/06/06/plessy-v-ferguson-update-6-6-16 [perma.cc/84RM-ZR5M].

94. *See* Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER (Apr. 25, 2004), www.newyorker.com/magazine/2004/05/03/did-brown-matter [perma.cc/UDH6-HFMD] (discussing opinions that the impact of *Brown* has been overstated).

95. *Id.*

96. *See* COTTER, *supra* note 28, at 304.

97. Sunstein, *supra* note 94.

98. COTTER, *supra* note 28, at 316.

> 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[99]

Even in declaring this, the Court had no power to enforce its decision, having neither the power of the pen nor the sword.[100] The critique was that "the Court, on its own, brought about little desegregation, above all because it lacked the power to overcome local resistance."[101]

In *Brown v. Board of Education II*,[102] the Court ordered states to take all steps "as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[103] Years later, Justice Thurgood Marshall, who argued *Brown*,[104] said "I've finally figured out what 'all deliberate speed' means. It means 'slow.'"[105]

The Court did not return to segregation. But, in 2006, the Court heard a case that dealt with selective enrollment and cited to *Brown* for support of the white students to select their schools.[106] In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court faced three questions concerning whether racial diversity could be a compelling interest to justify the use of race for public high school admissions.[107]

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99. Brown v. Bd. of Educ., 347 U.S. at 495.

100. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 2 (Univ. Chi. Press 2d ed. 2008) (addressing how effective the Court can be in effectuating social change, given its powers).

101. Sunstein, *supra* note 94.

102. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (providing follow-up action to consider how to ensure school integration in the states).

103. *Id.*.

104. After the rehearing, Justice Felix Frankfurter wrote Marshall a letter informing him that his rebuttal argument was the "most appropriate and the most forceful argument I have ever heard in any appellate court." Daniel Cotter, *Supreme Court Makes Seismic Shift 58 Years after Plessy v. Ferguson*, CHI. DAILY LAW BULL. (June 6, 2016), www.chicagolawbulletin.com/archives/2016/06/06/plessy-v-ferguson-update-6-6-16 [perma.cc/BEZ6-5WDC].

105. Sunstein, *supra* note 94.

106. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 709 (2007).

107. The entire case focused on these three questions:

> 1) Do the decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* apply to public high school students?
>
> 2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?
>
> 3) Does a school district that normally permits a student to attend the high school of her choice violate the Equal Protection Clause by denying the student admission to her chosen school because of her race in an effort to achieve a desired racial balance?

The Court found that racial diversity would not be a compelling interest and using racial diversity in public high school admissions constituted a violation of the Equal Protection Clause.[108] Writing for the plurality, Chief Justice Roberts stated:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way 'to achieve a system of determining admission to the public schools on a nonracial basis,' is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[109]

Justice John Paul Stevens wrote a scathing dissent, opening with "[t]here is a cruel irony in the Chief Justice's reliance on our decision in *Brown*.[110] Justice Stevens pointed out that only Black children were told where they could go to school, and that Chief Justice Roberts' use of such rationale in this case was not based on good analysis.[111]

In what appears to be further erosion of integration in higher education, the Court, in its recent October 2022 Term, heard a pair of cases that appear to signal the end of using race as a factor in college admissions. On October 31, 2022, the Court heard two cases, *Students for Fair Admissions v. President and Fellows of Harvard College*[112] and *Students for Fair Admissions v. University of North Carolina.*[113] The question in each case was whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in

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Parents Involved in Community Schools v. Seattle School District No. 1, OYEZ, www.oyez.org/cases/2006/05-908 [perma.cc/6GWU-B8WJ] (last visited Apr. 22, 2023).

108. *See id.* (noting the Court answered the questions with "[n]o, no, and yes.").

109. *Parents Involved in Cmty. Sch.*, 551 U.S. at 747-48 (quoting *Brown*, 349 U.S. at 301-02).

110. *Id.* at 798-99 (Stevens, J., dissenting). The dissent further challenged the plurality by recognizing that, in their own words, "[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin schoolchildren were told where they could and could not go to school based on the color of their skin." *Id.* (quoting plurality).

111. *Id.* at 79.

112. Transcript of Oral Argument at 1, Students for Fair Admissions v. Pres. & Fellows of Harv. Coll. (Oct. 31, 2022) (No. 20-1199), www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_6537.pdf [perma.cc/4WTR-P52S].

113. Transcript of Oral Argument at 1, Students for Fair Admissions v. Univ. N.C., et. al. (Oct. 31, 2022) (No. 21-707), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_9o6b.pdf [perma.cc/D47B-QSXD].

admissions.

Grutter addressed a narrowly tailored program for the University of Michigan Law School's admission program, and the Court held "that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[114] The consensus is that when the Court issues these two decisions, *Grutter* will be dead law.[115] Once again, based on this brief analysis and line of cases, the Court's forward progress on race in school settings has reached a point that the path to justice is not going to be through the Court for Black students and other people of color.

C. The Aberrations – Looking Back at the Long and Slow Arc of Justice, Where it Has Been Found

How do you reconcile the above premise with instances where the Court has advanced rights of various minorities and underrepresented groups? There have been several instances where this has happened, but with *Dobbs* and other cases, the question is: will rights be recognized going forward?[116] When the Court has acted, it has been a slow recognition and movement toward justice for minority groups. For purposes of this Article, a few areas of focus are: (1) abortion rights and (2) same-sex relationship rights.

1. Women's Rights and Reproductive Rights

As discussed,[117] the Court and its Justices have not always been kind or protective of women. In the landmark case of *Roe v. Wade*, the Court framed the case in its majority opinion:

> The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill

114. *Grutter v. Bollinger*, OYEZ, www.oyez.org/cases/2002/02-241 [perma.cc/4V2E-P4BQ] (last visited Jan 21, 2023).

115. *See* Amy Howe, *Affirmative action appears in jeopardy after marathon arguments*, ARGUMENT ANALYSIS (Oct. 31, 2022), www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments/ [perma.cc/BR2R-7TWA] (discussing implications); *FP SCOTUS Predictions: Supreme Court Set to Scrap Affirmative Action Admissions in Education*, FISHER PHILLIPS (Jan. 11, 2023), www.fisherphillips.com/news-insights/fp-scotus-predictions-supreme-court-set-to-scrap-affirmative-action-admissions-in-education.html [perma.cc/2X48-JELH] (providing predictions).

116. Cases include *Obergefell* and others that the dissenters in *Dobbs* identified as being future targets of the majority.

117. *See* discussion *supra* Part II.A.

> of Rights or its penumbras, or among those rights reserved to the people by the Ninth Amendment. Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.[118]

The Court, after reviewing privacy rights found to exist, ruled, "[i]nherent in the Due Process Clause of the Fourteenth Amendment is a fundamental 'right to privacy' that protects a pregnant woman's choice whether to have an abortion" balanced against the state's rights and protecting "the potentiality of human life."[119]

The *Roe* decision did not engender much criticism or attack in the first years after it was decided and, in 1975, when John Paul Stevens appeared before the Senate Judiciary Committee for his confirmation hearing, not a single question was asked of him on his views on abortion or the *Roe* decision.

The *Roe v. Wade* decision was intact and the law for nearly twenty years, with certain narrowing cases.[120] However, the Court substantially modified the rule for validity of states' laws restricting abortions when it decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[121] The *Casey* decision established the "undue burden" test,[122] and has been challenged since, with the Court not finding an undue burden in a number of cases. As the *Casey* majority wrote, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[123]

In recent Terms, the Court either refused to hear or ruled narrowly on abortion cases.[124] But, that changed when the Court

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118. *Roe*, 410 U.S. at 129 (first citing *Griswold*, 381 U.S. at 479; then citing *Eisenstadt*, 405 U.S. at 438; and then citing *Eisenstadt*, 405 U.S. at 460 (White, J., concurring); and then citing *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring)).

119. *Roe v. Wade*, OYEZ, www.oyez.org/cases/1971/70-18 [perma.cc/N4DG-MYH4] (last visited Jan 22, 2023).

120. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976) (blocking a law requiring spousal consent for abortion); Maher v. Roe, 432 U.S. 464, 480 (1979) (permitting states to exclude abortion services from Medicaid coverage); Colautti v. Franklin, 439 U.S. 379, 390 (1979) (striking down an unconstitutionally vague Pennsylvania law that required physicians to try to save the life of a fetus that might have been viable); Harris v. McRae, 448 U.S. 297, 322 (1980) (upholding the Hyde Amendment); Webster v. Reproductive Health Services, 492 U.S. 490, 491 (1989) (upholding rules requiring doctors to test for viability after twenty weeks and blocking state funding and state employee participation in abortion services).

121. *Casey*, 505 U.S. at 833.

122. *Id.* at 874.

123. Id. at 877.

124. *See* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016) (determining Texas law imposed undue burden on women); June Medical

heard oral arguments in *Dobbs* and then overturned *Roe* and *Casey*.[125]

Some have argued *Roe* was not as extensive in granting rights as perceived. For example, Mary Ziegler, "an expert on the law, history, and politics of reproduction,"[126] recently wrote, "[b]oth practically and theoretically, *Roe* was never the guarantor of those rights that people believed it to be."[127] Addressing how much of the opinion was focused on the rights of doctors more than women, Ziegler writes, "[u]ltimately, the Court's ruling did not so much embrace a sweeping notion of women's rights as it made regulating abortion harder, at least during the first trimester."[128] Ziegler then addresses the restrictions of reproductive rights over the years, including the Hyde Amendment,[129] which was upheld by the Court when challenged.[130] The article goes through *Dobbs* and notes, "sometimes our rights have nothing to do with the federal courts—they are also the result of state or federal legislation, state constitutional rulings, and ballot-initiative decisions passed by ordinary voters."[131]

Whatever the merits of critics that *Roe* did not extend substantial rights to women, the Supreme Court in *Roe* did find that the Constitution did in fact extend certain reproductive rights and privacy rights to women.

2. Same-Sex Relationship Rights

In 1986, the Court decided *Bowers v. Hardwick*, which held there was no constitutional protection for acts of sexual intercourse between consenting same-sex individuals.[132] Justice Byron White, writing for a majority on a deeply divided Court, wrote:

Services LLC v. Russo, 140 S. Ct. 2103, 2112 (2020) (finding Louisiana's law substantially similar to Texas' law in *Hellerstadt* and invalidating the law).

125. Transcript of Oral Argument at 4, Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022) (No. 19-1392).

126. *Martin Luther King Jr. Professor of Law*, U.C. DAVIS SCH. L., law.ucdavis.edu/people/mary-ziegler [perma.cc/Y9H8-MC7H] (last visited Feb. 25, 2023).

127. Mary Ziegler, *Roe Was Never Roe After All*, THE ATLANTIC (Jan. 21, 2023, 7:05 AM ET), www.theatlantic.com/ideas/archive/2023/01/roe-50-anniversary-abortion-casey/672794/ [perma.cc/R5JC-EHFB].

128. *Id.*

129. *See* EDWARD C. LIU & WEN W. SHEN, IFI2167, CONG. RSCH. SERV, THE HYDE AMENDMENT: AN OVERVIEW, crsreports.congress.gov/product/pdf/IF/IF12167 [perma.cc/8D8V-M3XF] (last updated July 20, 2022). The Hyde Amendment, named after Congressman Henry Hyde, who introduced it, refers to a restriction implemented by Congress in 1976 to prohibit federally funded abortions, with certain exceptions. *Id.*

130. Ziegler, *supra* note 127.

131. *Id. See infra* Part III (providing some state legislative actions and state constitutional rulings).

132. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. 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.[133]

Justice White identified when rights can be recognized under the Constitution:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 325, 302 U. S. 326 (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U. S. 494, 431 U. S. 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'
>
> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.[134]

In his dissent, Justice John Paul Stevens wrote:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried, as well as married, persons.[135]

Stevens' dissent would be cited in a case before the Court seventeen years later that adopted his dissent as the law of the land. In 2003, a law in Texas that criminalized sodomy for same-sex partners, but not co-ed partners, was challenged. In *Lawrence v. Texas*, in a 6-3 opinion, Justice Anthony Kennedy wrote:

> The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making

133. *Id.* at 194.

134. *Id.* at 191-92 (first quoting Moore v. East Cleveland, 431 U. S. 494, 431 (Powell, J.); and then citing *Griswold*, 381 U.S. at 506).

135. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (first quoting *Griswold*, 381 U.S. at 479; then citing Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); and then citing *Eisenstadt*, 405 U.S. at 438).

> their private sexual conduct a crime . . . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.[136]

Justice Antonin Scalia dissented, noting the Court had "largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[137] He also questioned what would prevent the Court from recognizing the right to same-sex marriage, as Canada had recently recognized.[138]

Justice Scalia would be prescient of same-sex marriage. In *United States v. Windsor*,[139] the Court invalidated the Defense of Marriage Act[140] as a violation of the Fifth Amendment.[141]

On June 26, 2015, two years after *Windsor*, Justice Kennedy completed his triumvirate of same-sex rulings, holding in *Obergefell v. Hodge*s that "[t]he Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express their identity."[142] Justice Kennedy concluded: "[t]hey ask for equal dignity in the eyes of the law. The Constitution grants them that right."[143]

Justice Scalia dissented in each of the three cases, arguing that a history and tradition analysis would have led to different results.[144] No solid assessment has been made of why the Court overruled *Bowers* not that many years after it was issued.[145] The

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136. *Lawrence*, 539 U.S. at 578 (2003) (citing to Justice Stevens' dissent in *Bowers*).

137. *Id.* at 602 (Scalia, J., dissenting).

138. *Id.* at 604-05. The Scalia reference to Canada recognizing same-sex marriage pointed to Halpern v. Toronto, 2003 WL 34950 (Ontario Ct. App. 2003), which held that same-sex couples had a fundamental right to marry.

139. United States v. Windsor, 570 U.S. 744, 775 (2013).

140. *See* Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022). The Defense of Marriage Act was a law signed by President Bill Clinton that prevented same-sex couples whose marriages were recognized by their home states from receiving the many benefits available to other married couples under federal law. *Id.* at § 2.

141. U.S. CONST. amend. V; *Windsor*, 570 U.S. at 744; *see also* Daniel Cotter, *June 26 and the SCOTUS Trifecta*, CHI. DAILY LAW BULL. (Sept. 23, 2015), www.chicagolawbulletin.com/archives/2015/09/23/dan-cotter-forum-9-23-15 [perma.cc/7JQ6-DB57] (discussing implications).

142. *Obergefell*, 576 U.S. at 651.

143. *Id.* at 781.

144. *See Lawrence*, 539 U.S. at 596 (Scalia, J., dissenting) (asserting history and tradition does not support the right to same-sex intercourse); *Windsor*, 570 U.S. at 794 (Scalia, J., dissenting) (arguing "a claim that [same-sex marriage is 'deeply rooted in this Nation's history and tradition' would of course be quite absurd"); *Obergefell*, 576 U.S. at 718-19 (Scalia, J., dissenting) (addressing how the majority did not get history and tradition right in finding that same-sex couples had a right to marry).

145. In his last term, Justice Kennedy wrote the narrow decision in

issue of whether the Court will revisit these three cases or the issue of same-sex marriage, directly, remains an open question.[146]

In December 2022, President Joe Biden signed into law the Respect for Marriage Act, which repeals the Defense of Marriage Act and provides protection to same-sex marriages and interracial marriages, but does not require any state to issue such licenses.[147] The Act was passed to address the potentiality that the Court might overturn *Obergefell*.[148]

III. CONGRESS AND THE COURT

At the hearings of the Presidential Commission on the Supreme Court of the United States,[149] Harvard Law School Assistant Professor of Law Nikolas Bowie testified.[150] Bowie's written statement identified the challenges of expecting Congress to resolve fundamental rights issues, while also identifying the issues with the Supreme Court being the branch to address such issues:

> The cause of the current public debate over reforming the Supreme Court is longstanding: Americans rightfully hold democracy as our highest political ideal, yet the Supreme Court is an antidemocratic institution. The primary source of concern is judicial review, or the power of the Court to decline to enforce a federal law when a majority of the justices disagree with a majority of Congress about the law's constitutionality.[151]

On a rare occasion, Congress addressed a SCOTUS decision, *Ledbetter v. Goodyear Tire & Rubber Co.*,[152] and provided clarity as to Congress' actual intent. The majority opinion, written by Justice Alito, addressed a technical issue regarding the 180-day window for filing a claim under Title VII of the Civil Rights Act of 1964.[153]

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

146. *But see Dobbs*, 142 S. Ct. at 2303 (Thomas, J., concurring) (illustrating the ideas that fuel the fear Justice Clarence Thomas will gain additional supporters on this Court).

147. Respect for Marriage Act, 117 Pub. L. No. 228, 136 Stat. 2305 (2022).

148. The Act does not codify *Obergefell*. *Id.* However, one of the findings of Congress in the Act is that "[m]illions of people, including interracial and same-sex couples, have entered into marriages and have enjoyed the rights and privileges associated with marriage." *Id.* at § 2(3).

149. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021) (creating the Presidential Commission).

150. Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, PRES. COMM'N SUP. CT. U.S. (June 30, 2021), www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [perma.cc/4GNM-LCNQ].

151. *Id.*

152. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 622 (2007).

153. *Id.* at 662 (stating Ledbetter brought the claim under the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(b), which prohibits employers from

Justice Alito concluded:

> Ledbetter's policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents. We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.[154]

Justice Ginsburg wrote a dissent for the four liberal Justices, asking Congress to fix this issue:

> The Court's approbation of these [noted] consequences is totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure . . . . This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose . . . . Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.[155]

Congress did just that. On January 29, 2009, the Lilly Ledbetter Fair Pay Act of 2009 became law.[156] The findings note that "[t]he *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress." [157]

Notwithstanding this example of Congress acting when the Court speaks contrary to congressional intent, Congress has not often fixed the Court's wrongs.[158] When the issue is one of constitutional interpretation, Congress cannot merely override what it perceives to be judicial misinterpretation, but must seek to ratify an Amendment to the Constitution.[159] Any proposal requiring

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discrimination on the basis of sex, race, color, national origin, or religion).

154. *Ledbetter*, 550 U.S. at 642 (internal references omitted).

155. *Id.* at 660 (Ginsburg, J., dissenting).

156. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5).

157. *Id.* at § 2 (finding that the decision also "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.").

158. *Ledbetter* is one instance. Another is the Religious Freedom Restoration Act, which almost passed unanimously by the Congress in 1993 and was a direct reaction to Employment Division v. Smith, 494 U.S. 872 (1990). Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1). Public outrage fueled Congress, and the House unanimously passed it, with the Senate voting 97-3. *Id.*

159. *The Court and Constitutional Interpretation*, SUP. CT. U.S., www.supremecourt.gov/about/constitutional.aspx [perma.cc/AKK6-Z738] (last visited Feb. 25, 2023) ("When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court. However, when the Court interprets a statute, new legislative action can be taken.").

a constitutional amendment is "dead on arrival—unlikely to be approved by either two-thirds of Congress or three-quarters of the states, as required by the rules of constitutional amendment in the Constitution."[160]

IV. THE PATH TO JUSTICE IS LIKELY NOT THROUGH THE COURT

A. Some Potential Ways to Constrain the Court

Over the last several years – with the Supreme Court issuing decisions that many do not accept as being the will of the nation – there have been numerous attempts at Court reform and holding the Court accountable. Many of these are not likely to pass divided chambers in Congress, but are more long-term considerations that may effectuate a rule of law and legal landscape that is more in keeping with the populace's expectations.[161] At the federal level, a number of reforms and new approaches have been proposed, and some are addressed briefly in this Part, such as jurisdiction stripping and reforms to the Terms served by Justices, as well as the number of Justices.

1. Jurisdiction Stripping

At various times in the Court's history, Congress has attempted to restrain the jurisdiction of the Court.[162] It can be done. *Federalist 80* summarized a way for the Court to be limited in its jurisdiction:

> From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such

160. Richard Albert, *2021 Jorde Symposium: The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2006-07 (2022).

161. *See* discussion *supra* Parts II.A-B (discussing certain Court rulings that were not necessarily seen as misguided at the time by the majority of the nation, but in retrospect were so against the basic understandings of what constitutes a fundamental right for all).

162. An early example of restraining jurisdiction of the Court happened in 1801 and 1802. A lame duck Congress in 1801 passed the Judiciary Act of 1801, which expanded federal judgeships while eliminating a Supreme Court seat. In 1802, Congress passed the Judiciary Act of 1802, repealing the prior year's act and also changing the Court's sitting from two sessions a year to one, thus the Court did not sit for more than a year. *Marbury v. Madison* was filed in 1801 but not heard and decided until 1803.

> regulations as will be calculated to obviate or remove these inconveniences.[163]

Congress does have such powers. Article III, Section 2, Clause 2 of the Constitution establishes the Court's appellate jurisdiction:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[164]

The Court has reviewed the powers of Congress to address what jurisdiction the Court has over cases and controversies, dating back to *Marbury v. Madison*.[165] Chief Justice John Marshall wrote for the Court:

> If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.[166]

Only a constitutional amendment can change original jurisdiction.[167] Regarding appellate jurisdiction, Congress has the power to change such jurisdiction, provided Congress "may not impose rules of decisions or direct a court how to decide a particular case."[168]

Congress has introduced measures to limit the activities of the Court over the years. For example, Representative Steve King (R-Iowa) introduced bills in 2015 and 2017, the latter to prevent the Court from citing to the Patient Protection and Affordable Care Act[169] cases from the Supreme Court.[170] The entire text of the 2017 bill stated:

> Under Article 3, Section 2, which allows Congress to provide exceptions and regulations for Supreme Court consideration of cases and controversies, the following cases are barred from citation for the purpose of precedence in all future cases after enactment: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573, 183 L. Ed. 2d 450 (2012) and *King v. Burwell*, 135 S. Ct. 2480, 2485, 192 L. Ed. 2d 483

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163. THE FEDERALIST NO. 80 (Alexander Hamilton) (McClean's ed. N.Y 1788, Lib. Cong. Rsch. 2023).

164. U.S. CONST. art. III, § 2, cl. 2.

165. Marbury v. Madison, 5 U.S. 137, 153 (1803).

166. *Id.* at 174.

167. *Id.*

168. Daniel Cotter, *House Bill Poses Tricky Question on Congress' Power, Constitutional Law*, CHI. DAILY LAW BULL. (Jan. 23, 2017), www.chicagolawbulletin.com/archives/2017/01/23/congress-scotus-power-1-23-17 [perma.cc/AR8W-3KF9].

169. H.R. 132, 114th Cong. (2015).

170. H.R. 177, 115th Cong. (2017).

(2015) and *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2782, 189 L. Ed. 2d 675 (2014).[171]

The bill went nowhere – it was questionable as it directed the Court not on appellate jurisdiction per se, but on what it could or could not do or cite.[172] Another 2015 bill King introduced[173] would have prevented federal judges from having jurisdiction in any marriage cases.[174]

In *Ex Parte McCardle*, the Court held that Congress may withdraw jurisdiction after it has previously provided the Court with such jurisdiction.[175] The Court wrote: "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[176]

Congress can overstep such stripping authority. In *United States v. Klein*, decided shortly after *McCardle*, the Court addressed a statute that Congress enacted, which provided individuals could recover proceeds of their property that had been seized during the Civil War if they could prove they had not aided the rebellion during the war.[177] The 1870 Congressional act was in reaction to a Supreme Court decision, *United States v. Padelford*, which held that a presidential pardon for such activities was proof a person had not aided the rebellion.[178]

In *Klein*, the Court held that Congress may withhold the right of appeal in certain types of cases, but may not impose rules of decisions or direct a court how to decide a particular case.[179] *Klein* has been weakened in recent Terms,[180] but still remains good law.

While jurisdictional stripping is permitted, and some have

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171. *Id.*

172. *See, e.g.*, U.S. v. Klein, 80 U.S. 128, 147 (1871) (establishing the congressional provision improperly denied the Court appellate jurisdiction regarding decisions by the Court of Claims based on such pardons and told the Court how to act).

173. Restrain the Judges on Marriage Act of 2015, H.R. 1968, 114th Cong.

174. The bill argued:

> No court created by an Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, any type of marriage, section 1738C, or this section.

Id.

175. Ex Parte McCardle, 74 U.S. 506, 512-13 (1868).

176. *Id.*

177. *Klein*, 80 U.S. at 137.

178. United States v. Padelford, 76 U.S. 531, 542 (1869).

179. *Klein*, 80 U.S. at 128.

180. *See* Bank Markazi v. Peterson, 578 U.S. 212, 213 (2016) (discussing *Klein* and stating, "Congress may amend a law and make the amended prescription retroactively applicable in pending cases.").

advocated for it,[181] with the current Congressional split, it is unlikely that any introduced bills would be enacted.[182] There is the risk, despite elections, "that Congress will exercise its Article III power unwisely."[183] Consequently, the question persists: "[y]our friendly reminder that in just a few years the Court has completely changed the constitutional law of abortion, guns, religion, and administrative law. If changing judges changes law, do we know what law is?" [184] Justice Kagan has expressed similar concerns about the only thing that has changed are the Justices sitting, stating, "[p]eople are rightly suspicious if one justice leaves the court or dies and another justice takes his or her place and all of sudden the law changes on you."[185] Justice Kagan joined Justice Breyer's dissent in *Dobbs*. The dissent noted that the only thing that changed was the make-up of the Court, referencing that the "majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them."[186]

Paul Rosenburg recently wrote an article reviewing

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181. *See*, *e.g.*, Christopher Jon Sprigman, *Jurisdiction Stripping as a Tool for Democratic Reform of the Supreme Court*, PRES. COMM'N SUP. CT. U.S. (Aug. 15, 2021), www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf [perma.cc/XY72-8HC2]. Sprigman stated:

> That is for Congress to use the power that the Constitution has always given it to override, in appropriate cases, decisions of the Supreme Court and indeed any federal court. Not through an Article V amendment, which is virtually always an impossible hurdle to clear. But rather through Congress's Article III authority to strip the jurisdiction of both the Supreme Court and the lower federal courts. Congress's virtually plenary power to determine courts' jurisdiction is, if used with discretion and determination, a power to enforce Congress's interpretations of the Constitution's meaning, and to deprive courts of jurisdiction to review those interpretations. It is, in effect, a power to limit, or to qualify, judicial supremacy.)

Id.

182. An interesting argument is that Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) would permit this action. The Court held, "[t]o distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power, this Court's precedents establish the following rule: Congress violates Article III when it 'compel[s] . . . findings or results under old law.' But Congress does not violate Article III when it 'changes the law.'" *Patchak*, 138 S. Ct. at 905 (internal citations omitted).

183. *Id.*

184. Eric Segall (@espinsegall), TWITTER (Jan. 14, 2023, 9:02 AM), www.twitter.com/espinsegall/status/1614276852356452352 [perma.cc/98B5-VKPE].

185. Kelsey Vlamis, *Justice Elena Kagan said people are "rightly suspicious" of the Supreme Court if the law can change whenever a justice dies or resigns*, BUS. INSIDER (July 21, 2022), www.businessinsider.com/elena-kagan-suspicious-law-changes-when-supreme-court-justice-dies-2022-7 [perma.cc/STE2-7JLS].

186. *Dobbs*, 142 S. Ct. at 2335 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

Reconstruction as a potential model to address the clash between Court rulings and the populace's resistance to retracting or constricting individual rights. Rosenburg wrote: "[Congress] repeatedly changed the size of the Supreme Court, stripped the court of jurisdiction over a class of cases that sought to challenge Reconstruction, and used its enforcement power to protect fundamental rights and expand the ability of the federal courts to redress state abuse of power."[187]

During Reconstruction, Congress tried to introduce supermajority Court votes to overturn Congress, but Rosenburg recognizes that with the current majority on the Court, this would be difficult.[188] While an interesting notion, the reality is that even if this were instituted, the rights and liberties of those identified in this Article would be unprotected for two reasons: (1) Congress is closely divided and unlikely to take broad initiatives to protect women, marginalized people, or the LGBTQ+ community; and even if it did (2) the Court has a supermajority of six conservatives who would be able to undo such congressional actions.

2. Use of the Ninth Amendment

One provision that has seldom been used by the Court to bolster rights not specifically enumerated in the Constitution is the Ninth Amendment, which provides "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[189]

The purpose of the Ninth Amendment lacks consensus.[190] Some have suggested that, like the words before the comma in the Second Amendment, the language has no operative meaning or purpose.[191] But others have suggested that the better case is that it does have meaning and a reason:

> When Robert Bork compared the Ninth Amendment to an inkblot, he violated John Marshall's famous dictum that '[i]t cannot be presumed

187. Paul Rosenburg, *How to fix the Supreme Court: Congress has the power, and simply isn't using it*, SALON (Jan. 15, 2023), www.salon.com/2023/01/15/how-to-fix-the-court-congress-has-the-power-and-simply-isnt-using-it/ [perma.cc/R35Z-7DS3].

188. *Id.* (stating "[s]upermajority requirements are an avenue to rein in the court and make it harder to strike down federal laws, but they hardly offer a solution to a court dominated by a conservative supermajority, as ours is today.").

189. U.S. CONST. amend. IX.

190. *See* Randy E. Barnett & Louis Michael Siedman, *The Ninth Amendment, Common Interpretation*, NAT'L CONST. CTR., constitutioncenter.org/the-constitution/amendments/amendment-ix/interpretations/131 [perma.cc/LQ8J-HA6W] (last accessed Apr. 30, 2023) (providing excellent analysis of the purpose).

191. *See* District of Columbia v. Heller, 554 U.S. 570, 572 (2008) (opining that "[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause."). This statement came from Justice Scalia. *Id.*

> that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.' Still, Bork was on to something, for until quite recently the Ninth Amendment has been the Rorschach test of constitutional theory. The question 'What does the Ninth Amendment mean?' has frequently elicited interpretations that tell us more about the constitutional visions of the interpreters than about the words of the amendment. But the Ninth Amendment is not an inkblot; it consists of English words that are simple and direct.[192]

However, usage of the Ninth Amendment has not been an effective means to support such unenumerated rights, and is not likely to be a viable path to justice. The Cato Institute referred to it as "the second-least relevant"[193] Amendment in the Bill of Rights.

James Wilson,[194] a former Pennsylvania delegate to the Constitution, defended the Constitutional Convention not including any Bill of Rights in the Constitution submitted to the states.[195] On November 29, 1787, Wilson spoke on the topic:

> I am called upon to give a reason, why the Convention omitted to add a bill of rights to the work before you …. I cannot say, Mr. President, what were the reasons, of every member of that Convention, for not adding a bill of rights …. In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous …. [A] bill of rights is not an essential or necessary measure. But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt the enumeration, everything that is not enumerated is presumed to be given.[196]

In the first Congress, James Madison, the "Father of the Constitution,"[197] introduced a number of actual amendments that

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192. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 80 (2006).

193. James Knight, *Americans Should Remember the Ninth Amendment*, CATO INST. (Nov. 20, 2019), www.cato.org/commentary/americans-should-remember-ninth-amendment [perma.cc/EX49-7RJG].

194. *See* Daniel Cotter, *Madison's Right-Hand Man Gets Little Credit For Role With Constitution*, CHI. DAILY LAW BULL. (Aug. 15, 2016), www.chicagolawbulletin.com/archives/2016/08/15/wilson-constitution-8-15-16 [perma.cc/Y4EZ-VK3R] (discussing that some have made claims Wilson is the true person entitled to the title, "Father of the Constitution.").

195. STATE HIST. SOC'Y WIS., DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 387 (John P. Kaminski & Gaspare J. Saladino eds., 2d prntg.). James Wilson lists South Carolina, New Jersey, New York, Connecticut and Rhode Island as having no state bill of rights at the time. *Id.* at 388.

196. *Id.* at 387-89.

197. *See* Daniel Cotter, *Bill Of Rights, Now Seen as Sacred, Had Rocky Road to Adoption*, CHI. DAILY LAW BULL. (July 16, 2016), www.chicagolawbulletin.com/archives/2016/07/18/bill-of-rights-history-7-18-16 [perma.cc/5FTB-7XVV]

would be inserted into the Constitution, including this language at Article I, Section 9:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[198]

The challenge with the Roberts Court is that it is unlikely to embrace an expansive reading of the Ninth Amendment.[199]

3. Arguing for the Full Recognition of the Famous Footnote

The *United States v. Carolene Products Company* opinion contains perhaps the most famous footnote in the Court's history – footnote four.[200] Footnote four set forth a framework that continues to be used. It applies a form of heightened scrutiny where a law or statute conflicts with Bill of Rights protections for certain issues in the political process, and where regulations adversely affect "discrete and insular minorities."[201]

However, the Roberts Court approach uses "history and traditions," and the First Amendment to protect others against discrete and insular minorities.[202]

In recent Terms, the Court has increasingly relied on the First Amendment's free exercise, freedom of speech, and the other six rights enumerated.[203] It is not likely to go back to using this footnote

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(analyzing introduction of amendments and their reception).

198. Barnett & Siedman, *supra* note 190.

199. *See, e.g.*, *Hearings Before The Committee on The Judiciary United States Senate*, 102d Cong. 225 (questioning by Senator Patrick Leahy (D-Vt.)) (expressing concerns at Clarence Thomas' nomination hearings on his Ninth Amendment views and explaining: "I ask that because you have expressed some very strong views, as you know better than all of us, on the ninth amendment. You had an article that was reprinted in a Cato Institute book on the Reagan years. You refer to Justice Goldberg's 'invention,' of the ninth amendment in his concurring opinion in *Griswold*. And you said—and let me quote from you. You said, 'Far from being a protection, the ninth amendment will likely become an additional weapon for the enemies of freedom.' A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a ninth amendment case came before you, you would have an open mind?"). *See also Dobbs*, 142 S. Ct. at 2228 (2022) (finding no right to privacy vis-à-vis abortion). It is hard to fathom this Court recognizing any substantive meaning in the Ninth Amendment.

200. United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

201. *Id.*

202. *See, e.g.*, U.S. CONST. amend. I; Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (utilizing the First Amendment to deem California law unduly burdensome on free speech).

203. *See* David A. Karp, *Top 10 First Amendment Cases of the Supreme Court Term*, CARLTON FIELDS (June 30, 2022), www.carltonfields.com/insights/publications/2022/top-10-first-amendment-cases-of-the-supreme-court [perma.cc/5LK9-3XWA] ("The court invoked the First Amendment in cases

to protect those who need protecting.

4. Court Reform

A final way to address the Court's issues and balance the protections of those who have not been protected would be to implement various Court reforms. President Joe Biden's Executive Order 14,023 established the Presidential Commission on the Supreme Court.[204] This Commission is comprised of a bipartisan group of thirty-six constitutional scholars and former judges. The Commission is not tasked with making recommendations, but the two reforms noted below are the most common.[205] Others include each president having two appointments per four-year presidential term and expanding the Court.[206]

On December 8, 2021, the Commission issued its final report.[207] It did have one recommendation that engendered extensive support: term limits. The report advised President Biden: "[a]mong the proposals for reforming the Supreme Court, non-renewable limited terms—or 'term limits'—for Supreme Court Justices have enjoyed considerable, bipartisan support."[208]

There is debate about whether introducing Term limits can be accomplished without amending the Constitution. The appointment powers of the president of the United States provide: "[h]e shall have Power, by and with the Advice and Consent of the Senate, to … nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the supreme Court."[209] Combined with the language of Article III, the appointment to a specific role as "Judges of the Supreme Court" would seem to curtail some of the term limit ideas.

Article III judges serve lifetime tenures, based on the following language:

> The judicial Power of the United States, shall be vested in one

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regulating social media platforms, prayer at public schools, state funding of religious schools, campaign finance restrictions, billboard advertisements, and religious exemptions to COVID-19 vaccine mandates.").

204. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

205. *See, e.g.*, Supreme Court Tenure Establishment and Retirement Modernization Act of 2022, S. 4706, 117th Cong. § 8 (proposing to establish 18-year Terms).

206. *See, e.g.*, Ganesh Sitaraman & Daniel Epps, *How to Save the Supreme Court*, 129 YALE L.J. 148, 175 (2019) (offering a balanced bench and also a "lottery" process for Justices to sit on panels).

207. PRES. COMM'N SUP. CT. U.S., FINAL REPORT 1 (Dec. 2021), www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [perma.cc/KKD8-UBNN]. The purpose of the Commission and the final report was "to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals." *Id.*

208. *Id.* at 111.

209. U.S. CONST. art. II, § 2, cl. 2.

> supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour….[210]

The term "good Behaviour" has been interpreted to be equivalent to lifetime tenure.

Many of the reforms regarding the Court's size or Justices' Terms of service raise serious issues of implementation[211] and whether amendment(s) to the Constitution would be necessary to effectuate such changes. An argument does exist that Term limits could be introduced, but it is not by any means a resolved issue. In any event, given the close margins in both chambers of Congress, serious efforts at reforming the service of Supreme Court Justices is unlikely.

5. Constraining the Court by Ignoring It

Ignoring the Court is another approach to address the Court's discriminatory, inefficient, and illogical conclusions. The argument is "just ignore them. The President and Congress do not actually have to obey the Supreme Court."[212] Perhaps this may work on a limited basis. However, given current political divide between states and the way the Court grants jurisdiction, this proposal seems, at best, idealistic. This method has been unsuccessfully tried before. In *Worcester v. Georgia*, the question arose as to whether Georgia could regulate conduct between citizens of the states and Native Americans.[213] Chief Justice John Marshall, writing for a 5-1 Court, answered no. Justice Marshall wrote:

> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union . . . . [T]he whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States.[214]

Former President Andrew Jackson is rumored to have responded, "John Marshall has made his decision, now let him enforce it."[215] Georgia ignored the Supreme Court's decision, but the matter never became a crisis.

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210. U.S. CONST. art. III, § 1.

211. This issue will be discussed at the Symposium held April 13, 2023.

212. Ryan Cooper, *Democrats Have a Better Option Than Court Packing*, THE WEEK (Sept. 22, 2020), theweek.com/articles/938865/democrats-have-better-option-than-court-packing [perma.cc/H4HU-KGXC].

213. Worcester v. Georgia, 31 U.S. 515, 538 (1831).

214. *Id.* at 519-20.

215. Jeffrey Rosen, *Supreme Court History: The First Hundred Years*, THIRTEEN, www.thirteen.org/wnet/supremecourt/antebellum/history2.html [perma.cc/354Z-7JND] (last visited on Mar. 19, 2023).

The biggest impediment to simply ignoring Supreme Court decisions might be the case *Cooper v. Aaron*, in which the Court held that state officials are required to follow federal orders based on Supreme Court opinions.[216] The per curiam opinion explained the reasoning:

> Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 5 U. S. 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[217]

Given the political divide in the states and the *Cooper* holding, ignoring the Court's decisions is not a strong approach to negating the Court's decisions.

6. Working the Current Landscape

The 118th Congress is narrowly divided, with the Senate controlled 51-49 by Democrats, and the House controlled 222-212 by Republicans—a situation likely to result in gridlock.[218] Many proposals or considerations require Congress to take action. This is unlikely given the current hyper-partisan Congress. However, that is not to say that Democrats should remain focused on ways to make sure the Court is not issuing decisions, 6-3. To the extent they can, Democrats should be careful in the types of cases appealed to the Supreme Court. However, the ability to obtain significant progress on issues of Democratic interest in the current Congress is difficult, if not impossible, in the current national landscape.

7. Establishing a Code of Ethics

One path that could make things more transparent and perhaps instill more accountability at the Court is to implement a robust code of ethics. Fix the Court[219] and its founder, Gabe Roth,

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216. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

217. *Id.*

218. *See, e.g.*, Bill Schneider, *Messy New Congress and Coming Gridlock: Founders Intended Governing to be Difficult*, THE HILL (Jan. 8. 2023, 10:30 AM ET), thehill.com/opinion/campaign/3804344-messy-new-congress-and-coming-gridlock-founders-intended-governing-to-be-difficult/ [perma.cc/ZE4M-TBFL] (explaining the Founders wanted our government to not work very well, and that this current state of affairs in Congress is as intended).

219. *See About Us*, FIX THE COURT, fixthecourt.com/about-us/ [perma.cc/7SGE-QJZS] (explaining it is, "a nonpartisan, 501(c)(3) organization . . . that

have pushed for Court reforms to establish a code of ethics and to insist upon more transparent and detailed disclosures.[220] In the 117th Congress, the Supreme Court Ethics, Recusal, and Transparency Act of 2022 was introduced.[221] It required the following to be established or implemented: a code of ethics, minimum disclosure standards, and a mandatory recusal process.[222] A more accountable Court would potentially lead to a more trusted Court and one that the nation might more easily accept as legitimate when it issues its most contentious rulings. The sense of improprieties amongst members of the Court in their decisions could be suppressed by a better understanding of the financial and other involvements of the Justices. It remains unseen whether we will see serious reforms that would satisfy those seeking it.

8. Reviewing the Court

Some Senate members have also promoted another approach—a review mechanism. Senators Sheldon Whitehouse (D-RI) and Catherine Cortez Masto (D-NV), of the 117th Congress, introduced the Supreme Court Review Act.[223] This proposal:

> Mirrors the Congressional Review Act by codifying a process for passing new laws in response to Supreme Court decisions that interpret federal statutes or roll back constitutional rights;
>
> Includes expedited procedures for the Senate to pass these laws by a simple majority;
>
> Prevents abuse of the process by excluding any 'extraneous' changes to federal law, similar to the 'Byrd Rule' during the reconciliation process; and
>
> Ensures that members of the minority party in the Senate have an opportunity to propose alternative updates to the law.[224]

This bill, if enacted, would provide a mechanism to quickly and effectively respond to decisions of the Supreme Court that are

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advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people.").

220. *See Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (Mar. 7, 2023), fixthecourt.com/2023/03/recent-times-justice-failed-recuse-despite-clear-conflict-interest/ [perma.cc/9BTD-UNYY] (tracking issues in ethics, including Justice Thomas' failure to recuse from a case that overlapped with Ginni Thomas' involvement in January 6 activities and other ultraconservative matters, and other recent incidents, demonstrating calls for reforms seem more plentiful).

221. Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R. 7647, 117th Congress.

222. *Id.*

223. Supreme Court Review Act of 2022, S. 4681, 117th Cong.

224. Press Release, Senator Sheldon Whitehouse, Whitehouse, Cortez Masto Propose Congressional Check On Supreme Court Decisions (July 28, 2022) (on file with author).

against the views of Congress and the nation. This offers another reform worth pursuing, but it would be unlikely to find traction or likelihood of passage in the 118th Congress, given the House split.

9. Rebalance the Article III Courts

During the Trump Presidency, he left a rich legacy of appointing Article III judges to the federal benches, including three Supreme Court Justices in just four years.[225] However, his legacy on the bench is not just the three conservative Justices he secured on the Supreme Court. His most impactful legacy might be at the appellate level.[226] For example, President Trump placed six judges on the Fifth Circuit. Those judges have "put the court at the forefront of resistance to the Biden Administration's assertions of legal authority and to the regulatory power of federal agencies."[227] The new Fifth Circuit judges' "rulings . . . at times [have] broken with precedent and exposed rifts among the judges, illustrating Trump's lasting legacy on the powerful set of federal courts that operate one step below the Supreme Court."[228] During his single term, "Donald Trump [left] the White House having appointed more than 200 judges to the federal bench, including nearly as many powerful federal appeals court judges in four years as Barack Obama appointed in eight."[229] The focus on the federal appeals court judges was instrumental, with Trump having "appointed 54 federal appellate judges in four years, one short of the 55 Obama appointed in twice as much time," resulting in Trump having "'flipped' the balance of several appeals courts from a majority of Democratic appointees to a majority of Republican appointees,"[230] including the Eleventh, Second, and Third Circuits.[231] The Biden Administration

225. *See, e.g.*, Daniel A. Cotter, *Judicial Nominations in the Trump Administration*, HARV. L. & POL'Y REV. BLOG (July 8, 2019), harvardlpr.com/2019/07/08/judicial-nominations-in-the-trump-administration/ [perma.cc/48LZ-GBH9] (reviewing claims of record setting judicial nominees and addressing President Trump's success in confirming Article III justices during his presidency).

226. *See* Ann E. Marimow, *Trump's Lasting Legacy on The Judiciary is Not Just at The Supreme Court*, WASH. POST (Jan. 29, 2023), www.washingtonpost.com/politics/2023/01/29/5th-circuit-court-trump-judges-conservative/ [perma.cc/N6H3-ZAAV].

227. *Id.*

228. *Id.*

229. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [perma.cc/8BSL-378H].

230. *Id.*

231. *See Factbox: Donald Trump's legacy - six policy takeaways*, REUTERS (Oct. 30, 2020, 5:33 AM), www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK [perma.cc/7M33-R2DM] ("The Atlanta-based 11th U.S. Circuit Court of Appeals, the Manhattan-based 2nd Circuit and the Philadelphia-based 3rd

must take steps to ensure that the lower-level courts become balanced again and counter some of the "court packing" that the Trump Administration was able to implement.

One difference between the current Biden Administration and the last Democrat presidency is the focus on confirming judges at a much faster pace and with more focus. According to statistics for Biden's first two years, he has "appointed 97 federal judges compared with the 85 judges Trump had confirmed and the 62 judges confirmed under Obama by this point in their presidencies."[232] Thus far, "Biden has appointed more federal judges than any president since John F. Kennedy at this point in his presidency" but continues to face pressure from judicial advocacy groups "to speed up the pace of his judicial confirmations."[233]

President Biden has appointed a very diverse bench in his first two years. Many groups, including the American Constitution Society,[234] have pressed the Biden Administration to continue appointing a large number of Article III judges in the current 118th Congress, while Democrats retain a clear majority in the Senate.[235] American Constitution Society President Russ Feingold issued a statement calling for the Senate "to confirm 138 judges in two years, or roughly 70 judges per year."[236] In the blog, Feingold calls for three

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Circuit all had Democratic-appointed majorities when Trump became president in 2017.").

232. Candice Norwood & Jasmine Mithani, *Two Years in, Biden has Prioritized Nominating Women of Color as Judges*, THE 19th (Jan. 26, 2023, 11:10AM CT), 19thnews.org/2023/01/biden-reshaping-federal-judiciary-appointments/ [perma.cc/69S6-P7Q9].

233. *Id.* This pressure stems from a fear his "nominations would expire at the end of the year" while there are still vacancies on the federal courts which affect the advocates' ability to move cases through the dockets. *Id.*

234. *See About ACS*, AM. CONST. SOC'Y, www.acslaw.org/about-us/ [perma.cc/JH8C-AHSJ] (last visited Mar. 19, 2023). The American Constitution Society is "a 501(c)3 non-profit, non-partisan legal organization. Through a diverse nationwide network of progressive lawyers, law students, judges, scholars, advocates, and many others, our mission is to support and advocate for laws and legal systems that strengthen our democratic legitimacy, uphold the rule of law, and redress the founding failures of our Constitution and enduring inequities in our laws in pursuit of realized equality." *Id.*

235. Some have proposed that, in an effort to assure that the Court at least remains with three Democrats, Justices Elena Kagan and Sonia Sotomayor retire to permit President Biden, with a Senate majority, to replace them. *See* Ian Millhiser, *Sotomayor and Kagan need to think about retiring*, VOX (Dec. 21, 2022), www.vox.com/policy-and-politics/23507944/supreme-court-sonia-sotomayor-elena-kagan-ruth-bader-ginsburg-retire [perma.cc/A4DW-NHA7]. *But see* Daniel A. Cotter, *Supreme Court Mulls Attorney-Client Privilege: 'If it ain't broke, don't fix it'*, CHI. DAILY LAW BULL. (Jan. 16, 2023), www.chicagolawbulletin.com/daniel-cotter-supreme-court-attorney-client-privilege-legal-vs-non-legal-advice-20230116 [perma.cc/9P3J-XX38] (emphasizing many reasons this approach will not work).

236. Russ Feingold, *We Need More Judges*, ACS IN BRIEF (Jan. 13, 2023), www.acslaw.org/inbrief/we-need-more-judges/ [perma.cc/8LY6-GHLY].

measures to help this process along: (1) eliminate the blue slip;[237] (2) reduce floor time for consideration; and (3) allow for simultaneous consideration of numerous judges.[238]

The most practical way to impact future rulings and decisions at the federal level is to continue filling vacancies on the Court and try to balance the courts at the district court and court of appeals levels. The three proposals that the American Constitution Society has suggested are viable ways towards this objective. Filling as many Article III seats as possible is the one thing, among various reforms and solutions available, that can have a long-term impact on the rights and liberties important to many Americans.

B. The Potential Path to Justice by Breaking Barriers at the State Level

In the wake of *Dobbs*,[239] some states put the issue of abortion and various issues surrounding reproductive rights on the ballots.[240] In several states, the electorate rejected prohibitions or restrictions that would further constrict reproductive rights, while in a number of other states, abortion was made part of the state constitution.[241] Long term, advocates should consider whether there is a viable constitutional path to reach a federal consensus on women's reproductive rights, but that path is hard to fathom in the way our nation's political landscape currently exists.[242]

A current potential path – although not one that is clear-cut to nationwide victory on issues such as abortion – is to encourage those in conservative states from extreme measures, such as enacting more restrictive prohibition on abortion rights.[243] Mobilization of

237. *See* Dan Cotter, *Confirmation Bias- A Book Review*, LINKEDIN (Aug. 17, 2019), www.linkedin.com/pulse/confirmation-bias-book-review-dan-cotter/ [perma.cc/XWA7-45JT] (describing the "blue slip" Senate practice of requiring two blue slips, or "okays", to be submitted to the Senate by the candidate's home state senators before the Senate will consider the candidate). While the Republicans, when in the majority, have insisted a Democrat president follow the process, during the Trump Administration, Senator Chuck Grassley and others decided to change the rules. *Id.*; *see also* Daniel A. Cotter, *2nd Circuit Nominee is One of Trump's Most Radical Picks*, DES MOINES REGISTER (Oct. 15, 2019), www.desmoinesregister.com/story/opinion/columnists/2019/10/15/2nd-circuit-nominee-steven-menashi-one-trumps-most-radical-picks/3983913002 [perma.cc/7BTZ-RQ8W] (discussing the history of the "blue slip" practice).

238. Feingold, *supra* note 236.

239. *Dobbs*, 142 S. Ct. at 2228.

240. *See infra* notes 248-62 and accompanying test on ballot measures.

241. *See infra* notes 263-65 and accompanying text describing such actions in California, Michigan, and Vermont.

242. Schneider, *supra* note 218 (stating "more and more states and districts are dominated by one party, owing to geographic polarization of the voters and, in the House of Representatives, redistricting to protect incumbents.").

243. While the main victories in several states, including red states, were abortion rights and restrictions, the same education and advocacy could be used

supporters and advocates of other rights for protections of those rights and liberties deemed to be in harm's way[244] can be effective.

The November 2022 elections saw the story of "wins" on abortion issues overall while also seeing Republicans gain supreme court seats in key states that could shape issues, such as redistricting and the independent state legislature theory.[245] If this theory is adopted by the Supreme Court, it would fundamentally alter the ability of state courts to challenge or review election decisions made by legislatures.

The following are examples of how several states have addressed abortion rights in light of *Dobbs*. States acting either by ballot referendum or by state supreme court decision include both conservative and liberal states. Informing the electorate of the dangers of radical actions by ballot or by legislatures, and encouraging them to reject extreme restrictions on rights for the underrepresented seems to be the most likely way to break barriers and protect this nation. The warning cry, "it's a republic, if we can keep it,"[246] signals loud and is a call to action, as it remains true that the republic is worth fighting to save. Several states responded to this fight in the midterms and more recently.

1. The Kansas Referendum

Shortly after the Supreme Court decided *Dobbs*, Kansas voters went to the polls. One of the items they were asked to vote on was the *Value Them Both Amendment*.[247] The Amendment, if passed, would have added the following to the state constitution:

> § 22. Regulation of abortion. Because Kansans value both women and children, the constitution of the state of Kansas does not require

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in protecting other rights.

244. Abortion and reproductive rights, for example.

245. On December 7, 2022, the Court heard *Moore v. Harper*. Transcript of Oral Argument at 1, Moore v. Harper, No. 21-1271 (Dec. 7, 2022). Subsequently, the North Carolina Supreme Court, which changed its makeup from Democratic majority to Republican majority, agreed to a rehearing, potentially making the Supreme Court case moot. *See* Daniel A. Cotter, *Moore No More? SCOTUS Jurisdiction, N.C. Rehearing Cast Shadow Over Case*, CHI. DAILY LAW BULL. (Feb. 13, 2023), www.chicagolawbulletin.com/daniel-cotter-us-supreme-court-independent-state-legislature-theory-moore-20230213 [perma.cc/8PM9-9AVN] (discussing the decision to rehear *Moore*).

246. *See* Julie Miller, "*A Republic if You Can Keep It*": *Elizabeth Willing Powel, Benjamin Franklin, and the James McHenry Journal*, LIB. CONG. BLOGS (Jan. 6, 2022), blogs.loc.gov/manuscripts/2022/01/a-republic-if-you-can-keep-it-elizabeth-willing-powel-benjamin-franklin-and-the-james-mchenry-journal/ [perma.cc/3RLU-E972]. This was said by Benjamin Franklin, in response to question about the type of government the Constitutional Convention had just formed, on the last day of the Convention, September 18, 1787. *Id.*

247. *State of Kansas Official Primary Election Ballot*, KAN. SEC. ST. (Aug. 2, 2022), sos.ks.gov/elections/22elec/2022-Primary-Election-Constitutional-Amendment-HCR-5003.pdf [perma.cc/8ZJA-RKT9].

> government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.[248]

The Kansas legislature summarized the proposal:

> HCR 5003 proposes an amendment to the Kansas Constitution for consideration at a special election called on August 2, 2022, to be held in conjunction with the primary election held on that date. That amendment, if approved by a majority of Kansas voters, would create a new section in the Kansas Bill of Rights concerning the regulation of abortion. The resolution states the amendment may be cited as the Value Them Both Amendment.[249]

By a margin of 59.2% to 40.8%, the voters of Kansas "sent a resounding message about their desire to protect abortion rights, rejecting a ballot measure that would have allowed the state legislature to tighten restrictions or ban the procedure outright."[250] Not only did the proposed Amendment lose by a large margin, but twenty-seven out of forty state senate districts defeated the measure.[251]

2. Five Other States on Abortion

On November 8, 2022, during the congressional general election, abortion was on the ballot in several states. In five states, issues surrounding abortion were on the ballot:

- Montana considered an abortion measure that addressed born alive issues and would have imposed criminal penalties on health care providers;[252]
- Kentucky considered a proposal that would have further restricted abortion rights;[253]

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248. *Id.*

249. *"Value Them Both" Constitutional Amendment; HCR 5003*, KAN. LEGIS. RSCH. DEP'T, kslegislature.org/li_2022/b2021_22/measures/documents/summary_hcr_5003_2021 [perma.cc/F4M3-SUQR] (last visited Mar. 19, 2023).

250. *Kansas voters protect abortion rights; Biden comments*, ASSOC. PRESS (Aug. 2, 2022, 08:00 PM CDT), www.ksn.com/news/your-local-election-hq/vote-tabulation-for-kansas-value-them-both-amendment/ [perma.cc/3TZW-MF2G].

251. Christopher Reeves, *Voters told them no, but Kansas Republicans are advancing wild new anti-abortion legislation anyway*, DAILY KOS (Jan. 21, 2023, 9:01AM CST), dailykos.com/stories/2023/1/21/2148111/-Voters-told-them-no-but-Kansas-Republicans-are-advancing-wild-new-anti-abortion-legislation-anyway [perma.cc/RHB8-45C2].

252. LR-131, H.B. 167, 67th Leg. (Mont. 2022).

253. H.B. 91, 2021 Reg. Sess. (Ky. 2021) (proposing an amendment to the state constitution).

- Michigan considered a proposal to amend its constitution to protect abortion rights;[254]
- California considered putting abortion rights in its state constitution;[255] and
- Vermont considered backing abortion rights.[256]

A number of other ballot initiatives, which would have further restricted abortion, did not make the ballots.[257]

Montana rejected the born alive provision,[258] and healthcare criminal penalties,[259] while Kentucky rejected further restrictions.[260] Kentucky voters were asked to decide:

> Are you in favor of amending the Constitution of Kentucky by creating a new Section of the Constitution to be numbered Section 26A to state as follows: *To protect human life, nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion?*[261]

The two conservative states, Montana and Kentucky, rejected the measures by decent margins, an indication that the voting population does not approve such actions.

The three other states, California, Michigan, and Vermont, added abortion protections to their constitutions, with the following language approved by their voters:

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254. *See* STEPHEN JACKSON, ET. AL, SEN. FISCAL AGENCY, NOVEMBER 2022 BALLOT PROPOSAL 22-3, www.senate.michigan.gov/sfa/Publications/BallotProps/Proposal22-3.pdf [perma.cc/6LZZ-Q3U3] (last accessed Apr. 22, 2023) (providing an overview of Michigan's Ballot Proposal 22-3).

255. *Proposition 1*, LEGIS. ANALYST'S OFF., lao.ca.gov/BallotAnalysis/Proposition?number=1&year=2022 [perma.cc/E2CP-RMQE] (last visited Apr. 22, 2023).

256. *Data for Progress*, FILES PROGRESS, www.filesforprogress.org/datasets/2022/10/dfp_vt_midterm_tabs_october.pdf [perma.cc/A2J8-XN4W] (last visited Mar. 19, 2023) (providing the text of Vermont's Proposal 5).

257. *2022 Abortion-related Ballot Measures*, BALLOTPEDIA, ballotpedia.org/2022_abortion-related_ballot_measures (last visited Mar. 19, 2023) (tracking measures across the nation).

258. *See* LR-131, H.B. 167, 67th Leg. (Mont. 2022). Montana's proposed "Born-alive" referendum would have protected an infant born in the course of an abortion. *Id.*

259. *See* Amy Beth Hanson, *Montana voters reject "born alive" abortion referendum*, AP NEWS (Nov. 10, 2022), apnews.com/article/abortion-health-business-montana-a99111675c40301d1940addca098d599 [perma.cc/7B9Q-2MS4]. Healthcare professionals would have faced criminal charges for not taking "all medically appropriate and reasonable actions to preserve the life" of the baby to be aborted. *Id.*

260. Jordan Smith, *Kentucky Voters Reject Amendment 2 In "Repudiation of Extreme Anti-Choice Agenda*," THE INTERCEPT (Nov. 9, 2022), theintercept.com/2022/11/09/abortion-rights-kentucky-election/ [perma.cc/E8CS-KZUQ].

261. Press Release, Daniel Cameron, Ky. Att'y Gen., Attorney General Advisory on Proposed Constitutional Amendment #2 (Oct. 21, 2022) (on file with Commw. Ky. Off. Att'y Gen.).

- California:

> SEC. 1.1. The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.[262]

- Michigan:

> Sec. 28. (1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.
>
> An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.
>
> Notwithstanding the above, the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.
>
> (2) The state shall not discriminate in the protection or enforcement of this fundamental right.[263]

- Vermont:

> Article 22. [Personal reproductive liberty] That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.[264]

These five states and their votes on the respective proposals, demonstrate that getting information to voters on issues of importance can result in mobilizing the electorate. It might be a useful tool for other states to follow.

3. South Carolina Supreme Court Rules

In *Planned Parenthood South Atlantic, et al. v. State of South*

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262. *Text of Proposed Laws*, CAL. SEC'Y ST., vig.cdn.sos.ca.gov/2022/general/pdf/topl1.pdf [perma.cc/DZZ4-GMTD] (last visited Feb. 25, 2023).

263. *Ballot Proposal 3 of 2022*, MICH. DEPT. ST., www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_3_of_2022.pdf [perma.cc/LKF2-CK2L] (last visited Feb. 25, 2023).

264. *Data for Progress*, *supra* note 256.

Carolina,[265] the South Carolina Supreme Court considered a legislative enactment, *The Fetal Heartbeat and Protection from Abortion Act*,[266] and whether the act "violates a woman's constitutional right to privacy, as guaranteed in article I, section 10 of the South Carolina Constitution."[267] Article I, section 10 of South Carolina's constitution provides:

> SECTION 10. Searches and seizures; invasions of privacy. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.[268]

In a 3-2 majority decision, which included the Chief Justice of the South Carolina Supreme Court, the majority stated:

> We hold that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable, and implicates a woman's right to privacy. While this right is not absolute, and must be balanced against the State's interest in protecting unborn life, this Act, which severely limits—and in many instances completely forecloses—abortion, is an unreasonable restriction upon a woman's right to privacy and is therefore unconstitutional.[269]

The South Carolina Supreme Court joins Alaska,[270] California,[271] Florida,[272] Kansas,[273] Massachusetts,[274] Minnesota,[275] Montana,[276] and New Jersey[277] in finding such a right.[278]

4. The Narrow Path to Justice

Despite the resounding defeat in Kansas of its restrictive abortion amendment, the Kansas legislature has since introduced legislation that would severely limit access to abortions in the state. The simple amendment provides the following change:

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265. Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 774 (S.C. 2023).
266. S.C. CODE ANN. § 44-41-680 (Supp. 2022).
267. *Planned Parenthood S. Atl.*, 882 S.E.2d at 774.
268. S.C. CONST. art. I, § 10.
269. *Planned Parenthood S. Atl.*, 882 S.E.2d at 774.
270. Valley Hosp. Ass'n v. Mat-Su Coalit., 948 P.2d 963, 965 (Alaska 1997).
271. People v. Belous, 71 Cal.2d 954, 975 (Cal. 1969).
272. *In Re* T.W., 551 So. 2d 1186, 1188 (Fla. 1989).
273. Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461, 466 (Kan. 2019).
274. Moe v. Sec'y Admin. & Fin., 417 N.E.2d 387, 390 (Mass. 1981).
275. Women St. of Minn. v. Gomez, 542 N.W.2d 17, 19 (Minn. 1995).
276. Armstrong v. State, 989 P.2d 364, 364 (Mont. 1999).
277. Right to Choose v. Byrne, 450 A.2d 925, 926 (N.J. 1982).
278. Mabel Felix, Laurie Sobel, & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KAISER FAM. FOUND. (Jan. 20, 2023), www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/ [perma.cc/4CLH-FRZE].

> Except as provided in subsection (a), nothing shall prevent any city or county from regulating abortion within its boundaries as long as the regulation is at least as stringent as or more stringent than imposed by state law. In such cases, the more stringent local regulation shall control.[279]

It would replace the current section that provides, "[n]o political subdivision of the state shall regulate or restrict abortion."[280]

So, despite a resounding win on the ballot by Kansas voters, the legislature continues to push its agenda. But given the alternatives, there is not a brighter light to the path to justice than through the public rejecting extreme measures, such as the very restrictive proposal Kansas voters faced last year.

The way to break the barrier to justice when it comes to many of the rights that individuals fear might be eroded by the Supreme Court likely does not lie with redress by the Court. The current Court is very conservative, and the October 2021 Term saw the Court issuing the most 6-3 decisions by percentage in the modern Court, with the six in the majority in most of those cases representing the six conservative Justices.[281]

The experience of adopting protection for women's reproductive rights in three states and rejecting restrictions on women's reproductive rights in two states suggests that states that can enshrine particular rights will do so, and in those states where that is not possible due to political makeup, it appears that at least in women's reproductive rights, extreme measures and harsh restrictions will not pass on ballot initiatives. In terms of other rights such as those discussed earlier in this Article, time will tell if similar efforts can be successful. In the meantime, state legislatures, such as Kansas, will try to find ways to enact and implement restrictive measures on women, the LGBTQ+ community, and other underrepresented groups.[282]

The breaking of barriers to achieve a path to justice is not for the faint of heart or those not fully committed to change. A combination of ways to reform the Court and strategic usage of ballot initiatives and state supreme courts seems to be the best way to effectively effectuate changes to help ensure that there is a way to break barriers and find a path to justice.

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279. S.B. 65 §§ 1-3, 2022-23 Leg. Sess. (Kan. 2023).

280. *Id.*

281. Adam Feldman, *6-3 is the new SCOTUS 5-4*, EMPIRICAL SCOTUS (July 11, 2022), www.empiricalscotus.com/2022/07/11/new-scotus-5-4/ [perma.cc/7QJ3-EQWC].

282. As noted *supra* note 274, Kansas is a state whose supreme court has found certain rights exist, so the developments if this referenced legislation passes and is challenged in the judicial system will be interesting to watch.

5. A Special Election

As noted, the South Carolina Supreme Court recently issued a decision rejecting restrictive abortion laws.[283] Recently, a battle over a swing seat on the Wisconsin Supreme Court brewed, with the liberal candidate, Janet Protasiewicz, winning,[284] which likely will impact how that state's supreme court might rule on abortion, redistricting, and other rights.[285] The Wisconsin Supreme Court is now a 4-3 liberal majority. A conservative sitting justice did not run for re-election. On April 4, 2023, a progressive candidate and a conservative candidate faced off for the open seat on the Wisconsin Supreme Court. It appears the mobilization of women in the five states discussed will also happen in Wisconsin.

V. CONCLUSION

The path to justice for individuals has not often been found at the Court. When it has been found, traversing the path to reaching those findings typically has been slow, and with the current Court, may be fleeting. The path, albeit slim, might include strategically using ballot referendums, legislatures, and courts at the state level to help ensure the path to justice is protected. This path does not appear currently viable through the Supreme Court of the United States. The state route is not a perfect solution, but perhaps as issues, such as abortion and other rights are being determined at the state level, an approach that focuses on preventing further erosion or restrictions of rights will make this nation, on important individual rights issues, a more perfect union.

Mobilization is key to success at the national, local, and state level. Those who wish to keep the republic must rise up together and by voting and action, yell collectively to the rest of the nation, "I'm as mad as hell, and I'm not going to take this anymore!"[286] Nothing else will result in protection of those rights and liberties so many hold so dear.

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283. *See supra* notes 266-70.

284. Phillipo Rocco, *The Wisconsin Supreme Court Victory Is a Major Opportunity for Rebuilding Working-Class Politics*, JACOBIN, www.jacobin.com/2023/04/wisconsin-supreme-court-election-janet-protasiewicz-victory-democracy-working-class-politics [perma.cc/Z55M-ZACS] (last accessed April 9, 2023).

285. *See* Reid J. Epstein, *2023's Biggest, Most Unusual Race Centers on Abortion and Democracy*, N.Y. TIMES (Jan. 25, 2023), www.nytimes.com/2023/01/25/us/politics/wisconsin-supreme-court-election.html [perma.cc/L5C6-TTNN] (discussing the Wisconsin race).

286. NETWORK (Metro-Golden-Mayer 1976) (statement of character Howard Beale).