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Constitutional Demotion

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Constitutional Demotion

Teri Dobbins Baxter†

Introduction

Public trust in the government generally—and the Supreme Court specifically—has declined in the last few years and is currently at or near historically low levels.[1] While Americans of all races and across the political spectrum are losing faith in the government's ability to address new and ongoing crises, the reason for the skepticism differs. Some White Americans began losing faith in the 1960s when the government prioritized civil rights, support for the poor, and affirmative action.[2] They perceived these policies to unfairly benefit Black Americans and continued distrusting the government even after those policies were mostly abandoned.[3] Currently, a far-right segment of the Republican

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1. *See, e.g.*, Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [perma.cc/5G59-2L48] (reporting data on trust in the judicial branch by political party). Only 47% of respondents reported having "a great deal" or a "fair amount" of trust in the judicial branch. *Id.* "This represents a 20-percentage-point drop from two years ago, including seven points since last year, and is now the lowest in Gallup's trend by six points." *Id.* While 67% of Republicans trust the federal judiciary, only 46% percent of Independents and 25% of Democrats trust it. *Id.*; Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx [perma.cc/4Y6D-L2AC] (reporting survey results about trust in government).

> In the past few years, Americans' trust in the government's handling of domestic problems has not strayed far from the record low of 35% in 2019 . . . . Although it remains the most trusted of the three branches, Americans' trust in the judicial branch (headed by the U.S. Supreme Court) has dropped precipitously, to a nearly record-low 54%.

Brenan, *supra*.

2. *See* Alexandra Filindra, Noah J. Kaplan & Beyza E. Buyuker, *Beyond Performance: Racial Prejudice and Whites' Mistrust of Government*, 44 POL. BEHAV. 961, 967 (2022).

3. *Id.* at 962.

party seems to fear democracy itself[4] because they fear losing power and influence in an increasingly diverse country.[5]

Black Americans, women, and members of the LGBTQ+ community also fear losing the limited power they have acquired, but they also fear losing rights.[6] While White men always have been able to claim the full benefit of the rights conferred or protected by the Constitution, the same cannot be said of other groups.[7] Justice Kagan gives a concise description of the distribution of rights at the nation's founding:

> Democratic ideals in America got off to a glorious start; democratic practice not so much. The Declaration of Independence made an awe-inspiring promise: to institute a government "deriving [its] just powers from the consent of the governed." But for most of the Nation's first century, that pledge ran to white men only. The earliest state election laws excluded from the franchise African Americans, Native Americans, women, and those without property.[8]

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4. *See* Charles Homans, *How 'Stop the Steal' Captured the American Right*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html?te=1&nl=the-morning&emc=edit_nn_20220719 [perma.cc/KG7A-89JR] ("The insistence on America as a 'republic' but not a 'democracy' is a tendentious reading of James Madison popularized by the John Birch Society, the conspiratorial anti-communist organization — a justification for governing the country according to conservative values and policy prerogatives, even when the numerical majority of its people did not vote for them.").

5. *Id.*; *see also* Edward Lempinen, *Cecilia Hyunjung Mo: The Male Backlash Against Democracy is No Surprise*, BERKELEY NEWS (Nov. 18, 2022), https://news.berkeley.edu/2022/11/18/cecilia-hyunjung-mo-the-male-backlash-against-democracy-is-no-surprise/ [perma.cc/VUJ9-89ZC] (noting that "for white men, and especially working-class white men, [the gains experienced by people of color, women, and LGBTQ+ people] have often come at a perceived cost. Increasingly, [White men] are turning against democracy itself . . . .").

6. *See, e.g.*, Paul Gordon, *Supreme Court Term 2018-2019: An Ultra-Conservative Majority*, PEOPLE FOR AM. WAY (July 2019), https://www.pfaw.org/report/supreme-court-term-2018-2019-an-ultra-conservative-majority/ [perma.cc/T5PE-LKHZ] ("With the Court's fair-minded constitutionalists—Justices Ginsburg, Breyer, Sotomayor, and Kagan—in the minority, the ultra-conservatives are taking steps to cement their movement's political power and reverse many of the advances that protect our health, our jobs, and our most basic constitutional rights."); Ronald Brownstein, *The Supreme Court's 'Dead Hand,'* ATLANTIC (Feb. 11, 2022), https://www.theatlantic.com/politics/archive/2022/02/supreme-court-conservative-rulings/622050/ [perma.cc/7WB9-SU5A] ("[T]he GOP Court majority is moving at an accelerating pace to impose that coalition's preferences on issues such as abortion, voting rights, and affirmative action.").

7. *See, e.g.*, Christopher M. Richardson, *Op-Ed: Dobbs Isn't The First Time The Supreme Court Took Away Key Rights*, L.A. TIMES (July 15, 2022), https://www.latimes.com/opinion/story/2022-07-15/supreme-court-abortion-civil-rights [perma.cc/WEZ9-N23M] (noting that Black Americans gained constitutional and civil rights during the Reconstruction Era, only to lose them when Reconstruction was abandoned). "Instead of buttressing newly won rights for Black Americans, the conservative court effectively ended them." *Id.*

8. Brnovich v. Democratic National Party, 141 S. Ct. 2321, 2351–52 (2021) (Kagan, J., dissenting) (pointing out the disconnect between the country's ideals and its practices, particularly with respect to voting).

With only a fraction of the population allowed to participate in elections and decide on the laws that would govern everyone, the results reflect the beliefs, priorities, and interests of that exclusive group.[9]

Over the next 200 years, the Fifteenth and Nineteenth Amendments extended the right to vote to include every American citizen, and the Voting Rights Act removed roadblocks that prevented Black citizens and others from exercising that right.[10] In addition, the Supreme Court granted constitutional protection to affirmative action policies, privacy rights—including the right to make decisions about reproduction and sexual privacy[11]—and it expanded the right to marry to include same-sex couples.[12] All of these changes brought the country closer to the ideal of equality in all aspects of life. But recent partisan polarization, the death of Justice Ginsburg, the retirement of Justice Kennedy, and the addition of two conservative Justices to replace them have stoked fears of losing these rights that so many generations fought to secure.[13]

Unlike the concerns of White citizens—whose fears of losing significant power are not supported by evidence[14]—the fears of women, Black Americans, and the LGBTQ+ community are proving justified. The Supreme Court's new 6-3 conservative majority has indicated a willingness to weaken voting rights laws and has adopted a theory of constitutional interpretation that only recognizes constitutional rights that are mentioned in the text or are "rooted in the history and tradition" of this country.[15] The danger inherent in this approach—at least as it has been applied by the Court—is that this nation's history and traditions reflect the racist, sexist, and homophobic beliefs prevalent at that time.[16] Only recently has this country interpreted the Constitution in a way that

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9. *Id.* at 2326.

10. *Id.* at 2330, 2343.

11. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding married couples have a constitutional right to use contraceptives); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing a right to privacy for adult consensual sexual activity).

12. *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding the right to marriage includes same-sex couples).

13. Brownstein, *supra* note 6.

14. *See* Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/ [perma.cc/8BHG-327V] (noting that while there is more diversity in Congress, White men are still overrepresented); Richie Zweigenhaft, *Fortune 500 CEOs, 2000-2020: Still Male, Still White*, SOC'Y PAGES (Oct. 28, 2020), https://thesocietypages.org/specials/fortune-500-ceos-2000-2020-still-male-still-white/ [perma.cc/5SH5-DLDS] ("White men may have lost power, but they continue to be the dominant group in the corporate elite— they held 96.4% of the Fortune 500 CEO positions in 2000, and still hold 85.8% in 2020.").

15. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (holding that the Fourteenth Amendment Due Process Clause only protects rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty").

16. *See, e.g.*, *infra* Parts I, II.

protects the rights of previously excluded groups.[17] If the recent history of recognizing the rights people of all races, genders, and sexual orientations is insufficient for them to be considered "rooted in the nation's history and traditions," then those rights can be stripped away, and those groups can be returned to a state of inferior and inadequate constitutional protection.

This Article focuses on the exclusion of Black Americans from the protections of the original Constitution, and the limited constitutional rights afforded to women and LGBTQ+ Americans until the twentieth century.[18] It acknowledges roadblocks to enforcement of constitutional violations and examines how recent Supreme Court opinions and decisions have eroded and threaten to further erode rights of these groups. The Article ends with comments about how losing constitutional protection can affect the way that members of these groups view the Constitution, the system that it created, and their place within it.

I. The History of Constitutional Rights for People of African Descent

When it was initially ratified, the United States Constitution was of little value to people of African descent. The original Constitution not only allowed slavery, it prohibited Congress from abolishing the slave trade until 1808.[19] In addition, it included a fugitive slave clause that guaranteed the return of enslaved people who escaped into states that prohibited slavery.[20] In his opinion in *Dred Scott v. Sanford*, Justice Taney explained the status of people of African descent at that time:

> [T]hey were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power

17. *See, e.g.*, *infra* Section I.C.

18. While other groups have had their constitutional rights systematically violated, this Article focuses on several recent Supreme Court decisions that have called into question rights that these groups have fought so long to gain. It does not attempt to address the unique and complicated constitutional challenges of groups such as Native Americans, which are certainly deserving of attention.

19. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. I, § 9, cl. 1. Article V states "no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article." *Id.* art. V.

20. "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." *Id.* art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1.

and the Government might choose to grant them.[21]

The Court then held that African descendants—whether free or enslaved—were not "people" as that term was used in the Constitution and, therefore, were not entitled to any constitutional protections.[22] Consequently, whatever virtues the Constitution possessed, it meant nothing to the large enslaved and free Black populations.

A. The Thirteenth and Fourteenth Amendments Make the Constitution Relevant to Black Americans

The Thirteenth Amendment ended slavery in most circumstances and should have ushered in an era of equality and empowerment for formerly enslaved and oppressed populations.[23] Instead, states found ways to maintain White supremacist policies and Black exploitation.[24] Convict leasing enabled local governments to take advantage of the loophole in the Thirteenth Amendment allowing involuntary servitude for those convicted of a crime.[25] Black Codes made it illegal to be unemployed or to leave one employer to work for another; imposed vague "vagrancy" laws; made it a crime to be "disrespectful" to White people; and criminalized a host of other actions that made it difficult to avoid breaking the law.[26] If accused of a crime, Black people were not allowed to testify against a White person in court, leaving Black defendants to be tried and convicted by all-White juries and judges.[27] Once convicted, the prisoner could be leased to plantation owners to work on the plantations—sometimes the very plantations on which they were formerly enslaved.[28] Because the plantation owners no longer had a property interest in the prisoners, they had no incentive to treat them

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21. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

22. *Id.* at 404–05 (holding that people of African descent were not "people" or "citizens" as those terms were used in the U.S. Constitution).

23. U.S. CONST. amend. XIII.

24. Slaughterhouse Cases, 83 U.S. 36, 70 (1872) ("States in the legislative bodies which claimed to be in their normal relations with the Federal government . . . imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity."); *see also* Teri Dobbins Baxter, *Dying for Equal Protection*, 71 HASTINGS L.J. 535, 559–61 (2019) (discussing efforts to maintain White supremacy after ratification of the Thirteenth Amendment).

25. "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII (emphasis added).

26. Baxter, *supra* note 24, at 559–60.

27. *Slaughterhouse*, 83 U.S. at 70.

28. Baxter, *supra* note 24, at 561.

humanely and would literally work them to death.[29] Recognizing that abolishing slavery was not enough to ensure that freedom for Black Americans was more than just a nominal change of status, the Fourteenth Amendment was drafted and ratified.[30]

B. Narrow Interpretations Limit the Early Effectiveness of the Fourteenth Amendment

The Fourteenth Amendment was designed in part to overrule the *Dred Scott* decision—which held that people of African descent could not be citizens—and to address some of the tactics used by states to keep formerly enslaved people in a permanent lower class.[31] Among its most important provisions, the Equal Protection Clause prohibited denying anyone "equal protection of the laws."[32] However, the Supreme Court did little to enforce the equal protection mandate of the Fourteenth Amendment, holding instead that Congress lacked the power to enforce civil rights.[33] Instead, the Court held that the enforcement clause only authorized federal legislation aimed at "remedying" discriminatory laws or government policies.[34] The Court has also interpreted the Privileges and Immunities Clause so narrowly that it is nearly meaningless.[35] These

29. *Id.* ("Unlike slaveholders, who had the right to a slave's labor for the entirety of the slave's life, prisoners were only valuable until the end of their sentence, which removed any financial incentive for the 'employers' to treat the prisoners humanely or provide for their well-being beyond their term of service.").

30. *Id.* at 551–52.

31. *Slaughterhouse*, 83 U.S. at 70. "These circumstances . . . forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much." *Id.*

32. U.S. CONST. amend. XIV, § 1.

33. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. However, the Supreme Court held that this section only allowed Congress to legislate in order to correct or nullify state action that violated the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (interpreting Congress' power under the enforcement clause narrowly).

34. *Id.* ("To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.").

35. *Slaughterhouse*, 83 U.S. at 74 (holding that the Fourteenth Amendment only protects privileges and immunities granted by the federal government or the Constitution and not civil rights—which are granted and regulated by the states); *Civil Rights Cases*, 109 U.S. at 11–12 (holding that the Privileges and Immunities Clause applies to state actors and not private actors). Since then, the Court has rarely mentioned the Fourteenth Amendment Privileges and Immunities Clause, and it has not been the exclusive source of any substantive rights. *See, e.g.*, Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 U. KAN. L. REV. 61, 101 n. 37 (1995)

decisions significantly diminished Congress' ability to enact federal legislation to combat racial discrimination by private actors.[36] Most notably, the Court later held that laws mandating segregation did not violate the Equal Protection Clause, thus ensuring continued inequality for several more generations.[37]

While the Court acknowledged that the Fourteenth Amendment required states to treat Black citizens equally, state officials consistently failed to intervene or prosecute even the most blatant and violent attacks against Black Americans, including lynchings.[38] Nearly 5,000 lynchings have been documented from the end of Reconstruction to as recently as the 1950s, and the vast majority of the victims were Black.[39] Only a tiny fraction of perpetrators were prosecuted or convicted,[40] even when the lynchings took place in front of large crowds.[41] In sum, the requirement of equal protection of the laws was largely ignored.

("The Slaughter-House Cases . . . rendered the Privileges and Immunities Clause of the Fourteenth Amendment meaningless by limiting it to the rights of federal citizenship and then construing those rights narrowly."); John A. Powell & Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 ST. LOUIS U. L.J. 1153, 1175 (2008) ("With the exception of the reversal of *Plessy*, the conclusions of *Slaughterhouse* and the *Civil Rights Cases* remain substantially intact. As a consequence, our view of the Fourteenth Amendment remains unjustifiably narrow.").

36. *Civil Rights Cases*, 109 U.S. at 24–25 (holding that Congress has the power under the Fourteenth Amendment to restrain only state and not private actors).

37. Plessy v. Ferguson, 163 U.S. 537 (1896) ("[T]he enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . . .").

38. The Supreme Court held in *U.S. v. Cruikshank* that the Fourteenth Amendment did not give Congress authority to pass legislation punishing discrimination—even violence and murder—perpetrated by individuals. *United States v. Cruikshank*, 92 U.S. 542 (1875). "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." *Id.* at 553–54. Instead, it could only legislate in response to state action. Baxter, *supra* note 24, at 562–69 (citing EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 4 (3d ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf [perma.cc/9MC9-RENU]).

39. EQUAL JUST. INITIATIVE, *supra* note 38, at 27 (noting that Black Americans were not the only race of people to be lynched, but the ratio of White to Black lynching victims rose from 1:4 to 1:17 after 1900); *see also* Baxter, *supra* note 24, at 563 (discussing the rise of lynching after the end of Reconstruction and withdrawal of federal troops).

40. Baxter, *supra* note 24, at 567 ("Several southern states passed their own anti-lynching laws as proof that states were up to the task of protecting African Americans and that there was no need for federal intervention. However, those laws were not enforced and 'of all lynchings committed after 1900, only 1 percent resulted in a lyncher being convicted of a criminal offense.'").

41. EQUAL JUSTICE INITIATIVE, *supra* note 38, at 28 (describing "public spectacle lynchings"); *see also* Baxter, *supra* note 24, at 567 (quoting MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 146 (2011)) (explaining how law enforcement

Eventually Congress relied on the Commerce Clause as a source of its authority to enact civil rights legislation, and the Supreme Court upheld the Civil Rights Act of 1964, which outlawed racial discrimination in places of public accommodation.[42] Although Congress also claimed to have authority to enact the law under the enforcement clause of the Fourteenth Amendment, the Court concluded that "Congress possessed ample power" under the Commerce Clause and declined to consider whether it also had authority under the Fourteenth Amendment.[43] Other federal laws have been passed and upheld under Congress' spending power, such as those denying funding to schools that discriminate on the basis of race and sex.[44] Thus, the history and tradition of exclusion and discrimination were finally left behind as Congress passed and the Court upheld laws designed to ensure constitutional protection and opportunities for advancement for Black Americans who spent centuries fighting and advocating for them.

C. The Equal Protection Clause's Transformational Power

Even without the ability to enforce civil rights against private actors, the Equal Protection Clause has been used to effect major societal changes, including banning segregation in public schools,[45] striking down anti-miscegenation laws[46] and racially restrictive housing laws,[47]

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overwhelmingly ignored and failed to prosecute lynchers, even when the intent to lynch was announced ahead of time and the lynching took place in broad daylight in front of large crowds).

42. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that Congress had authority under the Commerce Clause to enact the Civil Rights Act of 1964).

43. *Id.* at 250 ("This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.").

44. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) (interpreting Title IX, which prohibits discrimination on the basis of sex, and noting that the Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause"); *see also* Barnes v. Gorman, 536 U.S. 181, 185 (2002) ("Title VI invokes Congress' power under the Spending Clause.").

45. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954), *enforced* 349 U.S. 294 (1955) (holding that racially segregated schools "deprived [Black children] of the equal protection of the laws guaranteed by the Fourteenth Amendment").

46. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

47. Buchanan v. Warley, 245 U.S. 60, 82 (1917) (finding a Kentucky law unconstitutional when it prohibited Black Americans from living in majority White areas).

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

Id. at 80–81.

prohibiting the use of societal racial biases as grounds to remove a child from a parent's custody,[48] and allowing Black citizens to serve on juries.[49]

Yet the Equal Protection Clause has also been used as a shield to prevent transformational change. After centuries of excluding Black and other racial minority applicants, state schools began actively seeking to admit candidates to remedy past discrimination and to increase the diversity of their student bodies.[50] These policies were quickly challenged on the grounds that they discriminated against White applicants in violation of the Equal Protection Clause.[51]

While the Supreme Court has struck down policies that established a quota of minority applicants to be admitted,[52] it held that diversity of the student body was a compelling state interest and admissions policies that used race as one factor in a holistic review of the applicants were narrowly tailored to achieve that interest.[53] Challenges to policies at various schools have remained constant and the Court will decide another challenge in the 2022 term.[54] Many expect that the current Court will hold that the use of race as a factor in admissions violates the Equal Protection Clause.[55] If it does so, then a practice with the potential to help

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48. Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding racial biases in society cannot justify removing a child from its mother's custody). "Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917." *Id.* (citing *Buchanan*, 245 U.S. at 81).

49. Strauder v. West Virginia, 100 U.S. 303, 310 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692 (1975) (holding that a West Virginia law that excluded Black citizens from juries "amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State").

50. *See, e.g.*, Regents of Univ. of California v. Bakke, 438 U.S. 265, 266 (1978) (discussing U.C. Davis medical school program to admit students from economically and educationally disadvantaged communities, including ethnic minorities from such backgrounds).

51. *See id.* at 270. The U.C. Davis program was implemented in 1973 and Allen Bakke, a White applicant, filed suit in 1974 after his applications in 1973 and 1974 were both denied. *Id.* at 277. He alleged that the special admissions program discriminated against White applicants in violation of the Equal Protection Clause, the California Constitution, and the Civil Rights Act of 1964. *Id.* at 277–78.

52. *Id.* at 320 (applying strict scrutiny and holding that the "quota" imposed by the special admissions program was not necessary to achieve the school's interest).

53. Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (upholding an admissions program that "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

54. Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022); Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022). One of the questions to be decided is whether to overrule *Grutter*, 539 U.S. 306, and hold that institutions of higher education cannot use race as a factor in admissions.

55. Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon Arguments*, SCOTUSBLOG (Oct. 31, 2022), https://www.scotusblog.com/2022/10/affirmative-action-

remedy centuries of discrimination, to enrich the educational environment of all students, and positively impact the lives of countless people will be outlawed.[56]

D. Evidentiary and Structural Hurdles to Remedying Equal Protection Violations

As important as the Equal Protection Clause is, there are evidentiary and structural hurdles to successfully litigating equal protection claims. The evidentiary hurdle stems from the Supreme Court's holding that a plaintiff in a racial discrimination suit must prove that the purpose or intent of the challenged law or practice was to discriminate.[57] Structural hurdles include immunities found in the Constitution and created by the courts.[58]

i. Disparate impact and the problem of proof

Although the Civil Rights Act itself has not been repealed, and 42 U.S.C. § 1983 provides a remedy for violations of the Equal Protection Clause, the Supreme Court has made it difficult to prove actionable discrimination.[59] In the past, states proudly declared their intent to discriminate against racial minorities.[60] Such proclamations are rare today. Instead, discrimination is often inferred by the impact of policies or practices.[61] However, it is not always enough to prove that a law, policy,

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appears-in-jeopardy-after-marathon-arguments/ [perma.cc/2F52-WSRT] ("[D]uring nearly five hours of oral arguments . . . the court's conservative majority signaled that it could be ready now, 19 years after Grutter, to end the use of race in college admissions"); *see also* Kevin R. Johnson, *Foreword:* Bakke *at 40: The Past, Present, and Future of Affirmative Action*, 52 U.C. DAVIS L. REV. 2239, 2240 (2019) ("The truth of the matter is that *Bakke*'s days may be numbered. The Supreme Court, with two new Justices appointed by President Trump, is poised to revisit the constitutionality of affirmative action." (footnote omitted)).

56. *See, e.g.*, Jennifer Jones, Bakke *at 40: Remedying Black Health Disparities Through Affirmative Action in Medical School Admissions*, 66 UCLA L. Rev. 522, 530 (2019) ("[T]he evisceration of racial remediation in the four decades since Bakke has done much more than perpetuate racial inequity in access to higher education. It's made Black access to healthcare more difficult to come by.").

57. *See* Washington v. Davis, 426 U.S. 229, 244–45 (1976) (holding that proof of discriminatory intent is necessary to establish a violation of the Equal Protection Clause).

58. *See supra* Section I.D.ii. (describing the principles of sovereign and qualified immunity established through federal caselaw and its interpretation of the Constitution, as well as the hurdles these immunities pose to constitutional rights).

59. *Washington*, 426 U.S. at 244–45.

60. United States v. State of Alabama, 628 F. Supp. 1137, 1140–41 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987) (discussing the history of segregated schools in Alabama and noting that "[f]rom its beginnings until 1956, the University of Alabama . . . did not admit black students, pursuant to the ironclad custom and policy of the State of Alabama requiring segregation of the races in all spheres of life").

61. For example, in *Texas Department of Housing & Community Affairs v. Inclusive*

or practice has the *effect* of discriminating against a person or group; instead, they must prove an intent to discriminate.[62] This is often an impossible task.[63] As a consequence, very few claims of racial discrimination succeed.[64]

ii. Sovereign and qualified immunity hinder enforcement of constitutional rights

A right that is enshrined in the Constitution is presumably important. One might assume that if such a right is violated, there is a remedy available to compensate for or punish the violation. Often, that is not the case. In fact, the Constitution itself limits remedies available for such violations. The Eleventh Amendment's pronouncement of state sovereign immunity was ratified soon after the Supreme Court held in *Chisholm v. Georgia* that it had jurisdiction to hear a case brought by a citizen of South Carolina against the State of Georgia.[65] That ruling alarmed many who believed that sovereign states had immunity from suits brought by private citizens.[66] The Eleventh Amendment was quickly

Communities Project, Inc., the plaintiffs alleged that the Texas agency responsible for distributing federal tax credits "caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." 576 U.S. 519, 526 (2015). *See also, e.g.*, Davis v. Washington, 512 F.2d. 956, 960 (D.C. Cir. 1975), *rev'd* 426 U.S. 229 (1976) ("The cases hold, and we agree, that evidence establishing that significantly more blacks than whites fail a written entrance examination given to all applicants is sufficient, as a matter of law, to show the racially disproportionate impact of the examination.").

62. *Washington*, 426 U.S. at 244–45 ("[T]o the extent that [prior Court of Appeals decisions] rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."). While disparate impact is not sufficient to prove racial discrimination under the Equal Protection Clause, several federal statutes impose liability for disparate impact without the need to prove discriminatory intent. *See Texas Dep't of Hous.*, 576 U.S. at 545–46 ("The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 . . . and the statutory purpose.").

63. Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *As A Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1307 (2018) ("In almost every area of law, the requirement for proof of discriminatory intent has frustrated the ability to use the Equal Protection Clause to remedy race discrimination.").

64. *See, e.g.*, *id.* at 1307–12 (illustrating how the intent to discriminate requirement has frustrated claims of racial discrimination in criminal sentencing, the death penalty, and school segregation).

65. Chisholm v. Georgia, 2 U.S. 419, 420 (1793).

66. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 11 (1890) (noting that *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in

ratified to extend such immunity from suit in federal courts unless it was waived by the states.[67]

The doctrine of sovereign immunity was familiar to those in the founding era.[68] In the monarchy the new nation left behind, the monarch's decision could not be appealed, and it was often declared that the monarch was infallible.[69] The Supreme Court gave a different justification:

> Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.[70]

In addition to "embarrassment," concerns about depleting the public treasury formed an additional rationale for sovereign immunity.[71]

Some courts and scholars believe that the financial cost of judgments in lawsuits against sovereigns was not the only concern. They argue that such judgments "allocate[] public funds in a way that is

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due course adopted by the legislatures of the states"); Alden v. Maine, 527 U.S. 706, 706 (1999) ("The doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. . . . This was also the understanding of those state conventions that addressed state sovereign immunity in their ratification documents.").

67. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 484 (1987) ("The reaction to *Chisholm* was swift and hostile. The Eleventh Amendment passed both Houses of Congress by large majorities in 1794. Within two years of the *Chisholm* decision, the Eleventh Amendment was ratified by the necessary 12 States.").

68. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 773 (2008) (discussing the colonial understanding of sovereign immunity).

69. *Id.* at 771 ("[S]ince the King was the highest authority in the feudal judicial system, by definition, no appeal existed from his decisions."). *But see* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3–4 (1963) (citing LUDWIK EHRLICH, XII PROCEEDINGS AGAINST THE CROWN (1216–1377) 42 (Vinogradoff ed. 1921)) ("Indeed, it is argued by scholars on what seems adequate evidence that the expression 'the King can do no wrong' originally meant precisely the contrary to what it later came to mean. '[I]t meant that the king must not, was not allowed, not entitled, to do wrong . . . .' It was on this basis that the King, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions 'let justice be done,' thus empowering his courts to proceed.").

70. Nichols v. United States, 74 U.S. 122, 126 (1868); *see also* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 458 (2016) (noting concerns about the ability of the government to function if subject to lawsuits and financial liability).

71. Florey, *supra* note 68, at 787–88.

primarily determined by the judiciary, not the democratic process, making it more difficult to abide by the principle of majoritarian rule and to maintain the proper boundaries needed to establish separation of powers."[72] While the above-stated concerns may seem reasonable, they do not take into consideration the lost legitimacy of a system in which victims of constitutional violations are left without adequate remedies.[73] The Court has also recognized federal immunity, which generally prohibits suits against the federal government;[74] tribal sovereign immunity;[75] and foreign sovereign immunity.[76]

The judicially-created doctrine of qualified immunity has had a much greater impact. "The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[77] Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[78] As a practical matter, this relieves police officers of liability they would otherwise face under 42 U.S.C. § 1983.[79] In recent years, a growing

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72. *Id.* at 790.

73. *Id.* at 773–74. "For years, the doctrine of state sovereign immunity was generally neglected, and its impact was minimized through the Supreme Court's holding that Congress enjoyed broad power to abrogate the states' immunity." *Id.* (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 15–16 (1989), *overruled by* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)). More recent cases have limited Congress' ability to abrogate States' immunity. *See Seminole Tribe of Florida*, 517 U.S. at 72–73 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." (footnote omitted)). However, the Court acknowledged that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Id.* at 59.

74. Florey, *supra* note 68, at 777. Federal sovereignty is not mentioned in the Constitution, but it is an established doctrine that is largely justified on the same grounds as state sovereign immunity. *Id.* at 776–77. Congress has waived immunity in many federal statutes, including the Administrative Procedures Act, the Federal Tort Claims Act, and the Tucker Act (for non-tort claims). *Id.* at 778.

75. Like state and federal sovereign immunity, tribal sovereign immunity is based on tribes' sovereign status. *Id.* at 779.

76. *Id.* at 780.

77. City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

78. Malley v. Briggs, 475 U.S. 335, 335 (1986).

79. The text of 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

number of scholars and judges have criticized this doctrine,[80] arguing that it is inconsistent with the text of 42 U.S.C. § 1983, which states that "every person" who violates constitutional rights "shall be liable."[81] Furthermore, the requirement that the violated rights be "clearly established" goes beyond the common law immunities that were recognized when section 1983 was passed.[82]

As Judge Steven R. Reinhardt has observed, the doctrines of sovereign and qualified immunity together result in a system often lacking in accountability.[83] He notes

> The problem is that, due to sovereign immunity protections for the federal government and state governments, and the need to prove an unlawful policy or custom to hold a municipality liable under § 1983, claims against law enforcement officers are often the only remedy for individuals who suffer violations of their constitutional rights. However, in the name of protecting these officers from being held formally accountable for "minor" errors made in the line of duty, the Court has through qualified immunity created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights.[84]

Judge Reinhardt's summation explains how simply granting or acknowledging that constitutional rights exist is not the same as guaranteeing those rights will be enforced or that a remedy will be available when those rights are violated.

Government actors have incentives to protect the constitutional rights of members of the political majority and those who have power and

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80. *See, e.g.*, Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095 (2018) ("In recent years, federal courts scholars have undermined some of the basic empirical and legal assumptions undergirding qualified immunity, and in 2017, [Justice Thomas] expressed a willingness to reopen this uncommonly stable doctrine." (footnote omitted)).

81. *See* Edward C. Dawson, *Replacing Monell Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 529 (2018) ("[T]he qualified immunity defense itself has no basis in the text of § 1983.").

82. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the doctrine may be justified with respect to common law immunities recognized in 1871 when § 1983 was enacted, but the "clearly established law" requirement unjustifiably extends the doctrine).

83. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); *see also* Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021) https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [perma.cc/U646-8MGA] (describing how qualified immunity protects police officers who violate the rights of Black Americans and the power police unions have to thwart legislation that seeks to limit this immunity).

84. Reinhardt, *supra* note 83, at 1245 (footnote omitted).

influence.[85] There is less risk when violating the rights of those who are politically unpopular, or when violating politically unpopular laws. Those who wish to enforce unpopular laws, and the politically unpopular who wish to vindicate their own rights, may have to litigate knowing that they can only obtain injunctive relief with no personal liability or negative consequences for those who commit the violation.[86] The plaintiffs may also face backlash from those in the community—many of whom may be in positions of power or influence—who feel that the violation is justified or desirable.[87]

E. The Fifteenth Amendment and Voting Rights

After the Fifteenth Amendment was ratified, the newly enfranchised Black voters helped usher in a tidal wave of Black elected officials, including sixteen Black Congressmen.[88] In response, states employed many tactics that were facially neutral with respect to race but had the effect of making it difficult or impossible for Black citizens to vote.[89] In

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85. *See, e.g.*, Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J. 529, 535 (2015) (arguing that corporations and wealthy donors have disproportionate influence on politicians).

> [T]he Supreme Court interpreted the free speech system and the text of the Constitution to empower corporations to spend unlimited amounts of money from their corporate treasury funds to influence electoral contests. . . . Those who controlled corporate treasuries suddenly found that they could use the immense resources of a corporation to support compliant politicians and to target non-compliant ones.

Id.

86. *See, e.g.*, Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [perma.cc/352N-WANH] (exploring the Supreme Court's upholding of the qualified immunity doctrine and its findings that government officers cannot be held liable even though the Constitution had been violated).

87. *Cf.* John S. Huntington & Lawrence Glickman, *America's Most Destructive Habit*, ATLANTIC (Nov. 7, 2021), https://www.theatlantic.com/ideas/archive/2021/11/conservative-backlash-progress/620607/ [perma.cc/WTJ7-BQKZ] (describing cycle of rebellion against political minorities who try to enforce or expand their rights). "Each time political minorities advocate for and achieve greater equality, conservatives rebel, trying to force a reinstatement of the status quo." *Id.*

88. *See National Voter Registration Act — Statutory Interpretation — Election Law —* Husted v. A. Philip Randolph Institute, 132 HARV. L. REV. 437, 442 (2018) (discussing the rise of Black political power during Reconstruction and subsequent voter suppression efforts). "After ratification of the Fifteenth Amendment in 1870, African Americans began to accrue considerable political power, at least relative to the past. During the Reconstruction Era, over one thousand black men won elected office, including the first sixteen black congressmen." *Id.*

89. *Id.* at 442–43 ("[T]he end of Reconstruction marked the arrival of a backlash, and a new era of voter suppression. Using a combination of legal provisions such as poll taxes and literacy tests--not to mention extrajudicial violence--states dramatically decreased black voter registration and turnout." (footnote omitted)); *see also* Shelby Cnty., Ala. v. Holder, 570

many places, those who attempted to vote faced threats or acts of violence.[90] As a consequence, although they had the right to vote as a matter of constitutional law, as a practical matter they remained disenfranchised for nearly ninety additional years.[91]

In 1966, Congress passed the Voting Rights Act "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'"[92] When it was enacted, Section 2 of the Act prohibited any state from enacting any "standard, practice, or procedure . . . imposed or applied . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[93] Section 5 required specific states (those specified in Section 4) to receive federal approval before making any changes in the law related to voting.[94] The states to which it applied were those "States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election."[95] The tests included literacy tests, knowledge tests, "good moral" requirements, and "the need for vouchers from registered voters."[96]

Congress had tried to address the problem by outlawing the tests and other state-imposed hurdles, but "litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved."[97] Sections 4 and 5 were scheduled to expire after 5 years but were repeatedly amended and the expiration dates

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U.S. 529, 536–37 (2013) (outlining state tactics to prevent Black citizens from voting, including "literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters").

90. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 218–19 (2009) (Thomas, J., concurring and dissenting in part) (discussing the need for the Fifteenth Amendment, including the violence against Black voters). "Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated intimidation and violence." *Id.* (citing L. MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 34 (2003)).

91. *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 217–22.

92. *Shelby Cnty.*, 570 U.S. at 535 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1).

93. Voting Rights Act, tit. I, § 2 (current version at 52 U.S.C. § 10301(a)).

94. *Shelby Cnty.*, 570 U.S. at 534–35.

95. *Id.* at 537 (citing Voting Rights Act, tit. I, § 4, *invalidated by* Shelby Cnty, 570 U.S. 529 (2013)).

96. *Id.* (citing Voting Rights Act, tit. I, § 4 (current version at 52 U.S.C. § 10303(c)).

97. *Id.* at 536 (citing *Katzenbach*, 383 U.S. at 313–14).

extended.[98] The amendments resulted in additional states and political divisions being subject to Sections 4 and 5.[99] In 2006 Congress renewed Sections 4 and 5 with an expiration date of 2031.[100]

In 2013, the Supreme Court heard *Shelby County v. Holder*, which challenged the constitutionality of Sections 4(b) and 5 of the Voting Rights Act.[101] While the Court acknowledged that the provisions "made sense" in 1966 and justified departure from the federalism principle requiring all states to be treated the same,[102] it believed that "[n]early 50 years later, things have changed dramatically."[103] The Court noted that the Voting Rights Act had been successful in addressing discrimination and improving voter turnout among racial minorities, and concluded that the coverage formula of Section 5 was no longer justified or constitutional.[104] In her dissent, Justice Ginsburg argued that the lack of discriminatory policies and improvements in voter turnout were precisely because of the preclearance requirement.[105]

In the years since the *Shelby County* decision, states previously subject to the preclearance requirement have implemented numerous laws affecting voting.[106] "Unsurprisingly, that decision has led to the enactment of a host of voter suppression tactics such as purging voter rolls, restricting voting rights of returning citizens, instituting onerous voter ID laws, limiting access to voting by mail, and other measures that disproportionately affect low-income and Black and [B]rown voters."[107]

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98. *Id.* at 538. For example, Congress "amended the definition of 'test or device' to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English." *Id.* That resulted in all of Arizona, Texas, and Alaska, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota to be subject to Section 5. *Id.*; *see also* Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019).

99. *Shelby Cnty.*, 570 U.S. at 538.

100. *Id.* at 564–66 (Ginsburg, J., dissenting).

101. *Id.* at 529.

102. *Id.* at 546 (quoting *Katzenbach*, 383 U.S. at 308) (noting that the formula that determines which states and political subdivisions would be subject to Section 5 "accurately reflected those jurisdictions uniquely characterized by voting discrimination 'on a pervasive scale,' linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement").

103. *Id.* at 547.

104. *Id.* at 557. Section 2 of the Voting Rights Act was not affected by the decision in *Shelby County*. *Id.* ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

105. *Id.* at 590 (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

106. Nancy Abudu, *Seven Years After* Shelby County vs. Holder, *Voter Suppression Permeates the South*, S. POVERTY L. CTR. (June 25, 2020), https://www.splcenter.org/news/2020/06/25/seven-years-after-shelby-county-vs-holder-voter-suppression-permeates-south [perma.cc/Y9YP-8586].

107. *Id.*

In 2021, the Court decided *Brnovich v. Democratic National Committee*, which interpreted Section 2 of the Voting Rights Act.[108] A previous version of the statute had been interpreted to require proof of discriminatory purpose,[109] but the Act was amended to state that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[110] This language allows plaintiffs to prove a violation based on the results of the policy instead of the intent.

In *Brnovich*, the Democratic National Committee (DNC) filed suit claiming that certain voting restrictions imposed by the State of Arizona violated Section 2 of the Voting Rights Act.[111] Specifically, they challenged the rule that votes cast in the wrong precinct would not be counted,[112] and the rule that limited those who could collect mail-in ballots to a small list of people.[113] The DNC "claimed that both the State's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction 'adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens'" and that the ballot-collection restriction was "enacted with discriminatory intent."[114]

The Court upheld both election rules.[115] While it acknowledged the language in Section 2(a) that speaks to the impact of the regulation, it focused on the language of Section 2(b), which directs courts to consider whether the affected class had an equal *opportunity* to participate in the election.[116] The Court concluded that the challenged rules did not violate the Voting Rights Act, particularly in light of the state's interest in preventing voter fraud.[117]

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108. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021).

109. *Id.* at 2332 (noting that the Court interpreted the original language of the Act to require proof of discriminatory purpose).

110. Voting Rights Act of 1965, Pub. L. No. 89-110, tit. I, § 2(a), 79 Stat. 437 (current version at 52 U.S.C. § 10301(a))

111. *Brnovich*, 141 S. Ct. at 2334.

112. *Id.* at 2330.

113. *Id.* ("[M]ail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver.").

114. *Id.* at 2334.

115. *Id.* at 2350.

116. *Id.* at 2337 (finding that "equal openness" is the touchstone). The Court considered five factors relevant to the opportunity to vote: (1) the size of the burden imposed by a challenged voting rule; (2) the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982; (3) the size of any disparities in a rule's impact on members of different racial or ethnic groups; (4) the opportunities provided by a State's entire system of voting; and (5) the strength of the state interests served by a challenged voting rule. *Id.* at 2338–39.

117. *Id.* at 2343–44.

Justice Kagan's dissent argued "that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness . . . ."[118] Justice Kagan noted that the factors that the majority directed courts to consider are not found anywhere in the text of the Act, and all weigh in favor of upholding voter restrictions that might have a discriminatory effect.[119] Moreover, the dissent pointed out that the majority gave too much weight to the state's interest in preventing voter fraud.[120] While the Act had previously been interpreted to require proof that "a less biased law would not 'significantly impair [that] interest,'"[121] the *Brnovich* majority rejected that rule and instead gave more consideration to the importance of a state's interest.[122] This, along with the majority's determination that the restrictions were "modest" and "unremarkable,"[123]—conclusions disputed by the dissenting Justices[124]—led the Court to conclude that the restrictions did not violate the Act.[125]

Concerns about Section 2 of the Act resurfaced when the Court agreed to hear *Merrill v. Milligan*.[126] In that case, the Court will consider a challenge to the State of Alabama's 2021 redistricting map. The plaintiffs allege that the plan violates the Act because it created one majority-Black district and divides remaining majority-Black communities among the other six districts, thereby diluting the vote of Black citizens.[127] Opponents of the plan filed suit. The district court found that the plaintiffs were "substantially likely to establish that the Plan violates Section Two of the Voting Rights Act" and granted the petition for a preliminary injunction.[128] The district court directed the state legislature to draw a new plan.[129] Alabama filed a petition for certiorari in the Supreme Court, which the Court granted.[130]

118. *Id.* at 2351 (Kagan, J., dissenting).

119. *Id.* at 2362 ("The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens' voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority's non-test test makes it possible to save.").

120. *Id.* at 2370–71.

121. *Id.* at 2364 (quoting Houston Lawyers' Ass'n v. Att'y Gen. of Texas, 501 U.S. 419, 428 (1991)).

122. *Id.*

123. *Id.* at 2344.

124. *Id.* at 2362 (Kagan, J., dissenting).

125. *Id.* at 2348.

126. Merrill v. Milligan, 142 S. Ct. 879 (2022) (granting stay of preliminary injunction).

127. Caster v. Merrill, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *1 (N.D. Ala. Jan. 24, 2022), *cert. granted before judgment sub nom. Merrill*, 142 S. Ct. 879.

128. *Id.* at *2.

129. *Id.* at *5.

130. *Merrill*, 142 S. Ct. 879.

While it is not clear how the Court will decide the case, some who are concerned about the future of the Voting Rights Act were alarmed by the Court's decision to grant Alabama's petition to stay the district court's injunction, thereby allowing the challenged redistricting map to be used for the 2022 elections.[131] The Court did not issue an opinion explaining its decision, but Justice Roberts wrote a dissenting opinion, stating that, in his view, "the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction."[132] He noted confusion about proper application of Supreme Court precedent in voting dilution cases and agreed that the Court should grant the petition for certiorari, but would not have granted the petition to stay the district court injunction.[133]

Justice Kagan, joined by Justices Breyer and Sotomayor, wrote a dissenting opinion that also concluded that the district court properly applied existing precedent and further noted that the district court found that it was not even a close case.[134] Justice Kavanaugh responded in a concurring opinion and argued that the stay merely avoided the "chaos" that would ensue if Alabama had to draw a new map in such a short time before an election,[135] but Justice Kagan noted that the challenged map had been drawn in less than a week.[136] In any event, the decision to stay the district court's opinion has increased fears that the Court will change the test for voter dilution in a way that further weakens the Voting Rights Act's ability to ensure that racial minorities' voices are not diluted or silenced.[137]

II. Substantive Due Process, Privacy, and Liberty for Women and LGBTQ+ People

Women have made significant gains in education, business, and politics, but the progress has been slow. Women did not secure the right to vote until the Nineteenth Amendment to the Constitution in 1920.[138] Supreme Court decisions in the 1960s recognized constitutionally

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131. *Id.* (granting stay of preliminary injunction).

132. *Id.* at 882 (Roberts, J., dissenting).

133. *Id.*

134. *Id.* at 883 (Kagan, J., dissenting).

135. *Id.* at 880 (Kavanaugh, J., concurring).

136. *Id.* at 883 (Kagan, J., dissenting).

137. *See, e.g.*, Kelly Mena & Fredreka Schouten, *Key States Making Moves to Change Election Laws and Voting Options*, CNN (Feb. 8, 2022), https://www.cnn.com/2022/02/08/politics/redistricting-election-lawsvoting/index.html [perma.cc/S5X9-QV8N] ("[T]he justices . . . announced they would revisit a portion of the landmark 1965 Voting Rights Act in the months ahead – sparking fears among voting rights activists that the court could erode a key provision of the law ahead of the next presidential election in 2024.").

138. U.S. CONST. amend. XIX.

protected privacy rights and gave women new power to make decisions about their bodies and reproduction.[139] This allowed them to take control of their health and delay having children, making it possible to take advantage of higher education and career opportunities at a much higher rate.[140] For Black women, it was a continuation of their liberation, since Black women's bodies had not been their own during slavery, when they were forced to bear children for the benefit of their enslavers.[141]

Those same privacy rights were the basis for finding constitutional protection for private sexual conduct between consenting adults and requiring states to allow same-sex couples to marry.[142] These rights were located in the Fourteenth Amendment's Due Process Clause, and the cases acknowledging these rights allowed LGBTQ+ members of society to form families and have those families formally recognized, respected, and protected by the government.[143] These rights are at risk under the current Court's view that only enumerated rights and rights "deeply rooted in this Nation's history and tradition" are deserving of constitutional protection.[144]

A. *Women's Evolving Rights and Autonomy*

White women have always been considered "people" as that term was used in the Constitution, but women had only limited constitutional protection and rights through the nineteenth century.[145] State laws regulated most aspects of society, and many state laws treated women as

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139. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state prohibition on the use of contraceptives violated the constitutional right to privacy); *see also* discussion *infra* Section II.A.

140. *See* Kim Elsesser, *After* Roe v. Wade *Vote, Access To Contraception Could Be Under Scrutiny*, FORBES (May 3, 2022), https://www.forbes.com/sites/kimelsesser/2022/05/03/after-roe-v-wade-vote-access-to-contraception-could-be-under-scrutiny/?sh=419ff38c66a [perma.cc/W8LX-UWFY] (detailing studies that examine the impact contraception has had on women's careers and educational attainment); *see also* discussion *infra* Section II.A.

141. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22–55 (1997); Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [perma.cc/79PP-3W8V].

142. *See* discussion *infra* Section II.B.

143. *Id.*

144. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

145. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422 (1857) (enslaved party) ("Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

inferior citizens.[146] Women, especially married women, lacked rights necessary to support or make decisions for themselves.[147] They often lacked the right to vote or hold office and had no direct influence on the laws or politics of the time.[148]

Women's lack of power extended to their own bodies.[149] A man could not be convicted of raping his wife because "consent by the wife to sexual relationships with her husband is implicit in the marital contract."[150] In addition, because a married woman had no separate legal identity from her husband, he could not be convicted of raping "himself."[151] Laws regulating and banning birth control and abortion deprived women of the ability to choose whether and when to procreate.[152] Of course, Black women during slavery were considered

146. Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 86, 90 (1994) (describing the "subjugation and subordination" of women under English common law and the adoption of this common law in the United States during the nineteenth century). "Status and political power were acquired through the ownership of land. Since women were denied both, they inescapably were inferior citizens." *Id.* at 86.

147. Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 16 (2017) (explaining that married women lost the right to own or control their property, enter into contracts, or dispose of property in a will).

148. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951 (2002) (noting that opponents of giving women the right to vote argued that "women were represented in the state through male heads of household and because enfranchising women would harm the marriage relationship"). "Women began seeking the right to vote under the federal Constitution during the drafting of the Fourteenth Amendment but did not secure recognition of this right until ratification of the Nineteenth Amendment over a half century later." *Id.*

149. *See* Baxter, *supra* note 147, at 17 (citing People v. De Stefano, 467 N.Y.S.2d 506, 512 (Cnty. Ct. N.Y., Suffolk Cnty.1983) (discussing historical justifications for the spousal rape exemption)) ("At common law, spouses were immune from liability for torts committed against the other spouse. For instance, a husband could not be guilty of raping his wife.").

150. *See, e.g.*, *id.* (describing historical justifications for the spousal rape exemption); People v. Damen, 193 N.E.2d 25, 27 (Ill. 1963) (explaining rationale for spousal rape exemption).

151. *Id.* (citing cases acknowledging that married women had no separate existence from their husbands). "At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended, or merged in that of the husband." Henneger v. Lomas, 44 N.E. 462, 463 (Ind. 1896). This view of women no longer exists in any state. *See* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1311 (2015) ("[T]he law has largely eliminated the fiction of legal unity and most of its remnants, including spousal immunity.").

152. *See, e.g.*, CONN. GEN. STAT. § 53-32 (1958) (repealed 1971) ("Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."). Section 54-196 provided: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. § 54-196 (1958) (repealed 1971).

merely property, and forced pregnancy was a means of increasing the enslaver's property.[153]

The Fourteenth Amendment Due Process Clause eventually emerged as the source of many important substantive rights, including the right to reproductive choice.[154] In 1965, the Court finally recognized a constitutionally protected right to privacy that included a married woman's right to use contraception.[155] Seven years later, that right was extended to single women.[156] The right to control procreation has allowed women to exercise autonomy over their own bodies, make medical decisions without unnecessary and intrusive state oversight or intervention, and ultimately to pursue educational and professional opportunities in record numbers.[157] In other words, these rights have proved invaluable in allowing women to achieve economic independence and to fully participate and succeed in every aspect of society.[158] Taking away those rights jeopardizes all of those accomplishments.

B. Sexual Privacy and Equality for LGTBQ+ Couples

As recently as 1986, the Supreme Court held in *Bowers v. Hardwick* that the laws criminalizing certain private, consensual, sexual acts—particularly acts between people of the same sex—did not violate the constitutional rights of homosexuals.[159] The Court held that its prior substantive due process decisions should not be read to include the right to engage in homosexual sodomy.[160] The Court's focus on homosexual activity was both puzzling and telling since the statute at issue prohibited

153. Goodwin, *supra* note 141 ("Black women's sexual subordination and forced pregnancies were foundational to slavery. If cotton was euphemistically king, Black women's wealth-maximizing forced reproduction was queen.").

154. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that women have a constitutionally protected right of privacy that included the right to use contraception).

155. *Id.* (holding that the law banning contraception "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

156. Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (holding that banning contraception for unmarried women but not married women violated the Equal Protection Clause). "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis added)

157. *See* Elsesser, *supra* note 140 (citing studies linking access to birth control and abortion to a dramatic rise of women in professional programs and high-powered careers).

158. *Id.* (citing a study finding "a direct link between access to contraception and a woman's salary").

159. Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (challenging the constitutionality of a Georgia sodomy statute that criminalized oral and anal sex).

160. *Id.* at 192 (holding that no test for identifying fundamental rights "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy").

sodomy regardless of the sex or sexual orientation of the participants.[161] After concluding that no fundamental rights were at issue, the Court applied rational basis scrutiny, concluded the moral objections of a majority of the Georgia electorate were a sufficient basis for criminalizing sodomy, and held that the statute was constitutional.[162]

Seventeen years later, the Court overruled *Bowers* in *Lawrence v. Texas*.[163] That case challenged a Texas statute prohibiting certain sexual acts only between people of the same sex.[164] The Court concluded the *Bowers* Court "misapprehended the claim of liberty there presented to it" and criticized the "historical premises relied upon by the majority and concurring opinions" relating to regulations of private sexual conduct.[165] The Court opined:

> The case [involves] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[166]

Twelve years later, the Court held the Due Process and Equal Protection Clauses required states to allow same-sex couples to marry.[167]

While substantive due process has always had its critics—including members of the current Court[168]—for nearly half a century the Court consistently protected privacy rights and provided a degree of confidence

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161. GA. CODE ANN. § 16-6-2 (1984) ("(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . (b)(1) . . . [A] person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .").

162. *Bowers*, 478 U.S. at 196.

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

164. *Id.* at 563 ("The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: 'A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.' The statute defines '[d]eviate sexual intercourse' as follows: '(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.' § 21.01(1).").

165. *Id.* at 567–68.

166. *Id.* at 578.

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

168. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' . . . ." (citation omitted)); *see also* discussion *infra* Section II.C.

that the Constitution was a powerful shield against government intrusion into the lives of people who were in the social and political minority.[169]

C. Overruling Roe v. Wade *and the Retreat from Substantive Due Process*

The Court's opinion in *Dobbs v. Jackson Women's Health Organization* casts doubt on the future of many rights protected under the substantive due process doctrine.[170] The opinion not only ruled that the right to have an abortion was not constitutionally protected,[171] it held that the Constitution did not protect privacy rights more generally, and further held that only those unenumerated rights that are "deeply rooted in this Nation's history and tradition"[172] and "essential to our Nation's 'scheme of ordered liberty'" are protected under the Fourteenth Amendment Due Process Clause.[173] The Court's highly controverted historical evidence to support its conclusion that abortion is not a part of the country's history and tradition is one flaw in the opinion.[174] Equally troubling is the Court's reasoning that casts doubt on other reproductive and privacy rights that have been upheld on the same or similar grounds that were rejected in *Dobbs*.[175]

The problem is the Court's choice to adopt a theory of constitutional interpretation that expressly relies on laws passed at a time in our nation's history when people of African descent, women, and other disfavored groups had no voice in the legislative process or outcome.[176]

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169. *See* Michael J. Higdon, *LGBTQ Youth and the Promise of the Kennedy Quartet*, 43 CARDOZO L. REV. 2385 (2022) (discussing how the "Kennedy Quartet" cases have protected adult sexual minorities' rights).

170. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

171. *Id.* at 2242 (stating in overruling *Roe v. Wade* that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment").

172. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

173. *Id.* at 2246 (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).

174. The dissenting opinion in *Dobbs* disputes the majority's sources and conclusions regarding the history of abortion rights. *Dobbs*, 142 S. Ct. at 2324 (Breyer, J., Sotomayor, J., Kagan, J., dissenting) ("[E]arly law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before 'quickening'—the point when the fetus moved in the womb. And early American law followed the common-law rule.").

175. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding a constitutional right to use contraceptives exists); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing a right to privacy for adult consensual sexual activity); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding the right to marriage includes same-sex couples).

176. *See* discussion *supra* Part I, Section II.A.

As the dissenting opinion in *Dobbs* points out, the beliefs, opinions, and practices of those excluded groups are invisible to today's justices.[177]

> Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.[178]

If the Court continues to rely on these same views when assessing other rights, it is likely to hold that the rights of privacy, bodily autonomy, and sexual privacy—at least as applied to women, children, and non-heterosexual couples—are not deeply rooted in the nation's history and tradition.[179]

In fact, Justice Thomas called on the Court to reconsider several of the Court's substantive due process cases. "[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents . . . ."[180] If the Court heeds Justice Thomas' suggestion, the hard-won rights of previously marginalized groups could be revoked, and women's continued participation in higher education and the professional sphere will be jeopardized.[181] This would not only affect women, but the entire American economy and society.[182] It would also risk the newly realized liberty and stability of LGBTQ+ couples and their children.[183]

III. Consequences of Constitutional Demotion

For Black Americans, women, LGBTQ+ Americans, and other racial, religious, and political minorities, the Constitution has never been enough to protect their rights—it was necessary but not sufficient.[184] A

177. *Dobbs*, 142 S. Ct. at 2324–25 (Breyer, J., Sotomayor, J., Kagan, J., dissenting).

178. *Id.* at 2325.

179. *Id.* at 2319 ("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.").

180. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (internal citations omitted).

181. Elsesser, *supra* note 140.

182. *E.g.*, Kate Bahn & Annie McGrew, *A Day in the U.S. Economy Without Women*, AM. PROGRESS (Mar. 7, 2017), https://www.americanprogress.org/article/a-day-in-the-u-s-economy-without-women/ [perma.cc/3RV5-C8X3] (stating women contribute trillions of dollars to the nation's annual GDP).

183. Obergefell v. Hodges, 576 U.S. 644, 646 (2015) ("[C]hildren suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life.").

184. *See supra* Parts I, II. *See generally* Brownstein, *supra* note 6 (demonstrating that ideological beliefs of the Supreme Court Justices affect the rights granted to citizens).

combination of constitutional amendments, Supreme Court precedent, and federal legislation has resulted in tremendous strides towards equality and full participation in American society.[185] However, recent Supreme Court opinions threaten to drag each of these groups back to a time when they enjoyed fewer rights and less freedom than other groups.[186]

The Supreme Court's decision to make "history and tradition" the test for recognizing constitutional rights means that this country's history of racism, sexism, heteronormativity, and religious intolerance will define and limit the rights of many who have only recently been able to feel fully American, equally protected, and fully free.[187] Judging through that interpretive lens is a choice, and it is not the only option available. Nothing in the Constitution requires or even directly supports using centuries-old "history and tradition" to limit the rights it grants or protects.[188]

Judges can be faithful to the text of the Constitution while also supporting the ideals of equality, liberty, and justice that we claim to hold dear. Constitutional provisions could be interpreted in light of later amendments and large-scale societal shifts.[189] Rights for women and racial minorities could be determined by recognizing rights comparable or analogous to those historically and traditionally enjoyed by White men. The key is to look beyond the history and tradition of only a select group, which ignores the experiences of others and the evolution of our society as reflected in amendments to the Constitution.

The groups discussed in this Article know and have a collective memory of times before their rights were recognized. Their fear is not of an unknown or hypothetical threat, but of a return to their past. The right to vote and know that your vote will have weight equal to other citizens is a core value in a democratic society.[190] The right to make decisions about your body is key to being an independent and autonomous being.[191]

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185. *See supra* Parts I, II.

186. *See supra* Sections I.D, I.E, II.C.

187. *Id.*; *see also* Brownstein, *supra* note 6 ("[F]ar more young people than ever before openly identify in polls as part of the LGBTQ community.").

188. *Cf.* U.S. CONST. (making no mention of "history" or "tradition").

189. This approach is consistent with "living constitutional theory" but is not meant to advocate for that theory specifically. *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (discussing the debate between originalism and living constitutionalism).

190. *E.g.*, U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

191. *Cf.* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[C]lassifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, [are sure] to deprive all the State's citizens of liberty without due process of law.").

The ability to choose intimate partners and to marry and have that marriage recognized and respected is crucial to being an equal part of society.[192]

If fundamental rights are lost, there may be no reason to trust or respect the Constitution or the institutions it created. While concerns about a "second civil war" are—hopefully—overstated,[193] those who have fought for and enjoyed the benefits of constitutional protection are not likely to quietly accept demotion to second-class status.[194] State and federal laws that protect the rights of the groups affected by the Supreme Court decisions are important and welcome, but they cannot take the place of constitutional protection. In order to live up to the promise of the Constitution, the courts cannot continue to interpret it in a way that creates and perpetuates inequality for large swaths of the population.

Conclusion

Basic rights should not be limited to those living in a subset of states, and they should not be subject to repeal by a less accommodating Congress. The Constitution is supposed to set the baseline for the rights of all Americans, and it should be—and can be—interpreted in a way that accomplishes that objective. If the notion of justice is not an adequate motivator, reducing the threat of societal instability should be more than sufficient.

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192. Obergefell v. Hodges, 576 U.S. 644, 647 (2015) (legalizing same-sex marriage in part because "new insights and societal understandings [of marriage] can reveal unjustified inequality").

193. *See, e.g.*, Michelle Goldberg, *Are We Really Facing a Second Civil War?*, N.Y. TIMES (Jan. 6, 2022), https://www.nytimes.com/2022/01/06/opinion/america-civil-war.html [perma.cc/Y4U2-3ZCP]; William G. Gale & Darrell M. West, *Is the U.S. Headed for Another Civil War?*, BROOKINGS (Sept. 16, 2021), https://www.brookings.edu/blog/fixgov/2021/09/16/is-the-us-headed-for-another-civil-war/ [perma.cc/7LZJ-TEXD]; *BU Historian Answers: Are We Headed for Another Civil War*, BU TODAY (Mar. 27, 2019), https://www.bu.edu/articles/2019/are-we-headed-for-another-civil-war/ [perma.cc/P8L6-7X32] (stating the United States is displaying pre-civil war signs).

194. Brownstein, *supra* note 6 ("How long will rising generations allow what Roosevelt called the 'dead hand' of a Court rooted in an earlier time to block their priorities?").