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State & Electorate Mobilization: The Most Promising Path to Justice in Modern America

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

DANIEL A. COTTER

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

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I. INTRODUCTION

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

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

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


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

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

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

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


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

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


10. See Castro-Huerta, 142 S. Ct. at 2491 (finding federal and state authorities have concurrent jurisdiction for certain criminal cases); Haaland v. Brackeen, OYEZ, www.oyez.org/cases/2022/21-376 [perma.cc/UAU4-BVYCF] (last accessed Apr. 9, 2023) (considering the Indian Child Welfare Act, which was argued before the Court on Nov. 9, 2022). In Castro-Huerta, Justice Gorsuch dissented, writing in part, “[b]ut in time, Worcester came to be recognized as one of this Court’s finer hours. The decision established a
affirmative action in college admissions. The Court will hear another case involving services for websites in the LGBTQ+ community—the Court appears likely to find for the web developer, denying further opportunity to protect LGBTQ+ rights. Court observers do not hold out much promise for protections for the LGBTQ+ community. We can expect further attacks on same-sex marriage and other LGBTQ+ rights in the current and coming Terms.

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

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


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

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

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

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

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

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

17. Id.
18. U.S. CONST. amend. XIV.
19. See, e.g., Civil Rights Cases, 109 U.S. 3, 25-26 (1883) (holding that the Fourteenth Amendment did not permit the federal government to prohibit discriminatory behavior by private parties, and the Civil Rights Act of 1875 was unconstitutional); Slaughterhouse Cases, 83 U.S. 36, 82 (1873) (finding the Fourteenth Amendment only banned the states from depriving Black people of equal rights). But see, Brown v. Board of Ed., 347 U.S. 483, 494 (1954) (determining school segregation based on race to be unconstitutional).
20. See, e.g., Press Release, Supreme Court (May 3, 2022) (on file with author) (“Yesterday, a news organization published a copy of a draft opinion in a pending case.”).
21. Charles Benson, Sen. Baldwin says overturning Roe V. Wade could be slippery slope against birth control, WTMJ-TV MILWAUKEE (May 4, 2022, 6:24
Critics and fact checkers pointed to several instances on the civil side where the Court had taken away a constitutional right. One is the *Lochner v. New York* case, in which the Court held that the freedom of contract was violated by a New York law limiting the hours bakers could work, and thus the Fourteenth Amendment’s right to liberty afforded to employer and employee was violated and the law was held unconstitutional. This case ushered in the “Lochner Era,” a period from 1890 to 1937 described as the Court having a “laissez-faire economic policy” and “using a broad interpretation of due process that protected economic rights, tended to strike down economic regulations of working conditions, wages or hours.” The result is that those in positions of powerlessness, the *Lochner* situation, meaning women and children at the time, were not protected.

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

23. The era was defined by the famous case, *Lochner v. New York*, but the period goes back almost twenty years before *Lochner* was decided. *Lochner Era*, LEGAL INFO. INST., www.law.cornell.edu/wex/lochner_era [perma.cc/SVA5-3BEC] (last visited Mar. 15, 2023). The reasoning is that *Lochner* was the most famous and definitive case by the Court on the laissez-faire economic policy, but the Court had decided numerous other decisions. *Id.* Laissez-faire economic policy generally refers to free market capitalism that opposes government intervention or restrictions. *Id.*
24. *Id.*
25. *Id.*
27. *Id.*
28. See, e.g., Brian T. Goldman, *The Switch in Time That Saved Nine: A Study of Justice Owen Roberts’s Vote in West Coast Hotel Co. v. Parrish*, CUREJ COLL. UNDERGRADUATE RSCH. ELEC. J., UNIV. OF PA. 4, 5 (Jan. 1, 2012). The *West Coast Hotel* case is famous for the “switch in time that saved nine.” *Id.* at 112. During the New Deal, the Court invalidated a number of President FDR’s initiatives and laws and Roosevelt threatened to pack the Court. *Id.* at 46-47. Separate and apart from the court packing, Chief Justice Charles Evans Hughes was having conversations with Justice Owen Roberts about the rulings and analysis. *Id.* at 89. In *West Coast Hotel*, Roberts moved to the majority. *Id.* at 6; see also DANIEL A. COTTER, THE CHIEF JUSTICES: THE SEVENTEEN MEN OF THE CENTER SEAT, THEIR COURTS, AND THEIR TIME (Twelve Tables Press 2019) (analyzing each Chief Justice).
30. *Id.*
A second reference to the reversal of a constitutional right arose in 1990 when the Court decided *Employment Division v. Smith*, holding that two employees, who were Native American Church members that used illegal drugs for religious purposes, were not protected by the First Amendment’s Free Exercise Clause.\footnote{31} In writing for the majority, Justice Antonin Scalia held that the Court had never found that an individual’s religious beliefs excuse the employee from complying with otherwise valid regulations.\footnote{32}

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

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

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

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

\begin{itemize}
\item \footnote{31. Employment Division v. Smith, 494 U.S. 872, 874 (1990).}
\item \footnote{32. Id. at 878-89.}
\item \footnote{33. See, e.g., *In the Shadow of Sherbert: An Understanding of Smith as Judicial Codification*, FEDERALIST SOCIETY (Sept. 20, 2021), fedsoc.org/commentary/fedsoc-blog/in-the-shadow-of-sherbert-an-understanding-of-smith-as-judicial-codification [perma.cc/LB7A-GP3U] (“That standard was first laid out in *Sherbert v. Verner*, where the Court held unconstitutional the denial of unemployment benefits to a woman whose unemployment was a result of her religious beliefs.”).}
\item \footnote{34. Sherbert v. Verner, 374 U.S. 398, 399 (1963) (noting the plaintiff was a member of the Seventh-day Adventist church and fired for refusing to work on her Sabbath Day, Saturday).}
\item \footnote{35. Madeline Heim, *Baldwin Wrong that Supreme Court has Never Taken Away a Constitutional Right*, POLITIFACT (June 3, 2022), www.politifact.com/factchecks/2022/jun/03/tammy-baldwin/baldwin-wrong-supreme-court-has-never-taken-away-c/ [perma.cc/92FH-2LBP].}
\item \footnote{36. See discussion infra Part I (discussing that the bigger point is throughout the Court’s history, the Court has not often recognized identifiable and protected rights for various groups, and with the exception of a few aberrations, has not often protected those that one might think they have).}
\item \footnote{37. Dobbs, 142 S. Ct. at 2263.}
\item \footnote{38. Id. at 2263, n. 48.}
\end{itemize}
A close examination of the cited cases in Alito’s footnote 48 suggests that in almost every, if not all, instances cited by Alito, the Court found a right existed in the Constitution, expanding protections, the reverse of the decision in Dobbs. Some of the

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

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

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

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\(^{41}\) See, e.g., *Obergefell*, 576 U. S. at 664-65 (stating “identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution” requiring “reasoned judgment” in “identifying interests of the person so fundamental that the State must accord them its respect.”).
The current view of recency bias stems principally from the Dobbs decision. The current view of recency bias stems principally from the Dobbs decision. Dobbs explicitly overturned Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey. Justice Alito scathingly wrote: “Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, Roe and Casey have enflamed debate and deepened division.”

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

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

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

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

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

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44. See Smith, 494 U.S. at 874 (identifying rare instances on the civil side of reversing rights).
45. Dobbs, 142 S. Ct. at 2243.
49. Id. at 2258.
50. Id. (first quoting Roe, 410 U.S. at 159; then quoting Casey, 505 U.S. at 852).
51. Id. at 2258.
The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts . . . . Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," we have a duty to 'correct the error' established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.52

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

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

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


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

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

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

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

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

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56. Id.

57. Id.

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

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

New York State Rifle & Pistol Association Inc. v. Bruen, 142 S. Ct. 2228, 2177 (2021) (Breyer, J., dissenting). “History and tradition” was also used in *Dobbs* and is used increasingly by the conservative majority in the Roberts Court. *Dobbs*, 142 S. Ct. at 2248. This history debate has long existed. See, e.g., Philip B. Kurland, *The Origins of The Religion Clauses of The Constitution*, 27 WM. & MARY L. REV. 839, 841-42 (1987) (recognizing “history is relevant to constitutional decision” and does not contend the “Constitution should be molded by the sitting justices either to suit their own predilections” but that history “should not be expected . . . to provide specific answers to the specific problems that bedevil the Court.”). Some have expressed concerns about the dangers of the “history and tradition” analysis by the Court. See Robert P. Jones, *This Supreme Court’s dangerous vision of ‘history and tradition,’” RELIGION NEWS SERV. (July 4, 2022), www.religionnews.com/2022/07/04/this-supreme-
missing its fiftieth anniversary when *Dobbs* was decided. Same-sex marriage, contraception, the privacy of same-sex intercourse, and other LGBTQ+ rights are more recently recognized, and it is hard to understand how these are more rooted in “history and tradition” than abortion rights. Time will tell what further rights face various erosions in the coming Terms.

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

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

II. THE COURT HAS NOT BEEN THE SAVIOR OF MINORITIES

While the Court is often considered a branch of our federal government that has, historically been the “champion of the poor, working people, and racial minorities,”\(^\text{61}\) that, with few exceptions, is not true.\(^\text{62}\)

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

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\(^\text{62}\) As Adam Cohen, a former member of the New York Times editorial board and president of Volume 100 of the Harvard Law Review, wrote:

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

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

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

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

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

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

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


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

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

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

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

72. The Court, however, did find in 1923 that parents had the right to
many rights eventually deemed to exist by the Court in its history, privacy rights did not see a quick recognition by the Court. In 1890, Louis Brandeis, who eventually became an Associate Justice of the Supreme Court,73 wrote a law review article with his partner, Samuel Warren, entitled The Right to Privacy.74 While the Court would occasionally advance protections of privacy in subsequent years, it was a slow process, as evidenced by a dissent Justice Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.75

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

A. Women and the Court

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

determine if German could be taught to their young children. Meyer v. Nebraska, 262 U.S. 390, 397 (1923).
76. See supra notes 62 - 63 and accompanying text.
Court held that there was no violation of the Equal Protection Clause of the Fourteenth Amendment when a Michigan statute prohibited women from obtaining a bartender’s license. *Goesaert v. Cleary*, a 6-3 Court opinion issued by Justice Felix Frankfurter, opened with:

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

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

The fact that women may now have achieved the virtues that men have long claimed as their prerogatives, and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic .... The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that, as to a defined group of females, other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition.

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

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

Several years later, Belva Lockwood sought admission to the

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77. U.S. CONST. amend. XIV, § 1.
79. Id. at 466.
81. Id.
Bar of the Supreme Court of the United States. Chief Justice Waite responded to the admission application: “[b]y the uniform practice of the Court from its organization to the present time, and by the fair construction of its rules, none but men are permitted to practice enforce it as attorneys and counselors.” Chief Justice Waite challenged Lockwood by noting the only way this would change was by legislation. On February 15, 1879, President Rutherford B. Hayes signed such legislation.

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

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

*Buck* has never been expressly overturned.

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

### B. Schools, Integration, and Affirmative Action

Another example of the slow, indirect arc of the Court and the treatment of an underrepresented group is with Black people, specifically with school integration and affirmative action. In *Plessy v. Ferguson*, the majority favorably discussed legislation requiring
segregation in schools and asserted these laws requiring “separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”

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

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

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

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

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


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

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

95. Id.

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

97. Sunstein, supra note 94.

98. COTTER, supra note 28, at 316.
‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.\textsuperscript{99}

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

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

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

\begin{itemize}
  \item 100. See GERARD N. ROSENBERG, THE HOLLOW HOPE 2 (Univ. Chi. Press 2d ed. 2008) (addressing how effective the Court can be in effectuating social change, given its powers).
  \item 101. Sunstein, supra note 94.
  \item 103. Id.
  \item 104. After the rehearing, Justice Felix Frankfurter wrote Marshall a letter informing him that his rebuttal argument was the “most appropriate and the most forceful argument I have ever heard in any appellate court.” Daniel Cotter, Supreme Court Makes Seismic Shift 58 Years after Plessy v. Ferguson, CHI. DAILY LAW BULL. (June 6, 2016), www.chicagolawbulletin.com/archives/2016/06/06/plessy-v-ferguson-update-6-6-16 [perma.cc/BEZ6-5WDC].
  \item 105. Sunstein, supra note 94.
  \item 107. The entire case focused on these three questions:
  \begin{itemize}
    \item 1) Do the decisions in Grutter v. Bollinger and Gratz v. Bollinger apply to public high school students?
    \item 2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?
    \item 3) Does a school district that normally permits a student to attend the high school of her choice violate the Equal Protection Clause by denying the student admission to her chosen school because of her race in an effort to achieve a desired racial balance?
  \end{itemize}
\end{itemize}
The Court found that racial diversity would not be a compelling interest and using racial diversity in public high school admissions constituted a violation of the Equal Protection Clause.\textsuperscript{108} Writing for the plurality, Chief Justice Roberts stated:

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

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

In what appears to be further erosion of integration in higher education, the Court, in its recent October 2022 Term, heard a pair of cases that appear to signal the end of using race as a factor in college admissions. On October 31, 2022, the Court heard two cases, \textit{Students for Fair Admissions v. President and Fellows of Harvard College}\textsuperscript{112} and \textit{Students for Fair Admissions v. University of North Carolina}.

The question in each case was whether the Supreme Court should overrule \textit{Grutter v. Bollinger} and hold that institutions of higher education cannot use race as a factor in
Grutter addressed a narrowly tailored program for the University of Michigan Law School’s admission program, and the Court held “that the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” The consensus is that when the Court issues these two decisions, Grutter will be dead law. Once again, based on this brief analysis and line of cases, the Court’s forward progress on race in school settings has reached a point that the path to justice is not going to be through the Court for Black students and other people of color.

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

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

1. Women’s Rights and Reproductive Rights

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

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


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

117. See discussion supra Part II.A.
of Rights or its penumbras, or among those rights reserved to the people by the Ninth Amendment. Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.\textsuperscript{118}

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

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

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

In recent Terms, the Court either refused to hear or ruled narrowly on abortion cases.\textsuperscript{124} But, that changed when the Court

\begin{footnotesize}
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\item[\textsuperscript{118}]
\textit{Roe}, 410 U.S. at 129 (first citing \textit{Griswold}, 381 U.S. at 479; then citing \textit{Eisenstadt}, 405 U.S. at 438; and then citing \textit{Eisenstadt}, 405 U.S. at 460 (White, J., concurring); and then citing \textit{Griswold}, 381 U.S. at 486 (Goldberg, J., concurring)).
\item[\textsuperscript{119}]
\item[\textsuperscript{120}]
\item[\textsuperscript{121}]
\textit{Casey}, 505 U.S. at 833.
\item[\textsuperscript{122}]
\textit{Id.} at 874.
\item[\textsuperscript{123}]
\textit{Id.} at 877.
\item[\textsuperscript{124}]
See \textit{Whole Woman’s Health v. Hellerstedt}, 579 U.S. 582, 591 (2016) (determining Texas law imposed undue burden on women); \textit{June Medical
\end{itemize}
\end{footnotesize}
heard oral arguments in Dobbs and then overturned Roe and Casey. 125

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

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

2. Same-Sex Relationship Rights

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

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128. Id.
130. Ziegler, supra note 127.
131. Id. See infra Part III (providing some state legislative actions and state constitutional rulings).
Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.133

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

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

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.134

In his dissent, Justice John Paul Stevens wrote:

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

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

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

133. Id. at 194.
134. Id. at 191-92 (first quoting Moore v. East Cleveland, 431 U. S. 494, 431 (Powell, J.); and then citing Griswold, 381 U.S. at 506).
their private sexual conduct a crime . . . . Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.136

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

Justice Scalia would be prescient of same-sex marriage. In United States v. Windsor,139 the Court invalidated the Defense of Marriage Act140 as a violation of the Fifth Amendment.141

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

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

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137. Id. at 602 (Scalia, J., dissenting).
138. Id. at 604-05. The Scalia reference to Canada recognizing same-sex marriage pointed to Halpern v. Toronto, 2003 WL 34950 (Ontario Ct. App. 2003), which held that same-sex couples had a fundamental right to marry.
140. See Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022). The Defense of Marriage Act was a law signed by President Bill Clinton that prevented same-sex couples whose marriages were recognized by their home states from receiving the many benefits available to other married couples under federal law. Id. at § 2.
142. Obergefell, 576 U.S. at 651.
143. Id. at 781.
144. See Lawrence, 539 U.S. at 596 (Scalia, J., dissenting) (asserting history and tradition does not support the right to same-sex intercourse); Windsor, 570 U.S. at 794 (Scalia, J., dissenting) (arguing “a claim that [same-sex marriage is ‘deeply rooted in this Nation’s history and tradition’ would of course be quite absurd’); Obergefell, 576 U.S. at 718-19 (Scalia, J., dissenting) (addressing how the majority did not get history and tradition right in finding that same-sex couples had a right to marry).
145. In his last term, Justice Kennedy wrote the narrow decision in
issue of whether the Court will revisit these three cases or the issue of same-sex marriage, directly, remains an open question.\textsuperscript{146}

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

### III. CONGRESS AND THE COURT

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

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

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

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

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

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

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

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

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

154. Ledbetter, 550 U.S. at 642 (internal references omitted).
155. Id. at 660 (Ginsburg, J., dissenting).
157. Id. at § 2 (finding that the decision also “significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.”).
159. The Court and Constitutional Interpretation, SUP. CT. U.S., www.supremecourt.gov/about/constitutional.aspx [perma.cc/AKK6-Z738] (last visited Feb. 25, 2023) (“When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court. However, when the Court interprets a statute, new legislative action can be taken.”).
a constitutional amendment is “dead on arrival—unlikely to be approved by either two-thirds of Congress or three-quarters of the states, as required by the rules of constitutional amendment in the Constitution.”

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

A. Some Potential Ways to Constrain the Court

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

1. Jurisdiction Stripping

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

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


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

162. An early example of restraining jurisdiction of the Court happened in 1801 and 1802. A lame duck Congress in 1801 passed the Judiciary Act of 1801, which expanded federal judgeships while eliminating a Supreme Court seat. In 1802, Congress passed the Judiciary Act of 1802, repealing the prior year’s act and also changing the Court’s sitting from two sessions a year to one, thus the Court did not sit for more than a year. Marbury v. Madison was filed in 1801 but not heard and decided until 1803.
regulations as will be calculated to obviate or remove these inconveniences. 163

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

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

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

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

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

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

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

164. U.S. Const. art. III, § 2, cl. 2.
166. Id. at 174.
167. Id.
(2015) and *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2782, 189 L. Ed. 2d 675 (2014).\(^{171}\)

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

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

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

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

While jurisdictional stripping is permitted, and some have

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

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

*Id.*
176. *Id.*
177. *Klein*, 80 U.S. at 137.
180. See *Bank Markazi v. Peterson*, 578 U.S. 212, 213 (2016) (discussing *Klein* and stating, “Congress may amend a law and make the amended prescription retroactively applicable in pending cases.”).
advocated for it.\textsuperscript{181} with the current Congressional split, it is unlikely that any introduced bills would be enacted.\textsuperscript{182} There is the risk, despite elections, “that Congress will exercise its Article III power unwisely.”\textsuperscript{183} Consequently, the question persists: “[y]our friendly reminder that in just a few years the Court has completely changed the constitutional law of abortion, guns, religion, and administrative law. If changing judges changes law, do we know what law is?”\textsuperscript{184} Justice Kagan has expressed similar concerns about the only thing that has changed are the Justices sitting, stating, “[p]eople are rightly suspicious if one justice leaves the court or dies and another justice takes his or her place and all of sudden the law changes on you.”\textsuperscript{185} Justice Kagan joined Justice Breyer’s dissent in Dobbs. The dissent noted that the only thing that changed was the make-up of the Court, referencing that the “majority has overruled Roe and Casey for one and only one reason: because it has always despised them, and now it has the votes to discard them.”\textsuperscript{186}

Paul Rosenberg recently wrote an article reviewing

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

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

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

\textsuperscript{183} Id.

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

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

\textsuperscript{186} Dobbs, 142 S. Ct. at 2335 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
Reconstruction as a potential model to address the clash between Court rulings and the populace’s resistance to retracting or constricting individual rights. Rosenburg wrote: “[Congress] repeatedly changed the size of the Supreme Court, stripped the court of jurisdiction over a class of cases that sought to challenge Reconstruction, and used its enforcement power to protect fundamental rights and expand the ability of the federal courts to redress state abuse of power.”

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

2. Use of the Ninth Amendment

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

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

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

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

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


191. See District of Columbia v. Heller, 554 U.S. 570, 572 (2008) (opining that “[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”). This statement came from Justice Scalia. Id.
that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.’ Still, Bork was on to something, for until quite recently the Ninth Amendment has been the Rorschach test of constitutional theory. The question ‘What does the Ninth Amendment mean?’ has frequently elicited interpretations that tell us more about the constitutional visions of the interpreters than about the words of the amendment. But the Ninth Amendment is not an inkblot; it consists of English words that are simple and direct.\(^192\)

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

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

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

In the first Congress, James Madison, the “Father of the Constitution,”\(^197\) introduced a number of actual amendments that


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

\(^{196}\) *Id.* at 387-89.

\(^{197}\) See Daniel Cotter, *Bill Of Rights, Now Seen as Sacred, Had Rocky Road to Adoption*, CHI. DAILY LAW BULL. (July 16, 2016), www.chicagolawbulletin.com/archives/2016/07/18/bill-of-rights-history-7-18-16 [perma.cc/5PTB-7XVV]
would be inserted into the Constitution, including this language at Article I, Section 9:

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

The challenge with the Roberts Court is that it is unlikely to embrace an expansive reading of the Ninth Amendment.\(^{199}\)

3. Arguing for the Full Recognition of the Famous Footnote

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

However, the Roberts Court approach uses “history and traditions,” and the First Amendment to protect others against discrete and insular minorities.\(^{202}\)

In recent Terms, the Court has increasingly relied on the First Amendment’s free exercise, freedom of speech, and the other six rights enumerated.\(^{203}\) It is not likely to go back to using this footnote

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


201. *Id*.


4. Court Reform

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

On December 8, 2021, the Commission issued its final report. It did have one recommendation that engendered extensive support: term limits. The report advised President Biden: “among the proposals for reforming the Supreme Court, non-renewable limited terms—or ‘term limits’—for Supreme Court Justices have enjoyed considerable, bipartisan support.”

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

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

The judicial Power of the United States, shall be vested in one
supreme Court, and in such inferior Courts as the Congress may from
time to time ordain and establish. The Judges, both of the supreme
and inferior Courts, shall hold their Offices during good
Behaviour...210

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

Many of the reforms regarding the Court’s size or Justices’
Terms of service raise serious issues of implementation211 and
whether amendment(s) to the Constitution would be necessary to
effectuate such changes. An argument does exist that Term limits
could be introduced, but it is not by any means a resolved issue. In
any event, given the close margins in both chambers of Congress,
serious efforts at reforming the service of Supreme Court Justices
is unlikely.

5. Constraining the Court by Ignoring It

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

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

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

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211. This issue will be discussed at the Symposium held April 13, 2023.
212. Ryan Cooper, Democrats Have a Better Option Than Court Packing,
THE WEEK (Sept. 22, 2020), theweek.com/articles/938865/democrats-have-better-option-than-court-packing[perma.cc/H4HU-KGXC].
214. Id. at 519-20.
215. Jeffrey Rosen, Supreme Court History: The First Hundred Years,
The biggest impediment to simply ignoring Supreme Court decisions might be the case *Cooper v. Aaron*, in which the Court held that state officials are required to follow federal orders based on Supreme Court opinions. The per curiam opinion explained the reasoning:

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

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

6. **Working the Current Landscape**

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

7. **Establishing a Code of Ethics**

One path that could make things more transparent and perhaps instill more accountability at the Court is to implement a robust code of ethics. Fix the Court and its founder, Gabe Roth,
have pushed for Court reforms to establish a code of ethics and to insist upon more transparent and detailed disclosures. In the 117th Congress, the Supreme Court Ethics, Recusal, and Transparency Act of 2022 was introduced. It required the following to be established or implemented: a code of ethics, minimum disclosure standards, and a mandatory recusal process.

A more accountable Court would potentially lead to a more trusted Court and one that the nation might more easily accept as legitimate when it issues its most contentious rulings. The sense of improprieties amongst members of the Court in their decisions could be suppressed by a better understanding of the financial and other involvements of the Justices. It remains unseen whether we will see serious reforms that would satisfy those seeking it.

8. Reviewing the Court

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

This proposal:

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

This bill, if enacted, would provide a mechanism to quickly and effectively respond to decisions of the Supreme Court that are advocates for non-ideological ‘fixes’ that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people.

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

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

222. Id.

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

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

9. Rebalance the Article III Courts

During the Trump Presidency, he left a rich legacy of appointing Article III judges to the federal benches, including three Supreme Court Justices in just four years. However, his legacy on the bench is not just the three conservative Justices he secured on the Supreme Court. His most impactful legacy might be at the appellate level. For example, President Trump placed six judges on the Supreme Court. Those judges have “put the court at the forefront of resistance to the Biden Administration’s assertions of legal authority and to the regulatory power of federal agencies.”

The new Fifth Circuit judges’ “rulings . . . at times [have] broken with precedent and exposed rifts among the judges, illustrating Trump’s lasting legacy on the powerful set of federal courts that operate one step below the Supreme Court.” During his single term, “Donald Trump [left] the White House having appointed more than 200 judges to the federal bench, including nearly as many powerful federal appeals court judges in four years as Barack Obama appointed in eight.” The focus on the federal appeals court judges was instrumental, with Trump having “appointed 54 federal appellate judges in four years, one short of the 55 Obama appointed in twice as much time,” resulting in Trump having “flipped” the balance of several appeals courts from a majority of Democratic appointees to a majority of Republican appointees, including the Eleventh, Second, and Third Circuits.


227. Id.


230. Id.

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

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

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

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

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


236. Russ Feingold, We Need More Judges, ACS IN BRIEF (Jan. 13, 2023), www.acslaw.org/inbrief/we-need-more-judges/ [perma.cc/8LY6-GHLY].
measures to help this process along: (1) eliminate the blue slip;\(^{237}\)  
(2) reduce floor time for consideration; and (3) allow for simultaneous consideration of numerous judges.\(^{238}\)

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

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

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

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

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

\(^{238}\) Feingold, \textit{supra} note 236.

\(^{239}\) \textit{Dobbs}, 142 S. Ct. at 2228.

\(^{240}\) See \textit{infra} notes 248-62 and accompanying text on ballot measures.

\(^{241}\) See \textit{infra} notes 263-65 and accompanying text describing such actions in California, Michigan, and Vermont.

\(^{242}\) Schneider, \textit{supra} note 218 (stating “more and more states and districts are dominated by one party, owing to geographic polarization of the voters and, in the House of Representatives, redistricting to protect incumbents.”).

\(^{243}\) While the main victories in several states, including red states, were abortion rights and restrictions, the same education and advocacy could be used
supporters and advocates of other rights for protections of those rights and liberties deemed to be in harm’s way can be effective.

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

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

1. The Kansas Referendum

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

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

244. Abortion and reproductive rights, for example.


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

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

The Kansas legislature summarized the proposal:

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

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

2. Five Other States on Abortion

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

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

248. Id.
251. Christopher Reeves, Voters told them no, but Kansas Republicans are advancing wild new anti-abortion legislation anyway, DAILY KOS (Jan. 21, 2023, 9:01AM CST), dailykos.com/stories/2023/1/21/2148111/-Voters-told-them-no-but-Kansas-Republicans-are-advancing-wild-new-anti-abortion-legislation-anyway [perma.cc/RHB8-45C2].
Michigan considered a proposal to amend its constitution to protect abortion rights; California considered putting abortion rights in its state constitution; and Vermont considered backing abortion rights.

A number of other ballot initiatives, which would have further restricted abortion, did not make the ballots. Montana rejected the born alive provision, and healthcare criminal penalties, while Kentucky rejected further restrictions. Kentucky voters were asked to decide:

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

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

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

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

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


• California:

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

• Michigan:

Sec. 28. (1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

An individual’s right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.

Notwithstanding the above, the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.

(2) The state shall not discriminate in the protection or enforcement of this fundamental right.

• Vermont:

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

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

3. South Carolina Supreme Court Rules

In Planned Parenthood South Atlantic, et al. v. State of South
Carolina, the South Carolina Supreme Court considered a legislative enactment, *The Fetal Heartbeat and Protection from Abortion Act*, and whether the act “violates a woman’s constitutional right to privacy, as guaranteed in article I, section 10 of the South Carolina Constitution.” Article I, section 10 of South Carolina’s constitution provides:

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

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

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

The South Carolina Supreme Court joins Alaska, California, Florida, Kansas, Massachusetts, Minnesota, Montana, and New Jersey in finding such a right.

4. The Narrow Path to Justice

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

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267. Planned Parenthood S. Atl., 882 S.E.2d at 774.
269. Planned Parenthood S. Atl., 882 S.E.2d at 774.
272. In Re T.W., 551 So. 2d 1186, 1188 (Fla. 1989).
275. Women St. of Minn. v. Gomez, 542 N.W.2d 17, 19 (Minn. 1995).
Except as provided in subsection (a), nothing shall prevent any city or county from regulating abortion within its boundaries as long as the regulation is at least as stringent as or more stringent than imposed by state law. In such cases, the more stringent local regulation shall control.\footnote{S.B. 65 §§ 1-3, 2022-23 Leg. Sess. (Kan. 2023).}

It would replace the current section that provides, “[n]o political subdivision of the state shall regulate or restrict abortion.”\footnote{Id.}

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

The way to break the barrier to justice when it comes to many of the rights that individuals fear might be eroded by the Supreme Court likely does not lie with redress by the Court. The current Court is very conservative, and the October 2021 Term saw the Court issuing the most 6-3 decisions by percentage in the modern Court, with the six in the majority in most of those cases representing the six conservative Justices.\footnote{Adam Feldman, \textit{6-3 is the new SCOTUS 5-4}, E\textsuperscript{MP}IRICAL SCOTUS (July 11, 2022), \url{www.empiricalsotus.com/2022/07/11/new-scotus-5-4/}[perma.cc/7QJ3-EQWC].}

The experience of adopting protection for women’s reproductive rights in three states and rejecting restrictions on women’s reproductive rights in two states suggests that states that can enshrine particular rights will do so, and in those states where that is not possible due to political makeup, it appears that at least in women’s reproductive rights, extreme measures and harsh restrictions will not pass on ballot initiatives. In terms of other rights such as those discussed earlier in this Article, time will tell if similar efforts can be successful. In the meantime, state legislatures, such as Kansas, will try to find ways to enact and implement restrictive measures on women, the LGBTQ+ community, and other underrepresented groups.\footnote{As noted supra note 274, Kansas is a state whose supreme court has found certain rights exist, so the developments if this referenced legislation passes and is challenged in the judicial system will be interesting to watch.}

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

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

V. CONCLUSION

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

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

\(^{283}\) See supra notes 266-70.

