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I. Introduction

While state and federal governments have shared power and authority throughout the history of the United States, the United States Supreme Court significantly influences this power dynamic by determining how the Constitution applies to the protection of individual rights. The Constitution itself provides little direction regarding the roles of the Supreme Court; therefore, the scope and authority of the Court is highly contested. Similarly, political theorists and the American public alike have argued that the Supreme Court is inadequately executing its prescribed responsibilities, sometimes overstepping its authority and, at other times, neglecting

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its duties.[2] Though the Supreme Court is responsible for upholding the ideals of the Constitution and adapting to changing times, it has often supported laws that increase state sovereignty at the expense of the rights of minorities. Minorities and historically marginalized groups lack protection from the majority-dominated legislative and executive branches, leaving this responsibility to the courts. Today, the Supreme Court directly influences the protection of individual rights and is beginning to neglect its responsibility to protect the interests of various minority groups, as seen in recent decisions. When the state or federal governments fail to protect minority interests and individual rights, the Supreme Court must assert its constitutional authority and regularly intervene on behalf of vulnerable minority populations.

II. Background

A. Constitutional Origins and Expansion of Federalism

Federalism is a system of government wherein power and authority to govern is shared by a central government and regional governments. Under the Articles of Confederation, the first government system of the United States, the American experiment seemed on the verge of failure. The weak central government struggled to pass laws and govern a nation of independent states. The solution that the framers of the new Constitution arrived at was a relatively untried system of government known as federalism, under which

2 See also: Mitchell F. Crusto, The Supreme Court's New Federalism: An Anti-Rights Agenda, 16 GA. St. U. L. REV. 517 (2000), Eric J. Segall & Christopher Jon Sprigman, Reducing the Power of the Supreme Court: Neither Liberal nor Conservative but Necessary (and Possible); N.Y.U. J. of Legis. & Pub. Pol'y Quorum (2020); Jay Ambrose, Opinion: The U.S. Supreme Court oversteps its authority The Detroit News (2020), https://www.detroitnews.com/story/opinion/2020/06/23/opinion-u-s-supreme-court-oversteps-its-authority/3236423001/ (last visited Feb 11, 2023); Kathryn Haglin et al., Americans don't trust the Supreme Court. That's dangerous., Washington Post, October 10, 2022, The Court and Constitutional Interpretation, Supreme Court of the United States, https://www.supremecourt.gov/about/constitutional.aspx (last visited Feb 11, 2023).

the several states and the central government shared the power and authority to govern.

Article III of the United States Constitution declares that "the judicial Power of the United States shall be vested in one supreme Court."[3] However, it is vague regarding the Supreme Court's role.[4] Under the new system of federalism, it was unclear what the authority of this "Supreme Court" would be and the extent of its power over the affairs of the several states. The debate over this question can be seen in the Federalist Papers and the responding remarks from "Brutus" during ratification.[5] Alexander Hamilton wrote in Federalist 78 about what he perceived the role of the Supreme Court to be. While emphasizing that the Court would be the "least dangerous" branch, he also noted the importance of an independent judiciary with powers and authorities not outlined in the Constitution.[6] This view was shared by those aligned with the Federalist Party, who advocated for a stronger central government.

In line with the assertion that the Supreme Court is a non-dangerous branch, the federal government as a whole was described as not imposing on state governments, only reaffirming the rights included in the Articles of Confederation and creating a feasible way of implementing them. James Madison describes this in Federalist

3 U.S. Const. art. III, § 1.

4 See Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 Ohio State Law Journal. 221 (2003).

5 The Anti-Federalists were worried that under the new Constitution, the national government would be too strong and would threaten individual liberties. In response to the Federalist Papers, written by James Madison, John Jay, and Alexander Hamilton, the Anti-Federalists published a series of papers written under pseudonyms. The most famous of these are the Brutus papers, likely written by Robert Yates. These papers brought to light concerns about the federal court system, the powers of the president, and the domination of the national government over the states, among other worries (see Mitzi Ramos, Anti-Federalists The First Amendment Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/1175/anti-federalists (last visited Feb 5, 2023).

6 THE FEDERALIST NO. 78 (Alexander Hamilton).

45 and Amendment 10.[7] Madison explains that federal powers are "few and defined" in contrast with the "numerous and indefinite" state powers.[8] Despite these regulatory measures, the power of the federal government, and with it, the judiciary, has grown immensely.

The Supreme Court largely stayed out of the public eye until the early 1800s when a dispute arose between the Adams and Jefferson Administrations. In the landmark decision *Marbury v. Madison*[9] *(1803)*, John Marshall[10] claimed the authority of judicial review for the Supreme Court, asserting for the first time that the Court possessed the power to declare laws unconstitutional. This responsibility, not specifically afforded to the Judiciary, marks the start of the Supreme Court's expansion of power and influence.

B. Dual Federalism in the Courts

In the years leading up to the Civil War, dual federalism was adopted by the legislative and judicial branches. Dual federalism is a political philosophy that federal and state governments both retain

7 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (U.S. Const. amend. X.).

8 The Federalist No. 45 (James Madison).

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

10 John Marshall was the nation's fourth Chief Justice and is widely considered to be the most influential individual to fill that role. He served in the Revolutionary War. He later worked as a lawyer and served on the Virginia Legislature. He served as Secretary of State under President John Adams before President Adams nominated him to serve as Chief Justice. Under the Marshall Court, the power and prestige of the judiciary branch expanded. Marshall interpreted the Constitution "in ways that significantly enhanced the powers of the federal government" (see John Marshall, the great chief justice, William & Mary Law School, https://law.wm.edu/about/ourhistory/John%20Marshall,%20the%20Great%20Chief%20Justice.php (last visited Feb 5, 2023).

sovereignty over their jurisdiction[11]. During the ideological division preceding the Civil War, the Supreme Court tried to placate the Southern States by giving them more autonomy to prevent their secession. In doing so, the Court neglected the individual rights of African Americans in the South. This failure to protect is evident in cases such as *Dred Scott v. Sanford,* in which the Supreme Court ruled that enslaved people were property and thus did not enjoy essential rights.[12]

During the Reconstruction era following the Civil War, new amendments were passed to ensure the rights of historically disenfranchised individuals, in particular, the rights of African Americans. The 13th, 14th, and 15th Amendments, known today as the Civil Rights Amendments, prohibit slavery, protect privacy rights and allow all citizens the right to vote.[13] These amendments provided the Court explicit authority to protect individual rights from state and federal legislation. Despite these provisions, the Supreme Court often failed to preserve these rights.[14] In one of the most controversial Supreme Court decisions, the Supreme Court asserted in *Plessy v. Ferguson* that segregation was permissible if facilities and accommodations were "separate, but equal."[15] This case established a doctrine that allowed the majority to discriminate against the minority on the basis of race. This decision indicates that the Court is not infallible and often makes decisions that we now recognize as wrong.

11 See also: Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. Wash. L. REV. 139 (2001); Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1 (2006); Troy Smith, Dual Federalism Center for the Study of Federalism (2006), https://encyclopedia.federalism.org/index.php/Dual_Federalism (last visited Feb 11, 2023).

12 Dred Scott v. Sandford, 60 U.S. 393 (1856).

13 U.S. Const. amends. XIII, § 1, XIV, § 1-4, XV, §1.

14 Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); Washington v. Davis, 426 U.S. 229 (1976); Korematsu v. United States, 323 U.S. 214 (1944).

15 Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

C. Cooperative Federalism

The rise of cooperative federalism marked an end to the distinctly different nature of state and federal governments. Though states and the federal government continued to share power, the federal government became much more involved in state affairs. With this increased involvement came increased intervention by the Supreme Court into state laws as the Court began to better protect individual and minority rights.

The Warren Court marked a time in American judicial history when the Supreme Court actively supported the liberty of minorities. The Court frequently struck down laws that infringed upon the rights of the people. One such example is *Brown v. Kansas Board of Education (1954),*[16] a landmark Supreme Court decision that abolished the "separate but equal" doctrine mandated by *Plessy v. Ferguson*[17] and marked a key victory for the Civil Rights Movement. The Warren Court similarly protected individual rights by protecting the right to privacy in the cases of *Griswold v. Connecticut*[18] and *Loving v. Virginia*.[19] In this instance, the Court upheld the rights of the minority population and prioritized them over state interests. These cases established the precedent that the Fourteenth Amendment protects individual rights to privacy and promises equal protection. Based on this precedent, the Supreme Court asserted in *Roe v. Wade* (1973)[20] that the Constitution protects people's right to an abortion, overturning state laws to the contrary.

D. Modern Federalism

"New Federalism" is the political philosophy that the federal government has accumulated too much power and pur-

16 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

17 Plessy, 163 U.S. 537 (1896).

18 Griswold v. Connecticut, 381 U.S. 479 (1965).

19 Loving v. Virginia, 388 U.S. 1 (1967).

20 Roe v. Wade, 410 U.S. 113 (1973).

ports to return "rightful" power to the state governments. New Federalism began in earnest in the 1980s and continues to be a guiding judicial philosophy for many Supreme Court justices today. This prevalence is apparent in *Printz v. United States,*[21]

21 Before a federal system was established to conduct background checks, the Brady Handgun Violence Prevention Act (Brady Bill) required "local chief law enforcement officers" to perform background checks on prospective handgun buyers in their respective locales. Two separate county sheriffs--Jay Printz and Richard Mack--challenged the constitutionality of this act on behalf of Montana and Arizona, respectively. District courts ruled that because the mandatory background checks were severable from the rest of the act, voluntary background checks were permissible. The Supreme court accepted the petition on appeal from the Ninth Circuit Court and consolidated the cases. The question before the court was whether or not the Necessary and Proper Clause empowers Congress to require states to regulate handgun purchases by performing duties required by the Brady Bill's handgun applicant background checks. In a 5-4 decision, the Court determined that Congress did not possess the power to require background checks under the commerce clause because the Necessary and Proper clause does not empower the federal government to fulfill its federal tasks for it, even temporarily. The Court determined that the Federal government could not impose its duties on the states, giving them more discretion to perform duties not yet organized by the federal government (Printz v. United States, 521 U.S. 898 (1997)).

United States v. Lopez[22], and *Dobbs v. Jackson*.[23] These cases shifted decision-making power back to the states at the expense of already established individual rights.

Despite the recent, significant losses to independent rights in the modern era, there have been some advancements for civil rights today upheld by the Supreme Court. These decisions point to the Supreme Court's ability to continue to promote individual well-being when state laws do not uphold such essential rights. For example, in both *Lawrence v. Texas*[24] and *Obergefell v. Hodges*,[25] the Supreme Court overturned state law in order to maintain the protection of people in the LGBTQ+ community.

22 A 12th-grade student in San Antonio, Texas, brought a concealed firearm into his high school and was charged under Texas law with possession of a firearm on school premises. State charges were dropped the following day after federal charges were filed for violating a federal criminal statute, the Gun-Free School Zones Act of 1990. The statute forbids "any individual knowingly to possess a firearm at a place that [he] knows...is a school zone." Lopez was found guilty at a bench trial and sentenced to 6 months imprisonment and two years of supervised release following a bench trial. Lopez petitioned the United States Supreme Court on the basis of the constitutionality of the federal statute. The question before the Court is whether or not the Gun-Free School Zones Act of 1990 exceeds the powers afforded to the federal government by the Commerce Clause. In a 5-4 decision, the Court ruled that this federal act was unconstitutional because it overtly oversteps the power afforded to the federal government by the Commerce clause of the Constitution specifically because the criminal statute has nothing to do with commerce, let alone interstate commerce. The Court gave greater power to the States to regulate criminal activity within their borders, minimizing the federal government's power (United States v. Lopez, 514 U.S. 549 (1995)).

23 Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).

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

25 Obergefell v. Hodges, 576 U.S. ___ (2015).

III. Proof of Claim

A. The Ambiguity and Adaptation of the Constitution

The Constitution's language is ambiguous. Many issues regarding the formation of government were not fully addressed in the text of the Constitution—one of the reasons Anti-Federalists pushed for the Bill of Rights. The Constitution lacked explicit instructions on forming and establishing the judicial branch of government. Article III left the establishment of the Courts primarily up to Congressional discretion, as it had only three sections—in comparison to the ten establishing the legislative branch. The Bill of Rights also limited federal powers to only those enumerated with the Tenth Amendment to the Constitution, explicitly stating that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[26] This distinction provides the states the power to regulate education, local government, welfare, and health and explicitly prevents federal impositions in these areas. These regulations on federal power decreased the influence of the federal government as a whole and, subsequently, the Federal Judiciary.

Since the ratification of the Constitution, individuals and scholars have debated whether it is appropriate to interpret the Constitution according to the letter of the document or whether it is meant to be adapted as the country evolves. This argument is specifically articulated in the Federalist and Anti-Federalist Papers written by members of the Constitutional Convention of 1787.

In Federalist 78, Alexander Hamilton argued for the importance of a federal judiciary. He describes the justices of the Supreme Court as "the bulwarks of a limited Constitution against legislative encroachments."[27] Hamilton argued that the role of the judiciary, as defined by the Constitution, was "to guard the Constitution and the rights of individuals," which often are imposed upon by "serious

26 U.S. Const. amend. X.

27 THE FEDERALIST NO. 78 (Alexander Hamilton).

oppressions of the minor party."[28] This branch of government was an essential protection of the minority but was also the "weakest of the three departments of power."[29]

Federalist 45, authored by James Madison, explains that the United States Constitution was not attempting to expand the powers afforded to the federal government but only "substitute a more effectual mode of administering them."[30] The principle highlighted by Madison is explicit in the Tenth Amendment of the Constitution, which specifically allocates discretion for unenumerated powers to the state.[31] This increased the ambiguity regarding federal courts because the Constitution established them but left the organization and procedures to Congressional discretion.

The ambiguity of the Constitution allows for different interpretations regarding the role of the Supreme Court, which have evolved throughout the history of the United States. Supreme Court cases have interpreted the words of the Constitution—and its amendments—since the establishment of judicial review. It is seen in these decisions that often, the justices themselves do not agree

28 *Id*.

29 *Id*.

30 THE FEDERALIST NO. 45 (James Madison).

31 U.S. CONST. amend. X

on the interpretation of the law because the justices understand the Supreme Court's role in different ways.[32]

Controversies arise because citizens and governments in the modern era face circumstances and problems that the founders could never have imagined. Thomas Jefferson himself recognized the need for laws and statutes to change to address the problems that would inherently arise, saying, "Every constitution then, and every law, naturally expires at the end of 19 years."[33] Though the Constitution has never been replaced as Jefferson suggests, it is nevertheless essential to adapt it to today, as the world is vastly different than it was when the Constitution was ratified.

Through the Lens of History
B. During the Era of Dual Federalism

Consider, for example, *Dred Scott v. Sanford* decided in 1859. Dred Scott was an enslaved person who lived in Missouri but resided

32 Judicial Philosophers–including Supreme Court Justices–are often sorted into two categories: those who believe in a living constitution and those who argue the Constitution is a 'dead' document. Proponents of a dead constitution are sometimes referred to as Textualists or Originalists because of their view that the Judiciary—specifically the Supreme Court—should interpret the Constitution based on the text and the meaning of the text at the time it was adopted. Justice Antonin Scalia was a self-proclaimed textualist and interpreted the Constitution as such, which can be seen through his many dissents (See Justice Antonin Scalia, Constitutional Interpretation the Old Fashioned Way (March 14, 2005) (transcript available on the Boston College Website)). On the other hand, those who possess the living Constitution philosophy claim that the Constitution was initially 'defective' and as society betters itself, the Constitution must follow suit (See Thurgood Marshall, The Constitution: A Living Document, 30 HOWARD L.J. 915 (1987)). Justice Thurgood Marshall explains the need for the evolution of the Constitution using the question of slavery and African American rights, explaining the importance of recognizing the defects of the Constitution and the changes necessary to resolve the flaws in the original document (See Thurgood Marshall, The Constitution: A Living Document, 30 HOWARD L.J. 915 (1987)).

33 Thomas Jefferson, To James Madison from Thomas Jefferson (Sept. 6, 1789), reprinted by FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-12-02-0248.

in Illinois for several years.[34] When he returned to Missouri, he sued for freedom because his residence in Illinois, a free state, made him a free man. In a 7-2 decision, the Court ruled that Dred Scott was not a citizen and, thus, was not allowed to file suits. The Court also ruled that Congress could not free enslaved people in federal territories claiming that enslaved people were property. Thus, it was unconstitutional to deprive enslavers of their property under the Fifth Amendment. In this instance, due process of law was erroneously applied to the majority, white enslavers, rather than to the vulnerable minority of free black individuals and enslaved people. This case represents a debate about who is entitled to civil rights under the Constitution. In *Dred Scott*, the justices took a highly restrained view of the Constitution, utilizing history to justify continued institutional racism—persecuting the minority to benefit the majority. In a sentiment often echoed in the intervening years, the Court stated, "it is not the province of the Court to decide upon the justice or injustice, the policy or impolicy of these laws."[35] The Court also employed an originalist lens of what was permissible under the Constitution, as it questioned which groups were considered citizens when the Constitution was ratified. It claimed that the provisions of the Constitution apply only to individuals who were descendants of citizens at the time the Constitution was adopted. The Court reasoned that African Americans "have never been regarded as part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure."[36]

In this era of dual federalism, the Court was often concerned with returning rights to the states—and in the case of *Dred Scott*, federal territories—even at the expense of individual or minority rights. The Court egregiously claimed, in a manner that is strikingly similar to the statements of the Court today, that "no one…supposes that any change in public opinion or feeling, in relation to this unfortunate race… should induce the Court to give to the words of the

34 Dred Scott, 60 U.S. 393 (1856).

35 *Id*. at 405.

36 *Id*. at 412.

Constitution a more liberal construction their favor than they were intended to bear when the instrument was framed and adopted."[37] The judgment in this case, plainly wrong and founded on the notion of white supremacy, indicates that the Court of this era had no inclination to advance the rights of historically marginalized groups. This faulty holding argues that even if the legislatures overturn the fundamental rights to life, liberty, and property, the Courts do not possess the power to repeal state authority. However, these rights were protected at the time of *Dred Scott* under the Fifth Amendment and are further protected today by the Fourteenth Amendment. As Justice McLean wrote in his dissent of *Dred Scott*, the case indicates that if a court could so flagrantly fail to protect individual rights "on a question involving the liberty of a human being," the law affords little protection.[38]

In *Plessy v. Ferguson*, the Supreme Court erroneously adopted the principle of stare decisis, maintaining the precedent established in *Dred Scott v. Sanford.*[39] It asserted that segregation based on race was permissible if treatment was "separate but equal."[40] The majority claimed that while the object of the Fourteenth Amendment was to "enforce absolute equality of the two races before the law", it was impossible that it could have been intended to "abolish distinctions based upon color, or to enforce social … equality, or a commingling of the two races upon terms unsatisfactory to either."[41] Like *Dred Scott* before it, *Plessy* relied on the dual federalism notion that all rights not explicitly given to the federal government were to be regulated by state governments, as outlined in the Tenth Amendment. This indicates the Court's deference to state governments regarding issues not explicitly outlined in the Constitution, especially in regard to the fundamental rights of minority groups. The Court claimed that any "badge of inferiority" placed on "the colored race" exists

37 *Id*. at 426.

38 *Id*. at 564.

39 *Id*.

40 Plessy, 163 U.S. 537 (1896).

41 *Id*. at 544.

"solely because the colored race chooses to put that construction upon it" and argued that "social prejudices" could not be "overcome by legislation."[42] The Court presupposed that legislation could not eradicate racism, failing to recognize that racism is much harder to overcome if minority and majority groups are not already on an equal basis before the law. The case argues that if a minority group has been treated inequitably, it was the responsibility of the minority group to overcome obstacles placed on them by other individuals. This erroneous thinking was severely detrimental to the equity and equal rights of African Americans. It is an instance in which the Court should have instead intervened to protect this historically-marginalized group.

Similarly, in the case of Abrams v. United States, the Court upheld the suppression of a minority group's opinion by affirming the conviction of several Russian immigrants who opposed World War I. The fundamental right of free speech for a minority group was impeded. Conservative Justice Holmes (joined by Justice Brandeis) argued that affirming this conviction was expanding the power of the federal government too far in its regulation of speech, saying, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[43] In this circumstance, the Court failed to protect the minority's freedom of speech and trampled upon the rights of these Russian immigrants.

C. Cooperative Federalism and the Warren Court

Today's Court has employed the philosophy of judicial constructionism, reestablishing that the Constitution protects fundamental individual rights. During the Warren Court era of cooperative federalism, the Supreme Court was more willing to intervene against laws that undermined individual rights. The Court prioritized an expansion of rights for historically marginalized groups under the due process clause and equal protection clause of the Fourteenth Amendment. One such case is *Brown v. Kansas Board of Education*, which held

42 *Id*. at 551.

43 250 US 616, 630 (1919) (Holmes, J., dissenting).

that the "separate but equal" doctrine espoused in *Plessy* was inherently unequal because segregation has a "detrimental effect upon" African American children, giving them "a sense of inferiority."[44] In this case, the Court recognized that segregation on the basis of race is in opposition to liberty and thus violates the Fourteenth Amendment. The Court highlights that, while it is important to acknowledge history when deciding a case, it is more important to apply the promises of individual liberty guaranteed by the Constitution. The Court held that "the question presented in these cases must be determined, not based on conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education in the present place in American life throughout the nation."[45] As the Court has held in many significant decisions since *Brown*, the questions presented in recent cases cannot be determined on the basis of conditions that existed when the Fourteenth Amendment was adopted, but rather, how they relate to current American life and principles.

In *Griswold v. Connecticut*, the Court affirmed that married couples have a right to contraception under the implicit right to privacy guaranteed in the penumbra of rights afforded by the First Amendment.[46] The concurring opinion in *Griswold* argues that under the Ninth Amendment, rights that are not explicitly mentioned in the Constitution are still retained by the people. This opinion serves as a significant argument favoring ratified amendments to protect implicit (though not unenumerated) rights in the Constitution. *Griswold* enables women, a politically underrepresented and historically marginalized group, to obtain a greater dimension of freedom than was possible before this case was decided. The binding precedent established in *Brown v. Board* and reaffirmed in *Griswold* demonstrates that the Court has a responsibility to ensure that the Constitution is interpreted in the context of contemporary American ideas about what a right to "life, liberty, and property" truly means.

44 Brown, 347 U.S. 483, 494 (1954).

45 *Id*. at 483.

46 Griswold, 381 U.S. 479 (1965).

Perhaps the quintessential example highlighting the importance of applying the provisions of the Constitution to contemporary issues is *Loving v. Virginia*, which held that a Virginia statute that criminalized interracial marriage was unconstitutional under the equal protection clause of the Fourteenth Amendment, holding that "the mere equal application of a statute containing racial classifications" is not enough to "remove the classifications" of racial discriminations.[47] It also held that in some cases, the equal application is equivalent to equal protection, indicating that in cases not involving a distinction on the basis of race or another inherent characteristic, equal application of the law is enough to determine if there is a rational basis for the discrimination. However, the Court noted in *Loving* that "the fact of equal application does not immunize the statute from the weighty burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[48] This critical constitutional principle indicates that a law that discriminates on the basis of race has a higher burden of due process than a statute that does not involve this characteristic. The Court has a responsibility to apply this higher burden of due process to other historically marginalized groups.

D. Modern Federalism in the Court

In recent years, the Court has wavered between judicial restraint and judicial activism. For example, the Rehnquist Court of 1986-2005 was reluctant to strike down unconstitutional state laws burdening vulnerable minority populations, choosing instead to preserve the precedent of previous Court decisions, thereby showing judicial restraint.[49] In the years since *Roe v. Wade* was decided in 1973, the Court has at times fulfilled its obligation to protect minorities who are

47 Loving, 388 U.S. 1, 8 (1967).

48 *Id*. at 9.

49 United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Grutter v. Bollinger, 539 U.S. 306 (2003); McConnell v. FEC, 540 U.S. 93 (2003).

discriminated against under unconstitutional laws.[50] At other times, the Court adhered to principles of Neo-federalism that protect "sovereign immunity" – a judicial philosophy that constitutional scholar Akhil Reed Amar notes "allows [state and federal governments] to violate citizens; federal constitutional rights…even if such immunity means that the [government's] wrongdoing will go partially or wholly unremedied."[51]

In *Bowers v. Hardwick (1986)*, the Court held that there is no constitutional protection for homosexuals to engage in sodomy.[52] The decision in Bowers perpetuated discrimination against LGBTQ+ individuals and failed to protect a right available to other intimate couples. The Court neglected its responsibility to apply a higher burden of scrutiny to cases involving discrimination against minority groups. As the Court of Appeals for the Eleventh Circuit held before the case was brought to the Supreme Court, "homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."[53] The Court should have validated this decision, but instead, it failed to protect the minority group's right to privacy that was afforded to majority groups.

That is not to say that the Court has always failed to fulfill its constitutional obligation to protect minorities and historically disadvantaged groups. Two such examples are *Lawrence v. Texas (2003)*[54] —which overturned the Bowers decision—and *Obergefell v. Hodges (2015)*[55], both of which ensure that members of the LGBTQ+ community enjoy the same protection under the law as other consenting individuals. *Obergefell* held that same-sex couples are entitled to the same right to marry that heterosexual couples enjoy. Interestingly,

50 Roe, 410 US 113 (1973).

51 Akhil Reed Amar, *Of Sovereignty and Federalism,* 96, Yale L. J. 1425, 1426-7 (1987).

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

53 *Id*. at 189.

54 Lawrence, 539 U.S. 558 (2003).

55 Obergefell, 576 U.S. ___ (2015).

the Court held that while "history and tradition guide and discipline the inquiry into whether a right is so fundamental that the State must accord them its respect," such a study of history does not "set [the inquiry's] outer boundaries."[56] The Court noted that history is an important consideration when determining whether a right is fundamental or not. However, it reaffirmed that history could be, and often is, wrong. Thus, it cannot be the only consideration when deciding if a right is fundamental. History informs, but should never decide, the rights we are privileged to enjoy today because history was not always fair and equitable to historically powerless groups.

Additionally, the Court notes that "the nature of injustice is that we may not always see it in our times" and that the framers of the Bill of Rights and Fourteenth Amendment "did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[57] This is a vital principle of constitutional scholarship, highlighting that while the Constitution is indeed intentionally ambiguous, it is the responsibility of each generation to learn the meaning of liberty. Like the Court did in *Brown*[58] when it highlighted segregation's ill effects on school children, the Court notes in *Obergefell* the instability and stigma that same-sex couples and their families endure.[59] The Court notes that if "rights were determined by those who exercised them in the past, then received practices could serve as their continued justification, and new groups could not invoke rights once denied."[60]

History demonstrates that when faced with a majority group undermining minority rights, the appropriate decision is that the Court adopt a more robust activist philosophy. However, this paper does not contest that it is challenging to strike the appropriate balance between a philosophy of judicial restraint and a philosophy of

56 Obergefell, 576 U.S. ___, 2 (2015).

57 Obergefell, 576 U.S. ___, 11 (2015).

58 Brown, 347 U.S. 483 (1954).

59 Obergefell, 576 U.S. ___ (2015).

60 Obergefell, 576 U.S. ___, 18 (2015).

liberal protection for minority groups. Yet, the Court has often held that it has a heightened responsibility to protect minority rights, so it must do better at maintaining and protecting said rights.[61] When the Court employs a philosophy of liberal protection, it is not, as opponents say, subverting the democratic process and undermining the lawmaking power of legislatures. Instead, it is applying the United States Constitution, an inherently ambiguous document, to the challenges of the contemporary world. It protects those individuals who would otherwise be overlooked by what James Madison called "the superior force of an interested and overbearing majority."[62]

E. Due Process and Strict Scrutiny

Since the ratification of the Fourteenth Amendment in 1868, legal scholars and Supreme Court justices have debated how to apply the Due Process Clause to constitutional issues and whether there are legitimate grounds to rule laws unconstitutional that fail to meet substantive due process. The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or happiness, without due process of law."[63] For one hundred fifty years, scholars and justices have debated what constitutes due process of law.

It is evident that the Court should not always take a pro-individual stance. Nor is it true that the Court can create rights. Rather it determines what constitutes an implied right under the current constitution. Cases, such as the now infamous *Lochner v. New York*, demonstrate that the Court has in the past overstepped its constitutional authority at times when it purported to protect rights under

61 Lawrence v. Texas, 539 U.S. 558 (2003); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); United States v. Virginia, 518 U.S. 515 (1996); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); McCleskey v. Kemp, 481 U.S. 279 (1987); Grutter v. Bollinger, 539 U.S. 306 (2003); Obergefell v. Hodges, 576 U.S. ___ (2015); Reed v. Reed, 404 U.S. 71 (1971).

62 The Federalist No. 10 (James Madison).

63 U.S. Const. amend. XIV, § 1.

the Fourteenth Amendment.[64] However, the Court should expand its requirements for strict scrutiny and consider potential biases against marginalized groups.

One case in which the Court appropriately considered potential bias is the previously discussed *Loving v. Virginia*, in which Chief Justice Warren noted that racial classifications, "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[65] This protection must be applied to other historically marginalized groups, as the Supreme Court is responsible for the protection of minorities.

In *Griswold v. Connecticut*, the Court held that though it does not "determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions," it does have the right to intervene when legislatures infringe upon intimate rights

64 In 1905, the defendant (Lochner) was accused of violating Section 110 of the labor law of the State of New York which states that no employee should be required or permitted to work more than sixty hours a week or ten hours a day. Having been previously convicted of a violation of the same act—which he did not appeal—the court determined that this was his second offense and convicted him accordingly. Lochner appealed the decision to the Appellate Division of the Supreme Court, Fourth Department, where the judgment of conviction was affirmed. Lochner then petitioned the United States Supreme Court. The question before the Court was, does the New York State Labor law violate the liberty—right to contract—protected by the Due Process Clause of the Fourteenth Amendment? The Court held that the New York Labor Law was a violation of the right to contract protected by the Fourteenth Amendment's due process clause. The Court reversed the decision of the Appellate Court. The Court determined first that the due process clause of the Fourteenth Amendment protected the right to purchase or sell labor. The Court further explained that States possess police powers that relate to the safety, health, morals, and general welfare of the public. The State thus possesses the power to prevent certain contracts from being made if the State possesses the legitimate exercise of its police power. The Court determined that the State did not possess legitimate police powers in this case and thus overstepped the bounds of its power and violated the Fourteenth Amendment and, subsequently, the Federal Constitution. Lochner v. New York, 198 U.S. 45 (1905).

65 Loving, 388 U.S. 1, 11 (1967).

to privacy guaranteed under the Fourteenth Amendment.[66] This holding indicates that the Court is authorized to apply strict scrutiny to laws that have the potential to undermine the fundamental individual rights that every citizen of the United States is entitled to.

As was held in *Reno v. Flores*, the Fourteenth Amendment "forbids the government to infringe… [on] 'fundamental liberty' interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[67] As a matter of precedent, this case notes that a state may not infringe upon fundamental rights, and should they do so, the Supreme Court is compelled to intervene. The Court has been reluctant to expand this authority to the application of strict scrutiny beyond fundamental rights and issues regarding race to include other historically marginalized groups. However, when they have done so, the Courts are viewed as being on the right side of history.

More recently, in *Obergefell v. Hodges*, the Court held that "the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[68] This decision highlighted that legislative statutes are subject to higher, stricter scrutiny when they involve fundamental rights. In *Obergefell*, the dissent wrote that "allowing unelected federal judges to select which unenumerated rights rank as 'fundamental'—and to strike down state laws based on that determination"[69] Though perhaps a legitimate concern, it is mitigated by the doctrine of strict scrutiny utilized by the Court. The more significant concern at this moment in history is the tendency to deny minorities and historically disadvantaged groups the civil rights they are entitled to. Thus, the Court should err on protecting individual rights rather than on a strict constructionist view of the Court's role.

66 Griswold, 381 U.S. 479, 482 (1965).

67 Reno v. Flores, 507 U.S. 292, 302 (1993).

68 Obergefell, 576 U.S. ___, 24 (2015).

69 Obergefell, 576 U.S. ___ at 11 (2015) (Roberts C. J., dissenting).

F. Changing World and Political Shifts/Implications Today and in the Future

The debate between loose and strict constructionism is of particular relevance today, as the Court appears poised to position itself as strictly restrained and thus strictly in opposition to its responsibility to protect the rights of historically disadvantaged groups.

The Court has a responsibility to protect and advocate for minority rights. In the case of *Dobbs*[70], the Court overturned a long-established principle that, like *Griswold*, gave women more autonomy.[71] The majority's departure from stare decisis held that "the Court short-circuited the democratic process by closing it to [a] large number of Americans who disagreed with Roe,"[72] failing to consider that many Americans disagreed with the unanimous decision in *Brown v. Board of Education*.[73] Many disagreed with the decision made in *Griswold v. Connecticut*.[74] Many disagreed with the decision made in *Loving*.[75] If the Supreme Court had failed in each of those instances to do its duty to protect fundamental individual rights and instead waited for legislators and the majority to support these fundamental minority rights, we would perhaps still be waiting for those momentous changes to occur. The Supreme Court is the branch of government best positioned to support minority rights, as it is less politically accountable–they do not rely on the majority for reelection--than the legislative and executive branches and many state supreme courts; each state has a different appointment method.

Even if it is impossible to draw a sharp line in the sand when the Supreme Court is overstepping its authority, it is clear that the Court must do more to protect historically disadvantaged groups. *Dobbs*,[76]

70 Dobbs, 597 U.S. ___ (2022).

71 Griswold, 381 U.S. 479 (1965).

72 Dobbs, 597 U.S. ___ at 5 (2022).

73 Brown, 347 U.S. at 483 (1954).

74 Griswold, 381 U.S. 479 (1965).

75 Loving, 388 U.S. 1 (1967).

76 Dobbs, 597 U.S. ___ (2022).

on its face, claims to reverse a broad overstep in authority perpetuated by the Court. However, it diminishes the rights of women, who, as a group, are a historically disadvantaged political minority.

As the branch responsible for upholding the U.S. Constitution, and in a system that regularly undermines the rights of historically disadvantaged groups, the Court must step in more regularly to protect all the nation's people. It has the authority to do so under the Fifth, Ninth, and Fourteenth Amendments, and it remains the best safeguard against a majority that could look upon minorities unfavorably.[77] The Court must do more to protect the disenfranchised and politically alienated. Under the guise of judicial restraint, the Court appears poised to neglect this responsibility. Thus, some level of reform must occur to protect individual and minority rights.

In *Dobbs v. Jackson*, the dissent argued that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[78] Contrary to what many believe today, adopting the Constitution to fit a modern view of liberty and its place in the world does not undermine the Constitution but rather strengthens it. It has expanded "the sphere of protected liberty" and brought in "individuals formerly excluded."[79] This view of the Constitution has made our republic more democratic and fairer, not less. To argue otherwise is to minimize the grand tradition of American equality and diminish the equality of marginalized individuals today. As Chief Justice John Marshall said, the Constitution is "intended to endure for ages to come" and thus must adapt to a future "seen dimly."[80]

IV. Possible Solutions

There are many possibilities to expand the power and reach of the Supreme Court regarding the protection of minority rights.

77 U.S. Const. amends. V, IX, XIV.

78 Dobbs, 597 U.S. ___ at 18 (2022) (Kagan, J., Sotomayor, J., & Breyer, J., dissenting).

79 *Id*. at 22-23.

80 McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

A. Legislative Change at State and Federal Levels

If the Supreme Court fails to support the rights of minorities, then state and federal legislatures are responsible for protecting these fundamental rights. The federal and state legislatures could potentially pass laws that better support minority and individual rights. However, this solution has drawbacks. The Supreme Court could overrule this solution through the principle of judicial review. Federal and state legislatures are subject to the Supreme Court. If the Supreme Court is determined to neglect its responsibility to protect minority rights by expanding strict scrutiny, it matters little what legislation is passed. Relying on the legislatures also presupposes that legislators will be willing to work across the aisle and compromise to promote equitable laws, which seems unlikely in an increasingly polarized political climate.

The executive and legislative branches are elected by the majority, often leaving the minority underrepresented. In a two-party political system, this poses a significant threat to minority groups. In the Federalist Papers, James Madison explains that factions—in this case, synonymous with political parties—directly threaten the public good and minority interests. He explains, "when a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."[81] Under majority control, the rights and interests of the minority can and often are ignored in place of majority interests. As the Supreme Court has a responsibility to protect minority rights, this potential solution may be counterintuitive. By allowing the majority to influence the Supreme Court, the minority would lose the support of the sole branch of government best suited to protect its rights; thus, it would be ultimately counterproductive.

81 THE FEDERALIST NO. 10 (James Madison).

B. Supreme Court Reform

Another potential solution to the Supreme Court's insufficient protection of minority rights is encouraging the Supreme Court to reform to promote a more modernized Court. As seen above, the legislative and executive branches influence the Supreme Court, and they could change the organization of the Supreme Court to reflect modern judicial philosophy. Despite the promise of this solution, each area of possible reform has significant drawbacks.

Judicial Philosophy has significantly changed over the years just as political beliefs and ideologies shift. One solution to maintain the consistency between the judicial philosophy of the Supreme Court and that of the country is to impose term limits for Supreme Court Justices. This solution has several drawbacks, including the previously articulated problem of majority domination. Imposing term limits on the Supreme Court could potentially result in a Court more in line with the general public's views—sharing a similar judicial philosophy—but could also contribute to the politicization of the Court, which could be detrimental to its legitimacy. A Court that does not maintain precedent when there is little reason not to do so becomes unreliable and fickle.

Writing in Federalist 78, Alexander Hamilton emphasized the importance of stare decisis. To "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[82] A Supreme Court that flips at nearly every election, similar to the legislature, could easily overrule previously established precedent, making the Court unreliable and allowing for arbitrary decisions and biases to be incorporated into decisions. This unreliability will directly undermine the legitimacy of the Court making it more challenging to enforce decisions made by them.

Another solution to ensure the Supreme Court continues to protect minority rights is employing the threat of impeachment—and actual impeachment. The legislative branch does have a method

82 The Federalist No. 78 (Alexander Hamilton).

of recourse to protect against Supreme Court injustice. Though impeachment is technically feasible to remove a Supreme Court Justice, the ambiguity in the Constitution as to what constitutes "good" and "bad" behavior makes this an unlikely solution. The longevity of this solution is in question, mainly because it would be detrimental to the Court's legitimacy and stability if a Justice who opposed the party in power could be easily impeached by a Senate that disagreed with them. Additionally, removal by impeachment has never been done before. Although one Justice, Samuel Chase, was impeached by the House of Representatives in 1804, he was acquitted by the Senate and retained his position.[83]

C. Constitutional Amendment

It is theoretically feasible to pass a constitutional amendment that would more explicitly protect the rights of minorities and individuals. The Supreme Court is bound to protect and uphold the Constitution, which includes all amendments. By passing a federal constitutional amendment, the legislature—through the ratification process—would force the Court to uphold and protect the rights of minority groups. Implicit rights included in the penumbra provided by the Fourteenth Amendment could be explicitly listed, meaning that arguments over the protection of specific rights would have no standing—the Constitution would directly protect them. Alternatively, the federal legislature could pass a constitutional amendment to further define the role of the United States Supreme Court, ultimately giving it more authority to liberally protect minority groups.

Passing a constitutional amendment is incredibly difficult, as there are many barriers to successfully ratifying a constitutional amendment. The text of the Constitution explicitly states the process of ratification in Article V:

> The Congress, whenever two-thirds of both houses shall deem it necessary shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-

83 *Samuel Chase*, Oyez, https://www.oyez.org/justices/samuel_chase (last visited Feb 2, 2023).

> thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;[84]

Constitutional amendments are challenging to pass because of the requirement to obtain widespread approval. For an amendment to be proposed, two-thirds of the legislature or the states must agree on the necessity. This requirement means that to propose an amendment, 33 states, or about 180 members of the legislature, would have to agree on the existence of a problem. Furthermore, to achieve ratification, three-fourths of the states or the legislature must approve of the language and content of the amendment.

Following the ratification, ambiguous wording can perpetuate the problem of explicit rights. Some constitutional provisions and amendments are vague and open to various interpretations. In one sense, this is valuable, as it allows interpretation to shift and evolve as the country changes. Nevertheless, it enables individuals in power to twist the constitutional provisions to support their goals. Despite these drawbacks, ratifying constitutional amendments is still a viable option to better ensure the Supreme Court protects minority rights because the Constitution and its amendments bind the Supreme Court.

Unfortunately, there is not a clear and simple solution to the problem of the Supreme Court failing to uphold the rights of minority groups. All proposed solutions have significant drawbacks that, in some cases, render their benefits useless. Holding the judiciary accountable remains difficult for the people in America, as they must rely on the legislative and executive branches to work together and accurately represent their interests. As of now, the most viable option to ensure the maintenance of minority rights is a constitutional amendment that explicitly defines the role of the Supreme Court as

84 U.S. Const. art. 5.

being the branch responsible for the protection of the minority from an "overbearing majority."[85]

V. Conclusion

The controversy surrounding the role of the Supreme Court is complex, and it is difficult to maintain an appropriate balance between judicial restraint and adapting the Constitution to contemporary issues. However, the current Court has failed to find an appropriate balance. As the branch of government most immune to the political system and the branch of government tasked with upholding the Constitution, the Supreme Court is in the best position to protect minorities from inequitable laws and policies. When the Court fails to do so, it is detrimental to fundamental rights. The Court has proved in the past that it can be a bulwark against injustice, but it has also demonstrated that it can perpetuate and enable injustice. The Supreme Court is now at a historical moment where it must decide whether the current Court will be considered one which fulfilled its responsibility as a protector of historically disenfranchised groups. Cases like *Perez v. Sturgis Public Schools, et al*.[86], a case about the rights of disabled individuals in the public school system, and *Merrill v. Milligan*[87], a case about racial discrimination that is claimed to violate the Voting Rights Act, serve as an opportunity for the Court to re-establish its role as protector of minority groups. Alternatively, this Court could be considered a Court that trampled fundamental rights under the guise of returning power to state governments and promoting limited government, as in the case of *Dobbs v. Jackson*.[88] If the Court continues on its current path, its decisions could be incalculably harmful to groups of marginalized people. Today, this Court must prioritize equity for all individuals. At this crossroads

85 The Federalist No. 10 (James Madison).

86 *Perez v. Sturgis Public Schools, et al*, Oyez, https://www.oyez.org/cases/2022/21-887 (last visited Feb 13, 2023).

87 *Merrill v. Milligan*, Oyez, https://www.oyez.org/cases/2022/21-1086 (last visited Feb 13, 2023).

88 Dobbs, 597 U.S. ___ (2022).

moment, the Supreme Court must choose to uphold its constitutional authority and protect the rights of individuals and minorities when state and federal governments infringe upon those rights.