IS THE SUPREME COURT CONTRIBUTING TO THE EROSION OF AMERICAN DEMOCRACY? WHAT SOME OF THE COURT'S DECISIONS FORESHADOW

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INTRODUCTION

Once on the path of solidifying its role as one of the most revered institution, and an impartial arbiter of judicial fairness within the United States, the Supreme Court, within recent decades, witnessed a decline in confidence and respectability among Americans.[1] According to the 2023 Gallup Poll, 41 percent of Americans approve of the

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1. *See* Forrest James "Jim" Robinson Jr., *Promoting Public Trust and Confidence in Courts Vital to Our Future*, 92 KAN. BAR J. 38, 38 (2023) ("We continue to see a trend of eroding public trust and confidence in courts that should alarm us all. Courts exist to uphold the rule of law. Properly functioning courts depend on the public's trust and confidence. Society's rules and norms are largely voluntary. We expect people will comply, not just because of possible penalties for non-compliance, but also because people perceive courts to be fair and impartial").

Court's performance.[2] And, in May 2024, a Marquette University survey indicated that the Supreme Court's approval dropped to 39 percent.[3] This Article asks two key questions: (i) What contributed to this gradual decline? (ii) When did the decline start? Answers to these questions are difficult to summarize into a coherent analytical unity, given the many controversial decisions by the Court, and the varied conceptual views and perspectives on such decisions.[4]

Some scholars, writers, and legal analysts have argued that the decline is due to some Justices shifting towards a more conservative ideology, while others noted the increasing politicization of the Supreme Court,[5] both of which many contend have resulted in the erosion of democracy. As Aziz Z. Huq claims, "Since John Roberts was appointed to the office of Chief Justice of the United States in September 2005, the Supreme Court has elaborated several lines of doctrine that have enabled or accelerated democratic backsliding."[6] Could it be that the declining confidence and respectability of the Supreme Court is due to some of its decisions which many view as contributing to the erosion of democracy?

Emphatically stated, given the diversity, complexity, and number of the Supreme Court's decisions, it would be presumptuous to attempt a comprehensive review in hopes of providing conclusive answers to the above questions. Cognizant of this reality, the aim of this paper is to focus analysis on a small convenient sample of the Supreme Court's decisions which, reportedly, contributed to the erosion of democracy, and the declining public trust in the Court. These include the

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2. *See* Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://new s.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx.

3. *See New Marquette Law School Poll National Survey Finds Approval of U.S. Supreme Court Falls to 39%, Second Lowest Since* 2020, MARQUETTE UNIV. NEWS CTR. (May 22, 2024), https://www.marquette.edu/news-center/2024/new-marquette-law-poll-national-survey-finds-approval-of-supreme-court-falls-to-39.php ("A new Marquette Law School Poll national survey finds that 39% of adults approve of the job the U.S. Supreme Court is doing, while 61% disapprove. This is the lowest approval of the Court since July 2022, when 38% approved and 61% disapproved.").

4. *See* Brenan, *supra* note 2. According to the 2023 Gallup poll of the people surveyed, 39% said the court was too conservative, 42 % said it's about right, and 17 % said it's too liberal.

5. *See* April Rivera, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices' Unethical Behavior*, 52 SW. L. REV. 308, 311 (2023).

6. Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 ANNALS OF AM. ACAD. POL. & SOC. SCI. 50, 54 (2022).

Voting Rights Act, Voter ID laws, *Roe v. Wade*, changes in elections campaign contributions, Affirmative Action, and LGBTQ+ rights which, in recent years, are said to be among the most controversial decisions rendered by the Court.[7] Admittedly, the identified issues are far from being an exhaustive list, and indeed constitute a very small fraction of controversial rulings by the Court. However, this paper posits that the selected Court's decisions on the mentioned issues are instrumental in hastening the erosion of democracy.[8] The hope is that the arguments presented in this paper will stimulate scholarly interest that furthers discussion and debate on the afore-mentioned and other issues that impact and influence the Supreme Court's decisions on democracy in America.

I. AMERICAN DEMOCRACY

An oft stated comment is that the American Democracy is an ongoing experiment.[9] Nevertheless, for nearly two and half centuries the nation prided itself on being an exemplar of democracy.[10] As the

7. *See* Luke A. Boso, *Religious Liberty, Discriminatory Intent, and the Conservative Constitution*, 2023 UTAH L. REV. 1023 (2023).

8. *See generally* Jenny Breen, *Democratic Erosion and the United State Supreme Court*, 2024 UTAH L. REV. 341, 391 (2024) ("The analysis in this Article presents a dispiriting picture of the role of the Supreme Court in the process of democratic erosion in the contemporary United States . . . assess[ing] recent Court opinions in four key areas of democratic erosion: (1) strategic electoral manipulation, (2) executive aggrandizement, (3) income inequality, and (4) speech rights."); Jenelle Carlin, *Correcting a Corrupt Court: How Unethical Legislative and Judicial Decisions Have Led to the Disintegration of Basic Human Rights, Civil Liberties, and Personal Freedoms in the Name of Scoring Points for Political Parties–and How We Can Fix It Without Expansion*, 22 SEATTLE J. FOR SOC. JUST. 529, 529 (2024) ("The unchecked nature of the Supreme Court of the United States and the unethical behaviors of Congressmembers and Supreme Court Justices alike have culminated in the recent overturning of important historical case precedent, the diminution of the Court's reputation, and the erosion of America's founding democratic principles.").

9. *See* Kindaka J. Sanders, *The Red Pill: Critical Race Theory, Ostrich Law, and the 14th Amendment Right to Free and Equal Thought and Dignity*, 55 ST. MARY'S L.J. 147, 156 (2024) ("America's Founders were ardent students of the Enlightenment as well as the classical antiquities that preceded the Dark Ages. America's experiment in democracy is a direct result of the Enlightenment. The Enlightenment, a product of the scientific revolution, was the social and political version of the scientific method. To argue that the United States Constitution does not protect critical thinking and the scientific method is to argue that the Constitution does not protect our experiment in democracy.").

10. Katharine H. Parkera & Anthony Petrosino, *The Least Known Celebration of America's Founding Principles—Law Day*, 92 FORDHAM L. REV. 2317, 2317 (2024) ("Every year since May 1, 1958, the United States has recognized Law Day.

frequently cited text reveals,[11] American Democracy emerged from the reasoned thoughts of men with great intellect and foresight.[12] These Founding Fathers as they came to be known, labored assiduously to construct a system of governance premised upon the integration of disparate groups of colonizers from varied colonized territorial formations into a national democratic unity.[13]

As it exists today, American Democracy can neither be characterized as an overnight construction, nor the result of one fell swoop of divine enlightenment or intervention.[14] Ostensibly, the democratic system of governance initially took shape over several years of intense discussions, debates, and refinements by the small group of colonists and distinguished individuals seeking detachment from the domination of British sovereignty.[15] As Heather Cox Richardson pointed out, "Far from being part of a divine plan, the idea of American democracy emerged from the peculiar circumstances of thirteen of the eighteen British-governed colonies in North America in the years between 1763 and 1776."[16]

Codified in 1961, it is 'a special day of celebration' for Americans to reaffirm 'their loyalty to the United States' and rededicate themselves 'to the ideals of equality and justice under law in their relations with each other and with other countries.'").

11. *See generally* THE FEDERALIST (George Stade ed., 2006).

12. *See* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 17–35 (2006).

13. *See* Shiv Narayan Persaud, *The American Constitution in Cycle of Kali Yuga: Eastern Philosophy Greets Western Democracy*, 20 SEATTLE J. FOR SOC. JUST. 63, 73 (2022) ("Realizing the failures of the Articles to bridge the territorial and ideological divides that existed at the time, the Framers of the Constitution found it necessary to formulate homogenizing principles that would result in the unification of the divergent groups and interests, while promoting a collective consciousness in the crystallization of a centralized nation").

14. *See* IRONS, *supra* note 12, at 48–68.

15. Thomas Linzey & Daniel E. Brannen, Jr., *A Phoenix from the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENV'T. L. & POL'Y 1, 8 (2018) ("The colonists' struggle with British rule illustrates how community self-government took shape as the foundation of the contemporary American system of constitutional law . . . By adopting the Declaration of Independence in 1776, the Second Continental Congress made clear that a government's power originates from the people, and that the people have the right to alter their system of government to protect their 'Life, Liberty . . . Safety and Happiness.'").

16. HEATHER COX RICHARDSON, DEMOCRACY AWAKENING: NOTES ON THE STATE OF AMERICA 171 (2023).

For many, the genesis of democratic governing principles can be gleaned from the declaration of independence.[17] As the architects of the document proclaimed on July 4, 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from consent of the governed . . . .[18]

Evident from the above quote are some of the criteria—equality, rights, power derived from the governed—the Founding Fathers envisaged as constituting a democracy.[19] From its early, and somewhat controversial beginning, the American Democracy then took roots in a constitution that formalized the structure and functions of three uniquely governing pillars essential for upholding and sustaining the ideals and principles of democracy.[20] The three institutions structural-functional, and relational governing ideals discussed in The Federalist,[21] and outlined in the Constitution impressed the French aristocrat

17. *See* Linzey & Brannen, Jr., *supra* note 15, at 9 ("[T]he Declaration of Independence codified the core test for whether a system of government is 'republican' in nature, and thus, legitimate under the American system of law . . . the Declaration requires it to secure the most basic of human civil and political rights and to incorporate the elements of self-government. When a government fails to meet those requisites, the people are naturally endowed with the basic right to change, reform, or abolish that government and replace it with another.").

18. *See* THE UNITED STATES CONSTITUTION AND OTHER AMERICAN DOCUMENTS 80 (2009) [hereinafter THE CONSTITUTION].

19. *See generally* THE FEDERALIST, *supra* note 11 (discussing the system of separation of powers, and checks and balances to preserve equality by preventing tyranny).

20. *See* Ryan T. Williams, *The Road Most Travel: Is the Executive's Growing Preeminence Making America More Like the Authoritarian Regimes it Fights So Hard Against?*, 6 ALA. C.R. & C.L. L. REV. 139, 142 ("America has never been a true democracy in the sense of one person, one vote, for every office. It is a democratic republic founded on the constitutional principle of the separation of powers . . . No monarch, no single ruler would ever have total power over the people.").

21. Eric K. Yamamoto & Sarah M. Kelly, *Abdicating Judicial Independence: Expanding the State Secrets and Deliberate Process Privileges to Bury National Security Abuses of Civil Liberties*, 4 N.C. C.R. L. REV. 343, 412–13 (2024) ("In envisioning the United States as a constitutional democracy, James Madison declared in the Federalist Papers that the 'accumulation of all powers, legislative, executive, and judiciary [in one branch] . . . may justly be pronounced the very definition of tyranny.' The three independent yet overlapping branches were founded on mutual commitments to security and liberty . . . when the president or executive officials abuse those powers for personal or political gain, transgressing the constitutional

Alexis De Tocqueville who proceeded to discuss them in some detail in his much-cited treatise *Democracy in America*.[22]

For generations, Americans of every persuasion prided themselves in their citizenship of a nation where constitutional democracy prevails.[23] The preamble to the Constitution states,

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity do ordain and establish [the] Constitution of the United Staes of America.[24]

From its ideological constitutional grounding, American Democracy gradually unfolded over two centuries through Congressional-Presidential policies, Constitutional Amendments, and Supreme Court's decisions.[25] Of the three governing branches, American citizens for generations have perceived and upheld the Supreme Court as objective arbiter in the continued preservation of America's democratic ideals.[26] However, in recent decades, some scholars, and legal practitioners, have called into question decisions by the court and their impact on democracy.[27]

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liberties of those in America, the Founders envisioned the judiciary as the ultimate protector of those liberties").

22. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (2003).

23. *See* Robin M. Wolpert, *At the Bar of Possibility*, 74 BENCH & BAR MINN. 4, 4 (2017) ("The unrivaled insights of Alexis de Tocqueville regarding the pivotal role of lawyers as leaders in American representative democracy ring true today: 'There is almost no political question in the United States that is not resolved sooner or later into a judicial question.' . . . Much has changed since Tocqueville made his observations in 1835, raising questions about whether his faith in lawyers rings true today").

24. THE CONSTITUTION, supra note 18, at 3.

25. Gilda Daniels, *Democracy's Destiny*, 109 CAL. L. REV. 1067, 1069–70 ("From its beginning, America has had a paradoxical democracy, which declared that 'all men are created equal' while simultaneously denying the right to vote to those who were not male, White, or property owners . . . We have seen many warnings regarding how easily a country can 'slide' into authoritarianism").

26. *See* Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. FORUM 821, 824–25 ("The current crisis of the Supreme Court is, we believe, inextricably linked to what is perhaps the central question in American constitutional law and theory: what is the role of the Supreme Court in a democracy? . . . [M]ost scholars thinking about the role of the Court recognize that the Court's role must ultimately be constrained by, and consistent with, democracy – even if they differ wildly in their prescriptions for how to achieve that result").

27. *See id.*

As defined by Webster's Dictionary, democracy is "a form of government in which the people choose leaders by voting . . . relating to the idea that all people should be treated equally."[28] And, as Levitsky and Ziblatt define it, "democracy [is] a system of government with regular free and fair elections, in which all adult citizens have the right to vote and possess basic civil liberties such as freedom of speech and association."[29] From these definitions, some of the rights and freedoms of citizens become quite evident. It should be noted that these rights and freedoms are constitutionally outlined and protected, and therefore subjected to litigation when perceived to be, or knowingly violated.[30]

II. THE SUPREME COURT

As previously mentioned, the framers of America's Constitutional Democracy divided relations of decision-making authority into three distinct branches of government, the Presidency, Congress and the Supreme Court.[31] This triadic governing arrangement they concluded, after prolonged debate, would function to equilibrate the vicissitudes or usurpation of power, and promote the formation of a unique democratic authenticity through the production of societal relations of national unity that fosters social, political, and economic advancement.[32]

In championing the principles of democracy, the Framers, under Article II, Section 2 of the Constitution, authorized the President to nominate candidate[s] who must be confirmed by a two thirds majority of Senate members' before being appointed as a Justice of the

28. *Democratic*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/democratic (last visited May 2, 2025).

29. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 6 (2018).

30. *See* Breen, *supra* note 8, at 344.

31. *See generally* U.S. CONST. arts. I, II, III.

32. *See generally* THE FEDERALIST NO. 9 (Alexander Hamilton) ("It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy. . . . The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.").

Supreme Court.[33] As De Tocqueville noted, "a Federal Supreme Court was created to be a unique tribunal, one of whose prerogatives was to maintain the division of power between the two governments as the constitution had established it."[34] Constituted of nine politically appointed Justices, the Supreme Court is expected to serve in the interest of democracy.[35] However, the Constitution does not specify the specific qualifications of Justices, nor stipulates adherence to impartiality.[36]

Guaranteed lifetime appointments, Supreme Court Justices have rendered, and will continue to render decisions that have prolonged effects on America's democratic social structural relations and arrangements.[37] De Tocqueville explained the Court this way: "The Supreme Court's position is higher than any known court both by the nature of its rights and by the categories subject to its jurisdiction . . . [it] is the one and only national court, responsible for the interpretation of laws and treaties."[38]

Following from this constitutional requirement, the presumption is that well qualified, competent, objective, and impartial jurists, deem worthy of occupying the office for life, would be nominated by the

33. U.S. CONST. art. II.

34. *See* ALEXIS DE TOCQUEVILLE, *supra* note 22, at 134.

35. *See* Sean D. Kammer, *"Whether or Not Special Expertise is Needed": Anti-Intellectualism, the Supreme Court, and the Legitimacy of Law*, 63 S.D. L. REV. 287, 313 (2018) ("The United States is not a pure democracy, as we all know. [Americans] generally see courts, especially the Supreme Court, as the protectors of fundamental rights as against the democratic will of the people—as against a 'tyranny of the majority,' as Alexis de Tocqueville famously called it.").

36. *See About the Court*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_general.aspx (last visited Mar. 15, 2025); Raymond J. McKoski, *The Refusal of Supreme Court Nominees to Discuss Legal, Political, and Social Issues at Senate Confirmation Hearings: Ethical Obligation or Survival Strategy?*, 73 S.C. L. REV. 27, 44 (2021) ("The second oath taken by federal judges differs from the first oath 'in that it is tailored to ensure that the oath-taker understands his or her primary directive—to decide cases impartially without regard to personal predilections or the social, economic, religious, financial, or political status' or other irrelevant personal characteristics of a litigant . . . Although the oath requires that a judicial nominee publicly accept the solemn obligation of impartiality, the oath does not create that duty. Nor does the judicial oath define impartiality. Courts define the concept of impartiality in the context of constitutional provisions, statutes, and rules of judicial conduct that prohibit judicial partiality."); Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. 43, 51 (2002) ("Strangely enough the U. S. Constitution does not impose any requirements or qualifications on those who are to become 'judges, both of the supreme court and inferior courts.'").

37. *See* McKoski, *supra* note 36, at 43.

38. ALEXIS DE TOCQUEVILLE, *supra* note 22, at 175.

President for confirmation by the Senate.[39] Over the years, presidents demonstrated a propensity to nominate attorneys-at-law who subscribed to particular legal views, and convictions, to fill vacant positions on the Supreme Court.[40] In efforts to gain confirmation by the required number of senators, it is not unusual for nominees to guise their true legal, or political convictions to earn the coveted position of Supreme Court Justice.[41] For example, Justices Alito, Kavanaugh, and Gorsuch all testified that *Roe v. Wade* was settled precedent when questioned on this issue by senators.[42] And, as will be discussed later in this paper, they voted to overturn the precedent.

Over the years, both Democrat and Republican presidents nominated individuals they deemed qualified—for confirmation by the Senate—to fill vacant positions on the Court.[43] Such appointment practice customarily tilts decision-making authority towards a majority—at least five—likeminded Justices.[44] According to court observers and legal analysts, most of the Court decisions in recent years reflect the shared conservative judicial philosophies.[45] In some instances, the decisions truncate the democratic freedoms previous

39. *See* McKoski, *supra* note 36, at 29 ("Some observers believe that the only legitimate function of the Senate in the confirmation process is to protect against the appointment of an incompetent, unprincipled crony of the President . . . Advocates for a broader role of the Senate find . . . that the Constitution grants the Senate the 'Power of interfering in every part of the Subject' and 'a Right to decide upon [the nomination's] Propriety or Impropriety . . . Regardless of the Framers' intent, beginning with Justice Potter Stewart's confirmation hearing in 1975, the Senate Judiciary Committee has consistently interrogated Supreme Court nominees on their judicial philosophy and ideology.").

40. *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, 1707–08 (2021) ("Republican presidents, as a result of a series of contingencies since Richard Nixon's appointments first began the Supreme Court's move right, have gotten more than their share of high court justices. Democrats, when they had their chance, replaced progressive jurists with centrist liberals . . . .").

41. *See generally* McKoski, *supra* note 36.

42. *See* Earl M. Maltz, *The Long Road to* Dobbs, 50 HASTINGS CONST. L.Q. 3, 56 (2023).

43. *See generally* Doerfler & Moyn, *supra* note 40.

44. *See* Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in A "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 564 (2020) ("Thanks to polarization in Congress and the Presidency, for the first time in Supreme Court history all of the conservative-leaning Justices have been appointed by Presidents of one party and all the liberal-leaning Justices appointed by Presidents of the other party.").

45. *See generally* Allan C. Hutchinson, *The Good, the Bad and the Ugly of Dobbs: A Constitutional Reckoning*, 63 SANTA CLARA L. REV. 309 (2023) (discussing the *Dobbs* decision and its impacts on women's rights and reproductive health).

Justices of the Court granted to sectors of the population denied such freedoms.[46] As noted before, further discussion on this issue follows in later sections of this paper.

III. SOME QUESTIONABLE DECISIONS BY THE SUPREME COURT

A. The Voting Rights Act

One of the hallmarks of democracy is citizens' right to exercise their voting franchise.[47] Denied such right deprives citizens of opportunities to actively, and meaningfully, participate in the electoral process—a system designed to enable citizens to freely elect local, and national representatives they consider worthy champions in addressing and resolving their concerns.[48]

Throughout American history, while White ethnics, overall, as an ethnic group, enjoyed voting privileges, African Americans generally found themselves politically disenfranchised especially during the period commonly known as Jim Crow.[49] Denied democratic rights to

46. Mustafa Aijazuddin, *Dobbs and Kennedy: A Foreshadow to the End of Stare Decisis?* 35 DUPAGE CNTY. BAR ASS'N BRIEF 30, 33 (2022) ("[For example,] in overturning *Roe* and *Casey*, *Dobbs* . . . relied on an idiosyncratic belief shared amongst a minority of people in the United States: that abortion is morally unconscionable . . . In *Kennedy*, the Supreme Court effectively ended fifty-one years of Court precedent by stripping away public-school students' fundamental right to religious freedom.").

47. *See* Margaret Wrenn Hickey, *Upholding Democracy: What Lawyers Can Do*, 95 WIS. LAW. 4, 4 (2022), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=95&Issue=9&ArticleID=29370 ("The right to vote is integral to our democracy. It is a constitutional right, and a responsibility, of every qualified American.").

48. Erica L. Laroux, Comment, *Voting Rights Suspended Under the Guise of Federalism and Voter Fraud in the Wake of* Shelby *and* Brnovich, 49 S.U. L. REV. 441, 442 (2022) ("'After a century's failure to fulfill the promise' exemplified in the Fifteenth Amendment, the Voting Rights Act of 1965 was enacted 'to protect the right of every American to vote in every election that he may desire to participate in.'").

49. Jim Crow laws were a collection of state and local statutes that legalized racial segregation. Named after a Black minstrel show character, the laws—which existed for about 100 years, from the post-Civil War era until 1968—were meant to marginalize African Americans by denying them the right to vote, hold jobs, get an education or other opportunities. Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence and death. *See* Editors, *Segregation in the United States*, HISTORY (Jan. 12, 2023) https://www.history.com/topics/black-history/segregation-united-states; Alexis Clark, *How the History of Blackface is Rooted in Racism*, HISTORY (Mar. 29, 2023) https://www.history.com/news/blackface-history-racism-origins; Editors, *Civil War*, HISTORY (Apr. 20, 2023) https://www.history.com/topics/american-civil-war/american-civil-war-history.

vote, a vast proportion of the African American population, especially in Southern States, found themselves deprived of meaningful and beneficial representation, in addition to exclusion from almost every level of federal, state, and local policy decisions including democratic governance.[50] It took decades of struggles, protests, and loss of lives before Congress enfranchised African Americans by passage of the Voting Rights Act in 1965.[51]

Grounded in the Fifteenth Amendments of the U.S, Constitution, the Voting Rights Act marks a turning point in the electoral franchise of minorities.[52] As Amendment XV, Section I clearly states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[53] The wording of the Fifteenth Amendment that "citizens should not be denied the right to vote based on race or color" begs the following questions: (a) Why did some states refuse to grant African Americans the voting right; and (b) Weren't African Americans equally citizens as the dominant White sector of the population? Valid verifiable answers to these questions are difficult to ascertain.

However, it is worthy to stress that while the Fifteenth Amendment was ratified in February of 1780, several States refused to grant African Americans suffrage.[54] And although Section 2 of the Voting

50. *See* Laroux, *supra* note 48, at 441–42 ("Despite the Nation's attempts to ensure the right to vote from 1880-1965, egregious efforts to suppress the minority vote endured. While the Supreme Court was successful in thwarting some blatant suppression schemes, the extraordinary battle for voting rights reached a turning point when Bloody Sunday sent a shockwave through the nation.").

51. *Id.* at 442 ("The amount of African Americans registered to vote in the South increased by more than fifty percent from 1964, reaching 3.3 million in 1970. The Act's success was largely due to the 'trigger' and preclearance provisions authorizing oversight by the Justice Department. From 1965-2006, the Justice Department prevented almost 1200 voting laws from going into effect - many of which were intentionally discriminatory."); *see also Voting Rights Act (1965)*, NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/voting-rights-act (last visited Mar. 9, 2025).

52. *See Voting Rights Act (1965)*, *supra* note 51.

53. U.S. CONST. amend. XV, § 1.

54. *See* M. Isabel Medina, *The Missing and Misplaced History in* Shelby County*,* Alabama v. Holder - *Through the Lens of the Louisiana Experience with Jim Crow and Voting Rights in the 1890s*, 33 MISS. COLL. L. REV. 201, 207 (2014) (For example, "[t]he Colfax Massacre in 1873 [Louisiana] gave witness to the violence which black voters would encounter in casting their vote, and made it clear, as well, that law, specifically constitutional law, could insulate that violence from accountability. Attempts to prosecute some (over 100) of the perpetrators of the massacre federally under an act prohibiting persons from interfering with the franchise

Rights Act of 1965 made clear that, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color,"[55] several States invented new ways to deny African Americans their voting franchises.[56]

Between 1965 and 1969, various States challenged the Voting Rights Act of 1965 several times, but the Supreme Court upheld several key decisions of Section 5 constitutionality, "affirming the broad range of voting practices for which preclearance was required."[57] This led Congress to readopt and strengthen the Act in 1970, 1975, 1982, and 2006 with intent that the voting privileges of African, Hispanic, and Native Americans would not be abridged.[58]

Evidently, both Congress, and the Supreme Court, expressed support for the democratic principles of governance by their refusals to deny, or abridge, voting privileges based on race or color.[59] Yet, such

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resulted in a guilty verdict for three defendants, but was ultimately set aside by the United States Supreme Court on a technicality in *United States v. Cruikshank* in 1875, with the Court noting that 'the Constitution of the United States has not conferred the right of suffrage upon any one'").

55. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended as 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

56. *See* Jonathan Kwortek, *Guilty Beyond a Reasonable Vote: Challenging Felony Disenfranchisement Under Section 2 of the Voting Rights Act*, 93 S. CAL. L. REV. 849, 855–57 (2020) ("The Black Codes . . . [which included v]agrancy laws, adopted by nine southern states, criminalized unemployment and selectively targeted Blacks . . . The *Mississippi Plan of 1890* directly attacked Black access to the voting booth through an assortment of 'poll taxes, literacy tests, understanding clauses, newfangled voter registration rules, and "good character" clauses.' . . . alleging the need to maintain the integrity of elections, . . . [with] surrounding states adopt[ing] identical restrictions.").

57. *Voting Rights Act of 1965*, *supra* note 51 (citing South Carolina v. Katzenbach, 383 U.S. 301, 327–28 (1966); Allen v. State Bd. of Elections, 393 U.S. 544 (1969)).

58. *See* Patty Ferguson-Bohnee, *The Struggle for Equal Voting Rights: 45 Years of the Voting Rights Act*, ARIZ. ATT'Y, Nov. 2010, at 27 ("The activities in the South focused on African American voters. But in the West, states such as Arizona had prohibited Native Americans and Hispanic Americans from voting . . . Although the act was passed in 1965, other methods were used to limit the effectiveness of the minority vote, such as gerry-mandering, annexations, adoption of at-large voting systems and packing. This led to the renewal of the act in 1970 and 1975 . . . The 1982 amendments also made certain provisions of the act permanent. In 2006, Congress reauthorized the expiring provisions of the act for another 25 years, after multiple hearings and extensive testimony highlighted continued obstacles for minority voters.").

59. *See id.*

upholding of the democratic process suffered a setback in 2013 when, in the case of *Shelby County v. Holder*, the "[Supreme] Court struck down a key provision of the [Voting Rights] act involving federal oversight of voting rules in nine states."[60] In so doing, the Supreme Court altered, and weakened the democratic rights of citizens, especially that of African Americans and other minority groups—rights the Court sought to preserve and even expand from 1965 to 2012.[61] As Paul Smith of the Campaign Legal Center noted:

> The court, led by Chief Justice John Roberts, has handed down a series of anti-democratic decisions over the past 15 years, including the *Shelby County v. Holder* decision that gutted Section 5 of the VRA—the all-important preclearance provision that did so much to protect the rights of Black and brown voters in the South.[62]

60. *Voting Rights Act of 1965*, *supra* note 51; *see About Section 5 of the Voting Rights Act*, C.R. DIV., U.S. DEP'T OF JUST. (Nov. 17, 2023), https://www.justice.gov/crt/about-section-5-voting-rights-act. ("On June 25, 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act . . . The effect of the *Shelby County* decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance for the new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the Voting Rights Act."); Kristopher A. Reed, *Back to the Future: How the Holding of* Shelby County v. Holder *Has Been a Reality for South Dakota Native Americans Since 1975*, 62 S.D. L. Rev. 143, 143–44 (2017) ("The Supreme Court [] resolved to remove the best protection against discriminatory voting laws in jurisdictions with the worst history of denying voting rights to minority groups—Section 5 of the Voting Rights Act of 1965 ('VRA') which required congressional preclearance of any changes to a jurisdiction's voting laws. [] The Court based its reasoning on the idea that overt discrimination and voter denial present during the passage of the VRA—so called 'first-generation' discrimination—was no longer an issue."); *see also* Shelby County v. Holder, 570 U.S. 529 (2013).

61. *See* Laroux, *supra* note 48, at 462 ("Following the *Shelby County* decision, several states [] passed sweeping voter suppression legislation guised as acts of ballot security. Before *Shelby* invalidated the trigger and preclearance provisions of Section, the Department of Justice was tasked with reviewing and quashing discriminatory voter laws before their enactment. In Brnovich [594 U.S. 647 (2021)], the Court raises the threshold for a Section 2 violation to an unattainable level. Barring flagrant discriminatory intent, a state law with a legitimate justification is unlikely to ever be held to violate Section 2.").

62. Paul Smith, *Supreme Court's Impact on Voting Rights Is a Threat to Democracy*, BLOOMBERG L. NEWS (Sept. 27, 2023, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X1IK6J64000000?bna_news_filter=us-law-week#jcite.

B. ID Laws, and Redistricting

Emboldened by the Supreme Court's 2013 decision which "gutted" Section 5 provisions of the Voting Rights Act, Republican state officials rushed to impose new restrictions principally aimed at negatively impacting African Americans' and other minorities of color from freely exercising their democratic right to vote.[63] For instance, almost immediately after the Court's verdict, Texas,[64] and North Carolina[65] took steps to implement some of the most restrictive voter ID laws.[66] Soon thereafter, several other States sought to impose voting restrictions.[67] As Levitsky and Ziblatt explained in their book *How Democracies Die*, "by 2016 fifteen states had adopted [ID] laws . . . The laws were passed in states where Republicans controlled both legislative chambers, and in all but Arkansas, the governor was also a Republican. There is little doubt that minority voters were a primary target."[68]

Levitsky and Ziblatt's claim that voter ID laws targeted minorities finds support in a study done by the Brennan Center for Justice. The Center reported that "[a]s many as 11 percent of eligible voters do not have the kind of ID that is required by states with strict ID requirements, and that percentage is even higher among seniors, minorities,

63. *See* Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 655 (2017) ("Since 2010, twenty states - most of them with Republican-controlled legislatures - have established new limitations on voting. Most commonly, these include requirements that voters show photo ID, but new laws also restrict voter registration drives, curtail early voting, and limit the distribution and collection of absentee ballots. The Supreme Court's 2013 decision in Shelby County v. Holder lifted a significant barrier to such legislation . . . ."); LEVITSKY & ZIBLAT, *supra* note 29, at 184; *see also* RICHARDSON, *supra* note 16, at 78.

64. *See* Veasey v. Abbott, 830 F.3d 216, 272 (5th Cir. 2016).

65. *See* Cheng, *supra* note 63, at 658–59 ("In July 2013, the Republican-dominated North Carolina legislature enacted the Voter Information Verification Act . . . [establishing] a new photo ID requirement for voters and eliminated or restricted a number of voting and registration mechanisms . . . ." The Fourth Circuit struck down much of the law, with "Judge Diana Motz declar[ing], 'Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist.'").

66. *See* LEVITSKY & ZIBLATT, *supra* note 29, at 184.

67. *See generally*, Cheng, *supra* note 63 (discussing laws in Tennessee, Virginia and Wisconsin).

68. *See* LEVITSKY & ZIBLATT, *supra* note 29, at 184.

people with disabilities, low-income voters, and students."[69] The report's overview went on to state that "[m]any citizens find it difficult to obtain government photo IDs because the necessary documentation, such as a birth certificate, is often difficult or expensive to acquire."[70] Given this reality, why then did several states rush to promulgate ID laws that serve to impede and even prevent citizens from exercising their voting franchise? Simply put, several states based their restrictive voter ID laws on the false claim of widespread voters' fraud in the country.[71] As previously noted, the laws were aimed at disproportionately affecting African Americans and other minority groups from exercising their voting franchise,[72] which, in turn, limited their meaningful input into policy decisions that influence and impact their lives. As Levitsky and Ziblatt noted "[e]fforts to discourage voting are fundamentally antidemocratic . . . ."[73]

A more recent Supreme Court's decision that alters the democratic rights of African Americans and other minority groups is that of *Alexander v. South Carolina*.[74] Writing for the majority, Justice Alito stated:

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69. *Voter ID*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/voter-id (last accessed Mar. 15, 2025).

70. *Id*.

71. *See* LEVITSKY & ZIBLATT, *supra* note 29, at 184; Cheng, *supra* note 63, at 655 ("Voting rights organizations, minority groups, and Democrats have vigorously challenged such provisions in court, generally arguing that they are a deliberate attempt to suppress voting by minorities, the poor, and young Americans, all of whom tend to vote Democratic. States have defended their legislation as minimally burdensome and necessary to deter voter fraud. Courts have generally sided with the states, but in 2016, the Fifth Circuit, the Fourth Circuit, and a Wisconsin district court struck down voting laws in Texas, North Carolina, and Wisconsin, respectively.").

72. *See* LEVITSKY & ZIBLATT, *supra* note 29, at 184.

73. *Id*. at 186.

74. Alexander v. S.C. State Conference of the NAACP, 602 U.S. 1, 1–2 (2024); *see* Matthew Poliakoffa, *Disentangling Race and Politics: Racial Gerrymandering in South Carolina's First Congressional District*, 19 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 56, 56 (2024) ("The boundaries of [South Carolina's First Congressional District] CD-1 [were] contentious in the Republican-controlled South Carolina state legislature's [] redistricting process. The state legislature's plan shored up Republican support in the district by adjusting the lines and shifting nearly two-hundred thousand people between CD-1 and nearby CD-6. The South Carolina State Conference of the NAACP noted that thirty thousand of the residents moved from CD-1 to CD-6 were Black, and it filed suit on the grounds that the new plan for CD-1 was unconstitutional under the Fourteenth and Fifteenth Amendments' Equal Protection Clauses.").

> The Constitution entrusts state legislatures with the primary responsibility for drawing congressional districts, and redistricting is an inescapably political enterprise. Legislators are almost always aware of the political ramifications of the maps they adopt, and claims that a map is unconstitutional because it was drawn to achieve a partisan end are not justiciable in federal court. Thus, as far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in redistricting. By contrast, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subjected to strict scrutiny and may be held unconstitutional . . . First, a party challenging a map's constitutionality must disentangle race and politics if it wishes to prove that the legislature was motivated by race as opposed to partisanship. Second, in assessing a legislature's work, we start with a presumption that the legislature acted in good faith.[75]

In response to the decision, the ACLU in a press release stated:

> In a 6-3 vote, the Supreme Court today issued a decision that reversed a federal trial court's unanimous finding that Congressional District 1 in South Carolina's 2022 map is an unconstitutional racial gerrymander. The court also ruled that the district court applied the incorrect standard to plaintiffs' intentional vote dilution claim and returned that claim to the district court for further proceedings.
>
> The decision is a rejection of the historical deference given to the trial court's factual findings and adds to the already difficult evidentiary burden that plaintiffs must demonstrate to remedy racial discrimination in voting. This divided decision underpins efforts nationwide to deny Black voters' fair access to the political process to elect their preferred candidates.[76]

By its decision in *Alexander v. South Carolina*, the Supreme Court laid the foundation for other States to gerrymander voting

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75. *Alexander*, 602 U.S. at 1.

76. Press Release, ACLU, U.S. Supreme Court Rejects Unanimous Post-Trial Decision and Long-Settled Precedent, Allows South Carolina's Racially Discriminatory Congressional Map to Stand, (May 23, 2024, 11:30 AM), https://www.aclu.org/press-releases/u-s-supreme-court-rejects-unanimous-post-trial-decision-and-long-settled-precedent-allows-south-carolinas-racially-discriminatory-congressional-map-to-stand.

districts to the benefit of White candidates while erecting electoral barriers that further weakened African Americans' and other minority groups' meaningful participation in the perpetuation of America's democracy.[77]

Noteworthy is that many state, and current national policy decision makers, ascended into political office through gerrymandering—the crafting of local electoral districts' boundary-lines that facilitate the dominance of members of one political party irrespective of discrimination against, and underrepresentation of, African Americans and other minority groups in the states' legislatures.[78]

Gerrymandering has not only trampled upon the democratic rights of African Americans and other minority groups, it has also turned the tides on the nation's course of multicultural inclusiveness, and the formalization of the dynamic participatory trends in American democracy,[79] one symbolized by a phrase in the Pledge of Allegiance—"one Nation under God, indivisible, with liberty and justice for all." Paul Smith may have summed it best when he said,

> It wasn't always this way. During the second half of the 20th century, the court frequently played a pivotal role as a protector of democracy. Since then, the court has opened the door for laws that silence people of color, the poor, and the young, and permitted unbridled gerrymandering to entrench political factions unable to win majority approval.[80]

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77. *See* Poliakoffa, *supra* note 74, at 76 ("*Alexander* remains a case narrowed to a specific set of facts in a specific congressional district . . . The decision, however, would be deeply consequential for similar claims going forward . . . [T]he bar to prove the predomination of race in future claims will be extraordinarily high . . . further heighten[ing] an already 'demanding' burden for plaintiffs.").

78. *See* Laura Odujinrin, *The Dangers of Racial Gerrymandering in the Frontline Fight for Free and Fair Elections*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 164, 167 (2021).

79. *See* Ronak Patel, *Race-Conscious Independent Redistricting Commissions: Protecting Racial Minorities' Political Power Through Rules-Based Map Drawing*, 69 UCLA L. REV. 624, 626–27 (2022) ("The developments of the Civil Rights Era—specifically the U.S. Supreme Court's establishment of the one-person, one-vote principle and Congress's passage of the Voting Rights Act of 1965 (VRA)—pushed the United States closer to becoming a fully realized, multiracial democracy. But . . . the increased racial polarization of the nation's two primary political parties has allowed map drawers to use partisan advantage as a legal justification for the creation of districts that dilute minority voters' electoral power and ability to equally participate in our democracy.").

80. Smith, *supra* note 62.

C. Roe v. Wade

Subjugated under male domination for over two centuries, women gradually made incremental gains in achieving human rights' privileges enjoyed by men.[81] One of such right is the granting of the voting franchise which women secured after years of petition, lobbying, civil disobedience, and picketing the male dominated establishments.[82] The women's protest, and resistance to male dominance, which spanned several decades from the 1800s to the early 1900s, resulted in the passage of the 19th Amendment to the U.S. Constitution which states that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."[83]

While the Nineteenth Amendment granted women the right to vote, it did not extend to freedom over female sexuality and reproductive freedom.[84] Analogous to the fight for suffrage, it took decades of lobbying and policy changes for women to legally win the right to have an abortion.[85]

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81. *See* Miranda McGowan, *The Democratic Deficit of Dobbs*, 55 LOY. U. CHI. L.J. 91, 129–31 (2023) ("The Fourteenth Amendment dimmed the lights on women's rights by inserting, for the first time, the word 'male' into the Constitution . . . As originally understood, the Fourteenth Amendment permitted states to deprive women of civil rights, the guarantees of privileges and immunities, equal protection, and the right to vote. Giving women the right to vote in 1920 retroactively cured the flaws of the original ratifying process no more than a backdated check paid the bill on time.").

82. *See id.*

83. U.S. CONST. amend. XIX; *see* Anna Greer, Note, *Women Seldom Make History and Tradition: Patriarchal Originalism in Dobbs*, 17 DEPAUL J. FOR SOC. JUST. 1, 50 (2023) ("In Wyoming, white women first got the vote in 1870, followed by white women in Utah who achieved enfranchisement that same year. White female enfranchisement followed in Washington in 1883, Montana in 1887, and Colorado in 1893. The Nineteenth Amendment was not ratified until 1920, after a hard-fought campaign that included hunger strikes and forced feedings.").

84. *See* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 729, 773–74 (2024) ("There is a powerful argument that women's full citizenship under the Fourteenth Amendment's Equal Protection Clause, as well as the Nineteenth Amendment's right to vote, requires control over their reproductive lives. The majority's refusal even to grapple seriously with those arguments is further evidence of the [Dobbs] opinion's crabbed and thin commitment to democracy.").

85. *See* Mark L. Rienzi, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1215 (2000) ("Abortion returned to national prominence in the 1950s, with a push to liberalize or repeal America's abortion laws driven largely by Planned Parenthood and the population control movement. Pro-reform forces and the wholesale social changes of the 1960s coalesced for a 'legislative crescendo' that began in 1967. That

On January 22, 1973, in a 7-2 decision on *Roe v. Wade*, the Supreme Court ruled that women have the right to choose whether to have abortions, and that States' bans on such practices are unconstitutional.[86] As frequently noted, *Roe v. Wade* and its progeny recognized the right to privacy with respect to reproductive freedom, which enabled them to make decisions regarding their sexual health.[87]

Since its passage, *Roe* and its progeny enabled women for nearly fifty years to enjoy reproductive freedom.[88] After reaffirming *Roe* in a 1992 case, *Planned Parenthood v. Casey*,[89] in 2022, in *Dobbs v. Jackson Women's Health Organization*—better known as *Dobbs*—a Mississippi case which imposed a ban on abortions after fifteen weeks, the Supreme Court in a 5-4 decision overruled *Roe* and stated that the issue of abortion should be left to the States.[90] In the rationale for

year, the AMA issued a statement favoring liberalization of abortion laws, and twenty-eight state legislatures considered liberalization bills. A 1968 Presidential Advisory Council on the Status of Women called for the repeal of all abortion laws. By 1970 twelve states had passed liberalization laws, and four states - Hawaii, New York, Alaska, and Washington - had repealed their abortion restrictions entirely.").

86. Roe v. Wade, 410 U.S. 113, 152–54 (1973); *see* Craig Peyton Gaumer & Paul R. Griffith, *Whose Life Is It Anyway?: An Analysis and Commentary on the Emerging Law of Physician-Assisted Suicide*, 42 S.D. L. REV. 357, 369 (1997) ("In 1973, the Court's 7-2 decision in Roe v. Wade announced that the right to privacy protected by the Fourteenth Amendment was broader than the right to marital intimacy established by Griswold . . . Justice Blackmun, writing for the [Roe] majority, affirmed the proposition that some rights not mentioned in the text of the Constitution are nevertheless protected privacy rights because they are 'fundamental' or 'implicit in the concept of ordered liberty.'").

87. *See id.* at 370–71 ("Roe and its progeny have been the subject of considerable controversy and judicial attention over the past two decades. Indeed, the Roe decision seemed on the verge of being overturned prior to the Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey. Casey involved a constitutional challenge to a Pennsylvania abortion law. The joint decision of Justices O'Connor, Kennedy, and Souter not only affirmed the basic conclusion reached by Roe concerning a woman's right to reproductive choice, but also acknowledged that 'it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'").

88. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 416 (2022) (Breyer, J., Kagan, J., & Sotomayor, J., dissenting) ("[The Dobbs majority] converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.").

89. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

90. *Dobbs*, 597 U.S. at 215; Callie Yu, *A Choice Taken Away: When a Fundamental Right Loses Its Status*, 50 W. ST. L. REV. 149, 150 (2023) ("In 2018, the State of Mississippi enacted the Gestational Age Act which banned abortion procedures

overturning *Roe*, Justice Alito, the key architect behind the ruling, utilized in part, centuries old archaic British policies to boost the Court's decision.[91]

In his opinion to overturn *Roe*, Justice Alito wrote that, "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."[92] One can deduce from Justice Alito's statement that he is correct, and that the Justices who initially ruled in favor of *Roe*, and those who reaffirmed the decision for nearly fifty years were all wrong.[93] Justice Alito's claim also begs the questions: (i) How can so many Justices render wrongful decisions on *Roe* for so many years? And (ii) Does Justice Alito believe that he has a monopoly on objective jurisprudence, and that the Justices who upheld *Roe* do not? In fact, Justice Alito's own remarks call into question his objectivity. Here is why.

In his confirmation hearing before the Senate, Justice Alito said:

> *Roe v. Wade* is an important precedent of the Supreme Court. It was decided in 1973, so it has been on the books for a long time. It has been challenged on a number of occasions, and I discussed those yesterday, and the Supreme Court has reaffirmed the decision,

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if the gestational age of the unborn human was greater than fifteen weeks, with the exception of medical emergencies or severe fetal abnormalities. [The] Jackson Women's Health Organization (JWHO) 'filed suit in Federal District Court against various Mississippi officials [and the] district court granted summary judgment in favor of JWHO . . . In a 6-3 decision, the Court reversed and held that the Constitution does not confer a right to abortion and returned the authority to regulate abortion to the people and their elected representatives.").

91. *See* Greer, *supra* note 83, at 23–28 ("[H]is eight-century survey of history can be divided into two portions: a broader one dedicated to common-law authorities and a narrower one dedicated to mid to late 19th-century authorities . . . The Court largely explores these two implied categories of histories and historical sources, mostly evenhandedly, in that it does not explore them in much depth at all . . . As to both sources, the Court fails to observe that they were written in medieval times. Not only centuries before Reconstruction or even the Founding, but also centuries before important features of current American life, from niceties like modern sleeves to more basic things like the word 'America.'").

92. *Dobbs*, 597 U.S. at 231.

93. Aijazuddin, *supra* note 46, at 33 ("Dobbs and Kennedy [stripping away public-school students' fundamental right to religious freedom] present a question as to how norms can develop and become deeply rooted in the nation's history and tradition as a matter of law, if any attempts to codify such a norm are blocked in the legislature and overturned without regard to *stare decisis*. The society that we live in today is not the same, or even substantially the same, as United States society in 1868 during the Reconstruction Era and less so in 1789 after Ratification. Refusing to acknowledge society's evolving norms and trying to live by the norms of 1868, jeopardizes the Court's relevance, credibility, and legitimacy.").

> sometimes on the merits, sometimes in *Casey* based on *stare decisis*, and I think that when a decision is challenged, and it is reaffirmed that strengthens its value as *stare decisis* for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it, and second, I think stare decisis reflects the view that there is wisdom embedded in decisions that have been made by prior Justices who take the same oath and are scholars and are conscientious, and when they examine a question and they reach a conclusion, I think that's entitled to considerable respect, and of course, the more times that happens, the more respect the decision is entitled to, and that's my view of that. So it is a very important precedent . . . .[94]

The above extended quote calls into question Justice Alitos' belief in raw judicial power in answering questions on *Roe* posed to him by Senators at his confirmation, especially when he expressed his thought on the reaffirmation on *Roe* and *stare decisis*.[95] He said then: "*[S]tare decisis reflects the view that there is wisdom embedded in decisions that have been made by prior [J]ustices who take the same oath and are scholars and are conscientious*."[96] If Justice Alito was right when he uttered these words for confirmation to the Supreme Court, why did he claim that the decision on *Roe* was "egregiously wrong from the start?" The seemingly contradictory remarks point to

94. *Current Supreme Court Justices' Answers to Questions About* Roe *and Abortion During Their Confirmation Hearings*, CTR. FOR REPROD. RTS., https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/4%20Current%20Supreme%20Court%20Justices%20Answers%20to%20Questions.pdf.

95. *See* N. William Hines, *Should the Recent* Timbs *and* Dobbs *Decisions Revive Interest in the Excessive Fines Clause as the Constitutional Basis for Federal Regulation of Punitive Damages?*, 109 IOWA L. REV. ONLINE 46, 67 (2024) (noting "the same criticism that Justice Alito's majority opinion levels at the *Roe* and *Casey* decisions—that they were exercises of 'raw judicial power' that were more legislative than judicial in nature—can also easily apply to the *Dobbs* decision, which overturned almost fifty years of what many of the majority justices themselves testified in their Senate confirmation hearings they regarded as well-settled law.").

96. Evan D. Bernick & Christopher R. Green, *What Is the Object of the Constitutional Oath?*, 128 PENN ST. L. REV. 1, 15 (2023) (emphasis added) (quoting *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr.: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 455 (2006) (statement of Justice Samuel Alito)).

some of the concerns raised regarding Justice Alito's tone in the opinion as a far cry from cogent and careful reasoning.[97]

Similar to Justice Alito's response on *Roe* to Senators, current Justices Gorsuch provided testimony in his Senate confirmation hearing that he considers Roe as a "precedent that has been affirmed."[98] And, Justice Kavanaugh at his confirmation hearing said that *Roe* "is settled as a precedent."[99]

When compared to answers at their confirmation hearings before the Senate, and their subsequent decisions on the overturning of Roe, the above Justices appear to have cast some doubt on the veracity of their opinions before, and after, their appointments to the highest Court.[100] And they, along with Justices Roberts, Barrett and Thomas

97. *See* Michael J. Gerhardt, *Supreme Myth Busting: How the Supreme Court Has Busted Its Own Myths*, 2023 WIS. L. REV. 603, 611 (2023) ("To begin with, the tone of Justice Alito's opinion in *Dobbs* is a far cry from the kind of cogency and careful reasoning that is, or should be, the hallmark of reasoned elaboration. It treats the more than twenty justices who joined in the original *Roe* and voted subsequently to reaffirm it as dullards and partisans. Alito's tone is dismissively arrogant, perhaps sadly not surprising given that he has spent most of his career belittling women, as he did when he led (unsuccessfully) a movement to prevent his alma mater Princeton University from admitting women."); Greer, *supra* note 83, at 8–9 ("[Professor] Bernick [] observes Justice Alito's erasure of anti-Catholic bigotry along with multiple analytical flaws in *Dobbs*' originalist and doctrinal reasoning [in the *Dobbs* decision]. One such flaw is the Court's ambiguity in what kind of meaning history and tradition ascribes to the Constitution, failing to say if the original meaning is public understanding, original intent, or another form of meaning.") (citing Evan D. Bernick, *Vindicating Cassandra: A Comment on* Dobbs v. Jackson Women's Health Organization, 2022 CATO SUP. CT. REV. 227, 262 (2022)).

98. D'Angelo Gore, Robert Farley & Lori Robertson, *What Gorsuch, Kavanaugh and Barrett Said About Roe at Confirmation Hearings*, FACTCHECK.ORG (June 24, 2022, 12:44 PM), https://www.factcheck.org/2022/05/what-gorsuch-kavanaugh-and-barrett-said-about-roe-at-confirmation-hearings (Gorsuch stated "[*Roe*] is a precedent that is now 50 years old. *Griswold* involved the right of married couples to use contraceptive devices in the privacy of their own home. And it is 50 years old. The reliance interests are obvious. It has been repeatedly reaffirmed. All very important factors again in analyzing precedent.").

99. *Id.* (Kavanaugh stated "[*Roe*] is settled as a precedent of the Supreme Court, entitled the respect under principles of stare decisis. And one of the important things to keep in mind about *Roe v. Wade* is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly, reaffirmed in *Planned Parenthood v. Casey* in 1992.").

100. *See* Allan C. Hutchinson, *The Good, the Bad and the Ugly of* Dobbs*: A Constitutional Reckoning*, 63 SANTA CLARA L. REV. 309, 347 (2023) ("While all five Justices were appointed by Republican presidents, certain statements were made by them during their Senate confirmation hearings that raise disturbing doubts about their good faith in handling the divisive issue of abortion and the continuing validity of the *Roe* precedent. Indeed, at a minimum, these declarations offer some credible

who supported the decision, seem to undermine the public's trust in the Court.[101]

As one of the three pillars of a democratic nation, the Court, as indicated by its low approval rating, apparently tilted the social relations of power backwards, to the time of male dominated norms.[102] This seems evident from the Court 6-3 decision that restricted women's freedom and autonomy to make the reproductive decision to choose abortions on their own.[103] The decision also granted authority over abortion and the reproductive health of women to the individual States.[104]

In their zest to exercise the new power vested upon them the Supreme Court, legislators in several states—the vast majority of whom are males—within weeks thereafter, promulgated laws, and revitalized draconian policies that severely restricted women's reproductive rights, and criminalizes abortion with lengthy jail sentences and even death to perpetrators.[105] Despite lacking in requisite education and

evidence that they were not entirely proceeding with integrity and honesty when *Dobbs* and related matters came before them.").

101. Kenneth Berman, *Stare Decisis and the Supreme Court's Undoing Project*, AM. BAR ASS'N (Oct. 18, 2022), https://www.americanbar.org/groups/litigation/resources/litigation-journal/2022-fall/stare-decisis-supreme-courts-undoing-project/ ("At the Dobbs oral argument, Justice Sotomayor warned that, if the Court were to overrule Roe and Casey, the Court would not survive the 'stench . . . in the public perception that the Constitution and its reading are just political acts.' She accurately predicted the public's perception.").

102. *See* Marc Spindelman, Dobbs' *Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 172 (2023) ("Importantly, the Kavanaugh concurrence's overall rights patterning—like the majority opinion's—remains steadfastly male-centered and even male-dominant, if in variegated ways.").

103. *See id.* at 132 ("Spousal notification and/or veto laws revived after *Dobbs* . . . will be assessed in a new constitutional environment . . . However sexist it is to require pregnant women to consult or heed husbands or other men in order to make informed reproductive decisions for themselves, this sexist logic accords with *Dobbs'* decision to allow the states to make women's and other pregnant people's pregnancy-ending decisions for them.").

104. *See* Laurie Coles & Danielle Essma, *Dobbs v. Jackson: Changes in U.S. Global and Domestic Leadership for Women's Rights*, N.Y. STATE BAR ASS'N (Mar. 8, 2023), https://nysba.org/dobbs-v-jackson-changes-in-u-s-global-and-domestic-leadership-for-womens-rights/?srsltid=AfmBOoo5vqGpfEkH84lYR5us1qKKy8fqxPPriXx2xGSdodsJlH1sF5dS ("When *Dobbs* removed federal recognition of women's interests and left decisions to the states, it prompted women to reassess their relationships with the state authorities surrounding them, which leads to the question of how power is maintained at a national level.").

105. Sonia M. Suter, *Alito Is Wrong: We* Can *Assess the Impact of* Dobbs*, and It Is Bad for Women's Health*, 53 SETON HALL L. REV. 1477, 1496 (2023) ("Several states were quick to accept *Dobbs's* invitation to pass or reinstate draconian abortion

training to make medical decisions, state legislators unabashedly trampled upon women's democratic freedom to seek and access reproductive health services, and in so doing endangered the health, safety and wellbeing of many.[106] And, by criminalizing abortion, state legislators also trampled upon healthcare professionals' democratic freedom to earn a living through employment in the occupational field of women's reproductive health for which they are eminently qualified.[107] As noted by Professor Jack Balkin, "laws criminalizing

bans. Many of the bans were imposed from the start of pregnancy and often without exceptions for health and fetal anomalies."); Alejandra Caraballo et al., *Extradition in Post*-Roe *America*, 26 CUNY L. REV. 1, 13 (2023) ("The majority's decision in *Dobbs* is hateful, nihilistic, and disruptive. Justice Samuel Alito, joined by the majority, callously dismissed the many harms to living breathing people, to their families and friends, and to their communities that have formed to support and share life with them."); Deborah Machalow, *Screwed but Not Even Kissed: The Parade of Reproductive and Economic Horribles Likely to Follow* Dobbs, 26 J. GENDER RACE & JUST. 81, 100–01 (2023) ("While the mainstream anti-abortion movement has typically preferred to punish abortion providers, shying away from penalizing pregnant persons who access care, a growing number of Republicans have voiced support for punishing those who obtain abortions and have begun proposing legislation to do just that . . . More recently, in May 2022, a Republican Louisiana state representative proposed the Abolition of Abortion in Louisiana Act, which would have permitted formerly pregnant persons who obtained abortions to be charged with homicide.").

106. *See* Caraballo et al., *supra* note 105, at 14 ("What the *Dobbs* majority (and the Mississippi legislature) did was not a report on biological findings—it was a usurpation of power for the purpose of imprinting their Christian faith's foundational way of knowing on the rest of us."); Laura Hermer, *Minnesota Should Strengthen Its Protection for Reproductive Liberty*, 79 BENCH & BAR MINN. 30, 30 (2022) ("Paternalistic state legislatures can now force women to gestate unintended and unwanted children, upending women's futures and their families' lives in the process."); Danielle Zoellner, *Criminalizing the Doctor-Patient Relationship: How Abortion Aiding and Abetting Laws Violate A Physician's First Amendment Rights*, 65 B.C. L. REV. 1143, 1143 (2024) ("The [*Dobbs*] holding opened the floodgates for state legislatures to pass total and near-total bans on abortion services across the United States. Included among the abortion bans passed are aiding and abetting laws that threaten to punish physicians criminally and civilly for advising pregnant individuals about abortion services."); Amanda Hainsworth, *Dobbs and the Post-Roe Landscape*, BOS. BAR ASS'N. (Nov. 7, 2022), https://bostonbar.org/journal/dobbs-and-the-post-roe-landscape/ ("A ten-year-old rape victim in Ohio, for example, was forced to travel to Indiana to avoid the horrifying prospect of compelled motherhood as a child. The doctor who performed the abortion in Indiana, where abortion was legal at the time, was subsequently targeted by state officials and harassed by the public.").

107. *See* Hainsworth, *supra* note 106 ("Abortion clinics have shuttered operations throughout the Southeast, creating vast 'abortion deserts' and forcing patients to travel long distances to access care, if they can travel at all . . . Those in rural communities, poor people, domestic violence victims, and countless others for whom travel is not affordable, practical, or safe face a Sophie's choice: they must either attempt to procure abortion pills from an online pharmacy and take them without medical supervision, or accept forced birth.").

abortion violate the Fourteenth Amendment's principle of equal citizenship and its proclamation against class legislation . . . laws that criminalize abortion are class and subordinating legislation that helps maintain second-class citizenship for women."[108]

Prior to the Supreme Court's overturning of *Roe*, Justice O'Connor during her tenure on the Court cautioned on judicial scrutiny over the issue of abortion.[109] It was perhaps her understanding of the law on reproductive freedom versus moral conviction that led the other justices in rendering the decision in *Planned Parenthood v. Casey*:[110]

> Justices O'Connor, Kennedy and Souter formed the [*Casey*] trio. Starting with an opening dash of rhetorical flourish—"Liberty finds no refuge in a jurisprudence of doubt"—they proceeded to affirm "*Roe*'s essential holding." . . . Without saying so directly, the trio had invoked the specter of a "brave new world" in which the state could demand that individuals' bodies be subjected to pervasive governmental control . . . Insisting that as jurists they were not "free to invalidate state policy choices with which we disagree," much less "mandate our own moral code," the trio rather grandly declared that they nonetheless could not "shrink from the duties of our office." That duty amounted to nothing more or less than the obligation to exercise "reasoned judgment" . . . To those who were convinced that *Roe* had been wrong the day it was decided, the majority urged that they not forget the

108. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–327 (2008).

109. Paula Walter, *How the United States Supreme Court Aborted the Texas Abortion Statute*, 12 J. HEALTH & BIOMEDICAL L. 233, 258 (2017) ("Prior to Casey, Justice O'Connor had continuously ruled against expanding the applicability of Roe … Justice O'Connor's changed opinion [in Casey] suggested that perhaps something shifted her understanding of the law on reproductive rights and persuaded her to alter her vote. In her earlier dissenting opinions in Akron and Thornburgh, Justice O'Connor had stated that the State's 'compelling' interests in ensuring maternal health does not depend on the trimester system, but, are present throughout pregnancy").

110. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Walter, *supra* note 109, at 258 ("Judicial scrutiny should be limited in focus on the legitimate purpose of a state's abortion laws and regulation, such as advancement of compelling interests, with heightened scrutiny reserved only for when the state imposes an undue burden on the woman's decision. Justice Kennedy expressly acknowledges this standard and adopted this very test in Casey, using exact language from Justice O'Connor's dissenting opinion in Akron. This deference was perhaps a clear attempt to unite the court and persuade Justice O'Connor to join the Casey majority opinion, as it unmistakably articulated her original undue burden standard.").

> damage that would be done by overruling. Irrespective of what was said to rationalize such a course, it would be widely interpreted as a retreat "under fire," which "would subvert the Court's legitimacy beyond any serious question." For Justices O'Connor, Kennedy, and Souter, the decision to stay the course with Roe very likely constituted a moment of personal anguish. "Some of us as individuals find abortion offensive to our most basic principles of morality," they wrote, which was similar to what O'Connor had said at her confirmation hearing. A different decision by any one of the three would have instantly ended the practice of legalized abortion in much of the country.[111]

Justice O'Connor and her two colleagues may have predicted the Court's negative impact on the socio-political dynamics of American democracy, for almost immediately after the Dobbs Court overturned *Roe*, women took to the streets in organized demonstrations of protest against the decision.[112] This they did in Washington, D.C, and in several other State capitals throughout the country.[113] As an expression of their democratic freedom to choose, activists also successfully mobilized support for enshrining abortion rights in their states' constitutions.[114] For example, California, Michigan, Vermont and Ohio voters approved amendments to their states' constitutions to protect women's

111. Stewart Jay, *Ideologue to Pragmatist?: Sandra Day O'Connor's Views on Abortion Rights*, 39 ARIZ. ST. L.J. 777, 804–10 (2007).

112. *U.S. Supreme Court Overturns* Roe v. Wade*, Ends Constitutional Right to Abortion*, 29 NO. 07 WESTLAW J. CLASS ACTION 11, 11 (2022) ("A draft version of Alito's ruling indicating the court was ready to overturn *Roe* was leaked in May, igniting a political firestorm. The June 24 ruling largely tracked this leaked draft . . . Hours later, protesters angered by the decision still gathered outside the court, as did crowds in cities from coast to coast including New York, Atlanta, Chicago, Denver, Los Angeles and Seattle.").

113. *See id.*

114. *See* Murray & Shaw, *supra* note 84, at 774 ("The first such state was Kansas, where in August 2022 a resounding fifty-nine percent of voters rejected an amendment that would have removed abortion-rights protections from the constitution and allowed state legislators to ban or restrict the procedure. This trend only accelerated during the November 2022 election, when voters in California, Michigan, and Vermont enshrined abortion protections in their state constitutions.").

right to abortion.[115] And, in Kentucky and Kansas voters rejected efforts to amend abortion rights provided in their States' constitutions.[116]

D. Citizens United v. Federal Election Commission and Dark Money

The impact and influence of campaign-financing on electoral politics has a prolonged history within the United States.[117] Campaign-financing, with its far-reaching tentacles on swaying public opinion, is known to have assisted politicians into coveted political offices all over the country.[118] Especially in key decision-making positions such as Governorships at the state level, and Congressmen, Senators, and

115. *See id.* at 774–75 ("California voters added language to their constitution to explicitly guarantee [abortion rights and reproductive freedom]. Michigan voters adopted a constitutional amendment guaranteeing abortion rights and reproductive freedom, overriding a 1931 abortion ban that might otherwise have taken effect. And in Vermont, where a 2019 law already guaranteed abortion rights, voters used the referendum process to install an additional layer of protection . . . ."); Amy Grossberg, *Ohio Voters Approve Ballot Questions on Abortion, Recreational Marijuana*, WESTLAW HEALTH DAILY BRIEFING (Nov. 8, 2023) ("Voters in Ohio answered two health-related ballot questions Nov. 7[, 2023] with a resounding yes, amending the state constitution to establish a right to an abortion and other reproductive medical decisions . . . .").

116. *See* Murray & Shaw, *supra* note 84, at 774–75 ("Following Kansas's lead, Kentucky voters rejected a constitutional amendment that would have made it harder to challenge abortion restrictions. The amendment sought to direct 'question[s] of access to abortion to the state's Republican-controlled legislature and prevent[] [state] courts from . . . interpreting' the state constitution in favor of abortion rights.").

117. *See* Eduardo Dominguez, *Buying Your Congressman: How Unlimited Campaign Spending Undermines Democratic Values*, 46 W. ST. L. REV. 43, 44 (2019) ("The inception of the modern campaign finance laws began at the federal level with the Federal Election Campaign Act Amendment of 1974 ('FECA'). FECA contained four basic forms of regulation: (1) disclosure, (2) limits on the size of campaign contributions, (3) limits on campaign expenditures, and (4) public financing of campaigns.").

118. *See* John A. Fortunato & Shannon E. Martin, *The Supreme Court Perspective of Media Effects As Expressed in Campaign Finance Reform*, 14 TEX. WESLEYAN L. REV. 197, 207–08 (2008) ("National political parties could take the unregulated soft money and direct it to state organizations where elections were the most contentious. Soft money could be used to fund get-out-the-vote drives and generic party advertising, commonly referred to as issue advocacy advertising."); Dominguez, *supra* note 117, at 48–49 ("The term 'soft money' refers to contributions made to state and local candidates, or outside groups . . . The term 'hard money' refers to regulated contributions used in federal elections . . . The term 'dark money' refers to expenditures made for the purpose of influencing the decisions of voters, where the donor is undisclosed and the money used to make the expenditures cannot be traced-that is, the source of the money is not known.").

the President at the national level,[119] campaign-financing is regarded as a crucial asset, and the envy of both Republicans and Democrats.[120] Individuals capable of amassing large sums of campaign dollars are better positioned to utilize their financial resources in reaching and influencing a wider audience of voters regarding their political agenda.[121] This led many potential political office seekers to rely on individuals and Political Action Committees (PACs) as their primary campaign contributors. However, prior to 2010, while PACs could raise large sums of money, their contributions were restricted. According to the Brennan Center for Justice,

> Political action committees, known as PACs, [were] organizations that raise and spend money for campaigns, or whose major purpose is to support or oppose political candidates, legislation, or ballot initiatives. Traditional PACs [were] permitted to donate directly to a candidate's official campaign, but they [were] also subject to contribution limits, both in terms of what they can receive from individuals and what they can give to candidates. For example, PACs [were] only permitted to contribute up to $5,000 per year to a candidate per election.[122]

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119. *See* Federico Giustini, Note, *Amplifying the Small Donor Through Federalized Public Financing Infrastructure*, 31 CORNELL J.L. & PUB. POL'Y 331, 341–42 (2021) ("Whether it is a local congressional race, a statewide senate race, or the presidential race, the cost of campaigning for federal office has exploded. The Supreme Court in *Citizens United v. FEC* helped push election cycles to its current obscene spending heights. The decision severely weakened many pieces of federal regulations on campaign finance.").

120. *See* Michael S. Kang, *Hyperpartisan Campaign Finance*, 70 EMORY L.J. 1171, 1207–08 (2021) ("Campaign finance law itself has been a viciously partisan battlefield, with Democrats favoring regulation and Republicans staking out an aggressively deregulatory posture on campaign finance regulation . . . The major parties' positions on campaign finance law seem driven by ideology as much as partisan self-interest.").

121. *See* Dominguez, *supra* note 117, at 57–58 ("One example of this is the Koch brothers. During the 2018 midterm elections, a group ran by the Koch brothers planned to spend nearly $400 million that election cycle. The group's priority was prison reform . . . But this behavior was not limited to this one piece of legislation, as this group was also involved with the passage of the new tax law signed by the president in 2017 . . . [T]heir passage shows the level of influence big donors have in shaping the legislative agenda of elected politicians. Average voters, on the other hand, do not seem to have that level of influence on elected officials.").

122. Daniel I. Weiner & Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Jan. 29, 2025) https://www.brennancenter.org/our-work/research-reports/citizens-united-explained; Dominguez, *supra* note 117, at 45 ("PACs are limited to contributing $5,000 to a candidate committee [or $15,000 to national party

Given the importance of funding in political campaigns a conservative nonprofit group that labelled itself Citizens United challenged the "campaign finance rules after the FEC stopped it from promoting and airing a film criticizing presidential candidate Hillary Clinton too close to the presidential primaries."[123] Agreeing to listen to the challenge, the Supreme Court took the case and in January 2010 rendered a 5-4 ruling decision in favor of Citizens United[124] that granted corporations and outside groups the authority to spend unlimited amounts of money on elections,[125] "so long as they were not formally working with a candidate or a party."[126] Despite the Court's ruling against formal endorsement of a particular candidate or party, it seemed to open the floodgates of financial contributions[127] by the superrich and corporations who "promptly formed super PACs . . . that were allowed to take funds from 'dark money' groups-nonprofit that do not have to disclose their donors." [128] As the Brennan Center for Justice expresses, "perhaps the most significant outcomes of *Citizens United* have been the creation of super PACs, which empower the

committee] each election cycle; this includes primaries, general, or special elections . . . [And w]hen multiple affiliated PACs make a contribution, their contribution is aggregated and treated as one donor for the purposes of the contribution limits.").

123. *Id.*

124. *See* Citizens United v. FEC, 558 U.S. 310 (2010). In its decision, the Supreme Court reasoned that unlimited spending by wealthy donors and corporations would not distort the political process, because the public would be able to see who was paying for ads and "give proper weight to different speakers and messages." But in reality, the voters often cannot know who is actually behind campaign spending. *Id.* at 371.

125. *See id.*

126. RICHARDSON, *supra* note 16, at 76.

127. Dominguez, *supra* note 117, at 45 ("In 2002, Congress passed the Bipartisan Campaign Reform Act . . . commonly referred to as the McCain-Feingold Act. McCain-Feingold served two purposes: it (1) prohibited soft money contributions to national political parties, and (2) limited campaign financing to hard money . . . Eight years after the passage of McCain-Feingold, campaign finance law saw a dramatic change with the Supreme Court's ruling in *Citizens United* . . . Finally, during the same year, the D.C. Circuit Court in *Speechnow v. Federal Election Commission*, relying on *Citizens United*, struck down limits on individual contributions to independent expenditure political action committees. The aftermath of *Speechnow* gave rise to what is modernly known as Super PACs.").

128. RICHARDSON, *supra* note 16, at 76; *see* Weiner & Tau, note 122 ("Dark money expenditures increased from less than $5 million in 2006 to more than $300 million in the 2012 election cycle and more than $174 million in the 2014 midterms. In the top 10 most competitive 2014 Senate races, more than 71 percent of the outside spending on the winning candidates was dark money. These numbers actually underestimate the impact of dark money on recent elections, because they do not include super PAC spending that may have originated with dark money sources . . . .").

wealthiest donors, and the expansion of dark money through shadowy nonprofits that don't disclose their donors."[129] Regarding the expansion of dark money in electoral politics, Levitsky and Ziblatt explained the influence of dark money:

> Thanks, in part, to the loosening of finance campaign laws in 2010, outside groups such as American for Prosperity and the American Energy Alliance-many of them part of Koch billionaire family network-gained outsized influence in the Republican Party during the Obama years. In 2012 alone, the Koch family was responsible for some $400 million in election spending. Along with the Tea Party, the Koch network and other similar organizations helped elect a new generation of Republicans for whom *compromise* was a dirty word.[130]

Since the Supreme Court's decision in favor of *Citizens United*, "dark money" undoubtedly penetrated and undermined trust in the electoral process,[131] a revered participatory activity that extols one of the virtues of American democracy. The decision enabled corporations and billionaires to utilize their wealth to demonize political opponents and manipulate public opinion through bombardment of the airways, social media, print, and other media with advertisements that support preferable candidates that serve their interests.[132] By utilizing their financial resources to influence and sway the electorate, corporations and billionaires have undermined the political processes that result in the elections of individuals with questionable commitments to the interests of the majority of their constituents.[133]

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129. *Id.*

130. LEVITSKY & ZIBLATT, *supra* note 29, at 173.

131. *See* Dominguez, *supra* note 117, at 48–49 ("Although 'dark money' generally refers to the expenditures made by undisclosed donors [it] can also refer to money expended by political non-profit organizations or Super PACs. This is because political non-profit organizations are not legally required to disclose their donors, and such non-profits can choose not to.").

132. *See* Richardson, *supra* note 16, at 76.

133. Michael R. Siebecker, *The Incompatibility of Artificial Intelligence and* Citizens United, 83 OHIO ST. L.J. 1211, 1251 (2022) ("[M]any corporate executives pursue clandestine corporate spending. According to some estimates, during the 2020 presidential election over $1 billion in political expenditures came from 'dark money,' . . . Recent studies suggest corporations spent $750 million in dark money contributions during the 2020 election cycle.").

E. Affirmative Action and Students' Admissions to Postsecondary Institutions

Nearly two and a half centuries ago the founding fathers penned the Preamble to the Declaration of Independence which proclaims as one of the "self-evident" truths that, "All men are created equal."[134] Since that time, African Americans and other minority groups have yet to experience equality similar to that of White citizens.[135] It took years of struggles, organized protests, and legal challenges for African Americans and minorities to make incremental gains in civil liberties accorded to the dominant population sector.[136] A landmark decision by the Supreme Court that paved the way towards equality is *Brown v. Board of Education*, commonly referred to as *Brown*.[137] Decided on May 17, 1954, Justices unanimously ruled that State-sanctioned public schools segregation violated the Fourteenth Amendment[138] and was therefore unconstitutional.[139] Then, in 1955, the Court unanimously ruled that states should speedily begin desegregation.[140]

Serving as the catalyst for change, *Brown* proved to be the instrument that gradually opened the once closed doors to equal rights for African Americans, and citizens of color—for these groups

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134. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

135. *See* Regina Ramsey James, *How to Fulfill A Broken Promise: Revisiting and Reaffirming the Importance of Desegregated Equal Educational Access and Opportunity*, 68 ARK. L. REV. 159, 161 (2015) ("After all, we live in a nation that first declared its independence with such noble statements as 'all men are created equal,' and 'that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness' and yet identified black men and women as the property of their southern 'owners' and as merely 'three fifths of all other Persons.").

136. *See id*. at 170 ("Protests of the people welcomed in the 1960s, and courts and other institutions began to recognize that definitive measures would ensure the unrealized promises of equal opportunities materialized.").

137. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

138. *See* U.S. CONST. amend. XIV. According to the Fourteenth Amendment: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

139. *See Brown*, 347 U.S. at 495–96.

140. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955); James, *supra* note 135, at 168 ("If overturning decades of government-sanctioned discrimination was difficult, 'fashioning and effectuating' the remedy—actual desegregation—proved to be a far more arduous task. Unfortunately, the Court decided in *Brown II* to leave this task to the lower courts in the various southern states.").

experienced further gains ten years later with the passage of the Civil Rights Act of 1964.[141]

Prior to the passage of the Civil Rights Act, President Kennedy in 1961, sought to expand the rights of African Americans and other minority groups with his executive order of Affirmative Action.[142] Initially focused on the area of employment, Affirmative Action expanded into other areas by way of the Civil Rights Act of 1964, which arguably served as the policy catalyst in integrating African Americans and other minority groups into the mainstream of America's democratic society.[143]

Following President Kennedy's executive order, and the passage of the Civil Rights Act, various Universities began to utilize Affirmative Action to integrate their student body through the admission of African Americans and other minority groups.[144]

> Colleges and Universities began implementing affirmative action, or "race-conscious" admissions programs in the 1960s. For many higher education institutions,

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141. *See* James, *supra* note 135, at 171 ("Although a new beginning of sorts, the July 2, 1964 signing of the Civil Rights Act by President Lyndon B. Johnson, represented the culmination of a long battle waged, not only in Washington, but also in the deep South—the heart of segregation."); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 24 (1964).

142. *See* Emily Mae Czachor, *What is Affirmative Action? History Behind Race-Based College Admissions Practices the Supreme Court Overruled*, CBS NEWS (June 29, 2023, 5:07 PM),https://www.cbsnews.com/news/what-is-affirmative-action-history-college-admissions-supreme-court/ ("Affirmative action refers to any set of policies in place to ensure equal opportunity and prevent discrimination based on a broad range of identities, including race, sex, gender, religion, national origin and disability. Originally introduced on a large scale in the 1960s to address racial discrimination, affirmative action policies typically appear in employment and education contexts."); Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

143. *See* Kenneth Prewitt, *Racial Classification in America: Where DO We Go From Here*, 134 DAEDALUS 5, 8–9 (2005); Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1195 (2002) (Professor Andersen argues that "Racial integration of mainstream institutions is necessary both to dismantle the current barriers to opportunity suffered by disadvantaged racial groups, and to create a democratic civil society."); M. Jill Austin & Lara Womack, *The Future of Affirmative Action in Tennessee*, 35 TENN. BAR J. 12, 13 (1999) ("The initial goal of affirmative action was to increase the awareness of discrimination and to provide a means for employer self-examination so that discrimination could be avoided in the future.").

144. *See* James, *supra* note 135, at 160 ("Lawmakers implemented affirmative action programs and policies, which often used race as a deciding factor for inclusion. Under such plans, one's status as a member of an ethnic minority group historically subjected to disparate treatment gave an applicant, whether worker or student, special consideration for a desired slot.").

> affirmative action admissions policies were the only way that black students could gain access to otherwise completely segregated institutions. Unlike white college applicants who might be from a long line of college graduates, black students were often - and in some cases still are - the very first individual in their family to apply to a postsecondary institution. Legacy students (students whose parents, grandparents, or other relatives attended the school the applicant is applying to) were almost exclusively white. The benefits Colleges and Universities give to legacy students have historically been unavailable to the vast majority of black students even when legacy "points" were given on a racially neutral basis. Since inception, affirmative action programs have been characterized as everything from institutional 'reverse' racism, to necessary plans that seek to ameliorate decades of racism.[145]

As an increasing number of Colleges and Universities considered race as factor in students' admission, a few students and anti-Affirmative Action advocates began to challenge the respective institutions admissions' policies.[146] For example, in 1997, Barbara Grutter, a white student from Michigan was denied admission to the University of Michigan Law School despite her respectable college grades and LSAT score.[147] She sued the College which admitted that in its effort to increase diversity in the field of law, it does factor in race in admission decisions.[148] On June 23, 2003, the Supreme Court decided the

145. Christine Kiracofe, *Race-Conscious Admissions Policies in American Institutions of Higher Education: How* Students for Fair Admissions v. Harvard *Could Impact the Practice of Affirmative Action*, 2020 BYU EDUC. & L.J. 1, 4 (2020).

146. Diane Heckman, *U.S. Supreme Court Issues Fatal Knock-Out Punch as to the Use of Race as a Factor in a Holistic Approach in College and University Admissions Policies: The Back Story and Phase One Affirmative Action Cases*, 416 ED. L. REP. 749, 763 (2024) ("Remarkably, all the Supreme Court's 1978-2016 college admissions cases . . . were commenced by prospective white students, who were overrepresented at all the subject universities, alleging reverse race discrimination, predicated upon the Equal Protection Clause."); James, *supra* note 135, at 160 ("After years of dismantling by the United States court system, affirmative action programs, for the most part, are now defunct. Viewed as reverse discrimination, these programs are now considered just as egregious as the old 'separate but equal' laws and policies of Jim Crow.").

147. *See* Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

148. *See* Valerie Njiiri, Grutter v. Bollinger*: Race as a Factor in Public Higher Education Admissions Policies*, 55 MERCER L. Rev. 797, 810 (2004).

case that became known as *Grutter v. Bollinger*.[149] In a 5-4 decision the Court ruled in favor of the University.[150] As the American Bar Association stated, "The issue was whether a public school's consideration of race as a factor for admissions decisions violated the Fourteenth Amendment. Applying strict scrutiny, a narrow majority upheld the school's admissions policy as narrowly tailored to the school's compelling interest in achieving diversity."[151] And as Louis Pollak further explains about the decision, "[T]o be sure, Justice O'Connor opinion for the Court in *Grutter* was keyed to the deference to the school's perception of its compelling educational interest in assuring a diverse student body, rather than to 'striving for a racial balance to correct inequalities of opportunity.'"[152]

On June 29, 2023, the Supreme Court gutted *Grutter*, but did not overrule it in the cases brought by the conservative organization, *Students for Fair Admissions Inc. (SSFA) v. President and Fellows of Harvard College*, consolidated with *SSFA v. University of North Carolina (UNC)*.[153]

> Notably, the Court did not expressly overrule *Grutter* in its decision, as SFFA had called for. It instead applied *Grutter* and highlighted the "serious reservations … [it] had about racial preferences" and the limitations it placed on race-based admissions programs, including its restriction on using race for stereotyping and its emphasis that race-based admissions programs "must have reasonable durational limits" and that such "deviation from the norm of equal treatment" must be a "temporal matter." Additionally, the Court in its majority opinion did not specifically evaluate the admissions programs under Title VI — which prohibits

149. *Id.* at 799–800 ("In a 5-4 decision, the Court affirmed the court of appeals decision and determined that the Law School's goal of attaining a diverse student body was a compelling interest. The Court held that the Law School's race-based admissions program did not violate the Equal Protection Clause because it was narrowly tailored, and the educational benefits from a diverse student body were a compelling interest.").

150. *Id.*

151. *See* Quimbee, *Promoting Diversity? It's Constitutional! (Grutter v. Bollinger)*, AM. BAR ASS'N (Apr. 6, 2018), https://www.americanbar.org/groups/law_students/resources/on-demand/quimbee-grutter-v-bollinger/.

152. Louis H. Pollak, *Race, Law & History: The Supreme Court from "Dred Scott" to "Grutter V. Bollinger"*, 134 DAEDALUS 29, 41 (2005).

153. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 191–92 (2023).

> discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance — instead reciting the principle that discrimination that violates the Equal Protection Clause committed by an institution that accepts federal funds also violates Title VI.[154]

Although the Supreme Court did not overrule *Grutter,* its decision served to diminish the effectiveness of postsecondary institutions reliance on Affirmative Action to bring about racial diversity among their student populations.[155] It is therefore not surprising that the Court's decision served to legitimize the erosion of the gains made African Americans and other minority groups in effectively competing with Whites for labor market occupations that the acquisition of education from prestigious colleges and universities made possible.[156] The importance of higher education for socio-economic advancement in society is well documented, and a host of research has validated,[157]

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154. Sidley, *U.S. Supreme Court Ends Affirmative Action in Higher Education: An Overview and Practical Next Steps for Employers*, SIDLEY AUSTIN LLP (Aug. 2, 2023), https://www.sidley.com/en/insights/newsupdates/2023/08/us-supreme-court-ends-affirmative-action-in-higher-education.

155. *See* Arie Wright et al., *Race-Conscious Programs in Education*, 25 GEO. J. GENDER & L. 829, 850–51 (2024) ("There were also suggestions that *Grutter* required race-based admissions programs to continue for at least 5 more years. The majority, however, saw this as a misinterpretation of *Grutter*, and believed instead that this was the Court's opinion, not a fact, that race-based preferences would be unnecessary by 2028 . . . Harvard[] [claimed] that the admissions programs do not require a strict end point . . . [but] the majority view[ed] this as a misinterpretation of precedent. While *Grutter* allowed for periodic reviews to determine if racial preferences were still necessary, the holding ultimately required these programs to eventually end.").

156. *See* Tung Yin, *Is "Diversity" Diverse Enough?*, 21 ASIAN AM. L.J. 89, 94–95 (2014) ("Minority graduates from prestigious colleges were 'much more likely than whites to hold leadership positions in civic and community organizations, especially those involving social service, youth, and school-related activities.' In a similar vein, other scholars have argued [it] encourage[s young minorities] to pursue similar career paths . . . [and] communities will benefit [from] those minority graduates . . . as doctors, lawyers, and other professionals"); Wright et al., *supra* note 155, at 869 ("Following the Court's ruling in *SFFA*, using diversity as a consideration for college admissions is no longer a viable option for schools. Without a clear landscape to provide guidance for colleges and universities to follow, the likelihood of future litigation remains high, and this area of law remains unsettled.").

157. *See* Asees Bhasin & Gregory Curfman, *Gutting* Grutter*: The Effect of the Loss of Affirmative Action on Diversity Among Physicians*, 20 IND. HEALTH L. REV. 1, 15–16 (2023) ("In their brief opposing the grant of certiorari, Harvard University claimed that if it were to abandon all consideration of race in their admissions process, African-American and Hispanic enrollment would decline from 14% to 6% and 14% to 9%, respectively.").

that the acquisition of education from prestigious postsecondary institutions increase the probability of success.[158] This is readily verifiable from an examination of the Alma Maters current, and a majority of past Justices.[159]

Denied equal rights and opportunities for centuries, African Americans and other minority groups had to incrementally claw their way into the privileges of American citizenry granted to, and enjoyed, by Whites.[160] This reality calls into question the current Supreme Court's opposing decisions that previous Justices of the said Court rendered justifiable to promote equality – opinions that make way for opportunities of success by a sector of the citizenry that historically experienced the denial of such rights and privileges in America's democratic society.

F. LGBTQ+ Rights

LGBTQ+ activism toward the advancement of American democracy has, unfortunately, intentionally or unintentionally been underplayed—even though numerous individuals within this population sector have served admirably in the military, various branches of government, educational institutions, corporations, and other occupations

158. *See* Edgar G. Epps, *Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO ST. L.J. 755, 758–59 (1998) ("When such disadvantaged students [] attend graduate or professional school, they are more likely to attend institutions with relatively low prestige rankings. The prestige rankings of the institutions from which individuals obtain doctoral degrees affect, in turn, the prestige of the institutions by which they are employed.").

159. *See* Jeh Charles Johnson, *The Demise of Affirmative Action: Where Do We Go from Here?* N.Y. STATE BAR ASS'N (Aug. 22, 2023), https://nysba.org/the-demise-of-affirmative-action-in-higher-education-where-do-we-go-from-here/?srsltid=AfmBOopAB8yiLwe8_nioXC0qxU-oLnm21PhJqi0mXsz8SjkRHse0JU9Ly ("There is every reason to believe that corresponding backslides in diversity will occur in the professions that depend on a diverse pipeline of graduates from higher education. As Justice Sotomayor noted in her dissent, eliminating affirmative action in higher education will cause a return to 'a leadership pipeline that is less diverse than our increasingly diverse society, reserving 'positions of influence, affluence, and prestige in America' for a predominantly white pool of college graduates.'").

160. *See* Katy Newland, *A Firm Grip on Affirmative Action*, 30 VT. BAR J. 49, 50 (2004) ("It is obvious that equality has not yet been reached . . . Granting modest advantages to minorities and women is a fair and deserving act considering the centuries of discrimination that benefited white males. Affirmative Action is a concept that was made in hopes to level the playing field for all Americans . . . In the Grutter v. Bollinger case the court ruled the policy shall not be permanent.").

integral to the nation's political stability and advances.[161] Such they did, without disclosing their sexual orientation or gender identification for fear of discrimination, reprisals, or outright ostracism which would have resulted in their denial of opportunities, and abridge the totality of their democratic rights and privileges as legitimate citizens.[162]

Like other discriminated and disenfranchised sectors of the population, equal protection for the LGBTQ+ community[163] came about incrementally through governmental policies, but more so by way of the Supreme Court's jurisprudence, the first of which is said to be the decision rendered in *Romer v. Evans* (1996).[164] In expressing the majority opinion, Justice Kennedy wrote that Colorado's constitutional amendment violated the Equal Protection Clause by "classif[ying]

161. *See* Scott De Orio, *Bad Queers: LGBTQ People and the Carceral State in Modern America,* 47 L. & SOC. INQUIRY 691, 695 (2022) ("[L]ike the strategies of LGBTQ rights activists—historical narratives have been shaped by the political necessity to distance LGBTQ identity from the stigma of sexual 'deviance' with which it was previously associated as a necessary precondition for positing LGBTQ people as legitimate and deserving of the rights and benefits of full citizenship."); Kyler J. Palmer, Bostock, *Backlash, and Beyond the Pale: Religious Retrenchment and the Future of LGBTQ Antidiscrimination Advocacy in the Wake of Title VII Protection*, 15 DEPAUL J. FOR SOC. JUST. 1, 2, 78 (2022) ("Early LGBTQ rights groups of the homophile movement advanced assimilationist goals of acceptance into, rather than dismantling of, preestablished societal institutions . . . By returning to the grassroots beliefs of visionary LGBTQ advocates—that human rights are not only basic rights, but essential rights that include racial justice, women's reproductive freedom, sexual freedom, accessibility, and other basic liberties—our house will be stronger and more inclusive").

162. *See* Christopher R. Leslie, *The Geography of Equal Protection* 101 MINN. L. REV. 1579, 1604–05 (2017) ("While gay Americans have achieved greater political and social acceptance as they have come out of the closet and disproved prejudice-based stereotypes, any absolute gains are offset and diminished by the political influence of opponents of gay rights who are often more powerful, with deep pockets and an obsession for opposing equal rights. Because of this organized opposition, gays must work harder and longer to achieve basic rights, which suggests that gays suffer a relative deficit of political power.").

163. *See* Arthur S. Leonard, *Thoughts on* Lawrence v. Texas, 11 WIDENER L. REV. 171, 178 (2005) ("[I]t was probably equal protection that . . . related more directly to many of the remaining gay rights issues, notably other forms of governmental discrimination, including marriage, parental rights (custody, visitation and adoption), military service, immigration rights for partners, equal benefits rights, tax status discrimination, and so forth.").

164. *See* Romer v. Evans, 517 U.S. 620, 623 (1996); Leonard, *supra* note 163, at 177 ("[T]he 1996 decision in *Romer v. Evans* marked the first major gay rights victory in the Supreme Court in a generation. The opinion by Justice Kennedy, declaring unconstitutional Colorado's infamous Amendment 2, again contained language suggesting sympathy for the right of gay people to be treated as equal citizens of the United States and not to be singled out for invidious treatment by the government.").

homosexuals not to further a proper end but to make them unequal to everyone else . . . A State cannot so deem a class of persons a stranger to its laws."[165]

While *Romer v. Evans* decision rendered that discrimination based on someone's sexual orientation violated the Equal Protection Clause, *Lawrence v. Texas* (2003)[166] ruling offered protection to homosexuals regarding their sexuality within the confines of their own homes.[167] Ten years later, LGBTQ+ individuals made civil rights gains in *United States v. Windsor* (2013)[168], and *Obergefell v. Hodges* (2015)[169] both of which dealt with same sex marriage.[170] And, in *Bostock v. Clayton County* (2020)[171] the Supreme Court ruled that Title VII of the Civil Rights Act protects individuals from discrimination because of their sexual orientation, or gender identity.[172]

As evidenced from the above cited cases, it took almost two decades for LGBTQ+ individuals to legally be granted some of the democratic rights and privileges enjoyed by heterosexual citizens.[173]

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165. *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

166. *See* Lawrence v. Texas, 539 U.S. 558, 569 (2003).

167. Leonard, *supra* note 163, at 171 ("[B]y eliminating laws against consensual, private acts of sodomy by adults, the decision removes the stigma of criminality from gay sex, opening up the possibility that lesbians, gay men, and bisexuals can attain full and equal rights of citizenship in this country").

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

169. Obergefell v. Hodges, 576 U.S. 644, 652 (2015).

170. *See* Naomi Seiler et al., *Gender Identity, Health, and the Law: An Overview of Key Laws Impacting the Health of Transgender and Gender Non-Conforming People*, 16 ST. LOUIS U.J. HEALTH L. & POL'Y 171, 192 (2023) ("In *United States v. Windsor*, the Court, striking down a section of the Defense of Marriage Act which defined 'spouse' as a person of the opposite sex, noted that laws of an 'unusual character' warrant more careful scrutiny, but did not establish exactly what level of scrutiny applies to laws that discriminate based on sexual orientation. Two years later, in *Obergefell v. Hodges*, the Court recognized the fundamental right of same-sex couples to marry under the Fourteenth Amendment, but declined to define sexual orientation as a suspect or quasi-suspect class under the Equal Protection Clause.").

171. Bockston v. Clayton County, 590 U.S. 644 (2020).

172. *See* Seiler et al., *supra* note 170, at 193 ("[T]he Supreme Court held that firing an employee 'merely for being gay or transgender' constitutes discrimination 'because of such individual's . . . sex' in violation of Title VII of the Civil Rights Act of 1964 . . . While Bostock does not directly implicate the Equal Protection Clause, the majority stated that 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'").

173. Sydney Jackson, *Dobbs' Impact on LGBTQ+ Rights: Where Do We Go from Here?*, 101 U. DET. MERCY L. REV. 43, 64 (2023) ("A monumental triumph in LGBTQ+ rights, the Supreme Court in 2003 invalidated state anti-sodomy laws that criminalized same-sex sexual intimacy holding that it violated the Due Process

However, it was not long thereafter that the Supreme Court began to impinge on the civil liberties the LGBTQ+ community legitimately gained as American citizens.[174] For example, in *303 Creative LLC v. Elenis* (2023)[175] the Supreme Court ruled that the Colorado law which prohibited discrimination against someone's because of his/her sexual orientation violated the free speech right of plaintiff Lorie Smith who was interested in creating websites only for heterosexual couples with explicit statements that they are not for same sex couples.[176] Interestingly, the Supreme Court took up the case even though Lori Smith had not yet established a website, nor was she sued by anyone for her intent to exclude same-sex wedding websites.[177] The Court's ruling potentially raises corollary concerns for businesses that provide services considered expressive,[178] but serve to embolden proponents seeking legislation targeting the LGBTQ+ community.[179]

Clause . . . To curb the 'history and tradition' argument from the dissent, the majority pointed out that, 'American laws targeting same-sex couples did not develop until the last third of the 20th century.'").

174. *Id.* at 64 ("The decision in *Lawrence* may also be in jeopardy following *Dobbs* . . . An overturn of *Lawrence* would activate dormant anti-sodomy laws in states that still have them on their books despite the Supreme Court's decision in 2003. Fourteen states such as Florida, Georgia, Maryland, and Michigan have 'trigger laws' which would automatically become effective with the overruling of *Lawrence*. These inactive laws ban same-sex intimacy, including oral and anal sex").

175. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 579–82, 603 (2023).

176. *See* Jackson, *supra* note 173, at 65–67 ("Lorie Smith, a web designer who believes a marriage should be reserved for a union between a man and a woman, claimed the Communication Clause of Colorado's Anti-Discrimination Act (CADA) violated her constitutional rights because she could not refuse to provide services to gay couples . . . [T]he Court held that the First Amendment is violated when the government seeks to compel an individual to say or do something when it prefers to remain silent or force that individual to include differing ideas that do not match their own beliefs.").

177. *Id.* at 66.

178. *See* Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 565, 590 (2024) ("[For example, a] bar may prohibit female customers out of the concern that serving women alcohol demonstrates approval of women being out on the town rather than caring for their children, or encouragement of sexual immorality. Serving people from other countries may offend a xenophobic businessowner who is concerned that providing these services sends a message that immigrants are welcome in America. These refusals . . . may now be backed by the force of First Amendment protections under the logic of *303 Creative*.").

179. *See* Kimberly Jade Norwood & Jaimie Hileman, *The Tragic Costs of "Protecting" Trans Youth*, 73 WASH. U. J.L. & POL'Y 203, 206–07 (2024) ("The decision in *303 Creative LLC* . . . will roll back the gains of LGBTQ+ communities . . . [given] newly proposed bills and recently enacted laws specifically targeting

By its decision in *303 Creative LLC*, the Supreme Court obviously displayed a willingness to stymie the expansion of LGBTQ+ citizens civil liberties.[180] Hence, the decision brings to the fore the current Court's inclination to impinge upon, if not retard, the democratic rights and freedoms prior Supreme Court's adjudication on behalf of the LGBTQ+ community – rights and privileges already enjoyed by the larger citizenry of this nation.[181]

IV. DISCUSSION AND CONCLUSION

The question posed in the introduction of this paper as to whether the Supreme Court has contributed to the erosion of democracy seems to find support in the foregoing decisions discussed. A careful examination of the Court's decisions presented in various sections of this paper suggests a three-pronged approach in the Court's rulings that contributed to the erosion of democracy, (i) through the overturning of precedent[182] such as *Roe*, which several past and some current

LGBTQ+ people generally, and Trans people more specifically . . . [such as] banning the use of pronouns that do not align with a person's assigned sex at birth; laws and policies making it difficult . . . to legally change one's name . . . bans on bathrooms and locker rooms and bans applicable to sports teams; laws banning Trans children from accessing gender-affirming care; and finally, several laws legalizing government censorship of books [on] sexual orientation or gender identity in schools.").

180. *See* Heather Walter-McCabe, 303 Creative*: The Public Perils of Ignoring Public Health Harms in LGBTQ Rights Cases*, 27 J. HEALTH CARE L. & POL'Y 188, 216 (2024) ("The Court's recent decisions illustrate a pattern where the Court holds that dignitary harms and associated public health harms do not rise to the level of harm occurring when a person is required to provide public accommodations (too often framed as expressive speech) to LGBTQ individuals . . . Even without mentioning the harms, the Court sends a clear message to LGBTQ communities—your harm is not a necessary consideration for analysis in the Court's rulings.").

181. *See* Mollie McQuillan et al., *A Solution in Search of A Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX*, 33 MARQ. SPORTS L. REV. 195, 215–16 (2022) ("If the anti-LGBTQ+ cases eventually advance to the U.S. Supreme Court, it remains to be seen if this more extreme conservative Court might hinder progress on LGBTQ+ rights as well. If the Supreme Court did take up the question of athletic bans for transgender student-athletes, it could be a giant step backwards for civil rights because the vast majority of state and federal court decisions have ended in favorable results for transgender students.").

182. "Precedent refers to a court decision that is considered an authority for deciding subsequent cases involving identical or similar facts, or similar legal issues. Precedent is incorporated into the doctrine of stare decisis and requires courts to apply the law in the same manner to cases with the same facts. Some judges have stated that precedent ensures that individuals in similar situations are treated alike instead of based on a particular judge's personal views . . . Precedent is generally established by a series of decisions. Sometimes, a single decision can create precedent. For example, a single statutory interpretation by the highest court of a state is

Justices considered important; (ii) by nibbling away at policies promulgated by Congress—e.g., Civil Rights Act, and Affirmative Action—that expanded democratic rights and privileges to sectors of the citizenry long denied such prerogatives; and (iii) by weakening electoral policies relating to gerrymandering districts, and permitting unlimited political campaign contributions—dark money—both of which serve to dilute the impact and effectiveness of the voting population of their democratic rights to elect representatives who champion their causes and concerns.

Increasingly, within the last twenty-five years, scholars, legal analysts, and members of the lay public[183] have called into question the legal-rational interpretations of some of the Supreme Court's decisions, especially in instances where a slim majority of five Justices determined the outcome.[184] According to several legal scholars, the current Justices who share conservative ideologies of legal jurisprudence have swayed the Court onto a path that contributes to the erosion, instead of upholding, the system of democracy.[185] Frequently,

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generally considered originally part of the statute." *Precedent*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/precedent (last visited Apr. 10, 2025).

183. *See* James L. Gibson & Gregory A. Caldeira*, Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 207–08 (2011) ("Most Americans have a fairly realistic view of how Supreme Court justices make their decisions . . . Most believe that judges have discretion and that judges make discretionary decisions on the basis of ideology and values, even if not strictly speaking on partisanship.").

184. *See* Vincent Martin Bonventre, *Supremely Divided: Court's Conservative Bent Intensifies*, 93 N.Y. ST. BAR J. 6, 8 ("When considering those appeals presenting issues having clearly opposing political or social sides – i.e., 'conservative' versus 'liberal' – the court's decisional record was more than 60% conservative. Among the individual justices, the ideological spectrum ranged from Justice Samuel Alito, who voted for the conservative position 90% of the time, to Justice Sonia Sotomayor, who did so on only 6% of the issues . . . Contrast the voting records of the three liberal justices who remain since the loss of Ruth Bader Ginsburg—Sotomayor, Stephen Breyer and Elena Kagan – with any of the others. The most politically conservative record among the liberals was that of Justice Kagan at 18%. The least politically conservative record among the conservatives on the Court was that of Chief Justice Roberts at 68%.").

185. *See* Pamela S. Karlan, *The New Counter Majoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2354–55 (2021) ("[Democracy is] experiencing a high level of polarization; and [the country] is confronting 'constitutional rot.' In such a world, 'the Supreme Court may be a vanguard of partisan policy, but is unlikely to be a vanguard of democracy protection and constitutional renewal.' The parties 'disagree about what democracy actually is,' and 'as a result, when Justices on a polarized Court promote their appointing party's constitutional values, they may also be helping that party entrench itself politically.'"); Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 763 (2022) ("Because traditional avenues that could be used to

their criticisms focus on the Court's decisions that stripped civil rights gains, those that support the promulgation of voters' suppression policies, or the overturning of precedents—decisions instrumental in weakening the democratic rights and privileges of citizens.[186]

Given the Court's recent historic rulings, focus of criticisms came to be centered on Justices Alito's and Thomas' judicial objectivity[187] whose written opinions militate against the privileges granted to minorities, African Americans, women and citizens of color.[188] Specifically with regard to Justice Alito, the American Civil Liberties Union (ACLU) noted that, "During his 15 years on the federal bench, Alito has regularly used his judicial discretion to narrow and restrict civil rights and civil liberties protections, illustrating a broader pattern of

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defend democracy, from federal legislation to the Supreme Court to state governments, have proven unwilling or unable to do so, the legal ethics regime stands as an unlikely, but highly capable, guardrail between American democracy and rising illiberalism."); Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 L. & SOC. INQUIRY 314, 315–22 (2023) ("Democracy is in crisis worldwide . . . If the quality of courts is eroding alongside other democratic institutions, then perhaps some good-governance court reforms would help shore them up or recommit them to their founding mission."); *see generally* Breen, *supra* note 8.

186. *See* Karlan, *supra* note 185.

187. *See* Jimmy Hoover, *Rep. Ocasio-Cortez Moves To Impeach Justices Thomas and Alito*, NAT'L L.J. (July 10, 2024, 5:51 PM), https://www.law.com/nationallawjournal/2024/07/10/rep-ocasio-cortez-moves-to-impeach-justices-thomas-and-alito/?slreturn=20250423184929 ("Progressive Rep. Alexandria Ocasio-Cortez introduced articles of impeachment Wednesday for Justices Clarence Thomas and Samuel Alito Jr., a provocative move destined to fail in the Republican-controlled House but another sign of political backlash against the U.S. Supreme Court by the left . . . Ocasio-Cortez' impeachment articles accuse Thomas and Alito of 'high crimes and misdemeanors' in connection with undisclosed gifts from billionaire benefactors, and the justices' failure to recuse from cases involving the Jan. 6, 2021, insurrection.").

188. *See* Diane Heckman, *U.S. Supreme Court Issues Fatal Knock-Out Punch as to the Use of Race as a Factor in a Holistic Approach in College and University Admissions Policies: Phase Two Affirmative Action Cases Eradicating Such Usage in College*, 417 ED. LAW REP. 1, 13-14 (2024) ("As one commentator recently opined— capturing the role and influence of the Court, 'Troublingly, the decisions in Kennedy and other recent cases from this new Court majority call into question the current Court's commitment to stare decisis and the stability of the law under this Court.' Two Supreme Court decisions rendered during June 2022 illustrating that rejection of legal precedent were: Dobbs v. Women's Health Organization, and N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, with majority decisions penned by respectively Justices Alito and Thomas. Not surprisingly, this same super-conservative block supported the evisceration of affirmative action in post-secondary education").

privileging government power over individual rights."[189] And, Michael Waldman went beyond the ACLU's comments when he wrote that, "Alito has long been inscrutably angry, unwaveringly dogmatic, and the most predictably partisan of all justices . . . his growing brazenness still shocks."[190]

Regarding Justice Thomas, John Blake explained that

> Thomas has consistently ruled against civil rights programs that attempt to address the legacies of slavery and Jim Crow segregation on behalf of Black people. He called such programs "racial tinkering." . . . [He also has said] that programs designed to make up for racism are demeaning and patronizing to Black people – and unconstitutional, because the Constitution is "colorblind."[191]

Increasingly, discussion and debates have intensified among court observers questioning the ideology of these Justices who deflect the criticisms levelled against them especially with regards to their views on the January 6, 2020, insurrection,[192] and more recently,

189. *ACLU Says Alito Confirmation Would Erode Balance of Powers, Harm Civil Rights and Liberties*, *Threaten O'Connor Legacy*, ACLU (Jan. 19, 2006, 12:00 AM), https://www.aclu.org/press-releases/aclu-says-alito-confirmation-would-erode-balance-powers-harm-civil-rights-and.

190. Michael Waldman, *Alito and His Upside-Down Flag Make the Case for Supreme Court Term Limits*, BRENNAN CTR. FOR JUST. (May 22, 2024), https://www.brennancenter.org/our-work/analysis-opinion/alito-and-his-upside-down-flag-make-case-supreme-court-term-limits?.

191. John Blake, *Here's Why Many Black People Despise Clarence Thomas. (It's Not Because He's a Cconservative.)*, CNN (Sept. 11, 2023, 6:00 AM), https://www.cnn.com/2023/09/11/politics/clarence-thomas-black-people-blake-cec/index.html.

192. *See* Katie Buehle, *Alito Flag Report Fuels Ethics Debate, But Likely No Recusal*, LEXISNEXIS L. 360 (May 17, 2024), https://www.law360.com/pulse/articles/1838359/alito-flag-report-fuels-ethics-debate-but-likely-no-recusal ("Democratic lawmakers and court watchdog groups reacted to the Times' report by renewing their calls for Supreme Court ethics reform, while specifically imploring Justice Alito to recuse himself from all cases related to the 2020 election."); Nathan M. Crystal, *Recusal of Judges and Justices Is All in the News*, 33 S.C. LAWYER 18, 18 ("Recusal of judges is a hot topic these days. Various news services recently reported that the House Committee investigating the events of January 6 has reviewed more than two dozen text messages between Virginia Thomas, the wife of Supreme Court Justice Clarence Thomas, and former President Donald Trump's then Chief of Staff, Mark Meadows, in which Ms. Thomas urged Mr. Meadows help President Trump to 'stand firm' for 'constitutional governance' that was at risk of a 'Heist' from the 'Left'").

presidential immunity, decisions that serve to weaken democracy.[193] In upholding the American system of democracy, Justices' adherence to the rule of law are crucial, especially since their views can sway the Court's decisions in favor, or against, the expansion of democratic rights and privileges to all citizens, without bias or discrimination based on race, gender, religious faith, or national origin.[194] Given such view, many Court observers have called into question several decisions by the "Robert's Court" which they equate with "conservative activism."[195] As Geoffrey Stone brought to the forefront over a decade ago:

> Recent cases that illustrate "conservative activism" include decisions that aggressively interpret the First Amendment to invalidate restrictions on commercial advertising and campaign finance regulations, aggressively interpret the Equal Protection Clause to invalidate affirmative action, aggressively interpret the Takings Clause to invalidate laws regulating property, and aggressively interpret the principle of federalism to invalidate federal laws dealing with such issues as domestic violence, handguns, the environment, and age discrimination [aggressively interpret the Fourteenth

193. *See* Jimmy Hoover, *Supreme Court, Establishing Presidential Criminal Immunity, Makes History*, ALM (July 2, 2024, 6:45 AM), https://www.law.com/supremecourtbrief/ ("The ideologically split, 6-3 decision is the most significant ruling on the question of presidential criminal immunity in the country's history . . . [holding] that former presidents enjoy broad, and in many cases, 'absolute immunity' over their official actions taken while in office.").

194. *See* Sheldon Whitehouse, *Knights-Errant: The Roberts Court and Erroneous Fact-Finding*, 84 OHIO ST. L.J. 837, 892 (2024) ("The Supreme Court's claim to supremacy in constitutional interpretation is at its weakest when the interpretation is premised on bogus facts . . . When fact-finding is done in an unconstrained manner, when the facts arrived at are indefensible, and when they are used to reach a preferred outcome, this signals wrongful trespass into the policymaking function the Constitution assigns to the political branches . . . The American people deserve a Court that plays by the rules.").

195. *See id.* at 839–40 ("Over the past decade or so, the Supreme Court's Republican-appointed majority has had a near-uniform pattern of handing down rulings benefitting identifiable Republican donor interests. These decisions have involved hot-button issues like reproductive rights, immigration, health care, voting rights, affirmative action, civil rights, workers' rights and union fees, campaign finance, 'dark money,' and climate change. The Roberts Court from 2005 through 2019 furnished more than 80 5-4 wins for Republican donor interests—often abandoning self-professed jurisprudential principles to reach those results.").

> Amendment to invalidate a woman's right to choose whether to have abortion, [my addition]].[196]

As evidenced from the above list of decisions, one can apprehend from the issues discussed in this paper how several rulings by the Supreme Court mirror that of "conservative activism."[197] Such activist ideological predisposition played a vital role in the rendering of decisions that obstructed societal relations of accommodation, and social harmony, while contributing to the erosion of democratic freedoms made possible by decisions previous Justices of the Court rendered.

Towards the Court's continuation along an "activist" decision path, Paul Smith forewarns that, "Given the threats still looming, and the Roberts Courts poor track record on democracy issues, it's time to find new ways to defend and strengthen democracy so every voter can make their voice heard and know their vote counts."[198]

It is noteworthy that Justices are the only governmental officials who hold life-time appointments.[199] Hence, this raises concerns as to: (i) Whether individuals who surpass the retirement age of employees in all other government-civil service occupations, can objectively and effectively carry out their requisite functions, especially at advanced ages that medical sciences confirmed to be strongly correlated with diminished intellectual and physical capabilities; and (ii) Whether life-time appointments help to promote judicial activism since such insulates Justices from dismissal?

It is noteworthy that on July 29, 2024, President Biden shifted his own policy stance in calling for: (i) term limits to Supreme Court justices, (ii) an amendment to the Constitution that no one was above the

196. Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REVIEW 1533, 1549 (2008).

197. Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 205 (2015) ("A separate signal of the conservatives' activism is the number of 5-4 decisions in controversial cases. The conservative justices have dramatically altered the legal landscape via these bare-majority decisions, a pattern suggesting that ideology, not consensus, is their true motivation.").

198. *See* Smith, *supra* note 62.

199. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 777 (2006) ("The Framers followed the eighteenth-century English practice, which developed in the wake of the Glorious Revolution of 1688, of securing judicial independence through life tenure in office for judges.").

law, and (iii) a binding code of conduct for the justices, which presumably would include a duty of impartiality.[200]

In the United States, a nation with a population of diverse ethnic, racial and color complexities, existing in a dynamic confluence of distinct cultural proclivities, the question emerges: Is democracy the monopolistic right of a singular ethnic group? Whether the answer is "Yes" or "No," either response calls into question whether we are within the throes of the passing of American Democracy - given the ruling trajectory of the current Supreme Court? On this issue, the seated jury is all Americans.

200. *See* Aileen Graef, Julia Benbrook, John Fritze & Arlette Saenz, *Biden Calls for Major Supreme Court Reforms, Including Term Limits, at Civil Rights Act Event Monday*, CNN (July 29, 2024, 7:40 PM), https://www.cnn.com/2024/07/29/politics/biden-supreme-court-reform/index.html ("'I have great respect for our institutions and the separation of powers laid out in our Constitution,' Biden said . . . 'But what's happening now is not consistent with that doctrine of separation of powers.' Biden's proposals — a constitutional amendment stripping the president of immunity for crimes committed while in office, term limits for Supreme Court justices, and a binding code of conduct for the high court — stand little chance of going anywhere with a divided Congress.").