FROM PROTECTION TO EMPOWERMENT

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ABSTRACT

To those alarmed by the current state of the Court and its jurisprudence, Jack Balkin's The Cycles of Constitutional Time *sounds a hopeful note—this too shall pass: the current regime, the constitutional rot, the polarization. This Essay proposes an addition to the list of things that will hopefully pass away—the minority protection model of rights jurisprudence. The minority protection model grew out of American apartheid at a time when being Black was the trigger for oppression and the wholesale denial of citizenship. In contrast, this Essay notes that we are now living in a time when denials of citizenship are partial and when oppression and privilege intersect in the bodies of the traditionally marginalized as well as the traditionally privileged. This Essay discusses how this relative oppression and "hybrid intersectionality" have caused modern rights protection to turn on subjective evaluations of the salience of a given characteristic rather than on objective marginalization. It argues that modern rights protection now depends on power as much as need—regardless of whether one uses the liberal or conservative iteration of the minority protection model.*

This Essay seeks to explain this shift from protection to political power in terms of jurisprudential tribalism, in which jurists' desires for peer group affirmation dictates, often unconsciously, their understandings of which characteristics are salient and warrant protection in a conflict. It uses the opinions and nonanswer of Masterpiece Cakeshop *to illustrate the challenges of hybrid intersectionality and the influence of the Justices' tribal affiliations on their evaluations of which rights are implicated in a case. This Essay concludes by calling for a shift in rights jurisprudence from a focus on minority protection to a focus on minority power sharing, noting that a framework of empowerment is better able to engage intersectional identities and combat jurisprudential tribalism.*

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INTRODUCTION

> *You know, I bring things up like the judges right? Supreme Court Justices, we have to get — you know, you could have as many as four? I guess it's a scenario where this president could pick five Supreme Court Justices.*
>
> *And if you pick two that are left, left, left, it's going to be a disaster for our country. . . .*
>
> . . . .
>
> *. . . This next four years is where you will pick more Supreme Court Justices than anybody has every [sic] had the opportunity to do. Believe me, I'll make you very proud of those Justices everyday [sic].*[1]
>
> —Donald Trump

In 1943, Justice Jackson declared that "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[2] This, of course, is not true. Our current fundamental rights regime depends very much on the outcome of elections. During his 2016 presidential campaign, Donald Trump noted in a Virginia rally that, "[e]ven if you can't stand Donald Trump, even if you think I'm the worst, you're going to vote for me. You know why? Judges."[3] He was not alone in this view. James Dobson captured the views of a sizeable portion of the conservative base when he declared:

> In many ways, this [2016 election] is a single-issue election because it will affect every dimension of American life: the makeup of the Supreme Court. Antonin Scalia's sudden death made this election the most significant of our lifetime. The next president will nominate perhaps three or more justices whose judicial philosophy will shape our country for generations to come.[4]

To a lesser extent, Democratic candidates also made the presidential election a popular referendum on our fundamental rights jurisprudence. Hillary Clinton noted that "the next president could get as many as three appointments . . . . It's one of the many reasons why we can't turn the White House over to the

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[1] Donald Trump, Speech at Wilmington, North Carolina, Campaign Rally (Aug. 9, 2016,), http://time.com/4445813/donald-trump-second-amendment-speech/.

[2] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[3] Igor Bobic, *Donald Plays His Trump Card with Fretful GOP: Remember the Supreme Court*, HUFFINGTON POST (Aug. 2, 2016, 2:44 PM), https://www.huffingtonpost.com/entry/donald-trump-supreme-court_us_57a0b0dde4b0e2e15eb72daa [https://perma.cc/3JKU-WJR8].

[4] CT Editors, *James Dobson: Why I Am Voting for Donald Trump*, CHRISTIANITY TODAY, Oct. 2016, at 58.

Republicans again."[5] Clinton further emphasized, "[w]e have to preserve marriage equality . . . . [W]e've got to make sure to preserve [*Roe v. Wade*]."[6] Senator Bernie Sanders sounded a similar note when he urged supporters who were considering not voting for Hillary Clinton to "take a moment to think about the Supreme Court justices that Donald Trump would nominate and what that would mean to civil liberties, equal rights and the future of our country."[7] Perhaps unsurprisingly, 70% of voters in 2016 factored control of the Supreme Court into their voting decisions; in fact, approximately 20% indicated that future appointments were the most important factor in their votes, up from only 7% in 2008.[8] This suggests that politicians and citizens increasingly believe that the protection of their fundamental rights depends on how many Justices from their political party are on the Supreme Court. As a result, modern rights jurisprudence has become a subset of competing party platforms. It consists of conservative judicial philosophies and "fundamental" rights and liberal judicial philosophies and "fundamental" rights, rather than the transcendent values that the concept of rights was intended to index.

Existing approaches to rights jurisprudence, however, have not fully engaged with the partisan localization of rights adjudication. Though Justice Jackson's claim about elections and rights is descriptively false, conversations around the legitimacy of judicial review still frame the argument as a choice between liberal judicial engagement and conservative judicial restraint, rather than addressing the partisan amalgamation of engagement and restraint that currently exists. Thus, on one side are those deeply invested in substantive fairness, such as proponents of living constitutionalism's minority protection model.[9] They insist

[5] Jonathan Easley, *Clinton: 'I Have a Bunch of Litmus Tests' for Supreme Court Nominees*, HILL (Feb. 3, 2016, 10:50 PM), https://thehill.com/blogs/ballot-box/presidential-races/268174-clinton-i-have-a-bunch-of-litmus-tests-for-supreme-court [https://perma.cc/FBR3-KEA4].

[6] *Id.*

[7] Bernie Sanders, Speech at the Democratic National Convention (July 25, 2016), https://www.npr.org/2016/07/25/487426056/read-bernie-sanders-prepared-remarks-at-the-dnc [https://perma.cc/A49T-XDPS] (noting that Clinton's Supreme Court appointments would "defend a woman's right to choose, workers' rights, the rights of the LGBT community, the needs of minorities and immigrants and the government's ability to protect our the [sic] environment").

[8] *See* NBC News Exit Poll Desk, *NBC News Exit Poll: Future Supreme Court Appointments Important Factor in Presidential Voting*, NBC NEWS (Nov. 8, 2016, 6:35 PM), https://www.nbcnews.com/card/nbc-news-exit-poll-future-supreme-court-appointments-important-factor-n680381 [https://perma.cc/GP7E-JYW2].

[9] *See, e.g.*, Timothy P. Loper, *Substantive Due Process and Discourse Ethics: Rethinking Fundamental Rights Analysis*, 13 WASH. & LEE J.C.R. & SOC. JUST. 41, 57 (2006) ("Contrary to Justice Scalia's pronouncements that the Due Process Clause is meant to prevent the Court from protecting minority rights, the Due Process Clause requires the judiciary to protect even those minority rights that are not enshrined in democratically passed legislation." (footnote omitted)); Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. & SOC.

that judges are best able to navigate the shoals of intersectionality and allocate rights and powers between competing minorities in ways that promote fundamental values. This liberal preference for judicial engagement can shift to a preference for restraint, however, when the "fundamental values" are perceived as regressive.[10] Opposing them are originalists whose minority protection model is premised on consent.[11] They believe that the consent of the Founding Generation to a certain allocation of rights and powers is a neutral baseline from which to allocate protection to those formerly excluded from the Founding Era's polity.[12] In keeping with this view, racial disparities and minority disempowerment traceable to Founding Era exclusions of African Americans are not weighty enough to warrant non-originalist rights enforcement by judges.[13] Moreover, the consent of the Founding Generation trumps modern consent.[14] This leads to a policy of judicial restraint, unless enforcement of Founding Era silences would allow modern majorities to discard conservative norms and preferred freedoms.[15]

In his book *The Cycles of Constitutional Time*, Jack Balkin offers a framework for understanding why the two approaches vacillate between engagement and restraint.[16] He suggests that we begin by realizing that American constitutional time is not linear, as the two primary theories of judicial

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CHALLENGES 220, 227 (2010) (noting that substantive due process clause is "indispensable . . . for protecting minority rights"); *id.* at 224 (describing substantive due process as "carv[ing] out areas of existential determination . . . beyond the reach of government" for "all citizens regardless of how insular or marginalized those citizens may be due to a particular trait or characteristic").

[10] *See, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2400 (2020) (Ginsburg, J., dissenting) (bemoaning fact that "[t]oday, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree").

[11] *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998) (describing "[o]ur constitutional order" as one that depends on "actual contracts").

[12] *See id.*

[13] *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1759-60 (2010) (suggesting that judicial correction of African Americans' exclusion from constitutional drafting and ratification process would have produced only "small benefits . . . almost certainly exceeded by the ordinary costs of judicial correction").

[14] Easterbrook, *supra* note 11, at 1121-23.

[15] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (holding that Second Amendment protects individual right to keep and bear arms for defensive purposes). The conservative majority's opinion effectively nullified the precatory clause of the Second Amendment, offering instead a semi-substantive due process claim that the Second Amendment codified a preexisting Founding Era right to possess and carry weapons for the purpose of self-defense. *Id.* at 577-78, 635-36; *see also* Shelby County v. Holder, 570 U.S. 529, 544, 556 (2013) (narrowing Congress's power under enforcement clause of Fifteenth Amendment in name of implied fundamental principle of "equal state sovereignty").

[16] JACK BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 4 (2020).

review (originalism and living constitutionalism) presuppose.[17] Instead, American constitutional time is cyclical and is defined by our location in the life cycles of three concurrent political cycles: the rise and fall of constitutional regimes, the cycle of polarization and depolarization, and the cycle of constitutional rot and renewal.[18] It follows from this, according to Balkin, that our theories of judicial review are also somewhat cyclical, with proponents of living constitutionalism and originalism reasoning about judicial engagement or judicial restraint in accordance with their positioning in the cycles of constitutional time.[19] For example, Balkin notes that at the end of the first Republican regime (1860-1932),[20] living constitutionalism began as a critique of existing jurisprudence.[21] It emphasized judicial restraint that would allow Congress to deal with the new social realities brought about by industrialization.[22] As the New Deal/Civil Rights regime became dominant, however, proponents of living constitutionalism began to interpret the Constitution as promoting active judicial intervention to protect civil rights and liberties.[23] What began as a critique, according to Balkin, morphed into a justification.[24] Similarly, he notes that originalism began as a critique of living constitutionalism at the end of the New Deal/Civil Rights regime.[25] Originalism linked its calls for judicial restraint to an interpretative method dependent on original intent and meaning.[26] Later, as the Reagan regime became dominant, however, original meaning became the justification for expansive judicial engagement to protect fidelity to the Constitution and its federalist principles.[27] To Balkin, the shifting commitments of originalism and living constitutionalism to judicial engagement or judicial restraint are a function of where we happen to be located in the cycles of constitutional time.

Balkin's account suggests not only that we apply theories of constitutional interpretation differently at different points in constitutional time but also that, at least on occasion, new regimes bring with them new theories of constitutional interpretation. For example, Balkin's account of the shift from the New Deal/Civil Rights regime to the Reagan regime suggests that a new approach to constitutional interpretation—originalism—rose in tandem with the new Reagan regime and helped to anchor some of its defining characteristics.[28] For me, this

[17] *Id.*
[18] *Id.* at 6.
[19] *Id.* at 97.
[20] *Id.* at 15 (delineating regime cycles).
[21] *Id.* at 99.
[22] *Id.*
[23] *Id.* at 100.
[24] *Id.* at 101.
[25] *Id.* at 102.
[26] *Id.*
[27] *Id.* at 104-05.
[28] *See id.* at 102-05.

invites the question of whether the new Democratic regime Balkin predicts should be accompanied by a new approach to constitutional interpretation. For, while many things in American reality (and thus American constitutional time) are cyclical, there is one aspect that is progressive, directional, and noncyclical—demographic changes in the racial and ethnic compositions of "we the people."

America has been browning year by year,[29] but our primary constitutional theories have not been modified to address this reality and continue to presuppose a world in which all the majorities are White, and all the minorities are non-White. Theories premised on the idea that people of color are minorities, however, will likely have limited utility in a polity in which the numerical minority is White, the numerical majority is non-White, and a host of marginalized individuals in between have intersecting memberships in additional majorities and minorities defined in a variety of nonracial terms. This is particularly true when one's location on these intersecting axes is not fixed by one's membership in a single suspect class but turns on contextual evaluations of the relative salience of one's overlapping sources of privilege and vulnerability. Moreover, the contextual salience assigned to an individual's privilege and vulnerability may or may not track the quantitative definitions of minority status I am using here.

In this Essay, I argue that the demographic changes driving the current iteration of our constitutional cycles underscore the need for a new constitutional theory to anchor the defining traits of the new regime. I argue for a theory of empowerment tailored to the majority-minority America that the framers never imagined,[30] and indeed from which they might well have recoiled in horror.[31] I agree with Balkin that the impetus for this new approach will not come from the Court, but must instead come from the democratic mobilization of the people and their elected representatives.

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[29] *See* William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS (Sept. 10, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/ [https://perma.cc/PCJ5-ZXEB].

[30] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 411-12 (1857) (enslaved party) ("It is obvious that [Black people] were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union. . . . [I]t is impossible to believe that these rights and privileges were intended to be extended to them."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *id.* at 451 ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.").

[31] *See, e.g.*, Letter from Thomas Jefferson to Jared Sparks, Ed., N. Am. Rev. (Feb. 4, 1824), https://founders.archives.gov/documents/Jefferson/98-01-02-4020 [https://perma.cc/F2NQ-FC39] (highlighting Jefferson's view that persons freed from enslavement should be sent to Africa); *Jefferson's Attitudes Toward Slavery*, MONTICELLO, https://www.monticello.org/thomas-jefferson/jefferson-slavery/jefferson-s-attitudes-toward-slavery/#footnote16_rubhs7m [https://perma.cc/GFT6-7CBT] (last visited Sept. 23, 2021) (examining Jefferson's support for abolition and belief that deporting persons freed from enslavement was "essential" because the races could not live together peaceably).

This Essay is divided into five parts. In Part I, I describe the origins of our primary model of rights jurisprudence—the minority protection model. I begin by noting that the rise and fall of Nazism in Germany generated new understandings of democratic legitimacy which centered substantive fairness for minorities alongside enactment of majority preferences. I note that these new understandings delegitimized majority preference as a justification for American apartheid and conferred moral legitimacy on *Brown v. Board of Education*'s[32] efforts to protect Black Americans.[33] I then discuss the elevation of the *United States v. Carolene Products Co.*[34] Footnote 4 to a substantive rights doctrine as an attempt to translate the moral legitimacy of *Brown* into legal legitimacy.

In Part II, I argue that the minority protection model adapted from *Carolene Products* is not well suited to our modern moment for two reasons: (1) the intersectional nature of privilege and oppression; and (2) jurisprudential tribalism—in which judges' desires for peer group affirmation dictates, often unconsciously, their understandings of which characteristics are implicated and salient in a particular rights conflict. I begin by noting that the suspect class paradigm of *Carolene Products* presupposes a world in which a single characteristic (race) is the trigger for direct discrimination across contexts. I suggest that this model of minority rights protection—in which protection is triggered by the *presence* of a single characteristic—is outdated. It cannot adequately protect individuals whose experiences of discrimination are triggered by the *salience* of intersecting characteristics (some marginalizing, some privileging) in a given context. I then link the increased subjectivity introduced by the shift from presence to salience to jurisprudential tribalism. I argue that this shift means that rights protection, which under *Carolene Products* is supposed to turn on one's experiences of prejudice and rights denial, instead turns on the power of one's tribe on the Court.

The rise in appointments of judges and Justices who favor original public meaning approaches to rights adjudication has resulted in a modification of the *Carolene Products* approach. As a result, in Part III, I discuss minority rights jurisprudence under the original public meaning approach and discuss why it is even less suited to the current moment than more progressive approaches to minority rights. I begin by discussing the "supermajority" decision-making halo that has been cast over the Constitution's drafting and ratification process to justify resort to original public meaning. I note that the 12% of the Founding Era's population that was involved in this process was not a "defective" supermajority but was simply not a supermajority at all. I then argue that the dynamics of power and exclusion attending the ratification of the Constitution mean that under the original public meaning approach, voters of color and White women are replaced by their disenfranchised predecessors, and the views of those in a post-apartheid America are replaced with the views of those who

[32] 347 U.S. 483 (1954).

[33] *Id.* at 495 (holding that separate educational facilities are inherently unequal).

[34] 304 U.S. 144 (1938).

created American apartheid. I note that defining rights based on the understandings of the creators of apartheid will likely be underprotective and disempowering for minorities of color and is also likely to appear increasingly illegitimate the more racially diverse America becomes.

In Part IV, I use *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[35] to provide a concrete example of the limitations of both liberal and conservative approaches to the minority protection model. In this Part, I discuss how the focus on the presence of a single discrete characteristic (religion or sexual orientation) rather than on the relative salience of intersecting characteristics distorts both analyses. I note that both parties in the case were members of the most privileged group in America, White men of property. I argue that this centers the White male middle-class experience in ways that further marginalize those whose sexual orientation or religious identity is compounded by race, gender, and class. I argue that this makes constitutional allocation of rights between these groups turn on an incomplete account of marginalization and privilege.

In addition, I discuss the ways in which the accounts of marginalization and privilege that are present in the *Masterpiece Cakeshop* narrative are impacted by jurisprudential tribalism. I note that the conservative Justices viewed the case as raising an issue of religious discrimination while the liberal Justices viewed the case as raising an issue of sexual orientation and gender identity discrimination. The characteristics the Justices found most salient in the case reflected the rights and norms hierarchies of their respective tribes. I then ascribe the nonanswer of *Masterpiece Cakeshop* to the limitations of our current model of rights protection, which is ill suited to taking account of intersectionality and jurisprudential tribalism.

In Part V, I turn to proposed solutions. I begin this Part by suggesting that approaches to rights jurisprudence should change according to the maturation level of the democracy. I suggest that the minority protection model is best suited to dysfunctional democracies marked by widespread disenfranchisement and direct discrimination along one or two characteristics. As democracies become more egalitarian, pluralistic, and inclusive, however, I argue that rights jurisprudence should shift from a focus on minority protection to a focus on minority power sharing. In the case of American democracy, I argue that a framework of power sharing rather than identification of a single triggering characteristic is better able to handle intersectional identities and increased jurisprudential tribalism.

Rather than setting forth the entire theory of empowerment jurisprudence here, I focus on two central goals of the theory. The first is reducing the reserve control of the judiciary. Reserve control is defined by the degree to which our ability to choose is dependent on the favor or goodwill of those with power. It indexes a life lived under the will of another, but another who often (but not always) wills that you have autonomy. The second goal is increasing the self-

[35] 138 S. Ct. 1719 (2018).

governing capability of the citizenry. Self-governing capability is the ability of individuals to collaborate with other members of society, on fair and equal terms and with equal capacity for influence, to establish the structures, procedures, and policies of their society. I argue that meeting these two goals requires a shift from judicial supremacy to legislative supremacy. As a result, I suggest that Congress take the lead in this shift by unilaterally (re)claiming supremacy in rights jurisprudence under the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments. I acknowledge the challenges of such a step, but conclude that such challenges are an inescapable reality of the pursuit of both democracy and democratic legitimacy.

I. THE RISE OF THE MINORITY PROTECTION MODEL

A. Brown *and Moral Legitimacy*

In 1954, only 20% of the African-American population in the Southern states had registered to vote;[36] 80% remained disenfranchised by poll taxes,[37] literacy tests, and threatened and actual violence.[38] As a result, there were only two African-American members of the House of Representatives, and no African-American senators[39] or cabinet members.[40] There were only two African-American federal judges in the entirety of the United States, and they were the first non-White judges in the nation's history.[41] Thus, though African Americans

[36] STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 139 (Lexington Book 1999) (1976).

[37] For a discussion of disenfranchisement tools and their effects during the post-Reconstruction era, see Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 90-96 (2008).

[38] LAWSON, *supra* note 36, at 124-39 (highlighting challenges of enfranchising Black voters in the South in 1940s and 1950s); *see also* SUSAN CIANCI SALVATORE, NEIL FOLEY, PETER IVERSON & STEVEN F. LAWSON, U.S. DEP'T OF THE INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 30, 72 (2009) (discussing enfranchisement of Black Americans in 1950s and 1960s).

[39] IDA A. BRUDNICK & JENNIFER E. MANNING, CONG. RSCH. SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE U.S. CONGRESS: 1870-2020, at 7 (2020).

[40] Robert C. Weaver would not become the first Black Cabinet Secretary until 1966. *The Nation*, TIME, Mar. 4, 1966, at 25, 29.

[41] *Demography of Article III Judges, 1789-2020*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity [https://perma.cc/82H2-BHT5] (last visited Sept. 23, 2021). Although the Federal Judicial Center identifies Judge Irvin Mollison as becoming the first non-White Article III judge in 1945, *see id.*, Congress did not designate the U.S. Customs Court as an Article III tribunal until 1956, and the Supreme Court did not recognize its Article III status until 1962. CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 677 (centennial ed. 2017).

made up approximately 10% of the population in the 1950s,[42] they were only a small percentage of registered voters across most of the South and held less than 2% of offices across all three branches of the federal government.[43] Formal and informal legal rules ensured that European Americans occupied positions of power and political influence to the almost total exclusion of African Americans. In this context, the distinction between the dominant majority and the victimized minority was very simple; it was a distinction literally painted in black and white—a powerless Black minority being oppressed and tyrannized by a White majority.

The Supreme Court issued its unanimous *Brown v. Board of Education* decision in this context, holding that school segregation was inherently unequal and a violation of the Fourteenth Amendment.[44] This holding overturned almost 100 years of Fourteenth Amendment precedent and conflicted with contemporaneous practice at the time the Amendment was ratified. It was immediately condemned by Southern conservatives as judicial overreaching and a violation of state sovereignty[45] and questioned by some Northern liberals.[46] Over time, however, history served to justify *Brown* and discredit the charges of overreaching, causing *Brown* to become the new touchstone of our fundamental rights jurisprudence.

The unassailability of *Brown* owed an enormous debt to the global context in which it was decided. For example, a few years after *Brown*, Adolf Eichmann's trial in Israel filled Americans' television screens with disturbing testimonies of gas chambers, concentration camps, and a defendant who epitomized the "*banality of evil*."[47] Barely two years later, the nation's television screens were filled again, this time with images of police officers and housewives brutally attacking Black children and other nonviolent protestors, all of whom were guilty only of seeking the racial equality promised in *Brown*.[48] *Brown* was

[42] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., PC(S1)-10, SUPPLEMENTARY REPORTS: RACE OF THE POPULATION OF THE UNITED STATES, BY STATES: 1960, at 3 tbl.56 (1961) (reporting that Black Americans made up 10.5% of total U.S. population in 1960).

[43] *See* sources cited *supra* notes 36-41 (providing evidence of Black Americans' voter registration and representation in government).

[44] 347 U.S. 483, 495 (1954).

[45] 102 CONG. REC. 4,515-16 (1956) (statement of Rep. Howard W. Smith, signed by 100 of his colleagues) (criticizing *Brown* as "unwarranted," "a clear abuse of judicial power," and an "exercise [of the Justices'] naked judicial power and substitut[ion of] their personal political and social ideas for the established law of the land").

[46] *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20, 34-35 (1959) (discussing *Brown* as an example of the Court's "decreeing value choices").

[47] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 231 (1963).

[48] *E.g.*, *Presbyterian Leader Outraged by Birmingham Racial Struggle*, N.Y. TIMES, May 6, 1963, at 26 (reporting Rev. Eugene Carson Blake's comments that he was "sick and disgusted" after watching on television as police attacked and arrested hundreds of children

bookended by Nazi atrocities and Southern terrorism, and the similarities between the two were difficult to overlook. In both, an amorally defined democratic majority engaged in crimes against humanity, bringing into sharp relief the distortions that can flow from a polity's ability to allocate citizenship rights solely on the basis of majority preference.

By "amorally defined," I mean something that is rendered legitimate by the bare exercise of power (for example, the power to enact preferences) rather than by notions of justice or substantive fairness. Joseph Schumpeter argued for this type of amoral democracy when he insisted that we must "leave it to every *populus* to define himself"[49] and cannot judge a polity's choices regarding who is included and who is excluded. Instead, according to Schumpeter, "it is not relevant whether we, the observers, admit the validity of [the] reasons or of the practical rules by which they . . . exclude portions of the population; all that matters is that the society in question admits it."[50] In contrast, Robert Dahl questioned whether democracies defined solely by majority preference are coherent democracies, since a one-party dictatorship could still count as a democracy, so long as the party defined itself as the demos and was internally democratic.[51]

The Dahl/Schumpeter debate mapped onto the actual events surrounding the rise and fall of Nazism in Germany. The rise of Nazism in Germany began with the "democratic" dismantling of the constitution of the Weimar Republic,[52] if "democratic" is limited to processes sanctioned by the majority. Attempts to prosecute Nazi war criminals, however, underscored the limits of process-based definitions by inviting value-laden definitions of what properly counts as "law."[53] The result was a growing consensus that true democracies are not amoral and must be about more than the competitive elections and majority preferences privileged by Schumpeter. Instead, the idea that democracy has a certain internal morality[54] that is concerned with the substance of majority decision-making, not just the process, gained widespread currency in the United

for "seeking the [Fourteenth Amendment] right given to them" during the Children's March in Birmingham).

[49] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 245 (3d ed. 1950).

[50] *Id.* at 244.

[51] Robert A. Dahl, *Procedural Democracy*, *in* CONTEMPORARY POLITICAL PHILOSOPHY 147, 153-54, 158 (Robert E. Goodin & Philip Pettit eds., Wiley 3d ed. 2019) (1997).

[52] Carlos F. Lucero, J., U.S. Ct. of Appeals for the Tenth Cir., A Constitutional Call to Arms, Annual Stevens Lecture at the University of Colorado Law School (Sept. 27, 2018), *in* 90 U. COLO. L. REV. 653, 662-63 (2019).

[53] *See* Frank Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, 18 RATIO JURIS 162, 163 (2005) (exploring debate over "whether the Nazi Regime created the law in Germany or . . . lacked legality" and the impact of this question on validity of Nuremberg Trials and punishment of Nazi war criminals).

[54] *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 7 (2001) (arguing that democracy "comes with its own internal morality" that "requires constitutional protection of many individual rights").

States and elsewhere.[55] Under this view, democracy is also concerned with the justifications for exclusions of groups from the demos, not just the level of support for those exclusions by the included members of the demos.[56] As a result of this new paradigm, the objections to the anti-Semitic tyranny in Germany and the denial of citizenship to the Jewish population seemed equally applicable to the anti-Black tyranny in the South and the denial of citizenship to African Americans. Anti-Nazism seemed to presuppose antiracism. Thus, it was not long after the juxtaposition of the two that the *Brown* decision became the paradigmatic expression of judicial review in the United States, for *Brown* indexed the idea that something more than bare majority preference must justify denying the equal protection of the laws of the demos to those subject to the rules of the demos.[57]

As Professor McConnell has noted, "[s]uch is the moral authority of *Brown* that if any particular theory [of judicial review] does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[58] The canonization and justification of *Brown* produced a fundamental change in understandings of American democracy and thus ushered in a new rights paradigm.[59] The horrors of Nazism and Southern terrorism led to the adoption of a key modifier that transformed conceptions of American democracy, and in so doing transformed approaches to rights jurisprudence. That modifier is the word "constitutional"—American *constitutional* democracy. That modification means that the political exclusion of geographically included groups must be justified by something more than bare preference and that democracy can no longer be defined as majority rule *simpliciter*.[60] In a constitutional democracy, the rule of the majority and its ability to enact its preferences into law are limited by the constitutional rights held by minorities.[61]

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[55] *See, e.g.*, Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 592-94 (1996) (suggesting that post-World War II, human rights and democracy are "virtually tautological"); *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[56] *See* SUNSTEIN, *supra* note 54, at 7 (arguing that "by itself the idea of 'majority rule' is a caricature of the democratic aspiration").

[57] *See* Dahl, *supra* note 51, at 153-54, 158-60.

[58] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

[59] *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 115 (1998) (describing *Brown*'s "revival of the Equal Protection Clause" as starting point for Warren Court's inclusive democracy decisions).

[60] *See* Kenneth L. Karst, *Constitutional Equality and the Role of the Judiciary*, *in* THE PROMISE OF AMERICAN POLITICS: PRINCIPLES AND PRACTICE AFTER TWO HUNDRED YEARS 211, 211 (Robert L. Utley, Jr., ed., 1989) ("*Brown* was also the beginning of a new ordering of our institutions of government, one in which the judiciary—and the Supreme Court in particular—would play a more active role in articulating the nation's fundamental values and defending those values in the name of the Constitution.").

[61] *See id.* at 232 (highlighting *Brown* as example of Court exercising proper "moderating" function between majority and oppressed minority).

The idea of a constitutional democracy generated a new democratic formula—majority rule plus minority rights. This was a seismic shift from pre-*Brown* understandings of democracy, in which rights as well as rule belonged solely to the local White majorities,[62] with minorities of color generally having "no rights which [the majority] was bound to respect."[63] In other words, pre-*Brown* America could only be considered a democracy if legitimacy is parasitic on power rather than substantive fairness. After the Holocaust underscored the limits of this approach, a new approach to democracy attentive to issues of substantive fairness and equal citizenship emerged. *Brown* became the linchpin of this approach in the United States, in large part as a function of adding legal legitimacy[64] to the moral legitimacy it had obtained from the historical context. It was in the process of securing *Brown*'s legal legitimacy that what I call the "minority protection approach" to judicial review was generated and entrenched.

B. Brown *and Legal Legitimacy*

As noted above, early conceptions of majority rule seemed to suggest that majorities had the right to do whatever they had given themselves the power to do, regardless of minority opposition. Within the U.S. constitutional framework, White men had given themselves the power to do many things that are viewed as manifestly unjust in hindsight.[65] Open-ended constitutional language was used to justify those actions as constitutional even as the harmed minorities urged more inclusive definitions of liberty and equality. All those who lose in a democracy are harmed in some sense, however, and suffer a loss of liberty or equality. As a result, the legal legitimacy of *Brown* turned on the existence of a general principle that would enable courts to determine when the "liberty and equality" claims of "harmed" minorities should be vindicated. Wechsler suggested that no such general principle could exist, for resolving such claims

[62] *See* Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1586-87 (2012) (describing Reconstruction as repudiation of pre-Civil War tradition of United States as a "white man's Government").

[63] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[64] *See, e.g.*, Wechsler, *supra* note 46, at 32 ("The problem inheres strictly in the reasoning of the [*Brown*] opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned.").

[65] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (upholding state segregation of railway passengers, noting that if legal segregation "stamp[ed] the colored race with a badge of inferiority. . . . it [wa]s not by reason of anything found in the act, but solely because the colored race cho[se] to put that construction upon it"); *Dred Scott*, 60 U.S. (19 How.) at 404 (concluding that Black Americans were not citizens and therefore had no claim to "rights and privileges" of citizenship); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625-26 (1842) (invalidating state law that prohibited abduction of "fugitive" enslaved persons to re-enslave them across state lines); CONG. GLOBE, 36th Cong., 1st Sess. 920 (1860) (statement of Sen. Stephen A. Douglas) ("This is a white man's Government, made by white men for the benefit of white men, to be administered by white men and nobody else . . . .").

would always turn on political rather than legal choices.[66] In essence, limiting majority power to protect the liberty interests of this group over the equality interests of that group, or vice versa, would require a substantive ranking of groups and preferences for which the U.S. Constitution provides no guidance. How were courts to decide when majority liberty trumped equality and which types of equality trumped liberty? A substantive constitutional principle was found in an unusual place: Footnote 4 of *Carolene Products*.[67] This principle established that courts are justified in setting aside the political choices of majorities in three circumstances: (1) when a fundamental right is at issue, (2) when the political process is being restricted, and (3) when discrete and insular minorities are being harmed by laws rooted in prejudice.[68] The centuries-long political subordination of African Americans was the paradigmatic example of Footnote 4's area of concern. For, in the case of segregated African Americans, there was widespread, objective evidence of discreteness, insularity, and prejudice;[69] access to the political process was restricted with impunity;[70] and there was a denial of almost every right, textual or implied,[71] at one time or another. Thus, Footnote 4 was deployed to ground the legal legitimacy of *Brown* and of the minority protection model.

Had history stopped there, the continued utility of the minority protection model would be unquestionable. But history did not stop there. Social movements inspired by *Brown* produced fundamental changes in the levels of formal subordination experienced by African Americans[72] as well as in the background norms that legitimated that subordination. Social movements also

[66] *See* Wechsler, *supra* note 46, at 15 (noting that constitutional adjudications require addressing "issues that are inescapably 'political' . . . in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone").

[67] 304 U.S. 144, 152 n.4 (1938).

[68] *Id.*

[69] *E.g.*, *Plessy*, 163 U.S. at 552 (upholding validity of "separate but equal" accommodations); *see also* Palmer v. Thompson, 403 U.S. 217, 228 (1971) (denying Equal Protection challenge where city closed swimming pools instead of integrating them).

[70] *E.g.*, Giles v. Harris, 189 U.S. 475, 488 (1903) (upholding provisions of state constitution that effectively disenfranchised African-American voters).

[71] *See* John S. Rock, George L. Ruffin & WM. Howard Day, Comm. on Publ'n, Nat'l Convention of Colored Men, *Proceedings of the National Convention of Colored Men, Held in the City of Syracuse, N.Y., October 4, 5, 6, and 7, 1864*, *in* MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS (Howard Holman Bell ed., 1969) (setting forth declaration of wrongs endured by those enslaved and obstacles to righting those wrongs in aftermath of Civil War); ST. GEORGE R. TAYLOR, OCTAVIUS V. CATTO & JOHN D. RICHARDS, COMM. ON PUBL'N, NAT'L EQUAL RTS. LEAGUE, FIRST ANNUAL MEETING OF THE NATIONAL EQUAL RIGHTS LEAGUE, HELD IN CLEVELAND, OHIO, OCTOBER 19TH, 20TH, AND 21ST, 1865 app. at 41, 45-49 (Philadelphia, E.C. Markley & Son 1865).

[72] *See, e.g.*, Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

led to calls for the application of the model to groups whose subordination was independent of formal disenfranchisement and not as easily explained in Footnote 4 terms.[73] Though Ely's representation-reinforcement model sought to rest the legitimacy of the protection afforded by the model on the political powerlessness of groups rather than subjective determinations of which rights are fundamental,[74] his efforts ultimately failed.[75] The Court has not recognized any new suspect classes for nearly fifty years,[76] and has instead largely collapsed the first and third prongs of *Carolene Products* such that in the modern era, protectible status often follows from the "fundamentalness" or "nonfundamentalness" of the right denied rather than the degree of subordination.[77] This leads to asymmetry between the level of protection afforded by the courts and the level of vulnerability experienced by groups in society.[78]

[73] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting) (criminalization of "sodomy"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 92 (1973) (Marshall, J., dissenting) (discrimination on basis of socioeconomic status); Reed v. Reed, 404 U.S. 71, 77 (1971) (discrimination on basis of sex); Bonnie Eisenberg & Mary Ruthsdotter, *History of the Women's Rights Movement*, NAT'L WOMEN'S HIST. ALL. (1998), https://nationalwomenshistoryalliance.org/history-of-the-womens-rights-movement/ [https://perma.cc/R6JQ-3NVZ] (women's equality); *Poor People's Campaign*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/poor-peoples-campaign [https://perma.cc/AR55-53Z8] (last visited Sept. 23, 2021) (economic security); *Stonewall Riots: The Beginning of the LGBT Movement*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (June 22, 2009), https://civilrights.org/2009/06/22/stonewall-riots-the-beginning-of-the-lgbt-movement/ [https://perma.cc/BLH6-8AFH] (LGBTQ+ equality).

[74] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980).

[75] Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1577 (2013).

[76] Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755, 1758 (2018) ("For all of the attention this political process approach—which Justice Scalia once described as an 'old saw' in constitutional law—has received in the academy and lower courts, the Supreme Court has not recognized a new suspect class on the basis of political powerlessness for more than forty years." (footnotes omitted)). The Court last recognized a new suspect class (women) in *Frontiero v. Richardson*, 411 U.S. 677, 686, 688 (1973) (plurality opinion), because this group had faced "pervasive" discrimination in the political arena. Tang, *supra*, at 1758 n.13. In Tang's view, "the Court has had three clear opportunities to recognize gays and lesbians as a new protected minority group, only to rule in their favor on different grounds." *Id.* at 1758 (citing Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013); Romer v. Evans, 517 U.S. 620 (1996)).

[77] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (implying historic subordination is irrelevant because there is no right to identity-based representation); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (finding insularity irrelevant to protecting White persons against discrimination).

[78] Individuals with felony records and undocumented immigrants are subjected to apartheid-era levels of political exclusion, but it is rare for the Court to take an interest in their plight. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (denying Equal Protection challenge to convicted felon disenfranchisement); *see also* Kleem v. Immigr. & Naturalization

II. THE LIMITATIONS OF THE MINORITY PROTECTION MODEL

When the distinction between majority status and minority status was as clear as the distinction between Black and White and majority tyranny took the form of disenfranchisement, the minority protection model was the gold standard of rights jurisprudence. It cannot, however, be the gold standard of rights jurisprudence in the new regime, even if courts are inclined to breathe new life into suspect class/discrete and insular minority analysis, for two reasons: (1) the intersectional nature of privilege and oppression, and (2) jurisprudential tribalism.

A. *Intersectional Oppression and Privilege*

In the decades since minority protection became a constitutional norm, the list of oppressive majorities has continued to grow—White, male,[79] Christian, heterosexual, cisgender—creating a wealth of new marginalized identities. As the categories of oppressive majorities and marginalized minorities have increased, the intersectional nature of oppression and privilege has become more apparent. These days, any one individual is likely to be the majority oppressor in one aspect of their identity and the minority victim in another—for example, African-American men, European-American lesbians, and Christian Latinx persons. In this context, the issue is not the bare fact of having a marginalized aspect of one's identity. Instead, it is the salience of that identity given the context[80] as well as the ways in which the relationship between the individual's privileged and marginalized identities impact that salience.

Unlike the American apartheid era—in which systematic and pervasive racial discrimination created a legal regime in which race was the most salient factor in experiences of legal and social oppression and privilege—the salience of modern marginalized identities tends to be partial, contingent, and contextual. In other words, the salience of modern marginalized identities turns on the intersectional dynamics of a particular context rather than absolute deprivations, raising questions of which aspects of identity are more salient in a given instance rather than which aspect is most salient overall. The recent controversy over rightness or wrongness of Tamron Hall's interview with Joey Gugliemelli (also known as drag queen Sherry Pie), an admitted sexual offender, offers a preview

Serv., 479 U.S. 1308, 1308 (1986) (denying application for extension of time to file petition for writ of certiorari where immigrants requested withholding from deportation); O'Rourke v. Immigr. & Naturalization Serv., 467 U.S. 1256, 1256 (1984) (denying petition for writ of certiorari where immigrant alleged he was unlawfully held without bail).

[79] Males are treated as an oppressive majority, though they have been a numerical minority in the U.S. since approximately 1950. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., PC80-1-B1, 1980 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, at 1–15 fig.15 (1983).

[80] *See* ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 102 (2018).

of how conflicts over salience can play out.[81] Tamron Hall announced that she would interview Gugliemelli regarding Sherry Pie's disqualification from *RuPaul's Drag Race* due to sexually exploitative behavior.[82] To those opposed to the interview, most salient in determining the direction of marginalization were Sherry Pie's gender representation and the ways in which his actions fed stereotypes about the LGBTQ+ community.[83] To those supporting the interview, most salient was the racial difference between the reporter and Gugliemelli's victims and how the criticisms seemed to privilege White victimhood while invoking stereotypes of Black inferiority.[84] Was the issue one of a cisgender person marginalizing the LGBTQ+ community? Or was it one of White persons seeking to marginalize a Black woman for declining to privilege White victims? The answer depends on the relative salience one assigns to race and LGBTQ+ identity in this context. A similar conflict is latent in the charges of anti-Semitism leveled against Palestinian activists[85] and in the battles over transgender women in sports.[86] Who is marginalized in these contexts, who is privileged, and whose rights are "really" threatened? The answers to these questions are highly contested across society,[87] and as Alexis de Tocqueville noted, questions that capture the attention of American society almost invariably end up being resolved by American courts.[88] But how will courts resolve such issues? The continued existence of institutionalized race and gender hierarchies in the absence of overtly discriminatory laws means that an accurate account of marginalization cannot limit what is salient in a particular context to what is presented as salient on the surface of a dispute. Thus, courts must also consider

[81] *See* Kevin Fallon, *Tamron Hall's Controversial Interview with 'Drag Race' Predator Sherry Pie Was a Lot*, DAILY BEAST (Feb. 16, 2021, 5:44 PM), https://www.thedailybeast.com/tamron-halls-controversial-interview-with-drag-race-predator-sherry-pie-was-a-lot?ref=scroll.

[82] Joey Nolfi, *Sherry Pie Victims,* RuPaul's Drag Race *Cast Speak on 'Irresponsible' Tamron Hall Interview*, ENT. WKLY. (Feb. 18, 2021, 4:51 PM), https://ew.com/tv/sherry-pie-tamron-hall-interview/ [https://perma.cc/45HE-ZU9Y].

[83] *See* Fallon, *supra* note 81.

[84] *See id.*

[85] *See* Gary Spedding, *We in the Palestinian Solidarity Movement Have a Problem with Anti-Semitism*, HAARETZ (Apr. 10, 2018), https://www.haaretz.com/opinion/.premium-we-in-the-palestinian-solidarity-movement-have-a-problem-with-anti-semitism-1.5414417; *see also* Elizabeth Dwoskin & Gerrit De Vynck, *Facebook's AI Treats Palestinian Activists Like It Treats American Black Activists. It Blocks Them*, WASH. POST (May 28, 2021, 8:09 PM), https://www.washingtonpost.com/technology/2021/05/28/facebook-palestinian-censorship/.

[86] *See* Emilia Benton, *The Fight for Transgender Athletes' Right to Compete*, RUNNER'S WORLD (Mar. 18, 2021), https://www.runnersworld.com/news/a35852603/transgender-women-in-sports/.

[87] *See, e.g.*, *id.* (demonstrating that in sports context, some see transgender women as those being marginalized while others see need to protect cisgender women).

[88] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 441 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

the impact of intersecting marginalization and intersectional privilege in such contexts.

The minority protection model, however, is not well suited to taking the differential impact of various aspects of identity into account, for it is a blunt instrument designed for the pervasive, one-dimensional marginalization that characterized American apartheid. This accounts for its overreliance on the identification of a single suspect class[89] and the modern elision of vulnerability and rights denial.[90] The minority protection model requires the imposition of a minority-majority binary on rights conflicts that erases the impacts of multiple marginalizing characteristics and sources of privilege.[91] This oversimplification undermines the ability of the model to account for and respond to modern rights conflicts that involve competing claims of marginalization[92] and competing articulations of the underlying right. Moreover, oppression and powerlessness are best understood as points lying at the intersection of multiple continuums, rather than as functions of a single characteristic that is either present or absent in some exclusive and objective sense. The essentialized binaries of the *Brown* era—White/non-White or numerical minorities/majorities—have given way to new understandings of identity as contested and contingent. Unfortunately, the minority protection model is not easily adapted to this new complexity, which is why it relies increasingly on value-laden interpretations of marginalization and of rights. As a result, it is increasingly likely to fail to protect (or to significantly underprotect) the vulnerable populations who are its *raison d'être*.

B. *Jurisprudential Tribalism*

Intersectional complexity has pushed the minority protection model towards the elision of rights and vulnerability, while the utility of this shift is increasingly undermined by jurisprudential tribalism. Jurisprudential tribalism indexes jurisprudence defined and shaped by a Justice's membership in and loyalty to the ideological peer group from which they seek affirmation.[93] As a result, increasingly, there is a distinctly conservative brand of "rights talk" and a distinctly liberal brand of "rights talk." The conservative brand of rights talk is likely to privilege originalist approaches to rights adjudication and the autonomy of states. It is also likely to prioritize textual rights such as those found in the

[89] *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (framing question presented in terms of disadvantage to "some suspect class").

[90] *E.g.*, *id.*

[91] *See* Franciska Coleman, Marginalization, Privilege and Power: The Limits of the Fourteenth Amendment (unpublished manuscript) (on file with author).

[92] *Id.*

[93] LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 48 (2006); NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT, at xi (2019).

First and Second Amendments.[94] In addition, its proponents are more likely to be affiliated with the Federalist Society rather than the American Constitution Society and to see Justice Scalia as an icon. The liberal brand of rights talk is likely to privilege evolutionary approaches to rights adjudication and the (privacy-oriented) autonomy of individuals. It is also likely to prioritize the equality and substantive due process rights of the Fourteenth Amendment.[95] Moreover, its proponents are more likely to be affiliated with the American Constitution Society than the Federalist Society and to see Justice Ginsburg as an icon.

This bifurcation of rights reasonings is made even more troubling by partisanship. On the current Court, the brands of rights talk are not the freestanding brands of individual Justices but rather track party affiliation so closely that party affiliation is a reliable proxy for the factual, political, and methodological priors of the Justices.[96]

This has two primary effects. First, it collapses the distinction between what Levinson and Balkin call high politics and low politics.[97] High politics refers to controversies over basic constitutional values, while low politics refers to the pursuit of partisan advantage.[98] One might view disagreement about whether to privilege protecting constitutional structure over protecting individual rights as a matter of high politics. However, this question becomes indistinguishable from low politics when protecting structure will provide partisan benefits for a party that protecting rights will not. Partisan gerrymandering is one example of the modern conflation of these two types of controversies. A Justice's refusal to adjudicate partisan gerrymandering claims in the name of protecting federalism

[94] *See, e.g.*, *About Us*, FEDERALIST SOC'Y, https://fedsoc.org/about-us#Background [https://perma.cc/2RK2-X62L] (last visited Sept. 23, 2021) ("We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.").

[95] *See, e.g.*, *About ACS*, AM. CONST. SOC'Y, https://www.acslaw.org/about-us/ [https://perma.cc/2TSK-F86X] (last visited Sept. 23, 2021) ("ACS believes that the Constitution is 'of the people, by the people, and for the people.' We interpret the Constitution based on its text and against the backdrop of history and lived experience. Through a diverse nationwide network of progressive lawyers, law students, judges, scholars and many others, we work to uphold the Constitution in the 21st Century by ensuring that law is a force for protecting our democracy and the public interest and for improving people's lives.").

[96] *See, e.g.*, Garrett Epps, *The Extreme Partisanship of John Roberts's Supreme Court*, ATLANTIC (Aug. 27, 2014), https://www.theatlantic.com/politics/archive/2014/08/john-robertss-dream-of-a-unifying-court-has-dissolved/379220/ (suggesting that "[o]n the Roberts Court, for the first time, the party identity of the justices seems to be the single most important determinant of their votes"). *See generally* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2016) (charting rise and impact of partisanship on Supreme Court).

[97] *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062 (2001).

[98] *See* BALKIN, *supra* note 16, at 80.

and separation of powers allows the Republican Party[99] to manipulate the redistricting process in order to give itself a majority of the power in the legislatures of the states in which it is a minority party. In contrast, a Justice's decision to invalidate partisan gerrymandering claims in the name of protecting the voting rights of individuals allows the Democratic Party to nationalize redistricting norms in ways that make it easier to translate population advantages into political power.

Second, in conflicts that involve competing claims of marginalization and privilege, jurisprudential tribalism is generally outcome determinative. Jurists' desires for peer group affirmation consciously and unconsciously dictate their understandings of the facts and the law and of the "right" and "good" in the conflict.[100] For example, conservative jurists who care primarily about the good opinion and esteem of conservative elites and institutions are unlikely to modify their understandings of higher law based on the critiques of liberal elites.[101] Similarly, liberal jurists, who care most about the opinions and esteem of liberal elites and institutions, are likely to persist in their views unmoved by even the most vehement critiques of conservative elites.[102]

More problematically, these two peer groups have come to believe fundamentally different things about the state of the world and the basic facts that describe that state.[103] Thus, what distinguishes liberal and conservative jurists is not merely the ways in which they reason about the law or the manner in which they apply the law to the facts but their very understandings of what the "facts" are.[104] For example, liberal and conservative elites differ in their beliefs about the degree to which voter suppression remains a problem,[105] with

[99] The Democratic Party also engages in gerrymandering, but its gains tend to be less than Republican gains. *See, e.g.*, Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019, 9:01 AM), https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/ [https://perma.cc/8G8Y-CY3Q] ("Of the 59 seats that were shifted [on average] per election due to partisan gerrymandering, 20 shifted in favor of Democrats while 39 shifted in favor of Republicans.").

[100] *See* BAUM, *supra* note 93, at 159.

[101] *See id.* (noting that judges' perspectives on good are shaped by those whose opinions matter to them).

[102] *See id.*

[103] *E.g.*, Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 537 (2020) ("[W]e are living in a time when there is fundamental disagreement among members of the public regarding basic facts about the state of the world, and there is no generally accepted arbiter whom a broad spectrum of the public will rely upon to resolve public factual disputes.").

[104] *Id.* at 566.

[105] *See, e.g.*, Philip Ewing, *Voting and Elections Divide Republicans and Democrats like Little Else. Here's Why*, NPR (June 12, 2020, 5:03 AM), https://www.npr.org/2020/06/12/873878423/voting-and-elections-divide-republicans-and-democrats-like-little-else-heres-why [https://perma.cc/2KGX-TUN7] (reporting that Democrats believed Nevada's plan to send mail-in ballots "only to people who had voted in

conservatives viewing voter suppression as a problem that has long since been solved[106] and liberal elites viewing it as a continuing problem that has only become more insidious over time.[107] Liberal and conservative jurists are embedded in their respective silos and thus absorb their facts about the world from the same, increasingly partisan, news sources as their fellow elites.[108] It is therefore unsurprising that Chief Justice Roberts's opinion in *Shelby County v. Holder*[109] presupposes a world in which voter suppression is a problem solved,[110] while Justice Ginsburg's dissent presupposes a world in which voter suppression continues apace.[111] The result was an opinion which was supposed to be made based on neutral application of the law to the facts, but which instead tracked partisan identity and loyalty.[112] This is not because the Justices simply disregarded the facts or the law but rather because what the Justices understood to be the facts was parasitic on their partisan identities, as was their choice of which constitutional value (racial equality in voting or equal state sovereignty) to privilege.

The minority protection model positions vulnerable groups as objects of judicial protection, with the level of protection they are afforded being rooted in their degree of vulnerability and the nature of their oppression rather than in their share of political power.[113] It presupposes that minority rights are better protected by judges, who will disinterestedly evaluate degrees of oppression,

recent elections rather than to all registered voters . . . . would disenfranchise some citizens," while Republicans asserted that "sending out ballots to everyone . . . open[s] up the prospect for fraud" (citation omitted)).

[106] *E.g.*, Hans A. von Spakovsky, *"Voter Suppression" Is a Myth, but It's an Article of Faith to Liberals*, HERITAGE FOUND. (Feb. 14, 2020), https://www.heritage.org/election-integrity/commentary/voter-suppression-myth-its-article-faith-liberals [https://perma.cc/X8DN-2UAR] (labeling voter suppression as "false narrative belied by the facts," such as increased voter turnout in 2018 and studies showing voter ID laws do not suppress voting).

[107] *E.g.*, Edward Lempinen, *Stacking the Deck: How the GOP Works to Suppress Minority Voting*, BERKELEY NEWS (Sept. 29, 2020), https://news.berkeley.edu/2020/09/29/stacking-the-deck-how-the-gop-works-to-suppress-minority-voting/ [https://perma.cc/CEG7-NQ4H] (describing "deck-stacking strategies" embraced by Republicans).

[108] DEVINS & BAUM, *supra* note 93, at 45-46.

[109] 570 U.S. 529 (2013).

[110] *See id.* at 535.

[111] *See id.* at 559 (Ginsburg, J., dissenting).

[112] *See* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 694 (2015) ("*Shelby County* demonstrates how the Justices' different factual presumptions can shape their legal views and how the Justices can offer one-sided factual presentations that fail to do justice to a case's complexity."); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 131-32 (arguing that the Court's embrace of federalism principles in *Shelby County* can be explained by judicial ideology).

[113] *See* Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."), *aff'd*, 570 U.S. 744 (2013).

rather than legislators, whose determinations will be influenced by power. When partisan-motivated reasoning meets intersectionality, however, the question at the heart of the minority protection model—degree of vulnerability and need—becomes a political question that turns on elite sympathy for one's cause and the power one's tribe wields on the Supreme Court. It becomes a question courts are least suited to answer.

III. ORIGINALISM AND THE MINORITY PROTECTION MODEL

A critique of the minority protection model may seem inapt, given that originalism is currently ascendant on the Supreme Court. But such has been the moral authority of *Brown* and the minority rights model it birthed that originalist rights jurisprudence also has a minority protection model. Rather than looking to degrees of oppression and vulnerability to identify the objects of constitutional protection, however, originalism looks to the original public meaning of the constitutional text.[114] Did the founding public or Reconstruction Era generation (narrowly defined) intend the Constitution to protect this "who" doing this "what"?[115] If so, they are protected. If not, they are not protected. This obviously produces a very different set of protected minorities than the vulnerability approach. Moreover, this approach of looking to original meaning rather than vulnerability is much more likely to construe the Constitution as a contract of adhesion for people of color. They are bound by meanings and understandings they had no part in creating. Given that demographic change is rapidly transforming people of color into the nation's majority,[116] an approach to constitutional interpretation that seeks to substitute the prior, silenced people of color for the current, empowered people of color can be expected to elevate our current legitimacy crisis into a full-blown constitutional crisis over time.

This questionable approach is generally justified by arguments that the textual rights in the Constitution have the actual consent of the American people.[117] In this view, the Founding Generation created a social contract through an ultimate act of popular sovereignty[118] and deeply democratic "supermajoritarian" processes,[119] making deference to their understandings an instantiation of

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[114] Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 479 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453 (2013); Lawrence B. Solum, *Semantic Originalism* 18-19 (Ill. Pub. L. & Legal Theory Rsch. Papers Series No. 07-24, 2008) [hereinafter Solum, *Semantic Originalism*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

[115] *See* Solum, *Semantic Originalism*, *supra* note 114, at 40.

[116] Frey, *supra* note 29.

[117] *See* Easterbrook, *supra* note 11, at 1122.

[118] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5-18 (2005); Easterbrook, *supra* note 11, at 1121-25.

[119] *See, e.g.*, Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 Nw. U. L. REV. 1627, 1627-28 (2013) (noting originalist argument that "the Constitution owes its legitimacy as higher law to the fact that it was ratified by the American people through a supermajoritarian process").

majority rule. This approach has the benefit of seeking to rest law more firmly on consent and of recognizing that the reserve control of judges can operate as domination in ways indistinguishable from majoritarian tyranny. The problem, however, is the special status originalism accords to the Founding Era's "supermajority."

First, the special status originalism accords to constitutional text and original meaning flows in large part from the perceived strengths and democratic pedigree of the original framing, privileging the meanings produced during "supermajoritarian" deliberations over those produced by majoritarian politics.[120] This privileging of the original meaning in its various forms necessarily presupposes that the negotiation of the original constitutional terms was either unproblematic from a democratic perspective or that any flaws were effectively corrected through subsequent amendments.[121] These assumptions, however, are only valid within a world that has legitimated the disempowerment and disenfranchisement of almost 70% of the Founding Era's population—comprised of poor White men, women, and men of color.[122] Outside that peculiar framing, the Founding Fathers did not create a democracy but rather created and constitutionalized a patriarchal apartheid in the United States. As a result, America's "popular sovereignty," while an innovative improvement over the monarchies and aristocracies of the day,[123] was limited to property-owning White men, who comprised roughly 12% of the population.[124] This falls far short as a democratic process justification for privileging the meanings and applications endorsed by that 12% above the more inclusive participatory outcomes of the modern era. A supermajority created through racial, gender, and socioeconomic exclusion is vulnerable to claims that it is not a flawed supermajority[125] but is simply not a supermajority at all. It is a White, male, propertied minority. Can a long-dead White, male, propertied minority (which we know was deeply socialized into bigotry and racism and possessed only a theoretical knowledge of democracy) really be relied upon for unbiased evaluations of whom our Constitution should protect? To be a bit more pointed, are white supremacists, however gentlemanly, patriotic, and knowledgeable, really the best source of inspiration for countering marginalization in a

[120] McGinnis & Rappaport, *supra* note 13, at 1720-22 (grounding argument for originalist interpretation of Constitution on "supermajoritarian" enactment process).

[121] *Id.* at 1697.

[122] *See* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 4 (London, J. Phillips, George-Yard, Lombard-Street 1793) [hereinafter 1790 CENSUS] (documenting that adult White males, only group enfranchised during this period, constituted approximately 21% of U.S. population); *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 7 (rev. ed. 2009) (estimating that 40% of adult White males were ineligible to vote in early America).

[123] AMAR, *supra* note 118, at 7-9, 277-80.

[124] *See* 1790 CENSUS, *supra* note 122, at 4; KEYSSAR, *supra* note 122, at 7.

[125] *See* McGinnis & Rappaport, *supra* note 13, at 1696-97 (noting that ratification process followed "appropriate supermajority rules" but had "significant defects").

pluralistic society? Or would a living, multiracial, gender-inclusive Congress, with centuries of instantiated democracy and civil rights advocacy to draw upon, be better?

Moreover, original public meaning originalism anchors the judicial protection of the disempowered to the public meanings of the very citizenry that first disempowered them. By focusing primarily on the constitutional meanings of a partial public comprised of wealthy White men, originalism erases the constitutional meanings of excluded partial publics, recreating the very problem of lack of consent its appeal to supermajoritarianism was believed to remedy. For example, while courts have frequently treated social prejudice as nonjusticiable,[126] many people of color in the Founding Era viewed social prejudice as part and parcel of the system of enslaving people.[127] These views, however, are not part of the canon of the public understandings of the Founding Era and were not clearly reflected in the Reconstruction Amendments.

To be coherent, originalism must be premised on the legitimacy of an amoral democracy in which the polity is defined by power rather than rights. Since White people had the power in the Founding Era, they alone constituted the polity, and no cognizable distortion in our understanding or application of the Constitution occurs as a result of excluding the public meanings of the non-White and disenfranchised of this era. Originalism's theory of rights thus relies on an amoral understanding of democracy and then uses that understanding to restrict exercises of self-governance in a democracy presupposed to possess internal morality.[128] The result is that those marginalized by the amoral definitions of democracy in the Founding Era become remarginalized by originalist constructions of rights in the modern era, for originalism makes current rights parasitic on the power allocations in the Founding Era. For example, one in sixteen African Americans is currently disenfranchised by the "or other crimes" provision of the Fourteenth Amendment,[129] which was written

[126] *See* James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 724 (2016).

[127] *Id.* ("For the convention's delegates in 1864, it was plain that racial prejudice was part and parcel of slavery; it was, they said, slavery's shadow. Importantly, the convention was not speaking only about the remnants of slavery in law, such as facially oppressive laws like the Black Codes of the South or Jim Crow laws of the North. The point extended to private prejudice, which they believed to be just as much an extension of slavery and an obstacle to freedom as were Jim Crow laws.").

[128] *See* SUNSTEIN, *supra* note 54, at 7 (discussing democracy's internal morality).

[129] CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020).

by men who felt that it was politically infeasible,[130] if not actually undesirable,[131] for any African Americans to have the right to vote. Preservation through transformation[132] is only possible if there are certain foundational principles, like the primacy of White self-governance embedded in the 1789 and 1868 Constitution, that are immunized from change. One can thus expect that the more modern allocations of power deviate from Founding Era allocations, the more originalists' interpretations of rights will function to disempower women and men of color—to limit their self-governing capability—because Founding Era allocations of power are baked into the originalist approach. One need not conclude that this disempowerment is a feature rather than a bug to conclude that the legitimacy problems created by this approach will only become more severe as the nation becomes less White. As a result, the minority protection model of originalism is also ill suited to the rights challenges of the current context.

[130] CONG. GLOBE, 39th Cong., 1st. Sess. 2766 (1866) (statement of Sen. Jacob M. Howard) ("It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. . . . [I]f my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least; for I am opposed to the exclusion and proscription of an entire race. If I could not obtain universal suffrage in the popular sense of that expression, I should be in favor of restricted, qualified suffrage for the colored race."); *id.* ("I could wish that the elective franchise should be extended equally to the white man and to the black man; and if it were necessary, after full consideration, to restrict what is known as universal suffrage for the purpose of securing this equality, I would go for a restriction; but I deem that impracticable at the present time, and so did the committee.").

[131] *See* Richardson v. Ramirez, 418 U.S. 24, 43, 45-47 (1974); *see also id.* at 73-74 (Marshall, J., dissenting); CONG. GLOBE, 39th Cong., 1st. Sess. 2538 (1866) (statement of Rep. Andrew J. Rogers) ("I have no fault to find with the colored race. I have not the slightest antipathy to them. I wish them well, and if I were in a state where they exist in large numbers I would vote to give them every right enjoyed by the white people except the right of a negro man to marry a white woman and the right to vote. . . . Representatives of the eastern, middle, western, and some of the border States come here and attempt in this indirect way to inflict upon the people of the South negro suffrage. God deliver this people from such a wicked, odious, pestilent despotism! God save the people of the South from the degradation by which they would be obliged to go to the polls and vote side by side with the negro!").

[132] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2180 (1996) (describing process by which lawmakers and judges "modify the rules and reasons by which the legal system distributes social goods so as to produce a new regime, formally distinguishable from its predecessor, that will protect the privileges of heretofore dominant groups, although not necessarily to the same degree"); *see also* Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQ. 67, 68 (2018) (describing Siegel's "preservation-through-transformation" model as "a dynamic through which a group that opposes civil rights reform modernizes its rhetoric after a civil rights victory in an attempt to maintain unequal status regimes").

IV. *MASTERPIECE CAKESHOP* AND INDETERMINACY OF MINORITY RIGHTS PROTECTION

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission offers a concrete illustration of why neither the liberal nor the conservative view of the minority protection model can answer the questions presented by modern rights clashes, particularly given where we are in the cycles of constitutional time—the nadir of constitutional rot, the pinnacle of polarization, and the end of a regime.[133] In *Masterpiece Cakeshop*, the Court was asked to adjudicate a rights clash between a White Christian male and two White, apparently cisgender, male members of the LGBTQ+ community.[134] All three litigants appear to be property owners,[135] suggesting that all three are members of what has historically been America's most privileged group—White men of property. The race, class, and gender privilege of the litigants, however, allowed the Court to abstract race, class, and gender from its analysis, leaving only religious identity and sexual orientation. The case thus came to symbolize the clash between the protection of religious identity and the protection of LGBTQ+ identity occurring throughout modern society. The Court defined this conflict as one between at least two principles: "[T]he authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services" and "the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment."[136]

While it is definitely easier to balance two characteristics than five, abstracting race, class, and gender from the analysis has two effects that undermine the goal of minority protection. First, this approach centers the marginalization experienced by White, middle-class individuals in ways that further marginalize those whose experiences of religious identity or Sexual Orientation and Gender Identity ("SOGI") oppression are compounded by race, gender, and class. White, middle-class individuals experience oppression in qualitatively different ways than their less-privileged counterparts; thus, it is not clear that a rights analysis that centers them will adequately protect those who are more vulnerable.[137] Second, this framing makes constitutional protection

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[133] BALKIN, *supra* note 16, at 62-64.

[134] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018); Julie Compton, *Meet the Couple Behind the Masterpiece Cakeshop Supreme Court Case*, NBC NEWS (Dec. 6, 2017, 1:28 PM), https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976 [https://perma.cc/F4BT-GZXP].

[135] Allison Sherry, *After the Masterpiece Ruling, David Mullins and Charlie Craig Hope to Move On*, CPR NEWS (June 11, 2018), https://www.cpr.org/2018/06/11/after-the-masterpiece-ruling-david-mullins-and-charlie-craig-hope-to-move-on/ [https://perma.cc/74NK-PQ8S] (noting that Mullins and Craig own home together).

[136] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

[137] *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist*

depend on an incomplete account of the actual dynamics of marginalization and privilege. When race, gender, and class are held constant, the most salient characteristics at issue may well be religious identity and SOGI, but race, gender, and class are seldom held constant. A complete account of vulnerability must necessarily take into consideration the ways in which race, gender, and class exacerbate or moderate experiences of marginalization along other axes. The binary choices required by the minority protection model, however, leave no room for this.

While the distortions introduced by the inability of the minority protection model to account for intersectionality made it likely that a rights-based resolution would have been underprotective, the interplay between the Court's composition and partisan-motivated reasoning ultimately prevented the *Masterpiece Cakeshop* Court from reaching a rights-based resolution at all. The Court grounded its holding in the observation that applying different rationales to similar behavior by contesting social groups demonstrates unconstitutional bias.[138] True though this may be, it does not address the rights question—how to balance the constitutional right to free exercise against the statutory right to nondiscrimination in a time when *Employment Division v. Smith*[139] remains the governing law.[140] Moreover, the factual question of whether the adjudicative body actually had applied different rationales to similar behavior mapped onto the Justices' partisan priors in predictable ways. The conservative Justices found that the commission had treated a baker's refusal to bake an "anti-gay" cake differently than it had treated Jack Phillips's refusal to bake a celebratory cake.[141] This approach to the facts made religious discrimination the core of the rights issue, while decentering the concern for SOGI nondiscrimination. Unsurprisingly, this factual finding is consonant with the conservative rights hierarchy that privileges textual rights to religious freedom above what conservative jurists have described as an implied right to same-sex marriage.[142]

Politics, 1989 U. CHI. LEGAL F. 139, 140 ("Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender.").

[138] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

[139] 494 U.S. 872 (1990).

[140] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) ("Because the City's actions are . . . examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.").

[141] *Masterpiece Cakeshop*, 138 S. Ct. at 1735-36 (Gorsuch, J., concurring) ("The facts show that the two cases share all legally salient features. . . . In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.").

[142] *See* Davis v. Ermold, 141 S. Ct. 3, 3 (2020) (mem.) (statement of Thomas, J., and Alito, J., regarding denial of certiorari) ("In *Obergefell v. Hodges*, the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text." (citation omitted)); *see also* Mark Joseph Stern, *Two Supreme Court Justices Just Put Marriage Equality on the Chopping Block*, SLATE (Oct. 5, 2020 3:47 PM), https://slate.com/news-and-politics/2020/10/supreme-court-ready-to-overturn-obergefell.html [https://perma.cc/8N62-QRBV] ("'Davis may have been one of the first

The liberal Justices found that the conduct at issue in the "anti-gay" cake case was different from the conduct at issue in *Masterpiece Cakeshop*, so there was no religious discrimination.[143] This approach to the facts decentered religious discrimination as the core of the rights issue, while validating efforts to combat SOGI discrimination. Also unsurprising, this factual finding is consonant with the liberal rights hierarchy that privileges SOGI nondiscrimination principles above what liberal scholars have suggested is a right to discriminate based on religion.[144] Two liberal Justices sought to distance themselves from the resultant appearance of partisan-motivated reasoning by agreeing with the liberals that the cases were different and also agreeing with the conservatives that the commission's decision was non-neutral.[145] They offered the compromise evaluation that there that was a dissimilarity, but the decision was not based on that dissimilarity.[146]

The Court does note that future rights conflicts "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[147] This suggests a recognition that minority rights protection must do more than identify and protect a single suspect class. It does not, however, offer a framework for how such dual balancing and protection can be undertaken. There is nothing in the minority protection model that tells the Court which of two minorities[148] to protect because the theory was not designed to

victims of this Court's cavalier treatment of religion in its *Obergefell* decision,' [Justice] Thomas warned, 'but she will not be the last.'").

[143] *See Masterpiece Cakeshop*, 138 S. Ct. at 1749-50 (Ginsburg, J., dissenting) ("What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.").

[144] *See, e.g.*, Robert C. Blitt, *The Organization of Islamic Cooperation's (OIC) Response to Sexual Orientation and Gender Identity Rights: A Challenge to Equality and Nondiscrimination Under International Law*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 89, 126-28 (2018) (arguing that OIC's "understanding of Islamic religious imperatives" serves as nexus for discrimination against LGBTQ+ community); Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, 2016 U. ILL. L. REV. 1287, 1292 ("[U]nder the premise of protecting religious groups, some legislatures and courts have granted individuals and groups authority to inflict dignitary, and even physical, harms on others."); Velte, *supra* note 132, at 68 (describing religious exemptions from SOGI nondiscrimination principles as seeking to "usher[] in an era of the Gay Jim Crow").

[145] *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (Kagan, J., concurring).

[146] *Id.* at 1733 ("What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious."); *id.* ("[T]he different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.")

[147] *Id.* at 1732 (majority opinion).

[148] In Colorado, evangelical Christians comprised roughly 26% of the adult population in 2014. PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE app. d at 145 tbl. (2015). As of 2017, members of the LGBTQ+ community comprised around 5% of the state's adult population. Kerith J. Conron & Shoshana K. Goldberg, *Fact Sheet: Adult LGBT*

mediate between minorities or to balance the powers of competing minorities. Rather, the minority protection model presupposes that the rights conflict is between minority rights and majority power, hence the centrality of suspect class analysis. In cases like *Masterpiece Cakeshop*, where a minority of the population has managed to secure protections through majoritarian processes, the minority protection model offers courts the option of either ignoring the success of the minority group completely or of basing lasting allocations of rights on the political power of the temporary and shifting coalitions the minority group joined. Moreover, the justification of minority protection becomes incoherent when, as in *Masterpiece Cakeshop*, protecting one minority's power is construed as denying a different protected group's rights. This is particularly true when the definitions of the minority rights and powers at issue rely on partisan-motivated reasoning.

The nonanswer in *Masterpiece Cakeshop* reflects the limitations of the *Brown* model of minority rights protection. Intersectional rights analysis seems to demand either (1) some sort of lexical ordering of rights and identities that will help courts determine what to do in the event of a clash between competing "minority" rights and identities; or (2) the adoption of a different model, a proportionality model, that seeks to overtly balance protection of rights based on the specific facts at issue rather than on generalities about those with marginalized identities.[149] For example, the German approach is a sort of hybrid of these two. Germany's Constitution enshrines a textual commitment to human dignity as inviolable and places a duty on the state to protect the dignity of those within its borders.[150] This orientation functions to delegitimize the bare judicial selection of winners and losers in rights clashes.[151] Instead, the equal dignity of human beings as their own ends has yielded a form of proportionality adjudication in Germany that seeks to recognize and balance multiple rights and

Population in the United States, UCLA SCH. OF L. WILLIAMS INST. (July 2020), https://williamsinstitute.law.ucla.edu/publications/adult-lgbt-pop-us/ [https://perma.cc/S8T8-P3RL]. As a result, in Colorado as elsewhere, the political power of both groups depends on the power of the coalitions of which they are a part. *See, e.g.*, William Schultz, Opinion, *How Colorado Did a 180 on Gay Rights*, WASH. POST (Dec. 17, 2018) https://www.washingtonpost.com/outlook/2018/12/17/how-colorado-did-gay-rights/ (describing impact of alliance with corporate America on LGBTQ+ equality movement's successes in Colorado and elsewhere).

[149] *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 110-11 (2021).

[150] GRUNDGESETZ [BASIC LAW] art. 1 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/.

[151] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 15, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 118 (Ger.) (invalidating law that authorized government to shoot down hijacked airplanes on ground that airline passengers' constitutional guarantee of human dignity could not be discounted and sacrificed ex ante).

interests simultaneously,[152] rather than elevating any single right or interest into a "trump." An example is Germany's abortion jurisprudence which recognizes that the state has an obligation to protect unborn life as well as a competing obligation to protect a woman's rights of human dignity, life, and free development of her personality.[153] This has led to a regime in which abortion is illegal but decriminalized and in which the state has an obligation to provide an extensive network of social and financial supports for pregnant women.[154]

The United States has similar rights clashes, but our Federal Constitution is oriented towards privileging specific liberties (often influenced by class)[155] rather than towards maximizing human dignity. As a result, our constitutional and interpretive frameworks require that some rights and interests trump others but do not provide guidance on how to identify these trumps. While the German Constitution suggests that dignity trumps all and this approach privileges proportionality, the U.S. Constitution is unclear about whether liberty or equality is the dominant value and about when state rights trump individual rights. This has created a jurisprudence in which the hierarchical ordering of rights and competing intersectional identities is done on an individual basis by individual jurists consulting their own factual, political, and methodological priors. This means that liberty and equality, states' rights and individual rights, trump at different times across cases for inconsistent reasons. Moreover, when the judiciary is polarized, Justices are likely to embrace the lexical orderings and priorities of their party,[156] meaning that whether equality or liberty trumps, or whether state rights or individual rights trump, will vary based on how party platforms are implicated by the rights at issue. This explains the centrality of judicial appointments in presidential elections. *Masterpiece Cakeshop* underscores that our existing model of rights protection cannot be counted on to

[152] *See* GREENE, *supra* note 149, at 114-16, 131-32, 137 (comparing German and American judicial approaches to abortion, explaining significance of German judiciary's "insistence on recognizing multiple and competing constitutional rights").

[153] *See* 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203.

[154] *See* GREENE, *supra* note 149, at 126-27, 130-32.

[155] *See, e.g.*, Mary Anne Franks, *Fearless Speech*, 17 FIRST AMENDMENT L. REV. 294, 302 (2018) (arguing that First Amendment's prohibition on interference with speech was designed for those who already had the right and means to speak freely—White men). As women and men of color were treated as property in early America, and did not have right to their own bodies much less the right to speak freely, Franks argues that the First Amendment "reflects white, wealthy men's experiences and interests." *Id.*; *see also* Harris v. McRae, 448 U.S. 297, 317-18, 326-27 (1980) (upholding Hyde Amendment's proscription of government-funded abortion care services).

[156] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 767-70 (2010). In *McDonald* the conservative Justices, who generally favor state-level protection of rights in the name of federalism, supported strong national protection of Second Amendment rights. *Id.* at 791. The liberal Justices, who tend to favor strong national protection of rights, favored state-level protection of gun rights. *Id.* at 902-05 (Stevens, J., dissenting); *id.* at 927 (Breyer, J., dissenting).

resolve rights clashes that involve intersectional complexity, particularly not when that complexity is conjoined with partisan-motivated reasoning.

V. FROM PROTECTION TO EMPOWERMENT

A. *Democracies Grow Up as Constitutional Time Cycles*

The minority protection model is designed for the protection of minorities in a dysfunctional democracy, but American democracy is no longer as dysfunctional as it was in the 1950s. In the years since *Brown*, race-based exclusions from the rights and privileges of citizenship have become more partial and indirect,[157] making claims of oppression by racial minorities more nuanced while also creating a framework in which claims of partial or indirect discrimination by other groups in society have gained currency. As minority oppression has become less black and white, claims under the minority protection model have become more relative, contextual, and numerous; they have also become more contentious. This contentiousness is a sign of marginalized groups' increased voice and access to the public square and ballot box—and of resistance to their voices. The resultant struggles for power among groups in society, while messy and unstable, is evidence of America's progress towards a fully inclusive democracy. America has not yet arrived at full inclusion, but judicial review premised on the politically voiceless and powerless minorities of yesteryear does a disservice to the very minorities it purports to protect by rendering invisible the democratic progress for which so many sacrificed lives and livelihoods. Instead of a model designed to protect minorities from a dysfunctional democracy, judicial review should be reoriented towards facilitating their full participation in a maturing democracy. In essence, it should shift from protection to empowerment.

Empowerment jurisprudence is rooted in the idea that democracies are capable of growing up, and that as they do so, the function of judicial review should shift from protecting citizens to facilitating the ability of citizens to protect themselves.[158] Thus, while judicial review in most new democracies must begin with the protection of minorities from majorities, this should not be a perpetual state of affairs. Constitutional theories of judicial review should not constitute a fourth cycle of constitutional time, with endless perambulations from restrained protection to engaged protection and back again. The goal of judicial review, like the goal of international human rights, should be the internalization of norms as a democracy matures and a corresponding reduction

[157] *See* Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305, 1306 (2004) (noting that after *Brown*, "[m]any private individuals, families, and institutions of civil society desired and still desire segregation; deprived of direct state support, they found other means for perpetuating it").

[158] I discuss the concept of empowerment jurisprudence more extensively in a current work in progress.

in the need for "outside" interference.[159] We need to grow beyond theories of how to protect minorities from democracy and instead generate robust theories of how to promote shared governance with minorities within the democracy. As we shift from the Reagan regime to the new regime dominated by the Democratic Party's coalition that Balkin predicts,[160] our constitutional theories of minorities' rights need to grow up into theories of minority power sharing.

A jurisprudence of minority power sharing—empowerment jurisprudence—is in some ways a gloss on Ely's representation-reinforcement approach.[161] Like representation-reinforcement theories, empowerment jurisprudence is concerned primarily, even solely, with political equality and self-governing capability. Without denying that all citizens in a constitutional democracy are to some extent unfree and thus lacking in full self-governing capability, empowerment jurisprudence focuses on those members of society with the least self-governing capability. "Least self-governing capability" is thus similar to the "discrete and insular minorities of process" theory,[162] though it rejects the idea that concepts of discreteness, insularity, or prejudice[163] are useful metrics for a society in which marginalization is experienced intersectionally rather than insularly. Instead of essentialized identities defined by "discreteness" or prejudice, this approach relies on (1) political representation in terms of registered voters, candidates, and elected officials (whose own intersectional identities allow for a more complex account of representation and power); and (2) assessments of minimum responsiveness.[164] Another key difference between empowerment jurisprudence and the representation-reinforcement approach lies in the fact that the representation-reinforcement approach was a gloss on a status quo that presupposed judicial supremacy, while empowerment jurisprudence is a theory of judicial engagement premised on legislative supremacy. This is not to say that empowerment jurisprudence should have been used to decide *Brown*. The minority protection model was well suited to the decidedly illiberal forms of democracy that had prevailed since the Founding. But kids and democracies grow up, and at some point our constitutional theory must emancipate American democracy. The new regime Balkin anticipates promises to be one of the most pluralistic and inclusive versions of democracy America has ever seen.[165] It will not be the Founding Era nor the *Brown* Era, and our constitutional theory should reflect that. The next section discusses why this shift is so important.

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[159] *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399 (1999) (contending that international human rights norms are enforced through transnational process of debate, interpretation, and ultimately domestic internalization).

[160] *See* BALKIN, *supra* note 16, at 27-29.

[161] *See* ELY, *supra* note 74, at 181.

[162] *Id.* at 151-60; *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[163] *See* ELY, *supra* note 74, at 151-52.

[164] *See* Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, 72 LAW & CONTEMP. PROBS. 197, 197-222 (2009).

[165] *See* BALKIN, *supra* note 16, at 172-74.

B. *Reserve Control and Self-Governing Capability*

Traditional approaches to judicial review rely on the courts to protect both minority rights and minority power. Empowerment jurisprudence, however, assigns facilitation of minority power to the courts and leaves protection of minority rights to Congress. It does this because it foregrounds the oft-forgotten larger ends of government: promoting social cooperation across generations among free and equal people on terms that are fair for all.[166] The linchpin of this purpose is the freedom of the people—freedom in relation to other individuals and freedom in relation to the state.[167] Freedom in relation to other individuals is a freedom of nondomination. It means that our ability to promote our ends and choose among those ends is not dependent on the goodwill of the more powerful.[168] Freedom in relation to the government is also a freedom of nondomination. It means that we share equally in the control of the terms by which the government governs and are not subject to the unlimited discretion of those in power.[169] As Philip Pettit noted:

> If I can limit your discretion in the choice of option or can impose my terms on how you choose, I have a degree of reserve control over what you do. Your capacity to choose this or that option is going to depend on the state of my will as to whether you should choose as you wish. If I want you to have discretion, then you will choose as you wish; if I cease to want this, you will not. But in either case you are going to remain subject to my will and in that sense unfree.[170]

Enslavement, reserve control, and self-governance are three points on the continuum of freedom. Enslavement indexes a life lived completely under the will of another without even the appearance of autonomy. As noted in the Introduction, reserve control indexes a life lived under the will of another, but another who often (but not always) wills that you have autonomy. Self-governance indexes the ability of individuals to collaborate with other members of society, on fair and equal terms and with equal capacity for influence, to establish the structures, procedures, and policies of their society. It replaces reserve control with authentic self-restraint.

The closer a citizenry or portion of a citizenry is to enslavement, the more central the minority protection model is to their ability to claim any degree of self-governing capability. In the *Brown* Era, the minority protection model was needed to move minorities away from near-enslavement into a system in which they had greater autonomy. This new system was a system of reserve control. Vulnerable minorities were finally recognized as having rights—but only those

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[166] *See* JOHN RAWLS, POLITICAL LIBERALISM 3, 15-22 (expanded ed. 2005).

[167] *See* PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD 3-5 (2014).

[168] *Id.* at 4; AMARTYA SEN, THE IDEA OF JUSTICE 305-09 (2009).

[169] *See* PETTIT, *supra* note 167, at 4.

[170] *Id.* at 3.

rights that the judiciary deigned to protect.[171] When the Warren Court expansively interpreted the rights and autonomy of vulnerable minorities, members of those groups lived under a regime of reserve control that seemed indistinguishable from authentic self-governance. That it was not authentic self-governance became increasingly evident as the composition of the Court changed.[172] For example, during the Rehnquist era, the Court's decisions diluted the protections against racial discrimination that had begun in the Warren Court and continued to a degree in the Burger Court.[173] The Rehnquist Court also significantly weakened the procedural protections afforded to criminals and prisoners.[174] Similarly, the Roberts Court has become infamous for consistently undermining protection for voting rights.[175] More recently, given the death of Justice Ginsburg and the appointment of Justice Barrett, minorities across the country are fearfully watching the Supreme Court, worrying about what will happen to their rights and whether the Court's will for them will be oppressive or benign.[176] This state of affairs is the essence of a regime of reserve control. The larger the scope of reserve control, the less self-governing the citizenry will be. (Though, the greater the degree to which a citizenry is lost to racism, bigotry, and other forms of oppression, the less self-governing it *can* be.)

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[171] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019) (concluding that partisan gerrymandering claims are nonjusticiable); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (extending exercise of fundamental marriage right to same-sex couples); McCleskey v. Kemp, 481 U.S. 279, 313-20 (1987) (rejecting challenge to Georgia death penalty system based on systemic racial disparities); Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (denying right to vote to felons); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (concluding that right to education is not fundamental).

[172] *See* Staci Rosche, Note, *How Conservative Is the Rehnquist Court? Three Issues, One Answer*, 65 FORDHAM L. REV. 2685, 2692 (1997) (conducting empirical analysis of Burger Court and Rehnquist Court decisions and concluding that Rehnquist Court had "a pattern of finding against racial minorities"). Similarly, the Roberts Court has consistently undermined protection for voting rights. *See, e.g.*, *Rucho*, 139 S. Ct. at 2506-07; Shelby County v. Holder, 570 U.S. 529, 556-57 (2013).

[173] *See* Rosche, *supra* note 172, at 2692.

[174] *See* Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1344-45, 1358-60 (2002).

[175] *See* Ian Millhiser, *Chief Justice Roberts's Lifelong Crusade Against Voting Rights, Explained*, VOX (Sept. 18, 2020, 8:00 AM), https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020; *see also Shelby County*, 570 U.S. at 556-57 (gutting any meaningful protection provided by section 5 of Voting Rights Act by invalidating coverage formula that served as basis for preclearance requirement).

[176] *See* Paul Waldman, Opinion, *Nightmare Ahead: Imagine the Damage a 6-3 Conservative Supreme Court Could Do*, WASH. POST (Sept. 21, 2020, 12:35 PM), https://www.washingtonpost.com/opinions/2020/09/21/nightmare-ahead-imagine-damage-6-3-conservative-supreme-court-could-do/; *see also* Daniel S. Lucks, Opinion, *Originalism Threatens to Turn the Clock Back on Race*, WASH. POST (Oct. 13, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/10/13/originalism-threatens-turn-clock-back-race/ (discussing how aftermath of Justice Ginsburg's death demonstrated Court's partisan nature).

Much of constitutional theory thus far has been concerned with how the judiciary's reserve control is exercised and with getting the Supreme Court's reserve control into the "right" hands.[177] Indeed, countless books have been written explaining which theory of constitutional interpretation should underlie the Court's use of the reserve control baked into judicial review, from originalism to popular constitutionalism.[178] There has been much less concern with increasing the self-governing capability of the citizenry by reducing the scope of the judiciary's reserve control.[179] This is evidenced by Balkin's observation that concerns with judicial restraint melt away once members of the new regime dominate the Court[180]—in other words, once the reserve control is in the "right" hands. Current proposals related to packing the Court are part and parcel of attempts to influence the direction of the Court's exercise of its reserve control (which only kicks the can down the road) rather than limiting the scope

[177] *See, e.g.*, Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2750-51 (2020) (explaining history of changes to Court's size and discussing legitimacy effects of modern court-packing plans to add more liberal Justices); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181-82 (2019) (proposing that one way to save Court's legitimacy would be changing its composition by appointing all federal appeals court judges as associate Justices and having them sit on Supreme Court by lottery that includes party limits); Richard Mailey, *Court-Packing in 2021: Pathways to Democratic Legitimacy*, 44 SEATTLE U. L. REV. 35, 39 (2020) (exploring whether there is legitimate way for Democratic President to "pack" Supreme Court); Bobic, *supra* note 3 (reporting on President Trump's 2016 campaign strategy emphasizing ability to appoint conservative jurists if elected); John Fritze, *Biden Wants to Put a Black Woman on the Supreme Court, Putting Spotlight on Lack of Diversity in Lower Courts*, USA TODAY (Feb. 17, 2021, 12:54 PM), https://www.usatoday.com/story/news/politics/2021/02/17/supreme-court-advocates-ask-joe-biden-name-black-women-judges/6722856002/ (describing push for President Biden to appoint more Black women to federal judiciary); *Senator Kennedy Opposes Bork Nomination* (C-SPAN television broadcast July 1, 1987), https://www.c-span.org/video/?c4594844/senator-kennedy-opposes-bork-nomination (documenting Senator Ted Kennedy's opposition to Judge Bork's nomination on ground that Bork "st[ood] for an extremist view of the Constitution and the role of the Supreme Court").

[178] *See generally, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM (2011) (proposing that when judges exercise their power of review, they should use blend of originalist and evolutionary approaches); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press 1986) (1962) (suggesting that judges should privilege passive virtues when exercising their power of judicial review); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (arguing that judges should use their power of judicial review to enforce original intent of framers); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing against judicial supremacy as corollary of judicial review).

[179] *But see, e.g.*, Boumediene v. Bush, 553 U.S. 723, 796-98 (2008) (rejecting Congress's attempt to limit federal courts' jurisdiction over habeas applications by Guantanamo Bay detainees); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (concluding that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker").

[180] *See* BALKIN, *supra* note 16, at 89 (noting that as dominant party gains control of judiciary, judicial review becomes increasingly useful means of advancing the party's goals).

of reserve control. A core of any theory of empowerment jurisprudence must be a limitation on the reserve control of the Court. At this time, one of the most straightforward methods of implementing such a limitation would be for Congress to reclaim its powers in the "appropriate legislation" clauses of the Thirteenth,[181] Fourteenth,[182] and Fifteenth[183] Amendments, and to assert its supremacy in those areas—a type of reverse *Marbury v. Madison*.[184]

This will not be easy. The current stalled congressional attempts to pass a new comprehensive voting rights bill, or even just a new section 4 formula for our existing voting rights law,[185] suggests it will be quite difficult. Moreover, added to this difficulty are the tendencies of legislators to preserve their political capital by relying on the courts to solve the most controversial issues of the day.[186] The argument for a new approach to constitutional interpretation is thus not an argument of ease but one of democratic legitimacy. American judicial review is not rooted in proportionality. It picks absolute winners and losers, distinguishing those whose interests warrant protection from those whose interests do not. Moreover, given the vagueness of our constitutional language and the complex intersections of rights and identities at issue, the reasoning courts use to select these winners and losers in rights cases rests on values as much as facts and is informed by politics as much as law.[187] Indeed, in times of partisan-motivated reasoning, the influence of values and politics often play determinative roles in shaping constructions of the facts and the law.[188] A countermajoritarian institution using its own values and partisan politics to withdraw from millions of citizens their right to protect their interests through the democratic process creates more than a countermajoritarian difficulty; it creates a legitimacy crisis. A shift to legislative supremacy in interpretations of the Thirteenth, Fourteenth, and Fifteenth Amendments would mitigate the crisis in two ways: (1) by placing final say over controversial issues that straddle the line between law and politics

[181] U.S. CONST. amend. XIII, § 2.

[182] *Id.* amend. XIV, § 5.

[183] *Id.* amend. XV, § 2.

[184] 5 U.S. (1 Cranch) 137 (1803).

[185] *See* Barbara Sprunt, *Senate Republicans Block Democrats' Sweeping Voting Rights Legislation*, NPR (June 22, 2021, 8:22 PM), https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate [https://perma.cc/2N3K-9ADJ].

[186] Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36-37 (1993); *see also* Zeke J. Miller, *GOP Candidates May Benefit from Supreme Court's Gay Marriage Decision*, TIME (Oct. 6, 2014, 10:07 PM), https://time.com/3475808/supreme-court-gay-marriage-2016-republican/ (describing politicians' readiness to move past marriage equality debate and redirect anger towards Supreme Court).

[187] *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178, 190 (Wendy Brown & Janet Halley eds., 2002).

[188] *See supra* notes 103-12 and accompanying text (describing how partisanship shapes factual understandings and legal outcomes related to voter suppression).

with the governmental body that is more majoritarian, and (2) by leaving final resolution of controversial issues with the body whose ability to balance competing interests is not limited by paradigms that presuppose that each conflict has only one rights-bearer.[189]

One might well argue that a move towards legislative supremacy would replace our current legitimacy crisis with a genuine constitutional crisis. The larger question, however, is whether a constitutional crisis can be avoided when a judiciary committed to an originalist minority protection model exercises expansive reserve control over a citizenry increasingly constituted by those who are disempowered by originalism and that is actively seeking to use its public autonomy to define its rights in expansive new ways.

CONCLUSION

The definition of insanity is doing the same thing over and over again but expecting different results.

—Unknown

Balkin's *The Cycles of Constitutional Time* provides an excellent framework for making sense of the current moment in American democracy. More significantly, without denying the serious dysfunction accompanying our current levels of constitutional rot and political polarization, Balkin's book manages to sound a hopeful note. We may be in dark times now, but the sun will shine again.[190] I agree. My goal here is to make the point that we will not transition from dark times to sunny days by doing the same things we have always done or by using the same minority rights models we have always used. Those frameworks and paradigms were constitutive of the current crisis—to expect them to suddenly usher in a different constitutional moment is, in a word, insanity. If we want different results, we must think differently about our Constitution and the methods we use to enforce its rights provisions. We must shift from protection to empowerment.

[189] *See* GREENE, *supra* note 149, at 30 (explaining that legislatures are more able than judiciaries to balance competing interests).

[190] BALKIN, *supra* note 16, at 3-6.