LECTURE

THE WARREN COURT V. THE ROBERTS COURT

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INTRODUCTION[1]

I will begin by briefly discussing four important Warren Court decisions and then four important Roberts Court decisions. These decisions are representative of the quite distinct approaches to constitutional interpretation embraced by each of these Courts, roughly half a century apart. I could, of course, discuss many more than these eight decisions, but these decisions are useful examples of my overall thesis.

Chief Justice Earl Warren retired from the Supreme Court in June of 1969, marking the end of the Warren Court. Before Warren joined the Court, school districts in seventeen states required Black schoolchildren to go to different schools from white children. In twenty-seven states, it was illegal for a Black person to marry a white person. Every state in the nation violated the principle of "one person, one vote." Government officials could sue their critics for ruinous damages for inaccurate statements, even if the critics acted in good faith. Married couples could be denied the right to use contraception. Public school teachers led their classes in overtly religious prayers. Police officers could interrogate suspects without telling them their rights. And criminal defendants who could not afford a lawyer had no right to a public defender, and on and on and on.[2]

The justices of the Warren Court had a profound vision of the role the Supreme Court should play in our American democracy. It is important to see that the often vitriolic criticisms of the Warren Court were wrong then, and they are wrong today. Since 1969, the Supreme Court has become ever more conservative. We have moved over the years from reasonably conservative Republican-appointed justices, like Harry Blackmun, Lewis Powell, John Paul Stevens, Anthony Kennedy, David Souter, and Sandra Day O'Connor, to a Court now including such rigidly conservative justices as Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.[3]

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[1] This lecture is based on a few of my recent books, including *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court*, *A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action*, and *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century.* At times, this lecture draws directly from the language my coauthors and I use in those books, although I have updated that language for style and content where appropriate. I do not include quotation marks for every direct quote from one of my own books. *See generally* GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT (2019) [hereinafter DEMOCRACY AND EQUALITY]; LEE C. BOLLINGER & GEOFFREY R. STONE, A LEGACY OF DISCRIMINATION: THE ESSENTIAL CONSTITUTIONALITY OF AFFIRMATIVE ACTION (2023) [hereinafter A LEGACY OF DISCRIMINATION]; GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY (2017) [hereinafter SEX AND THE CONSTITUTION].

[2] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 1-2 (describing legal doctrine existing before Warren joined Supreme Court that changed during his tenure).

[3] *See Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm

Conservatives today insist that they alone are truly committed to the rule of law—that the decisions of the Warren Court were the illegitimate product of the justices' political preferences. All of that is wrong. The Warren Court's decisions—unlike, it should be said, many of the decisions of the increasingly conservative Courts that have followed it—were principled, lawful, and consistent with the spirit and fundamental values of our Constitution.[4]

The Warren Court's vision, at its core, was deeply democratic. The Warren Court defined its role as acting when American democracy had failed: when certain groups were marginalized or excluded from the political process, when those groups were discriminated against, and when those in power manipulated the electoral process to perpetuate their own authority. The Warren Court protected African Americans, especially in the Jim Crow South; it protected the rights of political dissenters, religious minorities, and persons accused of crime. It addressed the failures in our democracy, and it stepped in to ensure fairness and equality in our legal and political systems. That is why the Warren Court's decisions have held up over time.[5]

Leading figures in the conservative legal movement have adopted, in name at least, an approach to the Constitution that they call "originalism." Originalism has many variants, but the essential idea is that judges, in interpreting the Constitution, should adhere to what they regard as the specific intentions of those who adopted the particular constitutional provision in question. Originalism conveys a sense of rigor, and the conservative embrace of originalism has fed into the notion that only conservatives do "real law"—that the Warren Court justices were unprincipled "activists" who simply enforced their own political preferences. In fact, though, originalism is not rigorous at all. It is all too easy for originalism to serve as rhetorical garb for conclusions that are reached for other reasons. Justices with strong personal opinions about such issues as gun rights, religion, affirmative action, abortion, voting rights, or campaign spending, simply convince themselves that the Framers of the Constitution would agree with them.[6]

To be clear, if originalism means adhering to the *ideals* that the Framers embraced—rule by the people, individual dignity, and equality—then no one could object to originalism. And it was the Warren Court that promoted those originalist *ideals* in a way that no Court, before or since, has ever done. To understand why I say this, it is useful to go back to the original understanding of the Framers.[7]

When the Constitution was first drafted, James Madison, perhaps the most important of the Framers, did not believe a bill of rights would serve any

[https://perma.cc/NDQ2-J73W] (last visited Sept. 14, 2024) (listing Supreme Court nominations and who submitted them).

[4] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 3.

[5] *See id.* at 4-5.

[6] *See id.* at 7-8.

[7] *See id.* at 8.

purpose.[8] He believed that political majorities would interpret those rights in any way that suited their own self-interest, and that guaranteeing such rights in the Constitution would therefore lead only to cynicism and disillusion.[9] On December 20, 1787, though, Thomas Jefferson, who was then serving as the Minister to France, wrote to Madison that, after reviewing the proposed Constitution, he regretted "the omission of a bill of rights."[10] In response, Madison expressed his doubt that a bill of rights would provide any meaningful check on the passions and interests of political majorities.[11] He maintained that, in practical effect, such constitutional guarantees would be mere "parchment barriers."[12] "What use," he asked Jefferson, "can a bill of rights serve in popular Governments?"[13]

Jefferson's answer was clear: the courts, he said, can ensure that the Bill of Rights is effective. "Your thoughts on the subject of the Declaration of [R]ights," he told Madison, fail to address one consideration "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their" ability to protect the most fundamental values of our nation.[14]

This exchange likely helped persuade Madison. On June 8, 1789, Madison proposed a bill of rights to the House of Representatives.[15] Echoing Jefferson's letter, Madison said that if these rights are:

> [I]ncorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative

[8] *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), https://founders.archives.gov/documents/Madison/01-11-02-0218 [https://perma.cc/7JZK-TJ65] (showing Madison did not view omission of bill of rights in Constitution as "a material defect").

[9] *See id.* (describing how bills of rights were violated where majority was opposed to right in question).

[10] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), https://founders.archives.gov/documents/Madison/01-10-02-0210 [https://perma.cc/8VDK-TWMD] (describing his qualms with proposed Constitution).

[11] Letter from James Madison to Thomas Jefferson, *supra* note 8.

[12] *Id.* (noting how majorities in every state have violated bills of rights, which are therefore mere "parchment barriers").

[13] *Id.*; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 328-29 (1996).

[14] Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), https://founders.archives.gov/documents/Jefferson/01-14-02-0410 [https://perma.cc/M4G6-HA3J] (highlighing importance of learning and integrity).

[15] *See* James Madison, Speech to Congress Proposing the Bill of Rights (June 8, 1789), *in* 1 ANNALS OF CONG. 448-59 (1789), https://www.congress.gov/annals-of-congress/volume-1.pdf (providing notes and text of James Madison's June 8, 1789, speech to Congress).

> or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution . . . .[16]

It was this special responsibility for making our constitutional rights a reality—rather than, in Madison's words, mere "parchment barriers"—that animated the Warren Court's decisions throughout the sixteen years of its existence.[17]

In the next Part of my Essay, I will illustrate my claims about the Warren Court by briefly examining four of its most important and most controversial decisions. I will explain what the world was like before these decisions, what the decisions did, and why they were justified.

I. THE WARREN COURT

A. Brown

Brown v. Board of Education[18] is, without question, one of the most important Supreme Court decisions in history. *Brown*, which was decided by a unanimous Court in May 1954, held that the Equal Protection Clause of the Fourteenth Amendment forbids racial segregation in public schools.[19]

Brown was the centerpiece of the Warren Court's most important effort—its attack on Jim Crow segregation in the South. More than any other decision, *Brown* exemplified the Warren Court's vision of the Constitution.[20]

In 1896, *Plessy v. Ferguson*[21]—a decision that is now as infamous as *Brown* is iconic—upheld a Louisiana statute that required railroads to provide "separate but equal" train cars for Black and White passengers.[22] From the late nineteenth century to the middle of the twentieth century, segregation was a way of life in the South. Public transportation, public parks, public beaches, public cemeteries, restaurants, water fountains, bathrooms, and public schools were all rigidly segregated.[23]

After World War II, some of that regime began to erode, but segregation still prevailed throughout the South. Public grade schools, especially, were at the core of white supremacy. They remained entirely segregated, not just in the deep South but in the border states and the District of Columbia, as well. The cases that became *Brown v. Board of Education* were the culmination of a decades-long litigation campaign by lawyers associated with the NAACP.[24]

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[16] *Id.* at 457 (defending incorporation of bill of rights into Constitution).

[17] THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961); *see* DEMOCRACY AND EQUALITY, *supra* note 1, at 1-3.

[18] 347 U.S. 483 (1954).

[19] *Id.* at 495; DEMOCRACY AND EQUALITY, *supra* note 1, at 13.

[20] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 13.

[21] 163 U.S. 537 (1896).

[22] *See generally id.* at 550-52.

[23] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 14.

[24] *See id.*

Earl Warren, the former governor of California, who had just been appointed Chief Justice by President Dwight Eisenhower—both Republicans—is often credited with having brought about a *unanimous* decision in *Brown*.[25] Warren's opinion for the Court in *Brown* squarely rejected the doctrine of "separate but equal."[26] "Separate educational facilities," the Court held, "are inherently unequal."[27] Warren's opinion emphasized the harm that segregated schools inflicted on Black children.[28] Racial segregation of public schools, he wrote, "may affect their hearts and minds in a way unlikely ever to be undone."[29]

Central to the Warren Court's approach in *Brown* was a now-famous footnote that the Court, in 1938, had included in its opinion in *United States v. Carolene Products Company*.[30] Footnote four in that opinion, which was written by Chief Justice Harlan Fiske Stone—no relation to me—suggested that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" must "be subjected to more exacting judicial scrutiny," and that "prejudice against discrete and insular minorities" calls for a "more searching judicial inquiry."[31]

As evidenced by *Brown*, this was the vision the Warren Court embraced. This vision gave the Court a role that was consistent with a commitment to democracy and equality and that enabled the Court to insist that democracy must operate in a fair and open manner. In that way, *Brown* set the stage for much of what the Warren Court did later, and it helped define a principled role for the Supreme Court to play in American government.[32]

Brown illustrates the genius of our constitutional system. Constitutional principles are not frozen in time; they evolve as society changes and as experience informs our understandings. The Framers of the Fourteenth Amendment did not believe they were outlawing school segregation, but they did have a vision of equality, and the Warren Court courageously carried forward that vision and adapted it for their time.[33]

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[25] *See* S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. POL. 689, 698 (1971) ("He not only worked to achieve unanimity on the vote but also wanted his opinion in the cases to have the support of all the justices.").

[26] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

[27] *Id.*

[28] *Id.* at 493-94 (highlighting segregation's detrimental effects on Black children's education).

[29] *Id.* at 494.

[30] 304 U.S. 144, 152 n.4 (1938).

[31] *See id.* at 152-53 n.4 (stating it is "unnecessary to consider now whether legislation which restricts these political processes" should receive more 14th Amendment scrutiny, thus implying it could be considered in other cases); *see* DEMOCRACY AND EQUALITY, *supra* note 1, at 20.

[32] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 18-19, 21.

[33] *See id.* at 25-26.

B. Engel

On June 25, 1962, the Warren Court handed down one of the Supreme Court's most controversial decisions ever. In *Engel v. Vitale*,[34] the Warren Court held that the First Amendment's Establishment Clause forbids a public school to require school prayer at the start of each day's classes.[35] 79% of Americans disapproved of the decision, which generated fierce condemnation.[36] School prayer and Bible reading in public schools first became common in the United States during the wave of religious fervor known as the Second Great Awakening, which swept across the nation in the early nineteenth century.[37]

Over the next half-century, with increasing immigration, especially among Catholics and Jews, public schools began inculcating Protestant beliefs in students ever more aggressively. During the twentieth century, conflict over school prayer and Bible reading continued to divide communities. In 1955, at the height of the Cold War, President Eisenhower declared that "[w]ithout God, there could be no American form of Government, nor an American way of life," and Congress, for the first time, added the words "under God" to the nation's pledge of allegiance, which increased the nation's commitment to religion in public life due to its portrayal as a struggle against "godless Communism."[38]

In *Engel v. Vitale*, the Board of Education of New Hyde Park, New York, like most other school districts across the nation, directed school principals to have a prayer said aloud by each class at the beginning of each school day.[39] In 1962, the Warren Court held the practice of school prayer unconstitutional.[40]

Justice Hugo Black delivered the opinion of the Court.[41] Black explained that "the State's use of [this] prayer in its public school system breaches the constitutional wall of separation between Church and State."[42] This was so, he explained, because:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business

[34] 370 U.S. 421 (1962).

[35] *Id.* at 424 ("We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.").

[36] DEMOCRACY AND EQUALITY, *supra* note 1, at 40.

[37] *See id.*, at 40.

[38] *Quotes*, EISENHOWER PRESIDENTIAL LIBR., https://www.eisenhowerlibrary.gov/eisenhowers/quotes [https://perma.cc/K9KX-U95C] (last visited Sept. 14, 2024); *see* DEMOCRACY AND EQUALITY, *supra* note 1, at 40-41.

[39] *Engel*, 370 U.S. at 422.

[40] *Id.* at 424.

[41] *Id.* at 422.

[42] *Id.* at 425.

> of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[43]

As with *Brown*, the reaction to *Engel* was fierce.[44] The Reverend Billy Graham declared that he was "shocked and disappointed";[45] Congressman George Andrews of Alabama raged that first "they put Negroes in the schools and now they've driven God out."[46]

Despite the widespread and often furious criticism of *Engel*, the Warren Court did not back down, and, at least for the moment, it still remains good law after being reaffirmed by both the Burger and Rehnquist Courts.[47] With more recent changes in the makeup of the Supreme Court, though, it remains to be seen whether the current justices will continue to honor these precedents.

C. Sullivan

New York Times Company v. Sullivan[48] is one of the Supreme Court's most important decisions on the meaning of the First Amendment. Like many of the Warren Court's decisions, it arose out of the battle for civil rights.[49]

On March 29, 1960, the *New York Times* ran a full-page advertisement titled "Heed Their Rising Voices," paid for by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."[50] The goal of the advertisement was to raise funds for the legal defense of King, who was then being criminally prosecuted in Alabama.[51] The advertisement described local authorities' actions that had been taken against civil rights protesters.[52] Some of these actions were described inaccurately in the advertisement.[53] Referring to the Alabama state police, for example, the advertisement stated that "[t]hey have arrested [Dr. King] seven times," when in fact they had arrested him only four times.[54]

In response to the advertisement, L. B. Sullivan, the Commissioner of Public Affairs of Montgomery, Alabama, who was not even named in the advertisement, filed a libel action against the *New York Times* and several of the

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[43] *Id.*

[44] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 45 (noting widespread criticism of *Engel*).

[45] *Id.*

[46] *See So They Say*, RENO GAZETTE-J., Aug. 10, 1962, at 4, https://www.newspapers.com/newspage/150505498/.

[47] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 48.

[48] 376 U.S. 254, 279-80 (1964).

[49] DEMOCRACY AND EQUALITY, *supra* note 1, at 63.

[50] *Sullivan*, 376 U.S. at 256-57.

[51] *See id.* at 257.

[52] *See id.* at 257-58.

[53] *See id.* at 258.

[54] *Id.* at 258; *see* DEMOCRACY AND EQUALITY, *supra* note 1, at 63-64.

African American clergymen who had signed the advertisement.[55] The Alabama courts at the time applied the traditional common law standard for libel, under which a speaker who made a defamatory statement about an individual was automatically liable for damages unless the speaker could prove that the statement was true.[56] Applying this standard, the Alabama jury awarded Sullivan immense damages, and the Alabama Supreme Court affirmed the judgment.[57]

As background to the Court's decision in *Sullivan*, it is helpful to understand that, in response to the Warren Court's decision in *Brown*, southern officials routinely used libel actions to deter northern newspapers from covering southern efforts to suppress the movement for civil rights.[58] It was against this background that the Warren Court considered the issue of libel and the First Amendment. The Court unanimously reversed the lower court decision and fundamentally redefined the relationship between libel of public officials and the First Amendment.[59]

In his opinion for the Court, Justice William J. Brennan Jr. observed, "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[60] Brennan then observed that "erroneous statement is inevitable in free debate" and such speech must therefore "be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[61] The defense of truth, Brennan explained, is inadequate to protect a robust freedom of speech and of the press because "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to" dangerous "self-censorship."[62]

The Warren Court thus concluded that the First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he can prove both that the statement was false and that it was made either with "knowledge that it was false or with reckless disregard of whether it was false or not."[63]

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[55] *See Sullivan*, 376 U.S. at 256.

[56] *See id* at 262.

[57] *See id.* at 262-63; DEMOCRACY AND EQUALITY, *supra* note 1, at 64-65.

[58] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 66 (discussing southern states' adoption of policies to hinder civil rights movement, including eleven other libel actions against *New York Times*).

[59] *See id.* at 66-67.

[60] *Sullivan*, 376 U.S. at 270.

[61] *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[62] *Id.* at 279.

[63] *Id.* at 280.

The Court's opinion in *Sullivan* has been lauded as "one of the great opinions of constitutional law"[64] and as perhaps "the best and most important" opinion the Court "has ever produced in the realm of freedom of speech."[65] As the renowned legal philosopher Alexander Meiklejohn famously declared, *Sullivan* was "an occasion for dancing in the streets."[66]

Against that background, it is more than a little unsettling that Justices Clarence Thomas and Neil Gorsuch have recently called upon the Court to overrule *Sullivan*.[67]

D. Reynolds

The story of how "one person, one vote" became an established constitutional principle is in many ways a quintessential Warren Court story. The decisions establishing that rule reflected the Warren Court's deep commitment to democracy and equality. And those decisions were consistent with—arguably demanded by—the principle that courts should step in when the democratic process cannot correct itself. The "one person, one vote" cases, like other Warren Court decisions, were revolutionary, but they also had deep roots in American law. The reapportionment decisions, as they are known, responded to a serious threat to democratic government.[68]

In the middle of the twentieth century, in many states, a small minority of the population was able to elect a majority of the state legislature. In particular, urban districts with many times the population of rural districts were represented by the same number of legislators as the rural districts. The Alabama state legislature at issue in *Reynolds v. Sims*[69] was an example of these pathologies. Bullock County, with a population of only 13,462, was allocated two seats in the Alabama legislature, whereas Mobile County, with a population of 314,301, —twenty-five times as many people—was allocated only three seats.[70]

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[64] New York Times v. Sullivan *and Freedom of Speech and Press in America*, ORG. OF AM. HISTORIANS DISTINGUISHED LECTURESHIP PROGRAM, https://www.oah.org/lectures/lecture/new-york-times-v-sullivan-and-freedom-of-speech-and-press-in-america/.

[65] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 194; DEMOCRACY AND EQUALITY, *supra* note 1, at 71.

[66] Kalven, *supra* note 65, at 221 n.125 (quoting Alexander Meiklejohn); DEMOCRACY AND EQUALITY, *supra* note 1, at 72.

[67] *See* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring) (declaring *Sullivan* and its progeny were "policy-driven decisions masquerading as constitutional law"); Berisha v. Lawson, 141 S. Ct. 2424, 2427-28 (2021) (Gorsuch, J., dissenting) (calling into question necessity of "actual malice" standard in today's media landscape).

[68] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 76-77.

[69] 377 U.S. 533 (1964).

[70] *Id.* at 545-46 (noting similar representation in two Alabama counties with drastically different populations); *see* DEMOCRACY AND EQUALITY, *supra* note 1, at 77-78.

This state of affairs was attributable to two things: the migration of Americans from rural areas to cities in the first half of the twentieth century, and the unwillingness of state legislators to redraw district lines in order to avoid districting themselves out of a job. The democratic process could not solve the problem because rural legislators, acting out of their own and their constituents' self-interest, refused to redraw the lines themselves.[71]

In *Reynolds v. Sims*, decided in 1964, the Warren Court, in an opinion by Chief Justice Warren, held that drawing state legislative districts to reflect the principle of "one person, one vote" "is required by the Equal Protection Clause."[72]

Not surprisingly, *Reynolds* was, at first, very controversial. Indeed, a subsequent bill stripping the Supreme Court of jurisdiction over reapportionment cases passed in the House of Representatives but failed in the Senate.[73] Once the states began to comply with the Court's requirements, though, the principles recognized by the Warren Court in *Reynolds* rapidly became embedded in the national sense of democratic values.[74]

The Court in *Reynolds* declared that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[75] This principle—referring to the right to vote—did more than condemn malapportioned legislatures. It established, as the Court said in *Reynolds*, that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized," and that any time a state treats people unequally with respect to their right to vote, the state must show an especially strong justification for its action.[76]

The Warren Court's decisions on voting embraced a principle of equality that was essential to our democracy, and it did so in a way that was clearly consistent with the appropriate—indeed, the essential—role of the judiciary in a democratic society.[77]

E. *Warren Conclusion*

As these four decisions illustrate, the Warren Court transformed American constitutional law in fundamental ways and gave meaning to our nation's constitutional commitment to such core values as equality, freedom of speech, freedom of religion, and democracy. In so doing, the justices of the Warren

[71] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 78-79 (noting *Carolene Products* footnote four anticipated uneven districting problems).

[72] *Reynolds*, 377 U.S. at 558.

[73] H.R. 11926, 88th Cong. (1964).

[74] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 82.

[75] *Reynolds*, 377 U.S. at 555.

[76] *Id.* at 562.

[77] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 88.

Court lived up to the highest responsibilities of the judiciary in our constitutional form of government.[78]

They protected the rights of those who were most vulnerable, and they protected and reinforced the most central tenets of our democracy. They did what justices of our Supreme Court are supposed to do, and what our Framers intended, and they did it courageously in the face of often furious criticism from those who benefitted from the world as it was before the Warren Court entered the picture.[79]

How might constitutional law have evolved over the past half-century if justices with the same vision of the Constitution as the justices of the Warren Court had remained in the majority? Whatever the answer, it was not to be. To the contrary, Republican presidents have appointed fifteen of the last twenty justices,[80] even though Republican presidential candidates have won the popular vote in only five of the last thirteen elections, and they have increasingly done so to politicize the Court.[81]

II. THE ROBERTS COURT

That brings me to the Roberts Court. As will become evident, in my view, the Roberts Court over time has not only abandoned the Warren Court's fundamental approach to constitutional interpretation, but it has increasingly replaced it with an often unprincipled and all too partisan approach to its most fundamental responsibilities. I say this not just because I disagree with many of the Roberts Court's most important decisions, but also because I believe those decisions would shock people like Thomas Jefferson and James Madison—not because in the world *they* lived in they would necessarily have reached different outcomes, but because in the world *we* live in today, they would have been appalled at how their vision of judicial review has been completely distorted.

A central thesis of conservative scholars, lawyers, and judges in recent decades is that the Constitution should be interpreted in a manner that is true to the specific understandings of those who drafted and ratified those provisions. This view, unlike the view of Jefferson and Madison, never played a role in debates over constitutional interpretation until the late 1970s, when it was embraced, in particular, by Robert Bork, Antonin Scalia, and the Federalist Society. Before then, pretty much everyone agreed that, given the Constitution's highly ambiguous wording, it would be largely pointless to imagine one could clearly identify a definitive, original understanding of Constitutional provisions. In recent decades, though, as the Court has become ever more conservative, this

[78] *See id.* at 158.

[79] *See id.*

[80] *Supreme Court Nominations (1789-Present)*, *supra* note 3.

[81] *See Statistics*, AM. PRESIDENCY PROJECT UC SANTA BARBARA, https://www.presidency.ucsb.edu/statistics/elections [https://perma.cc/3GQ9-VAY5].

approach has increasingly become a purported, but too often disingenuous, rationale for the justices' decisions.[82]

As with my discussion of the Warren Court, I will discuss four important decisions of the Roberts Court, although as with the Warren Court, I regard these decisions as merely illustrative of the Roberts Court's approach to constitutional interpretation. In particular, I will discuss the Roberts Court's decisions in four fundamentally important areas of constitutional law: campaign finance, guns, abortion, and affirmative action.

A. *Campaign Finance*

Let me begin, then, with the Roberts Court's dramatic 2010 decision in *Citizens United v. Federal Election Commission*.[83] In *Citizens United*, the Court, in a five-to-four decision, with only Republican-appointed justices in the majority, overturned centuries-old campaign finance restrictions designed to ensure a fair and principled electoral process, and ultimately enabled corporations and billionaires to spend unlimited funds to manipulate both the electoral process and the behavior of elected officials.[84]

In short, the Republican-appointed justices who decided *Citizens United* held for the first time in American history that limiting such spending violated the First Amendment's guarantee of freedom of speech.[85] Ironically, nothing in the text of the Constitution or in the records of the Constitutional Convention provides *any* hint the Framers intended for constitutional protections to extend to entities like corporations.[86]

Although the Supreme Court in the late nineteenth and early twentieth centuries began recognizing the *property* rights of corporations in cases like *Lochner v. New York*,[87] it consistently and emphatically rejected arguments that corporations had other fundamental rights protected by the Constitution. As the Court declared in 1907, referring to corporations, "[T]he liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons."[88]

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[82] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 160-61.

[83] 558 U.S. 310 (2010).

[84] *See* Tilman Klumpp, Hugo M. Mialon & Michael A. Williams, *The Business of American Democracy:* Citizens United*, Independent Spending, and Elections*, 59 J.L. & ECON. 1, 1 (2016) (finding corporate spending alters state house races about four percentage points on average and ten or more percentage points in certain states).

[85] *Citizens United*, 558 U.S. at 313-14 (opining all speakers, regardless of human or corporate form, use money to fund their speech, and those with more money with which to speak should not be distinguished).

[86] Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 495-97.

[87] 198 U.S. 45, 83 (1905).

[88] W. Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907).

Moreover, in 1990, in *Austin v. Michigan Chamber of Commerce*,[89] a six-member majority, including even Chief Justice William Rehnquist, upheld the constitutionality of a state law that prohibited corporations from attempting to influence elections by using their general treasury funds. The Court explained that, in light of the "unique legal and economic characteristics" of the corporate entity, corporations must have more limited rights to spend money on electoral politics than ordinary people.[90]

Thirteen years later, in 2003, the Court, in *McConnell v. Federal Election Commission*,[91] upheld the constitutionality of the Bipartisan Campaign Reform Act of 2002, which had bipartisan support in Congress and was signed into law by President George W. Bush.[92] In joining the majority opinion, Republican-appointed Justices John Paul Stevens and Sandra Day O'Connor invoked the long history of government restrictions on corporate campaign finance, and upheld the constitutionality of the law because it was justified by the government's important interest in preventing corruption of the electoral process by large financial contributions.[93]

Three years later, though, Justice O'Connor stepped down from the Court and was replaced by Samuel Alito. Shortly thereafter, in *Citizens United*, the new five-member conservative majority overruled *Austin*, *McConnell*, and a century of Supreme Court precedents, holding corporations have a First Amendment right to spend limitless general treasury funds supporting or opposing candidates for public office.[94]

As Justice Stevens observed in his dissenting opinion, the majority in *Citizens United* ignored the dangers of the corporate form and opened the door to their potentially distorting influence on the democratic process. Corporations, he observed, are not "'We the People' by whom and for whom our Constitution was established."[95]

In the years since then, the Roberts Court, with the support of *only* Republican-appointed justices, has vastly limited the ability of all levels of government to constrain the highly distorting effects of corporations and extraordinarily wealthy individuals on our democratic process, which, not surprisingly, has almost always benefited Republican candidates.[96]

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[89] 494 U.S. 652, 668-69 (1990).

[90] *Id.* at 658.

[91] 540 U.S. 93, 245 (2003).

[92] *See generally id.*

[93] *See* DEMOCRACY AND EQUALITY, *supra* note 1, at 170.

[94] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 312 (2010).

[95] *Id.* at 466 (Stevens, J., dissenting).

[96] *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 724 (2008) (holding "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 is unconstitutional); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 185 (2014) (striking down aggregate limits on amount individual may contribute during two-year period to all federal candidates); Fed. Election Comm'n v. Ted Cruz for Senate, 596 U.S. 289, 291 (2022)

Imagine an election for mayor in which debate time was allotted to each candidate based on the amount of money they and their supporters paid to the organizers of the debate. Thus, some candidates would be allotted forty minutes while others would be allotted only ten. Is that really consistent with the goals and values of our democracy or with what the Framers of our Constitution, including Jefferson and Madison, ever intended?

So much, once again, for original understanding.

B. *Guns*

Let me turn now to the issue of guns and the Second Amendment. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[97] Looking to the text, one question is: What does it mean? Does it mean that all persons in our nation have an inviolable constitutional right to purchase, obtain, own, and carry in public any handgun, rifle, machine gun, etc., they like? Or does it mean something less than that?[98]

Like almost all rights guaranteed in the Constitution, language that seems absolute on its face, whether it is freedom of speech, freedom of religion, equal protection of the laws, and so on, is never interpreted literally. Rather, the Supreme Court quite sensibly always holds that such language must be understood in terms of the broader concerns and values embodied in the particular provision at issue. Moreover, the text of the Second Amendment seems explicitly more limited than those other provisions, because it includes in the text a specific *reason* for the "right"—the need to have "a well regulated militia."[99] One would think that language defines the original meaning of the Amendment.

The Supreme Court first addressed the meaning of the Second Amendment in 1939 in the case of *United States v. Miller*.[100] In *Miller*, the Court considered the constitutionality of the National Firearms Act, which among other things, made

(striking down Section 304 of Bipartisan Campaign Reform Act of 2002, which limited amount of money candidates could receive through personal loans to campaign); *see also* Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920-2020*, 107 MINN. L. REV. HEADNOTES 54 fig.1 (2022), https://minnesotalawreview.org/wp-content/uploads/2022/11/Gulati-Epstein_Final-.pdf (finding Roberts Court sides with businesses 63.4% of time, 15% more than Rehnquist Court).

[97] U.S. CONST. amend. II.

[98] *See, e.g.*, David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015); Richard H. Fallon, Jr., *Taking the Idea of Constitutional "Meaning" Seriously*, 129 HARV. L. REV. F. 1 (2015); David A. Strauss, *Does Meaning Matter?*, 129 HARV. L. REV. F. 94 (2015); Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176 (2016).

[99] U.S. CONST. amend. II.

[100] 307 U.S. 174, 176 (1939).

it unlawful for any person to transport in interstate commerce a twelve-gauge shotgun without first registering it with the federal government.[101]

In a unanimous decision, the Court rejected the argument that the Act violated the Second Amendment. In an opinion by Justice McReynolds, the Court explained that Congress could regulate a sawed-off shotgun because the evidence did not suggest that the shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia."[102] In short, the Court held that the Framers enacted the Second Amendment not to guarantee an independent right of the individual, but to ensure the effectiveness of the militia, in part because, at the time the Second Amendment was adopted, all male citizens of a certain age were expected to be prepared to join the militia "bearing arms supplied by themselves."[103]

This precedent, holding that the Second Amendment did not protect any distinct constitutional right of the individual, stood for nearly seventy years until 2008, when the Roberts Court revisited the issue in the case of *District of Columbia v. Heller*.[104] The plaintiff in *Heller* challenged the constitutionality of a Washington, D.C., law that, among other things, made it a crime for any person to carry an unregistered firearm in public.[105] The five-member conservative majority held that the Second Amendment protects the right of individuals to possess firearms wholly unconnected with any service in the militia, including handguns, rifles, shotguns, and machine guns, and to use those firearms for any lawful purpose.[106]

Predictably, the Justices strongly disagreed about the "original" meaning of the Second Amendment and about the relevance of the text's reference to "[a] well regulated Militia, being necessary to the security of a free State."[107] In his majority opinion, Justice Scalia insisted that that phrase did not in any way limit the right to own and to carry guns provided by the Second Amendment.[108]

What changed most from *Miller* to *Heller* were two fundamental things. First, the majority of the Justices had moved sharply to the right over those intervening seventy years.[109] Second, the National Rifle Association had become a powerful

[101] *Id.* at 175.

[102] *Id.* at 178.

[103] *Id.* at 179.

[104] *See generally* 554 U.S. 570 (2008).

[105] *See id.* at 574-75.

[106] *See id.* at 620.

[107] *Id.* at 614-17, 636-723 (holding Second Amendment's original meaning protected firearm possession for non-militia purposes, contrasted with dissent arguing original meaning of Second Amendment was more limited).

[108] *Id.* at 616 ("Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service.").

[109] *See* April Rubin, *Supreme Court Ideology Continues to Lean Conservative, New Data Shows*, AXIOS (July 3, 2023), https://www.axios.com/2023/07/03/supreme-court-justices-political-ideology-chart [https://perma.cc/43VT-8FFS].

political force in the nation and had a *huge* impact on the views of the Republican Party, thus no doubt affecting the ideology of the justices in the *Heller* majority.[110]

In the years since *Heller*, the Roberts Court has decided several additional cases concerning the meaning of the Second Amendment. Most recently, in *New York State Rifle & Pistol Association v. Bruen*,[111] decided in 2022, the Court considered the constitutionality of a New York law that authorized the issuance of a permit to have handguns at home only if the applicant was of good moral character, had no history of crime or mental illness, and there was no good reason for denial of the permit. In addition, the New York law prohibited any person from carrying a handgun in public unless they could demonstrate a "special need for self-protection," such as evidence of threats, attacks, or other danger to personal safety.[112]

The six Roberts Court conservatives declared the law unconstitutional. Rejecting post-*Heller* lower court reasoning, Justice Clarence Thomas explained that a firearms regulation, even one furthering an important government interest, necessarily runs afoul of the Second Amendment unless the "regulation is consistent with this Nation's historical tradition."[113] Changed circumstances, in other words, are irrelevant. Thus, according to the Court, because the challenged New York law was not commonly used throughout history, it necessarily violates the Second Amendment, despite urbanization and enormous changes in the nature of firearms over the years.[114]

Not surprisingly, Justices Breyer, Sotomayor, and Kagan dissented.[115]

In no small part because of the Roberts Court's decisions on the Second Amendment,[116] the United States today has an estimated 120 guns for every 100 people.[117] That compares with Canada with approximately 30 guns per 100 people, France and Germany with approximately 20 per 100, Italy with approximately 14 per 100, Mexico with approximately 13 per 100, Russia with approximately 12 per 100, and Israel with approximately 6 per 100.[118] Indeed, there are now 400 million unregistered guns in the United States, and the

[110] *See* MATTHEW J. LACOMBE, FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE 37 (2021).

[111] 597 U.S. 1 (2022).

[112] *Id.* at 12.

[113] *Id.* at 17.

[114] *See id.* at 22.

[115] *See id.* at 83 (Breyer, J., dissenting).

[116] For a more recent decision, see United States v. Rahimi, 144 S. Ct. 1889 (2024).

[117] Harmeet Kaur, *What Studies Reveal About Gun Ownership in the US*, CNN (June 2, 2022, 4:13 PM), https://www.cnn.com/2022/06/02/us/gun-ownership-numbers-us-cec/index.html [https://perma.cc/C56P-XEE9].

[118] *Gun Ownership by Country 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/gun-ownership-by-country [https://perma.cc/Y2U9-3TDF] (last visited Sept. 14, 2024).

percentage of Americans murdered each year by firearms is twenty-two times higher than the rate of such murders in Europe.[119]

Surely, that's what the Framers intended.

C. *Abortion*

Let me turn now to abortion. One of the most important Supreme Court decisions in the twentieth century was the Court's 1973 decision in *Roe v. Wade*,[120] which, of course, was overruled by the Roberts Court in 2022, almost half a century later.[121] Let me emphasize at the outset that *Roe* was *not* a Warren Court decision, but a decision of the *Burger* Court.

The story of how we got to *Roe*, like the story of how we got to *Brown*, is important to remember, for it gives both content and context to the decisions in *Roe* and *Dobbs*. So, let us begin at the beginning.

At the time our Constitution was adopted, abortion was often relied upon by women to avoid the consequences of unwanted births. In that era, contrary to what many people today assume, abortion before quickening, that is, before the point at which the woman could feel movement—usually at around four-and-a-half months—was perfectly legal in every state in the nation. Moreover, even abortion *after* quickening was almost never punished.[122]

Indeed, this had been the state of the law at least as far back as the ancient Greeks. Although in the Middle Ages the Church condemned abortion as a sin, the law did not treat abortion as a crime. To the contrary, those who did not share the faith were free to do as they wished. For most families, abortion was seen as a critical way to manage family size. Indeed, in the early nineteenth century approximately 20% of all pregnancies in the United States ended in legal abortion.[123]

The general acceptance of abortion began to change, however, during the nineteenth century. Two factors especially contributed to this shift. First, religious perspectives on abortion began to change during the evangelical explosion of the Second Great Awakening, when evangelicals began to preach that a separate, distinct, and precious life came into being at the very moment of conception. Second, medical professionals in this era increasingly came to the view, based partly on religion and partly on half-baked science, that human life begins at conception. In the late 1850s, for example, the Boston doctor and religious moralist Horatio Storer emphatically rejected the notion that a woman

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[119] Kara Fox, Krystina Shveda, Natalie Croker & Marco Chacon, *How US Gun Culture Stacks Up with the World*, CNN, https://www.cnn.com/2021/11/26/world/us-gun-culture-world-comparison-intl-cmd/index.html [https://perma.cc/A8ZZ-CEDZ] (last updated Feb. 15, 2024, 6:09 AM).

[120] 410 U.S. 113 (1973).

[121] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[122] *See* SEX AND THE CONSTITUTION, *supra* note 1, at 233.

[123] *See id.* at 34, 229.

should decide this question for herself because, he maintained, during pregnancy a "woman's mind is prone to . . . derangement."[124]

Over the next several decades, religious moralists launched an aggressive campaign to rid the nation not only of abortion, but of contraception as well. The leading voices of this movement, such as Horatio Storer, explained the sole purpose of women is to "produce children," and women must therefore remain within their "God-given sphere."[125] As a result of this campaign, and in a complete reversal of the Framers' world, every state by the end of the nineteenth century had enacted legislation prohibiting the distribution of any product designed for purposes of contraception, and every state had enacted legislation prohibiting abortion at *any* stage of pregnancy, unless a doctor certified that the abortion was necessary to save the life of the woman. Thus, for the first time in our nation's history, abortion was unlawful even before quickening, and women who sought abortions were subject to prosecution.[126]

But despite the threat of criminal sanctions and the preaching of religious moralists, women in the late nineteenth century continued to seek abortions in record numbers. Indeed, by the turn of the twentieth century, approximately two million women had *illegal* abortions each year, and almost a third of all pregnancies ended in abortion. But now, for the first time in history, these abortions had to be performed in secret and unsafe circumstances, and by much less reliable practitioners than in the past, resulting in many more serious injuries and deaths.[127]

By the 1950s, with improvements in contraception, which was then increasingly, but still not universally, legal, the number of unwanted pregnancies gradually declined. But even then, approximately one million women each year resorted to illegal abortions. The vast majority of these women continued to turn either to self-induced abortions or to the dark and often terrifying world of "back-alley" abortions. In addition to those women who died in the course of these secret and illegal abortions, many thousands more each year suffered serious illness or injury.[128]

In the 1960s, though, the rising voice of the women's movement began to shape public discourse on abortion, arguing "[t]here is no freedom, no equality . . . possible for women until we assert and demand the control over our own bodies, over our own reproductive process."[129] As these arguments moved to the forefront of national debate, the law began to change, and several states once again legalized abortion.[130]

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[124] *See id.* at 235, 238.

[125] *Id.* at 239.

[126] *See id.* at 229-39.

[127] *See id.*

[128] *See id.* at 372-73.

[129] *Id*. at 377.

[130] *See id.* at 378-79.

But fierce opponents of abortion rights, and the rights of women more generally, such as the Moral Majority, quickly mobilized their forces and effectively shut down any further political progress, despite clear majority support for legalizing abortion.[131]

Faced with this sudden paralysis in the legislative arena, pro-choice advocates began for the first time to challenge the constitutionality of anti-abortion laws in the courts. In a series of lower court decisions, judges held that state anti-abortion laws were unconstitutional because, as a Republican-appointed federal judge in the South explained, such laws trespass "unjustifiably on the personal privacy and liberty of its female citizens in violation of the Ninth Amendment and the Due Process Clause."[132] Soon thereafter, the Supreme Court announced that it would hear the case of *Roe v. Wade*.[133]

Many Americans today think of *Roe* as a radical, left-wing decision, but that was not at all the view at the time. To the contrary, by 1973, a substantial majority of Americans supported the right of a woman to terminate an unwanted pregnancy.[134] Although the Constitution does not expressly mention a right to abortion, the Supreme Court has long understood that the Framers of our Constitution did not intend to limit the rights of Americans to only those rights *expressly* guaranteed in the Constitution. To the contrary, the Court, invoking the Ninth Amendment, the Due Process Clause's guarantee of the right to life, liberty, and property, and the implied right to privacy, had often recognized constitutional rights that were not expressly mentioned in the Constitution, including, for example, the right not to be sterilized, the right to use contraception, the right to travel across state lines, the right to marry, and the right to raise one's own children.[135]

In an overwhelming seven-to-two decision, the Supreme Court in *Roe* held that the Constitution did, indeed, guarantee a woman's right to decide for herself whether to bear a child.[136] Strikingly, five of the six justices appointed by Republican presidents, including even Chief Justice Burger, joined the decision.[137] Indeed, without their support, *Roe* would have come out the other way. That speaks volumes about the mainstream nature of the decision. The plain and simple fact is, at the time *Roe* was decided, the justices did not view the abortion issue as posing a particularly divisive *ideological* question. I can personally attest to this because I was a law clerk for Justice William Brennan when *Roe* was decided, so I saw it all firsthand.[138]

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[131] *See id.* at 381-82

[132] *Id.* at 463.

[133] *See id.* at 383-84.

[134] *See id.* at 472.

[135] *See id.* at 389-90.

[136] Roe v. Wade, 410 U.S. 113, 166-67 (1973).

[137] *See id.* at 113-67.

[138] *See* SEX AND THE CONSTITUTION, *supra* note 1, at 389-94.

Of course, as we know, *Roe* eventually mutated into a bitterly divisive issue, but this did not happen until the end of the decade, as the Culture Wars exploded over such issues as the Equal Rights Amendment, gay rights, sexual expression, and women's liberation, thus inflaming political and especially religious conservatives into a single, unified political movement. Indeed, by the summer of 1980, Republican Party leaders were treating Jerry Falwell, the head of the Moral Majority, more than any other religious figure in American history, like the leader of a powerful political constituency, and in his pursuit of the presidency, Ronald Reagan promised to appoint pro-life judges at all levels of the judiciary, thus ushering in a historic era of judicial nominations shaped in no small part by religious conceptions of constitutional law.[139]

In the years after 1980, a succession of Republican presidents sought openly to appoint Supreme Court justices who would vote to overturn *Roe*. Interestingly, though, three of those justices—Sandra Day O'Connor, Anthony Kennedy, and David Souter—disappointed those who appointed them. Demonstrating both a respect for precedent and an understanding of the fundamental right at issue in *Roe*, O'Connor, Kennedy, and Souter consistently reaffirmed *Roe*, despite repeated efforts to overturn the decision.[140]

Having learned this lesson, though, Republican presidents from Reagan to Trump grew ever more determined not to replicate this mistake, and with the Republican appointments of Justices Clarence Thomas, John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, all of whom were chosen in no small part because of their deeply embedded anti-abortion views, the anti-abortionists finally achieved their goal of overruling *Roe*.[141]

In the United States, before the decision in *Dobbs*, approximately 23% of all women aged forty years and older had obtained at least one legal abortion during their lives, and just under one million women had legal abortions annually.[142] *Roe* was deeply grounded in the Justices' understanding in 1973 that we, as Americans, must have the right to make fundamental decisions about our own lives and our own destinies.[143] *Roe* enabled women to chart their own futures and to control their own bodies. Indeed, it is a long-standing observation that if men could get pregnant, abortion would always have been safe and legal.[144]

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[139] *See id.* at 393-405.

[140] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833 (1992).

[141] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[142] *See* Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 112 AM. J. PUB. HEALTH 1284, 1287 (2022) (reporting results of study that women aged forty years and older had cumulative first abortion rate of approximately 23.7%).

[143] *See* SEX AND THE CONSTITUTION, *supra* note 1, at 426-27.

[144] *See* Emma Brockes, *Gloria Steinem: 'If Men Could Get Pregnant, Abortion Would Be a Sacrament,'* GUARDIAN (Oct. 17, 2015), https://www.theguardian.com/books/2015/oct/17/gloria-steinem-activist-interview-memoir-my-life-on-the-road.

But with the Court's decision in *Dobbs*, hundreds of thousands of women, mostly poor and minority, have once again been thrown each year back into the dark and dangerous world of illegal abortions.[145] So, what was the reasoning of Justice Samuel Alito's one-hundred page opinion in *Dobbs*?[146] The first challenge he faced, of course, was the doctrine of stare decisis, but Alito gave little, if any, weight to this long-standing principle of judicial decision-making.[147]

In order to make his case in *Dobbs*, Alito argued that *Roe* was fundamentally wrong because at the time the Fourteenth Amendment was adopted, a majority of states, for the reasons I set out earlier, had already made abortion a crime. Thus, applying a so-called "originalist" view, Alito insisted that *Roe* was wrong because those who adopted the Fourteenth Amendment did not at the time *affirmatively* intend it to hold laws restricting abortion unconstitutional.[148]

That clearly seems right. The Framers of the Fourteenth Amendment were not thinking about abortion in 1868. But the problem with this way of interpreting the Constitution, as I noted earlier, is that it is inconsistent with the more general goals of those who adopted these broad and open-ended provisions. What the Framers of the Fourteenth Amendment were doing, as the Burger Court understood in *Roe*, was embracing within the Constitution *principles* that they knew would have to be interpreted and applied over the course of centuries.[149]

Although Alito's originalist view seems credible to some conservative lawyers, judges, and academics, it had never before carried the day in the profession of law or the Supreme Court. The problem with originalism is that it is not originalist. It embraces an approach to constitutional interpretation that the Framers themselves never intended or even imagined. But that is the core of Alito's argument. He goes on and on to berate and insult the majority opinion in *Roe*. In the end, though, Alito's opinion, and the Court's decision, is not based on any principled approach to constitutional law. It is, instead, a personally

[145] *See* Nadine El-Bawab, *1 in 5 Patients Travel to Other States for Abortion Care, According to New Data*, ABC NEWS (Dec. 7, 2023, 2:48 AM), https://abcnews.go.com/Health/1-5-patients-travel-states-abortion-care-new/story?id=105429693 [https://perma.cc/37P7-3HHW] (noting in first half of 2023, "92,100 patients traveled across state lines for abortion care"); Priya Pandey, *A Year After* Dobbs*: People with Low Incomes and Communities of Color Disproportionately Harmed*, CTR. FOR L. AND SOC. POL'Y (June 23, 2023), https://www.clasp.org/blog/a-year-after-dobbs-people-with-low-incomes-and-communities-of-color-disproportionately-harmed/ [https://perma.cc/ZDB4-ZLQN].

[146] *Dobbs*, 597 U.S. at 215.

[147] *See id.* at 218.

[148] *See id.* at 248.

[149] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (noting Fourteenth Amendment's "concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

driven decision designed to further the political and religious views of the justices in the majority and of those who appointed them.[150]

I would like to make one final point. From 1973 to the present, among the justices not on the Court in *Dobbs*, nine Republican-appointed justices supported the decision in *Roe*, and only two opposed it—Justices Rehnquist and Scalia.[151] On the current Court, Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett all voted to overrule *Roe*.[152] That is the product not of law, but of politics determining the makeup of our Supreme Court and the meaning of our Constitution.

D. *Affirmative Action*

Let me turn now to the issue of affirmative action and the Roberts Court's six-to-three decision in 2023 holding affirmative action violates the Equal Protection Clause of the Fourteenth Amendment.[153] In effect, the six Roberts Court Republican-appointed justices overruled forty-five years of precedent when they held the Equal Protection Clause prohibits government from taking race into account even for the noblest of reasons.[154]

In the decades following *Brown*, the nation discovered that not discriminating against Black citizens was not enough to mitigate centuries of severe injustice, a "legacy of discrimination," as Justice Thurgood Marshall called it.[155] More than three centuries of slavery, segregation, racial violence, and rampant discrimination helped shape a toxic national culture designed to ensure that Black Americans were kept down. By 1950, Black Americans accounted for 10% of the population. But the United States Congress contained only two Black congressmen and no Black senators. No Black person served as a governor, and no major U.S. city was led by a Black mayor. Employment opportunities for Black Americans were likewise limited. The overwhelming majority of Black Americans at that time worked in low-paying manual or agricultural jobs.[156]

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[150] *See* Ruth Marcus, *Opinion, Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It.*, WASH. POST (Dec. 1, 2022, 9:21 AM), https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/.

[151] William Brennan, Potter Stewart, Warren Burger, Lewis Powell, and Henry Blackmun all joined the majority in *Roe*. *Roe*, 410 U.S. at 115. Anthony Kennedy, David Souter, and Sandra Day O'Connor wrote the plurality opinion of *Planned Parenthood v. Casey*, upholding the "essential holding" of *Roe*. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833-34 (1992). John Paul Stevens's opinion in *Casey* even more forcefully defended *Roe*. *See Casey*, 505 U.S. at 912-22.

[152] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215 (2022).

[153] *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

[154] *Id.* at 230.

[155] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting).

[156] *See* A LEGACY OF DISCRIMINATION, *supra* note 1, at 23-24 .

As the injustice of racial discrimination became ever more evident, in a televised speech in 1963, President John F. Kennedy declared that the time had come for the nation to "fulfill its promise" of racial equality.[157] After the assassination of President Kennedy, President Lyndon B. Johnson propelled the 1964 Civil Rights Act through Congress.[158] Understanding that Black economic inequality was as severe as Black political inequality, Johnson launched social welfare programs he called "the Great Society."[159] Two years later, following a bloody riot in Selma, Alabama, Johnson declared, "[I]t is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice."[160]

Soon thereafter, Johnson declared:

> [F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been fair.[161]

"[E]qual opportunity is essential," he said, "but not enough, not enough."[162] Equal treatment in the present, he concluded, could not redress the deep, continual effects of severe and often violent racial discrimination.[163]

By the late 1960s, a new wave of controversy arose in higher education. Admissions departments of colleges and universities emerged as the next battleground over racial justice with their policies of affirmative action that were intended to address the consequences of our nation's historic—and continuing—racial discrimination.[164] The case that would establish the framework for

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[157] *Televised Address to the Nation on Civil Rights*, JOHN F. KENNEDY PRESIDENTIAL LIBR. AND MUSEUM, https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights [https://perma.cc/849G-LRBY] (last visited Sept. 14, 2024).

[158] Ted Gittinger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964*, PROLOGUE MAG., Summer 2004, at 10, 11, https://babel.hathitrust.org/cgi/pt?id=uiug.30112075264983&seq=94.

[159] Lyndon B. Johnson, *Remarks at the University of Michigan, May 22, 1964*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-the-university-michigan [https://perma.cc/7U54-QKLQ] (last visited Sept. 14, 2024).

[160] Lyndon B. Johnson, *Special Message to the Congress: The American Promise. March 15, 1965*, 1965 PUB. PAPERS PRESIDENTS 281, 284; *see also* Lyndon B. Johnson, *Special Message to the Congress on the Right to Vote. March 15, 1965*, 1965 PUB. PAPERS PRESIDENTS 287, 287.

[161] Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights." June 4, 1965*, 1965 PUB. PAPERS PRESIDENTS 635, 636.

[162] *Id.*

[163] *Id.*

[164] *See* A LEGACY OF DISCRIMINATION, *supra* note 1, at 41-45.

evaluating the constitutionality of affirmative action for decades to come was the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*.[165]

Bakke, a white man whose application to the University of California Medical School was rejected, maintained that the institution's affirmative action program was unconstitutional.[166] Four of the justices voted to uphold the program on the ground that it is constitutionally permissible for the government to take race into account to remedy the disadvantages imposed on minorities due to past and present racial prejudice.[167] Four others avoided the constitutional question entirely.[168] The decisive opinion in *Bakke* was written by Justice Lewis Powell, one of the four recent Nixon appointees. Powell voted to invalidate U.C. Davis's program because it used a fixed racial quota to guarantee a predetermined minimum number of places for minority applicants, but he rejected the notion that *any* consideration of race in university admissions was unconstitutional.[169] In Powell's view, race could be considered as one of several factors in college admission policies because such programs were justified by the need for educational diversity.[170]

Justice William Brennan, joined by Justices White, Marshall, and Blackmun, wrote separately, noting that "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."[171]

Despite Justice Powell's hope that his diversity rationale for affirmative action as benefiting white and Black students alike would mollify affirmative action's opponents, conservative leaders operationalized their resentment post-*Bakke*. President Ronald Reagan, for example, refused to enforce many of the nation's civil rights laws and dismantled many federal affirmative action programs that had been established, even those by President Richard Nixon. By the decade's end, Reagan had appointed Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy to the Supreme Court, followed, in 1991, by President George H. W. Bush's appointment of Clarence Thomas.[172] Affirmative action was, at that point, under serious threat.[173]

A quarter century after *Bakke*, however, the Supreme Court decided two affirmative action cases in 2003 involving the University of Michigan.[174] Given the makeup of the Court at that time, when seven of the nine justices had been

[165] 438 U.S. 265 (1978).

[166] *Id.* at 277-78.

[167] *Id.* at 325 (Brennan, J., concurring).

[168] *Id.* at 410, 412 (Stevens, J., concurring).

[169] *Id.* at 320.

[170] *Id.* at 314.

[171] *Id.* at 325 (Brennan, J., concurring).

[172] *See Supreme Court Nominations (1789-Present)*, *supra* note 3.

[173] *See* A LEGACY OF DISCRIMINATION, *supra* note 1, at 56-57.

[174] Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

appointed by Republican presidents, many people believed that the Court would hold that any consideration of race in the admissions process was unconstitutional.[175] But because Justice Sandra Day O'Connor sought a middle ground, and persuaded Justices Stevens and Souter to join her, the Court upheld the use of race as one of many factors in making admissions decisions.[176] In the following decades, the Supreme Court consistently upheld the constitutionality of affirmative action programs as long as they were consistent with that approach.[177]

In 2023, though, with a Court consisting of six deeply conservative Republican-appointed justices, including three appointed by Donald Trump, the Roberts Court once again overturned almost half a century of precedent and held that it was per se unconstitutional for universities and other entities to take race into account in order to achieve the benefits of diversity or to redress the consequences of centuries of past and continuing racial discrimination.[178] One might have thought that these Justices would follow the doctrine of precedent, but, of course, these were the same Justices who a year before had overruled the Court's decision in *Roe*.[179]

I should note, by the way, that even an "originalist" interpretation of the Fourteenth Amendment leaves room for factoring in race as an appropriate consideration for rectifying the effects of both past and present racial discrimination. Indeed, when the Framers passed the Equal Protection Clause they simultaneously passed "a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal."[180] To cite just one example, in 1866, Congress expressly appropriated money for "the relief of destitute colored women and children."[181]

Such explicit references to race, in a range of federal and state legislation enacted at the same time as the Fourteenth Amendment, render it undeniable that, in passing the Fourteenth Amendment, the Framers did not intend to foreclose any governmental reliance on race in order to remedy the egregious past, present, and future effects of racial discrimination.

Many Americans are eager to believe that our country has leveled the playing field and delivered equal opportunity to its Black citizens, but wide educational,

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[175] *See, e.g.*, Martin D. Carcieri, *The Sixth Circuit and* Grutter v. Bollinger*: Diversity and Distortion*, 7 TEX. REV. L. & POL. 127, 128 (2002).

[176] *See Grutter*, 539 U.S. at 343.

[177] *See* Fisher v. Univ. of Tex., 579 U.S. 365, 388-89 (2016) (holding university's consideration of race in holistic review of applicants did not violate Equal Protection Clause).

[178] Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

[179] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 297-302 (2022).

[180] *SFFA*, 600 U.S. at 322 (Sotomayor, J., dissenting).

[181] *Id.* at 321 (Sotomayor, J., dissenting).

economic, and social gaps remain.[182] Of course, many Black Americans have made progress, accelerated in no small part by affirmative action.[183] But America today remains largely two separate spheres: one Black, the other white. Our society today maintains a broad range of disadvantages for Black Americans that perpetuates residential segregation, unequal schools, stark income inequality, highly disparate risk of criminal victimization, health care and food deserts, racialized incarceration, and impoverished minority communities.[184]

Today's six Republican-appointed justices simply chose to ignore this reality in its decision in *SFFA*. That decision will do serious damage to our nation's capacity to achieve meaningful racial equality in light of our long and continuing history of racial discrimination.

In thinking about the Roberts Court, it is worth noting that in the forty-five years between *Bakke* and the present, seven of the eleven Republican-appointed justices not *now* on the Court voted to uphold the constitutionality of affirmative action.[185] But no longer.

Unlike the Warren Court, the Roberts Court has a profoundly different understanding of our Constitution. In my view, the Roberts Court completely disregards the fundamental responsibilities that Jefferson and Madison entrusted

[182] *See, e.g.*, Ricardo Mimbela & Katie Duarte, *Visualizing the Racial Wealth Gap*, ACLU (Aug. 10, 2023), https://www.aclu.org/news/racial-justice/visualizing-the-racial-wealth-gap [https://perma.cc/H27H-DNB7].

[183] Amy Harmon, *How It Feels to Have Your Life Changed by Affirmative Action*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2023/06/21/us/affirmative-action-student-experiences.html.

[184] *See* Janis Bowdler & Benjamin Harris, *Racial Inequality in the United States*, U.S. DEP'T OF THE TREASURY (July 21, 2022), https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states [https://perma.cc/P685-BDMU] (noting, inter alia, Black median household income was $46,000 compared to $75,000 for white households, Black Americans experience "restricted access to quality health care," and segregationist housing policies resulted in depressed homeownership rates); Katie Rose Quandt & Alexi Jones, *Research Roundup: Violent Crimes Against Black and Latinx People Receive Less Coverage and Less Justice*, PRISON POL'Y INITIATIVE n.1 (Mar. 18, 2021), https://www.prisonpolicy.org/blog/2021/03/18/race-and-violence [https://perma.cc/T72Y-BWME] ("Black survey respondents were 22% more likely to experience a serious violent crime than non-Hispanic white respondents."); Nazgol Ghandnoosh, Celeste Barry & Luke Trinka, *One in Five: Racial Disparity in Imprisonment—Causes and Remedies*, SENTENCING PROJECT (Dec. 7, 2023), https://www.sentencingproject.org/publications/one-in-five-racial-disparity-in-imprisonment-causes-and-remedies/ [https://perma.cc/9DTS-MCFP] ("Black Americans [are] still imprisoned at five times the rate of whites . . . .").

[185] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 267-68 (1978) (showing Republican-appointed Justices Powell, Brennan, and Blackmun variously ruled in favor of affirmative action); Grutter v. Bollinger, 539 U.S. 306, 310 (2003) (showing Republican-appointed Justices O'Connor, Stevens, and Souter ruled in favor of admissions program giving special consideration of racial minorities); Fisher v. Univ. of Tex., 579 U.S. 365, 367 (2016) (showing Republican-appointed Justice Kennedy wrote majority opinion upholding admissions program which considered race of applicants).

our Supreme Court to thoughtfully fulfill with courage and determination, and betrays our nation's deepest constitutional aspirations of protecting democracy, liberty, and equality.