# 14th Amendment Topic Area Proposal

# *Short Cut*

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***Executive Summary***

**Elevator Pitch**

**We recommend that the college policy debate community choose the 14th amendment as its controversy area for the 2022-23 legal topic.**

**Intercollegiate policy debate deserves a wholistically legal topic that will engage students with enduring questions of civil rights, federalism, and constitutional law. The current political landscape is increasingly shaped by a red state activism which is changing the landscape for civil liberties nationwide. The 14th amendment holds special significance to how the congress, executive, and supreme court have historically crafted federal protections to restrain state infringement on rights provided in the US constitution. The right vote, Trans rights, and reproductive rights are contested legal questions well answered by the 14th amendment’s framework for privacy, equal protection, and due process of law. A topic area centering this area of constitutional jurisprudence would foster legal debates that would educate students on core legal precedent, the contested history of the US constitution, and the reconstruction era legacy of the 14th amendment.**

**The Core Controversy**

**The topic creates a variety of intersecting controversies attached to rich literature bases and core legal precedent.)**

***Federalism* –** **Entails the balance of power between the federal government and subnational actors the federal system. The 14th amendment fundamentally reshaped the modern federalist system in the US and is key to resolving contemporary disputes surrounding state and federal authority. While past topics have involved the issues of federalism, exploring the legal doctrines created by the 14th amendment opens up an old and rich debate going back to the civil rights movement, reconstruction era reform, and American civil war. The clash over the state and federal system largely relates to the protection or infringement of rights – the original purpose of the 14th amendment. Currently, this clash is revived as state legislation and court rulings contest the 14th amendment and the current state of rights framework provided by the US constitution. The 14th amendment will again resolve which end of the federal system has leadership over civil rights and protections going forward.**

***Civil Rights* –** **Are largely defined by the framework of the 14th amendment. The Equal Protection Clause bans discrimination at the federal level, creating a broad protection against the unequal application of constitutional rights by the states. Some argue that the expansion of interpreted rights provided by the 14th amendment would reduce harm by state action in the federal system. Others argue that the rogue creation of new rights through the 14th amendment leads to a dangerous and unstable form of judicial activism which disregards the original text of the constitution. The 14th amendment provides an active framework to address civil rights through privacy, equal protection, and due process of law. The 14th amendment defines the fundamental legal precedent that shape citizenship, legal personhood, and contemporary corporate personhood.**

***Constitutional Jurisprudence*** – **Is often enforced by and through the 14th amendment. The 14th amendment not only establishes its own protections but incorporates and enforces all other rights enumerated or otherwise interpreted in the US constitution. However, alternative approaches to expanding the protections of the constitution include amending and retracting various parts of the constitution or denying its legitimacy to begin with.**

**Why Now?**

**Within the past month, states have rapidly weaponized their autonomy to decrease access to abortion, transgender healthcare, and voting. And there has been a consistent debate in the past decade over the role states have in amplifying or hindering rights. This has far reaching implications for marginalized groups and democracy as a whole. This is the most pertinent topic the debate community could focus on in the current legal landscape.**

**Addressing Uniqueness Issues**

***Ukraine)* The situation in Ukraine presents a problem of major international concern, drawing questions of what government involvement in the crisis should look like and how internal affairs can have a global impact. This topic is not crafted as an immediate IR topic, but even so the situation is pertinent. Having debates about the efficacy or existence of United States constitutional modeling and the possibility of affecting Ukraine indirectly is good because it allows us to think on the nuance of the United States’ internal system. This will reward teams who find creative yet legitimate links with a high octane impacts. Even in a scenario in which conflict dies down or resolves, teams can still use those links to impact out to the conflict reigniting.**

***Midterms)* Midterms are rapidly approaching and with them, the possibility of a legislature in flux. This would make for some interesting and highly relevant debates on this topic by adding powerful uniqueness to both politics and federalism disads – with the legislature being in flux, crafting plans that will make lasting change that are difficult or unwise to undo will be important. In other words, midterms create more negative ground and force affirmatives to keep their solvency airtight.**

***Covid)*** **Despite relaxed covid regulation, some variant of covid continues to infect 5,500 and kill 300 people daily. As atrocious as this is, it does give teams powerful impacts that will be especially useful on this topic. Due to the disparate nature of covid policies across states, an affirmative that uses the fourteenth amendment to create a more unified covid policy would be extremely relevant, and would grant great ground to negative teams defending the localist approach. In a scenario in which covid reduces to the point of being a non-issue, teams can still invoke state policy handling covid as an issue, as it would create the infrastructure for handling future pandemics.**

**Topicality**

**The condition of a legal topic is one that relates to a controversy within legal jurisprudence and where the topic wording emphasizes legal research.**

**Federal protections through the Fourteenth amendment and the doctrine of selective incorporation with its significant use in the Supreme Court for issues of citizenship and human rights advocacy is decidedly grounded in constitutional law. A topic area which centers constitutional jurisprudence would create debate conditions that require legal conversations around precedent, rights, advocacy, and legal limits. Throughout this paper we have highlighted important reasons why collegiate debates around questions of federal amendment interpretations and constitutional protections would expose crucial points of controversy in legal jurisprudence which would require students to engage legal research and scholarship to answer questions of advocacy, reform, and federal power.**

**The fourteenth amendment has five sections, we believe section one will be the area of core controversy debated under this resolutional question. The text of section one is below:**

*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Constitution.congress.gov)*

**This resolution will facilitate legal debates about citizenship rights, privileges or immunities of citizens, the due process clause, and equal protections of rights. Each of these areas will produce controversial and robust debates that gives equal ground to critical and policy focused topic literature, as well as comprehensive combinations of common debate styles of participation. This allows space for debates about debate to branch out away from rehearsed debates and toward in-depth clash over the proper and best means of mitigating harms from the positions of policy based legal reform solutions and/or advocacy based abolition movements. It is important that critical literature be present in a topical manner that creates points of contestation versus situations where certain debaters are forced to go outside the scope of the resolutional question to find relevant literature.**

## *Core Affirmative Ground*

**Affirmatives on this topic will apply the 14th amendment to expand federal protections for rights and privileges contained within the US Constitution.**

**There are a wide variety of affirmative topic areas under this resolution. You will see in the full topic paper section of this document that potential affirmative ground has been separated into 3 categories. Each of these categories contain cut evidence representative of the literature base.**

* **Democracy and Citizenship**
  + **Voting rights**
  + **Abolition democracy**
  + **Positive rights**
  + **Reparations**
* **Privacy and Autonomy**
  + **Data privacy/surveillance**
  + **Trans rights**
  + **Prostitution**
  + **Abortion**
  + **Health Equity**
* **Punishment and the Carceral State**
  + **Incarceration**
  + **Prison abolition**
  + **Abolish the police**
  + **Capital punishment**

### Select AFF Solvency Advocates

\* A more complete list of cut evidence for affirmatives is listed in the full cut.

#### Voting Rights) Even if the framers of the Fourteenth Amendment accepted felony disenfranchisement, today our interpretation of the Equal Protection Clause should allow for the concept of equality to have evolved since 1868

CHUNG’2021 (Jean, Communications Manager at The Sentencing Project, “Voting Rights in the Era of Mass Incarceration: A Primer”, July 28, 2021, The Sentencing Project, <https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf>) lj

English colonists brought to North America the common law practice of “civil death,” a set of criminal penalties that included the revocation of voting rights. Early colonial laws limited the penalty of disenfranchisement to certain offenses related to voting or considered “egregious violations of the moral code.”22 After the American Revolution, states began codifying disenfranchisement provisions and expanding the penalty to all felony offenses.23 Many states instituted felony disenfranchisement policies in the wake of the Civil War, and by 1869, 29 states had enacted such laws.24 Political scientist Ward Elliot argues that the elimination of the property test as a voting qualification may help to explain the popularity of felony disenfranchisement policies, as they served as an alternate means for wealthy elites to constrict the political power of the lower classes.25 In the post-Reconstruction period, several Southern states tailored their disenfranchisement laws in order to bar Black male voters; targeting those offenses believed to be committed most frequently by the Black population.26 For example, party leaders in Mississippi called for disenfranchisement for offenses such as burglary, theft, and arson, but not for robbery or murder.27 The author of Alabama’s disenfranchisement provision “estimated the crime of wife-beating alone would disqualify sixty percent of the ~~Negroes,~~ [black population] resulting in a policy that would disenfranchise a man for beating his wife, but not for killing her. Such policies would endure for over a century.28 **Whether or not felony disenfranchisement laws today are intended to reduce the political clout of communities of color, this is their undeniable effect.** Legal status Disenfranchisement policies have met occasional legal challenges in the last century. In Richardson v. Ramirez, 418 U.S. 24 (1974), three men from California who had served time for felony convictions sued for their right to vote, arguing that the state’s felony disenfranchisement policies denied them the right to equal protection of the laws under the U.S. Constitution. Under Section 1 of the Fourteenth Amendment, a state cannot restrict voting rights unless it shows a compelling state interest. Nevertheless, the U.S. Supreme Court upheld California’s felony disenfranchisement policies as constitutional, finding that Section 2 of the Fourteenth Amendment allows the denial of voting rights “for participation in rebellion, or other crime.” In the majority opinion, Justice Rehnquist found that Section 2 – which was arguably intended to protect the voting rights of freed slaves by sanctioning states that disenfranchised them – exempts from sanction disenfranchisement based on a felony conviction. By this logic, the Equal Protection Clause in the previous section could not have been intended to prohibit such disenfranchisement policies. **Critics argue that the language of the Fourteenth Amendment does not indicate that the exemptions established in Section 2 should prohibit the application of the Equal Protection Clause to voting rights cases**.29 Moreover, some contend that the Court’s interpretation of the Equal Protection Clause in Richardson is inconsistent with its previous decisions on citizenship and voting rights, in which the Court has found that the scope of the Equal Protection Clause “is not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality.”30 Therefore, **even if the framers of the Fourteenth Amendment seemingly accepted felony disenfranchisement, our interpretation of the Equal Protection Clause today should allow for the ways in which our concept of equality may have evolved since 1868**

#### Abolition Democracy) The Supreme Court’s white supremacist jurisprudence forwards an anti-black colorblind constitutionalism, the 14th Amendment can become a tool for the anti-racist reconstruction of constitutional law toward Abolition Democracy.

Hasbrouck 22 - Brandon Hasbrouck. 1 Apr 2022. Assistant Professor of law at Washington and Lee University School of Law. J.D., Washington and Lee University School of Law. BOSTON UNIVERSITY LAW REVIEW. “The Antiracist Constitution.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4068747

It is March 6, 1857. Chief Justice Roger Taney rules that Dred Scott can have no recourse to seek his freedom in federal court.120 The ruling turns on the idea that Scott cannot satisfy the diversity of citizenship required to have a state law claim heard in federal court because, as a Black man, he cannot be a citizen of the United States.121 Chief Justice Taney cherry-picks his sources to conclude that state laws at the time the Constitution was adopted did not treat Black people as citizens.122 He carries the argument even further, though, and concludes that the states lack any power to make a Black person a U.S. citizen.123 This line of reasoning will be invalidated by the passage of the Thirteenth124 and Fourteenth Amendments.125 The Supreme Court has in its time produced something of a multidisc boxed set of racist decision hits. Many of them feature in basic constitutional law and criminal procedure casebooks—including, in addition to those I referenced above, the *Civil Rights Cases*,126 *McCleskey v. Kemp*,127 *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,128 *Milliken v. Bradley*,129 *City of Richmond v. J.A. Croson Co.*,130 *Gratz v. Bollinger*,131 *United States v. Armstrong*,132 *Whren v. United States*,133 *California v. Hodari D.*,134 and many more.135 Many of these decisions date to the past century—and the ones featured in casebooks certainly follow this trend, as most students have more of a need to learn what the law *is* than what it once was. In recent years, some of the most egregiously racist cases have involved the Court resting on constitutional colorblindness to establish why it will not attempt to deal in reasoning or remedies focused on race.136 To advocates of this sort of colorblindness, an ideal society would make no distinction whatsoever on the basis of race, and we should endeavor to reach such a state.137 At their most extreme, such advocates seek to eliminate racism in society by eliminating racial distinctions in law immediately and entirely.138 Or perhaps I should say that they claim to seek this—my thesis is less charitable as to their goals. While some form of colorblindness in American discourse predates Reconstruction,139 the rhetorical weaponization of colorblindness against remedial consideration of race arose as a theme in the late twentieth century.140 This modern use of colorblind constitutionalism is not so much a corruption of its legacy in the Supreme Court but a reclamation. As Randall Kennedy observed, Justice Harlan’s initial introduction of the concept to Supreme Court jurisprudence affirms white supremacy and squares with the historical Justice Harlan: “After all, he was a former slave owner, initially opposed the Thirteenth Amendment, and tolerated various forms of segregation, notwithstanding his *Plessy* dissent.”141 Despite colorblindness’s association with antiracist movements,142 its life as a constitutional doctrine is inextricably bound up with its white supremacist introduction to Supreme Court jurisprudence.143 Plenty of attention has been focused on the constitutional failings of jurisprudence in various fields of law. Angela Onwuachi-Willig admirably tackles the gap that *Brown v. Board of Education*144 left by failing to discuss the reasons schools were segregated in the first place, as well as how white supremacist reasoning has charged into that gap to challenge affirmative action in education.145 Devon Carbado delves into how ostensibly neutral criminal procedure decisions allow police violence to escalate unaccountably.146 Henry Chambers examines the history of racial disenfranchisement and the ineffectiveness of current constitutional protections to prevent it.147 Alison Brown and Angus Erskine have laid bare courts’ hesitancy to consider circumstantial evidence of employment discrimination.148 Law reviews around the country are full of such analyses highlighting instances of racism in our courts. And yet, the possibility that these disparate fields of law converge on anti-Black jurisprudence because the Court itself is anti-Black often evades scholarly review. An ancient parable from the Indian subcontinent tells the story of a group of blind men seeking to understand what an elephant is by feeling it.149 Each touches a part of the elephant—its trunk, its ear, its leg—and compares the elephant to some other object.150 The blind men disagree as to the nature of an elephant because all of them lack the context to observe the whole creature.151 The parable is meant to counsel against claiming a monopoly on truth, instead teaching to remain open to other perspectives so as to gain a more complete understanding. In the context of legal academia, we all too often specialize; I have had the pleasure of meeting and learning from experts in a variety of specialties.152 All of them challenge unjust legal institutions and doctrines in their scholarship, and each of these challenges is important and necessary. I do not think for a moment that any of them believes that the law is fundamentally just, with only a handful of problems in need of redress. This Article will take a different approach.153 Rather than focusing on the details of a single issue, I aim to explore their connections through their common patterns. The law once tolerated overt racial discrimination but later rejected the appearances of bigotry.154 In their place, (slightly) subtler systems emerged, relying on facial neutrality and procedural barriers to enforce white supremacy instead.155 As Justice Harlan said, white supremacy need do little more than rely on established constitutional principles to perpetuate itself.156 Justice Harlan’s vision of white supremacy—that white people could retain their position of privilege, wealth, and authority indefinitely without the intervention of law157— is not the white supremacy of the snarling, tiki-torch fascist.158 Instead, it relies on claims of colorblindness and meritocracy, hoping to avoid scrutiny of the question of just who determines what constitutes merit.159 White people’s cultural dominance, established by centuries of physical and economic violence, ensures that they retain the power to define what abilities and traits are considered meritorious.160 So long as that remains true, purportedly neutral, colorblind constitutional principles will ensure white people’s continued success. **Our constitutional history need not be our fate.** While *established* principles sufficiently maintain the status quo, they are not the only principles possible. Many of the drafters of the Reconstruction Amendments believed that the new order they created must necessarily account for race.161 Black public understandings of the new amendments were inclined to see them as an effort to remake the American social order as an antiracist one.162 The only thing stopping the Supreme Court from adopting such an understanding is the Court’s own engrained white supremacy. Our Constitution contains tools sufficient to accomplish a sweeping, antiracist reimagining of the law but requires a Court that believes in that possibility. Part I will address the Court’s history of anti-Black jurisprudence. I will begin with an examination of the Court’s openly anti-Black decisions, with a focus on the nineteenth century. This basal layer of anti-Black decisions can inform our understanding of what follows. Beginning with *Plessy v. Ferguson*,163 I will then explore the Court’s use of constitutional colorblindness, particularly in its modern incarnation, as a bludgeon against remedial measures. In this, at least, the Court’s modern advocates for a colorblind Constitution are fitting inheritors of Justice Harlan’s legacy. In constructing a Constitution that is purportedly colorblind, the Court has essentially rendered the Constitution an anti-Black document. Next, Part II will examine the consequences of an anti-Black interpretation of the Constitution. As Justice Harlan predicted, simply by purporting to remove race as a factor in constitutional decision-making, white supremacy can be perpetuated where it already exists.164 The myriad consequences are often the result of the Court’s fondness for erecting procedural barriers to the success of any challenge to systemic racism.165 Blackness, by essentially colonial mechanisms, is criminalized; police become an occupying force.166 Public discrimination is allowed to persist through the adoption of ostensibly neutral standards that lack regard for the history of oppression that created racial disparities along the lines of those same criteria.167 Private discrimination is tolerated so long as it can be done without outward displays of bigotry.168 Purposefully antiracist legislation is limited in its scope, often through the very constitutional tools meant to authorize it.169 The long years of slavery and Jim Crow laws ensured that—without remedial measures to reshape society—Black people would continue to face an uneven playing field in this country. To achieve any measure of success, we would have to be twice as good as our white counterparts. Constitutional colorblindness ignores this history and modern social realities with catastrophically anti-Black consequences. Finally, Part III will present the alternative: the antiracist potential of a color- conscious Constitution. While the benefits of an antiracist society should be obvious, the Constitution’s potential as a tool for achieving that goal has invited some skepticism.170 To that end, Part III will begin with a Section addressing historical antiracist understandings of the Constitution. I will primarily compare the legislative histories of the Reconstruction Amendments and their radical heritage to contemporaneous Black reactions to the Amendments and early legislation under them. These understandings form a critical—and too often disregarded—component of the Amendments’ original public meaning. The other two Sections of Part III will deal with the potential scope of the Reconstruction Amendments’ application. This Article advances a novel structural understanding of the Reconstruction Amendments, illuminating their abolitionist potential as a system unto themselves.171 First, I will explore the unrealized potential of the Thirteenth Amendment for further liberation from the badges and incidents of slavery. While I have previously explored the Amendment’s potential use as a tool of police abolition,172 the conceivable scope of the Amendment is substantially broader. Our entire carceral system has been bent to replicate many of the abuses of slavery, despite the supposed end of convict leasing during the New Deal era.173 Modern legislation to restrict reproductive choices—which disproportionately impacts Black women174— recalls the use of forced reproduction at the hands of enslavers.175 If we were to finish the work of abolition, we would do well to remember the Thirteenth Amendment’s potential as a foundation for that work. The final Section of Part III will address the various tools of the Fourteenth and Fifteenth Amendments for building an abolition democracy. While most of these tools have seen at least limited use from Congress or the Court to support race-conscious remedies, their potential is much greater. I will explore each of these tools as a possible vehicle for such remedies. **The Constitution, interpreted to truly entitle Black people to the equal protection of the law, due process, the privileges and immunities of citizenship, and equal voting rights, would be radically different than it is today—all without changing a word.** This radical interpretation, though, is wholly consistent with contemporaneous understandings of the Reconstruction Amendments. The Court—its role in systemic racism shielded by its fundamentally antidemocratic nature—has chosen a different interpretation so far. But if we want to live to see the last stains of white supremacy scrubbed from our constitutional system, we must first envision a better framework.

#### Data Privacy) The right to informational privacy remains elusive, federal protections must establish that unlimited government surveillance violates the 14th amendment.

Pittman 19 - Larry J. Pittman. Professor of Law and Leonard B. Melvin Lecturer in Law. He is a member of the Michigan State Bar, the American Bar Association and the ABA Section on Dispute Resolution. LL.M, Harvard University; J.D., The University of Mississippi; B.B.A., The University of Mississippi. “THE ELUSIVE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3344908

Governmental Employees’ Misuse of Information that Citizens Provide for Legitimate Purposes Each day American citizens submit private information to obtain the governmental benefits mentioned above.18 And, there are state laws mandating that some private information, such as sexually transmitted diseases, be submitted to public health agencies.19 The problem is that some governmental employees have used, and might use, such sensitive information for ulterior purposes, including to further their own private needs for romance and retaliation against others.20 Obviously, such illegitimate usages of citizens’ private information raise substantial issues that implicate one’s constitutional right to informational privacy. D. Pervasive Governmental Surveillance The concern here is that governments—through pervasive and sophisticated use of ever-present traffic and security cameras, face recognition technology, cell phone location tracking systems, bank account records, and other means of monitoring each and every aspect of citizens’ lives—can secretly create a map of one’s entire existence.21 Certain law enforcement entities have used such public and private information to target certain persons who allegedly show a propensity for criminal behavior.22 The crux of the problem is that a map of one’s entire existence creates a more substantial invasion of privacy than any single invasion that is joined with other invasions to create the map. In other words, an isolated traffic camera picture of a person’s running a red light may not be as harmful or psychologically oppressive as knowing that the government knows each and every step or computer keystroke the person took for three hundred and sixty-five days a year, for the last ten years. Such pervasive monitoring, including the eventuality that artificial intelligence might one day be able to read our minds, would leave us without any privacy in anything that we do. Thus, this Article, in part, takes the position that public monitoring, which might normally be permissible, may lead to a violation of one’s constitutional right to informational privacy if such monitoring becomes too pervasive.23 All of the above-stated examples are just some of the privacy concerns that are ripe for challenges under the constitutional right to informational privacy theory, as discussed in this Article. II. SUBSTANTIVE DUE PROCESS “RIGHT TO BE LET ALONE” UNDER THE FOURTH AMENDMENT The central thesis of this Article is that the liberty interest component of the Fourteenth Amendment provides support for a constitutional right to infor- mational privacy, and that right to privacy is consistent with the Court’s substantive due process precedent. This constitutional right to informational privacy is premised on Justice Brandeis’s “right to be let alone” principle, and it primarily stems from the Fourth Amendment’s protection against unreasonable governmental intrusion.24 The constitutional right to informational privacy is consistent with the Court’s substantive due process precedent, as articulated in Washington v. Glucksberg,25 Lawrence v. Texas,26 and Obergefell v. Hodges.27 First, in Glucksberg, the Court restated that the Fourteenth Amendment’s liberty interest protection includes the rights provided for in the Bill of Rights Amendments.28 Therefore, the Fourth Amendment right against unreasonable searches and seizures is a liberty interest protected by the Fourteenth Amendment.29 Second, Glucksberg affirmed a test for determining whether other rights are also protected by the liberty interest.30 The Court stated: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition . . . ” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful de- scription” of the asserted fundamental liberty interest.31 However, Lawrence cautions that courts should not rely strictly on a historical analysis that is frozen in time, but should also consider changes in practices that create a new normal, as “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”32 Subsequently in Obergefell, the Court, building on Glucksberg and Lawrence, established that the following factors are important when one seeks constitutional protection of a new liberty interest: (1) how state law and the public have historically treated the asserted liberty interest, (2) any change or evolution in the state law and public treatment of the asserted liberty interest, (3) the important principles or policies that support the asserted liberty interests, and (4) whether the challenged state’s intrusion on the asserted liberty interest is also a violation of the Equal Protection Clause.33 Therefore, an application of this substantive due process analysis, with a blending of Glucksberg, Lawrence, and Obergefell, shows that a constitutional right to **informational privacy does exist under the Fourteenth Amendment**. And, that right should be grounded in the Fourth Amendment’s right to privacy against unreasonable searches and seizures34 because the right to informational privacy stems from the same general concerns about unrestrained governmental actions. The following cases inform this analysis and support the general theme that the government has no right to one’s private information when there is a reasonable expectation of continued privacy in that information, unless the government offers a legally sufficient justification for its intrusion into such private matters. A. Entick v. Carrington The English case of Entick v. Carrington35 is a landmark case against im- proper governmental intrusion. In Entick, the owner’s home was searched under a general warrant that was not supported by any evidence that the owner had committed a crime or that his home contained evidence that he had written the libelous articles against the King and his officers that he was accused of writing.36 The appellate court eventually held that the search and seizure were unlawful, apparently because they were conducted pursuant to a general war- rant, without any evidence that the owner had committed the specific crime or that his home property contained evidence of the crime.37 Boyd v. United States38 emphasized the importance of Entick’s influence in the adoption of the Fourth Amendment.39 And it supports the notion that there is a zone of privacy that protects citizens from unjustified governmental intrusions into one’s “personal security,” “personal liberty,” and “private property.”40 Importantly, Boyd also shows that law enforcement does not have to physically invade one’s property to violate the Fourth Amendment.41 Instead, a governmental request for a production of documents, that contain private information, can also violate the Fourth Amendment.42 Therefore, despite recognizing that the forced production of documents was not the same type of intrusion as a government official’s entering the petitioner’s property and seizing the disputed invoices, the Court held that the forced production of the invoices had the same practical effect as a physical intrusion onto the petitioner’s property and the seizure of the invoices.43 The Court concluded that the statute allowing the notices for production of the invoices and the court order pursuant to the statute were void and unconstitutional as a violation of the Fourth Amendment.44 The implication of Boyd, for the theme of this Article, is that it shows that the Fourth Amendment offers protection beyond the traditional situations where law enforcement officials physically intrude onto private property to search through and seize tangible personal property.45 And, the Court also noted that an erosion of the Amendment’s purpose can “only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.”46 Such liberal construction should mean that it is time to explicitly recognize that the Fourth Amendment should be the foundational support for a constitutional right to informational privacy, and that the right is applicable to the States through the liberty interest clause of the Fourteenth Amendment. C. Weeks v. United States Weeks v. United States47 is another case that supports a constitutional right to informational privacy.48 In Weeks, the Court reversed the petitioner’s convic- tion and held that certain papers and books that were obtained from his private property, and admitted into evidence, should have been excluded because the federal law enforcement officers did not have a warrant to search the proper- ty.49 The Court made a statement that is relevant to this Article’s argument that the Fourth Amendment also protects one from the government’s attempt to co- erce the production of private information:

#### Trans Rights) State bans on trans healthcare violate the 14th amendment, federal protections must establish that trans healthcare is medically necessary and protected as a personal dignity.

Krotoszynsk 21 - MAY 16, 2021. Ronald J. Krotoszynski, Jr. is the John S. Stone Chair at the University of Alabama School of Law and the author of The Disappearing First Amendment. “The War on Trans Kids Is Totally Unconstitutional.” https://www.theatlantic.com/ideas/archive/2021/05/anti-transgender-children-laws-unconstitutional/618864/

Laws that prohibit physicians from providing treatments such as puberty blockers and cross-hormone therapy to minors are bad public policy. Their advocates claim that these are efforts to protect kids, who they argue may later change their mind, from medical treatments they characterize as irreversible. But these arguments don’t hold up to scrutiny: The laws—such as the one Arkansas just passed and those that more than a dozen other states, including Alabama, Oklahoma, South Carolina, and Texas, are actively considering—will certainly harm transgender children, denying them medical care that they need and causing them psychological pain. That should be reason enough to oppose these laws. But even those who are skeptical of today’s gender politics should oppose these laws for another reason: They clearly violate the U.S. Constitution. The most obvious, and compelling, constitutional objection to Arkansas’s Save Adolescents From Experimentation (SAFE) Act and laws like it arises from the Fourteenth Amendment’s guarantee of equal protection under the law. That guarantee means, among other things, that a state government may not target one group of residents for discriminatory treatment arising from animus, dislike, or irrational fear. Adam Serwer: The Republican Party finds a new group to demonize Since the 1970s, the Supreme Court has consistently rejected moral disapproval of a particular group of individuals as a constitutionally legitimate basis for imposing targeted legal burdens on the group. Thus, when Congress attempted to, in the Court’s assessment, “prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program,” the Supreme Court unanimously struck down the ban for otherwise eligible “hippies.” In U.S. Department of Agriculture v. Moreno, decided in 1973, Justice William J. Brennan Jr. wrote, “If the constitutional conception of ‘equal protection of the laws’ means anything, it must, at the very least, mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” This bedrock equal-protection principle has endured over time. As Justice Sandra Day O’Connor explained in her concurring opinion in Lawrence v. Texas, the landmark 2003 decision that invalidated Texas’s ban on same-sex intimacy in private, “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” In clear contradiction of this constitutional rule, Arkansas’s SAFE Act singles out one group in need of medical care—transgender children—and makes the provision of that care within the state unlawful. No other medically necessary service is proscribed; everyone else in the state may seek and obtain medically necessary treatment. Moreover, the Arkansas law also appears to require that ongoing treatments for gender dysphoria immediately stop, even if ceasing such treatment, including hormone therapy, could cause a child serious medical harm. Arkansas would need a reason other than mere fear or dislike of transgender children as a basis for denying them, and only them, lawful access to medical care. It does not have one. This is not about the fact that these kids are kids. Arkansas permits minors, with their parents’ consent, to obtain medically prescribed services or treatments for any other reason at all—just not this one. This is the essence of irrational discrimination, a fact not lost on Republican Governor Asa Hutchinson, who in vetoing the law called the SAFE Act a “vast government overreach” that constitutes unjustified “legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters involving young people.” His veto was almost immediately overridden by the Republican-led state legislature—and by overwhelming margins. The federal courts should hold that the SAFE Act and all similar state laws lack a legitimate government purpose, meaning that they are unconstitutional. Indeed, a court considering the constitutionality of the SAFE Act need not even decide whether transgender children as a class constitute a “discrete and insular minority” that requires more vigorous constitutional review under the equal-protection clause, because the law is self-evidently irrational, as it lacks any plausible scientific or medical basis and rests on obvious prejudice. The law’s supporters claim that their objective is safeguarding the health and safety of kids—after all, the statute is called the SAFE Act. Advocates of laws like this contend that children should not be permitted to make a life-altering, potentially irreversible decision, even on the advice of a treating physician and with the informed consent and approval of their parents. State Representative Robin Lundstrum, the lead sponsor of the SAFE Act, has argued that “these children need to be protected.” But an outright ban on medically necessary treatments will not protect these kids or reduce their risk of harm. In fact, Arkansas’s new law will be counterproductive and self-defeating, and many professional medical associations opposed the bill on these grounds. The rate of attempted suicide among trans kids is tragically high. A 2018 survey commissioned by the American Academy of Pediatrics found that more than half of transgender teen boys had attempted suicide, as had nearly a third of transgender girls and two-fifths of nonbinary youths. Much of the risk comes from the stigma of being trans in today’s society—something this law will only exacerbate. Read: Young trans children know who they are This is the epitome of an irrational, and hence unconstitutional, law. After the legislature’s almost instant override of his veto, Hutchinson quite properly denounced the legislature’s action as “a step way too far” that “puts a very vulnerable population in a more difficult position” and “sends the wrong signal to them.” (It also bears noting that the bills currently pending in many states, including those in Alabama and Oklahoma, are even worse than the SAFE Act, because, if enacted, they would threaten physicians with felony criminal charges for providing treatment to transgender minors or referring them for treatment. They would also render parents who seek and obtain such treatment for their children potential felons, in some cases directly under the proposed law and in others indirectly, for aiding and abetting the commission of a felony.) Arkansas law contains plenty of other concessions to minors. Arkansas currently permits minors to seek full emancipation at 17, to lawfully engage in sexual intercourse with adults at 16 (and at 14, under a “Romeo and Juliet” law, with persons between 14 and 17), and to marry at 17. In other words, Arkansas permits minors to make important, potentially life-altering decisions before they reach the age of 18, including living independently of their parents or guardians and engaging in behaviors that could lead to parenthood. Arkansas’s flat denial of a minor’s ability, with their parents’ consent, to make basic decisions about gender identity simply cannot be reconciled with these other state policies. The SAFE Act and pending state laws like it suffer from other serious constitutional infirmities as well—any or all of which should lead the federal courts to void them with alacrity. For starters, the U.S. Supreme Court has held repeatedly that the due-process clause of the Fourteenth Amendment protects the right of fit custodial parents to oversee the upbringing of their children. Meyer v. Nebraska and Pierce v. Society of Sisters, reaffirmed recently in Troxel v. Granville, require the government to respect, rather than displace, parents’ reasonable decisions regarding how best to advance the welfare of their children. As the Supreme Court explained in Pierce, “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” The SAFE Act tramples this fundamental constitutional principle. In Arkansas today, fit custodial parents are now legally powerless to seek and obtain medically necessary care for their offspring. Criminalizing a person’s medical status is also patently unconstitutional. In 1962, the Supreme Court invalidated a misguided California law that made it a crime to be “addicted to the use of narcotics.” In Robinson v. California, Justice Potter Stewart observed that “we deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense.” The justices invalidated the law because “narcotic addiction is an illness,” not a crime. Condemning as felons physicians and parents who secure access to recommended treatment for trans kids comes perilously close to directly criminalizing the mere status of being a transgender minor—and is therefore unconstitutional under Robinson’s reasoning that a state cannot legitimately punish medical status. Finally, although the Supreme Court has never squarely held that the Constitution guarantees a right to a medically necessary service or treatment (save for abortion and birth control), the Constitution’s guarantee of personal liberty encompasses protection for the security, integrity, and dignity of a person. Denying access to a medically necessary therapy compromises both the health and happiness of an individual. Read: Why is the media so worried about the parents of trans kids? As the Court stated in 1992’s Planned Parenthood v. Casey, matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, **are central to the liberty protected by the Fourteenth Amendment.**” The ability to seek and obtain medical advice and treatment directly related to one’s gender identity plainly falls within the constitutionally protected zone of “choices central to personal dignity and autonomy,” and, accordingly, a state government cannot constitutionally deny access to medically necessary treatments for gender dysphoria. The clear constitutional invalidity of laws like the SAFE Act should lead a constitutionally conscientious legislator, of whatever partisan or ideological stripe, to oppose those laws. Even if constitutional fealty isn’t a sufficient motivator, a prudent fiscal steward of scarce state funds should think twice before supporting a blatantly unconstitutional measure, because the Civil Rights Attorney’s Fees Award Act of 1976 requires a state government that loses a civil-rights case to pay both the attorney’s fees and court costs of the prevailing plaintiff. Futile efforts to defend anti-trans laws in federal court will drain a state’s treasury.

#### Health Equity) The 14th amendment’s equal protection clause can be used to affect legal health equity and establish a human rights framework that bans discrimination in healthcare.

Schweikart 21 - Scott J. Schweikart, JD, MBE. “How to Apply the Fourteenth Amendment to the Constitution and the Civil Rights Act to Promote Health Equity in the US”https://pubmed.ncbi.nlm.nih.gov/33818375/

Health equity in the United States requires elimination of differentials in access to health services according to race, ethnicity, sex, gender identity, comorbidity, or ability. To achieve health equity, governments can use a variety of tools, including civil rights legislation and constitutional jurisprudence. In the United States, 2 such examples are the Fourteenth Amendment to the Constitution’s Equal Protection clause and Title VI of the Civil Rights Act. While both have the capacity to reduce health disparities, in practice, neither has achieved its full potential because of how the judicial branch has interpreted and allowed these 2 laws to be enforced. How courts adjudicate health-related cases, especially those in which civil rights or other human rights legislation are at stake, is key to the successful promotion of legislative and jurisprudential approaches to motivating health equity and realizing justice for all. What Is Health Equity? Health equity has been widely defined as an “absence of socially unjust or unfair health disparities.”1 Equity is different than equality. While both equity and equality focus on notions of fairness, equality emphasizes giving people “the same resources or opportunities” while equity “recognizes that each person has different circumstances and allocates the exact resources and opportunities needed to reach an equal outcome.”2 Health equity in particular “focuses attention on the distribution of resources and other processes that drive a particular kind of health inequality.”1 Health equity is important because health is fundamental to the human experience. As Amartya Sen explains: “health is among the most important conditions of human life and a critically significant constituent of human capabilities in which we have reason to value.”3 Complete health equity is a theoretical ideal; in reality, different nations and governing structures have differing success in achieving health equity. The United States, for example, has stark disparities in health (https://journalofethics.ama-assn.org/article/blacklivesmatter- physicians-must-stand-racial-justice/2015-10) and access to care compared to peer nations like Canada.4 Hence, the drive to effectuate health equity in American society is paramount and key to achieving a more just society, while it would also enhance the quality of human life and its essence. Legislative Action on Civil Rights **Either by acting “as a provider or guarantor of human rights” or by implementing “policy frameworks that provide the basis for equitable health improvement,” governments can contribute to effectuating health equity**.5 With respect to human rights (https://journalofethics.ama-assn.org/article/promoting-health-human-right-post-aca- united-states/2015-10), the United States has no formally codified right to health, nor does it participate in a human rights treaty that specifies a right to health. A prime example of such a treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for a specific—though criticized as “vague” and “unrealistic”—right to health.6 The ICESCR has only been ratified and not signed by the United States, thus “making the treaty only morally rather than legally binding on the US.”6 However, as Paula Braveman et al have noted, the values underlying health equity are “rooted in deeply held American social values”7; hence there is scope for government action to effectuate health equity. The United States does have law in the domain of human rights. These laws—nominally known as civil rights—are, on the whole, designed to protect citizens from “discriminatory practices by governments and institutions” and also to “protect citizens from discriminatory practices by other citizens.”8 Indeed, Robert Hahn et al argue that civil rights laws are social determinants of health (https://journalofethics.ama-assn.org/article/how-should-health-professional-education-respond-widespread-racial-and-ethnic-health-inequity-and/2021-02), as they “causally affect the societal distribution of resources that in turn affect disease, injury, and health.”8 While not as explicit as an international human rights treaty, both the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964 offer examples of civil rights law that attempt to achieve more equitable outcomes in American society. What follows is an exploration of how effective these aspects of American civil rights law are in promoting health equity in America. Fourteenth Amendment. The Fourteenth Amendment of the US Constitution is famously known for its Equal Protection clause, which states that “nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws.”9 With regard to implementing health equity, the Fourteenth Amendment seems a natural place in US law on which to focus. Indeed, “the equal protection clause is generally thought to require government to treat similarly circumstanced individuals in a similar manner.”10 However, there is a history of US courts (the US Supreme Court in particular) not applying a heightened level of scrutiny to equal protection claims regarding unequal access to health care, which has allowed for inequities to continue.10 Throughout its jurisprudential history, the “Supreme Court [has] interpreted the Fourteenth Amendment far more narrowly than many of its drafters intended, most notably by holding that it did not apply to discrimination by private actors.”11 Additionally, the Supreme Court required the “exceedingly difficult” burden that “for a litigant to prevail” in an Equal Protection case, the plaintiff “must prove that the government acted with a ‘discriminatory purpose’” and that simply demonstrating that a “policy or practice has a disparate impact on people of a particular race is not sufficient to prevail on an Equal Protection claim.”11 Because of the narrow and restrictive legacy of court interpretation, the Fourteenth Amendment has been weakened and has not operated as an effective tool to implement civil and human rights. Ultimately, success and actual progress in enforcing civil rights came when the Supreme Court “upheld the Civil Rights Act of 1964, although it relied on Congress’s authority under the Commerce Clause, and not the Fourteenth Amendment.”11 Title VI of the Civil Rights Act. Title VI of the Civil Rights Act “prohibits discrimination on the basis of race, color, or national origin by both public and private entities that receive federal financial assistance.”12 Yearby explains that the passage of Title VI was heralded with the promise “to eradicate racial bias against African Americans in healthcare and equalize access to health care in the United States.”13 Indeed, there is evidence that Title VI has had some impact on reducing health inequities, with one study showing that “between 1965 and 2002, approximately 38 600 Black infant deaths were prevented by implementation of Title VI.”8 However, there are limitations on Title VI’s effectiveness in eliminating disparities and achieving health equity. Fifty years after the passage of the Civil Rights Act, “hospitals and nursing homes continue to be racially separate and unequal, in part because the government has failed to enforce Title VI.”13 Additionally, Yearby and Mohapatra note that “because HHS [US Department of Health and Human Services] does not apply Title VI to healthcare providers, physicians are allowed to limit African Americans’ access to quality healthcare based on interpersonal racism.”14 Although the failure to enforce Title VI occurred across all levels of government, failures in the judicial branch are noteworthy. Legal scholar Dayna Matthew notes that the “Federal Courts have systematically eviscerated the protection against discrimination Title VI was intended to provide.”15 For example, in 2001, the Supreme Court16 “ended the ability of private individuals to sue to enforce Title VI disparate impact standards.”12 The ruling limited the power of Title VI regulations, as private individuals or entities could “no longer bring a private right of action” based on claims regarding disparate impact or discriminatory effect but can only now “bring suits for intentional discrimination under Title VI.”17 However, public entities may still bring such claims, as the ruling does not prevent the Office of Civil Rights from bringing discriminatory effects cases under Title VI regulations.16 Matthew explains that the Supreme Court’s “restrictive construction” of Title VI can be interpreted as the Court “stumped by the injustice of holding actors liable for discriminatory conduct they do not intend and cannot control,” that is, “courts may fear the ubiquity of unconscious biases could require limitless liability rules.”15 However, the “fear” of extending liability has resulted in the thwarting of Title VI’s power to effectuate health equity—and perhaps its original intent. Courts’ Roles With regard to the jurisprudence of US civil rights laws—particularly the Fourteenth Amendment and Title VI of the Civil Rights Act—Flood and Gross argue that courts have an important role to play in implementing health equity by allowing a “properly framed right to health” to guide courts to better “scrutinize whether ... [regressive health policy] decisions adhere to human rights standards.”18 However, as discussed earlier, courts may not always effectively play this role, thus leading to difficulties in implementing or promoting health equity via civil rights legal frameworks. Alicia Yamin notes that variation in how effectively human rights are promoted (https://journalofethics.ama-assn.org/article/rights-disappear-when-us-policy-engages-children- weapons-deterrence/2019-01) is tied to “the purpose and function of courts, together with the design of the Constitution and legal system which play a role in how courts approach enforcing health and other ... rights.”19 Thus, while legislative and constitutional tools of civil rights law already exist (eg, the US Constitution, the Civil Rights Act) to promote health equity, the judicial function of interpreting and promoting these tools varies. For example, courts often employ “judicial caution” that discourages the challenging of policies on human rights grounds, thereby leaving an absence of “critical scrutiny” of the “policy choices” relating to health equity.20 However, there are examples in which courts may more strongly promote health equity (eg some state court decisions have “describe[d] health care as a necessity of life that requires special sensitivity to its availability”10); hence courts can be part of the solution (and not necessarily an obstruction) to effectuating greater health equity and social justice. Yamin argues that recognizing the variation in courts’ responses is crucial to understanding how to “promote patterns of judicialization [patterns in courts’ decisions and reasoning] to best foster more social justice through legal enforceability of health and related rights.”19 Conclusion Sen explains that “health equity [is] central to the understanding of social justice.”3 Braveman et al echo the notion that seeking justice is central to a desire to achieve health equity, explaining “that the heart of a commitment to addressing health disparities is a commitment to achieving a more just society.”7 In an effort to achieve a more just society, America has civil rights laws, such as the Fourteenth Amendment and Title VI of the Civil Rights Act. Both these laws have the potential to serve as powerful tools to achieve health equity and social justice. However, their scope and power have been limited by the judicial branch, with courts often allowing for more restrictive interpretations of the law and a narrower scope of their enforcement. In order to better achieve health equity and social justice in American society, attention must be paid to courts and their role in the process of effectuating health equity through law. Attention to courts is critical because, after analysis, patterns of court decision making might emerge that indicate that other solutions (outside of the judicial branch) are necessary to achieve health equity, such as possibly amending various civil rights laws15 to better achieve what some courts might not yet allow under current precedent and judicial interpretations.

#### Police Abolition) policing resistance is the original spirit of the Equal Protection Clause

Bernick 21, Bernick, Evan D., Assistant Professor at NIU, Policing as Unequal Protection (May 21, 2021). Available at SSRN: https://ssrn.com/abstract=3850829 or [http://dx.doi.org/10.2139/ssrn.3850829 //](http://dx.doi.org/10.2139/ssrn.3850829%20//) wwu ljh

These are concerns and objections that those who seek transformative change in policing have to confront, regardless of whether they make use of constitutional argumentation. They are concerns and objections that have already been raised. Appealing to the Equal Protection Clause will not alert M4BL’s critics to the existence of new arguments, ready to be taken up; critics have already invoked the Equal Protection Clause to resist M4BL’s demands and raised concerns about perverse, unintended consequences. 641 Integrating the historical function of the Equal Protection Clause with the history of policing can provide new resources with which to argue for the reduction of the police footprint. It can do so by (1) showing continuities between the evils at which the Equal Protection Clause was aimed and racialized police subjugation today; (2) highlighting the inadequacy of police reform efforts to prevent police subjugation; and (3) situating opposition to policing in the context of a freedom struggle against subjugation that is older than the United States and which shaped the Fourteenth Amendment. Critics can be expected to deny those continuities, question that account, and deny that M4BL is fighting anything resembling the same battle as did nineteenth-century abolitionists. But making use of these resources cannot hurt; and it may help quite a bit. CONCLUSION The Movement for Black Lives wants to stop police from violently controlling and killing Black people. If its pursuit of this goal does not look like anything that resembles constitutionalism, that may tell us more about the limitations of our conception of constitutionalism than it tells us about M4BL. We encounter radical critiques and demands, advanced in terms that do not make use of orthodox constitutional language; we might conclude that we are not encountering a movement that could have anything to do with the Constitution. Such a conclusion would be too quick. M4BL is a response to violence of a kind that has been inflicted and resisted throughout U.S. history, and its critique and demands could draw strength from explicit constitutional argumentation from the history of policing and the Fourteenth Amendment. That is because M4BL’s policing critique and demands are consistent with the letter and spirit of the Equal Protection Clause. In turn, constitutionalism could draw strength from M4BL’s activism in response to violence that remains a part of our constitutional history. Recognizing that an antipolicing construction of the Fourteenth Amendment is available to a radical social movement is simultaneously troubling and inspiring. It should not surprise us that a constitutional amendment made possible by radical contestation can provide resources to a radical movement today. But it should profoundly trouble us to see radical social movements separated by centuries fighting against racialized policing. The persistence of police violence might seem sufficient to justify M4BL’s omission to engage in much constitutional argumentation. It is true that constitutionalism did not stop racialized policing. And it is true that its failure to do so illustrates constitutionalism’s limits. Those struggling today, however, can take inspiration from the fact that nineteenth-century radicals were successful in embedding such a liberatory promise in the Constitution at all—one that, if interpreted consistently with its letter and spirit, would transform society today.

#### Abortion) State preemption key to enshrining Roe V. Wade into law and preventing state rollback of abortion

**Katyal ’21** (Neil Kumar Katyal is a professor of law at Georgetown University and former solicitor general of the United States, “The Supreme Court May toss Roe. But Congress can still preserve abortion rights.” The Washington Post, <https://www.washingtonpost.com/outlook/2021/06/07/roe-abortion-congress-mississippi/>) //wwu-kck

The Supreme Court’s recent decision to accept a [major abortion case](https://www.washingtonpost.com/politics/courts_law/supreme-court-abortion-roe-v-wade/2021/05/17/cdaf1dd6-b708-11eb-a6b1-81296da0339b_story.html?itid=lk_inline_manual_2) out of Mississippi has led to fear among many Americans that *Roe v. Wade* will be overruled next year. There is some chance of this — but that’s why it is crucial to understand that reproductive rights do not depend only on the justices. Here’s the thing: Congress can, right now, by simple majority vote, protect those rights and nullify any threat posed by the Mississippi case or any other. A year ago, when the last abortion [case](https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf) reached the high court, Chief Justice John G. Roberts Jr. cast the deciding vote to invalidate [Louisiana](https://www.washingtonpost.com/politics/courts_law/supreme-court-louisiana-abortion-law-john-roberts/2020/06/29/6f42067e-ba00-11ea-8cf5-9c1b8d7f84c6_story.html?itid=lk_inline_manual_5)’s abortion restrictions. Roberts surprised many by joining the four justices appointed to the court by Democratic presidents, one of whom was Ruth Bader Ginsburg. Today, however, Justice Amy Coney Barrett occupies the seat Ginsburg once did, leading some who support abortion rights to predict doom from the Mississippi case. Predictions are always tough in this business, but the far more important point is that this focus on the Supreme Court is misplaced. Reproductive rights need not depend at all on what the court does with *Roe*. In *Roe,* the Supreme Court in 1973, by a 7-2 vote, reviewed a Texas law that criminalized abortion, declaring it unconstitutional. The court’s opinion meant that states could generally not restrict abortions in the first trimester and for much of the second, until the point of fetal viability. Thus, women had a right to choose what to do until approximately the 24th week of their pregnancies. Mississippi, however, recently passed a law in defiance of that framework, restricting abortion after the 15th week. This law so flagrantly defies the Supreme Court that nothing like it has had a chance of success in any court since 1973. (Texas, not to be outdone by Mississippi, last month [outlawed abortions](https://www.washingtonpost.com/nation/2021/05/19/texas-abortion-law-abbott/?itid=lk_inline_manual_8) after the sixth week if a fetal heartbeat has been detected.) How a Mississippi abortion law could overturn Roe v. Wade A Supreme Court review of a Mississippi abortion law could pave the way for many other state laws that restrict or ban the procedure. (Video: Joshua Carroll/The Washington Post, Photo: Melina Mara/The Washington Post) This is subtle but important: When the Supreme Court hears a case about abortion, whether it was *Roe* in 1973 or the Mississippi case in the coming fall, it is not being asked to outlaw the practice of abortion. The court has only one power — the power of judicial review — which means all it can do is say whether a particular abortion restriction passed by a legislature is constitutional. The court cannot outlaw abortion itself. So if the court sides with Mississippi and says “you can have this law,” that simply means those states whose legislatures want such laws restricting abortion can have them. Other states that don’t want to restrict abortion do not have to. The court can’t *compel* abortion restrictions; it can simply *permit* them. [The Supreme Court rules us. Here’s how to curb its power.](https://www.washingtonpost.com/outlook/2020/09/29/supreme-court-reform-packing-jurisdiction-democracy/?itid=lk_interstitial_manual_11) What this simple insight means is that there are two ways, not one, to safeguard reproductive rights: one by legislatures and the other by courts. And because the Constitution says that federal law reigns supreme over state laws, this insight also means that Congress can sweep away state laws that conflict with federal protections. Congress uses this power of “preemption” all the time — blocking states from having their own food and drug laws, employment rules, banking regulations and the like. Congress also frequently passes legislation to guarantee rights. Indeed, almost all of the major civil rights protections you have at your job or at restaurants or in hotels are guaranteed by Congress, not the courts or the Constitution. That is because the Constitution restricts only governments, not private individuals or corporations. Right now, Congress has a bill before it that would capitalize on this insight and statutorily guarantee the reproductive rights recognized by the Supreme Court since 1973. Called the [Women’s Health Protection Act](https://www.congress.gov/bill/116th-congress/senate-bill/1645/cosponsors?searchResultViewType=expanded) and sponsored by senators including Kyrsten Sinema (D-Ariz.), Charles E. Schumer (D-N.Y.), Tim Kaine (D-Va.) and Amy Klobuchar (D-Minn.), it would codify the rights two generations have taken as part of American life. This legislation can be passed by simple majority vote, and if enacted, it would remove cases like the Mississippi one from the Supreme Court’s consideration. The rights would now be guaranteed by Congress, making it impossible for the court to trim them back. The only way states could try is to file separate lawsuits seeking judicial review of such legislation, arguing that Congress’ law is unconstitutional because Congress lacks the power to enact it. Such an argument has about zero chance of success. Since the New Deal, the Supreme Court has given Congress broad powers over interstate commerce, and the case here would be ironclad, on par with the rationales that undergird civil rights laws and their prohibitions on discrimination in employment, restaurants and the like. There is no way the Supreme Court could void such a law without collapsing the scholarly and judicial consensus about the reach of government power, present at least since the New Deal but with its roots going all the way back to the Bank of the United States case *McCulloch* from 1819. [With a conservative court, abortion foes could end Roe — and go even further](https://www.washingtonpost.com/outlook/2020/09/23/ginsburg-court-abortion-rights/?itid=lk_interstitial_manual_18) Some in the Senate would try to filibuster the legislation, claiming 60 votes, not 50, is needed to pass it. But if there is ever a piece of legislation that merits a departure from the filibuster, this is pretty much it. Recall that it was the Republicans in the Senate who bypassed the filibuster when they confirmed President Donald Trump’s three nominees to the Supreme Court, including Barrett. And Trump campaigned on the claim that *Roe* would “[automatically](https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html)” be overturned once his Supreme Court nominees were confirmed. It can’t be that one side gets to play by a “no filibuster” rule and the other side doesn’t. That is particularly so since one of the seats at the court was filled as a result of Republican senators’ gamesmanship over President Barack Obama’s nomination of Merrick Garland — [gamesmanship that itself](https://www.redding.com/story/opinion/columnists/2016/03/18/yoo-gop-right-to-delay-filling-of-supreme-court-seat/93707152/) had the goal of trying to overturn *Roe.* In this sense, *Roe* is unique — it occupies a role in Senate confirmations unlike any other case. If 50 is good enough to confirm a justice for life and against *Roe*, it should be good enough to democratically enshrine *Roe* into law, too. All it takes is 50 senators to sidestep the filibuster (or [return it to its original roots](https://www.washingtonpost.com/politics/biden-for-the-first-time-says-he-wants-to-overhaul-the-filibuster/2021/03/16/82b41bc4-86b6-11eb-bfdf-4d36dab83a6d_story.html?wpmk=1&wpisrc=al_politics__alert-politics&utm_source=alert&utm_medium=email&utm_campaign=wp_news_alert_revere&location=alert&pwapi_token=eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9..YME_7Bs_kFpGsRsgxo2rSp9-vGOW0kaOay0mxIFjpXY&itid=lk_inline_manual_23), like a speaking filibuster) for this particular piece of legislation. And especially when such legislation is designed to preserve the status quo over reproductive rights and codify five decades of understandings, it is hard to see how senators representing a small fraction of the United States should be able to block the popular will. With Republican senators such as Susan Collins (Maine) and Lisa Murkowski (Alaska) having [gone on the record](https://www.washingtonpost.com/politics/everyone-is-focused-on-lisa-and-susan-the-two-most-powerful-senators-in-the-fight-to-replace-kennedy/2018/06/28/d7f7f72e-7ae6-11e8-93cc-6d3beccdd7a3_story.html?itid=lk_inline_manual_24) to support *Roe*, a Senate majority for the Women’s Health Protection Act is exceptionally likely. And although Democratic senators such as Joe Manchin III (W.Va.) have expressed general support for keeping current filibuster rules, the act is best understood as falling within an existing exception to the filibuster: lifetime appointments to the Supreme Court. Indeed, it is a far more modest reform than [the 2017 decision](https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html?itid=lk_inline_manual_24) by then-Senate Majority Leader Mitch McConnell (R-Ky.) to end the filibuster for Supreme Court nominees. Citizens can easily feel disempowered when issues they care about are reduced to analyzing the proclivities of nine people in Washington sitting in black robes. Since 1973, the questions about reproductive rights have been dominated by the court, not Congress. But now we have an opportunity to recalibrate the balance and guarantee reproductive justice for Americans in every state. We don’t need the court to protect these rights. We just need a majority vote in Congress.

## Core Negative Ground

#### Disadvantages)

**Turnabout DA – Passing policy at the federal level to resist Republican advances reduce Democratic willingness to advance meaningful policies at the state level.**

**Court Politics DA – The aff forces a political compromise, which causes a series of crucial decisions on the supreme court’s docket in 2022-2023 to be ruled in favor of conservatives.**

**Judicial Supremacy DA – Expansion of the 14th amendment would lead to a judicial supremacy and activism that subordinates the rule of law to populism and could easily get modeled internationally.**

**Midterms DA – The 14th amendment has been cited as ground to exclude republican candidates from elections, landmark decisions would shift its interpretation and possibly the elections.**

**Agenda Politics DA – 14th amendment creates gridlock, and prevents policies passing.**

**State Sovereignty DA – Federal intervention in state policy reduces state autonomy, removing the power to pass meaningful local legislation.**

**Federalism DA – Federal consolidation of power through the courts removes power from state legislatures, reducing democracy.**

**Hollow Hope DA – Courts are not a site of meaningful societal change and trades off with grassroots movements.**

**Court Clog DA – Legislative ambiguity and relitigation from constitutional reinterpretation fills the courts with difficult to resolve cases and prevents cases from getting through.**

#### Counterplans)

**Constitutional Convention CP – States can hold a convention to amend the constitution to implement the affirmative’s plan, avoiding any disads whose internal link is consolidated power**

**50 States CP – Each state will pass the legislation proposed by the affirmative rather than passing it through the federal government. Much like the previous CP it would avoid any disads that start from a point of federal consolidation.**

#### Kritiques)

**The main thesis for core critiques of this topic will be along the lines of jurisprudence – the idea that social issues are intertwined with law. This is true for all marginalized identities, and oppressive structures, making it a core neg ground. Discussions that these arguments would lead to would look like: abolition v reform, amending v reinterpreting (or vice versa - resolution dependent), aiding material harms v structural reconstruction, short v long term effects of each etc. These debates are rich in literature bases for both sides of the debate, making the K debates nuanced and well prepped. Additionally, this core argument both allows the neg to venture into specific literature bases, while also maintaining a level of predictability on the affirmative side.**

**Examples:**

**NEOLIBERAL JURISPRUDENCE – K. Expansion of the 14th amendment turns humans into market objects, furthering Capital, Gender and Whiteness**

**RACIAL CAPITALISM/ABOLITION – K. The constitution forecloses any attempt of abolition; we cannot continue with the same methods and logics if we want to see change – we need to innovate new abolition constitutionalism.**

## Introduction to the Resolution

**The topic addresses major areas of debate in constitutional law through the framework of the 14th amendment. The 14th amendment not only creates its own protections through the Equal Protection Clause and Due Process Clause, but protects and incorporates all other constitutional rights at the federal level through the Privileges and Immunities Clause. These areas are often expanded and reinterpreted under new doctrines and case precedent to establish or enforce federal protection of rights contained in the US constitution. The topic essentially becomes a debate about what the US constitution comes to guarantee under its original enumeration, or what it ought to guarantee as a modern and functional expression of the original text.**

**The Actor**

***Option 1: The Federal Government***

**This option would establish federal protections with the coordination of the whole federal government, limit negative actor counterplan ground to non-federal actors, and allow affirmatives to specify federal actors most relevant to the protection they intend to establish or enforce.**

***Option 2: The Supreme Court***

**This option would use judicial review to interpret new federal protections. The 14th amendment is shaped by a rich supreme court precedent which a supreme court actor would contribute and to and interact with. A major legacy of the 14th amendment is selective incorporation, which is the doctrine by which the supreme court used the 14th to incorporate major sections of the bill of rights into federal protection. This doctrine and actor fundamentally changed the nature of the constitution and would ground the legal topic in supreme court jurisprudence and case-precedent literature.**

***Option 3: Passive voice – non-actor***

**There are two important reasons to consider a non-actor resolution for this year’s legal topic:**

**1) To make the resolution a normative statement about law. Non-actor resolutions open up student autonomy to define themselves as advocates relative to the law, allowing teams to craft legal advocacy independent of existing institutions.**

**2) To limit actor counterplan ground in the pursuit of a more wholistic debate about the current state of legal precedent. Concerns about the functionality of the topic relative to the 50 states counterplan are best addressed by a topic which does not insist on a specified actor to affect change in legal precedent.**

**The Direction**

**To substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment:**

**- The affirmative increases rather than decreases federal protections.**

**- The affirmative increases protections through a novel interpretation of the 14th amendment.**

**The Floor and Ceiling**

**The floor of the topic is)**

***To substantially increase federal protections:***

**To functionally establish and attempt to enforce new protection(s).**

**The federal government would be required to establish protection(s) through legislative, judicial, or executive action. Likely established through judicial review or new legislation.**

**Establish protection(s) with a national scope: applying to infringement on rights by the state or federal government. This may change rights as currently interpreted by the states but might also contest current limited interpretation of rights at the federal level, such as privacy in the context of NSA surveillance.**

**To substantially increase federal protection(s), ones not already established or enforced.**

***In at least one of the following areas:***

**The affirmative must create new protections within one or more of the major legal doctrines established by the 14th amendment as described by the section below.**

**The ceiling of the topic is)**

***Privileges and immunities guaranteed under the 14th Amendment:***

**Indicates the mechanism of constitutional law under which these protections must be established.**

**Federal protections must be those guaranteed by or through the 14th amendment.**

**The Privileges and Immunities Clause of the 14th amendment also incorporates other rights enumerated in the constitution for federal protection.**

***In at least one of the following areas:***

**Limits federal protections to fall within one or more of the major legal doctrines established by the 14th amendment as described by the section below.**

**The List**

**The 14th amendment contains multiple mechanisms to effect new rights protections at the state and federal level. The provisions we have chosen to focus on are the Due Process Clause and Equal Protection Clause, as well as the right to privacy which was interpreted out of multiple amendments through the Privileges and Immunities clause of the 14th amendment.**

**These create defined yet contestable areas for a resolutional list and floor relating to areas of established precedent and emerging interpretations.**

**The three suggested areas are due process, equal protection, and privacy.**

***Due Process:* The Due Process Clause affects protections related to the justice system and incorporates other rights contained in constitution to be under explicit federal protection. The 14th amendment shares this clause with the fifth amendment.**

https://www.law.cornell.edu/wex/due\_process

The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures. Most of this essay concerns that promise. We should briefly note, however, three other uses that these words have had in American constitutional law. Incorporation The Fifth Amendment's reference to “due process” is only one of many promises of protection the Bill of Rights gives citizens against the federal government. Originally these promises had no application at all against the states (see Barron v City of Baltimore (1833)). However, this attitude faded in Chicago, Burlington & Quincy Railroad Company v. City of Chicago (1897), when the court incorporated the Fifth Amendment's Takings Clause. In the the middle of the Twentieth Century, a series of Supreme Court decisions found that the Due Process Clause "incorporated" most of the important elements of the Bill of Rights and made them applicable to the states. If a Bill of Rights guarantee is "incorporated" in the "due process" requirement of the Fourteenth Amendment, state and federal obligations are exactly the same.

**Substantive Due Process is an emerging doctrine which interprets the Due Clause to extend to rights beyond those explicitly enumerated in the US constitution.**

https://www.law.cornell.edu/wex/substantive\_due\_process

Substantive due process is the notion that due process not only protects certain legal procedures, but also protects certain rights unrelated to procedure. Many legal scholars argue that the words “due process” suggest a concern with procedure rather than substance. Justice Clarence Thomas, one of this theory's most well-noted supporters, argued this point when he wrote that "the Fourteenth Amendment’s Due Process Clause is not a secret repository of substantive guarantees against unfairness"--understand the Due Process Clause. However, others believe that the Due Process Clause does include protections of substantive due process--such as Justice Stephen J. Field, who, in a dissenting opinion to the Slaughterhouse Cases wrote that "the Due Process Clause protected individuals from state legislation that infringed upon their “privileges and immunities” under the federal Constitution. Field’s dissenting opinion is often seen as an important step toward the modern doctrine of substantive due process, a theory that the Court has developed to defend rights that are not mentioned in the Constitution." Substantive due process has been interpreted to include things such as the right to work in an ordinary kind of job, marry, and to raise one's children as a parent. In Lochner v New York (1905), the Supreme Court found unconstitutional a New York law regulating the working hours of bakers, ruling that the public benefit of the law was not enough to justify the substantive due process right of the bakers to work under their own terms. Substantive due process is still invoked in cases today, but not without criticism (See this Stanford Law Review article to see substantive due process as applied to contemporary issues).

***Equal protection:* The Equal Protection Clause is crucial to the federal protection of civil rights, which are immunities related to non-discrimination by the state and federal government.**

https://www.law.cornell.edu/wex/equal\_protection

Equal Protection refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body state must treat an individual in the same manner as others in similar conditions and circumstances. Permissible Discrimination Before proceeding, it is important to remember that a government is allowed to discriminate against individuals, as long as the discrimination satisfies the equal protection analysis outlined below, and described in full detail in this Santa Clara Law Review article. U.S. Constitution The Fifth Amendment's Due Process Clause requires the United States government to practice equal protection. The Fourteenth Amendment's Equal Protection Clause requires states to practice equal protection. Equal protection forces a state to govern impartially—not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective. Thus, the equal protection clause is crucial to the protection of civil rights.

***Privacy:* The right to privacy was incorporated under the Due Process clause to guarantee a right to autonomy from government intervention.**

https://www.law.cornell.edu/wex/privacy

In the United States, the Supreme Court first recognized the right to privacy in Griswold v. Connecticut (1965). Before Griswold, however, Louis Brandeis (prior to becoming a Supreme Court Justice) co-authored a Harvard Law Review article called "The Right to Privacy," in which he advocated for the "right to be let alone." Griswold and the Prenumbras In Griswold, the Supreme Court found a right to privacy, derived from penumbras of other explicitly stated constitutional protections. The Court used the personal protections expressly stated in the First, Third, Fourth, Fifth, and Ninth Amendments to find that there is an implied right to privacy in the Constitution. The Court found that when one takes the penumbras together, the Constitution creates a "zone of privacy." While the holding in Griswold found for a right to privacy, it was narrowly used to find a right to privacy for married couples, and only with regard to the right to purchase contraceptives. Justice Harlan's Concurrence in Griswold Also important to note is Justice Harlan's concurring opinion in Griswold, which found a right to privacy derived from the Fourteenth Amendment. In his concurrence, he relies upon the rationale in his dissenting opinion in Poe v. Ullman (1961). In that opinion, he wrote, "I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." In privacy cases post-Griswold, the Supreme Court typically has chosen to rely upon Justice Harlan's concurrence rather than Justice Douglas's majority opinion. Eisenstadt v Baird (1971), Roe v. Wade (1972), and Lawrence v. Texas (2003) are three of the most prolific cases in which the Court extended the right to privacy. In each of these cases, the Court relied upon the Fourteenth Amendment, not penumbras.

### -Suggested Resolutions-

**Resolution 1: Federal Government Actor**

Resolved: The United States Federal Government should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment.

**Resolution 1: Federal Government Actor W/ Floor for Specified Areas**

Resolved: The United States Federal Government should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment in at least one of the following areas: the right to privacy, the Equal Protection Clause, the Due Process Clause.

**Resolution 1: Supreme Court Actor**

Resolved: The United States Supreme Court should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment.

**Resolution 1: Supreme Court Actor W/ Floor or Specified Areas**

Resolved: The United States Supreme Court should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment in at least one of the following areas: the right to privacy, the Equal Protection Clause, the Due Process Clause.

**Resolution 1: Passive Voice**

Resolved: Federal protections should substantially increase for privileges and immunities guaranteed under the 14th Amendment.

**Resolution 1: Passive Voice W/ Floor for Specified Areas**

Resolved: Federal protections should substantially increase for privileges and immunities guaranteed under the 14th Amendment in at least one of the following areas: the right to privacy, the Equal Protection Clause, the Due Process Clause.

### *-Select definitions-*

\*Complete list of definitions later in the file

#### The United States Federal Government is the three branches.

The Free Dictionary ND, accessed 9/12/2021, "Federal government of the United States," <https://www.thefreedictionary.com/Federal+government+of+the+United+States> // wwu ljh

Noun 1. U.S. government - the executive and legislative and judicial branches of the federal government of the United States.

#### The Supreme Court is the highest court in the US.

**White House ND** (The White House, “Our Government: The Judicial Branch,” <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/>) //wwu-kck

The Supreme Court of the United States is the highest court in the land and the only part of the federal judiciary specifically required by the Constitution.

**Federal protections take precedence over the states through the supremacy clause.**

**Book of Jen ‘21**, (Book of Jen is writing in reference to qualified legal scholars, “Here’s why anti-trans laws are not legal,” <https://bookofjen.net/heres-why-anti-trans-laws-are-not-legal/>)

Federal protections override state laws that attempt to take away those protections. This means that the anti-trans laws that some states have passed into law are not legal – and can be overturned by the federal government. The federal government gets its power to overturn state laws from the Supremacy Clause in the United States Constitution. Merriam-Webster describes the [Supremacy Clause](https://www.merriam-webster.com/legal/supremacy%20clause) this way: a clause in Article VI of the U.S. Constitution declares the constitution, laws, and treaties of the federal government to be supreme law of the land to which judges in every state are bound regardless of state law to the contrary. The Supremacy Clause is closely related to the idea of preemption. The Free Legal Dictionary says that [preemption](https://legal-dictionary.thefreedictionary.com/preemption) is a doctrine based on the Supremacy Clause of the U.S. Constitution that holds that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.

#### The privileges and immunities clause protects against state infringement on constitutional rights.

https://www.law.cornell.edu/wex/privileges\_and\_immunities\_clause

The Privileges and Immunities Clause of [Article IV](https://www.law.cornell.edu/constitution/constitution.articleiv.html), Section 2 of the Constitution states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This clause protects fundamental rights of individual citizens and restrains state efforts to discriminate against out-of-state citizens. However, the Privileges and Immunities Clause extends not to all commercial activity, but only to fundamental rights.

#### Guaranteed means to have a specified result.

**Merriam-Webster ND**, (Merriam-Webster, “Guaranteed,” <https://www.merriam-webster.com/dictionary/guaranteed> )

Definition of guaranteed 1 : assured with a guarantee (see [guarantee entry 2 sense 3](https://www.merriam-webster.com/dictionary/guarantee#h2)) : protected or promised by a guarantee a guaranteed annual wage a guaranteed loan In some California locales … public-safety workers can pull down truly swank livings, given their salaries, health benefits and guaranteed pension payouts.— Amanda Ripley 2 : certain to have a specified result or effect … the structural imbalance between rich cities and poor countrysides produces economic relations guaranteed to bring out the worst in people.— Raj Patel She transforms the discussion of ideas into a gratuitous spectacle of anger and aggression guaranteed to elevate the Nielsen ratings …— Daniel Harris

#### Under means subject to the law.

US Legal ND https://definitions.uslegal.com/u/under-the-law/

The term “under the law” means in conformity with law or subject to the law. The following is an example of a case law defining “under the law”: “Under the law” does not mean, "in pursuance of it," or "in conformity with it," but an act assumed to be done under it.

#### The 14th Amendment is the 14th amendment to the US constitution.

Constitution of United States of America 1789 (rev. 1992)

https://www.google.com/search?client=firefox-b-1-d&q=the+14th+amendment+to+the+US+constitution

# Full Cut

#### Below is the full topic paper with evidence, blocks, and completed shells. For readability and to meet the 25-page requirement the above represents a brief explanation of the below.

# Core Affirmative Ground

## Democracy and Citizenship

### Affirmative: Positive Rights

#### State Action doctrine = Positive rights exclusion

**Bernick 21**, Evan Bernick, 10/21, Professor of Law, Northern Illinois University College of Law. THE GEORGETOWN LAW JOURNAL in 2021. “Antisubjugation and the Equal Protection of the Laws”. <https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-110/volume-110-issue-1-october-2021/antisubjugation-and-the-equal-protection-of-the-laws/>

The State Action Doctrine The Supreme Court first declared that “[t]he provisions of the Fourteenth Amendment . . . all have reference to State action exclusively” in the 1880 case of Virginia v. Rives.64 But it was not until the 1883 Civil Rights Cases65 that the Court elaborated the premises and content of the state action doctrine, which holds that the Fourteenth Amendment ordinarily applies only to state action. The Civil Rights Cases arose from a constitutional challenge to provisions of the Civil Rights Act of 1875 that forbade racial discrimination in places of public accommodation.66 Writing for the Court, Justice Joseph Bradley determined that the first three words of the second sentence of Section 1 of the Fourteenth Amendment—“[n]o State shall”67—prohibits “State action of a particular charac- ter.”68 Bradley inferred: [U]ntil some State law has been passed, or some State action through its officers or agents has been taken . . . no legislation of the United States under [the Fourteenth] amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.69 The core constitutional problem with the Act was that “it ma[de] no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States.”70 Instead, it “la[id] down rules for the conduct of individuals in society towards each other.”71 Critics of the state action doctrine’s coherence argue that the state “acts” by supplying “private” contract and property rights and institutions for enforcing the latter. Accordingly, they contend that there is no compelling reason to treat only state action that “interferes” with a state-created status quo as constitutionally salient.72 Critics of the doctrine’s constitutional basis include those who agree with Justice Harlan’s dissent in the Civil Rights Cases, which pointed out that the Citizenship Clause of the Fourteenth Amendment lacks any state action require- ment.73 Other critics deny that the words “[n]o State shall” exclude the possibility of constitutional injuries arising from state omission.74 3. The Positive-Rights Exclusion Related to the state action doctrine is what might be called the “positive-rights exclusion.” The positive-rights exclusion insulates states and municipalities from constitutional liability for failing to supply people with services that would not exist absent government. There are exceptions to the positive-rights exclusion. Most criminal-procedural rights are in some sense “positive,” inasmuch as there are no courts, juries, or attorneys for indigent criminal defendants in the state of nature. But the exclusion has bite nonetheless; most pressingly, the exclusion releases states from any constitutional liability for failing to protect people against violence. The leading modern right-to-protection decision is DeShaney v. Winnebago County Department of Social Services.75 The details are disturbing but worth summarizing in order to appreciate the breadth of the Court’s deference to states and localities concerning protection. The Winnebago County Department of Social Services first learned that Randy DeShaney was physically abusing his son Joshua when Joshua was two years old.76 Welfare staff made monthly visits to the DeShaney home during a six- month period after emergency-room personnel told a caseworker that Joshua had been treated for suspicious injuries.77 The caseworker observed additional injuries and recorded her continuing suspicions that someone in the household was abusing Joshua.78 Still, even after Joshua was again treated for injuries and emergency-room personnel again notified the Department that they believed Randy was abusing Joshua, the Department did not act to remove Joshua from his father’s custody.79 Randy DeShaney beat his son into a life-threatening coma three months later.80 Joshua’s mother Melody sued the Department, alleging that the state deprived Joshua of his liberty by failing to provide him with adequate protection against his father’s abuse.81 The Supreme Court denied the claim, stating that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”82 The Court did acknowledge without endorsing the possibility of two exceptions: (1) affirmative obligations arising out of “‘special relationships’ created or assumed by the State with respect to particular individuals,” such as prisoners; and (2) obligations aris- ing from state-created dangers.83 DeShaney was litigated and decided as a due process case. In a footnote, the Court stated that “[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause” but noted that Melody had not advanced such an argument.84 Lower courts do not apply DeShaney to cases involving deliberate discrimination in the allocation of law-enforcement resources.85 But no court has interpreted DeShaney to permit the recognition of an equal-protection right to state protective resources.86 DeShaney received a torrent of criticism when it was decided, and its reputation has not improved. Criticisms span the normative and methodological spectrums— some scholars condemn it as immoral,87 others for its reliance on the state action doctrine,88 and others for its inattention to historical evidence.89 Some examples of the third originalist criticism do not rest upon any particular constitutional provision. For instance, Stephen Heyman “challenges DeShaney on its own ground—the original understanding of the Fourteenth Amendment” by amassing materials from English and antebellum legal theory and practice, and from congressional debates between the Fourteenth Amendment’s framers.90 At one point, he suggests that the Due Process Clause might prohibit states from “refusing to protect a person in life, liberty, or property, thereby depriving him of security against the invasion of those rights by others.”91 At another, Heyman claims that “the principal source of substantive rights in the [Fourteenth] Amendment was the Privileges or Immunities Clause” and that “[p]rotection was clearly regarded as among the basic privileges of American citizenship.”92 Equal protection of the laws supplements these substantive guarantees by “requir[ing] that the protection given to all citizens be equal.”93 This Article subjects the state action doctrine and positive-rights exclusion to scrutiny under only one clause of the Fourteenth Amendment: The Equal Protection Clause. We will see that, whatever the merits of the Court’s interpreta- tion of the Due Process Clause in DeShaney, these doctrines violate the original meaning and undermine the original function of the Equal Protection Clause.

This reinterpretation can extend the privileges and immunities of the 14th amendment to the protection of positive rights such as voting rights, common schooling, and forms of poverty relief.

**Bernick 21**, Evan Bernick, 10/21, Professor of Law, Northern Illinois University College of Law. THE GEORGETOWN LAW JOURNAL in 2021. “Antisubjugation and the Equal Protection of the Laws”. <https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-110/volume-110-issue-1-october-2021/antisubjugation-and-the-equal-protection-of-the-laws/>

In 1865 Black people in Sacramento claimed that the rights listed in the Declaration of Independence would “become a nullity,[sic] [without] the protection of the laws,”178 and Black people in Norfolk, Virginia affirmed the “necessity of the recognition of the right of suffrage for our own protection.”179 Finally, Black people on numerous occasions argued that the protection of the laws required removing the word “white” from the laws.180 The record is thus not free from contestation over the meaning of equal protection. To confirm that the duty-of-protection tradition informed the public meaning of the Equal Protection Clause, we must canvass the framing and ratification of the Fourteenth Amendment by antislavery Republicans. This will also enable us to identify the precise kinds of protection which the Clause was designed to secure. C. FRAMING EQUAL PROTECTION The words “equal protection” first became a focal point during the Thirty- Ninth Congress on February 26, 1866, when Representative John Bingham intro- duced his second draft of Section 1 of the Fourteenth Amendment.181 That draft provided: The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal pro- tection in the rights of life, liberty, and property.182 It is tempting to leap to the conclusion that this draft language was a precursor of the Equal Protection Clause and thus to read the latter as a guarantee of equal protection *of life, liberty, and property*. But “the laws” is absent from the draft, and the words “life, liberty, and property” appear in the Due Process Clause of the final amendment, not the Equal Protection Clause. Unfortunately, we have no record of any extended discussion of the signifi- cance of the move to “equal protection of the laws,” which took place as the Joint Committee on Reconstruction was deliberating over a plan put forward by Robert Dale Owen. Bingham proposed “equal protection of the laws” twice—first unsuccessfully, then successfully. His initial proposal was a proposed amendment to the Owen Plan, which provided that: “No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.”183 Bingham then moved for the following language to be added: “[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.”184 Bingham’s initial proposal failed. After a series of votes, he proposed the fol- lowing language as a replacement for, rather than an amendment to, the initial anti-racial-discrimination language of the Owen Plan: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.185 This second proposal succeeded. From May 8 to May 10, a third draft of Section 1 was discussed by the House. The equal protection of the laws received comparatively little attention. But Bingham and Thaddeus Stevens did comment on this new language. Bingham’s May 10 comments were brief and focused pri- marily upon the Privileges or Immunities Clause186: The necessity for the first section [is that] . . . . There was a want hitherto . . . . [Of] express authority of the Constitution to do that by congressional enact- ment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immun- ities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. . . . [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immun- ities of any citizen of the Republic . . . .187 Bingham distinguished between the protection of the “privileges and immun- ities of all . . . citizens” and the protection of the “inborn rights of every person”; between “deny[ing] to ... freem[en] the equal protection of the laws” and “abridg[ing]the privileges or immunities of...citizen[s]....”188 All people were entitled to the equal protection of the laws, but only citizens were entitled to the privileges and immunities of citizenship. Bingham did not precisely describe what basic protections all people were entitled to enjoy. He made plain that he considered these protections to be guaranteed by the Constitution as it stood.189 But he also believed that the federal government lacked the power to ensure that all people *actually* enjoyed these protections.190 Importantly, Bingham also went on to assure the House that “[t]he second section [of the proposed Fourteenth Amendment] excludes the conclusion that by the first section suffrage is subjected to congressional law. . . .” 191 On May 8, Representative Thaddeus Stevens spoke at greater length about Section 1.192 He stated that he could “hardly believe that any person can be found who will not admit that every one of these provisions is just.”193 He then claimed that those provisions were “all asserted, in some form or other, in our Declaration [of Independence] or organic law.”194 Stevens said that the proposed amendment would “allow[] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.”195 This appears to be a reference to the Equal Protection Clause, both because Stevens referred to equality and because he referred to “m[en]” rather than to citizens.196 What followed tends to confirm this supposition: Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.197 Finally, there is Senator Jacob Howard’s May 23 introduction of the Fourteenth Amendment to the Senate.200 Howard devoted most of his floor time to the Privileges or Immunities Clause.201 Like Stevens, he did not clearly differentiate between different Clauses: The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hang- ing of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.202 The reference to class legislation seems to be a reference to the “Black Codes.” Following the ratification of the Thirteenth Amendment, the former rebel states compelled Black people into constructive servitude by means of discriminatory laws that restricted travel, forbade marriage across the color line, forfeited wages if Black people broke yearly employment contracts that were forced upon them, and punished failure to show sufficient deference to whites.203 Still, questions abound. *What* abolishes the Black Codes? The Due Process Clause? The Equal Protection Clause? Both together? Does prohibiting states from “subjecting one caste to a code not applicable to another” prevent them only from imposing dis- criminatory punishments, or does it prohibit them also from discriminating in providing access to the courts, as Stevens seemed to say? Because Howard, like Bingham, went on to state that “the first section of the proposed amendment does not give . . . the right of voting,” we cannot attribute to him the view that anything in Section 1 forbade *all* unjustified discrimination.204 Had it even been arguable that either the Due Process Clause or the Equal Protection Clause guaranteed nondiscriminatory ballot access, why would not Howard deny that those Clauses did so? Howard’s May 28 proposal to add what would become the Citizenship Clause to the Fourteenth Amendment touched off a discussion that indirectly sheds light upon equal protection.205 Senator Edward Cowan pressed Howard on the “length and breadth” of Howard’s proposal.206 After questioning what rights the children of Chinese immigrants and Gypsies would have under Howard’s definition of cit- izenship, Cowan stated his understanding that: If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot mur- der him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the laws; but he is not a citizen in the ordinary accep- tation of the word. .... So far as the courts and the administration of the laws are concerned, I have supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection; but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States.207 Cowan drew a distinction between the protection of the laws—enjoyed as of right by “every human being within [the] jurisdiction” of “the courts and the administration of the laws”—and rights that only citizens were entitled to enjoy.208 This is consistent with Bingham’s distinction between the privileges and immunities of citizens and the rights of all people. And Cowan was not contradicted by any of his colleagues concerning this distinction. During the ratification campaign, proponents of the Fourteenth Amendment expounded the Equal Protection Clause. Speaking to a crowd in Martinsville, Ohio, Bingham described “the abuse of powers hitherto exercised by States, in which they denied the equal protection of the laws, or any protection of the laws whatever, to some of the noblest men in the Republic.”209 By this, he meant that the life and liberty and property of supporters of the United States had been attacked for “the crime of fidelity to the flag and fidelity to the Constitution.”210 Bingham then described a July 30, 1866 massacre of mostly Black Republicans by a white mob in New Orleans.211 He emphasized that the massacre was organ- ized by the mayor of New Orleans and carried out in part by Louisiana police.212 He urged his audience “[t]o put a fetter forever on the power of a State to do that thing” by placing the Equal Protection Clause in the Constitution.213 He stressed that every person—“no matter whence he comes, whether citizen or stranger, so long as he abides by the law, and comports himself well towards all other per- sons”—would be entitled under the Clause to the “same protection as the most dis- tinguished member of the Commonwealth.”214 Similarly, Indiana Governor (and eventual Senator) Oliver Morton stated in a July 18, 1866 message that the Equal Protection Clause would secure “every per- son who may be within the jurisdiction of any State, whether citizen or alien, and without regard to condition or residence, not only as to life and liberty, but also as to property.”215 He added that “[i]t has happened in times past that several of the Southern States discriminated against citizens of other States by withholding the protection of the laws for life and liberty, and denying to them the ordinary remedies in the courts for the vindication of their civil rights. . . .”216 Morton ridiculed Democrats’ argument that Section 1 conferred voting rights, describing it as “one of the most flagrant and impudent attempts to practice a fraud on the public mind of which I have any knowledge.”217 Representative Schuyler Colfax spoke of the “equal protection of just laws” and “equal laws [that] could be invoked by the poor as well as the rich.”218 Like Morton, Colfax denied that Section 1 implicated voting rights.219 Among the most detailed accounts of the equal protection of the laws was provided by Representative Mann of Pennsylvania during his state’s ratification debate in 1867: It supplies a deficiency which every man has felt; it makes every person equal before the law; it aims to make every court in the United States what justice is represented to be, blind to the personal standing of those who come before it. Its adoption will prohibit any judge in any State from looking at the wealth or poverty, the intelligence or ignorance, the condition and surroundings, or even the color of the skin, of any person coming before him. It will require the court to look solely at the merits of the claim which he presents, or the details of the crime with which he is charged; and that I submit, is a duty that ought to be required of every judicial tribunal.220 Mann did not say that the Equal Protection Clause guarantees *only* impartial adjudication, but he represented that the Clause would impose a duty of impartial- ity on “every judicial tribunal.”221 This duty of impartiality would extend beyond the context of race and require equal treatment regardless of socioeconomic status or intelligence. To summarize: we have a wealth of evidence that the original meaning of “the equal protection of the laws” encompassed at least (1) impartial executive protection of life, liberty, and property and (2) equal access to the courts. While a general-antidiscrimination principle was in the air, it is unlikely that it was widely shared. Prominent supporters of the Fourteenth Amendment consistently linked equal protection to life, liberty, and property rights, and they denied that Section 1 implicated voting rights. **An understanding of equal protection that forbade all arbitrary classifications would implicate voting rights as well as other positive rights of access to public goods—common schools, poverty relief, access to places of public accommodation—that either were or would in the course of time become associated with citizenship.** But preratification commentary on the Equal Protection Clause does not shed much light upon whether and how the duty of protection bound *legislatures*. Stevens and Howard talked of “codes” and “class legislation” that would be abolished, and Colfax spoke of “equal laws.”222 Other discussions, however, seem con- cerned only with the executive and judicial branches.

### Affirmative: Voting Rights

#### Even if the framers of the Fourteenth Amendment accepted felony disenfranchisement, today our interpretation of the Equal Protection Clause should allow for the concept of equality to have evolved since 1868

CHUNG’2021 (Jean, Communications Manager at The Sentencing Project, “Voting Rights in the Era of Mass Incarceration: A Primer”, July 28, 2021, The Sentencing Project, <https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf>) lj

English colonists brought to North America the common law practice of “civil death,” a set of criminal penalties that included the revocation of voting rights. Early colonial laws limited the penalty of disenfranchisement to certain offenses related to voting or considered “egregious violations of the moral code.”22 After the American Revolution, states began codifying disenfranchisement provisions and expanding the penalty to all felony offenses.23 Many states instituted felony disenfranchisement policies in the wake of the Civil War, and by 1869, 29 states had enacted such laws.24 Political scientist Ward Elliot argues that the elimination of the property test as a voting qualification may help to explain the popularity of felony disenfranchisement policies, as they served as an alternate means for wealthy elites to constrict the political power of the lower classes.25 In the post-Reconstruction period, several Southern states tailored their disenfranchisement laws in order to bar Black male voters; targeting those offenses believed to be committed most frequently by the Black population.26 For example, party leaders in Mississippi called for disenfranchisement for offenses such as burglary, theft, and arson, but not for robbery or murder.27 The author of Alabama’s disenfranchisement provision “estimated the crime of wife-beating alone would disqualify sixty percent of the ~~Negroes,~~ [black population] resulting in a policy that would disenfranchise a man for beating his wife, but not for killing her. Such policies would endure for over a century.28 **Whether or not felony disenfranchisement laws today are intended to reduce the political clout of communities of color, this is their undeniable effect.** Legal status Disenfranchisement policies have met occasional legal challenges in the last century. In Richardson v. Ramirez, 418 U.S. 24 (1974), three men from California who had served time for felony convictions sued for their right to vote, arguing that the state’s felony disenfranchisement policies denied them the right to equal protection of the laws under the U.S. Constitution. Under Section 1 of the Fourteenth Amendment, a state cannot restrict voting rights unless it shows a compelling state interest. Nevertheless, the U.S. Supreme Court upheld California’s felony disenfranchisement policies as constitutional, finding that Section 2 of the Fourteenth Amendment allows the denial of voting rights “for participation in rebellion, or other crime.” In the majority opinion, Justice Rehnquist found that Section 2 – which was arguably intended to protect the voting rights of freed slaves by sanctioning states that disenfranchised them – exempts from sanction disenfranchisement based on a felony conviction. By this logic, the Equal Protection Clause in the previous section could not have been intended to prohibit such disenfranchisement policies. **Critics argue that the language of the Fourteenth Amendment does not indicate that the exemptions established in Section 2 should prohibit the application of the Equal Protection Clause to voting rights cases**.29 Moreover, some contend that the Court’s interpretation of the Equal Protection Clause in Richardson is inconsistent with its previous decisions on citizenship and voting rights, in which the Court has found that the scope of the Equal Protection Clause “is not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality.”30 Therefore, **even if the framers of the Fourteenth Amendment seemingly accepted felony disenfranchisement, our interpretation of the Equal Protection Clause today should allow for the ways in which our concept of equality may have evolved since 1868**

#### 5.2 million adults in 2020 were denied the right to vote as a result of a felony conviction- felony disenfranchisement laws are a serious structural barrier to racial justice in the United States

CHUNG’2021 (Jean, Communications Manager at The Sentencing Project, “Voting Rights in the Era of Mass Incarceration: A Primer”, July 28, 2021, The Sentencing Project, <https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf>) lj

Research suggests that restoring voting rights to people impacted by the criminal legal system could aid their transition back into community life. The revocation of voting rights for people with felony convictions compounds isolation from communities, even though civic participation has been linked with lower recidivism rates. In one study, among individuals who had been arrested previously, 27% of non-voters were rearrested, compared with 12% of voters.38 Although the limitations of the data available preclude proof of direct causation, it is clear that “voting appears to be part of a package of pro-social behavior that is linked to desistance from crime.”39 The dramatic growth of the U.S. prison population and the corresponding reach of the criminal legal system over the last 40 years has led to high levels of disenfranchisement unparalleled among democratic nations. Nationwide, these policies disenfranchised an estimated 5.2 million adults in 2020. Disenfranchisement policies vary widely by state, ranging from no restrictions on voting to a lifetime ban upon conviction. Voting rights restrictions have potentially affected the outcomes of U.S. elections, particularly as disenfranchisement policies disproportionately impact people of color. Nationwide, as of 2020 one in every 16 Black adults could not vote as the result of a felony conviction, and in seven states more than one in seven Black adults was disenfranchised. Felony disenfranchisement laws remain a serious structural barrier to racial justice in this country. Denying the right to vote to an entire class of citizens is deeply problematic, undemocratic, and counterproductive to effective reentry. Fortunately, many states are reconsidering their archaic disenfranchisement policies, with half of states and the District of Columbia enacting reforms since 1997. But there is still much to be done before the United States will resemble comparable nations in allowing, honoring and promoting the full democratic participation of its citizens.

#### Statistical study about the number of people denied voting rights due to felony convictions in 2020

UGGEN ET AL’ (Christopher Uggen, Regents Professor of Sociology at the University of Minnesota, Ryan Larson, Ph.D. Candidate, Sarah Shannon, Ph.D. Associate Professor of Sociology at the University of Georgia, Arleth Pulido-Nava, J.D. Candidate at Mitchell Hamline School of Law , “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction”, October 2020, The Sentencing Project, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>) lj

#### Big ol article about process of disenfranchisement and how legal interpretation changes need to be made to prevent restrictions of voting rights

FINDLAW’21 (Business that provides online legal information and online marketing services for law firms, “How the fourteenth amendment protects voting rights”, August 20 2021, <https://constitution.findlaw.com/amendment14/annotation12.html>) lj

Although, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress,1 the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well.2 Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.3 The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns.4 The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the states for the electors of the most numerous branch of the legislature, and the states are authorized to determine the manner in which presidential electors are selected.5 The second section of the Fourteenth Amendment provides for a proportionate reduction in a state's representation in the House when it denies the franchise to its qualified male citizens6 and specific discriminations on the basis of race, sex, and age are addressed in other Amendments. We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record are obvious examples indicating factors which a state may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot.7 The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized.8 Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. When we are reviewing statutes that deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.9 Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years have led to some relaxation in the application of principles, but even as the Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.10 Voter Qualifications States may require residency as a qualification to vote, but durational residence laws are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.11 The Court applies this exacting test because the right to vote is a fundamental political right, preservative of all rights, and because a durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.12 The Court indicated that the states have a legitimate and compelling interest in preventing fraud by voters, but that it is impossible to view durational residence requirements as necessary to achieve that state interest.13 However, a 50-day durational residence requirement was sustained in the context of the closing of the registration process 50 days prior to elections and of the mechanics of the state's registration process. The period, the Court found, was necessary to achieve the state's legitimate goals.14 A state that exercised general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the state, the Court held, could not treat these persons as nonresidents for voting purposes.15 A statute that provided that anyone who entered military service outside the state could not establish voting residence in the state so long as he remained in the military was held to deny to such a person the opportunity such as all non-military persons enjoyed of showing that he had established residence.16 Restricting the suffrage to those persons who had paid a poll tax was invidious discrimination because it introduced a capricious or irrelevant factor of wealth or ability to pay into an area in which it had no place.17 Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school,18 and denied states the right to restrict the vote to property owners in elections on the issuance of revenue bonds19 or general obligation bonds.20 By contrast, the Court upheld a statute that required voters to present government-issued photo identification in order to vote, as the state had not required voters to pay a tax or a fee to obtain new photo identification. The Court added that, although obtaining a government-issued photo identification is an inconvenience to voters, it surely does not qualify as a substantial burden.21 The Court has also held that, because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed valuation of land, comported with equal protection standards.22 Adverting to the reservation in prior local governmental unit election cases23 that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.24 Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and non-landowning residents of such functions as flood control. The approach taken in this case seems different to a great degree from that in prior cases and could in the future alter the results in other local government cases. These cases were extended somewhat in Ball v. James,25 a 5-to-4 decision that sustained a system in which voting eligibility was limited to landowners, and votes were allocated to these voters on the basis of the number of acres they owned. The entity was a water reclamation district that stores and delivers water to 236,000 acres of land in the state and subsidizes its water operations by selling electricity to hundreds of thousands of consumers in a nearby metropolitan area. The entity's board of directors was elected through a system in which the eligibility to vote was as described above. The Court thought the entity was a specialized and limited form to which its general franchise rulings did not apply.26 Finding that prevention of raiding—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.27 But a law that prohibited a person from voting in the primary election of a political party if he had voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided because it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.28 A less restrictive closed primary system was also invalidated, the Court finding insufficient justification for a state's preventing a political party from allowing independents to vote in its primary.29 It must not be forgotten, however, that it is only when a state extends the franchise to some and denies it to others that a right to vote arises and is protected by the Equal Protection Clause. If a state chooses to fill an office by means other than through an election, neither the Equal Protection Clause nor any other constitutional provision prevents it from doing so. Thus, in Rodriguez v. Popular Democratic Party,30 the Court unanimously sustained a Puerto Rico statute that authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the governor or some other official, raised a constitutional question. The right of unconvicted jail inmates and convicted misdemeanants (who typically are under no disability) to vote by absentee ballot remains unsettled. In an early case applying rational basis scrutiny, the Court held that the failure of a state to provide for absentee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.31 Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not, or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.32 Access to the Ballot The Equal Protection Clause applies to state specification of qualifications for elective and appointive office. Although one may have no right to be elected or appointed to an office, all persons do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.33 In Bullock v. Carter,34 the Court used a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates that imposed the cost of the election wholly on the candidates and that made no alternative provision for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth. The system itself was voided because it was not reasonably connected with the state's interest in regulating the ballot and did not serve that interest and because the cost of the election could be met out of the state treasury, thus avoiding the discrimination.35 Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.36 In the absence of reasonable alternative means of ballot access, the Court held, a state may not disqualify an indigent candidate unable to pay filing fees.37 In Clements v. Fashing,38 the Court sustained two provisions of state law, one that barred certain officeholders from seeking election to the legislature during the term of office for which they had been elected or appointed, but that did not reach other officeholders whose terms of office expired with the legislators' terms and did not bar legislators from seeking other offices during their terms, and the other that automatically terminated the terms of certain officeholders who announced for election to other offices, but that did not apply to other officeholders who could run for another office while continuing to serve. The Court was splintered in such a way, however, that it is not possible to derive a principle from the decision applicable to other fact situations. In Williams v. Rhodes,39 a complex statutory structure that had the effect of keeping off the ballot all but the candidates of the two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the state's 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties.40 But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party's primary election, while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought, is not to discriminate unlawfully, because the state placed no barriers of any sort in the way of obtaining signatures and because write-in votes were also freely permitted.41 Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.42 [T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot.43 Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'44 Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election had to be nominated by primary elections and went on the ballot automatically, because the prior vote adequately demonstrated support. Candidates whose parties polled less than 200,000 but more than 2 percent could be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two categories had to be nominated in conventions and could obtain ballot space only if the notarized list of participants at the conventions totaled at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters signed petitions to bring the total up to one percent of the gubernatorial vote. [W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot, but the Court thought that one percent, or 22,000 signatures in 1972, falls within the outer boundaries of support the State may require.45 Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.46 A state may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates.47 Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination, within one year prior to the primary election at which nominations for the general election are made.48 So too, a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office.49 But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.50 Also invalidated was a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.51

#### The 14th Amendment has never been fully utilized to protect the rights of Black people the way it was intended- the federal government has a duty to enforce Section 2 in order to remedy this

CALDWELL’2022 (Patrick Caldwell is a deputy editor at The New Republic, “A Forgotten Section of the Constitution Could Help Democrats Save Voting Rights”, April 21, 2022, <https://newrepublic.com/article/165919/constitution-14th-amendment-section-2-democrats-voting-rights>) lj

The Republican Party is attacking democracy on many fronts, but none so direct as their assault on voting rights. In 2021 alone, 34 laws to restrict ballot access passed in 19 states. Democrats had hoped to pass national voter protection legislation, but were stymied after they failed to reform the filibuster. That doesn’t mean they’re out of options, though. In fact, they have a potential nuclear weapon sitting right there in the Constitution—if they’re willing to use it. Imagine that Speaker Nancy Pelosi were to declare that several states have violated a clause largely unused and forgotten for 154 years: Section 2 of the Fourteenth Amendment, which mandates that states lose a portion of their congressional delegation if they unduly restrict the right to vote. Sorry, Representative Marjorie Taylor Greene, but Georgia went too far in rolling back voting rights; your state lost a seat in Congress—and it’s yours. It would be a radical decision, one that some could compare to conservative lawyer John Eastman’s “coup memo” urging Vice President Mike Pence to nullify Electoral College votes. But unlike Eastman’s memo, it would have actual grounding in the text of the Constitution. Ratified in 1868, the Fourteenth Amendment is the most consequential tweak to the Constitution since the Bill of Rights. The amendment, passed in the heady Reconstruction era following the Civil War, has had wide-ranging consequences on American life. It’s the basis not just for racial justice case law such as Brown v. Board of Education, but also for Gideon v. Wainwright (guarantees your right to a free attorney), Griswold v. Connecticut (made birth control legal for married couples), and Roe v. Wade. “The Fourteenth Amendment has never really been fully utilized to protect the rights of Black people the way Congress intended,” said Eric Foner, one of the preeminent historians of Reconstruction. “But when you get to other kinds of rights, it’s been used in a very vigorous manner.” Most people know the first clause, the one that guarantees “equal protection of the laws.” But what comes next is often forgotten. It focuses on guaranteeing the right to vote and punishing states that suppress it. The relevant portion states: “[W]hen the right to vote … is denied to any of the male inhabitants of such State … the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” Or in simpler words: States can come up with specious reasons to block people from voting if they wish, but as a consequence, they will lose seats in the House. But the clause has never been successfully used. “One lesson of Section 2,” said Gerard Magliocca, a law professor at Indiana University, “is that even if you craft very specific language and you put it in the Constitution, that doesn’t mean it does anything.” That doesn’t mean it won’t ever be used, however. Democratic Representative Jamie Raskin told me that he and a handful of colleagues discuss how Section 2—along with Section 3, which bars serving in Congress if you’ve “engaged in insurrection or rebellion”—might be implemented to fight back against anti-democracy forces. “We’re in the fight of our lives for democracy, and we need every tool in the constitutional toolbox on the table,” Raskin said. “This is absolutely something we need to consider.” With a conservative Supreme Court eroding long-standing voting protections, an inept Congress unable to act, and state Republicans feeding off Trump’s Big Lie to block Democratic voters, perhaps it’s time to consider finally giving Section 2 some teeth. In the beginning, the Fourteenth Amendment might have just been Section 2. When the House first passed the amendment, it consisted solely of an early version of the section. But it failed to garner the necessary supermajority in the Senate. As a result, the Fourteenth was built out into its final, five-section version. “Originally, [Republicans] envisioned Section 2 as the crown jewel of the Fourteenth Amendment, not Section 1,” said Franita Tolson, a law professor at the University of Southern California. As Foner writes in The Second Founding: How the Civil War and Reconstruction Remade the Constitution, Section 2 shifted the boundaries of federalism, presenting an “unprecedented degree of national authority to intervene in local affairs.” Yet almost no one was happy with how it was worded. It helped splinter abolition from suffrage groups, since the amendment explicitly mentions “male” enfranchisement. And Radical Republicans were disappointed that the voting section wasn’t fully affirmative. “The Radicals couldn’t get Black suffrage into it,” Foner told me, “so they were looking around for ways to at least encourage the Southern states to give the right to vote to Black men.” Congress debated enforcing it in 1872, but it deemed numbers from the 1870 census unreliable, and nothing happened. Two years after the Fourteenth was ratified, the Fifteenth Amendment’s broader right to the vote for Black men came into effect, and Section 2 receded to the background for a time. Republicans—particularly Black politicians—regained interest and brought it up in Congress and their party platform in the 1890s and early 1900s, but it never gained real traction. “Congress never did it by itself,” Foner said, “and the Supreme Court said this is a political issue.” Section 2 has rarely been invoked in constitutional law. But it does allow restrictions based on “participation in rebellion, or other crime,” and courts have cited those last three words to justify felon disenfranchisement. An estimated 5.2 million people lack the right to vote due to that clause, 1.8 million of whom are Black citizens. Nearly a century after its passage, Section 2 appeared poised for a revival. “There was some more talk of doing something with it in the ’60s,” said Magliocca. The fourth of the 10 demands for the 1963 March on Washington for Jobs and Freedom called for “Enforcement of the Fourteenth Amendment—reducing Congressional representation of states where citizens are disfranchised.” The NAACP Legal Defense Fund filed a lawsuit to spur the federal government to enforce Section 2. And the 1964 Civil Rights Act required that the next census include data on voting. It didn’t explicitly name Section 2, but members of Congress pointed to possible enforcement as motivation. “But once the Voting Rights Act passed [in 1965], everybody decided that’s a better way of dealing with the problem,” Magliocca said. For a time, that may have been true. But decades later, after the 2013 Supreme Court decision in Shelby County v. Holder that gutted the central provisions of the Voting Rights Act, it’s hard to make that argument. “Section 2 is a statement that the electorate is supposed to be broader and more inclusive,” Tolson said, “and that Congress is going to take a greater role in protecting that.” “The problem,” Raskin said, “is that the central equal protection clause of the Fourteenth Amendment has been so eviscerated by a right-wing Supreme Court that we need to examine the congressionally activated portions of the Fourteenth Amendment as a counterweight to the disenfranchisement schemes.” Delineating what would or would not constitute a violation raises tricky questions. Is it voter-ID laws? Voter roll purges? “The devil’s in the details,” Raskin said. “It needs to respond to active disenfranchisement efforts. But there are certainly a lot of those going on.” He noted that many of the broader voting restrictions—repeals of weekend or early voting, say—aren’t as clear-cut. It would be up to Congress to sort out. “It’s been dead for so long that it’s hard to imagine it being resurrected,” Foner said. “Much as I think it should be.” But that doesn’t mean it’s not time to raise the possibility. We are living in dangerous times—ones that require a revival of the spirit of Reconstruction if we hope to maintain representative democracy. “Everything is hypothetical until it becomes urgent,” Raskin said. “Both Section 2 and Section 3 could be waking up soon. There’s no such thing as a dead letter in the Constitution.”

### Disenfranchisement Specific

#### Felon disenfranchisement provisions are tools for penalizing criminals and Americans of color

POWELL’2017 (Lauren Latterell, trial attorney at US department of justice, “Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement”, 2017, Michigan Journal of Race and Law, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1075&context=mjrl>) lj

While insights about the negative effects of felon disenfranchisement on democratic elections are relatively recent, the practice is certainly not new to the United States.18 Early Americans endorsed and adopted the European custom of Civil Death, disenfranchising men convicted of specific crimes—typically those believed to be particularly offensive or violent.19 By the Civil War, a majority of states had ratified some form of felon disenfranchisement into their constitutions or state laws.20

When African Americans were recognized as citizens and granted the right to vote, felon disenfranchisement provisions became tools not only for penalizing criminals, but for disenfranchising Americans of color on a massive scale.21 While most voting restrictions enacted for the purpose of disenfranchisement, such as literacy tests or poll taxes, were eliminated with the passage of the Voting Rights Act (“VRA”) and its amendments,22 felon disenfranchisement provisions have been virtually unaffected by the Act. In some cases, in fact, they have expanded since the VRA’s passage.23

#### History of disenfranchisement rooted in racism

POWELL’2017 (Lauren Latterell, trial attorney at US department of justice, “Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement”, 2017, Michigan Journal of Race and Law, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1075&context=mjrl>) lj

Understanding what has led to the disenfranchisement of American citizens on such a massive scale requires understanding the historical context surrounding the disenfranchisement of felons in the United States. This section analyzes the history of felon disenfranchisement laws to show their ties to racist objectives, namely the systemic disenfranchisement of people of color in the United States. While felon disenfranchisement laws were adopted by most states before the Civil War, the earliest forms of felony disenfranchisement laws were typically reserved for the most violent criminals.24 Not until the Civil War and the Reconstruction period did states begin to revise their felon disenfranchisement laws on a substantial scale to make them more restrictive.25 In the decades following the passage of the Fourteenth and Fifteenth Amendments, nearly every Southern state (with the exception of Texas) amended its laws to disenfranchise those convicted of petty larceny and related crimes.26 Therefore, for the first time in many states, those convicted of non-violent crimes (previously labeled as misdemeanors) could be disenfranchised.27 Some states achieved this by elevating the crime of larceny from misdemeanor to felony status, while others expanded the definition of felony larceny to include theft of livestock and items of increasingly low monetary value.28

This wide-scale expansion of disenfranchisement to include those convicted of petty larceny reflects the first major attempt by Whites to disenfranchise Blacks in response to the new social and political power they gained under the Reconstruction Amendments.29 Indeed, many Black citizens and White Republicans of the time acknowledged the movement as such, openly opposing felon disenfranchisement in front of Congress and in the media.30 In 1880, larceny convictions became more frequent in the months leading up to an election.31 And in behavior foretelling the inauguration of the Jim Crow era, some officials and poll workers successfully incited false allegations of larceny or other criminal charges to keep Black men out of the polls.32 The next wave of increasingly restrictive felon disenfranchisement laws arrived during the Jim Crow Era.33 From 1889 through the early 1900s, changes to disenfranchisement provisions were characterized by restrictions placed on those convicted of crimes typically believed to be committed more by Blacks than by Whites.34 These crimes were usually those considered “furtive” offenses, including “thievery, adultery, arson, wife-beating, housebreaking, and attempted rape.”35 Alabama—the only state whose felon disenfranchisement law would later be struck down by the Supreme Court due to Fourteenth Amendment violations36—explicitly acknowledged at its 1901 constitutional convention that the aim of the state’s new disenfranchisement provisions was to perpetuate White supremacy.37 And only a few years after Mississippi’s adoption of new felon disenfranchisement laws, its Supreme Court explicitly recognized that they were enacted with the intent of targeting African Americans: “Restrained by the federal Constitution from discriminating against the negro race, the [Mississippi] convention discriminated against its characteristics and the offenses to which its weaker members were prone.”38 As later sections of this Note will elaborate on,39 while we do not immediately view felon disenfranchisement laws as racially motivated, the felon disenfranchisement provisions of today are not divorced from the racist motivations that gave rise to these laws in the first place. Politicians continue to propagate notions of Black criminality to justify the marginalization of felons and ex-felons from society, through both mass incarceration and disenfranchisement.40 Furthermore, despite the expansion of the right to vote during the mid-to-late twentieth century for African Americans and other groups, the War on Drugs and other “tough on crime” policies implemented over the last 40 years have resulted in a drastic increase in the number of disenfranchised individuals, from 1.17 million in 1976 to 6.1 million in 2016.41

#### Statutory, constitutional, and equal protection challenges to felon disenfranchisement

POWELL’2017 (Lauren Latterell, trial attorney at US department of justice, “Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement”, 2017, Michigan Journal of Race and Law, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1075&context=mjrl>) lj

¶II. CONSTITUTIONAL AND STATUTORY CHALLENGES TO FELON DISENFRANCHISEMENT ¶Since the Jim Crow Era, changes in felon disenfranchisement provisions have been mixed.42 Although skeptics and opponents of felon disenfranchisement have been fighting for change since the late 19th century,43 few of their court battles have been won. This section analyzes the legal defeats and victories in the movement to re-enfranchise felons, which can inform potential strategies moving forward.44 ¶a.Equal Protection Challenges to Felon Disenfranchisement Representatives shall be apportioned among the several states according to their respective numbers . . . But when the right to vote . . . is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced.45 ¶Most claims attacking the constitutionality of felon disenfranchisement provisions have done so on the basis that the provisions violate the Fourteenth Amendment’s Equal Protection Clause. In 1974, the Supreme Court in Richardson v. Ramirez46 first confronted whether felon disenfranchisement laws violate the Equal Protection Clause.47 Although just a decade earlier the Court had established the right to vote as a fundamental right and held that restrictions on the franchise affecting any class of citizens must be subject to strict scrutiny,48 it nevertheless held in Richardson that California’s felon disenfranchisement provision did not violate the Equal Protection Clause.49 ¶The Richardson Court relied heavily on the text of Section 2 of the Fourteenth Amendment, which states, “representatives shall be apportioned among the states in proportion to each state’s population, minus any male who has been disenfranchised, with the exception of those disenfranchised “for participation in rebellion or other crime.”50 According to the Court, this language “distinguish[es] [felon disenfranchisement] laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by the Court.”51 Put more simply, the Court found that Section 2 of the Fourteenth Amendment positively affirms the constitutionality of felon disenfranchisement and therefore felons, as a class, have no constitutionally protected right to vote. ¶Because Richardson precluded any finding that disenfranchising felons as a class violates the Equal Protection Clause, opponents of these laws began to challenge disenfranchisement provisions instead on racial grounds. In Johnson v. Governor of Florida, a group of ex-felons challenged Florida’s constitutional amendment disenfranchising ex-felons under the Equal Protection Clause, arguing that, although the provision was facially neutral, racial animus motivated its passage.52 The 11th Circuit first reiterated the Supreme Court’s finding in Richardson that “a state’s decision to permanently disenfranchise convicted felons does not, in itself, constitute an equal protection violation,”53 because Section 2 of the Fourteenth Amendment explicitly allows for it.54 Regarding the allegations of racial animus and citing Washington v. Davis, 55 the court acknowledged that a facially neutral felon disenfranchisement provision enacted with racially discriminatory intent would violate the Equal Protection Clause.56 Nonetheless, the court ultimately determined that although Florida’s original 1885 constitutional amendment may have been motivated by racial animus, without a showing that the current and amended law was adopted with racially discriminatory intent, there would be no Equal Protection violation.57 Based on a finding that the state’s 1968 amendment to the relevant 1885 provision was enacted without racially discriminatory intent, the court upheld the statute.58 ¶While Johnson does not make clear to what extent, or in what manner, a state must amend its felon disenfranchisement provisions to legally override the racial animus with which it was originally enacted, other precedent is more illuminating. In Cotton v. Fordice, 59 the 5th Circuit applied reasoning similar to that in Johnson to uphold Mississippi’s felon disenfranchisement law; although the court acknowledged that the state’s 1890 provision was enacted for the purpose of disenfranchising Blacks, it held that the 1968 amendment “superseded the previous provision and removed the discriminatory taint associated with the original version.”60 According to the court, this was apparent because, while the original version of the law had excluded murder and rape—which were not considered “Black” crimes—the 1968 law included those crimes and excluded robbery.61 This exemplifies how the courts have looked to relatively minor amendments to state felon disenfranchisement laws as a means of dissociating current laws from the racial motivations of the original laws they are based on. ¶In Hunter v. Underwood, plaintiffs successfully challenged a state’s felon disenfranchisement provision under the Fourteenth Amendment for the first time.62 There, two men argued that Article 8 §182 of the Alabama Constitution was adopted to intentionally disenfranchise Blacks.63 Because the state’s 1901 Constitutional Convention (where the provision was adopted) was widely accepted to be “part of a movement that swept the post-Reconstruction South to disenfranchise Blacks,”64 the state was forced to concede that part of the intent behind the provision was racially discriminatory.65 Applying the test laid out in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 66 the Court asked whether the same provisions would have been adopted without the discriminatory purpose of disenfranchising Blacks.67 The state argued that an additional motivation behind the provision was to disenfranchise poor Whites, and that this alternative purpose provided a permissible basis from which to uphold the law.68 The Court rejected this argument, finding that the law was enacted to discriminate against Blacks on account of race and that it would not have been adopted absent this purpose.69 When considering whether Article 2 of the Fourteenth Amendment nonetheless exempted §182 from the possibility of an Equal Protection violation, the Court remarked, “we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez suggests the contrary.”70 Thus, while reaffirming the protection granted to felon disenfranchisement provisions generally under § 2 of the Fourteenth Amendment, the Hunter Court confirmed that that protection does not shield provisions that violate the Equal Protection Clause on the basis of racially discriminatory intent.71 In effect, this holding means that opponents of the laws can still hang onto the possibility that disenfranchisement provisions enacted with racially discriminatory intent will be deemed unconstitutional under the Equal Protection Clause. ¶ B. Statutory Challenges to Felon Disenfranchisement ¶ With the passage of the Voting Rights Act (VRA) and the Section 2 amendment expanding the Act’s scope to cover voting practices that are discriminatory in effect,72 some re-enfranchisement proponents saw a new and more flexible angle from which to attack felon disenfranchisement laws.73 Given the highly visible disparate impact of these provisions on racial minorities, there was hope that the VRA could finally provide a path to striking facially neutral laws down when discriminatory intent would be difficult to prove.74 ¶ To the chagrin of voting rights activists, however, most VRA claims against felon disenfranchisement laws have been unsuccessful in federal courts.75 A common theme among these holdings is that the Fourteenth Amendment protection of felon disenfranchisement laws described in Richardson precludes them from falling under the authority of § 2 of the VRA.76 The 11th Circuit described one facet of this argument in Johnson. 77 There, the court determined that while § 2 of the VRA typically extends to facially neutrally laws that have a racially disparate impact, because the Fourteenth Amendment explicitly protects a state’s right to disenfranchise felons, applying § 2 of the VRA to felon disenfranchisement laws would “allow a congressional statute to override the text of the Constitution.”78 In order to avoid this constitutional conflict, the Johnson court held that a facially neutral felon disenfranchisement provision cannot be challenged on the basis of racially disparate impact under the VRA, but can be challenged under the Equal Protection Clause on the basis of racially discriminatory intent.79 ¶ A year later, the 2nd Circuit provided additional reasoning as to why the Voting Rights Act’s application to felon disenfranchisement laws presents a constitutional conflict.80 In Hayden v. Pataki, 81 plaintiffs alleged that New York’s law disenfranchising felons had a discriminatory effect on African Americans and Latinos and therefore violated Section 2 of the Voting Rights Act.82 Significantly, the Hayden plaintiffs did not bring an Equal Protection Claim or allege that the law was adopted with discriminatory intent, but instead focused solely on the VRA’s disparate impact provision.83 In a line of reasoning similar to the 11th Circuit’s in Johnson, the Hayden court emphasized, “Section 2 of the Fourteenth Amendment explicitly leaves the federal balance intact with regard to felon disenfranchisement laws specifically.”84 Therefore, the court continued, to apply Section 2 to felon disenfranchisement laws would be to disrupt the states’ constitutionally protected right to adopt them.85 Given the sensitive nature of this conflict, the court determined that the VRA should only be held to apply to felon disenfranchisement provisions if Congress clearly specified that it was intended to do so.86 Citing a lack of such specification, the court declined to extend the statute to felon disenfranchisement provisions.87 ¶ Similarly, in Farrakhan v. Gregoire, the 9th Circuit denied plaintiffs’ claim that Washington’s felon disenfranchisement provision violated Section 2 of the Voting Rights Act because of its racially disparate impact.88 There, plaintiffs argued that the discriminatory effect on voting rights was the result of a racially discriminatory criminal justice system.89 Citing the Fourteenth Amendment’s affirmative sanction of criminal disenfranchisement and a lack of evidence regarding Congress’s intent to extend the application of the VRA felon disenfranchisement provisions, the court declined to extend the VRA to Washington’s law.90 ¶ Unlike the 11th and 2nd Circuits, however, the Farrakhan court emphasized that, for a VRA claim to be successful, “plaintiffs . . . must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”91 This suggests that if plaintiffs had been able to show intentional discrimination within Washington’s criminal justice system, the court may have been more willing to apply the VRA to the state’s felon voting ban. ¶ Collectively, these cases demonstrate that to successfully challenge a felon disenfranchisement provision under either the Fourteenth Amendment or the Voting Rights Act, plaintiffs must go beyond showing discriminatory effect and show that the state acted with discriminatory intent when adopting its current provision or, potentially, show intentional discrimination in the state’s criminal justice system itself.92 Although Supreme Court precedent on felon disenfranchisement provisions is minimal, Hunter shows that despite the apparent protection offered to them under § 2 of the Fourteenth Amendment, the Court is willing to strike down states’ provisions if plaintiffs make a showing of discriminatory intent.93

#### Implicit bias, racial threat, and symbolic racism are among the leading political motivations driving felon disenfranchisement

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¶THE POLITICAL AND RACIAL MOTIVATIONS DRIVING FELON DISENFRANCHISEMENT TODAY ¶Because the main barrier challengers of felon disenfranchisement laws face is proving discriminatory intent, to overcome this barrier, it is necessary to have a thorough understanding of how racism expresses itself through these provisions in a modern context. In this section, I explore various ways racism and racially-charged politics influence and are exacerbated by the felon disenfranchisement laws of today, with the hope of providing knowledge that can be applied to the appropriate constitutional test in the courts.113 ¶A.Implicit Bias ¶While the racism prevalent today tends to be more subtle or implicit than it was before the Civil Rights Movement, it is still possible to recognize. Current psychological research shows that a majority of Americans maintain some degree of implicit racial bias.114 Professor Erik Girvan defines implicit bias as the unconscious inferences people make about others as a result of our stereotypes, beliefs, and attitudes towards various groups.115 Recent implicit bias research suggests that around 68% of American adults implicitly favor Whites over Blacks.116 These inferences, although made unconsciously, can influence behaviors and perceptions in a tangible way.117 Experts on implicit racial bias believe that it results in discrimination against people of color in a variety of contexts.118 Studies have shown that it affects everything from school discipline to employment and police practices.119 ¶ B. Racial Threat Looking beyond how implicit bias affects individuals’ decision-making and behavior, some scholars have examined how racial biases and fear lead to increased support for racialized policies on the community or state level.120 A growing body of research known as racial threat theory shows that Whites respond to growing populations of non-Whites by using their disproportionate power to implement state-sanctioned control mechanisms.121 For example, various studies show that communities tend to spend more funds on their police practices as the percentage of residents who are Black increases.122 The same is true in towns near the U.S.-Mexico border as the percentage of Hispanic residents increases.123 ¶Scholars Behrens, Uggen, and Manza use the concept of racial threat to support the idea that the felon disenfranchisement provisions in place today remain motivated by racist ideals.124 While Whites and Democrats in the post-Civil War era explicitly used the law to keep Blacks away from the polls, and thus from political or economic power, Whites in power today may be influenced by perceived threats from minority groups, and may in turn react by disenfranchising those groups.125 Their 2002 study found that the percentage of non-White prisoners in a region is directly related to restrictive changes in felon disenfranchisement laws.126 Additionally, for each 1% increase in the percentage of non-White prisoners, a state is 10% more likely to pass its first felon disenfranchisement law.127 The study also found that states with proportionally fewer African American prisoners but relatively more African American residents have seen the fastest restoration of voting rights to ex-felons.128 ¶More recent research on racial threat has shown that the association of African Americans with crime directly relates to attitudes about felon disenfranchisement.129 One group of scholars found that the more strongly Whites equate African Americans with crime, the more they oppose reenfranchisement of ex-felons, particularly those convicted of violent crimes, which are most disproportionately associated with Blacks.130 They also found that political conservatives are more likely to oppose re-enfranchisement of ex-felons, except those convicted of illegally trading stocks, a traditionally “White” crime.131 ¶Political Threat and Implications of Expanding the Franchise ¶Pointing out that felon disenfranchisement provisions have always been beneficial to political conservatives, experts have also shown how political motives may continue to incentivize more restrictive disenfranchisement laws.132 In their research, Uggens and Manza show how felon disenfranchisement provisions play a key role in suppressing the votes and political power of marginalized groups.133 Using data on voter turnout and voter intention from 1972-2000, they estimate that felon disenfranchisement has resulted in significant losses for the Democratic party nationwide.134 In some cases, the voting power of felons and ex-felons would have reversed the outcome of major elections.135 For instance, the researchers estimate that during the presidential election of 2000, if felons and ex-felons in Florida had been granted the franchise, Al Gore would have won the state by over 80,000 votes and would have therefore received the number of electoral votes required to win the presidency.136 Moreover, felons and ex-felons are excluded from political participation in ways that extend beyond the voting booths. For instance, those who are disenfranchised may also be less likely to participate in other civic activities due to increasingly negative perceptions about their relationship with the government and political process.137 ¶In light of the political implications of restoring the vote to felons and ex-felons, it is important to consider how the provisions differ depending on the political balance at stake in each state. An overview of felon disenfranchisement provisions nationwide shows that states identified as “swing states” in the 2016 elections were more likely to have a more restrictive disenfranchisement provision when compared to all states.138 27% of swing states have the most restrictive felon disenfranchisement provisions,139 compared to 8% of states overall.140 In those states, the barriers to re-enfranchisement have been strong. For instance, in 2016, the Governor of Virginia signed an executive order restoring voting rights to exfelons, yet the Virginia Supreme Court ruled that his order violated the state constitution.141 ¶This research and the massive number of Americans affected by felon disenfranchisement in 2016 suggest that the effect of these provisions on our most recent presidential election may be have been considerable. And although today’s felon disenfranchisement provisions are facially neutral, these and other studies show how perceived racial threat or threats to the political status quo may play a role in bringing about harsher punishments for convicted felons and opposition to felon re-enfranchisement.142 In this way, these data harken back to the Reconstruction and Jim Crow eras, when “Black” crimes were punished more harshly than “White” crimes and felon disenfranchisement was introduced as a tool to suppress and dilute the votes of African Americans and the poor.143 ¶Symbolic Racism ¶Beliefs about the cultural inferiority of Blacks may also influence efforts to reform institutional racism and the way politicians interact with their constituents.144 While implicit biases and perceived racial or political threat are rampant in the U.S., explicit expressions of racism also continue to influence public policy.145 Some scholars describe explicit modern racism as “symbolic” rather than overt.146 This type of racism is based on notions of cultural inferiority and the belief that some racial groups are more likely to reject what they perceive as traditional American values, such as work ethic and self-reliance.147 As recently as 2008, a representative majority of White Americans surveyed agreed with statements that reflect a symbolically racist ideology, including the idea that “if Blacks would only try harder, they would be as well off as Whites.”148 At the same time, a majority of White Americans stated that they preferred a neighborhood where Whites were the clear majority.149 ¶In her work on politics and racism, Tali Mendelberg shows how many politicians and lawmakers use the racial fears and stereotypes harbored by White voters to their advantage.150 According to Mendelberg, because of social norms of racial equality, politicians are driven to appear racially neutral while at the same time appealing to racially resentful White voters.151 A powerful example of this type of appeal is the image of Willie Horton, an African American man convicted of raping a White woman, used by George Bush in the 1988 presidential campaign.152 On the surface, the ads incorporating Horton’s criminal history seemed to be about being “tough on crime” rather than about race. However, the ads also very clearly appealed to racial stereotypes representing Black men as dangerous criminals.153 ¶The Willie Horton story is part of a political rhetoric focusing on crime and punishment that prevailed in the 1980s and 1990s.154 The “War on Drugs,” which resulted in the almost constant portrayal of Black men as drug dealers and “super-predators” in the media, may characterize that era more than anything else.155 The “tough on crime” movement has led to a 500% increase in incarceration rates in the U.S., with disproportionate rates of arrest, conviction, and strict sentencing for people of color.156 ¶As the elections of 2016 and the first weeks of the Trump presidency demonstrate, this type of rhetoric is far from behind us. Donald Trump’s promises to build a wall to keep out “illegals,” his pledge to patrol Muslim neighborhoods during the election and his subsequent banning of Muslims from entering the country, and his description of Chicago as an “innercity hell,” among many other comments, reek of racist undertones. These messages have appealed to a largely White and working class who many argue feel threatened by the changing demographics of the United States. And while the full impact of the Trump Administration on racialized policies in the U.S. remains to be seen, the political events of 2016 and early 2017 have demonstrated that racial resentment remains strong in America. ¶This type of racialized rhetoric can also be found in politicians’ defenses of felon disenfranchisement laws.157 When asked in 2001 about the disproportionate effect his state’s laws had on African Americans, South Carolina Senator Thad Altman responded, “If it’s Blacks losing the right to vote, then they have to quit committing crimes.”158 And when defending the disenfranchisement of ex-felons, Senator Jeff Sessions argued in part that felon disenfranchisement is a reflection of states’ moral standards and is in the public interest, stating “each State has different standards based on their moral evaluation, their legal evaluation, their public interest.”159 Although some of these statements are race-neutral, they are all reminiscent of an era when White politicians explicitly defended felon disenfranchisement on the basis of the “peculiarities of habit, of temperament, and of character” they believed to be innate in African Americans.1

### Kritical Affirmative: Abolition Democracy

#### The Supreme Court’s white supremacist jurisprudence forwards an anti-black colorblind constitutionalism, the 14th Amendment can become a tool for the anti-racist reconstruction of constitutional law toward Abolition Democracy.

Hasbrouck 22 - Brandon Hasbrouck. 1 Apr 2022. Assistant Professor of law at Washington and Lee University School of Law. J.D., Washington and Lee University School of Law. BOSTON UNIVERSITY LAW REVIEW. “The Antiracist Constitution.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4068747

It is March 6, 1857. Chief Justice Roger Taney rules that Dred Scott can have no recourse to seek his freedom in federal court.120 The ruling turns on the idea that Scott cannot satisfy the diversity of citizenship required to have a state law claim heard in federal court because, as a Black man, he cannot be a citizen of the United States.121 Chief Justice Taney cherry-picks his sources to conclude that state laws at the time the Constitution was adopted did not treat Black people as citizens.122 He carries the argument even further, though, and concludes that the states lack any power to make a Black person a U.S. citizen.123 This line of reasoning will be invalidated by the passage of the Thirteenth124 and Fourteenth Amendments.125 The Supreme Court has in its time produced something of a multidisc boxed set of racist decision hits. Many of them feature in basic constitutional law and criminal procedure casebooks—including, in addition to those I referenced above, the *Civil Rights Cases*,126 *McCleskey v. Kemp*,127 *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,128 *Milliken v. Bradley*,129 *City of Richmond v. J.A. Croson Co.*,130 *Gratz v. Bollinger*,131 *United States v. Armstrong*,132 *Whren v. United States*,133 *California v. Hodari D.*,134 and many more.135 Many of these decisions date to the past century—and the ones featured in casebooks certainly follow this trend, as most students have more of a need to learn what the law *is* than what it once was. In recent years, some of the most egregiously racist cases have involved the Court resting on constitutional colorblindness to establish why it will not attempt to deal in reasoning or remedies focused on race.136 To advocates of this sort of colorblindness, an ideal society would make no distinction whatsoever on the basis of race, and we should endeavor to reach such a state.137 At their most extreme, such advocates seek to eliminate racism in society by eliminating racial distinctions in law immediately and entirely.138 Or perhaps I should say that they claim to seek this—my thesis is less charitable as to their goals. While some form of colorblindness in American discourse predates Reconstruction,139 the rhetorical weaponization of colorblindness against remedial consideration of race arose as a theme in the late twentieth century.140 This modern use of colorblind constitutionalism is not so much a corruption of its legacy in the Supreme Court but a reclamation. As Randall Kennedy observed, Justice Harlan’s initial introduction of the concept to Supreme Court jurisprudence affirms white supremacy and squares with the historical Justice Harlan: “After all, he was a former slave owner, initially opposed the Thirteenth Amendment, and tolerated various forms of segregation, notwithstanding his *Plessy* dissent.”141 Despite colorblindness’s association with antiracist movements,142 its life as a constitutional doctrine is inextricably bound up with its white supremacist introduction to Supreme Court jurisprudence.143 Plenty of attention has been focused on the constitutional failings of jurisprudence in various fields of law. Angela Onwuachi-Willig admirably tackles the gap that *Brown v. Board of Education*144 left by failing to discuss the reasons schools were segregated in the first place, as well as how white supremacist reasoning has charged into that gap to challenge affirmative action in education.145 Devon Carbado delves into how ostensibly neutral criminal procedure decisions allow police violence to escalate unaccountably.146 Henry Chambers examines the history of racial disenfranchisement and the ineffectiveness of current constitutional protections to prevent it.147 Alison Brown and Angus Erskine have laid bare courts’ hesitancy to consider circumstantial evidence of employment discrimination.148 Law reviews around the country are full of such analyses highlighting instances of racism in our courts. And yet, the possibility that these disparate fields of law converge on anti-Black jurisprudence because the Court itself is anti-Black often evades scholarly review. An ancient parable from the Indian subcontinent tells the story of a group of blind men seeking to understand what an elephant is by feeling it.149 Each touches a part of the elephant—its trunk, its ear, its leg—and compares the elephant to some other object.150 The blind men disagree as to the nature of an elephant because all of them lack the context to observe the whole creature.151 The parable is meant to counsel against claiming a monopoly on truth, instead teaching to remain open to other perspectives so as to gain a more complete understanding. In the context of legal academia, we all too often specialize; I have had the pleasure of meeting and learning from experts in a variety of specialties.152 All of them challenge unjust legal institutions and doctrines in their scholarship, and each of these challenges is important and necessary. I do not think for a moment that any of them believes that the law is fundamentally just, with only a handful of problems in need of redress. This Article will take a different approach.153 Rather than focusing on the details of a single issue, I aim to explore their connections through their common patterns. The law once tolerated overt racial discrimination but later rejected the appearances of bigotry.154 In their place, (slightly) subtler systems emerged, relying on facial neutrality and procedural barriers to enforce white supremacy instead.155 As Justice Harlan said, white supremacy need do little more than rely on established constitutional principles to perpetuate itself.156 Justice Harlan’s vision of white supremacy—that white people could retain their position of privilege, wealth, and authority indefinitely without the intervention of law157— is not the white supremacy of the snarling, tiki-torch fascist.158 Instead, it relies on claims of colorblindness and meritocracy, hoping to avoid scrutiny of the question of just who determines what constitutes merit.159 White people’s cultural dominance, established by centuries of physical and economic violence, ensures that they retain the power to define what abilities and traits are considered meritorious.160 So long as that remains true, purportedly neutral, colorblind constitutional principles will ensure white people’s continued success. **Our constitutional history need not be our fate.** While *established* principles sufficiently maintain the status quo, they are not the only principles possible. Many of the drafters of the Reconstruction Amendments believed that the new order they created must necessarily account for race.161 Black public understandings of the new amendments were inclined to see them as an effort to remake the American social order as an antiracist one.162 The only thing stopping the Supreme Court from adopting such an understanding is the Court’s own engrained white supremacy. Our Constitution contains tools sufficient to accomplish a sweeping, antiracist reimagining of the law but requires a Court that believes in that possibility. Part I will address the Court’s history of anti-Black jurisprudence. I will begin with an examination of the Court’s openly anti-Black decisions, with a focus on the nineteenth century. This basal layer of anti-Black decisions can inform our understanding of what follows. Beginning with *Plessy v. Ferguson*,163 I will then explore the Court’s use of constitutional colorblindness, particularly in its modern incarnation, as a bludgeon against remedial measures. In this, at least, the Court’s modern advocates for a colorblind Constitution are fitting inheritors of Justice Harlan’s legacy. In constructing a Constitution that is purportedly colorblind, the Court has essentially rendered the Constitution an anti-Black document. Next, Part II will examine the consequences of an anti-Black interpretation of the Constitution. As Justice Harlan predicted, simply by purporting to remove race as a factor in constitutional decision-making, white supremacy can be perpetuated where it already exists.164 The myriad consequences are often the result of the Court’s fondness for erecting procedural barriers to the success of any challenge to systemic racism.165 Blackness, by essentially colonial mechanisms, is criminalized; police become an occupying force.166 Public discrimination is allowed to persist through the adoption of ostensibly neutral standards that lack regard for the history of oppression that created racial disparities along the lines of those same criteria.167 Private discrimination is tolerated so long as it can be done without outward displays of bigotry.168 Purposefully antiracist legislation is limited in its scope, often through the very constitutional tools meant to authorize it.169 The long years of slavery and Jim Crow laws ensured that—without remedial measures to reshape society—Black people would continue to face an uneven playing field in this country. To achieve any measure of success, we would have to be twice as good as our white counterparts. Constitutional colorblindness ignores this history and modern social realities with catastrophically anti-Black consequences. Finally, Part III will present the alternative: the antiracist potential of a color- conscious Constitution. While the benefits of an antiracist society should be obvious, the Constitution’s potential as a tool for achieving that goal has invited some skepticism.170 To that end, Part III will begin with a Section addressing historical antiracist understandings of the Constitution. I will primarily compare the legislative histories of the Reconstruction Amendments and their radical heritage to contemporaneous Black reactions to the Amendments and early legislation under them. These understandings form a critical—and too often disregarded—component of the Amendments’ original public meaning. The other two Sections of Part III will deal with the potential scope of the Reconstruction Amendments’ application. This Article advances a novel structural understanding of the Reconstruction Amendments, illuminating their abolitionist potential as a system unto themselves.171 First, I will explore the unrealized potential of the Thirteenth Amendment for further liberation from the badges and incidents of slavery. While I have previously explored the Amendment’s potential use as a tool of police abolition,172 the conceivable scope of the Amendment is substantially broader. Our entire carceral system has been bent to replicate many of the abuses of slavery, despite the supposed end of convict leasing during the New Deal era.173 Modern legislation to restrict reproductive choices—which disproportionately impacts Black women174— recalls the use of forced reproduction at the hands of enslavers.175 If we were to finish the work of abolition, we would do well to remember the Thirteenth Amendment’s potential as a foundation for that work. The final Section of Part III will address the various tools of the Fourteenth and Fifteenth Amendments for building an abolition democracy. While most of these tools have seen at least limited use from Congress or the Court to support race-conscious remedies, their potential is much greater. I will explore each of these tools as a possible vehicle for such remedies. **The Constitution, interpreted to truly entitle Black people to the equal protection of the law, due process, the privileges and immunities of citizenship, and equal voting rights, would be radically different than it is today—all without changing a word.** This radical interpretation, though, is wholly consistent with contemporaneous understandings of the Reconstruction Amendments. The Court—its role in systemic racism shielded by its fundamentally antidemocratic nature—has chosen a different interpretation so far. But if we want to live to see the last stains of white supremacy scrubbed from our constitutional system, we must first envision a better framework.

#### Abolition constitutionalism applies the reconstruction amendments to create color conscious remedies and build abolition democracy.

Hasbrouck 22 - Brandon Hasbrouck. 1 Apr 2022. Assistant Professor of law at Washington and Lee University School of Law. J.D., Washington and Lee University School of Law. BOSTON UNIVERSITY LAW REVIEW. “The Antiracist Constitution.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4068747

Our Constitution, as it is and as it has been interpreted by our courts, serves white supremacy. The twin projects of abolition and reconstruction remain incomplete, derailed first by openly hostile institutions, then by the subtler lie that a colorblind Constitution would bring about the end of racism. Yet, in its debut in Supreme Court jurisprudence, colorblind constitutionalism promised that facially discriminatory laws were unnecessary for the perpetuation of white supremacy. That promise has been fulfilled across nearly every field of law as modern white supremacists adopt insidious, facially neutral laws to ensure the oppression of Black people and other vulnerable populations. However, it need not be this way. The Reconstruction Congress gave us the tools in the Thirteenth, Fourteenth, and Fifteenth Amendments to apply color-conscious remedies to **historic inequities and build an abolition democracy.** Previous scholarship has typically focused on the failure to achieve this goal within specific fields of law—criminal justice, education, employment discrimination, and more. Rather than simply analyze the symptoms of racist legal structures, this Article will demonstrate that the patterns across various fields of law reveal the presence of the underlying disease of white supremacy. Even those scholars willing to look to these patterns of oppression have tended to take the pessimistic view that the Constitution is hopelessly infested with white supremacist interpretations. This Article will instead argue that Congress and the courts can, and should, apply the Constitution as it was written and intended—to promote an antiracist vision of America—and will explore what an antiracist Constitution would look like in practice. The resulting framework demonstrates the doctrinal puissance of abolition constitutionalism. Where progressive constitutionalism often struggles to justify the rights-affirming results of the Warren Court and Roe v. Wade while excluding the possibility of a return to the Lochner era, abolition constitutionalism provides a robust basis to support civil rights, including reproductive rights, while rejecting the primacy of freedom of contract. If we want to shape a better America—a country that lives up to its purported ideals, rather than twisting them to cover for white supremacy—we must first understand what America has been. HBO’s Watchmen explored both the horrors that comfortable white Americans would rather believe are confined to the past and what a world where government power served antiracist ends could look like.3 In the show, the most powerful being in the universe, Doctor Manhattan, chooses to experience life without all that power—becoming, in contrast, a Black man in America.4 The character’s own history is explored in the original comics through a series of vignettes, which illustrate his unusual ability to perceive all of time without ordinary human limitations.5 America has a long history of white supremacy: political compromises that sold out Black rights, slavery, white backlash, suppressing advocates for justice by force of law, twisting the interpretation of the Constitution and laws to excuse systemic racism, and allowing the bigotry of years past to continue through ostensibly neutral laws.6 The story is too big to take in all at once. So, let us instead imagine how that history would appear if, like Doctor Manhattan, we might see all of time at once.

### Kritical Affirmative: Reparations

#### REPARATIONS: Potential aff to change interpretation of the Equal Protection Clause from Anticlassification to Antisubordination. Change is necessary for reparations.

Simone 21, Brooke Simone, 11/21, JD candidate at Michigan Law School, "Municipal Reparations: Considerations and Constitutionality," Michigan Law Review 120, no. 2 (November 2021): 345-394 /// wwu ljh

The current equal protection framework does not allow municipalities to adopt effective reparations that can adequately address structural racism. This is because existing doctrine reflects an anticlassification understanding of the Equal Protection Clause.303 Anticlassification theory requires the Court to be skeptical of all racial classifications, including those that provide positive benefits, because "race is [neither] a morally relevant basis for treating people differently" 04 nor a legitimate consideration in crafting public policy.305 This theory follows a conception known as the colorblind Constitution, 306 first articulated in Justice Harlan's dissent in Plessy v. Ferguson3 07 and championed today by Justice Thomas.3 08 On the other hand, antisubordination theory encompasses the idea that the Equal Protection Clause is meant to protect historically subjugated groups who are likely to be victims of oppression.3 09 It also protects groups of discrete and insular minorities who lack political power.31 0 Constitutionality hinges on whether a given policy perpetuates or remediates subordination, not whether it is composed in race-conscious language. 311 This antisubordination understanding is preferable for both its historical foundation and current practical application. Correspondingly, it would allow for governments to remedy past and current discrimination through race-conscious reparations. By examining municipal reparations, including the hypothetical Philadelphia plan, Section III.A reveals serious shortcomings in existing approaches to the Equal Protection Clause that arise from anticlassification theory. Section III.B advocates for an antisubordination understanding of the Equal Protection Clause. A. Problems with Anticlassification Theory The dominant anticlassification doctrine does not allow for effective race conscious reparations. Unfortunately, given recent jurisprudence and the Court's current composition, anticlassification theory has emerged as the Court's primary-if not only-normative understanding of the Equal Protection Clause. 312 At least three tenets of anticlassification theory frustrate reparatory efforts: (1) the prohibition of most benign, race-conscious remedial measures; (2) the doctrine's obsession with individualization; and (3) the belief that all classifications are stigmatic. First, reparations plans like the Philadelphia resolution directly contravene anticlassification theory's bar on benign, race-conscious classifications. Anticlassification theory considers a law's "evil" to be "the differentiation rather than who is acted upon." 313 Under this framework, the Court is concerned with the very existence of a classification that divides on the basis of a forbidden category, like race, 314 rather than the law's purpose and effects. A policy such as the Philadelphia resolution that provides job training only to minorities divides on the basis of race and would therefore be struck down. So too would reparatory housing benefits for Black residents of Evanston. Anticlassification theory thus impedes governments' ability to eradicate hierarchical systems that result from pervasive racism. 315 **Because of this, municipalities like Philadelphia are unable to sufficiently address both obvious and latent discrimination**. Second, the Philadelphia resolution violates the anticlassification approach's "choice to privilege individualism as a core equal protection value." 316 This approach envisions the Fourteenth Amendment as guaranteeing rights to individuals-doing so without attention to individuals' group identities, namely race. 317 Sweeping reparations policies like the Philadelphia resolution clash with this individualization principle because they extend benefits to a group based on race rather than individuals' precise circumstances. 318 But their breadth is necessary to make them effective. Wide-scale reparations confront systemic, not individual, injuries. 319 Third, the anticlassification tenet that race-based policies "carry a danger of stigmatic harm"3 2 0 does not permit effective municipal reparations. The Court has stated that race-conscious programs "reinforce common stereotypes"3 2 1 that "stamp minorities with a badge of inferiority. 3 2 2 In so holding, it has blocked myriad integrationist or remedial measures. These notions are premised on the erroneous idea that all racial classifications are stigmatic. 323 What the Court overlooks is that stigma is a product of cultural context, so assessing the purpose and context of a race-conscious remedy is necessary to determine if it stigmatizes. 324 Here, Philadelphia's establishment of youth educational programs would not stigmatize. The plan invests resources as recompense for racist policing and aims to limit stratifying, stigmatic effects on racial minorities. 325 **This flips anticlassification ideology on its head**: ignoring race is what allows stigma to persist. 326 Considering municipal reparations from an anticlassification perspective demonstrates the theory's flaws. The Court, relying on anticlassification theory, irrationally and increasingly views benign, race-conscious remedial measures designed to promote equality and foster opportunity as purportedly invidious discrimination. 327 Through this lens, broad, race-conscious reparations cannot become reality. B. Antisubordination Theory: A Better Understanding An antisubordination approach would allow legislatures to enact raceconscious reparations that survive strict scrutiny and ameliorate injustices. **For decades, scholars have advocated for an equal protection framework grounded in antisubordination principles rather than anticlassification theory.**328 This Note now joins the chorus. The antisubordination approach is predicated on the accurate understanding that society has entrenched hierarchies that subordinate historically disadvantaged groups.3 29 Under antisubordination theory, inquiry into a law's purpose is essential: Is the law intended to subordinate or to remediate? Inquiry into a law's effects is even more critical: Does the law operate to oppress or to empower?3 0 Antisubordination theory would have courts uphold laws that protect or advance the interests of minorities,331 as these laws have both beneficial purpose and effect. This antisubordination approach would allow for race-conscious remedial schemes such as the Philadelphia resolution because it is more pragmatic and flexible3 3 2 in at least three ways: (1) societal discrimination can be a compelling interest; (2) the government can more easily meet narrow tailoring requirements; and (3) neither alleged stigmatization nor special treatment are disqualifying. First, addressing general discrimination in municipal reparations would likely be a compelling interest under antisubordination theory because of such a plan's intention and effects. 333 Accordingly, the hypothetical resolution's endeavor to correct "a culture of systemic racism and bias"3 3 4 could be upheld. The same is true of plans that redress "historic and continued discrimination," 335 as in Burlington, Vermont, and "bias and racism in our governing systems, policies, and structures," 336 as in Providence, Rhode Island. Second, municipalities would not be as restricted in their efforts to satisfy narrow tailoring under an antisubordination theory. Unlike anticlassification theory-which requires a tie to specific injuries suffered by specific individuals 3 37-an antisubordination approach would permit actions that remedy past disparities or chip away at hierarchical inequities. Antisubordination theory allows efforts to eliminate the power disparities between white people and minorities. 338 Philadelphia could attempt to do so through a college scholarship program for students of color, for example. Also, municipalities would not have to consider race-neutral alternatives because benign classifications are not problematic under antisubordination theory. This provides greater freedom to Philadelphia City Council members, as well as their counterparts elsewhere, in drafting reparations legislation. Third, under an antisubordination theory, municipal reparations would not present concerns of supposed stigma nor special treatment. Regardless of whether reparations provide "psychological counseling to minority residents" 339-as in the Philadelphia City Council resolution-or "economic development programs and opportunities" to Black residents-as in Evanston's plan3 4 0-they would no longer be viewed as stigmatizing and thus not constitutionally disqualified. Antisubordination theory recognizes that racism, not the takes race into account if they hope to eliminate the effects of past and ongoing subordination and instead create equality of opportunity.349 As this Note has argued, broad-based reparations require explicitly considering race, and only if courts adopt an antisubordination approach would the municipal reparations presented here survive strict scrutiny. Antisubordination theory would allow reparations to be extended to "Philadelphians of color"3 50 and other groups that face long-term, structural disadvantages resulting from racial stratification. 351 Certainly, adopting an antisubordination understanding requires greater effort than maintaining an anticlassification approach; individuals and legal doctrine alike would have to acknowledge differences and strive to avoid negative effects. 352 Nevertheless, to fulfill the Equal Protection Clause's purpose, allow race-conscious remediation, and usher in a more perfect union, the Court must undertake the work of antisubordination. CONCLUSION "And so we must imagine a new country," writes Ta-Nehisi Coates in his seminal call to action The Case for Reparations.35 3 This appeal to imagination is not singular, nor is it unique to reparations. Social movements are reimagining the law's possibilities within a broader attempt to reimagine the state and push for radical transformation.3 54 Abolitionists like Mariame Kaba ask that we create a new way: "What can we imagine for ourselves and the world?" 355 As municipalities and other jurisdictions endeavor to meet racial justice demands, they must pass reparations. Beyond the considerations outlined in this Note, municipalities should be imaginative in choosing how to best rectify wrongs and further future equity, while amplifying the voices of those who have been affected by government and societal wrongdoing. 356 Governments that remedial imposition of a racial distinction, is what thwarts equality of opportunity.341 Antisubordination theory also does not consider race-conscious remedies "special treatment." On the contrary, it considers them worthy attempts to provide the full protection of the law where that protection has been shirked.3 42 Beyond these doctrinal differences, antisubordination theory is a preferable standard for two additional reasons: it is more faithful to the history of the Equal Protection Clause, and it is better suited to the current reality. To begin, antisubordination theory is more consistent with the Fourteenth Amendment's history and intent.3 1 4 In drafting the amendment's language, "equal" was of secondary importance to "protection;" its main purpose was to provide the protection of the laws to all people, not to ensure that protection was extended equally. 1" As the doctrine developed, suspect classes emerged "in response to a history of subordination of [B]lacks and women, not from a general hostility to differentiations."345 Antisubordination theory upholds this history and the Fourteenth Amendment's underlying intent by affirming the constitutionality of laws that provide protection from and ameliorate the impact of marginalization. Municipal reparations plans discussed in this Note are prime examples of such race-conscious laws that an antisubordination theory would allow. Antisubordination theory is also more attuned to the needs of the present. America is not a postracial society but a deeply unequal one3 4 6 whose laws operate to maintain that inequality. 3 Because "the lived experience of Black and brown people in this country continues to underscore the need for race-conscious policymaking,"348 governments must be able to enact legislation that perpetrated violent abuses like the Tulsa, Oklahoma massacre 357 should undoubtedly provide reparations. These victim-based, incident-focused plans are likely to pass constitutional muster. But reparations should not be confined by an anticlassification approach that stifles hope of remediating structural racism. Municipalities like Philadelphia must be able to deliver expansive reparations to their minority residents. An alternative understanding of the Equal Protection Clause would allow for broader reparations legislation to invest in communities of color. But this, too, will take imagination and effort. Advocates for race-conscious legislation must speak loudly and persuasively to redirect the constitutional path and restore the true intent of the Fourteenth Amendment. 358 Our nation is facing a reckoning, and reparations offer an opportunity to remake our society.359 It is time for municipalities to become imaginative in constructing reparations. For these municipal visions to become legal reality, the Court, too, must join this effort and reimagine the constitutional doctrine.

### Kritical Affirmative: Critical Feminist and Race Theory

#### FEMINIST AND RACE THEORY: Critical Feminism and Race Theory

Lever 21, Annabelle Lever, 2021, Professor at SciencesPo in Paris and a Permanent Researcher at the Centre de recherches politiques de Sciences Po (CEVIPOF), ‘EQUALITY AND CONSTITUTIONALITY’, Cambridge Handbook of Constitutional Theory, eds. Richard Bellamy and Jeff King, forthcoming (Ch. 4), [https://www.researchgate.net/profile/Annabelle-Lever/publication/354986182\_'EQUALITY\_AND\_CONSTITUTIONALITY'/links/6156cef7a6fae644fbb5cab6/EQUALITY-AND-CONSTITUTIONALITY.pdf //](https://www.researchgate.net/profile/Annabelle-Lever/publication/354986182_'EQUALITY_AND_CONSTITUTIONALITY'/links/6156cef7a6fae644fbb5cab6/EQUALITY-AND-CONSTITUTIONALITY.pdf%20//) wwu ljh

“MacKinnon’s critique of legal theory and practice helps to highlight two distinctive elements in contemporary reflection on equality and law that transcend her understanding of the causes of sexual inequality, or of the best way to remedy them. The first is the insistence that problems of inequality are best understood as problems of subordination or unequal power, rather than of arbitrary differences between people who should really be treated the same. As feminists have insisted, ‘an equal opportunity harasser’ – or a boss who sexually harasses male as well as female employees – does not make sexual harassment ok. Nor, importantly, does it alter the reasons to consider sexual harassment by bosses or fellow employees a threat to equality of opportunity, because of its consequences for the stability of women’s employment, their prospects of promotion, and their willingness and ability to compete for otherwise desirable forms of work. (Halley, Janet 2000) (MacKinnon, Catherine A 1979). The second element highlighted by MacKinnon’s ‘subordination’ approach to equality, is that unless one adopts an explicitly political and critical perspective on the social world, one will consistently fail to recognise inequality for what it is, and will therefore be blind to, or actively support, laws that permit coercion, exploitation, marginalisation and impoverishment because one sees them as the legally permitted consequences of morally permissible choices, or as the unchangeable expression of ‘natural’ differences. (Haslanger, Sally 2012) For example, the staggering differences in wealth between white and black people in the contemporary US are often seen and justified as the outcomes of individual choice, luck and/or differences of character and talent, rather than the result of slavery, segregation and of post-war government subsidies for home ownership, from which black people were deliberately excluded. (Hamilton and Darity Jr. 2010) (King 1997) (Rothstein 2017) Likewise, the ‘feminisation of poverty’, remarked in many countries since the 1980s, is treated as the natural consequence of more liberal conditions of divorce, and not of the way that legislatures, employers and courts value women’s time, activities, opportunities and security, including their access to adequate pensions in old age. (Glendon, Mary Ann 1991), (Okin 1989) (Pateman 1988) Taken together, these two elements in contemporary reflections on equality and law draw our attention to the epistemology of injustice. Specifically, they force us to reflect on the way that apparently rational, empirically well-supported and impartial claims about people’s natures, circumstances and actions require careful scrutiny, given our habituation to injustice and difficulty in recognising it for what it is. The literature, in this respect, is now enormous, but it can be helpful to look at Kimberlé Crenshaw’s important critique of American discrimination law, and its failure to recognise the way that racial and sexual injustice intersect, in order to grasp the epistemic problem and its relationship to legal practice, and our conceptions of constitutional government. (Crenshaw 1994 or in Kairys, 1990) (Collins 2008) (Perreau 2021) (Mercat-Bruns 2015; 2018; 2021; 2016)”

### Affirmative: Extraterritorial Protections

#### The Due Process Clause Should extend to foreign nations, creating novel protections for their autonomy as sovereign actors.

Ingrid 19 Ingrid Wuerth. “The Due Process and Other Constitutional Rights of Foreign Nations” Vanderbilt Law School https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwie0eaN8rr3AhUbXM0KHdyTCV0QFnoECAoQAQ&url=https%3A%2F%2Fir.lawnet.fordham.edu%2Fflr%2Fvol88%2Fiss2%2F10%2F&usg=AOvVaw13Oydz1hmVnszuu48GafZs

Foreign States as “Persons” Having made the connection between the word “process” in the Due Process Clause of the Fifth Amendment and jurisdiction over the defendant, the next steps are to show that those “process” protections extended to foreign states and that foreign states would have been understood as “persons.” The language from the 1799 opinion of the attorney general quoted above asks whether “process” reached foreign states or their property. Other sources used similar language.280 These sources also reaffirm that process only reached those defendants over whom the court had power or, in other words, jurisdiction. That connection is especially clear in cases involving foreign sovereigns because they or their property might be located in the United States, but nevertheless “process” could not reach them because the sovereign (the United States) lacked power or jurisdiction over them. “Process” was not just about physically finding or reaching the defendant, it also depended upon sovereign power—personal jurisdiction—over the defendant.

In a case involving the Cassius, a vessel owned by the French government, the district attorney in Philadelphia reasoned that “process of information and seizure” against the vessel “brings the sovereign to submit to the tribunal”281 and thus there was no jurisdiction over the vessel.282 Similarly, the term “process” was used in a 1781 case against the state of Virginia (discussed above) to describe Pennsylvania’s lack of personal jurisdiction over

Virginia.283 With a citation to international law treatises on sovereignty and jurisdiction, Pennsylvania’s lack of jurisdiction over Virginia was described in terms of process: “all its process against that state, must be coram non judice, and consequently void.”284 Process applied to foreign states just as it did to other states. These sources show that Fifth Amendment “due process” would have been understood as applying to foreign states.

Recent cases have reasoned that foreign sovereigns are not “persons” and for that reason are not protected by Fifth Amendment due process. That conclusion is not based on any historical analysis. In fact, foreign nations were often described as “persons.” Consider the argument of counsel in The Santissima Trinidad:

[A] foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.285

Here, “process” is used in part to refer to personal jurisdiction over a foreign sovereign if he comes personally into our territory. Although this quotation refers to an individual who embodies the state (e.g., the king) as enjoying “a personal immunity,” it also makes clear that judicial “process” might extend to public vessels.286 Process against the property of a foreign sovereign was often considered equivalent to process against the sovereign itself, although the property itself was not a person.287

One might argue that due process protects foreign sovereigns but only those that are monarchies or dictatorships, so that the sovereign is actually a person. That would lead to anomalous modern results, with hostile dictatorships entitled to constitutional protections. The distinction is also unwarranted as a historical matter. Personal jurisdiction over both U.S. and foreign states was discussed in terms of sovereignty, with citations to international law scholars such as Vattel, whose work was extremely well

known during the founding era.288 Vattel describes nations as persons, without regard to their form of government. He notes that “the body of the nation, the State, remains absolutely free” and refers to nation states as “moral persons” and as “free persons.”289 Vattel therefore reasons that a nation is “considered by foreign nations as constituting only one whole, one single person.”290 The law of nations itself was based in part on ideas drawn from, and analogies made to, the philosophical understanding of individuals.291

States as collective entities were even equated with persons in a variety of ways specifically related to whether they could be reached by process.292 Justice Wilson wrote in Chisholm v. Georgia that “[b]y a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person.”293 Chief Justice John Jay in the same case reasoned that “[s]overeignty is the right to govern; a nation or State-sovereign is the person orpersonsinwhomthatresides.”294 Bothjusticesconcludedthatstatescould be reached through the process of the U.S. courts.295

Article III to those in the Due Process Clause of the Fifth Amendment. Personal jurisdiction and notice were required by the vesting of “judicial” and only “judicial power” with the federal courts. That relationship between Article III and due process supports the argument that due process also prevented actors other than courts (i.e., the legislature) from exercising judicial power. Due process was very much about limiting judicial power, including both the scope of that power (as argued here) and who can exercise it (as Chapman and McConnell have argued). Second, one criticism of their position is the redundancy it tolerates between due process and specific prohibitions on legislative action, such as the Bill of Attainder Clause.301 The foreign-state analysis in this Article shows that due process was redundant of the procedural protections baked into Article III as well. Overlap and duplication between due process and separation of powers is everywhere.

The redundancy between separation of powers and due process also means that just as due process protects foreign states, so too, does separation of powers. There is no textual basis for concluding that foreign states are protected by the separation of powers limitations in the Fifth Amendment and by the Article III vesting of “judicial power” in the federal courts but not by other separation of powers protections. Indeed, courts have often assumed that foreign states may raise separation of powers arguments.302 Additional evidence supports this argument. Separation of powers principles were understood to protect entities other than individual “persons.” For example, in 1772 the East India Company argued that Parliament could not restrict its charter rights through laws that were “arbitrary” or “partial” and that the proper remedy for the corporate malfeasance in question was a “common law action.”303 Colonists raised similar separation of powers arguments against the Massachusetts Acts, which changed the terms of the Massachusetts Charter as punishment for the Boston Tea Party.304 The First Continental Congress charged that the Acts violated the “law of the land” (a phrase sometimes used interchangeably with due process) because they changed the “form of government” without “being heard, without being tried, without law, and without justice.”305 Although neither example extended separation of powers protections to foreign states, both illustrate that the separation of powers protections were not limited to individual “persons.”

III. CONTEMPORARY ISSUES REVISITED

This Article has examined Article III and due process from the perspective of the protections they afford to foreign states. Doing so brings together

Article III to those in the Due Process Clause of the Fifth Amendment. Personal jurisdiction and notice were required by the vesting of “judicial” and only “judicial power” with the federal courts. That relationship between Article III and due process supports the argument that due process also prevented actors other than courts (i.e., the legislature) from exercising judicial power. Due process was very much about limiting judicial power, including both the scope of that power (as argued here) and who can exercise it (as Chapman and McConnell have argued). Second, one criticism of their position is the redundancy it tolerates between due process and specific prohibitions on legislative action, such as the Bill of Attainder Clause.301 The foreign-state analysis in this Article shows that due process was redundant of the procedural protections baked into Article III as well. Overlap and duplication between due process and separation of powers is everywhere.

The redundancy between separation of powers and due process also means that just as due process protects foreign states, so too, does separation of powers. There is no textual basis for concluding that foreign states are protected by the separation of powers limitations in the Fifth Amendment and by the Article III vesting of “judicial power” in the federal courts but not by other separation of powers protections. Indeed, courts have often assumed that foreign states may raise separation of powers arguments.302 Additional evidence supports this argument. Separation of powers principles were understood to protect entities other than individual “persons.” For example, in 1772 the East India Company argued that Parliament could not restrict its charter rights through laws that were “arbitrary” or “partial” and that the proper remedy for the corporate malfeasance in question was a “common law action.”303 Colonists raised similar separation of powers arguments against the Massachusetts Acts, which changed the terms of the Massachusetts Charter as punishment for the Boston Tea Party.304 The First Continental Congress charged that the Acts violated the “law of the land” (a phrase sometimes used interchangeably with due process) because they changed the “form of government” without “being heard, without being tried, without law, and without justice.”305 Although neither example extended separation of powers protections to foreign states, both illustrate that the separation of powers protections were not limited to individual “persons.”

III. CONTEMPORARY ISSUES REVISITED

This Article has examined Article III and due process from the perspective of the protections they afford to foreign states. Doing so brings together

strands of doctrine and scholarship that seem almost entirely unconnected today. If foreign states are not protected by the Fifth Amendment, as lower courts have held, it becomes important to determine the full extent of their protections under Article III, which mentions them specifically. Viewing Article III in this way blurs doctrinal distinctions between subject matter jurisdiction and personal jurisdiction and pulls together historical scholarship on the immunity of U.S. states and the procedural protections due to foreign states. Procedural protections that are today associated with due process were protected by Article III and separation of powers.

Turning to the Fifth Amendment, contemporary historical work on personal jurisdiction generally bears little connection to the historical work on “due process.”306 That disconnect arises in part because modern personal jurisdiction (even in federal court) is mostly a function of the limitations imposed by the Fourteenth Amendment on state court jurisdiction and not those imposed by the Fifth Amendment on federal court jurisdiction.307 Scholars today struggle to see the relationship between due process and personal jurisdiction at all, an effort that has focused on the meaning of Pennoyer.308 Butaswehaveseen,earlycasesagainstforeignstateshighlight the connection, one that is based on the text of the Fifth Amendment itself: courts asked whether “process” could reach a foreign state as a way of asking whether the foreign state was outside the jurisdiction of the sovereign. Deprivations of property required “process” to be valid, and process reached only as far as jurisdiction.309 That relationship does not emerge clearly in early case law because the jurisdiction of federal courts was limited,310 because Article III also required personal jurisdiction, and because the content of the personal jurisdiction rules came from general law, not from the Constitution, as the next section describes.

A. Personal Jurisdiction and Other Due Process Protections

An important question remains: the content of the due process and Article III protections to which states and other defendants are entitled. The extent to which the outcomes of contemporary cases will change under the analysis developed here depends upon how one answers this question. If due process means that “minimum contacts” analysis applies to cases against foreign states, then those cases will come out differently than under the current approach in which they are not entitled to minimum contacts protections. But

if due process does not entitle defendants to “minimum contacts,” then the outcomes for foreign states may not change much and the outcomes for other defendants, including SOEs and private corporations, would change very significantly. The discussion here focuses on personal jurisdiction (as a function of both Article III and Fifth Amendment due process) but turns at the end to other due process limitations.

The Supreme Court has held that the Fourteenth Amendment’s Due Process Clause limits state court assertions of personal jurisdiction based on minimum contacts and reasonableness.311 The Court has not, however, held that the Due Process Clause of the Fifth Amendment includes comparable limitations. Lower courts and some commentators have generally concluded that the Fifth Amendment limitations are comparable, except that the relevant sovereign and territory is the United States as a whole, instead of the forum state.312 There is, however, widespread agreement that the Court’s Fourteenth Amendment personal jurisdiction analysis is an incoherent mess.313 The Court should pause before importing that mess into the Fifth Amendment.

The Fifth and Fourteenth Amendments arguably impose comparable limitations on personal jurisdiction because they use the same language, except for the relevant sovereign.314 It is possible, however, that the Fifth and the Fourteenth Amendments should be interpreted in different ways because the term “due process” was understood differently in 1868 than it was in 1791.315 It is also possible that “minimum contacts” is not a convincing interpretation of the original meaning of the Fourteenth Amendment, and for that reason it should not dictate the interpretation of the

Fifth Amendment.316 For those who eschew originalism, it bears repeating that “minimum contacts” is extremely widely criticized on policy grounds.

Cases involving foreign states provide no support for extending the Fourteenth Amendment’s “minimum contacts” analysis to the Fifth Amendment. Instead, they support the claim made by others that historical due process limitations bear little resemblance to modern personal jurisdictiondoctrine.317 Jurisdictionalrulestraditionallycamefrom“general law” which included customary international law—not from the Constitution.318 The general law could be changed through a treaty or a statute. The Supreme Court reasoned during the early nineteenth century that although federal courts lacked personal jurisdiction over foreign states (because they were immune from suit under existing law), Congress could extend personal jurisdiction and abrogate the immunity of foreign states if it wanted to do so.319

The cases involving foreign states suggest that the Constitution itself does not dictate the rules governing personal jurisdiction, whether as a function of Article III or of the Fifth Amendment. Other authors, including Wendy Perdue and Stephen Sachs have argued that Pennoyer v. Neff is best understood as requiring personal jurisdiction without setting the rules for howfarsuchjurisdictionextends.320 Asananalogy,theFullFaithandCredit Clause requires recognition of a judgment only if the rendering court had subject matter jurisdiction under the rules of the rendering court, and the Due Process Clauses are sometimes interpreted as requiring only that judges follow duly enacted law.321 Even if Article III and the Fifth Amendment do not set out any rules of (or limits on) personal jurisdiction, they do require that whatever those rules are, they must be satisfied. These could be termed “positivist”322 limitations on judicial power.

By modern ears, such protections are minimal, but they are also not nothing. They prevented arbitrary actions of federal courts, and they comported with the general eighteenth-century views of parliamentary supremacy.323 Congress may, of course, afford foreign states greater

jurisdictional protections than the Constitution requires. That decision lies with Congress, not the courts, so that international friction results not from shaky constitutional lines drawn by the courts but instead from the actions of Congress. Reading the Article III and Fifth Amendment requirements for personal jurisdiction as “merely” positivist also leaves open the question of how statutory limitations should be interpreted. International law may inform statutory interpretation in many ways. At a minimum, under the Murray v. Schooner Charming Betsy324 canon of interpretation, statutes should be interpreted when possible to avoid conflicts with international law.325

One might argue in favor of robust constitutional limits on personal jurisdiction, especially as a function of Article III, based on the statements of John Marshall and James Madison that suits against U.S. states or foreign states could only go forward with the “consent” of the sovereign, which might suggest that their personal jurisdiction defenses were constitutionally entrenched.326 Inotherwords,onthereadingofferedhere,statesandforeign sovereigns do not have to “consent” to suit if Congress chooses to subject them to jurisdiction, arguably in tension with the statements by Madison and Marshall when discussing Article III. But at the time Madison and Marshall wrote, Congress was extremely unlikely to subject foreign states to broad personal jurisdiction. As well, the term “consent” was used even when the defendant was unwillingly subjected to the jurisdiction of a court. To “consent” meant to come within the court’s jurisdiction—whether or not one formally agreed to, or otherwise welcomed, the suit itself.327

Finally, it is possible that by requiring due process of law, the Fifth Amendment meant that the process issued to compel defendants to appear must conform to (or provide comparable protections to) traditional forms of process.328 Abolishing any and all personal jurisdiction (or notice) limitations in federal courts might violate “due process” by eliminating “process” altogether and it might also violate Article III by authorizing a power not linked to sovereignty or territory at all, and therefore one that is not “judicial.”329 These limitations would not, however, support personal jurisdiction doctrine based upon minimum contacts and reasonableness. It is

also possible that the Fifth Amendment and Article III provide different levels or kinds of personal jurisdiction protections. As already noted, courts had little opportunity for direct consideration of constitutional limitations on personal jurisdiction because of other limitations on jurisdiction. Whether or not the two differ in their personal jurisdiction protections, foreign states are protected by both Article III and the Fifth Amendment, both of which required (at a minimum) the satisfaction of the applicable nonconstitutional rules governing personal jurisdiction.

If the Fifth Amendment and Article III afford only “positivist” personal jurisdiction protections, the outcomes of lower court cases holding that due process does not protect foreign states need not be reversed, although they were incorrectly reasoned. That is, if due process protects foreign states but due process only entitles them to what Congress gives them, then cases extending broad personal jurisdiction under the FSIA reach the correct outcome, even if they incorrectly reason that foreign states are not persons andhavenodueprocessrights.330 Thecasesthatwouldcomeoutdifferently going forward under a positivist approach to personal jurisdiction are those that were dismissed based upon a Fifth Amendment minimum contacts analysis—in other words, cases against SOEs not classified as foreign states andthoseagainstprivatedefendants.331 Onemightpreservetheoutcomesof these cases by reasoning that Congress has acted or failed to act under the assumption that private entities and SOEs are protected by minimum contacts.332 Doingsowouldpreventanabruptchangeofdoctrineandwould allow Congress to set future rules for the exercise of jurisdiction by the federal courts over all defendants. In any event, whatever personal jurisdiction protections are provided by due process and Article III, they apply to foreign states just as they do to private defendants. The Bancec test is accordingly irrelevant for due process purposes, contrary to the many lower court cases holding otherwise.

Finally, due process provides protections beyond personal jurisdiction. Article III requires notice as an aspect of judicial power, as discussed in Part II.A.3, and the Fifth Amendment also requires notice. The Article III and the Fifth Amendment notice requirements may differ, but whatever those

requirements are, foreign states are entitled to them. Courts and scholars have worried that affording due process rights to foreign states could hamstring U.S. responses to foreign policy crises because “the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law.”333 Fifth Amendment due process rights are limited and flexible, however. Some rights protect “natural, not artificial persons,” and they are likely inapplicable to foreign states just as they are to corporations.334 Due process rights often do not apply extraterritorially, a limitation with obvious importance for the rights of foreign states.335 Due process is also flexible. In the context of notice, for example, it requires what is “reasonable” “under all the circumstances.”336 Beyond notice, due process generally gives courts adequate room to calibrate the protections to which foreign states might be entitled in particular cases.337 After all, the leading formulation of procedural due process protections explicitly requires courts to consider the U.S. government’s interests in the challenged policy338—interests with great weight if, for example, the nation were facing a foreign policy or national security crisis.

B. Other Constitutional Rights

Viewing the Constitution from the perspective of foreign states shows that that they have due process rights and that they are protected by separation of powers. It also provides the groundwork for analyzing whether foreign states have additional constitutional rights. That analysis should reject general theories of constitutional exclusion and inclusion, should take a right-by- right approach, and should generally provide to foreign states the same litigation-related rights that other defendants enjoy.

Scholars writing on the rights of aliens and the extraterritorial application of the Constitution ask questions with titles such as “Whose Constitution?”339andDoestheConstitutionFollowtheFlag?340 Ifthoseare the questions, it is easy to see why courts and commentators have been quick to exclude foreign states. No entity is less like a “citizen”—even an alien can

give temporary fealty to the United States in a way that a foreign state cannot.341 No entity is so thoroughly “outside” the territory of the United States and outside “we the people” than a foreign sovereign state itself, which is defined in terms of its own territory and its own people. But the Constitution was not drafted as an answer to these abstract questions. It was drafted instead to address particular problems. Article III, for example, was written in part to address problems of state court bias that generated conflict with other countries. Yet by focusing narrowly on the word “person” in the Fifth Amendment and building a theory of exclusion around it, courts have turned federal judicial power (to which the Fifth Amendment applies) entirely on its head. When it comes to issues of inclusion and exclusion, the Constitution did not demarcate—or even assume as fixed background principles—sharp categories of general applicability.342

Consider another constitutional category: corporations. As described above, current doctrine draws a constitutional distinction between foreign corporations and foreign governments. Yet foreign corporations were difficult to separate from foreign nations themselves even in the late eighteenth century, as the East India Company example illustrates. Most corporations at the time were created to serve public purposes such as building infrastructure.343 Even with respect to purely domestic corporations, efforts to draw sharp constitutional lines broke down quickly.344 Today,theCourt’sapproachtotheconstitutionalrightsofprivate corporations starts not with a theory of business entities or of the nature of corporations but instead with a right-by-right analysis, focusing upon the significance and nature of the injury to the corporation.345 A right-by-right approach makes sense for foreign states as well. Without overstating the comparison, some of the Court’s reasoning with respect to corporations—for example, that they lack certain rights deemed “personal”—provides strong reasons to deny those same rights to foreign states.346

Foreign states share constitutionally significant attributes not just with corporations but also with U.S. states. As originally understood, “process” protected foreign and U.S. states.347 Both were also afforded special status in Article III. There are, however, important constitutional distinctions. U.S.

states ceded authority to the federal government by ratifying the Constitution, and they are also explicitly protected by it in ways that foreign states are not.348 Although that reasoning does not support the broad conclusion that foreign states are entitled to no constitutional rights, it may support other distinctions. For example, lower courts have held that U.S. states, but not foreign states, are entitled to sue parens patriae on behalf of their residents. Those cases are correct in reasoning that U.S. states are limited in their ability to engage in diplomatic negotiations with other U.S. states in order to protect their citizens, reasoning that does not fully apply to foreign states.349

The constitutional rights of foreign nations are also limited by the constitutional powers of other actors. Consider the right of access to court, a constitutional right with an “unsettled” basis that appears to include the First and Fifth Amendments.350 Foreign states are entitled to bring suit in state and federal courts, an entitlement usually described as an aspect of international comity rather than a constitutional right,351 and one that is limited to recognized foreign governments.352 In practice, the exception for “unrecognized” governments is a narrow one somewhat at odds with the comity rationale, because “recognized” governments with whom the United States has no diplomatic relations are entitled to access courts as plaintiffs.353 Assuming that access to court is a constitutional right enjoyed by foreign nations, the distinction between recognized and unrecognized states might be preserved as an aspect of the president’s exclusive power to recognize foreign governments. That power, recently underscored by the Supreme Court,354 could at least arguably include the right to decide which state-like entities are entitled to access the courts in the United States and which are not.355

Generally applicable limitations on constitutional rights and constitutional redress also curtail the protections to which foreign states are entitled. Territorial limits are an important example, as mentioned above.356 Relatedly, the First, Second, and Fourth Amendments extend certain protections to “the people.” That phrase, the Court has reasoned, “refers to a class of persons who are part of a national community,” a classification

which may exclude foreign states as it does some aliens.357 The government may limit First Amendment and other constitutional rights when it has a compelling reason to do so,358 a standard that may be relatively easy to meet when the government regulates foreign nations to protect national security.359 For example, the Takings Clause was drafted in part to protect those who are vulnerable because they are geographically and, thus politically, excluded from normal legislative decision-making,360 suggesting that foreign states ought to be presumptively included in, not excluded from, protection.361 Nevertheless, claims seeking compensation for war or national-security related takings by the government face significant hurdles when brought by any kind of entity.362 Justiciability doctrines such as standing and the political question doctrine also limit litigation brought by foreign states.363

But when foreign states and related entities face suit in the United States (whether a criminal action brought by federal prosecutors or a civil case based on an exception to the FSIA) basic litigation-related constitutional protections should generally apply.364 That conclusion is supported by the words “person” and “accused” in the Fifth and Sixth Amendments regulating procedure in civil and criminal cases.365 The term “person” has straightforward application to foreign states, as we have seen, and the word “accused” appears to refer to a person against whom the government brings a criminal action. Foreign states should thus be constitutionally entitled not only to due process protections but also to assistance of counsel, the right to a jury trial, and protection against double jeopardy.366 The wholesale

exclusion of foreign states from constitutional protections when they face suit in the United States cuts against the grain of Article III, which explicitly brought foreign entities into the federal judicial system with the intention of protecting them. Of more immediate practical significance, those protections apply to state-owned enterprises as they do to private corporations without the need to distinguish SOEs from foreign states.

CONCLUSION

Foreign states were an important audience for the Constitution. The framers sought to minimize conflict with other nations so as to ensure peace, to promote commerce, and to allow the United States to fully join the international community. Certain forms of constitutional inclusion, not categorical exclusion, were ultimately selected as the best way to achieve these aims. Foreign states accordingly benefitted from the extension of federal judicial power to include foreign-state diversity jurisdiction. The vesting of “judicial power” over “cases” also limited what federal courts could do as a matter of process and procedure. Federal courts only have power over defendants to whom notice is provided and over whom the court has jurisdiction, and these limitations apply to all defendants. Foreign states are also entitled to due process under the Fifth Amendment. Contemporary doctrine has lost sight of these basic principles and drawn false constitutional distinctions between foreign states, foreign corporations, and foreign state- owned corporations, putting foreign states at a constitutional disadvantage as compared to private actors, an outcome at odds with the purposes that animated Article III.

Viewing litigation-related constitutional rights from the perspective of foreign states draws together parts of the Constitution in ways that scholars have not yet done. Article III is a source of procedural protections such as personal jurisdiction and notice that today we associate exclusively with Fifth Amendment due process. Cases involving foreign sovereigns illustrate that Fifth Amendment “process” meant a territorially restricted power to compel attendance before the court, linking the term to personal jurisdiction. That power was also limited by the power of the sovereign itself. If a court lacked personal jurisdiction over a defendant, even one located within the territory of the forum court, process could not issue. Absent personal jurisdiction, there was also no Article III “case” and no “judicial power.” Due process protections were indeed duplicative of protections already provided to all defendants through separation of powers. These observations resolve modern doctrinal problems in a sensible way, and they also knit together ideas other scholars have advanced to understand domestic state sovereign immunity, personal jurisdiction, and the original meaning of the Fifth Amendment.

## Privacy and Autonomy

### Affirmative: Data Privacy

#### The right to informational privacy remains elusive, federal protections must establish that unlimited government surveillance violates the 14th amendment.

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Governmental Employees’ Misuse of Information that Citizens Provide for Legitimate Purposes Each day American citizens submit private information to obtain the governmental benefits mentioned above.18 And, there are state laws mandating that some private information, such as sexually transmitted diseases, be submitted to public health agencies.19 The problem is that some governmental employees have used, and might use, such sensitive information for ulterior purposes, including to further their own private needs for romance and retaliation against others.20 Obviously, such illegitimate usages of citizens’ private information raise substantial issues that implicate one’s constitutional right to informational privacy. D. Pervasive Governmental Surveillance The concern here is that governments—through pervasive and sophisticated use of ever-present traffic and security cameras, face recognition technology, cell phone location tracking systems, bank account records, and other means of monitoring each and every aspect of citizens’ lives—can secretly create a map of one’s entire existence.21 Certain law enforcement entities have used such public and private information to target certain persons who allegedly show a propensity for criminal behavior.22 The crux of the problem is that a map of one’s entire existence creates a more substantial invasion of privacy than any single invasion that is joined with other invasions to create the map. In other words, an isolated traffic camera picture of a person’s running a red light may not be as harmful or psychologically oppressive as knowing that the government knows each and every step or computer keystroke the person took for three hundred and sixty-five days a year, for the last ten years. Such pervasive monitoring, including the eventuality that artificial intelligence might one day be able to read our minds, would leave us without any privacy in anything that we do. Thus, this Article, in part, takes the position that public monitoring, which might normally be permissible, may lead to a violation of one’s constitutional right to informational privacy if such monitoring becomes too pervasive.23 All of the above-stated examples are just some of the privacy concerns that are ripe for challenges under the constitutional right to informational privacy theory, as discussed in this Article. II. SUBSTANTIVE DUE PROCESS “RIGHT TO BE LET ALONE” UNDER THE FOURTH AMENDMENT The central thesis of this Article is that the liberty interest component of the Fourteenth Amendment provides support for a constitutional right to infor- mational privacy, and that right to privacy is consistent with the Court’s substantive due process precedent. This constitutional right to informational privacy is premised on Justice Brandeis’s “right to be let alone” principle, and it primarily stems from the Fourth Amendment’s protection against unreasonable governmental intrusion.24 The constitutional right to informational privacy is consistent with the Court’s substantive due process precedent, as articulated in Washington v. Glucksberg,25 Lawrence v. Texas,26 and Obergefell v. Hodges.27 First, in Glucksberg, the Court restated that the Fourteenth Amendment’s liberty interest protection includes the rights provided for in the Bill of Rights Amendments.28 Therefore, the Fourth Amendment right against unreasonable searches and seizures is a liberty interest protected by the Fourteenth Amendment.29 Second, Glucksberg affirmed a test for determining whether other rights are also protected by the liberty interest.30 The Court stated: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition . . . ” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful de- scription” of the asserted fundamental liberty interest.31 However, Lawrence cautions that courts should not rely strictly on a historical analysis that is frozen in time, but should also consider changes in practices that create a new normal, as “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”32 Subsequently in Obergefell, the Court, building on Glucksberg and Lawrence, established that the following factors are important when one seeks constitutional protection of a new liberty interest: (1) how state law and the public have historically treated the asserted liberty interest, (2) any change or evolution in the state law and public treatment of the asserted liberty interest, (3) the important principles or policies that support the asserted liberty interests, and (4) whether the challenged state’s intrusion on the asserted liberty interest is also a violation of the Equal Protection Clause.33 Therefore, an application of this substantive due process analysis, with a blending of Glucksberg, Lawrence, and Obergefell, shows that a constitutional right to **informational privacy does exist under the Fourteenth Amendment**. And, that right should be grounded in the Fourth Amendment’s right to privacy against unreasonable searches and seizures34 because the right to informational privacy stems from the same general concerns about unrestrained governmental actions. The following cases inform this analysis and support the general theme that the government has no right to one’s private information when there is a reasonable expectation of continued privacy in that information, unless the government offers a legally sufficient justification for its intrusion into such private matters. A. Entick v. Carrington The English case of Entick v. Carrington35 is a landmark case against im- proper governmental intrusion. In Entick, the owner’s home was searched under a general warrant that was not supported by any evidence that the owner had committed a crime or that his home contained evidence that he had written the libelous articles against the King and his officers that he was accused of writing.36 The appellate court eventually held that the search and seizure were unlawful, apparently because they were conducted pursuant to a general war- rant, without any evidence that the owner had committed the specific crime or that his home property contained evidence of the crime.37 Boyd v. United States38 emphasized the importance of Entick’s influence in the adoption of the Fourth Amendment.39 And it supports the notion that there is a zone of privacy that protects citizens from unjustified governmental intrusions into one’s “personal security,” “personal liberty,” and “private property.”40 Importantly, Boyd also shows that law enforcement does not have to physically invade one’s property to violate the Fourth Amendment.41 Instead, a governmental request for a production of documents, that contain private information, can also violate the Fourth Amendment.42 Therefore, despite recognizing that the forced production of documents was not the same type of intrusion as a government official’s entering the petitioner’s property and seizing the disputed invoices, the Court held that the forced production of the invoices had the same practical effect as a physical intrusion onto the petitioner’s property and the seizure of the invoices.43 The Court concluded that the statute allowing the notices for production of the invoices and the court order pursuant to the statute were void and unconstitutional as a violation of the Fourth Amendment.44 The implication of Boyd, for the theme of this Article, is that it shows that the Fourth Amendment offers protection beyond the traditional situations where law enforcement officials physically intrude onto private property to search through and seize tangible personal property.45 And, the Court also noted that an erosion of the Amendment’s purpose can “only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.”46 Such liberal construction should mean that it is time to explicitly recognize that the Fourth Amendment should be the foundational support for a constitutional right to informational privacy, and that the right is applicable to the States through the liberty interest clause of the Fourteenth Amendment. C. Weeks v. United States Weeks v. United States47 is another case that supports a constitutional right to informational privacy.48 In Weeks, the Court reversed the petitioner’s convic- tion and held that certain papers and books that were obtained from his private property, and admitted into evidence, should have been excluded because the federal law enforcement officers did not have a warrant to search the proper- ty.49 The Court made a statement that is relevant to this Article’s argument that the Fourth Amendment also protects one from the government’s attempt to co- erce the production of private information:

### Affirmative: Trans Rights

#### State bans on trans healthcare violate the 14th amendment, federal protections must establish that trans healthcare is medically necessary and protected as a personal dignity.

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Laws that prohibit physicians from providing treatments such as puberty blockers and cross-hormone therapy to minors are bad public policy. Their advocates claim that these are efforts to protect kids, who they argue may later change their mind, from medical treatments they characterize as irreversible. But these arguments don’t hold up to scrutiny: The laws—such as the one Arkansas just passed and those that more than a dozen other states, including Alabama, Oklahoma, South Carolina, and Texas, are actively considering—will certainly harm transgender children, denying them medical care that they need and causing them psychological pain. That should be reason enough to oppose these laws. But even those who are skeptical of today’s gender politics should oppose these laws for another reason: They clearly violate the U.S. Constitution. The most obvious, and compelling, constitutional objection to Arkansas’s Save Adolescents From Experimentation (SAFE) Act and laws like it arises from the Fourteenth Amendment’s guarantee of equal protection under the law. That guarantee means, among other things, that a state government may not target one group of residents for discriminatory treatment arising from animus, dislike, or irrational fear. Adam Serwer: The Republican Party finds a new group to demonize Since the 1970s, the Supreme Court has consistently rejected moral disapproval of a particular group of individuals as a constitutionally legitimate basis for imposing targeted legal burdens on the group. Thus, when Congress attempted to, in the Court’s assessment, “prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program,” the Supreme Court unanimously struck down the ban for otherwise eligible “hippies.” In U.S. Department of Agriculture v. Moreno, decided in 1973, Justice William J. Brennan Jr. wrote, “If the constitutional conception of ‘equal protection of the laws’ means anything, it must, at the very least, mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” This bedrock equal-protection principle has endured over time. As Justice Sandra Day O’Connor explained in her concurring opinion in Lawrence v. Texas, the landmark 2003 decision that invalidated Texas’s ban on same-sex intimacy in private, “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” In clear contradiction of this constitutional rule, Arkansas’s SAFE Act singles out one group in need of medical care—transgender children—and makes the provision of that care within the state unlawful. No other medically necessary service is proscribed; everyone else in the state may seek and obtain medically necessary treatment. Moreover, the Arkansas law also appears to require that ongoing treatments for gender dysphoria immediately stop, even if ceasing such treatment, including hormone therapy, could cause a child serious medical harm. Arkansas would need a reason other than mere fear or dislike of transgender children as a basis for denying them, and only them, lawful access to medical care. It does not have one. This is not about the fact that these kids are kids. Arkansas permits minors, with their parents’ consent, to obtain medically prescribed services or treatments for any other reason at all—just not this one. This is the essence of irrational discrimination, a fact not lost on Republican Governor Asa Hutchinson, who in vetoing the law called the SAFE Act a “vast government overreach” that constitutes unjustified “legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters involving young people.” His veto was almost immediately overridden by the Republican-led state legislature—and by overwhelming margins. The federal courts should hold that the SAFE Act and all similar state laws lack a legitimate government purpose, meaning that they are unconstitutional. Indeed, a court considering the constitutionality of the SAFE Act need not even decide whether transgender children as a class constitute a “discrete and insular minority” that requires more vigorous constitutional review under the equal-protection clause, because the law is self-evidently irrational, as it lacks any plausible scientific or medical basis and rests on obvious prejudice. The law’s supporters claim that their objective is safeguarding the health and safety of kids—after all, the statute is called the SAFE Act. Advocates of laws like this contend that children should not be permitted to make a life-altering, potentially irreversible decision, even on the advice of a treating physician and with the informed consent and approval of their parents. State Representative Robin Lundstrum, the lead sponsor of the SAFE Act, has argued that “these children need to be protected.” But an outright ban on medically necessary treatments will not protect these kids or reduce their risk of harm. In fact, Arkansas’s new law will be counterproductive and self-defeating, and many professional medical associations opposed the bill on these grounds. The rate of attempted suicide among trans kids is tragically high. A 2018 survey commissioned by the American Academy of Pediatrics found that more than half of transgender teen boys had attempted suicide, as had nearly a third of transgender girls and two-fifths of nonbinary youths. Much of the risk comes from the stigma of being trans in today’s society—something this law will only exacerbate. Read: Young trans children know who they are This is the epitome of an irrational, and hence unconstitutional, law. After the legislature’s almost instant override of his veto, Hutchinson quite properly denounced the legislature’s action as “a step way too far” that “puts a very vulnerable population in a more difficult position” and “sends the wrong signal to them.” (It also bears noting that the bills currently pending in many states, including those in Alabama and Oklahoma, are even worse than the SAFE Act, because, if enacted, they would threaten physicians with felony criminal charges for providing treatment to transgender minors or referring them for treatment. They would also render parents who seek and obtain such treatment for their children potential felons, in some cases directly under the proposed law and in others indirectly, for aiding and abetting the commission of a felony.) Arkansas law contains plenty of other concessions to minors. Arkansas currently permits minors to seek full emancipation at 17, to lawfully engage in sexual intercourse with adults at 16 (and at 14, under a “Romeo and Juliet” law, with persons between 14 and 17), and to marry at 17. In other words, Arkansas permits minors to make important, potentially life-altering decisions before they reach the age of 18, including living independently of their parents or guardians and engaging in behaviors that could lead to parenthood. Arkansas’s flat denial of a minor’s ability, with their parents’ consent, to make basic decisions about gender identity simply cannot be reconciled with these other state policies. The SAFE Act and pending state laws like it suffer from other serious constitutional infirmities as well—any or all of which should lead the federal courts to void them with alacrity. For starters, the U.S. Supreme Court has held repeatedly that the due-process clause of the Fourteenth Amendment protects the right of fit custodial parents to oversee the upbringing of their children. Meyer v. Nebraska and Pierce v. Society of Sisters, reaffirmed recently in Troxel v. Granville, require the government to respect, rather than displace, parents’ reasonable decisions regarding how best to advance the welfare of their children. As the Supreme Court explained in Pierce, “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” The SAFE Act tramples this fundamental constitutional principle. In Arkansas today, fit custodial parents are now legally powerless to seek and obtain medically necessary care for their offspring. Criminalizing a person’s medical status is also patently unconstitutional. In 1962, the Supreme Court invalidated a misguided California law that made it a crime to be “addicted to the use of narcotics.” In Robinson v. California, Justice Potter Stewart observed that “we deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense.” The justices invalidated the law because “narcotic addiction is an illness,” not a crime. Condemning as felons physicians and parents who secure access to recommended treatment for trans kids comes perilously close to directly criminalizing the mere status of being a transgender minor—and is therefore unconstitutional under Robinson’s reasoning that a state cannot legitimately punish medical status. Finally, although the Supreme Court has never squarely held that the Constitution guarantees a right to a medically necessary service or treatment (save for abortion and birth control), the Constitution’s guarantee of personal liberty encompasses protection for the security, integrity, and dignity of a person. Denying access to a medically necessary therapy compromises both the health and happiness of an individual. Read: Why is the media so worried about the parents of trans kids? As the Court stated in 1992’s Planned Parenthood v. Casey, matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, **are central to the liberty protected by the Fourteenth Amendment.**” The ability to seek and obtain medical advice and treatment directly related to one’s gender identity plainly falls within the constitutionally protected zone of “choices central to personal dignity and autonomy,” and, accordingly, a state government cannot constitutionally deny access to medically necessary treatments for gender dysphoria. The clear constitutional invalidity of laws like the SAFE Act should lead a constitutionally conscientious legislator, of whatever partisan or ideological stripe, to oppose those laws. Even if constitutional fealty isn’t a sufficient motivator, a prudent fiscal steward of scarce state funds should think twice before supporting a blatantly unconstitutional measure, because the Civil Rights Attorney’s Fees Award Act of 1976 requires a state government that loses a civil-rights case to pay both the attorney’s fees and court costs of the prevailing plaintiff. Futile efforts to defend anti-trans laws in federal court will drain a state’s treasury.

### Kritical Affirmative: Prostitution

#### PROSTITUTION: Aff to change 14th amendment interpretation (under privacy/due process/private property/liberty) to cover prostitution.

Bernstein 21, James J. Bernstein, 2021, B.A., Columbia University (2020), J.D. Georgetown University Law Center (2024); "Property Prohibitions: Why Criminalizing Prostitution Violates Constitutional Guarantees," University of San Francisco Law Review 56, no. 1 (2021): 109-122 // wwu ljh

ONE CANNOT PRACTICE THE WORLD'S OLDEST PROFESSION in virtually every state of our nearly two-hundred-fifty-years young country.1 Despite a repeal of sodomy laws2 and other kinds of "morals legislation," 3 prostitution is explicitly outlawed around the country except for a few counties in Nevada. 4 Strident challenges to these statutes have proved futile, and courts have been reluctant to overturn these state laws. 5 Recently, challenges to California's prostitution ban have cited the Fourteenth Amendment-derived right to privacy, asking what business is it of the state to decide what goes on between consenting adults? 6 Despite this ostensibly related precedent, the Ninth Circuit Court of Appeals found that California's law does not violate the Fourteenth Amendment.7 Proponents of this argument have cited Lawrence v. Texas, which struck down anti-sodomy laws, to ground their discussion.8 Justice Anthony Kennedy, who wrote for the Court's majority, quoted Eisenstadt v. Baird in saying, "if the right to privacy means anything, it is the right of the individual . .. to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person .... "I But there is another, yet unexplored, avenue to these prohibitions which may further the case against outlawing prostitution: the property rights guaranteed through the Due Process Clause of the Constitution. Historically, according to both political theory and law, the body of jurisprudence has fallen within this category since private property does not just refer to, for example, land but one's physical being as well. 10 Further, it stands to reason that what one does with one's body is also of no business to the government, given that this right to personal autonomy is, by extension, part of the Due Process clause (like the right to privacy). 1 Bodily autonomy starts as an individual right which is protected-not infringed upon-by government. Yet, there is something unique about prostitution when contrasted with other forms of property. Opponents to legal prostitution cite the potential spread of disease as a main reason to keep prostitution illegal.' 2 To assuage this concern, the state-in the same manner that it regulates the sale and trade of homes, for example-could also regulate the prostitution industry." Or, as with other similar-but necessarily different-Fourteenth Amendment liberties, whatever activities consenting adults engage in, like marriage, may require state regulatory mechanisms.14 While Fourteenth Amendment liberties tend to reject government (largely understood in "privacy" contexts), property arguments need not shy away from various kinds of legislation. Thus, the prostitution-as-a-matter-of-liberty arguments fail to capture the needed regulation of such a transactional profession. In short, legal prostitution cannot perfectly fall into a "liberty" conversation because in some ways, marginal state intervention is not only a tangential feature of this equation, but also arguably an essential component as it relates specifically to one's property rights. To this end, the arguments in favor of overturning these prohibitions have been misguided. The recent challenge to California's prostitution prohibition cited that individuals have essential "liberties" derived from Lawrence.15 However, Lawrence did not specifically deal with prostitution.1 6 What's more, the right of individuals to engage in private, intimate ways does not follow the same logic that calls for legalizing prostitution. Challenges to these laws have cited the Due Process Clause's right to "liberty."1 7 However, the right of individuals to engage in sexual acts in exchange for financial payment is much more a matter of one's agency to sell their property, rather than a question of whether one enjoys a general liberty to do so. What may naturally follow from this discussion is a question of whether it is morally right for individuals to be employed as prostitutes. The Court in Lawrence,18 and especially in Obergefell v. Hodges,' 9 answered this question in part when it rejected claims to uphold legislation that proscribes morals for people.20 The "morality" argument against prostitution derives from the Christian Church which "publicly endorse[s] chastity as a virtue" and believes "romantic love was a response to the contractual nature of marriage during the Middle Ages due to the influence of the Christian Church." 2 1 Presumably, these rules did not apply to the parabolic characters of Boccaccio, where priests and nuns violated these "virtues" regularly.22 This is not mentioned to be glib; on the contrary, it is meant to highlight the loose applications of this code as laws outlawing prostitution-along with banning same-sex marriage or the rights of couples to purchase contraception-derived in part from this moral system. Thus, the desire to ensure that individuals cannot sell their property in the name of unshared principles is not just a simple inconsistency but given recent decisions, appears to be unconstitutional. 23 To these ends, this Comment will describe the constitutional basis for overturning the state-level bans on prostitution. Part I explores the historical origins of the private property guarantees of the Constitution. Part II discusses where the guarantees are manifest in the Constitution and challenges the extent of these guarantees. Part III analyzes the case of Lawrence v. Texas, which rightly did not answer the question of legal prostitution (but arguments can easily be derived from its principal findings). Lastly, Part IV considers the larger trend that courts-especially the Supreme Court-have displayed in overturning "morals legislation."

### Affirmative: Abortion

#### State preemption key to enshrining Roe V. Wade into law and preventing state rollback of abortion

**Katyal ’21** (Neil Kumar Katyal is a professor of law at Georgetown University and former solicitor general of the United States, “The Supreme Court May toss Roe. But Congress can still preserve abortion rights.” The Washington Post, <https://www.washingtonpost.com/outlook/2021/06/07/roe-abortion-congress-mississippi/>) //wwu-kck

The Supreme Court’s recent decision to accept a [major abortion case](https://www.washingtonpost.com/politics/courts_law/supreme-court-abortion-roe-v-wade/2021/05/17/cdaf1dd6-b708-11eb-a6b1-81296da0339b_story.html?itid=lk_inline_manual_2) out of Mississippi has led to fear among many Americans that *Roe v. Wade* will be overruled next year. There is some chance of this — but that’s why it is crucial to understand that reproductive rights do not depend only on the justices. Here’s the thing: Congress can, right now, by simple majority vote, protect those rights and nullify any threat posed by the Mississippi case or any other. A year ago, when the last abortion [case](https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf) reached the high court, Chief Justice John G. Roberts Jr. cast the deciding vote to invalidate [Louisiana](https://www.washingtonpost.com/politics/courts_law/supreme-court-louisiana-abortion-law-john-roberts/2020/06/29/6f42067e-ba00-11ea-8cf5-9c1b8d7f84c6_story.html?itid=lk_inline_manual_5)’s abortion restrictions. Roberts surprised many by joining the four justices appointed to the court by Democratic presidents, one of whom was Ruth Bader Ginsburg. Today, however, Justice Amy Coney Barrett occupies the seat Ginsburg once did, leading some who support abortion rights to predict doom from the Mississippi case. Predictions are always tough in this business, but the far more important point is that this focus on the Supreme Court is misplaced. Reproductive rights need not depend at all on what the court does with *Roe*. In *Roe,* the Supreme Court in 1973, by a 7-2 vote, reviewed a Texas law that criminalized abortion, declaring it unconstitutional. The court’s opinion meant that states could generally not restrict abortions in the first trimester and for much of the second, until the point of fetal viability. Thus, women had a right to choose what to do until approximately the 24th week of their pregnancies. Mississippi, however, recently passed a law in defiance of that framework, restricting abortion after the 15th week. This law so flagrantly defies the Supreme Court that nothing like it has had a chance of success in any court since 1973. (Texas, not to be outdone by Mississippi, last month [outlawed abortions](https://www.washingtonpost.com/nation/2021/05/19/texas-abortion-law-abbott/?itid=lk_inline_manual_8) after the sixth week if a fetal heartbeat has been detected.) How a Mississippi abortion law could overturn Roe v. Wade A Supreme Court review of a Mississippi abortion law could pave the way for many other state laws that restrict or ban the procedure. (Video: Joshua Carroll/The Washington Post, Photo: Melina Mara/The Washington Post) This is subtle but important: When the Supreme Court hears a case about abortion, whether it was *Roe* in 1973 or the Mississippi case in the coming fall, it is not being asked to outlaw the practice of abortion. The court has only one power — the power of judicial review — which means all it can do is say whether a particular abortion restriction passed by a legislature is constitutional. The court cannot outlaw abortion itself. So if the court sides with Mississippi and says “you can have this law,” that simply means those states whose legislatures want such laws restricting abortion can have them. Other states that don’t want to restrict abortion do not have to. The court can’t *compel* abortion restrictions; it can simply *permit* them. [The Supreme Court rules us. Here’s how to curb its power.](https://www.washingtonpost.com/outlook/2020/09/29/supreme-court-reform-packing-jurisdiction-democracy/?itid=lk_interstitial_manual_11) What this simple insight means is that there are two ways, not one, to safeguard reproductive rights: one by legislatures and the other by courts. And because the Constitution says that federal law reigns supreme over state laws, this insight also means that Congress can sweep away state laws that conflict with federal protections. Congress uses this power of “preemption” all the time — blocking states from having their own food and drug laws, employment rules, banking regulations and the like. Congress also frequently passes legislation to guarantee rights. Indeed, almost all of the major civil rights protections you have at your job or at restaurants or in hotels are guaranteed by Congress, not the courts or the Constitution. That is because the Constitution restricts only governments, not private individuals or corporations. Right now, Congress has a bill before it that would capitalize on this insight and statutorily guarantee the reproductive rights recognized by the Supreme Court since 1973. Called the [Women’s Health Protection Act](https://www.congress.gov/bill/116th-congress/senate-bill/1645/cosponsors?searchResultViewType=expanded) and sponsored by senators including Kyrsten Sinema (D-Ariz.), Charles E. Schumer (D-N.Y.), Tim Kaine (D-Va.) and Amy Klobuchar (D-Minn.), it would codify the rights two generations have taken as part of American life. This legislation can be passed by simple majority vote, and if enacted, it would remove cases like the Mississippi one from the Supreme Court’s consideration. The rights would now be guaranteed by Congress, making it impossible for the court to trim them back. The only way states could try is to file separate lawsuits seeking judicial review of such legislation, arguing that Congress’ law is unconstitutional because Congress lacks the power to enact it. Such an argument has about zero chance of success. Since the New Deal, the Supreme Court has given Congress broad powers over interstate commerce, and the case here would be ironclad, on par with the rationales that undergird civil rights laws and their prohibitions on discrimination in employment, restaurants and the like. There is no way the Supreme Court could void such a law without collapsing the scholarly and judicial consensus about the reach of government power, present at least since the New Deal but with its roots going all the way back to the Bank of the United States case *McCulloch* from 1819. [With a conservative court, abortion foes could end Roe — and go even further](https://www.washingtonpost.com/outlook/2020/09/23/ginsburg-court-abortion-rights/?itid=lk_interstitial_manual_18) Some in the Senate would try to filibuster the legislation, claiming 60 votes, not 50, is needed to pass it. But if there is ever a piece of legislation that merits a departure from the filibuster, this is pretty much it. Recall that it was the Republicans in the Senate who bypassed the filibuster when they confirmed President Donald Trump’s three nominees to the Supreme Court, including Barrett. And Trump campaigned on the claim that *Roe* would “[automatically](https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html)” be overturned once his Supreme Court nominees were confirmed. It can’t be that one side gets to play by a “no filibuster” rule and the other side doesn’t. That is particularly so since one of the seats at the court was filled as a result of Republican senators’ gamesmanship over President Barack Obama’s nomination of Merrick Garland — [gamesmanship that itself](https://www.redding.com/story/opinion/columnists/2016/03/18/yoo-gop-right-to-delay-filling-of-supreme-court-seat/93707152/) had the goal of trying to overturn *Roe.* In this sense, *Roe* is unique — it occupies a role in Senate confirmations unlike any other case. If 50 is good enough to confirm a justice for life and against *Roe*, it should be good enough to democratically enshrine *Roe* into law, too. All it takes is 50 senators to sidestep the filibuster (or [return it to its original roots](https://www.washingtonpost.com/politics/biden-for-the-first-time-says-he-wants-to-overhaul-the-filibuster/2021/03/16/82b41bc4-86b6-11eb-bfdf-4d36dab83a6d_story.html?wpmk=1&wpisrc=al_politics__alert-politics&utm_source=alert&utm_medium=email&utm_campaign=wp_news_alert_revere&location=alert&pwapi_token=eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9..YME_7Bs_kFpGsRsgxo2rSp9-vGOW0kaOay0mxIFjpXY&itid=lk_inline_manual_23), like a speaking filibuster) for this particular piece of legislation. And especially when such legislation is designed to preserve the status quo over reproductive rights and codify five decades of understandings, it is hard to see how senators representing a small fraction of the United States should be able to block the popular will. With Republican senators such as Susan Collins (Maine) and Lisa Murkowski (Alaska) having [gone on the record](https://www.washingtonpost.com/politics/everyone-is-focused-on-lisa-and-susan-the-two-most-powerful-senators-in-the-fight-to-replace-kennedy/2018/06/28/d7f7f72e-7ae6-11e8-93cc-6d3beccdd7a3_story.html?itid=lk_inline_manual_24) to support *Roe*, a Senate majority for the Women’s Health Protection Act is exceptionally likely. And although Democratic senators such as Joe Manchin III (W.Va.) have expressed general support for keeping current filibuster rules, the act is best understood as falling within an existing exception to the filibuster: lifetime appointments to the Supreme Court. Indeed, it is a far more modest reform than [the 2017 decision](https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html?itid=lk_inline_manual_24) by then-Senate Majority Leader Mitch McConnell (R-Ky.) to end the filibuster for Supreme Court nominees. Citizens can easily feel disempowered when issues they care about are reduced to analyzing the proclivities of nine people in Washington sitting in black robes. Since 1973, the questions about reproductive rights have been dominated by the court, not Congress. But now we have an opportunity to recalibrate the balance and guarantee reproductive justice for Americans in every state. We don’t need the court to protect these rights. We just need a majority vote in Congress.

#### Preemption doctrine is essential to give the middle finger to states banning access to medicinal abortion spiking in the squo by clarifying legal uncertainty

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The federal government could also create conflict with antiabortion states through preemption related to medication abortion. As noted, the FDA approved medication abortion in 2000, but used its authority to restrict access to the drug in a variety of ways. The FDA’s current regulation of mifepristone—the first medication in the two-medication regimen for medical abortions—includes a Risk Evaluation and Mitigation System (REMS). The imposition of a REMS is a rare action that by statute can only be imposed if a REMS is necessary to ensure that the drug’s benefits outweigh its risks.199 Scholars have argued that the FDA’s use of the REMS is unnecessary and unduly burdensome.200 The FDA’s current REMS, which will soon reflect its recent decision to allow virtual care, has the following requirements: (1) only certified providers can prescribe the drug, (2) patients must sign a Patient Agreement Form, and (3) only certified providers or certified pharmacies can dispense the drug.201 In the process of revising the REMS numerous times over the past decade, the FDA has made specific scientific findings about the drug’s safety and efficacy. For instance, in 2016, the agency removed its earlier requirements that patients consume the drug in-person, allowing patients to swallow their pills at home,202 and that physicians alone could prescribe the drug, allowing physician assistants and nurse practitioners to prescribe as well.203 The agency also found medication abortion safe and effective through the tenth week of pregnancy (not the seventh, as it had previously determined).204 In December 2021, the agency abandoned the REMS provision that forced patients to pick up the medication at a healthcare facility, finding that remote provision of medication abortion is safe and effective.205 Many states laws conflict with these determinations. Nineteen states require a physician to be present upon delivery of medication abortion, thus rendering completely remote abortion impossible.206 State legislation that requires in-person visits for counseling or ultrasounds further restrict the reach of online services. Current state laws also burden medication abortion in other ways that are inconsistent with the FDA’s mifepristone regulation: thirty-two states, for instance, only allow physicians to prescribe medication abortion, even though the FDA found it safe for non-physician providers to prescribe it. Many states, like Mississippi, also require patients to consume the drug in the presence of a provider—i.e., they cannot take the drug at home. And Texas recently enacted a law making it illegal to use medication abortion after the first seven weeks of pregnancy, even though the drug has been approved for used through the tenth week of pregnancy.207 Because the antiabortion movement understands how medication abortion poses an almost existential threat to their cause,208 there is great enthusiasm in antiabortion states for even greater restrictions against telemedicine. Indeed, South Dakota recently passed a law requiring patients to visit an abortion clinic four times to access medication abortion: to obtain consent, to pick up mifepristone, to pick up misoprostol, and to confirm the abortion’s completion.209 There is a strong, though legally uncertain, argument that federal law preempts these state restrictions. The U.S. Constitution’s Supremacy Clause establishes that when state and federal laws conflict, the federal law will preempt state law.210 For this reason, if Congress were to pass the Women’s Health Protection Act, or a similar law that created a federal right to abortion and limited state restrictions, there would be little question that these state abortion laws would be preempted. However, given the current, seemingly hopeless stalemate in the Senate, the prospects of a new federal law protecting abortion rights are slim to none in the short term.

### Affirmative: Health Equity

#### The 14th amendment’s equal protection clause can be used to affect legal health equity and establish a human rights framework that makes the United States the provider or guarantor of healthcare.

Schweikart 21 - Scott J. Schweikart, JD, MBE. “How to Apply the Fourteenth Amendment to the Constitution and the Civil Rights Act to Promote Health Equity in the US”https://pubmed.ncbi.nlm.nih.gov/33818375/

Health equity in the United States requires elimination of differentials in access to health services according to race, ethnicity, sex, gender identity, comorbidity, or ability. To achieve health equity, governments can use a variety of tools, including civil rights legislation and constitutional jurisprudence. In the United States, 2 such examples are the Fourteenth Amendment to the Constitution’s Equal Protection clause and Title VI of the Civil Rights Act. While both have the capacity to reduce health disparities, in practice, neither has achieved its full potential because of how the judicial branch has interpreted and allowed these 2 laws to be enforced. How courts adjudicate health-related cases, especially those in which civil rights or other human rights legislation are at stake, is key to the successful promotion of legislative and jurisprudential approaches to motivating health equity and realizing justice for all. What Is Health Equity? Health equity has been widely defined as an “absence of socially unjust or unfair health disparities.”1 Equity is different than equality. While both equity and equality focus on notions of fairness, equality emphasizes giving people “the same resources or opportunities” while equity “recognizes that each person has different circumstances and allocates the exact resources and opportunities needed to reach an equal outcome.”2 Health equity in particular “focuses attention on the distribution of resources and other processes that drive a particular kind of health inequality.”1 Health equity is important because health is fundamental to the human experience. As Amartya Sen explains: “health is among the most important conditions of human life and a critically significant constituent of human capabilities in which we have reason to value.”3 Complete health equity is a theoretical ideal; in reality, different nations and governing structures have differing success in achieving health equity. The United States, for example, has stark disparities in health (https://journalofethics.ama-assn.org/article/blacklivesmatter- physicians-must-stand-racial-justice/2015-10) and access to care compared to peer nations like Canada.4 Hence, the drive to effectuate health equity in American society is paramount and key to achieving a more just society, while it would also enhance the quality of human life and its essence. Legislative Action on Civil Rights **Either by acting “as a provider or guarantor of human rights” or by implementing “policy frameworks that provide the basis for equitable health improvement,” governments can contribute to effectuating health equity**.5 With respect to human rights (https://journalofethics.ama-assn.org/article/promoting-health-human-right-post-aca- united-states/2015-10), the United States has no formally codified right to health, nor does it participate in a human rights treaty that specifies a right to health. A prime example of such a treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for a specific—though criticized as “vague” and “unrealistic”—right to health.6 The ICESCR has only been ratified and not signed by the United States, thus “making the treaty only morally rather than legally binding on the US.”6 However, as Paula Braveman et al have noted, the values underlying health equity are “rooted in deeply held American social values”7; hence there is scope for government action to effectuate health equity. The United States does have law in the domain of human rights. These laws—nominally known as civil rights—are, on the whole, designed to protect citizens from “discriminatory practices by governments and institutions” and also to “protect citizens from discriminatory practices by other citizens.”8 Indeed, Robert Hahn et al argue that civil rights laws are social determinants of health (https://journalofethics.ama-assn.org/article/how-should-health-professional-education-respond-widespread-racial-and-ethnic-health-inequity-and/2021-02), as they “causally affect the societal distribution of resources that in turn affect disease, injury, and health.”8 While not as explicit as an international human rights treaty, both the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964 offer examples of civil rights law that attempt to achieve more equitable outcomes in American society. What follows is an exploration of how effective these aspects of American civil rights law are in promoting health equity in America. Fourteenth Amendment. The Fourteenth Amendment of the US Constitution is famously known for its Equal Protection clause, which states that “nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws.”9 With regard to implementing health equity, the Fourteenth Amendment seems a natural place in US law on which to focus. Indeed, “the equal protection clause is generally thought to require government to treat similarly circumstanced individuals in a similar manner.”10 However, there is a history of US courts (the US Supreme Court in particular) not applying a heightened level of scrutiny to equal protection claims regarding unequal access to health care, which has allowed for inequities to continue.10 Throughout its jurisprudential history, the “Supreme Court [has] interpreted the Fourteenth Amendment far more narrowly than many of its drafters intended, most notably by holding that it did not apply to discrimination by private actors.”11 Additionally, the Supreme Court required the “exceedingly difficult” burden that “for a litigant to prevail” in an Equal Protection case, the plaintiff “must prove that the government acted with a ‘discriminatory purpose’” and that simply demonstrating that a “policy or practice has a disparate impact on people of a particular race is not sufficient to prevail on an Equal Protection claim.”11 Because of the narrow and restrictive legacy of court interpretation, the Fourteenth Amendment has been weakened and has not operated as an effective tool to implement civil and human rights. Ultimately, success and actual progress in enforcing civil rights came when the Supreme Court “upheld the Civil Rights Act of 1964, although it relied on Congress’s authority under the Commerce Clause, and not the Fourteenth Amendment.”11 Title VI of the Civil Rights Act. Title VI of the Civil Rights Act “prohibits discrimination on the basis of race, color, or national origin by both public and private entities that receive federal financial assistance.”12 Yearby explains that the passage of Title VI was heralded with the promise “to eradicate racial bias against African Americans in healthcare and equalize access to health care in the United States.”13 Indeed, there is evidence that Title VI has had some impact on reducing health inequities, with one study showing that “between 1965 and 2002, approximately 38 600 Black infant deaths were prevented by implementation of Title VI.”8 However, there are limitations on Title VI’s effectiveness in eliminating disparities and achieving health equity. Fifty years after the passage of the Civil Rights Act, “hospitals and nursing homes continue to be racially separate and unequal, in part because the government has failed to enforce Title VI.”13 Additionally, Yearby and Mohapatra note that “because HHS [US Department of Health and Human Services] does not apply Title VI to healthcare providers, physicians are allowed to limit African Americans’ access to quality healthcare based on interpersonal racism.”14 Although the failure to enforce Title VI occurred across all levels of government, failures in the judicial branch are noteworthy. Legal scholar Dayna Matthew notes that the “Federal Courts have systematically eviscerated the protection against discrimination Title VI was intended to provide.”15 For example, in 2001, the Supreme Court16 “ended the ability of private individuals to sue to enforce Title VI disparate impact standards.”12 The ruling limited the power of Title VI regulations, as private individuals or entities could “no longer bring a private right of action” based on claims regarding disparate impact or discriminatory effect but can only now “bring suits for intentional discrimination under Title VI.”17 However, public entities may still bring such claims, as the ruling does not prevent the Office of Civil Rights from bringing discriminatory effects cases under Title VI regulations.16 Matthew explains that the Supreme Court’s “restrictive construction” of Title VI can be interpreted as the Court “stumped by the injustice of holding actors liable for discriminatory conduct they do not intend and cannot control,” that is, “courts may fear the ubiquity of unconscious biases could require limitless liability rules.”15 However, the “fear” of extending liability has resulted in the thwarting of Title VI’s power to effectuate health equity—and perhaps its original intent. Courts’ Roles With regard to the jurisprudence of US civil rights laws—particularly the Fourteenth Amendment and Title VI of the Civil Rights Act—Flood and Gross argue that courts have an important role to play in implementing health equity by allowing a “properly framed right to health” to guide courts to better “scrutinize whether ... [regressive health policy] decisions adhere to human rights standards.”18 However, as discussed earlier, courts may not always effectively play this role, thus leading to difficulties in implementing or promoting health equity via civil rights legal frameworks. Alicia Yamin notes that variation in how effectively human rights are promoted (https://journalofethics.ama-assn.org/article/rights-disappear-when-us-policy-engages-children- weapons-deterrence/2019-01) is tied to “the purpose and function of courts, together with the design of the Constitution and legal system which play a role in how courts approach enforcing health and other ... rights.”19 Thus, while legislative and constitutional tools of civil rights law already exist (eg, the US Constitution, the Civil Rights Act) to promote health equity, the judicial function of interpreting and promoting these tools varies. For example, courts often employ “judicial caution” that discourages the challenging of policies on human rights grounds, thereby leaving an absence of “critical scrutiny” of the “policy choices” relating to health equity.20 However, there are examples in which courts may more strongly promote health equity (eg some state court decisions have “describe[d] health care as a necessity of life that requires special sensitivity to its availability”10); hence courts can be part of the solution (and not necessarily an obstruction) to effectuating greater health equity and social justice. Yamin argues that recognizing the variation in courts’ responses is crucial to understanding how to “promote patterns of judicialization [patterns in courts’ decisions and reasoning] to best foster more social justice through legal enforceability of health and related rights.”19 Conclusion Sen explains that “health equity [is] central to the understanding of social justice.”3 Braveman et al echo the notion that seeking justice is central to a desire to achieve health equity, explaining “that the heart of a commitment to addressing health disparities is a commitment to achieving a more just society.”7 In an effort to achieve a more just society, America has civil rights laws, such as the Fourteenth Amendment and Title VI of the Civil Rights Act. Both these laws have the potential to serve as powerful tools to achieve health equity and social justice. However, their scope and power have been limited by the judicial branch, with courts often allowing for more restrictive interpretations of the law and a narrower scope of their enforcement. In order to better achieve health equity and social justice in American society, attention must be paid to courts and their role in the process of effectuating health equity through law. Attention to courts is critical because, after analysis, patterns of court decision making might emerge that indicate that other solutions (outside of the judicial branch) are necessary to achieve health equity, such as possibly amending various civil rights laws15 to better achieve what some courts might not yet allow under current precedent and judicial interpretations.

## Punishment and the Carceral State

#### Incarceration, capital punishment, and policing and are encompassed in the literature by the justice system, affirmatives have advantages about incarceration, prison abolition, capital punishment, or policing primarily relating to the due process clause and equal protection clause.

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### Affirmative: Capital Punishment

* New interpretation of the 8th amendment.

#### The supreme court has a bad history of not upholding equal protection violations under the fourteenth amendment particularly in cases of capital punishment– McCleskey v Kemp proves

HOAG’2020 (Alexis, Assistant Professor of law at the Brooklyn Law Center, “Valuing Black Lives, A Case for Ending the Death Penalty”, pg 1002-1003, 2020, Columbia Human Rights Law Review, <https://heinonline.org/HOL/Page?handle=hein.journals/colhr51&collection=journals&id=983&startid=&endid=1007>) lj \*edited for language

III. CHALLENGING CAPITAL PUNISHMENT UNDER THE FOURTEENTH AMENDMENT: MCCLESKEY V. KEMP The death penalty challenge in McCleskey v. Kemp was the culmination of years of legal strategy, data collection, and analysis to push the Court to squarely consider race in capital punishment.9 3 Justice Powell foreshadowed the challenge in his dissent in Furman, musing: "If a ~~Negro~~ [Black] defendant.., could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established. ' 94 Embracing Justice Powell's invitation, counsel for Mr. McCleskey argued that Georgia's death sentencing scheme racially discriminated against Warren McCleskey, a Black man sentenced to death for killing a white man, in violation of both the Eighth and Fourteenth Amendments. 95 In support, they relied on David Baldus's complex statistical study showing that Georgia's death sentencing scheme resulted in "persistent racial disparities in capital sentencing-disparities by race of the victim and by race of the defendant-that are highly statistically significant and cannot be explained by any of the hundreds of [other] sentencing factors .... Baldus's analysis showed that defendants charged with killing a white victim received the death penalty at a rate nearly eleven times higher than defendants charged with killing a Black victim. 9 7 Yet despite the clear conclusions from the data, the Supreme Court was unconvinced.9 8 In evaluating the Fourteenth Amendment claim, the Court seemed fearful of the vast implications of Mr. McCleskey's request. 99 Namely, finding an equal protection violation would have required the Court to acknowledge deeply entrenched, systemic racism in the administration of the death penalty. It was unwilling to concede that racism, bias, and prejudice played a role in police investigations, prosecutor charging decisions, and jury and judge decision-making. 100 Nor did the Court accept the statistical evidence as sufficient proof of purposeful racism in Mr. McCleskey's case. Instead, for Mr. McCleskey to prevail on an inference of discrimination, the Court "demand[ed] exceptionally clear proof,"10 1 despite the fact that the Court routinely relied on statistical evidence in other areas of the law to infer discrimination, particularly where "smoking gun" evidence is unlikely. 10 2 The Court also dismissed Mr. McCleskey's historical evidence, claiming that history from the Civil War era had "little probative value" and that "actions taken long ago" did not reveal "current intent."10 3 The Court therefore created a regime where the most relevant and probative evidence-i.e., historical discrimination and deliberate disproportionate punishment-could not be used to establish a Fourteenth Amendment equal protection violation. This undermined the intent to extend redressability to Black people inherent in the Fourteenth Amendment.

#### The 14th Amendment forbids public officials form intentional racial discrimination except for a compelling government interest- what that means has been interpreted differently from state to state and from case to case. The supreme court needs to abolish capital punishment because there is no way to administer the death penalty free from racial discrimination and arbitrariness

HOAG’2020 (Alexis, Assistant Professor of law at the Brooklyn Law Center, “Valuing Black Lives, A Case for Ending the Death Penalty”, pg 1003-1007, 2020, Columbia Human Rights Law Review, <https://heinonline.org/HOL/Page?handle=hein.journals/colhr51&collection=journals&id=983&startid=&endid=1007>) lj

¶IV. CHALLENGING THE DEATH PENALTY BASED ON THE UNDERVALUATION OF BLACK LIVES ¶The Fourteenth Amendment forbids public officials from intentional discrimination based on race absent a compelling government interest. This prohibition extends to investigating police officers and prosecutors exercising discretion. No compelling state interest can justify the government's failure to seek the death penalty in aggravated murders involving Black victims at similar rates as in cases involving white victims. The distinguishing factor in the government's failure to seek death is not the aggravation of the crime, but rather the race of the victim. As the Court recognized in McCleskey, "[i]t would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on 'an unjustifiable standard such as race."' 106 ¶Standing and Selection of Parties to Raise the Claim ¶A threshold determination in mounting a Fourteenth Amendment equal protection challenge is determining who should raise it: the estate of a Black victim, a defendant who murdered a Black victim and against whom the government did not seek death, or a defendant who murdered a white victim and against whom the government did seek death? No lawyer acting in her client's best interest would challenge the government's failure to seek death against her client. Instead, the question becomes whether a capitallycharged defendant who murdered a white victim has third-party standing to raise the issue on behalf of a murdered Black victim from a non-capital case. ¶Third-party standing determinations require the person pursuing the claim to have an interest in the outcome of the dispute, to be closely related to the third party, and for the third party to be unlikely to assert their own right. 107 Beginning with Craig v. Boren10 8 and continuing with Batson v. Kentucky'09 , the Court began to relax standing principles to address equal protection violations. In Batson, the defendant challenged the government's unlawful removal of a prospective juror based on the juror's race. In allowing a defendant to pursue a jury selection discrimination claim, the Court implicitly recognized that the unlawfully excluded juror was unlikely to assert their own right. Similarly, there is little likelihood that a Black murder victim's estate would assert the victim's right to equal protection of a criminal prosecution. Moreover, there is an additional harm in need of redress: the harm to the community where selective capital prosecution based on race undermines "public confidence in the fairness of our justice system."110 Like Batson, the prosecutor's discriminatory action "causes a criminal defendant cognizable injury... because it 'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt."1 ¶The most appropriate actor to bring the challenge is a Black defendant whom the state is seeking death against for allegedly murdering a white victim. To avoid procedural default, the ideal procedural mechanism to raise the claim is a pretrial motion after the prosecution has filed its death notice. To raise the claim, the lawyers must find a factually similar case from the same prosecuting jurisdiction involving a white or Black defendant prosecuted for murdering a Black victim and where the state declined to seek death. The two crimes should share identical possible aggravating circumstances and should have occurred during roughly the same timeframe. These similarities-aggravating facts, prosecutor's office, and timing-will help isolate the victim's race as the distinguishing characteristic between a death-noticed case and a non-capital prosecution. ¶Purposeful Discrimination ¶The central takeaway from McCleskey was that any subsequent challenge to the death penalty on equal protection grounds must include evidence of purposeful racial discrimination. 112 Thus, when raising the claim from the perspective of a Black murder victim, such evidence must support an inference that the decisionmakers acted with discriminatory purpose when they declined to seek death. Existing statistics illustrate the stark race-of-victim disparities in law enforcement murder investigations, prosecutor charging decisions, jury sentencing, and executions. However, McCleskey tells us we need more. ¶As Anthony Amsterdam explained in his 2007 remarks reflecting on McCleskey, we must collect information about racism in the community where the cases are being prosecuted, in the prosecuting attorney's office, and in the investigating police department. 1 1 3 We must also gather evidence of racial discrimination from the specific prosecutors involved in the charging decisions-their record of Batson violations, their personnel files, and any public statements they have made. 14 The NAACP Legal Defense and Educational Fund's amicus brief in Flowers v. Mississippi is an excellent example of how to identify racism in a specific community, in a prosecutors office, and in the practices of an individual prosecutor. 115 ¶A successful test case in a single jurisdiction could pave the way for subsequent challenges in other states that continue to seek the death penalty, eventually culminating in a national end to capital punishment. ¶Remedy ¶In response to the racially disproportionate data in McCleskey, one of the Justices mused: "It's such a curious case, because what's the remedy? Is it to execute more people?" 116 Of course not. At the time, Jack Boger demurred, offering that the Court need not make a facial holding on the constitutionality of the death penalty akin to the Court's decision in Furman. 117 However, today the only appropriate remedy is to abolish the death penalty. States still operating a capital punishment system are incapable of administering the death penalty free from racial discrimination and arbitrariness. Legally irrelevant factors continue to drive death sentencing including the quality of defense counsel, the location of the crime, and the race of the victim (and often the defendant). 118 Expanding the death penalty's reach to include defendants in Black victim cases serves only to perpetuate the undervaluation of Black lives because the perpetrators of Black victim cases are often also Black. 119 ¶To ensure that Black victims receive equal protection of the laws, the government must end the discriminatory imposition of capital punishment. A natural extension of valuing the lives of Black victims is to value the lives of all defendants, particularly Black defendants charged with aggravated murders. 120 ¶CONCLUSION ¶At its founding, the nation's criminal legal system distinguished between races to determine what behavior was criminal and who to punish. The Fourteenth Amendment, in part, was ratified to eradicate these distinctions. Placing equal value on Black lives-perpetrators and victims-relative to white lives, would compel the criminal legal system to address longstanding racial discrimination in the operation of the death penalty. Rather than expand or even reform capital punishment, the only solution is abolition. Borrowing from Allegra McLeod's prison abolition framework, abolition of the death penalty forces the law to confront the dehumanization, violence, and racial degradation inherent in death sentencing. 121 Empirical evidence gathered since Furman illustrates that our nation is incapable of administering the death penalty free from racial discrimination. It is time for this nation to cease tinkering with the machinery of death and to abolish capital punishment.

### Affirmative: Incarceration/Prison Abolition

#### Article about incarceration, the equal protection clause and what similarly situated means

CARROLL-FERRARY’2006 (Natasha, Attorney at NCF Law, “Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of “Similarly Situated””, New York Law School, <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1374&context=nyls_law_review>) lj

#### Article about menstrual health product access in prisons.

O’SHEA CARNEY’2020 (Mitchell, Professor of Law at the Oklahoma City University School of Law, “Cycles of punishment: The constitutionality of restricting access to menstrual health products in prisons”, 2020, Boston College Law Review, <https://heinonline.org/HOL/Page?handle=hein.journals/bclr61&collection=journals&id=2577&startid=&endid=2630>) lj

### Affirmative: Cash Bail

https://drexel.edu/law/lawreview/blog/overview/2020/September/cash-bail/

### Kritical Affirmative: Abolish the Police

#### POLICING/ABOLITION: policing resistance is the original spirit of the Equal Protection Clause

Bernick 21, Bernick, Evan D., Assistant Professor at NIU, Policing as Unequal Protection (May 21, 2021). Available at SSRN: https://ssrn.com/abstract=3850829 or [http://dx.doi.org/10.2139/ssrn.3850829 //](http://dx.doi.org/10.2139/ssrn.3850829%20//) wwu ljh

These are concerns and objections that those who seek transformative change in policing have to confront, regardless of whether they make use of constitutional argumentation. They are concerns and objections that have already been raised. Appealing to the Equal Protection Clause will not alert M4BL’s critics to the existence of new arguments, ready to be taken up; critics have already invoked the Equal Protection Clause to resist M4BL’s demands and raised concerns about perverse, unintended consequences. 641 Integrating the historical function of the Equal Protection Clause with the history of policing can provide new resources with which to argue for the reduction of the police footprint. It can do so by (1) showing continuities between the evils at which the Equal Protection Clause was aimed and racialized police subjugation today; (2) highlighting the inadequacy of police reform efforts to prevent police subjugation; and (3) situating opposition to policing in the context of a freedom struggle against subjugation that is older than the United States and which shaped the Fourteenth Amendment. Critics can be expected to deny those continuities, question that account, and deny that M4BL is fighting anything resembling the same battle as did nineteenth-century abolitionists. But making use of these resources cannot hurt; and it may help quite a bit. CONCLUSION The Movement for Black Lives wants to stop police from violently controlling and killing Black people. If its pursuit of this goal does not look like anything that resembles constitutionalism, that may tell us more about the limitations of our conception of constitutionalism than it tells us about M4BL. We encounter radical critiques and demands, advanced in terms that do not make use of orthodox constitutional language; we might conclude that we are not encountering a movement that could have anything to do with the Constitution. Such a conclusion would be too quick. M4BL is a response to violence of a kind that has been inflicted and resisted throughout U.S. history, and its critique and demands could draw strength from explicit constitutional argumentation from the history of policing and the Fourteenth Amendment. That is because M4BL’s policing critique and demands are consistent with the letter and spirit of the Equal Protection Clause. In turn, constitutionalism could draw strength from M4BL’s activism in response to violence that remains a part of our constitutional history. Recognizing that an antipolicing construction of the Fourteenth Amendment is available to a radical social movement is simultaneously troubling and inspiring. It should not surprise us that a constitutional amendment made possible by radical contestation can provide resources to a radical movement today. But it should profoundly trouble us to see radical social movements separated by centuries fighting against racialized policing. The persistence of police violence might seem sufficient to justify M4BL’s omission to engage in much constitutional argumentation. It is true that constitutionalism did not stop racialized policing. And it is true that its failure to do so illustrates constitutionalism’s limits. Those struggling today, however, can take inspiration from the fact that nineteenth-century radicals were successful in embedding such a liberatory promise in the Constitution at all—one that, if interpreted consistently with its letter and spirit, would transform society today.

**For More:**

David H. Gans, 7-19-2020, The 14th Amendment Was Meant to Be a Protection Against State Violence, *The* *Atlantic*, <https://www.theatlantic.com/ideas/archive/2020/07/14th-amendment-protection-against-state-violence/614317/?msclkid=11ed005ac1f511eca914fb45c96a60c3>

### Affirmative: Guantanamo Bay

https://constitutioncenter.org/blog/the-constitutional-debates-over-the-military-prison-at-guantanamo-bay

### Case Neg

#### Section 2 of the 14th amendment created a gaping constitutional loophole that has maintained felony disenfranchisement as tool of voter suppression

TAYLOR’2018 (Jennifer Rae, Equal Justice Initiative Senior Attorney, “Race, Voting, and a Gaping Loophole: A Critical Look at the 14th Amendment”, 08/13/18, <https://eji.org/news/race-voting-and-a-gaping-loophole-a-critical-look-at-the-14th-amendment/>) lj

**Upon the 150th anniversary of the Fourteenth Amendment this July, scholars, celebrities, and political leaders lauded its historic and continued promise of “equal protection” and “due process” for all. Few mentioned that, by permitting states to deny the vote for “participation in rebellion or other crime,” Section 2 of the amendment created a gaping constitutional loophole that has maintained felony disenfranchisement as voter suppression’s sturdiest tool.** In Richardson v. Ramirez, a 1977 decision upholding felony disenfranchisement in California, the United States Supreme Court held that the Fourteenth Amendment explicitly authorizes denying citizens’ voting rights due to criminal conviction – dealing a heavy blow to any hopes of using the Constitution to overturn felony disenfranchisement laws. “The Fourteenth Amendment is an amendment that was intended to give formerly enslaved people citizenship,” explained Ryan Haygood, a civil rights lawyer who has litigated landmark challenges to disenfranchisement. “But it was also the same amendment that allowed, expressly, for those rights to be withheld if you were convicted of a crime. That conflict is a function of America at once being a place that has very high ideals of freedom and equality, alongside very low practices that undermine the very things that we say we hold dear.” Ryan Haygood spent 12 years as a litigator with the NAACP Legal Defense Fund, where he challenged disenfranchisement laws throughout the country and worked to defend the Voting Rights Act before becoming president of the New Jersey Institute for Social Justice in 2015. “I think the Fourteenth Amendment is a mirror reflection of a country that thinks two things at the same time, and has a hard time knowing which one it values more. We’re a place that espouses liberty and justice for all, but we’re also very comfortable not living up to what that means.”

#### The criminal exception to voting rights in the 14th amendment is racially motivated disenfranchisement

TAYLOR’2018 (Jennifer Rae, Equal Justice Initiative Senior Attorney, “Race, Voting, and a Gaping Loophole: A Critical Look at the 14th Amendment”, 08/13/18, <https://eji.org/news/race-voting-and-a-gaping-loophole-a-critical-look-at-the-14th-amendment/>) lj

In 2002, the New York Times interviewed Southern leaders reflecting on their civil rights era records with hindsight and regret. “Today there is wide consensus that racial segregation is reprehensible and immoral,” the article read. “But 40 years ago, that wasn’t so clear.” Wasn’t clear to … whom? To the Black Americans and others who risked violence and death to protest segregation, discrimination, racial violence, and systematic injustice? When segregationists, or lynch mobs, or slave owners are excused as products of their time, are we to think of the segregated, the lynched, and the enslaved as “ahead of their time?” Was their knowledge of the injustice they faced some type of supernatural premonition? Or awareness of a truth American political institutions had been designed to ignore? If the enslaved could vote, it would not have taken a civil war to end slavery. The statement is so obvious it seems ridiculous: of course a system could not respect people enough to allow them to vote, and also disrespect them enough to treat them as property to be bought, sold, and abused. But there is more there. If disenfranchisement is a tool of oppression, can enfranchisement be a protection against oppression, that benefits the voter and the system their votes help shape? Congress would not have needed to pass the Voting Rights Act, Civil Rights Act, and other civil rights legislation; the United States Supreme Court would not have needed to strike down interracial marriage bans and segregation in schools, buses, and parks; and Jim Crow would not have lasted as long as it did if Black people in the South had been able to vote – and that is why they were kept from the ballot box by law and violent intimidation for generations. Times do change, but not in ways mysterious or unpredictable. If blatant forms of inhumane oppression were seen differently “back then,” it is because disenfranchisement distorts and blinds a nation’s collective view. The ideals of human rights and justice are destroyed and corrupted when whole segments of the population, already disproportionately suffering the effects of inequality, oppression, and exploitation, are also barred from wielding a ballot. This is “the story of Black America,” to use Dr. Johnson’s phrase, because this has been the position, the plight, and the struggle of Black America. Disenfranchisement maintains an unjust status quo by politically marginalizing the very communities best positioned to testify to the effects of injustice. We should regard disenfranchisement with suspicion and intolerance – not just because Black communities remain heavily burdened, but because centuries of Black lives demonstrate the policies’ heavy toll. Honest engagement with that long history can open our eyes to the consequences of labeling whole communities not quite equal enough to speak. “The people most impacted by a system are in the best position to think about ways to fix a broken system,” said Ryan Haygood of the New Jersey Institute for Social Justice, which recently launched a campaign to end felony disenfranchisement in the state. “If you create a system where people with convictions can’t vote to impact policies, you are weakening their voice and the voices of their communities and also undermining the legitimacy of the political and criminal justice systems.” A denunciation of disenfranchisement is not an ode to democracy. Voting alone will not save us. But the dissonance of idealizing freedom and democracy while maintaining an electoral caste system and the world’s highest incarceration rate will leave us little worth saving. If in 50 years, the evil of mass incarceration is portrayed as an unknowable injustice – this era’s particular version of a “different time” – our perpetuation of the unjust legacy of disenfranchisement will stand as damning evidence. Our unironic praise of the Fourteenth Amendment, with its criminal exception to voting rights intact, will be our telltale heart. And our layer of history will leave this lesson again unlearned. Blind spots do not excuse when they are willful. The rest of the story is there if we care to know it. It always has been.

#### More ev- Racial targetting

TAYLOR’2018 (Jennifer Rae, Equal Justice Initiative Senior Attorney, “Race, Voting, and a Gaping Loophole: A Critical Look at the 14th Amendment”, 08/13/18, <https://eji.org/news/race-voting-and-a-gaping-loophole-a-critical-look-at-the-14th-amendment/>) lj

In fall 2016, Alabama Secretary of State John H. Merrill became somewhat infamous in voting rights circles for an interview denouncing automatic voter registration. In the video footage, tall and slim Merrill sits alongside an American flag and ivory fireplace. He recites a list of Black civil rights activists before explaining, “These people fought. Some of them were beaten. Some of them were killed, because of their desire to ensure that everybody that wanted to had the right to register to vote and participate in the process. I’m not going to cheapen the work that they did.” “Just because you’ve turned 18 doesn’t give you the right to do anything,” he continued. “If you’re too sorry or lazy to get up off of your rear and go register to vote, or go register electronically, you don’t deserve that privilege. As long as I’m Secretary of State of Alabama, you’re gonna have to show some initiative to become a registered voter in this state.” On Independence Day of 1852, in Rochester, New York, abolitionist and orator Frederick Douglass delivered his famed address, “What To The Slave Is The Fourth of July?” One of the most haunting lines is at once a diagnosis and prediction for a nation then not yet one century old: “America is false to the past, false to the present, and solemnly binds herself to be false to the future.” A prophecy our present seems to fulfill. What mental gymnastics must it take to cite Dr. Martin Luther King Jr., John Lewis, and Rosa Parks as if anything about their legacies would be insulted by the implementation of broad and accessible voting systems? What falsehoods are required to believe a nation can, at once, be the world’s greatest democracy of justice and equality, boast the world’s highest incarceration rate, and bar from voting more than six million citizens? And what dissonance must we employ to accept and celebrate the Fourteenth Amendment as a legal foundation for all three? Increasingly, critiques of felony disenfranchisement reference the racial motivations of those who crafted 19th century laws linking voting rights to criminal convictions. But there is more there. The racial history of felony disenfranchisement is indeed relevant to its present, in part because of the continued burden disproportionately borne by Black Americans and other people of color – and more so, perhaps, because descendants of Africans enslaved in America have long been the most intimately reviled American child, suffering as the perpetual illustration of a lesson the nation refuses to learn. “Last night, Black voters in Alabama did not vote to save the state or the nation,” Dr. Theodore R. Johnson, a senior fellow at the Brennan Center for Justice, tweeted following Senator Doug Jones’s election. “They simply voted for self-preservation. Any ‘saving’ that occurred happened by proxy. But this is the story of Black America – the Union becomes more perfect when Black folks aren’t disenfranchised.”

# Core Negative Ground

## Topic Disadvantages

Turnabout DA – Passing policy at the federal level to resist Republican advances reduce Democratic willingness to advance meaningful policies at the state level.

Court Politics DA – The aff forces a political compromise, which causes a series of crucial decisions on the supreme court’s docket in 2022-2023 to be ruled in favor of conservatives.

Judicial Supremacy DA – Expansion of the 14th amendment would lead to judicial supremacy that lead to populism that could easily get modeled internationally.

Midterms DA – The 14th amendment has been cited as ground to exclude republican candidates from elections, landmark decisions would shift its interpretation and possibly the elections.

Agenda Politics DA – 14th amendment creates gridlock, and prevents policies passing.

State Sovereignty DA – Federal intervention in state policy reduces state autonomy, removing the power to pass meaningful local legislation.

Federalism DA – Federal consolidation of power through the courts removes power from state legislatures, reducing democracy.

Hollow Hope DA – Courts are not a site of meaningful societal change and trades off with grassroots movements.

Court Clog DA – Legislative ambiguity and relitigation from constitutional reinterpretation fills the courts with difficult to resolve cases and prevents cases from getting through.

### Turnabout DA

#### Qualified evidence exists suggesting that red-state efforts to curtail civil rights can embolden blue states to take parallel efforts to advance progressive initiatives, for example, stricter gun control which might be key to prevent destabilizing certain regions of Latin American countries[[1]](#footnote-1). Alternatively, one could easily imagine the value of sustaining 14th amendment jurisprudence authorizing states to prohibit disinformation or hate speech that otherwise might be considered protected under the Bill of Rights. Affirmatives on this topic would arguably reverse the current precedent permitting state limitations of constitutional rights, freezing these kinds of beneficial initiatives.

Sarat 21

[Austin Sarat, William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. He is author of numerous books on America’s death penalty, including “Gruesome Spectacles: Botched Executions and America’s Death Penalty.”, "Why progressives should resist temptation to imitate Texas law," Hill, 12-15-2021, https://thehill.com/opinion/judiciary/585878-why-progressives-should-resist-temptation-to-imitate-texas-law/?rl=1 // wwu-cjh]

‘Turnabout is fair play’ may be a good slogan for sports or even for the rough and tumble of political life, but it is no way to preserve a constitutional order. Progressives need to remember this lesson and resist the temptation to imitate Texas’s notorious SB8. That bill, in outright defiance of the Supreme Court decision in Roe v. Wade, bans abortion after six weeks of pregnancy; worse, it authorizes vigilantism as a way to enforce its patently unconstitutional abortion restriction. The effect of SB8 has already been felt throughout Texas, as the number of abortions in that state has dropped dramatically. Last week, the Supreme Court carved out a narrow avenue for people to challenge that law, but it allowed SB8 to remain in effect. Doing so was a destructive assault not only on the court’s own authority, but also to the idea that all Americans have rights guaranteed by a national constitution. It was yet another blow to national unity at a time when this country is already dangerously fractured. Writing in the Atlantic, law professor Mary Ziegler said that the court’s decision would usher in a “period of constitutional crisis.” As Ziegler noted, “With its decision, the court has handed states looking to nullify other constitutional rights a road map: Write a law like S.B.8 with a few tweaks, and the court’s majority may sign off on it. The only question will be whether Democrats as well as Republicans take up the court’s veiled invitation to play constitutional hardball.” Waiting in the wings to play hardball are political leaders in both red states and blue states. They are poised to follow Texas’s lead by imitating its seemingly bullet-proof way to avoid constitutional scrutiny. Florida, Arkansas, and other states with Republican-dominated legislatures are ready to use the SB8 precedent to enact their own abortion bans. As advocates warned the court in their briefs attacking SB8, “It is hardly speculation to suggest that if Texas succeeds in its gambit here, New York, California, New Jersey and others will not be far behind in adopting equally aggressive gambits to not merely chill but to freeze the right to keep and bear arms.” California’s Gov. Gavin Newsom was the first to fulfill that prophecy when he announced his intention to use the SB8 mechanism to achieve long-sought progressive ends. He tweeted, “SCOTUS is letting private citizens in Texas sue to stop abortion?! If that’s the precedent, then we’ll let Californians sue those who put ghost guns and assault weapons on our streets. If TX can ban abortion and endanger lives, CA can ban deadly weapons of war and save lives.” The New York Times reports that Gov. Newsom “instructed his staff to work with California’s legislature and attorney general to write a bill that would let citizens sue anyone who ‘manufactures, distributes, or sells an assault weapon or ghost gun kit or parts’ in California.” It quotes the governor as saying, “If the most efficient way to keep these devastating weapons off our streets is to add the threat of private lawsuits, we should do just that.” Doing something about guns and gun violence is without doubt an urgent national priority, but it should not come at the cost of replicating Texas’s lawlessness and the Supreme Court’s indefensible endorsement of it. Nationalization of the Constitution and the Bill of Rights’ protections was a hard-fought achievement and was an especially important goal of liberals for a century or more. It was an important objective of the 20th Century civil rights movement and others looking to make the United States more egalitarian and inclusive. That objective was resisted for generations, leaving states to go their own way in recognizing rights and citizens in one part of the country with one set of rights and citizens elsewhere with another. Indeed, in 1833, the Supreme Court explicitly ruled that the Bill of Rights did not apply in any way to the actions of state or local government. Writing in a case called Baron v. Baltimore, the great Chief Justice John Marshall wrote that “The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States… The powers… conferred on this government were to be exercised by itself, and the limitations on power… are naturally… applicable to the government created by the instrument.” After the Civil War and the passage of the 14th Amendment Marshall’s view began to fall out of favor. Only then did the Supreme Court hold that the word “liberty” used in that amendment referenced the kinds of things protected in the Bill of Rights. But even that did not happen quickly or without resistance. Eight years after the ratification of the 14th Amendment, the court decided in 1876 that even a right as fundamental as the “First Amendment to the Constitution, prohibiting Congress from abridging the right to assemble and petition, was not intended to limit the action of the State governments in respect to their own citizens, but to operate upon the National Government alone.” Indeed, it was not until 1897 that the Supreme Court for the first time began to extend Constitutional rights and the protections guaranteed in the Bill of Rights to exercises of power by state and local governments. Legal scholars have described the slow progress in extending those protections as a process of “selective incorporation,” a process that has not been completed to this day. Along the way, when conservatives have controlled the federal courts, progressives have offered a different vision of federalism in which states could and would act as bastions of liberty. Such a vision looks to state constitutions to afford greater protections than the Supreme Court may hold are applicable under the federal Bill of Rights. But that vision does not hold that states should nullify, ignore or impede the exercise of rights recognized by the Supreme Court. It is precisely the specter of such nullification that makes SB8 so pernicious. Progressives, facing a Supreme Court with at best a cramped vision of the Constitution and the Bill of Rights, need to resist the temptation to play on a terrain defined by those who would use any tool, no matter how dangerous, to achieve their political ends. Doing so may allow Gov. Newsom and others to achieve worthy goals in the short term, but they will — in the end — only amplify the long-term damage being wrought by their political opponents. The last thing the U.S. needs is a proliferating set of copy-cat assaults on our constitutional order. Chief Justice John Roberts got it right in last week’s abortion decision when he reminded all of us that “[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.”

### Court Politics DA

#### Recent peer-reviewed legal scholarship provides strong evidence that the Court Politics DA is a strong option for the negative. An affirmative which forces a significant portion of the conservative majority to simultaneously defect from its (sometimes contradictory) preference for federalism and conservative values while remediating its legitimacy deficit with liberals, could plausibly create space for a future shift away from avoidance tactics and produce a catastrophic compromise that favors conservative interests in one of several significant cases on the court’s 2022-2023 docket addressing issues ranging from the EPA jurisdiction under the CWA, ICWA, internet host liability, the dormant commerce clause, etc.[[2]](#footnote-2).

Bendor and Segey 22

[Ariel L. Bendor\* & Joshua Segev \*\* \* Frank Church Professor of Legal Research, Faculty of Law, Bar-Ilan University. \*\* Associate Professor, School of Law, Netanya Academic College. “”THE ROBERTS COURT, STATE COURTS, AND STATE CONSTITUTIONS: JUDICIAL ROLE SHOPPING,” (January 4, 2022). Law & Policy, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4000283 or [http://dx.doi.org/10.2139/ssrn.4000283 //](http://dx.doi.org/10.2139/ssrn.4000283%20//) wwu-cjh]

In this Article we reveal a dual dilemma, both material and institutional, that the Supreme Court in its current composition faces when reviewing liberal state court decisions based on the state constitution. The Article further describes substantive and procedural tactics that the Court adopts to address this dilemma, and illustrates the arguments by analyzing a number of recent Supreme Court decisions. The two dilemmas, the combination of which serve as a “power multiplier,” of sorts, have arisen following the last three appointments to the Supreme Court, which resulted in a solid majority of conservative Justices nominated by Republican presidents. One dilemma, material in nature, that the Roberts Court faces, is between the federalist component of the conservative legal worldview, that requires federal courts to defer to state courts’ rulings based on state constitutions, and its non-liberal component, based on conservative values. The second dilemma, institutional in nature, stems from the Roberts Court's legitimacy deficit among substantial sections of the American public, mainly supporters of the Democratic Party, which has increased as a result of the three recent appointments. The legitimacy deficit may make it difficult for conservative Justices to fully implement their judicial philosophy. We further argue that the emerging ambivalence of the Roberts Court, which is a consequence of the combination of these two dilemmas, is manifested, in addition to general avoidance doctrines and the specific state ground doctrine, also in two types of judicial tactics, substantive (such as seeking judicial compromise in order to reach a broad common denominator among the Justices) and procedural (such as encouraging other branches to carry out their obligations until the dispute is reasonably resolved), that the Court adopts in coping with liberal state court decisions based on the state constitution. In the last Part of the Article we illustrate our contentions by analyzing three recent Supreme Court decisions: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission (2018), Espinoza v. Montana Department of Revenue (2020) following Trinity Lutheran Church of Columbia, Inc. v. Comer (2017), and Republican Party of Pennsylvania v. Boockvar (2020).

### Judicial Supremacy DA

#### Abundant literature exists raising separation of powers concerns about an expanded interpretation of the 14th amendment. The following card goes so far as to suggest it opens the floodgates to total judicial supremacy and “government by lawsuit.” The risks of expanding precedent for a conservative Supreme Court to (in)validate rights should be apparent to readers, suggesting turns case arguments.

Cordova 18

[Nick Cordova, 2021 graduate of Harvard Law School, alumnus of Waynesburg University's Stover Center for Constitutional Studies and Moral Leadership, and a law clerk at the United States Court of Appeals for the Third Circuit, “The Path to Judicial Supremacy: How the Supreme Court has Disregarded the Advice of Robert H. Jackson in Interpreting the Fourteenth Amendment and Undermined the Separation of Powers,” Robert H. Jackson Center, 6-21-2018, https://www.roberthjackson.org/article/the-path-to-judicial-supremacy-how-the-supreme-court-has-disregarded-the-advice-of-robert-h-jackson-in-interpreting-the-fourteenth-amendment-and-undermined-the-separation-of-powers/ // wwu-cjh]

Answering the neither or both question is significant because one’s solution to the dilemma has a major effect on the relative power of the judiciary. If the Fourteenth Amendment allows the Court to expand its language to create protections that were clearly neither contemplated by its framers nor part of the ratifying public’s understanding, then the Court is free to substitute its own moral judgements for duly enacted legislation. The Court in this scenario really becomes a super legislature in which the opinion of any five justices becomes law above review and repeal. While this arrangement would inevitably produce some favorable outcomes for any particular ideology, it would not, over time, unbendingly align with any. Additionally, because the Court’s decision is final, it leaves the losing parties with no reason to express their discontent through the safe channels of political advocacy. The legislative and executive branches could be irreversibly frustrated at any time by a disaffected individual who gains the ear of a sympathetic court. A situation in which the will of the American people expressed through their state and national representatives can be undermined by a determined interest group with good lawyers really would amount to what Robert Jackson calls “government by lawsuit,” and what Raoul Berger calls “government by judiciary.” It is possible to argue that such a thing is more desirable than the system of republican government that came into being in 1789, but Robert Jackson insisted that we acknowledge its fundamental difference from representative democracy if such judicial power is to be preferred and exercised in the United States of America.

#### While judicial review may already be strong in some areas, the issue-specific uniqueness still goes strongly negative.

Patti 19

[F. Italia Patti. Assistant Federal Defender, Indiana Federal Community Defenders. B.A., J.D., University of Chicago. “Judicial Deference and Political Power in Fourteenth Amendment and Dormant Commerce Clause Cases,” SAN DIEGO LAW REVIEW, [VOL. 56: 221, 2019], <https://digital.sandiego.edu/cgi/viewcontent.cgi?article=2649&context=sdlr> // wwu-cjh]

II. THE SUPREME COURT’S DIVERGENT LEVELS OF DEFERENCE IN FOURTEENTH AMENDMENT AND DORMANT COMMERCE CLAUSE CASES

The Supreme Court takes two divergent approaches to Fourteenth Amendment and dormant Commerce Clause cases. The Court takes a passive approach in Fourteenth Amendment cases, deferring substantially to legislatures, and an active approach in dormant Commerce clause cases, deferring little to legislatures.

1 A. The Passive Approach in Fourteenth Amendment Cases

In Fourteenth Amendment cases, the Court has frequently emphasized the importance of judicial restraint. The Court argued that using “the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise” would encroach on legislatures’ power.2 Justice Felix Frankfurter, in particular, argued in Fourteenth Amendment cases that judicial power “must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. [I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power.”3 Scholars have gone further. Alexander Bickel argued that willingness to invalidate state laws on Fourteenth Amendment grounds was an “assault upon the legal order” that promoted lawlessness.4 Bickel even expressed the view that repealing the Due Process Clauses “might have been a solution” to judicial activism because the Due Process Clauses left too much room for judicial policymaking.5 Bickel praised Justice Frankfurter6 for his tendency to defer to state legislatures, noting that he would “defer[] in two senses; in many instances he deferred judgment, or in rendering judgment he deferred to the political institutions.”7 Concerns about judicial overreach have significantly impacted the Court’s review in Fourteenth Amendment cases. The Court has constrained its review of legislative decisions challenged on Fourteenth Amendment grounds in at least two ways. First, as discussed in Section II.A.1, the Court has refused to strike down laws under the Fourteenth Amendment’s Due Process Clause even if there is evidence that the law’s main purpose is to benefit an interest group.8 Second, as discussed in Section II.A.2, the Court has refused to invalidate laws under the Fourteenth Amendment’s Equal Protection Clause unless the challenged laws discriminate expressly or intentionally.9 Moreover, the Court will not searchingly review the available evidence to uncover discriminatory intent.10

#### Whether or not the debate hivemind will uncover international modelling internals (as it does for every topic for which there is a rich comparative and/or international legal lit base), potentially huge populism impacts ensue.

Issacharoff 19

[Samuel Issacharoff, Reiss Professor of Constitutional Law, New York University School of Law. “JUDICIAL REVIEW IN TROUBLED TIMES: STABILIZING DEMOCRACY IN A SECOND-BEST WORLD,” 98 N.C. L. REV. 1 (2019). Available at: [https://scholarship.law.unc.edu/nclr/vol98/iss1/3 //](https://scholarship.law.unc.edu/nclr/vol98/iss1/3%20//) wwu-cjh]

B. Managing the Risk

At risk when the link to electoral politics becomes too attenuated is that the judiciary will become simply a substitute for democratic politics. Once armed with constitutional authority, emboldened by its reservoir of competence, and then ennobled by the public choice insight about the risk of capture of the political branches, there is the risk that the domain of politics is limited to confirmation of first-order constitutional proclamations of rights. All the more so if claims of “ex post facto popular approval” of judicial interpretations by public acquiescence provide for no real measure of such endorsement of judicial authority. 261 Here I find myself in agreement with Bellamy that, under such a broad claim of judicial power, the judiciary itself will become the battleground for partisan strife, most visibly at times of contested judicial appointments, and that battles over the judiciary will displace normal forms of partisan contest through politics: “Effort will go into capturing the judiciary rather than constructing a legislative majority by reaching a mutually acceptable compromise with one’s political opponents. As a result, both sides become ever more polarised.”262 But the risk potentially reaches beyond the question of who sits as the judicial expositor of broad constitutional rights. While there are many examples of increasingly pitched battles over who are the judges, from the United States to Argentina, there are few examples of judges so commanding public policy as to diminish democratic politics in some provable context. But an analogy may be drawn to the hollowed ambit of domestic politics in the European context in ways that may serve as a caution. Writing at the beginning of the populist upsurge that would bring to prominence Wilders in the Netherlands, Le Pen in France, Podemos in Spain, Five Star in Italy, and a host of more menacing figures in Eastern Europe, Peter Mair cautioned that the centralization of increasing authority in European authorities had voided domestic national politics of responsibility for governance. The increased distance between electoral contestation and governing authority made politics a choice grounds for increasingly demagogic posturing with little accountability for subsequent governance. With broad anticipation of how traditional European political parties have withered before polar politics, Mair wrote: As popular involvement fades, . . . and as indifference grows, we can expect that even those citizens who do continue to participate will prove more volatile, more uncertain and more random in their expressions of preference. If politics no longer counts for so much, then not only should the willingness to vote begin to falter; so also should the sense of commitment among those who continue to take part. Choices are likely to prove more fickle, and to be more susceptible to the play of short-term factors. . . . Hand in hand with indifference goes inconsistency.263 And if the result of political posturing is that Spain is without a government for months on end,264 or Belgium even longer,265 not much matters because ultimate responsibility lies at the non-electoral level of European Union administration. When governance fails, Brussels may still rule Belgium, but it is not the elected representatives of the Belgian citizenry who are making the decisions. By analogy, the risk is that the judicialization of public policy may similarly contribute to voiding out customary politics and even turn national politics into a referendum on the judiciary. Certainly hostility to the European Court of Human Rights has been an oft-raised theme among the populist right in Europe, and the social rights rulings of the Colombian Constitutional Court serve as the backdrop for political contestation seemingly far removed from the actual rulings of the court. 266

### Midterms DA

#### Early in the season, negative teams may opt to leverage the midterms DA as core negative generic. The fact that the fourteenth amendment has been cited as possible grounds for excluding certain Republican candidates from the ballot suggests new landmark court rulings or legislation based on the same could give fodder for GOP to rally their base in advance of the elections[[3]](#footnote-3).

### Agenda Politics DA

The narrative of the politics DA is consistent yet stronger than the past topics. The uniqueness of this topic is that it is very apparent in the political sphere, making strong uniqueness and link scenarios plentiful. Currently I see 2 big scenarios. One could be in regard to Congress Covid spending, and the other around aid to Ukraine (both could impact pretty cleanly to extinction). As these arguments develop, there are surely more to appear, but laid below is what one could look like during the writing of this paper.

#### 14th amendment hearings and rulings drain political capital

Robertson 22, GARY D. ROBERTSON, 3-26-2022, staff writer, Explainer: Why the 14th Amendment has surfaced in midterms, Twin Cities, https://www.twincities.com/2022/03/26/explainer-why-the-14th-amendment-has-surfaced-in-midterms/amp/

Explainer: Why the 14th Amendment has surfaced in midterms

Lawmakers point at Rep. Marjorie Taylor Greene, R-Ga., after President Joe Biden delivered his first State of the Union address to a joint session of Congress at the Capitol, Tuesday, March 1, 2022, in Washington. (Jim Lo Scalzo/Pool via AP)

RALEIGH, N.C. — An 1868 amendment to the U.S. Constitution best known for protecting the due process rights of previously enslaved Americans has resurfaced in certain congressional races this year. Some attorneys and voters believe a rarely cited section of the 14th Amendment dealing with insurrection can disqualify a handful of U.S. House members from seeking reelection for events surrounding the Jan. 6, 2021, riot at the Capitol. First-term Republican firebrands Madison Cawthorn of North Carolina and Marjorie Taylor Greene of Georgia are among those targeted. Both are strong supporters of former President Donald Trump who have pushed his unsubstantiated claims of voter fraud in the 2020 presidential election. It’s a largely untested argument working its way through election agencies in at least three states, with little success so far. But court cases and appeals could address the extent to which state officials can scrutinize the minimum qualifications for candidates for federal office. WHAT DOES THE 14TH AMENDMENT SAY? There are five sections to the amendment. The best-known declares that no state can “deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Section 3 of the amendment also declares that no one can serve in Congress “who, having previously taken an oath, as a member of Congress … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same.” This section was designed to keep representatives who had fought for the Confederacy during the Civil War from returning to Congress. The amendment, however, allows Congress to pass laws that can remove such restrictions. HOW COULD IT APPLY TO LAWMAKERS TODAY? Voters from congressional districts where Cawthorn and Greene are seeking reelection this fall allege in legal filings that evidence shows they helped facilitate the Jan. 6, 2021, insurrection that attempted to thwart the certification of President Joe Biden’s Electoral College victory. The voters want state officials to investigate Greene and Cawthorn and disqualify them from appearing on ballots this year, based on the amendment’s language. Greene, according to a challenge filed Thursday with Georgia Secretary of State Brad Raffensperger, either helped plan the riot or helped plan the demonstration held beforehand, knowing that it was “substantially likely to lead to the attack, and otherwise voluntarily aided the insurrection.” In a video posted on social media, Greene said: “You can’t allow it to just transfer power ‘peacefully’ like Joe Biden wants and allow him to become our president because he did not win this election.” Somewhat similar allegations have been lodged with the North Carolina Board of Elections by voters challenging Cawthorn. Cawthorn spoke at the “Save America Rally” before the riot, days after he was sworn in to office, saying the “crowd has some fight in it.” A longshot Democrat candidate seeking to unseat Indiana Republican Rep. Jim Banks filed similar allegations against Banks with the state elections commission. HOW HAVE THE REPRESENTATIVES RESPONDED? Greene and Cawthorn have said they did nothing unlawful such as encouraging political violence or participating in an insurrection. Cawthorn, who was the first representative subjected to the challenge in January, said activists are going after “America First patriots” who backed Trump. Greene said she was targeted because she is “effective and will not bow to the DC machine.” Cawthorn proceeded to sue the State Board of Elections in federal court, saying that North Carolina’s candidate challenge process violated his constitutional rights and should be overturned. His lawyers also said Section 3 didn’t apply to Cawthorn because of congressional action in 1872. Free Speech for People, a national election and campaign finance reform group, is helping represent the voters in both challenges. The group has said more challenges could be filed against other members of Congress who are seeking reelection. WHAT’S HAPPENED TO THE CHALLENGES? Indiana’s state elections commission voted unanimously last month to reject the challenge against Banks. The commission’s chairman, a Republican, called the Capitol riot a “regrettable mark in history” but said there was no evidence that Banks was guilty of taking part in an insurrection. As for Cawthorn, U.S. District Judge Richard Myers ruled earlier this month that the State Board of Elections could not hear the voters’ challenges on Section 3 claims. Myers wrote that the 1872 law that removed office-holding disqualifications “from all persons whomsoever” — save for those who served in two specific legislative sessions among others — “demonstrates that the disability set forth in Section 3 can apply to no current member of Congress.” The North Carolina Board of Elections hasn’t appealed so far. Myers previously rebuffed efforts by voters who filed challenges to participate in the litigation, but the 4th U.S. Circuit Court of Appeals told him last week to reconsider their entry. Myers’ ruling could come as soon as next week. COULD VOTERS ULTIMATELY HAVE THEIR SAY? Free Speech for People argues that the 1872 law applied only to former members of the Confederacy: “The right of voters to bring this challenge to Cawthorn’s eligibility must be preserved,” group legal director Ron Fein said this month. Michael Gerhardt, a constitutional expert at the University of North Carolina law school, said he believes the 1872 law could be construed more broadly than how Myers ruled. But he also said the chances that candidate challenges will go forward under insurrection claims are “probably not good.” “It’s really a novel theory and there’s no consensus on what the actual procedure should be, and that does pose a problem,” Gerhardt said. He said it’s unclear, for example, whether a declaration that someone participated in an insurrection should come from a judge hearing evidence, state officials or Congress. If the challenges are unsuccessful or delayed, voters still will get to decide whether the subjects of the challenges should return to Congress. Greene and Cawthorn have GOP primaries in May. Cawthorn may have the more difficult road, with seven GOP opponents. He also has taken criticism for a video in which he called Ukrainian President Volodymyr Zelenskyy a “thug” even as his country resists a Russian invasion.

#### In court right now, the question is the final decision that will solidify relationships - this is bad for future political agendas

Wolf 22, Zachary B. Wolf, 4-25-2022, Politics Analysis Writer, Analysis: What's going on with Marjorie Taylor Greene and the 14th Amendment, CNN, https://amp.cnn.com/cnn/2022/04/25/politics/marjorie-taylor-greene-jan-6-what-matters/index.html

What's going on with Marjorie Taylor Greene and the 14th Amendment (CNN) Her critics say she fomented the January 6 insurrection, but Republican Rep. Marjorie Taylor Greene can't remember much about it. The congresswoman who prides herself on being a provocateur used variations of that theme -- "I don't recall" -- more than 50 times during testimony in a Georgia courtroom last week. The hearing about whether to disqualify her from seeking reelection took place on Friday -- before CNN published text messages on Monday in which Greene, in the weeks after Election Day 2020, suggested to then-White House chief of staff Mark Meadows that then-President Donald Trump could declare martial law to change the results of the presidential election. Amnesia about January 2021 is in the air. House Minority Leader Kevin McCarthy was caught in a lie, or an epic bout of forgetfulness, when he said last week he never considered calling on Trump to resign -- before reporters for the New York Times produced audio of him doing just that. There's a big difference between lying, which isn't illegal, and lying under oath, which can be illegal. And there's a very open question about whether a lawmaker who rejected US democracy should get to work in the US government. The long-shot bid to remove Greene from the ballot is an unprecedented attempt to exclude someone from office and could be a trial run for an effort against Trump, who is primed to try to get his old job back. Here's what to know about the attempt to hold Greene accountable for her alleged role in the January 6 insurrection: Has Greene been charged with a crime? No. Greene hasn't been charged with any crime and she denies doing anything other than calling for peaceful protest on January 6, 2021. There's not any indication she's under criminal investigation. In fact, despite hundreds of cases stemming from the insurrection, federal authorities haven't charged any public officials with violating the insurrection portion of US law, which would also ban a person from holding public office. Why was Greene in court last week? The challenge to Greene's candidacy was initiated by a group of Georgia voters who are working with liberal activists and constitutional scholars. Why would Greene be disqualified from holding office? There is a provision of the 14th Amendment to the US Constitution that bars officeholders who take part in or assist an insurrection from ever holding office again. The Georgia voters and liberal-leaning activist groups are using that provision to try to disqualify Greene from holding public office at the state or federal level in the future. What exactly does the relevant portion of the 14th Amendment say? Section 3 of the 14th Amendment is quite short, but not very simple. Here's what it says: No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. Has anyone ever been disqualified from holding office under this provision? Yes. But not in a very long time. The provision was passed to bar Confederates who had abandoned their oath to the US Constitution from government positions. That ban didn't last long, however. A blanket amnesty for former Confederates was passed in 1872, making the vast majority of the rebels again eligible for office. In 1898, it was removed for the last few hundred former Southern congressmen and senators. It was even symbolically removed for chief Confederates Jefferson Davis and Robert E. Lee with votes in Congress in the 1970s, even though both men had been dead for many decades. Do Greene's opponents say she took part in the insurrection? Greene was in the House and among the lawmakers who were evacuated when the Capitol was breached on January 6, 2021. She is not among the approximately 800 people who have been charged with taking part in the storming of the building. Rather, the group challenging Greene's candidacy says she helped inspire the insurrection and encouraged it. How do her opponents say she encouraged the insurrection? Here's what the attorney Andrew G. Celli Jr., who questioned Greene in court, said on CNN's "New Day" on Monday: On January 5th, the day before the insurrection, Congresswoman Greene told her followers on her Facebook page, on a national broadcast, that tomorrow is 1776. Now, that's the kind of rhetoric ... where people understood that 1776 was code for break into the Capitol, do violence, and most importantly, block the certification of Joe Biden. That is an act of insurrection. We demonstrated ... and proved that. What is Greene's response? In her testimony last week, Greene said that in referring to 1776, she was talking about "the courage to object" to the counting of electoral votes. Greene denied knowledge of any scheme to disrupt the electoral vote count in Congress and said she didn't know key players who organized the rally that preceded the congressional breach. She also fiercely rebuked any suggestions that violence was what she had in mind as she called for protests and objections to Congress' certification of Biden's win. What can't Greene remember? CNN's Marshall Cohen rounded up some of the larger things -- extremely pertinent details -- to slip Greene's mind: She said she didn't remember saying she opposed the peaceful transfer of power to President Joe Biden -- right before lawyers for the challengers played a video of her saying just that. She denied calling House Speaker Nancy Pelosi a "traitor" who might deserve the death penalty, but backtracked and acknowledged the comment when the challengers started to play the footage. Who decides if Greene should be disqualified? State Judge Charles Beaudrot, who presided over the hearing in Georgia, will make a recommendation within the next few weeks and then Georgia Secretary of State Brad Raffensperger will make the decision. Appeals are likely. "There will be court appeals. This will go to the Georgia Supreme Court ultimately," Celli said. Aren't we getting close to Georgia's primary? Yes, we are. Ballots have been printed and it's scheduled for May 24. In the event Greene was disqualified from the ballot, local officials would have to communicate to voters and post notices at polling places that votes for Greene would not be counted, according to Cohen's report. Do any other lawmakers face an effort like this? There was a similar effort against Republican Rep. Madison Cawthorn in North Carolina, but a federal judge shut it down. If the effort is successful against Greene, there's a school of thought it could be used against Trump in 2024. **What's the argument against this type of maneuver? One basic principle of democracy is that voters should get to choose their leaders**. The hard question is whether they should get to choose a leader who rejected the outcome of democracy in 2020. **Greene's lawyers have also argued that the disqualification hearing was inherently unfair and that the challengers were trampling on her free-speech rights**. Hasn't Greene already been ostracized? Sort of. Lawmakers refused to allow her to sit on committees because of controversial statements she's made, although only a handful of Republicans voted against her. Greene continues to be popular with the hard right of the party. And there are indications the party is moving toward her. She's traveling with McCarthy to the border with Mexico this week to raise the alarm about Biden's immigration policy. What are voters going to have to say about all of this? **This is the strange state of the US political scene, where those searching for accountability for the Capitol insurrection continue to run into roadblocks while Republican leaders, in their effort to move on, are eying big gains if frustrated voters turn on Democrats in November.**

#### Currently in congress: National Covid-19 Preparedness Plan – affects lives in US and internationally - extinction

**White House,22**, 4-27-2022, Fact Sheet: Biden Administration Underscores Urgent Need for Additional COVID-19 Response Funding and the Severe Consequences of Congressional Inaction, https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/27/fact-sheet-biden-administration-underscores-urgent-need-for-additional-covid-19-response-funding-and-the-severe-consequences-of-congressional-inaction/

The Biden Administration is sounding the alarm for the urgent need for Congress to provide funding for the nation’s COVID-19 response and is underscoring the severe consequences of their inaction: Fewer vaccines, treatments, and tests for the American people, and fewer shots in arms around the world. Over the past 15 months, the Biden Administration has used the resources Congress provided to mobilize a comprehensive COVID-19 response. As a result, the United States has made tremendous progress in our fight against the virus—saving over 2 million American lives, safely reopening our schools, creating jobs at a record pace, returning to more normal routines, and averting $900 billion in health care costs. In March, the President laid out a comprehensive National COVID-19 Preparedness Plan to keep America moving forward safely, by ensuring that lifesaving tools like vaccines and treatments remain free and widely available to Americans, by preparing for potential surges and new variants, and by getting more shots in arms around the world. Executing this plan remains essential to sustaining the progress we have made and saving more lives. There has been an uptick in cases in parts of the country and, while cases will continue to fluctuate, this virus has proven itself to be unpredictable. Without funding, the United States will be unprepared for whatever comes next. **COVID-19 isn’t waiting on Congress to negotiate**. Other countries will not wait. Time is of the essence. Congress must act urgently to help save more American lives and ensure we remain prepared. Congressional inaction on additional COVID-19 response funding means: Fewer Vaccines for Americans: The Administration cannot secure enough booster shots for every American, if they are needed in the fall. At this moment, the United States has enough supply to support one booster shot for Americans age 12 and over, and additional boosters for immunocompromised individuals and those age 50 and older. However, if additional booster shots are authorized and recommended for the general population, we will not have the supply necessary to provide free and easy access to them for all Americans. At this time last year, the Administration was contracting for future boosters that could ultimately be needed starting in September; this allowed us to make those booster shots free and widely available as soon as they were authorized. The Department of Health and Human Services (HHS) needs to begin contracting for boosters imminently so that the agency can conclude contractual negotiations as soon as May to ensure delivery of sufficient supply by September. Other countries are already placing orders for future needs and as a result, will get supply before it is available for Americans. Just yesterday, Pfizer submitted an application to the U.S. Food and Drug Administration (FDA) for Emergency Use Authorization for its booster for kids ages 5 to 11. If these boosters are authorized and recommended, we would not have enough supply for every child in that age group. Not having enough supply to support booster shots for everyone, if needed, ***puts American lives at risk***, and is a completely avoidable outcome. The Administration cannot secure new COVID-19 vaccines to protect against multiple variants for the American people. Vaccine manufacturers are working on developing vaccines that could offer broader and longer-lasting protection than our existing vaccines—and there is ongoing discussion among scientific and medical experts, including FDA’s panel of outside experts, about the potential need for vaccines with new formulations in the future to better protect us from variants. Just this month, Moderna released data on a new vaccine that could potentially offer better protection against multiple variants. The company also announced that it expects to release data on an Omicron-specific vaccine soon. This means that there could be more effective vaccines available as soon as this fall that can enhance the protection Americans receive from getting vaccinated. The United States should be securing these vaccines today, but without funding, the Administration cannot purchase doses for the American people or even ensure that America is in line for them. This could mean people in other countries have access to the best lifesaving vaccines before Americans. Vaccines have proven to be our single-most important tool in protecting people, and the best ones should be available for the American people. Fewer Treatments for Americans: The Administration cannot restock the nation’s supply of lifesaving treatments. To date, the Administration has distributed over 9.6 million courses of treatment across the country, working with states and territories, Tribes, pharmacies, federal health centers, and other partners to provide them to Americans for free. Due to a lack of funding, we have already missed the opportunity to purchase additional supply of these lifesaving treatments. To stretch our supply as much as possible, last month, the Administration was forced to cut the number of monoclonal antibody treatments distributed to states by over 30 percent. Ensuring these treatments remain free, widely available, and easy to access for people who need them is crucial to our nation moving forward safely. The Administration cannot invest in promising treatments or secure newer, even better treatments for the American people. The federal government will not be able to invest in next-generation treatments that have the potential to provide broader protection against future variants or to treat people who may not be able to take full advantage of current treatments. Several candidates may be promising, and the United States will lose an opportunity to secure its spot in line and to support ramped-up manufacturing capacity of these treatments if we do not have funding to secure supply prior to a potential authorization or approval. Given COVID-19’s potential to mutate, it is also prudent to support and secure a range of effective treatments that attack the virus in different ways to guard against future variants. The Administration will have to scale back purchases of treatments that protect immunocompromised Americans. The Administration has secured more than 1 million courses of Evusheld, a preventive therapy for immunocompromised people. Due to lack of funding, we have had to substantially scale back our plans to purchase additional supply. This therapy takes months to produce, and at this point, we are at risk of missing out on supply that will be delivered in the last few months of 2022. Congressional inaction will put immunocompromised individuals at greater risk as we enter this fall. Fewer Tests for Americans: The Administration cannot sustain domestic testing manufacturing capacity and will be unprepared for another surge in testing demand. Omicron drove unprecedented demand for COVID-19 testing around the world. As cases have fallen dramatically, so has demand for testing. Demand will continue to decrease over time, and as a result, domestic manufacturers will start ramping down production across the next several weeks and months. Federal investments are a crucial way to preserve the domestic testing manufacturing capacity we have built over the last 15 months. Without these investments, it will take manufacturers months to ramp back up to rebuild capacity, so failure to invest now will leave us with insufficient testing capacity and supply if we see another surge in cases and demand for testing increases once again. This would mean empty store shelves, long lines at testing sites, and slower results which will have life-or-death consequences for people who need to take lifesaving treatments within days of becoming symptomatic. That should not be allowed to happen. Fewer Shots in Arms Around the World: The United States cannot supercharge our effort to get more shots in arms, putting us at greater risk for more variants that may prove to be even more dangerous than the ones we have faced to date. The U.S. has now delivered over half a billion adult vaccines to 114 countries. Countries need funding and assistance to turn vaccines into vaccinations. Without additional funding for our global response, we will not have resources to help get more shots in arms in countries in need—which is one of the best ways we can prevent future variants. We will also lack funding to provide oxygen and other lifesaving supplies, and our global genomic sequencing capabilities will fall off—undermining our ability to detect any emerging variants around the world.

#### Dems have a slim chance winning the covid funding proposal.

Godfrey 22, Elaine Godfrey, 3-19-22, Staff Writer, “Republicans think they can win the COVID funding fight”, The Atlantic, <https://www.theatlantic.com/politics/archive/2022/03/covid-relief-aid-congress-republicans/627109/>

If a new coronavirus variant surges in the United States this year—perhaps the one currently tearing through Europe—there’s a reasonable chance that the country will be unprepared to fight it. You can thank Congress for that. Last week, lawmakers passed a massive spending bill without any additional funding for COVID-19 relief, despite White House pleas for more. Democrats would like to fulfill the administration’s request. But Republicans have taken the position that Congress has already done enough. “We don’t need COVID funding,” GOP Representative Randy Feenstra of Iowa told me. “Most people would say we’re done. We have more issues with inflation than COVID right now.” Politically, Republicans feel safe making this argument. New cases of COVID have been decreasing for weeks, and hospitalizations are on the decline too. Most cities that had mask mandates have gotten rid of them. Many Americans tell pollsters that they’re ready for the country to move on; people are focused on other issues, such as Russia’s war in Ukraine and rising gas prices. But more than 1,000 people are still dying every day from COVID. Experts predict that the new BA.2 subvariant could be the dominant strain in the United States in a matter of weeks. In other words, **refusing to approve new funding is a risk.** “People want us to be prepared in advance and stabilized,” the Democratic pollster Celinda Lake told me. “Republicans are voting against both.” If COVID gets much worse over the next few months, Democrats will rush to blame the GOP, especially if Republican members strike down a stand-alone vote on COVID relief. “They’re forcing a situation that’s going to make it worse for them” in November, Lake said. Of course, by election season, a spring debate over COVID funding will be a distant memory. If a new variant has overwhelmed the country by then, the partisan discourse will probably center on mask mandates and vaccines instead. Perhaps Republicans are right to bet that voters won’t punish them for blocking new funding. Republicans were skeptical about approving more money to combat the virus; they’d suggested that the government simply repurpose any funds that states hadn’t yet spent (but may have already earmarked). After many Democrats balked at this idea, House Speaker Nancy Pelosi stripped COVID aid from the funding bill entirely, hoping to deal with it separately later. Democrats may soon try to pass COVID relief as a stand-alone bill, but the chances of getting it through the tied-up Senate are slim. The White House is now warning that as soon as next week, the government will have to cut shipments of monoclonal-antibody treatments by a third, as my colleague Ed Yong wrote earlier this week. By next month, it won’t be able to reimburse health-care providers for treating uninsured Americans with COVID. By the summer, it’ll have to cut funds for test manufacturers. Perhaps most crucially, it’ll scale back global vaccination efforts that would help keep new variants from emerging. Democrats want to answer the White House’s call, though they’re divided on how to do it. Some members are a bit more closely aligned with Republicans, and would prefer to take an accounting of current COVID funds and redirect them to fulfill the White House’s needs. “There is a lot of money sloshing around,” Representative Elissa Slotkin of Michigan told me. “People understand the desire to sweep unspent funds; I just want that conversation to be fair.” Others, mainly progressives, support new spending, and even authorizing emergency funds for COVID relief. “We just put enormous amounts of money into defense spending” for Ukraine, Representative Pramila Jayapal of Washington, the chair of the Congressional Progressive Caucus, told me. “We’re literally asking for very little money here to deal with this global pandemic.” Republicans, on the whole, believe that Congress has already spent enough money combatting COVID in the past two years. “Everybody obviously is tired of all this, and I don’t mean that in a dismissive way,” Representative Tom Cole of Oklahoma told me. “The administration’s requests are legitimate, but we have the money; we don’t need to go deeper into debt.” Using up resources that have already been allocated is more important, GOP members argue. When I asked Representative Ron Estes of Kansas whether the possibility of a surge in cases due to a new variant would change Republicans’ views on funding, he told me that it’s “one of those things that we’ll have to see how it plays forward.” Estes also suggested that more Americans have natural immunity now, after so many contracted the most recent Omicron variant. To pass COVID relief on its own, rather than tucked into some larger package, Democrats would likely have to pair any new funding with spending cuts elsewhere to get it through both chambers of Congress. “All epidemics trigger the same dispiriting cycle,” Yong wrote earlier this week. “First, panic: As new pathogens emerge, governments throw money, resources, and attention at the threat. Then, neglect: Once the danger dwindles, budgets shrink and memories fade.” In Washington, D.C., the easiest thing to do is nothing. If lawmakers fail to pass any more money for testing or research or monoclonal-antibody treatments before another variant is raging through the United States, their neglect won’t be a surprise. But their panic might come too late.

#### For More:

#### 14th Amendment advances destroys democracy

**Turley 22** Jonathan Turley, Opinion Contributor, 4-21-2022, Destroying democracy to save it? Court advances effort to block GOP candidates from ballots, Hill, <https://thehill.com/opinion/judiciary/3275409-destroying-democracy-to-save-it-court-advances-effort-to-block-gop-candidates-from-ballots/>

#### Changing the constitution is polarizing and could destroy order.

**McCarty 19,** Nolan McCarty, 5-25-2019, Polarization and the Changing American Constitutional System (Chapter 12), Cambridge Core, <https://www.cambridge.org/core/books/abs/can-america-govern-itself/polarization-and-the-changing-american-constitutional-system/EC48F6A1559C4CAF67591F738BFF5A35>

#### Even Constitutional amendment suggestions lead to gridlock.

**Farina 15**, Cynthia R. Farina, 2015, William G. McRoberts Research Professor in Administration of the Law, Congressional Polarization: Terminal Constitutional Dysfunction?, Columbia Law Review, <https://columbialawreview.org/content/congressional-polarization-terminal-constitutional-dysfunction-2/>

#### Polarization threatens the destruction of US democracy

**McCoy 22**, Jennifer Mccoy, Benjamin Press,22, 1-18-2022, What Happens When Democracies Become Perniciously Polarized?, Carnegie Endowment for International Peace, Carnegie Endowment for International Peace, <https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190>

#### Polarization greatly impacts legislature functioning, but can be mitigated

**Walter 21**, Amy Walter, 12-7-21, Can America’s Political Polarization Be Fixed?, Democracy Journal, <https://democracyjournal.org/magazine/62-special-issue/can-americas-political-polarization-be-fixed/>

#### Reducing polarization is essential

**Lai 22,** Samantha Lai, 1-26-2022, Reducing extreme polarization is key to stabilizing democracy, Brookings, <https://www.brookings.edu/blog/techtank/2022/01/26/reducing-extreme-polarization-is-key-to-stabilizing-democracy/amp/>

#### The time to save democracy from increasing polarization is closing

Glasser 21, Susan B Glasser, 5-27-2021, American Democracy Isn’t Dead Yet, but It’s Getting There, New Yorker, <https://www.newyorker.com/news/letter-from-bidens-washington/american-democracy-isnt-dead-yet-but-its-getting-there>

### State Sovereignty DA

#### Squo interpretations of state sovereignty are broad but frail, which enables states to bypass patent law for mass production of medicine

Kumar ’21 (Sapna Kumar is an expert in administration and international law related to patent rights and 2018 fullbright schuman innovation grant recipient who works at the university of Houston law center as a professor of law and co-director of the institute of intellectual property and information law at the university of houston, “Promoting public health through state sovereign immunity,” Journal of Law and Innovation, Volume 4, No. 1, November 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1015&context=jli)//wwu-kck  
2. Patent-Related Case Law on Sovereign Immunity In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, the Supreme Court held that Congress’s waiver of state sovereign immunity under the Patent and Plant Variety Protection Remedy Clarification Act was unconstitutional.60 The statute expressly held that states, state instrumentalities, and state officers and employees were not immune under the Eleventh Amendment and doctrine of sovereign immunity for patent infringement.61 However, the Court observed that “Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.”62 It further noted that state patent infringement “does not by itself violate the Constitution,” unless “the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent.”63 Finding “scant support” for states “depriving patent owners of property without due process of law,” the Court concluded that the provisions “are ‘so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.’”64 If a state chooses to sue a defendant for patent infringement, then the defendant may challenge the validity of its patents. For example, in University of Florida Research Foundation v. General Electric Co., the University of Florida Research Foundation (UFRF) sued General Electric (GE) for patent infringement. GE moved to dismiss, arguing that the patent was directed towards ineligible subject matter under § 101 of the Patent Act, while UFRF claimed that its sovereign status blocked GE’s attempt to invalidate its patent.65 The Federal Circuit affirmed the district court, holding that the patent was invalid. It noted that UFRF waived its immunity by “voluntarily appearing in federal court,”66 and that that this waiver extended “to any relevant defenses and counterclaims.”67 States are furthermore not immune from inter partes review (IPR) challenges in the Patent Trial and Appeals Board. In Regents of Univ. of Minn. v. LSI Corp., the University of Minnesota claimed sovereign immunity shielded it from an IPR challenge of several of its patents.68 The Federal Circuit acknowledged that sovereign immunity applies “to agency adjudications brought by private parties that are similar to court adjudications.”69 However, it noted that the Supreme Court in Cuozzo Speed Techs., LLC v. Lee “concluded that IPR proceedings are essentially agency reconsideration of a prior patent grant.”70 The Federal Circuit consequently held that state sovereign immunity does not apply, given “that IPR is in key respects a proceeding between the government and the patent owner.”71 The three judges who issued the decision also provided “additional views,” noting that sovereign immunity should not apply to in rem proceedings, even for adversarial proceedings.72 The Supreme Court has stated “at least in some contexts,” in rem proceedings do not “interfere with state sovereignty” even if state interests are impacted.73 The judges noted that IPRs—which do not involve a state’s territory—appear to be the “type of in rem proceedings to which state sovereign immunity does not apply.”74 Overall, the relatively broad scope of state sovereign immunity raises the possibility that states could utilize it to protect themselves from damages if they infringe patents to safeguard public health. Part III explores mechanisms by which states might attempt this, such as by importing or directly producing drugs

#### Bolstering the 14th amendment strengthens federal agencies, creating a terminal impasse to state sovereignty

Kumar ’21 (Sapna Kumar is an expert in administration and international law related to patent rights and 2018 fullbright schuman innovation grant recipient who works at the university of Houston law center as a professor of law and co-director of the institute of intellectual property and information law at the university of houston, “Promoting public health through state sovereign immunity,” Journal of Law and Innovation, Volume 4, No. 1, November 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1015&context=jli)//wwu-kck

2. Agency Actions Against a State Infringer A state that attempts to import infringing drugs would also be vulnerable to U.S. agency actions. The U.S. International Trade Commission (ITC) and the FDA both have jurisdiction over imported drugs and may seize unauthorized shipments. Of these two agencies, the FDA poses the greatest risk to states. a. U.S. International Trade Commission A patent holder could file an action in the ITC under § 1337 of the Tariff Act. The ITC has the power to issue “exclusion orders,” which block infringing goods from entering into the United States and are enforced by the U.S. Customs and Border Protection.88 Although ITC proceedings are adversarial, the agency’s jurisdiction for exclusion orders is in rem,89 meaning that state sovereign immunity would not necessarily apply.90 The ITC can also issue cease-and-desist orders against parties that it has in personam jurisdiction over.91 It is unclear, however, whether ITC actions can be brought against state infringers. Limited exclusion orders apply only to “persons” determined to be violating § 1337,92 and cease-and-desist orders are limited to “any person” violating or believed to be violating § 1337.93 Although the Tariff Act notes that “[t]he word ‘person’ includes partnerships, associations, and corporations,” it fails to includes states.94 Likewise, penalties under various sections of the Tariff Act refer to “persons,”95 and 19 C.F.R. § 101.1 defines an “importer” as “the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf.”96 In Return Mail, Inc. v. United States Postal Service, the Supreme Court held that “[i]n the absence of an express statutory definition,” courts shall apply the “presumption that ‘person’ does not include the sovereign.”97 Given this presumption and the fact that the Tariff Act definitions omit states, it is unlikely that a state importer could be a direct target of an ITC investigation. The patent holder could bring an action against the exporter of the patented drug, and seek to have the drugs seized at the border. However, it may not succeed if the infringing drugs would benefit public health. If the ITC determines that an imported good infringes a patent, it is required to issue an exclusion order “unless, after considering the effect of such exclusion upon the public health and welfare . . . it finds that such articles should not be excluded from entry.”98 Although it is uncommon, the ITC has limited the use of exclusion orders when public health could be undermined.99 For example, in Certain Microfluidic Devices, the ITC issued a Limited Exclusion Order and a Cease and Desist Order, both of which permitted the continued importation of infringing goods that were needed for ongoing medical research.100 In a related Commission Opinion, the ITC noted that the technology at issue was needed for research related to cancer and cardiovascular disease, and it emphasized the importance of the research.101 Based on this reasoning, it seems unlikely that the ITC would exclude life- saving drugs if the non-infringing alternative was scarce. b. U.S. Food & Drug Administration The greatest threat to states that unlawfully import drugs is the FDA. The FDA’s mission includes “protecting the public health by ensuring the safety, efficacy, and security” of drugs,102 but its regulations can hinder states that try to improve drug access. For example, states cannot legally import prescription drugs from other countries.103 A 2003 law authorizes Canadian drug imports, but requires the FDA to certify that such importation would not create a safety risk. No drug has ever been certified under this law.104 Moreover, absent authorization by the Secretary of Health and Human Services for medical emergencies or shortages, only the manufacturer may import drugs.105 States have attempted to circumvent these stringent regulations without success.106 In 2013, Maine passed a law permitting people to purchase drugs from several foreign pharmacies,107 drawing on its power to regulate medical practice.108 Under the state law, retail pharmacies in Canada, the United Kingdom, Australia, and New Zealand were exempt from state licensing requirements for retail pharmacies.109 However, a federal district judge ruled that Maine’s law was preempted by federal law because it regulated pharmacies outside Maine’s borders.110 The FDA has shown some willingness to relax regulations during the COVID-19 pandemic. For example, the FDA made it easier for states to import personal protective equipment and other medical devices, and it issued an Emergency Use Authorization for various disposable masks.111 However, it is unclear whether this tolerance would extend to non-FDA approved drugs. In April 2020, the FDA claimed to be “working to address the COVID-19 pandemic by facilitating imports of drugs to potentially treat COVID-19,”112 but it does not appear to have made forward progress. It is therefore unclear how the FDA would react if a state were to attempt to import drugs that were only approved by a foreign regulatory agency for use abroad.

#### Weaking state sovereignty acts as an impasse to California’s project to directly manufacture underproduced drugs that goes into effect in June 2023

Kumar ’21 (Sapna Kumar is an expert in administration and international law related to patent rights and 2018 fullbright schuman innovation grant recipient who works at the university of Houston law center as a professor of law and co-director of the institute of intellectual property and information law at the university of houston, “Promoting public health through state sovereign immunity,” Journal of Law and Innovation, Volume 4, No. 1, November 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1015&context=jli)//wwu-kck

As discussed above, states sometimes use sovereign immunity to engage in bad behavior and avoid paying damages for patent infringement. But could states use the doctrine to protect public health instead? This Part discusses two possibilities: states purchasing generic versions of patented drugs from third parties or alternatively producing patented drugs themselves. A. States Obtaining Patented Drugs from Third Parties There are two ways that a state could obtain drugs from third parties. First, a state could contract with a domestic company to produce patented drugs on its behalf. However, as noted earlier, most courts of appeal have declined to extend state sovereign immunity to state contractors.75 Consequently, the patent holder could potentially sue a domestic third-party manufacturer for patent infringement, even if the manufacturer was producing drugs on behalf of a state. Alternatively, a state could import patented drugs from a country that either does not offer drug patents76 or has issued a compulsory license authorizing third-party manufacturing.77 Although a court could hold a foreign manufacturer liable as an infringer, the patent holder could have trouble collecting damages if the manufacturer lacks U.S.-based assets.78 Moreover, if the state were to pay a reasonable royalty to the patent holder, it is unclear that the state’s action would rise to the level of a due process violation under Florida Prepaid.79 1. Prospective Relief Against States in Federal Court Although a patent holder cannot sue a state for damages in federal court, it could sue an appropriate state official and seek an injunction prohibiting the importation and distribution of the patented drug.80 However, there is no guarantee that a patent holder would be able to obtain an injunction against the state infringer if the infringement benefitted public health. Under eBay, Inc. v. MercExchange, L.L.C., “a plaintiff seeking a permanent injunction must satisfy a four-factor test,” demonstrating: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.81 The Federal Circuit has held that a party seeking injunctive relief “must prove that it meets all four equitable factors,”82 and has noted in dicta that a court may not issue an injunction “[i]f a plaintiff fails to show ‘that the public interest would not be disserved by a permanent injunction.’”83 Based on existing precedent, it is unclear how the Federal Circuit would apply eBay to a situation involving a drug shortage. Many scholars regard the Federal Circuit as being pro-patent84 and the court has claimed in unpublished dicta that the public has a “strong interest” in protecting patent rights.85 This pro-patent view was illustrated in Amgen v. Sanofi, in which the Federal Circuit issued an injunction against a company that was manufacturing an infringing cholesterol-lowering drug.86 Although the patent holder sold a version of the drug to the public, some physicians allegedly preferred the 75mg dose that only the infringer offered.87 However, the Amgen decision was based on the fact that drug options were still available, just not in the preferred dose. In the event of a true drug shortage, such as what occurred in 2020 with remdesivir, the state would have a much stronger argument that an injunction would harm the public welfare and would therefore be impermissible under eBay. 2. 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States Directly Manufacturing Patented Drugs The United States has a critical shortage of domestic drug manufacturing facilities, and it is unclear what percentage of needed raw materials are domestically sourced.113 In 2020, the Department of Health and Human Services announced a plan to partner with private industry to expand U.S. pharmaceutical manufacturing capacity “for use in producing medicines needed during the COVID-19 response and future public health emergencies.”114 But rather than leave this issue to private industry, states with sufficient resources could create manufacturing facilities and produce their own drugs. Although production of complex drugs like vaccines may be out of reach in the short term, states could start with producing simpler drugs.115 The long-term goals would be to increase domestic drug production capacity and to enable drug production during shortages. Such facilities would have utility far beyond pandemics. Many older drugs including insulin are prohibitively expensive,116 because few pharmaceutical companies manufacture them.117 Were states involved in domestic drug manufacturing, they could put competitive pressure onto pharmaceutical companies to lower drug prices. Any excess manufacturing capacity could be contracted out to pharmaceutical companies during shortages. States that manufacture patented drugs would still encounter legal and practical hurdles. Although a state cannot be forced to pay damages as a direct infringer, a few district court cases suggest that contractors and suppliers could be held liable for indirect infringement under the Patent Act.118 If the Federal Circuit agrees, then a company supplying the state with raw materials would potentially be a contributory infringer. A state would also have to go through the expensive and time-consuming process of obtaining FDA approval for any drug it produces. Finally, states could face barriers with regard to supply chains tailored to for-profit companies.119 Despite these obstacles, states should still consider producing drugs. **By doing so, they would maximize avoidance of legal liability under state sovereign immunity.** They could also take advantage of existing intrastate and interstate initiatives that use collective purchasing power to reduce drug costs. For example, the Minnesota Multistate Contracting Alliance for Pharmacy has operated since 1985, negotiating discounts on behalf of thousands of governmental facilities.120 The Northwest Consortium allows various state agencies, local governments, businesses, and consumers to pool their purchasing power to obtain cheaper prescription drugs.121 State-owned pharmaceutical manufacturers could directly serve these groups, providing a source of low-cost drugs. Outside of public health emergencies, state-led drug production could also help reduce the cost of generic drugs. At least one state is currently pursuing producing its own drugs. In September 2020, California passed a state law requiring the California Health and Human Services Agency to enter into partnerships to produce or distribute prescription drugs, including at least one form of insulin.122 The law was, in part, a response to problems that hospitals had with maintaining adequate supplies of drugs and medical equipment during the pandemic.123 The shorter-term goal is for California to have third parties produce generic prescription drugs “that have the greatest impact on lowering drug costs to patients,” as well as to increase competition in drug manufacturing, prevent future drug shortages, improve public health, and reduce overall costs.124 **However, the long-term goal is even more ambitious: the agency will submit a report to the state legislature in July 2023 “that assesses the feasibility of directly manufacturing generic prescription drugs” and selling them “at a fair price.”125 Were California to directly produce its own drugs, it would pave the way for producing scarce patented drugs during future pandemics and public health emergencies. With the manufacturing infrastructure and raw materials already available, California would be able to quickly respond to drug supply problems with its own drug production.** Admittedly, strict FDA regulations remain a problem.126 But as Section C discusses below, the mere threat of manufacturing patented drugs may be sufficient to get the patent holder to negotiate or the federal government to use its broader powers.

#### Rights framework bad - Civil rights abuses remedied by the 14th amendment are the result of jurisprudence, not law – expansion can’t remedy judge bias and instills hollow hope

**Suski ’19** (Emily Suski is an associate professor of law at the university of south Carolina with particular expertise in Title IX and civil rights in public schools. She holds an LL.M. with honors from Georgetown University Law Center and a M.S.W. and B.A. with distinction from the university of north carolina, “The School Civil Rights Vacuum,” UCLA Law Review, <https://heinonline.org/HOL/PDFsearchable?handle=hein.journals/uclalr66&collection=journals&section=21&id=746&print=section&sectioncount=1&ext=.pdf&nocover=&display=0>) //wwu-kck

When sisters Emily and Brittany Morrow attended Blackhawk High School in Beaver County, Pennsylvania, they were "verbally, physically, and ... emotionally tormented" by another student, Shaquana Anderson.! Among other things, Shaquana threatened Emily and Brittany, threw Brittany down a flight of stairs in school, and attacked Brittany in the school cafeteria.2 Shaquana's friend, Abbey Harris, also elbowed Emily in the throat. Brittany, Emily, and their parents sought help from the school to stop the abuse. They "requested that the [school] do something to protect Brittany and Emily from the persistent harassment and bullying." In response, school officials suggested that "the Morrows consider moving to a different school rather than removing the bully from the school." 6 Lacking any other immediate solution, Emily and Brittany enrolled in private school.' They also brought a Fourteenth Amendment claim against the public school, arguing that it had a duty to protect them and failed to do so.' The Third Circuit denied their claim, however, finding no such duty exists for schools under the Fourteenth Amendment. 9 Emily and Brittany are not alone in their experience. 0 Millions of students suffer physical, verbal, and sexual harassment and abuse in school." One of the most common ways children suffer physical and verbal abuse in school is through bullying.1 2 According to the National Center for Education Statistics, in the 2014- 15 school year, approximately one out of every five children in grades six through twelve experienced bullying-an estimated five million children." As disturbingly prevalent as it is, bullying is not the only way children experience physical and verbal abuse in school, and students are not the only perpetrators of it. Teachers and other school staff also physically and verbally abuse children in school.1 4 In addition, students and school staff sexually harass and abuse students in school. From 2011 to 2015, approximately 17,000 students reported being sexually assaulted in school.15 Although certain laws should serve as a bulwark against these harms, counterintuitively they often do not. Both the Fourteenth Amendment and Title IX of the Education Amendments of 1972 have powerful potential to protect children and remedy harm.1 6 Because claims under these laws can be brought against the school system, and not just the individuals who caused the harm, they offer the promise of both individual remedies and systemwide reforms." Children who are verbally and physically abused by teachers and other students in school generally assert two kinds of claims under the Fourteenth Amendment: (1) a claim alleging that the schools had a duty to protect them and failed, and (2) a claim alleging the schools violated their right to personal liberty and bodily integrity. Children who are sexually harassed and abused in school bring claims under Title IX for sex discrimination.1 9 These plaintiffs rarely succeed, however.2 0 In fact, no federal court of appeals has ever recognized a Fourteenth Amendment duty to protect claim by students against the public schools.2 1 Despite being designed to hold the state accountable for violations of civil rights, nevertheless, the Fourteenth Amendment and Title IX can shield public schools from liability.2 2 This Article argues that the courts unjustifiably limit public school liability under these Fourteenth Amendment and Title IX claims for students' verbal, physical, and sexual harassment and abuse.2 3 This jurisprudence is limited due in large part to courts' misconceptions about both families and schools.2 4 More specifically, these misconceptions are that families, not schools, have total responsibility for protecting their children even during the school day; schools have expertise in matters of pedagogy and discipline warranting extraordinary judicial deference to their decisions; and schools labor under substantial burdens, and therefore courts should only very carefully and rarely add to those burdens by imposing liability.2 5 Further, these laws' anemic reach has three serious, troubling consequences. First, it affords schools substantial discretion to do little, and sometimes nothing, in response to student harms. Second, it shifts the burden of addressing student harms to families, which is a nearly impossible task because families are not at school with their children.2 6 Third, these effects disproportionately burden low- income families, who now comprise a majority of the public school population. They lack the social and financial resources needed for the task of protecting children from and addressing the harms that occur in school.2 7 Recognition of the misconceptions that support public school liability limits under the Fourteenth Amendment and Title IX, however, would allow courts to abandon them. Abandoning those misconceptions in turn justifies changing the assessment of Fourteenth Amendment and Title IX claims such that they can more effectively protect children from and address their harms in school.

### Federalism DA

#### Supreme court action consolidates state power within the federal government, erasing more local powers

**Dichio & Somin ’22** (Michael Dichio, Illya Somin, “Rethinking the supreme court’s impact on federalism and centralization,” George Mason University Legal Studies Research Paper Series, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4019506>) //wwu-kck

PREVIOUS LITERATURE ON THE SUPREME COURT AND CENTRALIZATION The long-dominant view in the literature is that the Supreme Court, on balance, promotes centralization. That view, which, in modern scholarship dates at least to Robert Dahl’s path breaking article,5 rests on the reality that the Supreme Court only rarely strikes down federal laws, upholding them far more often than it rules against them.6 By contrast it is far more common for it to impose significant constraints on state and local governments, by striking down their laws and regulations. Scholars have long noted that centralization rests “at the heart” of the federalism subfield within political science.7 It is also of obvious importance to legal scholars.8 To examine the historical development of centralization patterns, federalism scholars have recently built a sweeping and systemic dataset examining the de/centralization dynamic in federations around the world—the “De/Centralisation Dataset” (hereafter “DcD”).9 The DcD has uncovered five properties of dynamic de/centralization—direction, magnitude, tempo, form, and instruments.10 From these data, Dardanelli and his coauthors argued that the Supreme Court and court rulings, more broadly, are key “nonconstitutional instrument[s]” in our efforts to understand dynamic centralization and decentralization. As they note, “judicial decisions can have major implications” for the allocation of power between central and subnational governments when the judicial branch has substantial authority to resolve disputes.11 Using the DcD, John Kincaid concludes that in the U.S. case: “federal judicial rulings occupied first place for more than a century after 1789” in driving centralization.12 The limited existing empirical literature focusing on the Supreme Court’s impact on federalism, is largely consistent in concluding that it promotes centralization. In Exploring Federalism,13 for example, Daniel Elazar argued that the U.S. Supreme Court was responsible for an “overwhelming majority” of centralization within the American federal system during the two decades before his publication. Nearly a century before Elazar, Fred Powers,14 L.H. Pool,15 and Robert Scott16 contended that the Supreme Court played a major role in promoting centralization at the turn of the twentieth century both in the judiciary itself17 and with respect to the broader powers of the national government.18 Building on these findings and expanding globally, Aroney and Kincaid’s Courts in Federal Countries documented judicial institutions’ tendency toward centralization in many federal systems.19 Other scholarship has also highlighted similar tendencies of the U.S. Supreme Court across much of American constitutional history.20 Scholars have noted divergent patterns in the Court’s impact on federalism during different periods in history. Charles Wise focuses on the Court’s use of the “institutional” and “process” theories of federalism.21 The institutional school stresses the value of decentralization, understanding the theory of dual sovereignty and “the central role that judicial review plays in safeguarding state sovereignty”.22 By contrast, process theorists embrace a centralized model of federal power, with Congress enjoying near plenary authority over the states, limited only by procedural constraints.23 Like Aroney and Kincaid24 and Kincaid (writing separately),25 Wise finds the Court tends toward embracing the process theory of federalism, viewing Congress’s power as plenary, in most cases. But he sees these theories as being of different prevalence during different eras. He concludes, for example, that the period from 1819 to 1932 embodied the process school theory because of its broad “deference to Congress” in an effort to “establish an effective National Government”.26 Since 1991, he contends, the Court has embraced the institutional school, and its penchant for states’ rights.27 By contrast, others argue that the Supreme Court did significantly constrain federal power during the nineteenth and early twentieth centuries, albeit often in alliance with various political forces.28 In a comprehensive historical survey of judicial review of acts of Congress from the Founding to the late-twentieth century, Keith Whittington29 finds that the Supreme Court was relatively deferential to Congress during most periods, but also that its willingness to strike down federal laws has increased since the Rehnquist Court era, beginning in 1986. A 2016 article by one of us (Somin) highlights several important recent decisions limiting federal power, but does not make anything approaching a comprehensive case for the proposition that the Court limits federal power more than it expands it.30 Wise’s and others’ exclusive focus on federalism cases overlooks the larger impact the Court has had on federal-state relations across a variety of constitutional issue areas. The literature on centralization relies on a macro-level view of the factors behind centralization, and, in this article, we present a more specific and robust Supreme Court dataset that goes beyond the findings of the Dardanelli et al. database.31 As more fully described below, our database, covers a wider range of cases and allows a closer look at the different periods in the Court’s history. Therefore, this article adds significant texture and detail to the important findings Dardanelli et al.,32 Kincaid,33 Whittington,34 and others have produced. Our data and findings also develop some key qualifications and challenges to the conventional wisdom on the impact of the Supreme Court

### Hollow Hope DA

Hollow Hope is a term coined by Gerald Rosenberg. In its basic form, it is the theory that the government and the institutions alongside, cannot/will not produce social change – but rather the social change needs to happen first, at both the social and political level, for it to be reflected into the courts. Fiat does not trump this. The warranting in the analysis is that if popular public opinion differs from court decision it will consistently fail to hold up. This is evidenced in court decisions and rulings made that get rescinded upon scrutiny. Thus, putting faith into this system for change is hollow hope, as it will not pan out as hoped.

#### Courts fail to serve as the instigator of social/legal change, thus plan is nothing more than a “hollow hope”

**Whittington 21**, Keith E. Whittington, Summer 2021, Professor of Politics: Princeton University; Visiting Professor: Georgetown University Law Center, "The Supreme Court as a Symbol in the Culture War." Georgetown Journal of Law & Public Policy, vol. 19, no. 2, pp. 363-376. HeinOnline, <https://heinonline.org/HOL/P>?

Such empirical misconceptions have consequences. Gerald Rosenberg once emphasized that courts were a "hollow hope" for those seeking substantial social reform.35 The Court is also likely to be a hollow hope for those seeking an institution that will stand up to political majorities and defend a more robust conception of limited government or individual rights. The Court has defended these positions only when there was substantial support in the elected branches for doing so, and it has done so only in ways that were compatible with their political agendas. The Court is tethered to politics, and that prevents it from ever playing the role of the white knight. A philosophy of limited government must be fought for and won in the political arena, and courts might then be expected to follow. But there is little evidence that the Court will lead the way.

**For more:**

#### Abortion/LGBTQ Rights can’t be saved by law – example for hollow hope or a circumvention argument.

**Grant 22**, Melissa Gira Grant, 4-6-22, writer, “The Law Alone Can’t Halt the Christian Right’s Crusade Against Abortion and LGBTQ Rights”, TNR, https://newrepublic.com/article/166012/law-alone-cant-halt-christian-rights-crusade-abortion-lgbtq-rights?msclkid=b95b58d8c7fc11ecbc8d2af099f9bdfc

### Court Clog DA

When approaching complicate legal precedent, debaters who enter the field with poorly planned ideas will create difficult to interpret precedents that lead to incredibly murky waters. Additionally, constitutional precedent is especially important to litigation, as it can lead to relitigation of major cases and has far-reaching consequences for all United States Jurisprudence. Perhaps most importantly, the equal process clause, the due process clause, and the right to privacy are extremely difficult to arbitrate, which not only results in poor litigation, it results in longer litigation and practically writes the link chain to court breakdown by itself. In short: affirmatives will have to test or work within the bandwidth of the courts and negative teams will hold immense leverage over any affirmative that cannot recon with that fundamental limitation.

## Topic Counterplans

Constitutional Convention CP – States can hold a convention to amend the constitution to implement the affirmative’s plan, avoiding any disads whose internal link is consolidated power

50 States CP – Each state will pass the legislation proposed by the affirmative rather than passing it through the federal government. Much like the previous CP it would avoid any disads that start from a point of federal consolidation

#### As primary counterplan options- rather than allowing the judiciary or legislature to increase protections for unenumerated constitutional rights- the negative might advocate amending either federal or state constitutions to specifically enumerate rights advocated by affirmatives.

### Federal ConAm CP

#### The following evidence is from an article advocating the passage of an Equal Rights Amendment as an alternative to relying on the Fourteenth Amendment. The author proposes a novel process lowering the threshold of congressional and/or state votes for ratification. Internal (elaborated in previous sections of the article) as well as external net benefits could include SOP (aka judicial activism/supremacy), federalism and politics.

Stillwell 20

[Hayley R. Stillwell is a graduate of the University of Oklahoma College of Law and currently serves as a federal law clerk. “THE LESSER OF TWO EVILS: LOWERING THE CONSTITUTIONAL AMENDMENT BAR TO AVOID AN UNADAPTABLE CONSTITUTION, ENCOURAGED JUDICIAL ACTIVISM, AND DISRUPTED FEDERALISM,” DREXEL LAW REVIEW, Vol. 12, No. 3, 2020, pp. 521-560 // wwu-cjh[

B. The Lesser Evil: Fixing the Problem

The constitutional amendment process was intended to be difficult, only granting the coveted protection to the most important rights agreed upon by a near consensus of citizens. Lowering the constitutional amendment bar, therefore, should not be taken lightly, and should not be done too severely. But this course is the lesser of two evils and should therefore be pursued. Accordingly, to fix a dead Article V, its requirements should be slightly lessened, but still call for more than single party support in order to avoid an unadaptable constitution, encouraged judicial activism, and disrupted federalism.

1. Amend the amendment process

To amend Article V requires the amendment process found within it to be followed, and consensus to do so must therefore be built.49 Although it may seem so, this is not a futile goal. The Framers recognized the necessity for a functioning constitutional amendment process. The amendment process in the Articles of Confederation requiring unanimous consent did not work. At least a few proposed amendments would have likely gained the unanimous consent of the states eventually, but this task was nearly impossible. The Framers accordingly crafted a slightly lesser burden that a proposed amendment needs to overcome to achieve ratification and included it in the Constitution. Just like the Articles of Confederation amendment process, the Article V amendment process may theoretically produce a few more amendments over the next centuries, but due to the political polarization of our country, this task has become nearly impossible."o The Framers recalibrated their amendment mechanism in a similar situation; if necessary, we should consider doing the same.

a. Recalibration: proposed amendments to Article V

A balance must be struck in the constitutional amendment process. On the one hand, amending the Constitution cannot be too easy, or else the Constitution will not be anything special-it will not rise above mere statutes, the viability of which depend completely on the present will of the majority. On the other hand, amending the Constitution cannot be too difficult, or else it will fail to reflect the changing values of society and become effectively useless, just like the amendment tool in the Articles of Confederation. As it is now, amending the Constitution may be too difficult. Thus, amendment proposals to the amendment process should be considered.

i. Amendment proposal: decrease stage one percentages

Article V currently requires a two-thirds supermajority of both chambers of Congress to approve an amendment proposal before it is sent to the states for ratification.' One way to lower the Article V bar to maintain the functionality of the amendment process is to change the supermajority requirement from two-thirds, or about sixty-seven percent, to sixty percent. This number may seem a bit arbitrary-it is, and really any specific percentage will be. This number does, however, have some key characteristics that make it a contender to maintain the balance between difficulty and ease of amendment the Framers aimed to strike in Article V. First, based on the historical political party makeup of Congress, it will still require support from both sides of the aisle. No party has had sixty percent or more of the seats in either chamber since 1993.52 And no party has had sixty percent or more of the seats in both chambers at the same time since 1979.53 Thus, to garner sixty percent of congressional support of a proposed amendment will require some sort of agreement between members of different political parties, and therefore some sort of consensus as envisioned by the Framers. Second, it will decrease the number of approval votes needed in the Senate by six and in the House of Representatives by twenty-nine. 54 Again, while achieving the sixty-percent ap proval number will still be a difficult feat, this alteration will make it easier, but not too easy. It also will have no effect on the second stage of the proposed amendment approval process, requiring ratification by three-fourths of states.55 Recall, just because a proposed constitutional amendment emerges from Congress does not automatically mean it will make it into the Constitution; six proposed constitutional amendments have failed.56 This lowering of the bar at the first stage, then, will allow more constitutional amendment proposals to make it to the second stage of the amendment ratification process where an even larger supermajority of seventy-five percent of states must come together to approve a proposed amendment.57 Ideally, this will cultivate more widespread discussion about the merits of proposed amendments on a national scale and keep the Constitution and its virtues at the forefront of the minds of all Americans as they are challenged to consider if the Constitution is sufficient as is or needs a new amendment.

ii. Amendment proposal: alter stage two to a district popular vote

Another change that will lower the Article V amendment bar, and at the same time ensure that some consensus must be reached to amend the Constitution, is to administer stage two of the Article V amendment process via a district popular-vote within states. This method is somewhat like the electoral college in a presidential election: each state has a set number of votes based on population, and districts within each state vote to award one of the state's votes in favor of or against a proposed amendment." As is, stage two of the Article V amendment process is problematic when one considers the potential number of citizens who could be ignored. A proposed amendment sent to the states currently must be ratified by thirty-eight states to become part of the Constitution.59 Each state gets one vote in this process, but each state does not have an identical number of citizens. In fact, the difference in populations between the smallest state and the largest state is almost forty million people.60 This means that a proposed constitutional amendment could be ratified with the support of less than half of the population, depending on which states make up the thirty-eight ratifiers.61 This cannot be the consensus that the Framers had in mind for the amendment process.6 2 The stage two district popular-vote method decreases the risk that a proposed amendment becomes part of the Constitution with the approval of less than half of the population. In addition, discarding the 38-state requirement for this district popular-vote method will slightly lower the Article V bar, but at the same time maintain the requirement for consensus among multiple political parties.

### State ConAm CP

#### The following evidence points to the existence of solvency advocates for state constitutional amendments to accomplish similar or greater effects of an expanded interpretation of the 14th amendment.

#### Polonsky 21

[Daniel Polonsky, J.D., Harvard Law School, 2021; B.A., Vassar College, 2015. “Equal Protection Through State Constitutional Amendment,” Harvard Civil Rights-Civil Liberties Law Review, Vol. 56, 2021, pp. 413-447 // wwu-cjh]

B. The Promise of Constitutional Amendments

To avoid subsequent narrowing or retrenchment [Begin footnote] A benefit of constitutional amendments is their relative stability compared to legisla- tion and litigation. See JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 274–77 (2018). [End footnote] and ensure actual equality, advocates should seek to amend state constitutions to broadly and unequivocally guarantee actual equal protection and freedom from discrimi- nation. State constitutions are more easily amendable than the federal consti- tution, although some political willpower will be needed to enact these changes.120 State constitutions are particularly well suited for amending with specific language, and for continued experimentation to find the most effec- tive language. Specific language will insulate state court decisions from fed- eral review and protect against disingenuous interpretations, allowing for a better equal protection doctrine in state courts. State constitutions are more easily amenable.121 Eighteen states allow voters to amend their constitutions through initiatives.122 Alternatively, all state constitutions allow amendments to be initiated by state legislatures, but unlike the federal Constitution, many states do not require a supermajority of legislators to pass amendments, although many require the legislature to ap- prove the amendment in two sessions, and most require only a simple major- ity vote by the electorate for ratification.123 As of 2017, there have been over 7,500 amendments to current state constitutions, averaging 1.3 amendments per year per constitution.124 Of course, succeeding in ratifying an amendment is not guaranteed. Constitutional amendments require popular consensus—whether initiated by state legislatures or voter initiatives.125 Rather than convincing a handful of justices to change their interpretive analysis, advocates will need to convince at least half of all voters of the merits of the new mode of interpretation.126 It may not be possible in every state, or any state, to build a coalition that can get an equal protection amendment ratified, let alone one with specific lan- guage incapable of narrow construction. Even California, a very liberal state, rejected a 2020 proposition that would have repealed a constitutional provi- sion prohibiting affirmative action—supporters of the proposition raised over twenty million dollars to campaign for the measure, but were defeated by an opposition campaign that only raised just under one and a half million dollars.127 If twenty million dollars cannot get an affirmative action measure ratified in California, there may not be hope right now for equal protection amendments. And defeat could set back progress by years in the many states in which the constitution limits resubmission of proposals to voters for some period of time.128 Political willpower may be difficult to muster, but equal protection amendments seem to be a natural extension of state constitutions. As previ- ously discussed, state constitutions generally contain extensive bills of rights, using language that is “richer, more detailed and more specific”129 than the federal Bill of Rights, as well as positive language as opposed to negative or prohibitory language, with some even explicitly guaranteeing more than the corresponding federal right.130 State bills of rights tend to be placed at the beginning of state constitutions, with Article I outlining the individual rights of state residents.131 Given the prominence and specificity of individual rights guarantees, expanded equal protection guarantees would be right at home in state constitutions. State constitutions are ripe for experimentation. Many scholars have called the federal Bill of Rights a constitutional “floor,” because even if state constitutions are interpreted to protect fewer rights, states cannot them- selves violate rights protected by the federal Constitution.132 Even if a state amends its constitution in a way that judges interpret to provide fewer rights than before, there will be little harm, because the federal Equal Protection Clause will still apply and set the minimal safeguards for infringed rights. And poorly written state amendments are far easier to replace than federal amendments. The privileges and immunities clause of the federal Fourteenth Amendment was essentially nullified in 1873,133 but it is still the (ineffec- tive) law of the land. Experimentation with the federal Constitution is not wise, but states should take up Justice Brandeis’ call to serve as “laboratories of democracy.”134 States can utilize different language and determine what works best in practice, with the most effective language then available for adoption by other states. For example, the New York Senate passed a pro- posed “Inclusive Equal Rights Amendment,” which would (1) expand the categories of people protected, (2) define the term “civil rights” to make the state’s current anti-discrimination clause in Article I, § 11 self-executing, and (3) explicitly prohibit disparate impact discrimination.135 But this may not be the best approach. Perhaps the Court is right to be skeptical of strict scrutiny for disparate impact claims, and an “active rational basis test” would be better.136 The only way to determine the best approach is to experiment.137 Of course, there is reason to be wary—utilizing amendments to achieve a progressive vision of racial justice may open an unwanted can of worms and invite constitutional proposals that would harm minorities. California has played host to the aforementioned Robbins Amendment, along with Pro- position 8, which formalized marriage as a heterosexual institution.138 But conservatives have long been using constitutional amendments to attempt to return their states to less enlightened days—thirty-one states approved amendments limiting recognition of same-sex marriage between 1998 and 2012139— so the can of worms is already open. Progressives should not sac- rifice an avenue for racial justice out of fear of conservative backlash— unilateral disarmament will not lead to progress. Constitutional amendments can lead to better jurisprudence for racial justice than can be achieved under current state constitutions. Narrow lan- guage is harder for judges to interpret disingenuously and language differing from federal provisions will all but require independent interpretation.140 Ad- ditionally, many states look to the history of state constitutional provisions in interpreting them.141 Those proposing amendments today can make clear the intended purpose of the amendments through contemporaneous state- ments, essentially creating the legislative history that courts will rely on. When the text and history of equality provisions require judges to guarantee actual equal protection, those rulings will be insulated from federal review.142 What could actual equal protection entail? There are competing and conflicting visions of equity and equality, and choices will need to be made as to which to constitutionalize.143 The ideal formulation for a state constitu- tional amendment is beyond the scope of this Note, and there may be no one ideal solution, but some imperfect solutions could build on the work of scholars who have critiqued the federal doctrine. The Supreme Court’s intent requirement leaves no remedy for policies that have a disparate impact, even if that disparate impact is known.144 In light of unconscious bias, evidence of a disparate impact should itself give rise to an inference of discriminatory intent.145 In fact, any focus on intent is at odds with the reality of systemic racism.146 Perhaps disparate impact based on race should trigger strict scru- tiny147 or perhaps, once disparate impact is demonstrated, the burden should be shifted to the government to justify the policy via proof that it lacked feasible, less discriminatory means for achieving its objectives.148 Others have proposed even more novel tests.149 At a minimum, a better equal pro- tection doctrine would eschew Feeney,150 and find that taking an action with knowledge that it would have discriminatory consequences is a discrimina- tory intent.151 Which of these tests would best protect students from the implicit bias of their teachers? Which would provide Deandre Arnold with a claim against his school’s discriminatory rules and allow him to keep his dreadlocks? Which would find that sentencing algorithms have an unconstitutional dispa- rate impact? That the criminal legal system, from policing to sentencing, unconstitutionally kills people of color? This Note does not have the answer. State equal protection clauses need not even limit themselves to prohibiting discrimination by state actors. So long as the proposed clauses do not violate federal law, advocates are only as limited as their imaginations and their ability to get the language ratified.152 Working backwards from harms for which there is currently no remedy, advocates can fashion constitutional lan- guage that would guarantee a remedy. Getting that language adopted will not be easy, and litigators should not stop trying to get state judges to indepen- dently interpret their constitutions more broadly, but constitutional amend- ments are a viable avenue for guaranteeing actual equal protection under the law.

### Constitutional Convention CP

The core of this topic is the 14th amendment and constitutional law, which gives ample space for teams to discuss what the most effective way for utilizing the constitution is. Given that a large portion of the affs will be discussing state preemption against a minority of states, it stands to reason that the majority of states could form a coalition and call for a constitutional convention to either amend or reinterpret the constitution in some way to solve for the affirmative’s harms. This would be especially interesting to see in the context of the federalism debate, enabling a greater contrast between state and federal legislatures.

### 50 States CP

#### This topic fulfills the dreams of every 50 states counterplan debater, by providing a unique opportunity where the links are strong, and the alternative is competitive. In other words, this topic gives the 50 states counterplan the attention it deserves. We envision this counterplan paired with the “Hollow Hope” DA. The literature around hollow hope points to an alternative as either grassroots movements or state action instead of federal. This would solve circumvention and hollow hope because the change is more localized thus less likely to be overruled.

#### Similarly, this counterplan could also be paired alongside a Politics DA, by moving the controversy to the state level courts as a starting point mitigating the national government gridlock, and the Federalism DA or State Sovereignty DA for moving the power to the states not the federal government.

### Appendix [\_] Addtional Aff/Neg CP Ev

#### Arguing that the difficulty of amending constitutions creates certain distortions in state and federal constitutional jurisprudence.

[Jonathan L. Marshfield, \* Associate Professor of Law, University of Arkansas School of Law. “AMENDMENT CREEP,” Michigan Law Review, vol. 115, no. 2, November 2016, pp. 215-276. HeinOnline.// wwu-cjh]

#### Arguing that state self-restraint CPs might trigger backlash to remove justices, calling for state ballot initiatives that may or may not include constitutional amendment to increase legitimacy.

[Kenneth P. Miller, Associate Professor of Government and Associate Director of the Rose Institute of State and Local Government, Claremont McKenna College. “DEFINING RIGHTS IN THE STATES: JUDICIAL ACTIVISM AND POPULAR RESPONSE,” " Albany Law Review, vol. 76, no. 4, 2012-2013, pp. 2061-2104. HeinOnline. // wwu-cjh]

#### Defending state constitutional rights against pro-14th amendment critics, while acknowledging their limits as a counter-majoritarian bulwark of minority rights.

[Jonathan L. Marshfield, Assistant Professor of Law, University of Nebraska College of Law. “AMERICA’S MISUNDERSTOOD CONSTITUTIONAL RIGHTS,” University of Pennsylvania Law Review, Vol. 170, 2022, Available at SSRN: <https://ssrn.com/abstract=3914203> // wwu-cjh]

## Topic Kritiks

### GENERAL – K’s

The main thesis for core critiques of this topic will be along the lines of jurisprudence – the idea that social issues are intertwined with law. This is true for virtually all marginalized identities, and oppressive structures, making it a core neg ground. Discussions that these arguments would lead to would look like: abolition v reform, amending v reinterpreting (or vice versa - resolution dependent), aiding material harms v structural reconstruction, short v long term effects of each etc. These debates are rich in literature bases for both sides of the debate, making the K debates nuanced and well prepped. Additionally, this core argument both allows the neg to venture into specific literature bases, while also maintaining a level of predictability on the affirmative side.

**For more on jurisprudence:**

Melissa Burchard, ND, MB: University of North Carolina, Feminist Jurisprudence, Internet Encyclopedia of Philosophy, <https://iep.utm.edu/jurisfem/> , Date Visited: 4/25/2022 // wwu ljh

### CAPITALISM - K

#### Description:

There is sure to be more links than the one pulled; however, the thesis of the current argument is that the government has been invested in maintaining capitalism through the legal system. If the affirmative is using the system created to perpetuate capitalism, there will always be capitalism. Then this falls into the classic capitalism good/capitalism bad debates or arguing that the affirmative is anti-capitalist/step in the right direction. Capitalism always has an array of arguments in its literature base, and this topic would be no different. This is certainly going to be a generic core critique for the negative, guaranteeing the possibility for a capitalism debate.

#### Government intervention to try to aid in Capitalism’s wrongdoings only reproduces capitalism.

Leef 21, George C. Leef , 2021, B.A. from Carroll College, JD from Duke, taught economics, law, logic and philosophy at Northwood University, and author. Capitalism and Immorality, Cato Institute, [https://www.cato.org/regulation/summer-2021/capitalism-immorality //](https://www.cato.org/regulation/summer-2021/capitalism-immorality%20//) wwu ljh

Government intervention / For several decades after World War II, a coalition of American anti‐​communists, free‐​market advocates, and traditional social conservatives advocated for capitalism among other values. Their unwritten pact is now coming apart, with the defection of the social conservatives being especially striking. The unwritten pact between groups on the political right is now coming apart, with the defection of the social conservatives being especially striking. Devine cites the work of Hillsdale College historian Allan Carlson, who decries the effects of capitalism on the family. He blames capitalist businessmen for wanting cheap labor, which eventually drew women into the labor force and away from their traditional household roles. So, Carlson argues, capitalists promoted feminist ideology as well as liberal immigration policies. Rather than allowing the market to determine compensation, he advocates a governmental “family wage” for fathers so that wives could have children and remain at home with them. He contends that the New Deal shows how such federal policies can work. Throughout the book, Devine offers much evidence that **government interventions meant to improve upon the alleged moral and economic failings of capitalism have been costly and often counterproductive**. Those efforts don’t seem to have helped shore up support for capitalism. President Lyndon Johnson’s “War on Poverty,” for example, has spent vast amounts and yet failed to accomplish its goal of enabling the poor to become self‐​supporting citizens.

### NEOLIBERAL JURISPRUDENCE - K

#### Expansion of the 14th amendment turns humans into market objects, furthering Capital, Gender and Whiteness

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Furthermore, the Fourteenth Amendment is an ideal terrain for observing the shift from liberalism to neoliberalism because equal protection and due process were intimately tied up in the liberal political imaginary especially within the legal community. The vision of “legal liberalism,” which was hegemonic for much of the second half of the last century and to some degree still persists today within the legal academy, 40 focuses on legal rights and their enforcement by the courts as a means of instituting progress and the protection of insular minorities from discrimination. By offering a doctrine-specific analysis of neoliberalism, this dissertation seeks to reformulate critical theory’s understanding of law’s function and highlight the role of the courts as midwives at the birth of neoliberal hegemony. The project engages the current theoretical conversation within critical and political theory about neoliberalism, hoping to highlight the importance of sharpening its understanding of law’s central role in neoliberalism’s logic and legitimation. The selection of primary source materials however reflects the standards and expectations of legal scholarship; the chapters each pertain to a single legal issue and are constructed around the close reading of recent Supreme Court cases, resisting the propensity of critical theory scholarship on law to read one case in isolation as a self-contained text. Instead I read cases starting in the early 1970s through to the present to illustrate the often incremental and insidious nature of how law shifts power and meaning. I offer close readings of these lines of cases to simultaneously draw out the legal function of the use of private law frameworks and their underlying normative logic. Rather than simply taking neoliberalism as an interpretive context for my reading of case law, I ask how law functions tactically under neoliberalism—that is, not only how it reflects neoliberal rationality, but the ways it actively constructs neoliberal rationality and extends its effects in the world. The Privatization of Protection is structured according to the structure of the Fourteenth Amendment itself with a chapter addressing each of the Amendment’s doctrinal pieces: procedural due process, substantive due process, and equal protection. In each chapter I trace how the importation of private law models into public law by both liberal and conservative justices has eroded the law’s protective role. The liberal ideals of equal protection and due process have been redefined according to the needs, logics, and limits of the market through the concepts of efficiency, choice, and human capital with consequences disproportionately borne by the poor and working class. It interrogates not only these transformations and their material consequences, but also their centrality to neoliberalism’s “stealth revolution.” In my analysis, a central figure emerges as a catalyst, Justice Lewis Powell, who authored the transformative opinion in each of the doctrinal areas I examine. Chapter 1 “The Devil’s in the Details: Privatization and Anti-Collectivity in Procedural Due Process” contends that some of the most consequential legal transformations of the relationship between individuals and corporations under neoliberalism have been made quietly in the area of legal procedure while theoretical accounts were focused on more traditional civil rights issues or spectacular cases like Citizens United. The chapter begins with an overview of the evolution of procedural due process jurisprudence since the 1970s, drawing out the seeds planted in those early decades that are only now coming to fruition. In these early developments, one can see the introduction of efficiency as master-value and the technocratic logic of neoliberalism begin to take shape. I argue that the landmark case of Mathews v. Eldridge (1976)—which established the balancing test for procedural due process still used today— simultaneously expanded and transformed procedural due process by introducing considerations of judicial efficiency into the right itself. Mathews’s logic is in stark contrast to the Court’s reasoning only six years earlier in Goldberg v. Kelly, especially with regard to the “public interest.” In Goldberg, the Court asserts that helping the most disadvantaged in society not only benefits the poor but also benefits society as a whole.41 By contrast, the Mathews Court invokes the “public’s interest” to mean the interest in having a government that is efficient in its spending.42 When asking what changed between Goldberg and Mathews, perhaps the most cynical (and certainly incomplete) answer is the appointment of Justice Lewis Powell to the Supreme Court. And yet his role cannot be overlooked. I focus on Justice Powell as the author of this opinion and read it in conjunction with his infamous memo for the Chamber of Commerce, “Attack on American Free Enterprise Systems,” which identified the courts as central to the strategy of affecting pro-business change and was penned mere months before Nixon appointed him.43 The rest of the chapter focuses on two procedural issues which are not constitutional but have constitutional implications: the rise of arbitration and the withering of class action. Arbitration, which forces legal claims out of courts and into a privatized forum for adjudication, has expanded dramatically since the 1980s. I illustrate how the rise of arbitration has been the result of the Court’s reliance on free market frameworks. I argue that this expansion, although until recently largely excluded from popular and critical conversations, constitutes nothing less than the privatization of justice and the extension of corporate governmentality into the judicial realm. I also look at the dismantling of class action as part of the Supreme Court’s “anti-collectivity jurisprudence”44 insofar as it privileges the individual over the collective and the corporation over the individual, is justified by the discourse of efficiency, and elides the power differential between the two parties. 45 The chapter concludes with a close reading of American Express v. Italian Colors,46 a case at the intersection of arbitration and class action, which I argue is the point at which privatized procedure is allowed to fully subsume substantive law. The Court’s opinion separates the “right” to justice from the actual possibility of its pursuit in a textbook refusal of the material realities of choice and right. It likewise severely tips the balance in favor of corporations, denying access to the courts for consumers harmed by large corporations. Justice Kagan wrote a vitriolic indictment of this embrace of corporate power in her dissent, but I show, when one peels back the rhetoric, her ambition is actually quite modest. I argue this is representative of the limits of the liberal justices’ critiques more generally. 47 I show how in many ways the liberal justices have conceded the market framework and are challenging only the grossest abuses of power sanctioned in its name. I conclude by advocating for a politics of tedium, arguing that cases that are unsexy, not immediately legible as political, and esoteric, still have to be a part of any critical conversation about political economy—not only because they have significant material stakes, but also because we need to recognize tedium as a legal tactic. Those invested in critiquing neoliberal governance cannot allow in form or procedure what they would contest in substance. Proceduralism is but one instance of the retreat to formalism that is a characteristic means by which neoliberal reasoning conceals power and law’s role in the production of inequality. Chapter 2 “When Privacies Collide: The Privatization (Il)logics in the Court’s Abortion Jurisprudence” examines how the Court’s abortion jurisprudence constructs women as both consumerist and human capital subjects with regard to their reproductive choices. In so doing, I highlight the slippages and contradictions between the personal (private-domestic) and the market (private-economic) meanings of “privacy” in the Court’s jurisprudence and show how this justifies the unequal treatment of poor women with regard to the abortion right. I begin with Roe v. Wade (1973), tracing how the “right to choose” became the mode of legal and popular understanding of abortion instead of reproductive justice. I argue the funding cases, Maher v. Roe (1977) and Harris v. McRae (1980), transformed Roe’s holding into a consumer right (and abortion into a commodity) by placing them 24 fully in the private economic realm. 48 There is a slippage in these cases between the liberal public/private-domestic distinction and the neoliberal public/private-economic distinction. Although the political discourse still focuses on the specter of the Court overturning of Roe, since 1977 abortion has only been a right if you can afford it, eclipsing Roe’s promise for millions of women. Casey v. Planned Parenthood (1992), nearly two decades after Roe, turns to a different rendering of the social in economic terms and interprets the abortion right within a framework of human capital. In Casey, the majority preserves aspects of Roe based on the reliance interest of women who invested in their human capital on the assumption that they would have all means available to them to control their reproduction. The Court explicitly draws the analogy to private law and the principle of estoppel. Accordingly, those women who are within the market structures and have properly responded to produce their own human capital, the Court reasons should be able to protect that capital. Increased choice allows them to be better capitalist subjects. Poor women, however, are easily excluded from this entrepreneurial framework on the theory that they have not sufficiently invested and have already proven insufficiently responsive to market discipline, so there is no reliance interest to protect.49 48 In Harris, the Court reasons, “[t]he financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.” Harris v. McRae, 448 U.S. 297, 316 (1980). It is a perfect Hayekian articulation of the relationship between government, the market, and inequality. There is a paradox at the heart of this logic. Why under a human capital paradigm, are women who choose to have an abortion when confronted with an unplanned or unwanted pregnancy not valorized as good entrepreneurial subjects? Neoliberalism consistently positions itself against dependency on the state. Others have resolved this paradox by looking outside the theory of human capital to the historical alliance between fiscal conservatives and the religious right or to the ways such a radical embrace of female autonomy would threaten capitalism’s reliance on unpaid female labor.50 I contend that one need not look outside the paradigm of human capital to explain it. In the context of abortion, the woman’s human capital is never viewed in isolation but always already weighed against the human capital of the fetus, which is pure economic possibility, or human capital par excellence. Therefore, the law privileges this pure form of human capital over the mother who, especially if she does not have the resources to travel or pay for an abortion, has already proven herself insufficiently responsive to market forces and has consequently been positioned outside the market society In conclusion, I argue that in making the discourse of “choice” so explicit and the Court’s frank reliance on private law models, the Court’s abortion jurisprudence is actually an important lens for understanding a larger shift in the understanding of rights under the neoliberal Fourteenth Amendment—which to some degree has rendered all of the Fourteenth Amendment’s protections on the model of choice, the others, just more implicitly so. In light of this, the feminist critiques of “choice” and the abortion discourse may provide insight into how to understand and resist the privatization of protection, more generally. Chapter 3 “Market(able) Equality” addresses the Court’s transformation of equal protection jurisprudence over the last thirty years in accordance with market-logic and a narrow, non-distributive form of identity politics from which class has been almost entirely erased. I focus specifically on affirmative action doctrine, illustrating how neoliberal rationality permeates both sides of the issue. On one side, affirmative action is portrayed as a distortion of the proper and virtuous functioning of the market; on the other, affirmative action’s preservation is grounded in the needs of the market for “diversity” under globalization. And yet, despite this fundamental transformation, affirmative action is still heralded as one of the last remnants of legal liberalism. In this chapter, I build on Cheryl Harris’s highly influential work, “Whiteness as to market incentives and therefore outside the spontaneous order in which small-government principles apply, also characterizes law’s treatment of impoverished female subjects. 27 Property,” in which she argues that the Supreme Court’s equal protection cases preserve a property interest in “whiteness.” She argues that the form of property whiteness has taken shifted from a traditional concept of property focused on the right to exclude (Plessy v. Ferguson) to a modern concept of property focused on the preservation of expectations (Brown v. Board of Education). I argue that the Court’s most recent affirmative action cases represent a third and distinctly neoliberal model of property: human capital, and it is through this lens that we should understand the Court’s construction of “diversity.” The market/human capital reasoning is introduced in Justice Powell’s controlling opinion in Regents of the University of California v. Bakke (1978). But it comes to fruition in Grutter v. Bollinger (1997)—a case about the race-conscious admission policy of the University of Michigan Law School.52 O’Connor’s opinion, by citing to the express needs of the market for diversity programs at top tier universities, constructs educational institutions as primarily producers of human capital, meeting the needs of corporations and the market, which she then ties directly to US competitiveness under globalization. In so doing, O’Connor foregrounds the relationship of human capital to the nation-as- firm model of neoliberal legitimacy. Within my analysis of Grutter, I focus specifically on how “diversity” is configured within the economy of human capital, arguing that “diversity” is the use of nonwhiteness to enhance the human capital of whites and corporations through “cross cultural competence.”53 It is an extraction of surplus value. The Court’s reliance on the concept of “critical mass”—defined as the point at which non-minorities and by extension the market can benefit from including minorities through the benefits that flow from exposure to diversity, and no further—as a limit on the use and goals of affirmative action policies illustrates the degree to which supposed antisubordination efforts remain defined according to the needs and expectations of whiteness. One could even argue “critical mass” sets a limit defined by preservation of racial hierarchy insofar as it does not set a floor but only a ceiling on the use of affirmative action. In a brief coda to this chapter, I examine one final shift in the relation between public and private under neoliberalism with significant consequences for the Fourteenth Amendment—the privatization of government. The “state action doctrine” limits the Fourteenth Amendment’s protections to only those actions taken by the State. Thus, as corporations come to govern more of our lives under neoliberal governmentality, the protections of the 14 th Amendment cover an ever-finer sliver of our lives under late capitalism.

### SETTLER COLONIALISM - K

#### Description:

There is a rich literature basis for settler colonialism critiques in the constitution, and especially with the 14th amendment. The 14th amendment has an overarching objective of citizenship; however, this amendment was created with the intention of assimilating Indigenous peoples into the broader group of “Americans” destroying Indigenous sovereignty and self-governance. The literature is especially interesting, as the dynamics between the struggle between the Civil Rights Movement centered around Black Americans equality, and Indigenous sovereignty are nuanced and complex. Debates about the core intention/original meaning/spirit of the amendment are likely to be prominent in these debates. At the heart of this political inquiry is the tension of social justice movements with at times conflicting agendas. As this dilemma has not been resolved, there is lots of room for exploration on both sides of the debate.

#### The 14th amendment was created as a tool for assimilation and ongoing genocide of Indigenous peoples.

Kantrowitz 20, Stephen Kantrowitz, 2020 , Professor at University of Wisconsin – Madison and historian of race, indigeneity, politics, and citizenship in the nineteenth-century United States, “White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment”, Journal of the Civil War Era , MARCH 2020, Vol. 10, No. 1, Cracks in the Foundation: The Fourteenth Amendment and Its Limits: A Special Issue (MARCH 2020), pp. 29-53 <https://www.jstor.org/stable/10.2307/26888071>, /// wwu ljh

The Civil War era’s debates over citizenship are conventionally understood as having revolved around the status of emancipated African Americans. But they were also rooted in decades of US policy with regard to Native Americans. In Indian Country, citizenship’s intended purpose was to dissolve Native political sovereignty and to make Indian lands available for sale to white settlers. These two histories of citizenship existed in dynamic tension and were occasionally forced together, as in the Civil Rights Act of 1866 and the Fourteenth Amendment. This essay traces Civil War–era policymakers’ parallel debates over African American and Native American citizenship. Exploring those debates in particular through the thinking of conservative Democrat Allen Thurman suggests that while white supremacy came under sustained attack during this era, settler-colonialism—the ideology and practice of replacing Native with settler populations—did not. From the moment Ohio sent him to the Senate in 1869, Allen Thurman railed against the Fourteenth Amendment in the name of the white man’s republic. The amendment elevated “seven or eight hundred thousand semibarbarians” to the status of citizen, he complained, and would result in “the concentration of all power in the hands of the Federal Government.”1 Nevertheless, in 1873 Thurman rose from his Senate chair to defend a small Native band, a few hundred Ho-Chunk people who refused to live where treaties placed them, from the fate Wisconsin’s lawmakers and many of its white citizens planned for them: military removal from state. He reminded midwestern Republicans that their own misbegotten lawmaking forbade such a “compulsory emigration.” In foisting millions of unwelcome nonwhite citizens on white Southerners, Republicans had also extended their constitutional dispensation of citizenship, suffrage, and federal enforcement over their own “semi-barbarians.” The Fourteenth Amendment cut both ways. Thurman argued that these Native people, who had successfully evaded previous removals and lived far from their assigned tribal lands, were no longer under tribal government. They were instead, in the terms of the first section of the Fourteenth Amendment, “subject to the jurisdiction” of the United States. They should therefore be as secure in their right of residence (and their freedom from military removal) as any other group of citizens. Indeed, Northern Republicans should grant these citizens all the rights promised by their Reconstruction, or face the consequences. “If there are Ku Klux in Wisconsin who will not allow these people to vote,” Thurman sneered, “I pray my friend to be after them with the enforcement act, and punish them, and vindicate the right of suffrage, which belongs to all the people without distinction of race, color, or previous condition of servitude.”2 Thurman’s colleagues laughed to hear him recite policies he despised, but some were undoubtedly brought up short. In asserting that Fourteenth Amendment citizenship had implications for Native Americans, Thurman was bringing to the surface a history that had been unfolding throughout the Civil War era, alongside but in complicated relation to the heated and ongoing debates over the status of African Americans. The Civil War era’s debates over citizenship sprang from two distinct sources and involved two different sets of actors. One strand of those debates revolved around the African American quest for equality. This was universally understood to be central to the national politics of the era, and it remains central to our scholarship today. That history of citizenship began as an aspirational struggle for equal rights and a shared, nonracial national belonging; it became a national political struggle during the lateantebellum era as black and white activists built coalitions and recruited voters; and it took formal shape in the Fourteenth Amendment, which overturned the principle that the United States was a white republic.3 The other strand of the history of citizenship was composed of quite different material. At its core lay the federal government’s efforts to make citizens of Native Americans in order to acquire their land. This history has rarely featured in the historiography of the Civil War era, yet it absorbed the attention of antebellum officials and politicians and surfaced repeatedly during Reconstruction-era debates. These two histories existed in dynamic tension, in the same nation and under the same government, and were occasionally forced together, as in the Civil Rights Act of 1866 and the Fourteenth Amendment. It is thanks to the nineteenth-century history of emancipation and equal rights, and its rhyming sequel in the civil rights era, that many Americans hear the word citizenship as an affirmative statement of equality, as a goal and an aspiration. Despite the contradictions and ambiguities of African Americans’ relationship to the United States, the word retains a great deal of that charge. But to consider national citizenship from the standpoint of Indian Country—the territory of Native nations—is to encounter it anew, and in far less hopeful terms. Citizenship denotes incorporation into the civic and political body of the United States; it therefore exists in tension, and sometimes stands in outright opposition, to a bedrock imperative of Indigenous politics: sovereignty.4 Sovereignty describes the political and cultural integrity, autonomy, and equality of Native nations. To take Native sovereignty seriously is to consider citizenship from a different starting point: not of individuals and groups seeking equality within the United States but of federal policies that aimed to undo that autonomy and integrity and of Native people responding to those pressures. This is not to diminish either the creativity and experimentation that Native people brought to their encounters with citizenship or the protections and opportunities citizenship could sometimes provide; these are central themes of my larger project on the Ho-Chunk people’s encounter with citizenship in the Civil War era. In these pages, however, I focus on the visions, intentions, and actions of US policymakers and officials, who by and large regarded Native sovereignty as undesirable and impractical. By the late antebellum era, most US policymakers either disdained Native sovereignty outright or imagined it as dramatically limited in scope and relegated to tiny or distant territories. Native Americans would assimilate and be absorbed into the body politic, or they would find themselves pressed into ever-smaller homelands, and finally into extinction. Either way, their cultural and territorial disappearance was essential to the future of the US settler state. And citizenship was part of that assault on Native sovereignty and cultural survival. The anthropologist Patrick Wolfe described this disappearance as the essence of settler-colonialism, the form of colonialism that seeks to replace Indigenous people, their claims and their ways of life, with those of a settler population**. These imperatives produce a “logic of elimination” of Native populations. That can mean literal genocide.** It may also unfold, for example, in setter states’ laws of interracial sex and descent, which retain property in enslaved people through laws of hypodescent while making nonenslaved Indigenous people “disappear” through intermixture over a small number of generations.5 Viewed through the lens of a settler-colonial analysis, laws of citizenship were, like laws of racial descent, technologies of Native disappearance. That is, in Indian Country, policymakers understood US citizenship to be a means of dispossessing Native people of most or all of their land, dissolving their collective political bonds, and over time transforming them into functionally indistinguishable members of settler society. As the example of laws of racial descent suggests, the history of settlercolonialism has unfolded in close and complicated relationship with the history of white supremacy with regard to African Americans. The histories are not the same, but they cannot be disentangled from one another.6 This was in part Thurman’s point in the Senate in 1873. His juxtaposition of the two histories, and his insistence that they had very much to do with one another, was not intended to shed light or plead Native people’s cause; Thurman in fact regarded Native Americans and African Americans as equally ill-fitted for citizenship. During an early term in Congress, two campaigns for governor (both times narrowly defeated by Rutherford B. Hayes), two terms in the Senate, and a final campaign for the vice presidency, he represented the overtly white supremacist end of Northern Democratic politics. He argued consistently that white people alone were fit citizens and neighbors and that the United States must and would conquer and dispossess Native nations.7 This unapologetic pursuit of a white man’s republic along both of the intersecting streams of citizenship invites us to consider the entanglement of these histories from an appropriately disquieting angle. Thurman’s caustic and anti-egalitarian career suggests how US national citizenship was born wearing two faces—one casting its eyes upward and joining in a fierce and often bloody struggle for equality; the other usually gazing hungrily toward Indian Country and claiming, sincerely or cynically, that Native people could hope for no better outcome. **The Fourteenth Amendment forced these two distinct genealogies of national citizenship together, but it did not make them one.** The postwar constitutional revision was the outgrowth of a social movement that asserted a people’s innate capacity and fundamental belonging; its inadequacies notwithstanding, that reimagining of national citizenship squarely addressed the histories of slavery and white supremacy. But in this same moment, policy-makers rarely conceived of Native citizenship in comparable terms. It remained for them what it had always been: an instrumental afterthought in the midst of continuing conquest and a way of imagining a palatable resolution to the problem of the Indian future.

### ANTIBLACKNESS - K

#### Description:

There is an expansive literature base on Antiblackness, regardless of which exact wording will be chosen. Core thesis of these arguments are that the foundations of the laws and constitution were designed to maintain segregation and limit Black rights. There are strong ties to critiques to the carceral system as well. There is a jurisprudence link here as well, specifically that regardless of the politics behind the 14th amendment, it is consistently narrowly interrupted, making any policy hard if not impossible to enforce. Affirmative responses to this could investigate the original spirit of the law, which is constraining of policing, and in favor of a more abolitionist agenda, or could switch into a debate about fixing material needs v restructuring. There will be an array of deeply discussed arguments for both sides, regardless of the angle chosen.

#### The consistent misdirect and dismissals of cases on account of race is woven into the structures themselves.

Bernick 21, Evan Bernick, 2021, Assistant Professor of Law Northern Illinois University College of Law, “Antisubjugation and the Equal Protection of the Laws”, The Georgetown Law Journal, [https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/11/Bernick\_Antisubjugation.pdf //](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/11/Bernick_Antisubjugation.pdf%20//) wwu ljh

Black people have been subjugated by American police for centuries. The origins of policing in the United States have been traced through pre-Civil War slave patrols;452 the Fugitive Slave Act of 1850 authorized federal police to reclaim “fugitives from service or labor” from anywhere in the nation, including free states, after summary proceedings that were heavily stacked against alleged escapees.453 Free Black people and their white allies disobeyed the Act, organizing self-defense groups and teaming up to rescue Black people from federal custody by force of arms.454 Many abolitionists saw violent resistance as a legitimate response to police violence. Thus did Frederick Douglass tell a Free Soil Party convention that “[t]he only way to make the Fugitive Slave Law a dead letter is to make half a dozen or more dead kidnappers.”455 The story of the post-War policing of Black Americans is also devastating. Following the ratification of the Thirteenth Amendment, the former rebel states enacted the Black Codes, which were designed to re-subjugate Black people.456 The primary means through which the Codes operated was the “police” offense of vagrancy457—those caught by or on the roads without proof of employment were arrested, imprisoned, and forced to labor in mines and lumber camps pursuant to convict leasing programs.458 Today, Black Americans are more likely than whites to encounter police,459 to be stopped by police,460 and to be fatally wounded by police.461 In effect, a tax is extracted from Black people who would avoid encounters with, stops by, and violent deaths at the hands of police.462 The tax is paid in the form of heightened attention to dress and demeanor, altered traveling habits, decisions not to reside in all-white residential areas, and other costly forms of conformity to societal expectations concerning where one ought to be and act while Black.463 Owing to this history and lived experience of subjugation, Black communities today suffer from what Monica Bell has conceptualized as a “legal estrangement” from the police.464 The avowed, legitimating function of the police is protection—but many Black Americans do not “experienc[e] policing as a protective benefit,”465 thanks to a “cumulative, collective experience of procedural and substantive injustice.”466 It is therefore critical to emphasize that my proposal does not envision federal judges ordering states and municipalities to devote more resources towards policing. Nor does it recommend that states and municipalities do so on their own initiative. My proposal does envision Congress having more constitutional space to remedy state denials of protection to Black people. The post-Civil War record of congressional action on behalf of Black people provides reason for guarded optimism. Congress was the primary enforcer of civil rights during Reconstruction, and Reconstruction screeched to a halt in part because of the Supreme Court’s narrow readings of the Fourteenth Amendment.467 Many scholars also accept that Congress did more than the courts to secure Black freedom from discrimination during the Second Reconstruction—the civil rights movement.468 This record suggests that more harm to Black people may come from denying Congress its delegated Section 5 power to protect people from racial subjugation than by permitting Congress to exercise it.

### RACIAL CAPITALISM/ABOLITION - K

#### Description:

Abolition vs reform is a very popular debate in social justice. This topic is no different. The affirmative is anchored towards a reform of some kind, giving the negative a strong link into this debate. This will most likely be a core debate in this topic. Specific abolition can also be accessed, while the central thesis is likely to stay the same. Since these debates are popular, there will be plenty of literature and arguments for both sides resulting in well-thought out and in depth irritative testing.

#### The constitution forecloses any attempt of abolition; we cannot continue with the same methods and logics if we want to see change – we need to innovate new abolition constitutionalism.

Roberts 19, Dorothy E. Roberts, 11-8-2019, Professor at UPenn Law, George A. Weiss University Professor of Law and Sociology and the Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights, Abolition Constitutionalism, Harvard Law Review, <https://harvardlawreview.org/2019/11/abolition-constitutionalism/> // wwu ljh

I believe both approaches are worthy of consideration, and considering both is essential to developing a theoretically and pragmatically useful legal framework to advance prison abolition. Neither is based on a naïve faith in U.S. law or the judges who apply it to radically change carceral society. Indeed, **it is the realization that white supremacy is deeply woven into the fabric of every legal institution in the United States and upheld by U.S. constitutional law that made me an abolitionist in the first place**. The tension between recognizing the relentless antiblack violence of constitutional doctrine, on one hand, and demanding the legal recognition of black people’s freedom and equal citizenship, on the other, animates this Foreword as it has long animated abolitionist debates on the U.S. Constitution. Despite my disgust with the perpetual defense of oppression in the name of constitutional principles, I am inspired by the possibility of an abolition constitutionalism emerging from the struggle to demolish prisons and create a society where they are obsolete. This Foreword analyzes the potential for a new abolition constitutionalism as follows. In Part I, I provide a summary of prison abolition theory and highlight its foundational tenets that engage with the institution of slavery and its eradication. I discuss how abolition theorists view the current prison industrial complex as originating in, though distinct from, racialized chattel slavery and the racial capitalist regime that relied on and sustained it, and their movement as completing the “unfinished liberation” sought by slavery abolitionists in the past. Part II considers whether the U.S. Constitution is an abolitionist document. I interrogate the historic abolition constitutionalism by examining antebellum abolitionists’ readings of the Constitution and their partial incorporation into the Reconstruction Amendments, as well as the Supreme Court’s jurisprudence obstructing the Amendments’ transformative potential. I pay close attention to the Supreme Court’s most recent decision interpreting the relationship between the Fourteenth Amendment and carceral punishment — Flowers v. Mississippi — to analyze the Justices’ rejection of an abolitionist approach in their ruling. Finally, Part III links Parts I and II by exploring the relationship between prison abolition and the U.S. Constitution. I argue that, despite the ascendance of proslavery and anti-abolition constitutionalism, we should consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future. I hope to show that the **prison abolition movement can reinvigorate abolition constitutionalism**. In turn, today’s activists can deploy the Reconstruction Amendments instrumentally to further their aims and, in the process, construct a new abolition constitutionalism on the path to building a society without prisons.

### WOMENS RIGHTS - K

#### Description:

This argument addresses a long-lasting debate about the ground workings, and assumptions operate behind, within and against law. This will surely open the door for other feminist scholars (and intersectional literature) to be introduced in debates. This also digs into the debate about equal protections. This debate would likely look like the jurisprudence debates discussed earlier. Debates about reform, material needs, and intersecting oppressions will likely be common. This is another plentiful literature base with many recent works available for both sides of these debates.

#### The bias against women is strong both in the interpretation of protections, and in the foundations of the 14th amendment.

Bernick 21, Evan Bernick, 2021, Assistant Professor of Law Northern Illinois University College of Law, “Antisubjugation and the Equal Protection of the Laws”, The Georgetown Law Journal, [https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/11/Bernick\_Antisubjugation.pdf //](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/11/Bernick_Antisubjugation.pdf%20//) wwu ljh \*\*\* cw- mentions rape.

**There is a consistent theme in the Fourteenth Amendment cases discussed in this Article: Women lose**. Myra Bradwell lost; Jessica Gonzales lost in Castle Rock; victims of gender-motivated violence everywhere lost in Morrison. 438 This depressing record lends credence to an enduring concern about Fourteenth Amendment originalism439: Would full enforcement of the original Fourteenth Amendment leave women worse off? It might seem as if the history of the Fourteenth Amendment offers little to women. It is difficult to stomach Justice Bradley’s infamous concurrence in Bradwell, decided only five years after the Amendment was ratified.440 But as a description of the factual and normative claims that legitimized female subjugation, the concurrence is illuminating: [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.441 Bradley was constitutionally comfortable with an indefensibly discriminatory practice and alluded to countless common law maxims that are similarly odious.442 What comfort could the original Fourteenth Amendment provide to women, if a learned judge like Bradley thought such maxims constitutionally unproblematic so soon after ratification? Before confronting that question, we must ask another one: Just why did Bradley think the discrimination suffered by Bradwell was unproblematic? He claimed that it was “within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.”443 Although he acknowledged that “many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state,” he reasoned that “the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”444 Suppose that Bradley were presented with compelling evidence that his factual assumptions about female incapacity were false. Suppose further that the common law’s treatment of women changed, such that what was exceptional in 1873 became common. It is not at all clear how his constitutional reasoning would be affected. Further, Bradley did not discuss the Equal Protection Clause or closely examine common law rules that exposed women to violence. Take the martial-rape exemption, which denied women protection against violent crimes on the basis of their gender and marital status.445 In none of the records canvassed in this Article is the equal-protection language applied to the marital-rape exemption. There was, however, general agreement that equal protection entailed nondiscriminatory protective law and no claim that women were not entitled to equal protection. Accordingly, constitutional decisionmakers today must determine without aid from Joseph Bradley whether such laws unreasonably leave women less protected than other people against violence. Many of them do so—as Robin West has detailed, “a more obvious denial of equal protection [than the martial-rape exemption] is difficult to imagine.”446 Bradley’s misogyny does not tell us anything useful about the original letter or spirit of the Equal Protection Clause. West and Tuerkheimer have drawn upon the history of the duty of protection to argue for congressional intervention to protect what West called “the rights of citizens to be free, minimally, of the subordinating, enslaving violence of other citizens.”447 Tuerkheimer has focused in particular on investigations by the Department of Justice (DOJ) into discriminatory law-enforcement practices related to protection, such as the practices of declining to investigate rape cases involving non-strangers and shelving rape kits.448 Tuerkheimer accurately identifies these DOJ investigations as consistent with “what the 39th Congress intended . . . to redress.”449 But pattern-and-practice investigations must target patterns and practices of violating the Constitution. And what constitutes a constitutional violation is in turn defined (for many practical purposes) by the Court’s equal-protection doctrine which—as we have seen— underenforces the constitutional text by demanding state action and denying any positive right to protection. The recognition that state inaction resulting in a failure to protect women against violence constitutes an equal protection violation would afford Congress and the DOJ more discretion to draft protective legislation and investigate failures to protect women. It would make decisions like Morrison less likely. I do not mean to understate “the degree to which women’s injuries still are trivialized and rendered invisible by a pervasively misogynist legal, political, and social culture.”450 **Nor am I suggesting that this proposal will prove a panacea, particularly for women who suffer from intersecting, overlapping forms of violence because of multiple racial, class, and sexual identities**.451 The original meaning and function of the Equal Protection Clause will, however, give Congress more constitutional space than is presently available to secure women’s civil rights.

### FEMMINISM – K

#### Description:

This argument is more along the lines of a “classic” feminism debate. It critiques the analytical framework used in the constitution and following amendments and suggests instead a discussion focused through a feminist lens. Answers to this would be likely situated alongside the reform good/bad debates as illustrated above but could also go into a debate about how much change needs to occur until the lens is considered feminist, or debates about the types of feminism illustrated in the critique. The legal literature base for feminism is expansive and entails much more than a topic paper alone can outline.

#### It is critical to approach law with a feminist lens – absent this just recreates the same harms.

Monopoli 22, Paula A. Monopoli, 2-17-22, Sol & Carlyn Hubert Professor of Law, University of Maryland Carey School of Law. B.A., Yale College 1980; J.D., University of Virginia School of Law 1983, “Feminist Legal History and Legal Pedagogy”, Virginia Law Review, <https://www.virginialawreview.org/articles/feminist-legal-history-and-legal-pedagogy/> // wwu ljh

Women are mere trace elements in the traditional law school curriculum. They exist only on the margins of the canonical cases. Built on masculine norms, traditional modes of legal pedagogy involve appellate cases that overwhelmingly involve men as judges and advocates. The resulting silence signals that women are not makers of law—**especially constitutional law.** Teaching students critical modes of analysis like feminist legal theory and critical race feminism matters. But unmoored from feminist legal history, such critical theory is incomplete and far less persuasive. This Essay focuses on feminist legal history as foundational if students are to understand the implications of feminist legal theory. It offers several examples to illustrate how centering women and correcting their erasure from our constitutional memory is essential to educating future judges and advocates. Introduction On August 25, 1980, almost sixty years to the day after the Nineteenth Amendment became part of the United States Constitution, I walked through the doors of the University of Virginia School of Law.1 It was my twenty-second birthday and the beginning of a forty-year career in law, including thirty years in legal academia. But during the following three years of a traditional law school curriculum, I was not exposed to the idea that the Nineteenth Amendment was one of the most significant democratizing events in American legal history.2 Nor did I learn about the seventy-two-year struggle by women to overturn the legal regime of coverture that denied them control over their bodies, their income, and their children. No professor mentioned that women’s advocacy had yielded the vote in fifteen states prior to 1920, or that women had testified before Congress as part of the struggle to achieve a federal voting amendment. That silence taught me and other law students that women3 were not constitution-makers, but merely marginal figures in Constitutional Law—the course that sits atop the curricular hierarchy.4 Forty years later, this erasure of women’s legal history is still pervasive in the American law school curriculum. Most of my students still do not understand the link between the woman suffrage movement5 and the Fourteenth and Fifteenth Amendments.6 Nor do many of them seem to know that, as recently as 1982, this country failed to ratify a federal equal rights amendment.7 While a number of Constitutional Law casebooks now include some coverage of the Nineteenth Amendment, few delve deeply into women’s long struggle for legal and political rights preceding its ratification.8 And most do not characterize that struggle as having yielded one of the most significant shifts in power between the states and the federal government in American constitutional history. Many give only cursory coverage to the early debates among suffragists after the federal equal rights amendment was introduced into Congress in 1923.9 This expansive social movement for women’s rights continues to be largely absent from the core law school curriculum.10 Feminist legal scholars remain marginalized, with little of their scholarship actually changing how mainstream scholars teach law. And women continue to be subordinated in American society, remaining less than full citizens. Reva Siegel has observed that the Supreme Court’s development of Fourteenth Amendment sex discrimination doctrine “seems to have proceeded from the understanding that there is no constitutional history that would support a constitutional commitment to equal citizenship for women—that such a commitment is to be derived, to the extent it can be derived at all, by analogizing race and sex discrimination.”11 In terms of correcting that erasure, this paper’s primary argument is that law schools are an important locus of change. We generate legal scholarship. And we produce the future judges who will interpret constitutional provisions and the future lawyers who will advocate before them. In this Essay, I suggest that the failure of feminist legal scholarship to gain much traction among non-feminist scholars and to have more of an impact on how law is taught is connected to the failure to teach feminist legal history in law schools. And this erasure of women from the canon results in law school graduates who, when they become judges and advocates, are blind to the ways that law reifies the socio-economic subordination of women in terms of the gender pay gap, the disproportionate burdens of caregiving, and the structural barriers they face in advancing in the workplace. Law is central to the process of ensuring equality in a democratic society. But if women only exist, if at all, at the margins of the canon used to educate young lawyers, inequality and subordination will persist. What we have seen in the two years of a global pandemic—more than two million women pushed out of a labor market that is grounded in their free caregiving labor, and attacks on women’s constitutional reproductive rights12 —will continue if we do not rethink how the actors within our legal institutions are prepared to enter the profession. If they continue to leave law school with the understanding that women and law exist only in a siloed course of the same name, law will not respond to critical feminist theory because judges and advocates are unaware of feminist legal history.

### REPRODUCTIVE RIGHTS – K

#### Description:

This debate is the same thesis as jurisprudence above but focuses specifically on abortion and Roe v. Wade. Despite the Supreme Court ruling, abortion rights are consistently under attack. This could serve as a neg critique about the affirmative’s method. The affirmative would then (as any other debate) defend their method. The reason this argument is separated as its own section is because there is a literature base about “abortion jurisprudence”. A lot of the lines drawn, however, are arbitrary, allowing for further exploration and developed nuance.

#### Despite Abortion being protected under current interpretations of the 14th amendment, states are able to routinely challenge this, making it functionally unprotected.

Gazianis 22, Lucas Gazianis, 3-29-2022, Staff writer and columnist at Harvard Political Review, Is Abortion Irreconcilable? Insights from Jurisprudence and Same-Sex Marriage, Harvard Political Review, <https://harvardpolitics.com/abortion-same-sex-marriage/> // wwu ljh

Nearly 50 years after its “Roe v. Wade” precedent in 1973, the Supreme Court is weighing the constitutionality of a Mississippi statute banning almost all abortions after 15 weeks of pregnancy. The plaintiffs in “Dobbs v. Jackson Women’s Health Organization” have asked the Court to overturn “Roe” and find that the 14th Amendment of the Constitution does not protect a woman’s right to have an abortion and that bans on abortion before fetal viability — the point when a fetus is likely to survive outside the womb — are thus constitutional. As the justices deliberate, it appears that permanent resolution of the abortion debate in American society may be impossible. When the Court held in 2015 that the Constitution’s 14th Amendment protects a right to same-sex marriage, it essentially resolved the nationwide marriage debate — not only does every state allow same-sex couples to marry, but the issue has also disappeared almost completely from national contention. Though it has only been several years since “Obergefell v. Hodges” (2015), it has already cemented itself as a successful example of the Court seeking to remove a political issue from the hands of the legislature. In a similar fashion, the Court attempted to settle the abortion debate almost five decades ago. Why didn’t it work? What makes it different from same-sex marriage? And what can “Roe” and “Obergefell” tell us about the role of the Court in different political situations? First, let us look at the doctrine of substantive due process, the jurisprudential foundation for both opinions. The 14th Amendment provides procedural protection against deprivation “of life, liberty, or property, without due process of law.” But the Court has held many times, often controversially, that the Due Process Clause also provides substantive protection against certain laws. In essence, when the Court finds that a law infringes upon a “fundamental right” not mentioned directly in the Constitution, it holds that the government is denying people their liberty without due process of law (even if there has been procedural due process of law). The basis for substantive due process is that it is necessary to protect liberty where the Constitution does not provide citizens with explicit guarantees beyond its relatively few enumerated rights. Substantive due process is the means by which marriage, interstate travel, and procreation are fundamental rights even though they are unmentioned in the Constitution. Originalists — jurists who adhere strictly to the “original meaning” of constitutional provisions, seeking to relegate every issue not explicitly decided by the Constitution to the legislative arena — are quick to criticize substantive due process as an instrument that liberal judicial activists wield to invent new rights. Still, even most originalists acknowledge that certain rights, such as those mentioned before, are fundamental despite not appearing directly in the Constitution. The main point of dispute is where and how frequently the Court should invoke the doctrine. The Court’s approach in both “Roe” and “Obergefell” was to apply substantive due process to recognize a new 14th Amendment individual right that could not be overridden by legislation adopted by popular consensus. For abortion, the Court found that an unenumerated right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” It reasoned that the state’s interest in protecting the life of the fetus becomes compelling only at fetal viability, because the fetus presumably has the capacity for meaningful life outside the womb. For same-sex marriage, the Court reiterated earlier precedents establishing marriage as a fundamental right via the Due Process Clause, finding that the Equal Protection Clause extends this right to same-sex couples. Each case’s reasoning is complex and distinct, but a basic connection is that each recognized rights under the 14th Amendment’s protection that are not mentioned in the Constitution. The Court effectively substituted controversial legal reasoning for the legislature’s ability to address these issues. And this is the central criticism of an active substantive due process approach: it allows activist judges to interpret the Constitution in limitless ways that do not reflect the framers’ original intentions. It removes political issues from what the framers considered to be the legitimate domain of the people — the legislative branch — and transfers them to the hands of unelected judges. If one can take the Due Process Clause to provide a right to abortion, they object, what right could it not encompass if enough judges willed it to? There is a fundamental balance between ensuring the judiciary is not overshadowing the legislative process through overzealous constitutional activism and recognizing that legislative discretion can sometimes trample the rights of unpopular minorities in ways that violate the Constitution’s promises of liberty. But, again, the country seems to have moved on from the marriage debate, whereas abortion remains one of our most polarizing issues. What accounts for the difference? First, **abortion jurisprudence involves an arbitrary but very important value judgment: fetal viability as the marker of when abortion prohibitions are protected under the Constitution.** Justice Harry Blackmun, in his “Roe” majority opinion, argues that “When those trained [in] medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” In other words, the Court does not mean to resolve the moral question of abortion. It is merely identifying compelling interests in both maternal health and fetal life and devising a scheme — arbitrary, yes, but with a solid constitutional basis — for evaluating them against each other to resolve cases and controversies involving abortion. However, **in seeking to avoid weighing in on the morality or merits of abortion, the Court may have done just that — it legitimized the arbitrary threshold of fetal viability as the marker of constitutional protection for the right to abortion**. Independent of its legal manifestations, the moral question of abortion often hinges on the precise point at which a fetus is considered a human life. Many pro-lifers find this point to be conception, while the pro-choice movement splits between a variety of points during pregnancy, including viability and, more rarely, birth itself. The Court, even though it purports to remain neutral on this moral question, has held that abortion prohibitions before viability violate the Constitution, while those after viability do not. To pro-lifers who judge abortion as murder, this may seem completely arbitrary and, more crucially, founded upon a particular moral analysis of abortion. They argue that the Court taking away society’s right to make such moral judgments through the legislature amounts to a moral, political judgment on behalf of the Court itself. Compare this to same-sex marriage, an issue where public attitudes have evolved in countries all over the world as it has become more normalized and socially acceptable to be gay. Just a few years after preventing gay people from having the right to marry was a central culture war issue for the GOP, public support for same-sex marriage is at an all-time high, with a majority of Republicans, including 61% of young Republicans, now in favor. The marked increase in acceptance since 2015, when the Court resolved the political issue, shows few signs of reversal. As Republican state legislatures and attorneys general pass laws and file lawsuits aimed at challenging “Roe” or banning abortion in the case that the precedent is overturned, there is no observable, comparable trend for same-sex marriage. It may be impossible to answer exactly why public attitudes towards gay people have changed so much, but I suspect social contact and visibility hold a lot of explanatory power. Around half of Americans have a close friend or family member who is gay, and the share of people who know someone who is gay has increased by more than 25 percentage points over the last 20 years. Meanwhile, since 1977, the U.S. has seen colossal increases in the share of people who believe gay people should have equal employment opportunities and adoption rights. Critically, almost four times as many Americans today believe that people are born gay as in 1977. As more Americans have shifted away from the perspective that homosexuality is a lifestyle choice, it has naturally followed that more believe that marriage — a bedrock institution in American society — should be extended to gay people. For abortion, little of this is true. Even though abortion is a civil rights issue in that it deals with a woman’s right to choose, pro-lifers maintain that it is a women’s rights issue no less than the choice to kill a born baby is a women’s rights issue. And while almost one in four women will have an abortion by age 45, it is a medical issue and thus inherently more private — remember, the constitutional right to abortion stems from a fundamental right to privacy. Though both are fairly widespread, abortion is not as visible as same-sex relationships. Moreover, whereas debates over same-sex marriage deal with extending a widely accepted right to more people, abortion debates focus on the merits of the right itself. In the abortion debate, deeply held beliefs regarding conception and the rights fetuses are endowed with may make it harder for religious conservatives to compromise their fundamental principles on what they view as murder. Public support for abortion has remained relatively stagnant since “Roe,” and the fact that the Court is now poised to at least scale back its precedent imminently, after 50 years of “settled law,” offers some solid proof that social attitudes on abortion aren’t destined to change much at all. We can learn a lot about our politics from looking closely at the Supreme Court — how it approaches certain issues, how it balances its duty of dispassionate jurisprudence with its situation as a political institution, and how different justices navigate judicial philosophy across issues. We often think of the Court as a separate battlefield from the political arena, but in this column, I will show how jurisprudential debates can help us see political issues in a new light.

### TRANS LIVES - K

#### Description:

Trans rights are under constant attack, especially in the courts. This provides a strong link into trans literature. The legal field has many different angles on this issue, but there still seems to be indecisiveness on what the solution should be. This opens the debate for both the affirmative plan and alt for the negative. Trans folks are consistently shut out of legal definitions, but a debate is to be had if a reinterpretation could change this. Another level is the debate about whether the plan should happen, even if it does not solve the structural problem, but does offer relief.

#### Legal is language of oppressor - endorses stigmatization and erasure of trans bodies.

Levasseur 15 M. Dru Levasseur, 2015, J.D. Western New England University School of Law, is the Transgender Rights Project National Director for Lambda Legal Defense & Education Fund, Inc. and co-founder of the Jim Collins Foundation, Inc., Vermont Law Review, [https://lawreview.vermontlaw.edu/wp-content/uploads/2015/05/39-4-06\_Levasseur.pdf //](https://lawreview.vermontlaw.edu/wp-content/uploads/2015/05/39-4-06_Levasseur.pdf%20//) wwu ljh

Even as they make strides inside mainstream culture,115 transgender people remain “strangers to the law.”116 When seeking legal recognition in the courts, transgender people “face the possibility of a **systematic obliteration** of their personal identity,”117 what Professor Taylor Flynn labels, “a legal shredding of self.”118 Transgender people have been dehumanized, have had core, intimate aspects of their selves **legally erased** and their bodies publicly dissected for purported function and appearance.119 Transgender people have been judged defiant and **worthy of punishment**,120 **immoral**,121 **fraudulent**,122 **mentally ill**,123 **delusional**,124 **medically wrong**,125 or **imaginary/nonexistent**.126 Behind the “legal horror”127 of courts’ inability to accept and validate transgender people **as full human beings** is the courts’ failure to embrace the medical understanding of sex, which gives primacy to gender identity when weighing the factors of sex.

### DISABILITY - K

#### Description:

This critique is also along the lines of jurisprudence. The core thesis is there is a continual bias against disabled folks in the legal system, and specifically in the Due Process Clause of the 14th Amendment. This gives opportunity for critical disability literature. The debates could result in reform v abolition, or could be more of a case solvency debate, and to the extent the affirmative is able to change the conditions currently in place.

#### Despite being “protected” under 14th Amendment, Disabled parents are routinely deemed “unfit” due to bias courts hold.

Sjoquist 22, Geri C. Sjoquist 2-2-2022, Adjunct professor at the Mitchell Hamline School of Laws, part of Sjoquist Law LLC, and has been working in law for 25 yeears, Bias Towards the Disabled, American Bar Association, <https://www.americanbar.org/groups/family_law/publications/family-advocate/2022/winter/bias-towards-disabled/> // wwu ljh

Our biases include both favorable and unfavorable assessments that directly affect our understanding, actions, and decisions on an unconscious level. Remarkably, a person’s implicit associations—acquired over their lifetime—may or may not even align with their explicitly declared beliefs. Nevertheless, our unconscious biases cause us to assign a value to people. Unfortunately, because stereotypes persist, our split-second unconscious assignment of value too often leads to discriminatory practices and decisions that have little basis in fact. As a result, people with disabilities continue to encounter significant legal, medical, and familial resistance to their decision and desire to become or continue to be parents. Those of us who want to do our part in mitigating this result must start by making sure that state judiciaries across the country do not sidestep their duties to their citizens to address the issue of accessibility under the ADA and the Rehabilitation Act. This way, persons with disabilities are assured equal access to state and local governments and courts so that they may meaningfully exercise their fundamental rights protected by the Due Process clause of the 14th Amendment, and have a fair shot at having their cases evaluated by individualized factual assessments. Benjamin Franklin is quoted as saying, justice will not be served until those that are not affected are as outraged as those who are. The truth is we are all different, and we all have different abilities. And we all have implicit biases, preferences, and prejudices. The question that needs to be asked is whether our differences (and our uninformed ideas about the disabled) are being used in family court proceedings as a justification for unequal treatment, the kind that is already so routinely meted out by society at large through invisible slights, indignities, and unexamined assumptions.

# Resolution

### Introduction

#### The topic addresses major areas of debate in constitutional law through the framework of the 14th amendment. The 14th amendment not only creates its own protections through the Equal Protection Clause and Due Process Clause, but protects and incorporates all other constitutional rights at the federal level through the Privileges and Immunities Clause. These areas are often expanded and reinterpreted under new doctrines and case precedent to establish or enforce federal protection of rights contained in the US constitution. The topic essentially becomes a debate about what the US constitution comes to guarantee under its original enumeration, or what it ought to guarantee as a modern and functional expression of the original text.

### The Actor

#### *Option 1: The Federal Government*

#### This option would establish federal protections with the coordination of the whole federal government, limit negative actor counterplan ground to non-federal actors, and allow affirmatives to specify federal actors most relevant to the protection they intend to establish or enforce.

#### *Option 2: The Supreme Court*

#### This option would use judicial review to interpret new federal protections. The 14th amendment is shaped by a rich supreme court precedent which a supreme court actor would contribute and to and interact with. A major legacy of the 14th amendment is selective incorporation, which is the doctrine by which the supreme court used the 14th to incorporate major sections of the bill of rights into federal protection. This doctrine and actor fundamentally changed the nature of the constitution and would ground the legal topic in supreme court jurisprudence and case-precedent literature.

#### *Option 3: Passive voice – non-actor*

#### There are two important reasons to consider a non-actor resolution for this year’s legal topic:

#### To make the resolution a normative statement about law. Non-actor resolutions open up student autonomy to define themselves as advocates relative to the law, allowing teams to craft legal advocacy independent of existing institutions.

#### To limit actor counterplan ground in the pursuit of a more wholistic debate about the current state of legal precedent. Concerns about the functionality of the topic relative to the 50 states counterplan are best addressed by a topic which does not insist on a specified actor to affect change in legal precedent.

### The Direction

#### *To substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment:*

#### The affirmative increases rather than decreases federal protections.

#### The affirmative increases protections through a novel interpretation of the 14th amendment.

### The Floor and Ceiling

#### The floor of the topic is)

#### *To substantially increase federal protections:*

#### To functionally establish and attempt to enforce new protection(s).

#### The federal government would be required to establish protection(s) through legislative, judicial, or executive action. Likely established through judicial review or new legislation.

#### Establish protection(s) with a national scope: applying to infringement on rights by the state or federal government. This may change rights as currently interpreted by the states but might also contest current limited interpretation of rights at the federal level, such as privacy in the context of NSA surveillance.

#### To substantially increase federal protection(s), ones not already established or enforced.

#### *In at least one of the following areas:*

#### The affirmative must create new protections within one or more of the major legal doctrines established by the 14th amendment as described by the section below.

#### The ceiling of the topic is)

#### *Privileges and immunities guaranteed under the 14th Amendment:*

#### Indicates the mechanism of constitutional law under which these protections must be established.

#### Federal protections must be those guaranteed by or through the 14th amendment.

#### The Privileges and Immunities Clause of the 14th amendment also incorporates other rights enumerated in the constitution for federal protection.

#### *In at least one of the following areas:*

#### Limits federal protections to fall within one or more of the major legal doctrines established by the 14th amendment as described by the section below.

### The List

#### The 14th amendment contains multiple mechanisms to effect new rights protections at the state and federal level. The provisions we have chosen to focus on are the Due Process Clause and Equal Protection Clause, as well as the right to privacy which was interpreted out of multiple amendments through the Privileges and Immunities clause of the 14th amendment.

#### These create defined yet contestable areas for a resolutional list and floor relating to areas of established precedent and emerging interpretations.

#### The three suggested areas are:

#### *Due process)*

#### The Due Process Clause affects protections related to the justice system and incorporates other rights contained in constitution to be under explicit federal protection. The 14th amendment shares this clause with the fifth amendment.

https://www.law.cornell.edu/wex/due\_process

The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures. Most of this essay concerns that promise. We should briefly note, however, three other uses that these words have had in American constitutional law.

Incorporation

The Fifth Amendment's reference to “due process” is only one of many promises of protection the Bill of Rights gives citizens against the federal government. Originally these promises had no application at all against the states (see Barron v City of Baltimore (1833)). However, this attitude faded in Chicago, Burlington & Quincy Railroad Company v. City of Chicago (1897), when the court incorporated the Fifth Amendment's Takings Clause. In the the middle of the Twentieth Century, a series of Supreme Court decisions found that the Due Process Clause "incorporated" most of the important elements of the Bill of Rights and made them applicable to the states. If a Bill of Rights guarantee is "incorporated" in the "due process" requirement of the Fourteenth Amendment, state and federal obligations are exactly the same.

#### Substantive Due Process is an emerging doctrine which interprets the Due Clause to extend to rights beyond those explicitly enumerated in the US constitution.

https://www.law.cornell.edu/wex/substantive\_due\_process

Substantive due process is the notion that due process not only protects certain legal procedures, but also protects certain rights unrelated to procedure.

Many legal scholars argue that the words “due process” suggest a concern with procedure rather than substance. Justice Clarence Thomas, one of this theory's most well-noted supporters, argued this point when he wrote that "the Fourteenth Amendment’s Due Process Clause is not a secret repository of substantive guarantees against unfairness"--understand the Due Process Clause. However, others believe that the Due Process Clause does include protections of substantive due process--such as Justice Stephen J. Field, who, in a dissenting opinion to the Slaughterhouse Cases wrote that "the Due Process Clause protected individuals from state legislation that infringed upon their “privileges and immunities” under the federal Constitution. Field’s dissenting opinion is often seen as an important step toward the modern doctrine of substantive due process, a theory that the Court has developed to defend rights that are not mentioned in the Constitution."

Substantive due process has been interpreted to include things such as the right to work in an ordinary kind of job, marry, and to raise one's children as a parent. In Lochner v New York (1905), the Supreme Court found unconstitutional a New York law regulating the working hours of bakers, ruling that the public benefit of the law was not enough to justify the substantive due process right of the bakers to work under their own terms. Substantive due process is still invoked in cases today, but not without criticism (See this Stanford Law Review article to see substantive due process as applied to contemporary issues).

#### *Equal protection)*

#### The Equal Protection Clause is crucial to the federal protection of civil rights, which are immunities related to non-discrimination by the state and federal government.

https://www.law.cornell.edu/wex/equal\_protection

Equal Protection refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body state must treat an individual in the same manner as others in similar conditions and circumstances. Permissible Discrimination Before proceeding, it is important to remember that a government is allowed to discriminate against individuals, as long as the discrimination satisfies the equal protection analysis outlined below, and described in full detail in this Santa Clara Law Review article. U.S. Constitution The Fifth Amendment's Due Process Clause requires the United States government to practice equal protection. The Fourteenth Amendment's Equal Protection Clause requires states to practice equal protection. Equal protection forces a state to govern impartially—not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective. Thus, the equal protection clause is crucial to the protection of civil rights.

#### *Privacy)*

#### The right to privacy was incorporated under the Due Process clause to guarantee a right to autonomy from government intervention.

https://www.law.cornell.edu/wex/privacy

In the United States, the Supreme Court first recognized the right to privacy in Griswold v. Connecticut (1965). Before Griswold, however, Louis Brandeis (prior to becoming a Supreme Court Justice) co-authored a Harvard Law Review article called "The Right to Privacy," in which he advocated for the "right to be let alone." Griswold and the Prenumbras In Griswold, the Supreme Court found a right to privacy, derived from penumbras of other explicitly stated constitutional protections. The Court used the personal protections expressly stated in the First, Third, Fourth, Fifth, and Ninth Amendments to find that there is an implied right to privacy in the Constitution. The Court found that when one takes the penumbras together, the Constitution creates a "zone of privacy." While the holding in Griswold found for a right to privacy, it was narrowly used to find a right to privacy for married couples, and only with regard to the right to purchase contraceptives. Justice Harlan's Concurrence in Griswold Also important to note is Justice Harlan's concurring opinion in Griswold, which found a right to privacy derived from the Fourteenth Amendment. In his concurrence, he relies upon the rationale in his dissenting opinion in Poe v. Ullman (1961). In that opinion, he wrote, "I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." In privacy cases post-Griswold, the Supreme Court typically has chosen to rely upon Justice Harlan's concurrence rather than Justice Douglas's majority opinion. Eisenstadt v Baird (1971), Roe v. Wade (1972), and Lawrence v. Texas (2003) are three of the most prolific cases in which the Court extended the right to privacy. In each of these cases, the Court relied upon the Fourteenth Amendment, not penumbras.

### Suggested Resolutions

**Resolution 1: Federal Government Actor**

Resolved: The United States Federal Government should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment.

**Resolution 1: Federal Government Actor W/ Floor for Specified Areas**

Resolved: The United States Federal Government should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment in at least one of the following areas: the right to privacy, the Equal Protection Clause, the Due Process Clause.

**Resolution 1: Supreme Court Actor**

Resolved: The United States Supreme Court should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment.

**Resolution 1: Supreme Court Actor W/ Floor or Specified Areas**

Resolved: The United States Supreme Court should substantially increase federal protections for privileges and immunities guaranteed under the 14th Amendment in at least one of the following areas: the right to privacy, the Equal Protection Clause, the Due Process Clause.

**Resolution 1: Passive Voice**

Resolved: Federal protections should substantially increase for privileges and immunities guaranteed under the 14th Amendment.

**Resolution 1: Passive Voice W/ Floor for Specified Areas**

Resolved: Federal protections should substantially increase for privileges and immunities guaranteed under the 14th Amendment in at least one of the following areas: the right to privacy, the Equal Protection Clause, the Due Process Clause.

### Definitions for Suggested Resolutions

#### The United States Federal Government is the three branches.

The Free Dictionary ND, accessed 9/12/2021, "Federal government of the United States," <https://www.thefreedictionary.com/Federal+government+of+the+United+States> // wwu ljh

Noun 1. U.S. government - the executive and legislative and judicial branches of the federal government of the United States.

#### The Supreme Court is the highest court in the US.

**White House ND** (The White House, “Our Government: The Judicial Branch,” <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/>) //wwu-kck

The Supreme Court of the United States is the highest court in the land and the only part of the federal judiciary specifically required by the Constitution. The Constitution does not stipulate the number of Supreme Court Justices; the number is set instead by Congress. There have been as few as six, but since 1869 there have been nine Justices, including one Chief Justice. All Justices are nominated by the President, confirmed by the Senate, and hold their offices under life tenure. Since Justices do not have to run or campaign for re-election, they are thought to be insulated from political pressure when deciding cases. Justices may remain in office until they resign, pass away, or are impeached and convicted by Congress.

#### Should expects action.

**Law Insider, ND** (Law Insider is the top rated legal research site for contracts, clauses and defined terms with daily updates, “Should definition,” <https://www.lawinsider.com/dictionary/should>)

[**Should**](https://www.lawinsider.com/dictionary/should) means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance

#### Substantially increase means an increase of significant amount, extent, or degree

**Law Insider, ND** (Law Insider is the top rated legal research site for contracts, clauses and defined terms with daily updates, “Substantial increase definition,” <https://www.lawinsider.com/dictionary/substantial-increase>) //wwu-kck

[**Substantial increase**](https://www.lawinsider.com/dictionary/substantial-increase) means “important or significant in a large amount, extent, or degree,” and not resulting in insignificant or small benefit to the public health and safety, common defense and security, or the environment, regardless of costs. However, this standard is not intended to be interpreted in a way that would result in disapproval of worthwhile safety or security improvements with justifiable costs.

#### Federal protections take precedence over the states through the supremacy clause.

**Book of Jen ‘21**, (Book of Jen is writing in reference to qualified legal scholars, “Here’s why anti-trans laws are not legal,” <https://bookofjen.net/heres-why-anti-trans-laws-are-not-legal/>)

Federal protections override state laws that attempt to take away those protections. This means that the anti-trans laws that some states have passed into law are not legal – and can be overturned by the federal government. The federal government gets its power to overturn state laws from the Supremacy Clause in the United States Constitution. Merriam-Webster describes the [Supremacy Clause](https://www.merriam-webster.com/legal/supremacy%20clause) this way: a clause in Article VI of the U.S. Constitution declares the constitution, laws, and treaties of the federal government to be supreme law of the land to which judges in every state are bound regardless of state law to the contrary. The Supremacy Clause is closely related to the idea of preemption. The Free Legal Dictionary says that [preemption](https://legal-dictionary.thefreedictionary.com/preemption) is a doctrine based on the Supremacy Clause of the U.S. Constitution that holds that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.

#### For indicates purpose.

**Merriam-Webster ND**, (Merriam-Webster, “For,” <https://www.merriam-webster.com/dictionary/for>)

Definition of for (Entry 1 of 5) 1a —used as a function word to indicate purpose a grant for studying medicine b —used as a function word to indicate an intended goal left for homeacted for the best c —used as a function word to indicate the object or recipient of a perception, desire, or activity now for a good restrun for your lifean eye for a bargain 2a : as being or constituting taken for a fool eggs for breakfast b —used as a function word to indicate an actual or implied enumeration or selection for one thing, the price is too high 3 : because of can't sleep for the heat 4 —used as a function word to indicate suitability or fitness it is not for you to chooseready for action 5a : in place of go to the store for me b(1) : on behalf of : [representing](https://www.merriam-webster.com/dictionary/representing) speaks for the court (2) : in favor of all for the plan 6 : in spite of —usually used with all for all his large size, he moves gracefully 7 : with respect to : [concerning](https://www.merriam-webster.com/dictionary/concerning) a stickler for detail heavy for its size 8a —used as a function word to indicate equivalence in exchange $10 for a hat , equality in number or quantity point for point , or correspondence or correlation for every one that works, you'll find five that don't b —used as a function word to indicate number of attempts 0 for 4 9 —used as a function word to indicate duration of time or extent of space gone for two days 10 : in honor of : [after](https://www.merriam-webster.com/dictionary/after) named for her grandmother

#### The privileges and immunities clause protects fundamental rights of individual citizens and restrains state efforts to discriminate

https://www.law.cornell.edu/wex/privileges\_and\_immunities\_clause

The Privileges and Immunities Clause of [Article IV](https://www.law.cornell.edu/constitution/constitution.articleiv.html), Section 2 of the Constitution states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This clause protects fundamental rights of individual citizens and restrains state efforts to discriminate against out-of-state citizens. However, the Privileges and Immunities Clause extends not to all commercial activity, but only to fundamental rights.

#### Guaranteed means to have a specified result.

**Merriam-Webster ND**, (Merriam-Webster, “Guaranteed,” <https://www.merriam-webster.com/dictionary/guaranteed> )

Definition of guaranteed 1 : assured with a guarantee (see [guarantee entry 2 sense 3](https://www.merriam-webster.com/dictionary/guarantee#h2)) : protected or promised by a guarantee a guaranteed annual wage a guaranteed loan In some California locales … public-safety workers can pull down truly swank livings, given their salaries, health benefits and guaranteed pension payouts.— Amanda Ripley 2 : certain to have a specified result or effect … the structural imbalance between rich cities and poor countrysides produces economic relations guaranteed to bring out the worst in people.— Raj Patel She transforms the discussion of ideas into a gratuitous spectacle of anger and aggression guaranteed to elevate the Nielsen ratings …— Daniel Harris

#### Under means subject to the law.

US Legal ND https://definitions.uslegal.com/u/under-the-law/

The term “under the law” means in conformity with law or subject to the law. The following is an example of a case law defining “under the law”: “Under the law” does not mean, "in pursuance of it," or "in conformity with it," but an act assumed to be done under it.

#### The 14th Amendment is the 14th amendment to the US constitution.

Constitution of United States of America 1789 (rev. 1992)

https://www.google.com/search?client=firefox-b-1-d&q=the+14th+amendment+to+the+US+constitution

#### In means a position within limits.

Merriam-Webster ND (Merriam-Webster, “in,” https://www.merriam-webster.com/dictionary/in)

Definition of in

 (Entry 1 of 11)

1a —used as a function word to indicate inclusion, location, or position within limits in the lakewounded in the legin the summer

b : [into sense 1](https://www.merriam-webster.com/dictionary/into) went in the house

2 —used as a function word to indicate means, medium, or instrumentality written in pencilbound in leather

3a —used as a function word to indicate limitation, qualification, or circumstance alike in some respectsleft in a hurry

b : [into sense 4a](https://www.merriam-webster.com/dictionary/into) broke in pieces

4 —used as a function word to indicate purpose said in reply

5 —used as a function word to indicate the larger member of a ratio

#### At least means no less than.

**Law Insider ND** (Law Insider, “At least definition,” <https://www.lawinsider.com/dictionary/at-least>)

[**At least**](https://www.lawinsider.com/dictionary/at-least) in this section, means “not less than” but it could be more. Because s 41 envisages that an employer may agree to pay more than the statutory minimum, disputes as to the contractual entitlement to such a higher amount may also be arbitrated upon in the CCMA or a bargaining council.

#### One is a part of a category.

**Marriam-webster ND** (Marriam-webster, “On of,” <https://www.merriam-webster.com/dictionary/one%20of>)

one of the only [idiom](https://www.merriam-webster.com/dictionary/idiom) : one of very few : one in a small class or category

#### The right to privacy was incorporated under the Due Process clause to guarantee a right to autonomy from government intervention.

https://www.law.cornell.edu/wex/privacy

In the United States, the Supreme Court first recognized the right to privacy in Griswold v. Connecticut (1965). Before Griswold, however, Louis Brandeis (prior to becoming a Supreme Court Justice) co-authored a Harvard Law Review article called "The Right to Privacy," in which he advocated for the "right to be let alone." Griswold and the Prenumbras In Griswold, the Supreme Court found a right to privacy, derived from penumbras of other explicitly stated constitutional protections. The Court used the personal protections expressly stated in the First, Third, Fourth, Fifth, and Ninth Amendments to find that there is an implied right to privacy in the Constitution. The Court found that when one takes the penumbras together, the Constitution creates a "zone of privacy." While the holding in Griswold found for a right to privacy, it was narrowly used to find a right to privacy for married couples, and only with regard to the right to purchase contraceptives. Justice Harlan's Concurrence in Griswold Also important to note is Justice Harlan's concurring opinion in Griswold, which found a right to privacy derived from the Fourteenth Amendment. In his concurrence, he relies upon the rationale in his dissenting opinion in Poe v. Ullman (1961). In that opinion, he wrote, "I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." In privacy cases post-Griswold, the Supreme Court typically has chosen to rely upon Justice Harlan's concurrence rather than Justice Douglas's majority opinion. Eisenstadt v Baird (1971), Roe v. Wade (1972), and Lawrence v. Texas (2003) are three of the most prolific cases in which the Court extended the right to privacy. In each of these cases, the Court relied upon the Fourteenth Amendment, not penumbras.

#### The Equal Protection Clause is crucial to the federal protection of civil rights, which are immunities related to non-discrimination by the state and federal government.

https://www.law.cornell.edu/wex/equal\_protection

Equal Protection refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body state must treat an individual in the same manner as others in similar conditions and circumstances. Permissible Discrimination Before proceeding, it is important to remember that a government is allowed to discriminate against individuals, as long as the discrimination satisfies the equal protection analysis outlined below, and described in full detail in this Santa Clara Law Review article. U.S. Constitution The Fifth Amendment's Due Process Clause requires the United States government to practice equal protection. The Fourteenth Amendment's Equal Protection Clause requires states to practice equal protection. Equal protection forces a state to govern impartially—not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective. Thus, the equal protection clause is crucial to the protection of civil rights.

#### The Due Process Clause affects protections related to the justice system and incorporates other rights contained in constitution to be under explicit federal protection. The 14th amendment shares this clause with the fifth amendment.

https://www.law.cornell.edu/wex/due\_process

The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures. Most of this essay concerns that promise. We should briefly note, however, three other uses that these words have had in American constitutional law.

Incorporation

The Fifth Amendment's reference to “due process” is only one of many promises of protection the Bill of Rights gives citizens against the federal government. Originally these promises had no application at all against the states (see Barron v City of Baltimore (1833)). However, this attitude faded in Chicago, Burlington & Quincy Railroad Company v. City of Chicago (1897), when the court incorporated the Fifth Amendment's Takings Clause. In the the middle of the Twentieth Century, a series of Supreme Court decisions found that the Due Process Clause "incorporated" most of the important elements of the Bill of Rights and made them applicable to the states. If a Bill of Rights guarantee is "incorporated" in the "due process" requirement of the Fourteenth Amendment, state and federal obligations are exactly the same.

1. https://www.jstor.org/stable/43654914 [↑](#footnote-ref-1)
2. https://ballotpedia.org/Supreme\_Court\_cases,\_October\_term\_2022-2023#:~:text=It%20is%20often%20referred%20to,in%20October%20the%20following%20year. [↑](#footnote-ref-2)
3. https://wtop.com/government/2022/03/ap-explains-why-the-14th-amendment-has-surfaced-in-midterms/ [↑](#footnote-ref-3)