MINOR V. HAPPERSETT, *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*, AND THE SUPREME COURT'S REFUSAL TO RECONSTRUCT AMERICA

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INTRODUCTION

One hundred and fifty years ago, in the wake of the ratification of the Reconstruction Amendments, the United States Supreme Court decided *Minor v. Happersett*.[1] In *Minor*, the Court ruled Missouri could continue to deny women the right to vote based on their sex.[2] The decision was simply

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1. 88 U.S. (21 Wall.) 162 (1875).
2. *Id.* at 178 (affording right to vote to men alone is constitutional).

reasoned. In the absence of clear constitutional text requiring Missouri to provide the right to vote to women or proof that the right to vote was a right of citizenship, Missouri had no obligation to allow women to vote.[3] Some states had banned women citizens from voting since the country's founding.[4] Missouri had done so since its admission to the union.[5] The *Minor* Court ruled nothing had occurred in the wake of the Civil War that compelled Missouri to end the practice.[6] The Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments ratified in the wake of the Civil War—may have triggered constitutional change, but not enough to require women's suffrage.

The Reconstruction Amendments brought a measure of equality to all Americans and the promise of voting rights to a swath of Americans.[7] However, they did not explicitly address women and the franchise. The Thirteenth Amendment ended slavery.[8] The Fourteenth Amendment, in part, provided birthright citizenship, making citizens of formerly enslaved people and others who were born in the United States.[9] It also required states to provide a form of procedural equality to all citizens and persons.[10] The Fifteenth Amendment barred states from regulating the right to vote based on race, color, or previous condition of servitude.[11] The *Minor* Court decided none of the amendments spoke to voting rights for women. Barring an affirmative and explicit change to Missouri law or federal law, women in Missouri could be denied the right to vote.[12] *Minor* arguably is just an unfortunate nineteenth-century case in which the Court applied the mores of its time to decline to extend the Reconstruction Amendments to voting

3. *Id.* (ruling Missouri has the discretion to craft its electorate).

4. *Id.* at 172 (discussing state voting laws during the ratification era).

5. *Id.* at 177 (noting no new state had been admitted to the Union that had allowed women to vote).

6. *Id.* at 171 (noting that rather than create rights, the Fourteenth Amendment enforces rights that already exist).

7. *See* Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 851–52 (2021) (discussing effects of the Reconstruction Amendments).

8. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

9. U.S. CONST. amend. XIV, § 1 ("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."); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (ruling that a child born in United States of two Chinese subjects who were not U.S. citizens became a U.S. citizen at the time of his birth).

10. U.S. CONST. amend. XIV, § 1 (requiring states comply with due process and equal protection).

11. U.S. CONST. amend XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

12. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875) (noting the Court's role is to determine what the law is, not to determine what it should be).

rights that must be provided equally to women today in the wake of a reinterpreted Fourteenth Amendment and a Nineteenth Amendment which explicitly bars sex-based discrimination in voting.[13]

However, reading *Minor* as a straightforward, if anachronistic, case ignores an important point. The case provided an opportunity for the Court to consider American democratic principles anew during post-Civil War Reconstruction. The Thirteenth Amendment's abolition of slavery helped transition America from an antebellum slave society to a post-slavery society. The Court ignored what that transition could or should have meant for the rights of all citizens, including women, in an America ostensibly founded on democratic republican principles. It also ignored what the Fifteenth Amendment's explicit limitation on the race-based provision of the right to vote could have suggested about how the right to vote should be distributed to other citizens who had been denied the right to vote. Instead, the Court focused narrowly on whether the Fourteenth Amendment should be interpreted to create a right to vote for women or, alternatively, to recognize a preexisting right to vote that states should be forced to provide to women equally.[14] Finding neither, the *Minor* Court allowed women's diminished citizenship to continue.[15]

The *Minor* Court treated the Reconstruction Amendments as incremental changes to a Constitution that had allowed varying forms of injustice against American women rather than as transformational changes that would fulfill the promise of American liberty embedded in our foundational documents.[16] By allowing Missouri to continue to deny women the right to vote, the *Minor* Court ratified the violence Missouri inflicted on the citizenship and personhood rights women could have enjoyed in the wake of the Reconstruction Amendments' passage. In doing so, the Court refused to reconstruct America and our American democracy.

The *Minor* Court's approach to the Reconstruction Amendments is similar to the approach taken by the Court in a recent case—*Dobbs v. Jackson Women's Health Organization*.[17] The *Dobbs* Court considered the Fourteenth Amendment and the constitutional right to abortion,[18] which had

13. U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *see also* Reed v. Reed, 404 U.S. 71, 76 (1971) (noting the Equal Protection Clause applies to sex discrimination).

14. *Minor*, 88 U.S. (21 Wall.) at 176–78.

15. *Id.* at 178.

16. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting government's obligation to secure the unalienable, Creator-given rights that all possess at birth).

17. 597 U.S. 215 (2022).

18. *Id.* at 231.

been deemed embedded in the Constitution for a half century.[19] Ultimately, the Court excised the right from the Constitution and gave full authority to regulate abortion to states.[20] In the process, it missed an opportunity to reconsider how the Reconstruction Amendments could be deemed to have reconstructed America and instantiated a new vision of freedom for all Americans. The *Dobbs* Court's approach is not surprising, but it is a reminder of how incremental constitutional interpretation may restrain America from grappling with the full implications of the equality ostensibly embedded in its founding documents.

This short piece proceeds simply. Part I considers how the *Minor* Court interpreted the Reconstruction Amendments. Part II considers the Reconstruction Amendments and how they could be interpreted as incremental changes or as transformational changes to the Constitution. Part III considers how the *Dobbs* Court tracks the *Minor* Court's approach to interpreting the Fourteenth Amendment in an incremental fashion. This piece concludes with a few thoughts on the Court's approach to rights discovery and constitutional interpretation.

I. *MINOR V. HAPPERSETT*

Virginia Minor, a Missouri and United States citizen, sought to vote in Missouri's congressional and presidential elections in 1872.[21] She attempted to register to vote, but the registrar declined to register her because Missouri limited voting eligibility to men.[22] The Court stated the case's core issue simply:

> The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone.[23]

19. *See* Roe v. Wade, 410 U.S. 113, 164–66 (1973) (strictly limiting a state's ability to restrict abortion depending on gestational age).

20. *Dobbs*, 597 U.S. at 232, 302.

21. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 163–64 (1875).

22. *Id.* ("Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and Vice-President of the United States, and for a representative in Congress, and for other officers, at the general election held in November, 1872, applied to one Happersett, the registrar of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not a 'male citizen of the United States,' but a woman.").

23. *Id.* at 165.

The Court answered no, allowing Missouri to continue to deny Minor the right to vote.[24]

A. The Fourteenth Amendment and Citizenship

The *Minor* Court focused on the Fourteenth Amendment. Ratified in 1868, Section 1 of the Fourteenth Amendment reads:

> 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.[25]

The amendment extended citizenship to nearly all who were born in the United States—including former slaves.[26] Black people who had been born free, freed before the Civil War, freed during the Civil War, or freed in the wake of the Thirteenth Amendment arguably needed their citizenship to be confirmed by the Fourteenth Amendment, lest states deny that citizenship based on Supreme Court precedent, such as *Dred Scott v. Sandford*.[27] The Fourteenth Amendment also provided a measure of equality for all citizens through the Privileges or Immunities, Due Process, and Equal Protection Clauses, though the scope of equality the amendment provided was uncertain in the decade after the amendment was ratified.[28]

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24. *Id.* at 178.

25. U.S. CONST. amend. XIV, § 1.

26. *Id.*; *see also* Amanda Frost, *Paradoxical Citizenship*, 65 WM. & MARY L. REV. 1177, 1191 (2024) ("[T]he Court concluded that the Citizenship Clause's exception for those not 'born subject to the jurisdiction of the United States' was intended to bar only the children of diplomats and those born within Indian tribes from birthright citizenship—the two exceptions discussed in the legislative history. Everyone else qualified for citizenship by virtue of birth on U.S. soil, regardless of their parents' race, ethnicity, or immigration status." (footnote omitted)).

27. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The citizenship status of free Blacks had been unclear since *Dred Scott*, in which the Court determined Black people could not be citizens of the United States. For a general discussion of citizenship in antebellum America, see Henry L. Chambers, Jr., Dred Scott*: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209 (2007).

28. The Court began assessing the Fourteenth Amendment's meaning in cases such as *The Slaughter-House Cases*. 83 U.S. (16 Wall.) 36 (1873); *see also* Tsesis, *supra* note 7, at 851 ("Despite the monumental alterations to the Constitution, less than a decade after their ratification, the Supreme Court began to chip away at legislative authority to enforce federal civil rights law.").

Minor's citizenship prior to the Fourteenth Amendment's ratification or in its wake was not at issue.[29] Native born, white women had always been a part of the American citizenry,[30] regardless of how poorly they may have been treated as citizens.[31] Though the Fourteenth Amendment could confirm Minor's citizenship, she did not need the Fourteenth Amendment to make her a citizen of Missouri and of the United States. Rather, the Fourteenth Amendment should have been useful in determining what rights Minor was entitled to as a citizen, possibly augmenting her citizenship and personhood rights and cementing an equal place for her and all women in the American polity.[32]

B. The Privileges or Immunities (P-or-I) Clause

The *Minor* Court focused on the Fourteenth Amendment's Privileges or Immunities Clause (P-or-I Clause).[33] That clause requires states to provide the privileges or immunities of (national) citizenship equally to all its citizens.[34] The P-or-I Clause provides equality or non-interference regarding the provision of pre-existing rights of citizenship; it does not provide additional substantive rights.[35] If voting was one of the privileges or immunities of citizenship, a state could not provide it to male citizens and

29. As a native-born white woman, Minor had been a citizen before the Fourteenth Amendment was ratified. *Minor*, 88 U.S. (21 Wall.) at 170.

30. *Id.* at 166. Citizens of the states became citizens of the United States when the Constitution was ratified. *Id.* at 167 ("Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption.").

31. In many respects, women had been treated as second-class citizens. *See, e.g.*, Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (denying Fourteenth Amendment claim and allowing Illinois to deny woman a license to practice law because of her sex).

32. Much of Section 1 of the Fourteenth Amendment had been included in the Civil Rights Act of 1866. That act was passed pursuant to Section 2 of the Thirteenth Amendment. *See* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 82–83 (2010) (noting the Civil Rights Act of 1866 was the first statute Congress passed pursuant to its Section 2 power).

33. The Court may have focused on the clause because Minor focused her argument on the clause. However, the argument Minor made spoke to the broader implications of the Fourteenth Amendment. *See Minor*, 88 U.S. (21 Wall.) at 164 (summarizing Minor's oral argument).

34. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), created the distinction between privileges or immunities of national citizenship (protected by the Fourteenth Amendment) and privileges and immunities of the state citizenship (addressed in Article IV of the Constitution). *See* Cynthia Nicoletti, *The Rise and Fall of Transcendent Constitutionalism in the Civil War Era*, 106 VA. L. REV. 1631, 1686–91 (2020) (discussing *The Slaughter-House Cases*). The distinction between national and state citizenship matters in some cases, but the *Minor* Court's analysis did not turn on that distinction. *See Minor*, 88 U.S. (21 Wall.) at 170.

35. *Minor*, 88 U.S. (21 Wall.) at 171 ("The Fourteenth Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.").

refuse to provide it to female citizens.[36] If voting was not a privilege or immunity of citizenship, Missouri could grant the right to vote or deny it as it wished.[37]

The Constitution's text did not explicitly provide citizens the right to vote before the Fourteenth Amendment was ratified and does not to this day.[38] To be deemed a privilege or immunity of citizenship, the right to vote must have been a right provided to all citizens before the Fourteenth Amendment was ratified. Specifically, the *Minor* Court argued that voting and citizenship needed to be coextensive for voting to be deemed a privilege or immunity of citizenship.[39] It considered whether, before the U.S. Constitution or the Fourteenth Amendment were ratified, states either had denied the right to vote to any citizens or had provided the right to vote to noncitizens.[40]

The Court denied the right to vote was coextensive with citizenship, arguing the following points regarding the right to vote.

First, nearly all state constitutions circa 1776 denied women the right to vote. If the framers wanted to provide women the right to vote, they should have and likely would have been clear.[41]

Second, under Section 2 of the Fourteenth Amendment, states that limited the right to vote of men twenty-one years of age or older would lose congressional representation proportional to the size of the disfranchisement.[42] The Court suggested the provision would have been unnecessary if states were required to provide the right to vote to all citizens,

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36. *Id.* at 165.

37. *Id.*

38. *Id.* at 171 ("It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted."). Indeed, the U.S. Constitution still does not provide an affirmative right to vote. *See* Bertrall L. Ross II, *Fundamental: How the Vote Became a Constitutional Right*, 109 IOWA L. REV. 1703, 1706 (2024) ("However, the Constitution contains no explicit protections for the affirmative right to vote.").

39. *Minor*, 88 U.S. (21 Wall.) at 170 ("The direct question is, therefore, presented whether all citizens are necessarily voters.").

40. *Id.* at 171 ("This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption.").

41. *Id.* at 173 (noting that if framers had intended to make all citizens—including women—voters, they would have done so clearly).

42. [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, 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 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.

U.S CONST. amend. XIV, § 2.

including women.[43] The Court appears to have read Section 2 as exacting a price for the legislative choice of limiting the suffrage of men twenty-one years of age or older. A choice suggests a limitation on the right to vote would be constitutional, but costly. The Court theoretically could have read Section 2 to provide a penalty for unconstitutionally discriminating in the provision of the right to vote. That reading would suggest voting was becoming a key right of citizenship. The Court declined to read the provision in that way.

Third, the Fifteenth Amendment's bar on race-based discrimination in providing the right to vote would have been unnecessary if suffrage were a privilege or immunity of citizenship.[44] Though the Court may be correct, it is possible the Amendment made explicit what should have been implicit based on Section 2 of the Fourteenth Amendment, that suffrage should not be denied on the basis of race even if some states planned to do so.[45]

Fourth, the Republican Guarantee Clause, which guarantees each state a republican form of government,[46] does not require all citizens be given the right to vote. The Republican Guarantee Clause did not appear to apply to the original states that barred women from voting when the Constitution was ratified.[47] In addition, New Jersey was not challenged when it removed the right to vote from women in 1807.[48] New states were also admitted without objection though they denied women the right to vote.[49] Confederate states also were readmitted to the Union while denying women the right to vote.[50] Those examples suggest the Republican Guarantee Clause does not require women be allowed to vote.

Fifth, noncitizens could vote in some states, suggesting voting and citizenship were not coextensive.[51] Many or most of those noncitizens were on the path to citizenship, suggesting the right to vote may have been limited

43. *Minor*, 88 U.S. (21 Wall.) at 174–75 (arguing Section 2 would not have been written as it was if the legislature was required to provide all citizens the right to vote).

44. *Id.* at 175; *see also* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

45. For discussion of Section 2's history, see Richardson v. Ramirez, 418 U.S. 24, 73–74 (1974) (Marshall, J., dissenting).

46. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

47. *Minor*, 88 U.S. (21 Wall.) at 176 ("[I]t is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.").

48. *Id.* at 177.

49. *Id.*

50. *Id.*

51. *Id.*

to citizens and those who might be termed pre-citizens.[52] Nonetheless, the Court viewed noncitizen voting as proof that voting was not a privilege or immunity of citizenship.[53]

The Court could also have relied on the disenfranchisement of many white male citizens due to property restrictions in the early post-ratification period to suggest voting was not a P-or-I of citizenship.[54] The Court arguably did not need to prove that women had not been afforded the right to vote in the pre-ratification and post-ratification era to make the general point that the right to vote had not been afforded to all citizens when the Constitution was ratified.

The Court ruled the right to vote was not a privilege or immunity of citizenship that must be provided equally to women, in part, because the right often had not been provided to women in the past.[55] States had denied women and other citizens the right to vote before and since the Constitution's ratification. Given that history, voting and citizenship could not be said to be coextensive. Consequently, Missouri could continue to deny women the right to vote.[56] The Court did not consider whether the refusal to provide the right to vote to women because of their sex was proof that women had been improperly denied a privilege or immunity of citizenship, rather than that the right to vote was not a privilege or immunity of citizenship.[57]

C. The Substantive Rights of Citizens and Limitations on the Government

The *Minor* Court noted it was not allowed to reshape the law to what it should be, but that it was limited to declaring what the law was.[58] However, the Court did structure the constitutional inquiry. The Court's focus on the

52. For an in-depth discussion of noncitizen voting through most of America's history, see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

53. *Minor*, 88 U.S. (21 Wall.) at 177.

54. *See* Ross, *supra* note 38, at 1708 (noting the move away from property restrictions in voting in the early 1800s).

55. Treating voting as a right may have been aspirational given how the right to vote had been regulated, but doing so was not inconceivable, even early in the country's history. *See* Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 703 (2019) (discussing Justice Bushrod Washington's suggestion in the 1823 case *Corfield v. Coryell* that the right to vote is fundamental).

56. *Minor*, 88 U.S. (21 Wall.) at 178.

57. *See* Chambers, *supra* note 27 at 217 ("[V]oting is an exercise so tied to the notion of citizenship and belonging that it ought to have been deemed a citizenship right that had often been provided in a discriminatory fashion rather than a non-citizenship right.").

58. *Minor*, 88 U.S. (21 Wall.) at 178 ("Our province is to decide what the law is, not to declare what it should be. . . . If the law is wrong, it ought to be changed; but the power for that is not with us.").

P-or-I Clause centered on whether the Fourteenth Amendment guaranteed Minor's ability to vote. The manner in which the Court conceived of the Fourteenth Amendment coupled with the history of voting in the United States guaranteed the Court would allow Missouri to continue to limit the right to vote to men.

The Court's history-based approach to determining whether the right to vote was a privilege or immunity of citizenship may seem sensible, but it is deeply problematic. The approach suggests historical discrimination regarding the provision of what should be a privilege or immunity of citizenship proves the right is not a privilege or immunity of citizenship.[59] The P-or-I Clause, as interpreted by the *Minor* Court, is not a strong procedural vehicle for providing full equality to citizens.[60] It appears to apply only when a preexisting right that is supposed to be enjoyed by all citizens is denied to some citizens. In that situation, the state is obligated to provide the preexisting right to all citizens. If a plaintiff can find a right all citizens have enjoyed in the past or ostensibly are supposed to enjoy now, the Fourteenth Amendment will ensure the states provide that right to all citizens. That would narrowly serve the purpose of guaranteeing states would provide citizenship rights that had been provided to all citizens in the past to new Black citizens who were explicitly deemed citizens by Section 1 of the Fourteenth Amendment. However, when the P-or-I Clause can be defeated by proof that a quasi-citizenship right—voting—has not been provided to all citizens because it was discriminatorily denied to some citizens, the P-or-I Clause is no protection to the new citizens or the legacy citizens who were improperly denied rights in the past—women.

The Court could have asked a different question. Rather than ask whether the P-or-I Clause encompassed the right to vote, it could have considered whether the Fourteenth Amendment changed how Missouri could regulate or provide the right to vote. The question could have been: In the wake of the Fourteenth Amendment's ratification, can Missouri continue to stop a woman who is a citizen of Missouri and the United States from voting under its laws or its Constitution because of her sex? This is less a P-or-I Clause issue as much as a broader consideration regarding how state power could or should be regulated in a post-slavery, reconstructed society. Even if the right to vote were not strictly addressed by the P-or-I Clause, a state could

59. *Id.* at 177–78 (noting the history of the refusal to grant women the right to vote).

60. The clause appears to provide no good way for women to protect their interests, which were unlikely to be protected by the votes of men who refused to allow them to vote notwithstanding claims of virtual representation. *Cf.* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 980–81 (2002) (discussing virtual representation arguments often made in nineteenth century America before the Nineteenth Amendment's ratification).

be limited in regulating in an arbitrary manner a right so closely related to citizenship.

During its analysis, the *Minor* Court suggested constitutional text should be read in context.[61] It noted that the Constitution's provisions that might appear to suggest a right to vote for women citizens needed to be read in the context of the historical refusal to provide the right to vote to some citizens.[62] The Court's appeal to context could have led it to a different path. Context could have included pondering the Civil War and what ending slavery could mean for the rights of all citizens, including women and formerly enslaved people. The Court's approach to the P-or-I Clause stopped it from considering how the creation of a post-slavery America might affect the interpretation of the Reconstruction Amendments and engender a rethinking of the arguments underlying prior denials of the right to vote, especially when those arguments formed the basis for the continued denial of the right to vote to women. Part II considers how differently contextualized Reconstruction Amendments might apply to the issue of women's suffrage.

II. THE RECONSTRUCTION AMENDMENTS

Since the passage of the Fifteenth Amendment in 1870, the Reconstruction Amendments have provided a basis for reconstructing America. The amendments had four explicit effects. First, they created a post-slavery society.[63] Second, they confirmed a basis of American citizenship, functionally expanding it.[64] Third, they restructured the relationship among the federal government, the states, and citizens.[65] Fourth, they affirmed the importance of voting in American civic life. Viewed as incremental alterations to the Constitution, the amendments rebuilt the Union and gently reconstructed America. When read next to the promises made in the Declaration of Independence and the antebellum

61. *Minor*, 88 U.S. (21 Wall.) at 175 ("All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.").

62. *Id.* at 175.

63. *See* U.S. CONST. amend. XIII (abolishing slavery).

64. *See* U.S. CONST. amend. XIV (providing birthright citizenship to those born in the United States).

65. *See* Nicoletti, *supra* note 34, at 1637 (noting in the wake of the Reconstruction Amendments: "As Congressional Republicans argued, the primacy of national sovereignty meant that the citizen's principal relationship was with the national government rather than with the states. Correspondingly, the federal government was now to be the guarantor of the citizen's rights, bound to protect citizens even against interference by their own state governments."). In addition, the postbellum Court made clear that states were part of an insoluble union. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) (deeming the United States to be an indissoluble union Texas could not leave).

Constitution, but not fulfilled by those documents, the Reconstruction Amendments could have been treated as transformative alterations that would remake America's vision of freedom and fully reconstruct America.[66] Such a reading could have forced states to provide rights consistent with the freedom and the equal dignity of all citizens embedded in the founding documents. The amendments could have been transformative in their simplicity. The relationships and accompanying rights that could have been fostered by the Reconstruction Amendments should not be deemed to have been created by the amendments as much as uncovered after improper occlusion by American civic practices. However, rather than view the amendments as transformative, the Supreme Court interpreted them as incremental. *Minor v. Happersett* was a result of that incrementalism, which arguably reads the amendments literally without taking them seriously.

A. Antebellum Slave Society

In antebellum America, a slave society, freedom was highly contextual.[67] America's founding documents—the Declaration of Independence and the Constitution—suggest all are entitled to freedom, but they tolerated or embraced slavery.[68] The Declaration states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[69]

Disagreement may exist regarding what these words mean.[70] However, at the least, they suggest a fundamental equality among all and that

66. For a discussion of broad and narrow visions of how the Reconstruction Amendments reconstructed America, see Nicoletti, *supra* note 34, at 1632–40.

67. Society included free people with full rights, free people without full rights, enslaved people with some negligible amount of independence, and enslaved people with no freedoms. *See* Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 MISS. L.J. 703, 712–13 (2018) (noting limitations on freedom for free Blacks and differing levels of agency for groups of enslaved people).

68. *Compare* SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 1–2 (2018) (arguing the Constitution reflects compromises with slavery but does not validate it), *with* PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 9–10 (2018) (arguing that the Constitution protected slavery).

69. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

70. Justices with different political commitments may reach for the Declaration of Independence in similar circumstances. *See* Evenwel v. Abbott, 578 U.S. 54, 82 (2016) (Thomas, J., concurring in the

government's function is to help all people thrive in the context of liberty. State-supported slavery belies both principles.[71] The Declaration of Independence is not law, but it provides a context for thinking about what the Constitution may mean when it is interpreted.[72]

The Constitution suggests that fulfilling liberty is its animating reason. Its Preamble notes:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[73]

The Constitution arguably mocked those principles, as it was constructed to accommodate slavery.[74] By invoking "We the People," the Preamble could be read as exclusive, creating a line between free and enslaved, or between citizen and noncitizen, or both.[75] The Declaration of Independence suggests all people are created equal, but the Constitution's Preamble suggests the United States—governed by the Constitution—is for the people of the United States, however defined. The people of the United States at the time of the Constitution's ratification did not encompass all native-born people who were under the government's control.[76]

A word on citizenship and who constituted "the People" may be helpful. Before the Fourteenth Amendment was ratified, the issue of citizenship was contested. Some native-born residents of America were clearly citizens;

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judgment) (finding principles of voting equality embedded in the Declaration of Independence); Rucho v. Common Cause, 588 U.S. 684, 726–27 (2019) (Kagan, J., dissenting) (linking the Declaration of Independence to democracy and the need for elections).

71. *See* McDonald v. City of Chicago, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure.").

72. For an interesting discussion of whether the Declaration of Independence should be considered law, see Frederick Schauer, *Why the Declaration of Independence Is Not Law—And Why It Could Be*, 89 S. CAL. L. REV. 619 (2016).

73. U.S. CONST. pmbl.

74. *See* FINKELMAN, *supra* note 68, at 12–21 (2018) (discussing how the Constitution accommodated slavery).

75. Indeed, the Constitution limits the presidency to natural born citizens. *See* U.S. CONST. art. II, § 1, cl. 5. ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .").

76. Free Blacks and Native Americans could be excluded from "the People." *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

others were not clearly citizens.[77] Citizenship's substance was largely undefined in American law prior to *Dred Scott v. Sandford*.[78] In that case, the Supreme Court defined citizens as the group of people who formed the United States, for whose benefit the United States was founded, and who governed the United States.[79] The *Dred Scott* Court made clear (and the *Minor* Court confirmed) that women had always been a part of the people, a part of the citizenry.[80] The *Dred Scott* Court made just as clear that Black people, including freeborn Black people, freed slaves, and enslaved people—all of whom were supposedly descended from slaves brought to the United States—were not and could not be a part of the citizenry.[81] The debate over citizenship and who should be deemed to have been a part of "the People" was not fully resolved by the *Dred Scott* Court.[82] However, the case provided some judicial clarity regarding citizenship. Though the *Dred Scott* opinion was based, in part, on various inaccuracies,[83] its ruling appeared clear.[84] The decision described an American slave society that afforded multiple designations of people, including citizens, second-class citizens (women), potential citizens (Native Americans and aliens), and noncitizens (free and enslaved Black people).

Though the Declaration of Independence suggests everyone is born free, in the context of our American slave society, some were free and some were enslaved. In that society, people who were fully human could be stripped of their Creator-given human rights. Those people—enslaved people—could be explicitly and fully subjugated. Freeborn or freed Black people could be treated as noncitizens and partially subjugated.[85] In such a society, that some who were acknowledged to be free could be treated as somewhere between

77. For example, Frederick Douglass was a freed slave who was a citizen of New York in 1852 but would not have been treated as a citizen of the United States in 1857 in the wake of *Dred Scott*. The uncertainty regarding citizenship and free Blacks was palpable. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 64–66 (1978).

78. *See Dred Scott*, 60 U.S. at 454.

79. *Id.* at 404.

80. *Id.* at 422.

81. *Id.* at 409.

82. For example, in 1862, United States Attorney General Edward Bates found a free Black boat captain to be a citizen of the United States in seeming contravention of the *Dred Scott* opinion. *See* Citizenship, 10 Op. Att'y Gen. 382, 388 (1862); *see also* Martha S. Jones, *Response to Professor Blight's* Frederick Douglass and the Two Constitutions: Proslavery and Antislavery, 111 CALIF. L. REV. 1929, 1934–36 (2023); Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 560–62 (2000).

83. *See* FINKELMAN, *supra* note 68, at 201–10 (noting erroneous and unnuanced factual claims in Chief Justice Taney's majority opinion).

84. For a fascinating discussion of judges who may have disregarded the *Dred Scott* opinion, see Jones, *supra* note 82, at 1934–36.

85. Indeed, Illinois's Black Codes limited free Blacks outside of the context of slavery. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 940–41 (2019) (discussing Illinois's Black Codes).

free and subjugated is not surprising. Different groups of people could be afforded different sets of rights supposedly consistent with America's founding documents.[86] Providing variegated rights to different groups of people may not have been inconsistent with American "freedom." Women citizens could unsurprisingly be provided a different set of rights than other citizens. If the law in a society governed by documents professing freedom allows the full subjugation of slavery of some people, the law may unsurprisingly allow the lesser subjugation of some free people by denying them the right to vote.

B. The Thirteenth Amendment and Post-Slavery Society

In a post-slavery society, the stratification of citizens and persons may be inconsistent with governing documents that profess fidelity to freedom and equality.[87] The text of the Declaration of Independence did not change in the wake of the Civil War, but the text of the Constitution did. The ratification of the Thirteenth Amendment abolished slavery and transitioned America from a slave society to a post-slavery society.[88] The amendment reads:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.[89]

The Thirteenth Amendment disrupted some of the slave society's rights structure by eliminating slavery and creating a post-slavery or free society. That could have had two quite different effects on a rights discourse. In a free society, at least one designation of people—enslaved people—vanishes. Abolishing slavery may have merely guaranteed freedom for enslaved people. That vision of the Thirteenth Amendment may treat the amendment as an incremental addition to the Constitution and say nothing

86. *See* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 153 (2015) (noting the different sets of rights different people in America enjoyed in the immediate post-Civil War era).

87. *See generally*, Chambers, *supra* note 27.

88. However, some argue the Thirteenth Amendment may not have fully abolished slavery, allowing the enslavement of people as punishment for crime. *See, e.g.*, Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV, 1305, 1336 (2023) (noting the textual possibility that the Thirteenth Amendment allows slavery as punishment for serious crimes).

89. U.S. CONST. amend XIII, §§ 1–2.

about the rights of noncitizen Black Americans or women citizens more generally.[90] Conversely, the abolition of slavery and the destruction of America's slave society may have created a single class of persons, all of whom should be treated as citizens. In the absence of slavery, the principles underlying the Declaration of Independence and the Constitution might require government to treat all those people fairly and equally.[91] In such a society, the distinctions between groups of citizens may be thought to have been flattened, with a broad set of rights provided to all. That vision of a transformative Thirteenth Amendment (alone or in combination with a transformative vision of the Fourteenth and Fifteenth Amendments) could have affected women's rights generally and women's voting rights specifically. How the post-slavery society would be organized depends, in part, on whether the Thirteenth Amendment should be interpreted as incremental or as transformative.

C. An Incremental Vision of the Reconstruction Amendments

An incremental vision of the Thirteenth Amendment suggests the amendment did nothing more than end slavery, turning enslaved people into free Blacks with as few rights as free Blacks were bound to be given under *Dred Scott*.[92] The Thirteenth Amendment may have ended slavery, but it may not have changed a slave society mentality that allowed the government to provide substantially different treatment to different groups of citizens and people.[93] Such a vision suggests the Thirteenth Amendment has nothing to say about the rights of anyone other than former slaves.

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90. However, there is a significant scholarship linking the Thirteenth Amendment to women's rights. *See, e.g.*, Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER, RACE & JUST. 401 (2000); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1647 (2012); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1998); *see also* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012).

91. At least some members of Congress took a broad view of the Thirteenth Amendment's potential. *See* Tsesis, *supra* note 90, at 1647 ("Senator Reverdy Johnson, a Unionist Democrat, expressed the hope of many of his colleagues that the [Thirteenth] Amendment would provide Congress with the power to render the self-evident truths of the Declaration of Independence a practical reality.").

92. Historically, those rights were few. *See* Dred Scott v. Sandford, 60 U.S (19 How.) 393, 407 (1857) (enslaved party) ("[Black people] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

93. For a discussion of Black Codes that sought to limit freedom for Black people just after the Civil War's end, see Goodwin, *supra* note 85, at 935–41.

Women, for example, would enjoy no additional rights based on the amendment's ratification.[94]

In addition, an incremental vision of the Thirteenth Amendment may further or solidify an incremental vision of constitutional interpretation. An incremental vision of constitutional amendment suggests that the Constitution and the law change only as much as the text of an amendment demands. The Thirteenth Amendment—under an incremental vision—might be interpreted to have made America a society without slavery rather than a true post-slavery society.[95] Regardless of which society the Thirteenth Amendment created, an incremental Thirteenth Amendment would require a Fourteenth Amendment to fully secure any additional rights for those who did not enjoy equal rights before the ratification of the Thirteenth Amendment.[96] That could also encourage an incremental interpretation of the Fourteenth Amendment that interprets it narrowly as an enhancement to the Thirteenth Amendment that provides only the rights the Fourteenth Amendment appears to necessarily furnish.[97] That might also encourage an incremental vision of the Fifteenth Amendment that suggests only explicit denials of voting rights for minority citizens would be barred.[98]

The incremental approach might seem to be a steady and reasonable approach to constitutional interpretation. However, the Thirteenth Amendment was bold in one respect. The Thirteenth Amendment explicitly limits how states may govern their affairs. Prior to its ratification, the argument—even from Abraham Lincoln—had been that slavery could not be banned in states where it was legal because a state had sole control over that aspect of its law and culture.[99] In the wake of the Thirteenth

94. However, some have argued the Thirteenth Amendment could be used to stop women's subjugation. *See supra* note 90; *see also* Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1747–49 (2012) (discussing arguments linking the Thirteenth Amendment to women's rights).

95. A society in which free Blacks are treated as quasi-slaves might qualify as a society without slavery rather than a post-slavery society. *See* David F. Forte, *Spiritual Equality, the Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 600 (1998) (referencing some Black Codes: "The codes placed [B]lacks in a semi-permanent servitude on plantations.").

96. Section 2 of the Thirteenth Amendment allowed Congress to outlaw the badges and incidents of slavery. *See* The Civil Rights Cases, 109 U.S. 3, 22–23 (1883). However, that protection was only as strong as an ensuing Congress's commitment to equal rights.

97. A weak vision of the Fourteenth Amendment may encourage a lesser effect for the Fourteenth Amendment, such as by requiring intentional discrimination for its violation or a robust state action doctrine. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273–74 (1979) (ruling Fourteenth Amendment sex discrimination claim requires intentional discrimination).

98. A weak vision of the Fifteenth Amendment may encourage a lesser effect for that amendment such as by requiring intentional discrimination for its violation. *See* City of Mobile v. Bolden, 446 U.S. 55, 73–74 (1980) (plurality opinion) (requiring intentional discrimination to support a Fifteenth Amendment claim).

99. *See* EDWARDS, *supra* note 86, at 64 (noting Lincoln's pledge to leave slavery alone in states where it was legal).

Amendment, Congress could act directly on a state or state law to enforce the Thirteenth Amendment.[100]

The Reconstruction Amendments did not merely turn former slaves into non-slaves, though some Southern states treated the Thirteenth Amendment as if it did with the advent of Black Codes that replaced Slave Codes.[101] The Thirteenth and Fourteenth Amendments read together provided freedom to newly-freed slaves,[102] though they were not interpreted to guarantee the full rights to freedom that government might be required to secure consistent with the Declaration of Independence. *The Civil Rights Cases* limited the reach of the Thirteenth Amendment by focusing on what slavery entailed, finding that the amendment is aimed at issues relating to and flowing directly from or incident to slavery.[103] Even a broad vision of the incidents of slavery might place the beneficiaries of the Thirteenth Amendment merely on the level of a non-slave rather than the level of a fully free person who can live to the edge of their unalienable rights. *The Slaughter-House Cases* narrowed the scope of the Fourteenth Amendment through its interpretation of the P-or-I Clause to include a very constrained set of rights.[104] Other cases narrowed the scope of the Fourteenth and Fifteenth Amendments by requiring intentional discrimination before a violation of the amendments could be found.[105] The incremental vision of the Reconstruction Amendments led to a less robust reality of equality than their text could have provided.

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100. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (allowing a statute passed pursuant to congressional authority under the Thirteenth Amendment to regulate private transactions typically governed by state law).

101. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 390 (1978) (Marshall, J., concurring in part and dissenting in part) ("The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts.").

102. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (noting the Thirteenth and Fourteenth Amendments were designed to bring "universal freedom" to the newly freed); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (noting the Reconstruction Amendments were to provide "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

103. *See The Civil Rights Cases*, 109 U.S. at 21–22 (focusing the Thirteenth Amendment on rights withheld from freedmen stemming from slavery).

104. *See The Slaughter-House Cases*, 83 U.S. at 77–79 (limiting privileges or immunities covered by the Fourteenth Amendment to those stemming directly from the U.S. Constitution rather than to all rights provided to citizens by state governments).

105. For a fuller discussion of the limitations on the reach of the Reconstruction Amendments, see Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002).

D. A Transformative Vision of the Thirteenth Amendment and Its Effects on the Fourteenth and Fifteenth Amendments

A transformative vision of the Thirteenth Amendment would fully acknowledge the end of slavery, the beginning of a post-slavery society, and the need to honor personhood and citizenship consistent with the Declaration of Independence and U.S. Constitution. That would allow the full flowering of American freedom by reconstructing America's rights discourse as its founding documents suggest. In a post-slavery society that claims to value human rights, declining to provide rights that all should enjoy based on principles of equality is inconsistent with proper government authority. The Thirteenth Amendment ended slavery and arguably created a post-slavery society, which should create a single class of citizens that enjoys equal rights.

The Declaration of Independence assumed shared humanity and asserted the promise that government should help people reach or not stand in the way of people reaching their highest purpose.[106] The Constitution provides a form of government that supposedly fosters the purposes underlying the Declaration's vision. The Constitution's structure arguably encourages liberty by maintaining a state-based governing structure that provides the federal government only the power the Constitution provides it,[107] leaving residual power in the hands of the states and the people.[108] However, that structure safeguards liberty for all only when the states and governing majorities provide rights to all citizens equally.

A transformative Thirteenth Amendment could have made the Fourteenth and Fifteenth Amendments superfluous. They could have been deemed elaborations of what the Thirteenth Amendment should have been deemed to have already done.[109] In the wake of a Civil War that ended slavery, killed the possibility of secession, and gave Congress authority to ensure the vestiges of slavery were eradicated, virtually nothing that was

106. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting that all are born with rights including the right to liberty, and that governments are instituted to secure those rights).

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

108. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

109. That would have tracked the arguments of those like Frederick Douglass, who suggested the plain language of the Constitution even prior to the Thirteenth Amendment should have made free Black people citizens of the United States who were entitled to vote. *See* Bradley Rebeiro, *The Work Is Not Done: Frederick Douglass and Black Suffrage*, 97 NOTRE DAME L. REV. 1511, 1515 (2022) ("Using natural rights theory as a foundation, in the antebellum period, Douglass argued that [B]lacks already had the right to vote based on the natural equality of human beings, coupled with allegiance to the political community.").

accomplished by the Fourteenth and Fifteenth Amendments should have been deemed necessary to state in a constitutional amendment or would have been necessary to state if the Thirteenth Amendment had been treated as transformative.

Viewing the Thirteenth Amendment as transformative would require the reshaping of various understandings regarding the Constitution. Such an approach would consider what a rights structure should look like in a post-slavery society. The argument that the government has historically been free to provide different sets of rights to different groups of people before the Thirteenth Amendment was ratified and should be able to continue to do so in the absence of explicit, newly-ratified language stating the government cannot do so would lose. The existence of freedom and equality language in the Declaration of Independence and the Constitution would drive the new rights discourse.

The focus of a transformative vision of the Thirteenth Amendment would ask what rights a person needs to exercise to live up to the edge of the Creator-given rights the government exists to secure according to the Declaration of Independence. The question would be: What rights do people need to exercise to thrive in American society? The answer would not need to be tied to Thirteenth Amendment doctrine or slavery at all. Arguing the Thirteenth Amendment as a basis for growing rights is not new.[110] However, a transformative vision would provide a broader lens that would allow the rights discourse to continue to parallel our changing society. Whatever is necessary to allow a person to live to the edge of their abilities could be deemed a right, though how the government would be required to provide the right would require discussion. For example, education has never been considered a right protected by the U.S. Constitution.[111] Nonetheless, if an affirmative right to an education is necessary for a child to thrive, the Constitution, transformed by the Thirteenth Amendment, should protect that right.

A transformative vision of the Thirteenth Amendment is not radical. The amendment's interpretation would merely require America be true to the

110. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 4–5 (1995) ("Most recently, a new group of scholars is exploring the Thirteenth Amendment's present-day application to a broad range of subject areas, including First Amendment law, labor law, family law, and reproductive freedom rights. The breadth of new scholarship demonstrates the Thirteenth Amendment's enormous potential as a catalyst in fighting for citizens' freedom and equality rights and in keeping alive the Amendment's promise of liberation." (footnotes omitted)).

111. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

principles underlying its founding documents.[112] Our antebellum society ignored the freedom and equality principles underlying the Declaration of Independence.[113] Fidelity to those principles could have powered the postbellum society. It is not the vision or interpretation of the amendments that would be radical. Rather, a society based on the equality principles embedded in our founding documents might appear radical only in comparison to an antebellum society that had abandoned the principles expressed in its founding documents.[114]

A transformative approach to the Thirteenth Amendment might trigger a transformative approach to the Fourteenth Amendment. Such an approach might suggest the Fourteenth Amendment is not an extension of the Thirteenth Amendment, but just a reminder of what the Thirteenth Amendment should already have wrought. That would treat the Fourteenth Amendment as a belt-and-suspenders amendment. The Fourteenth Amendment could be viewed as an elaboration of how states are required to treat all its citizens in our post-Thirteenth Amendment, post-slavery society. The Fourteenth Amendment might not provide substantive rights, but it would suggest that any newly-recognized rights that would flow from the equality principles underlying our founding documents would be applied vigorously and rigorously.

Treating the Fourteenth Amendment as a manifestation of what the Thirteenth Amendment already did is not radical.[115] Section 2 of the Thirteenth Amendment provides Congress the power to enforce the Thirteenth Amendment. The Civil Rights Act of 1866, passed pursuant to that authority, provided some of the protections the Fourteenth Amendment eventually provided.[116] Put differently, some appear to have thought some of the substance of the Fourteenth Amendment was justified as an

112. It is reminiscent of the words of Dr. King. *See* Martin Luther King Jr., I've Been to the Mountaintop (Apr. 3, 1968) ("All we say to America is, 'Be true to what you said on paper.'").

113. Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PA. ST. L. REV. 413, 417–21 (2006) (discussing intellectual reliance of slavery abolition movement on the Declaration of Independence rather than the Constitution).

114. In some states, the change would not appear as radical as in others. For example, Frederick Douglass lived functionally as a New York citizen in the 1850s notwithstanding the *Dred Scott* Court's ruling that suggests he had no rights of a U.S. citizen.

115. The Fourteenth Amendment was necessary, in part, in response to the Black Codes passed in the wake of the Civil War that limited basic rights of free Blacks in arguable contravention of the spirit of the Thirteenth Amendment. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388–89 (1992) (discussing Fourteenth Amendment as response to Black Codes); *see also* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 52–55 (1999) (discussing Black Codes).

116. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1333–34 (2007); Harrison, *supra* note 115, at 1402–05 (discussing the link between Section 2 of the Thirteenth Amendment and the Civil Rights Act of 1866).

enforcement of the Thirteenth Amendment. That is not quite the same as arguing that the Thirteenth Amendment already provided the rights embedded in the Fourteenth Amendment, but it is close.

As important, the ratification of the Fourteenth Amendment does not prove the amendment was necessary to secure the rights it provides. The Fourteenth Amendment's passage was encouraged, in part, by the fear that the Civil Rights Act of 1866—including its affirmation that those born in the United States, including slaves freed by the Thirteenth Amendment, were citizens—could be repealed by simple legislation once the states that attempted to secede from the Union regained their full representation in Congress.[117] In addition, a Supreme Court could take an incremental approach and deny that the rights embedded in the Civil Rights Act of 1866 flowed from the Thirteenth Amendment.[118]

A transformative approach to the Fifteenth Amendment would treat it as a belt-and-suspenders amendment similar to the Fourteenth Amendment's interpretation.[119] Courts would recognize the amendment was not strictly necessary, but was a reminder that voting rights could not be denied based on race, color, or previous condition of servitude in a post-slavery society built on equality and democratic republican principles.

E. Applying a Transformative Vision of the Reconstruction Amendments to Minor v. Happersett

The *Minor* Court took an incremental approach to the Reconstruction Amendments, narrowly construing any effect the amendments might have on Minor's rights. The Court ignored the Thirteenth Amendment and any implications that might flow from its creation of a post-slavery society. It treated the Fourteenth Amendment in an incremental manner by considering whether the Fourteenth Amendment explicitly or implicitly gave women in Missouri the right to vote rather than considering if the principles underlying the Declaration of Independence and the Constitution would

117. *See* Steven G. Calabresi, *The Global Rise of Judicial Review Since 1945*, 69 CATH. U. L. REV. 401, 427 (2020) ("There was also an element of *elite hegemonic entrenchment* behind the adoption of the Fourteenth and Fifteenth Amendments. The proponents of those amendments were worried that once the eleven Confederate states were re-seated in Congress there might come a time when anti-civil rights democrats would outnumber pro-civil rights republicans and would repeal the Civil Rights Act of 1866. Thus, the Fourteenth Amendment was enacted to ensure this never happened.").

118. The Supreme Court's ability to limit the scope of the enforcement sections of the Reconstruction Amendments remains a concern. *See* McAward, *supra* note 32, at 98–102.

119. For a fascinating discussion of how constitutional amendments may protect rights already protected by the Constitution, see Robert M. Black, *Redundant Amendments: What the Constitution Says When It Repeats Itself*, 94 U. DET. MERCY L. REV. 195, 209–13 (2017) (discussing the Fourteenth Amendment's possible partial redundancy).

support a right to vote regardless of how states had provided it in the past.[120] The Court also considered the Fifteenth Amendment solely to suggest a right to vote could not be derived from the Fourteenth Amendment because the Fifteenth Amendment would be surplusage if a right to vote were protected directly by the Fourteenth Amendment.[121]

If the Court had read the Reconstruction Amendments as transformative, its approach would have substantially changed. The questions it asked would have changed and the arguments made from the prior practice of denying women a right to vote would have changed. The focus of the questions would have changed from whether Minor had acquired the right to vote based on the text of the Fourteenth Amendment to what rights an equal member of society must be allowed to exercise. That implicates whether Missouri could continue to deny the right to vote based on sex. Given the *Minor* Court's composition and disposition, the result may not have changed with a refocused analysis, but how the Court reached its conclusion would have changed.

In a post-slavery society governed by the principles underlying the Declaration of Independence and the Constitution, a key question becomes: Why should a state in the United States, which must have a republican form of government, be allowed to deny women the right to vote because of their sex? The argument the *Minor* Court accepted—that it is too late to argue the non-enfranchisement of women violates the Republican Guarantee Clause—would not be a justification for continuing to deny women the right to vote. The question would not be what had been done in the past, but what needed to be done in the future in the wake of the Reconstruction Amendments.[122] The focus of the inquiry would need to be on justifications for denying women the right to vote in 1875 rather than on whether the right to vote had been treated as coterminous with citizenship before 1875.

Voting is important in a republic, though it had been considered a privilege or a political right subject to substantial limitations before the Civil War.[123] Voting and elections are mentioned in the Constitution as originally

120. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176–77 (1875).

121. *Id.* at 175.

122. In the postbellum era, the Republican Guarantee Clause arguably should have provided the right to vote to all citizens without more. *See* Ross, *supra* note 38, at 1708 ("Although states continued to define the political community to include only adult white men until after the Civil War, for those white men the provision of the right to vote was deemed indispensable to republican government. And as federal constitutional changes forced the expansion of the political community to include people of color, women, and eighteen-year-olds, the evolved meaning of republican government required that those entrants be entitled to the same fundamental right to vote.").

123. *See* Rebeiro, *supra* note 109, at 1513 (discussing historical view that voting is a political right separate from civil rights).

ratified.[124] Voting is mentioned in Section 2 of the Fourteenth Amendment and is the Fifteenth Amendment's core concern.[125] Given how central voting was to civic life and power by 1875—so important it had expanded to virtually all men though it was denied to most women—the issue in *Minor* could have focused on the circumstances under which Missouri could deny a woman's right to vote because of her sex.[126]

The justification for denying the right to vote would need to relate to the reasons a right to vote exists.[127] For example, a state might argue that a voter must have a stake in the government to vote. If the purpose of government was to protect property rather than to expand liberty, a property requirement may have seemed sensible historically.[128] However, in 1875, a justification would have needed to be a justification based on the nature of voting and on what government's proper role was in 1875. Denials of the right to vote on substantive grounds would likely be narrow. Denials of the right to vote based on demographics might be extraordinarily narrow, especially if the post-slavery society recognized a single class of citizens. Limitations based on age might remain sensible, but few others might. The point is not that children of all ages should have been allowed to vote. Rather it is that using age as a proxy for having sufficient maturity or some other characteristic deemed necessary to vote might be reasonable. Basing voting on the age of majority might be sensible but basing it on some other age might be problematic.[129]

The narrow question to be answered in *Minor* could have been: In the wake of a serious reading of the principles underlying the American republic and the Reconstruction Amendments, can Missouri justifiably deny

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124. The Constitution suggests elections for both federal and state offices. *See* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

125. U.S. CONST. amend. XIV, § 2 (providing loss of congressional representation for denying right to vote to men twenty-one years of age or older); U.S. CONST. amend. XV, § 1 (barring limitation on right to vote based on race, color, or previous condition of servitude).

126. *See* Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 186 (2020) ("The national and constitutional commitment to a popularly elected government, expressed in the Guarantee Clause, has expanded and solidified since the Framing. After the Civil War, Congress relied on the Guarantee Clause to insist on universal male suffrage as a condition for the confederate states' readmission to the Union.").

127. *See* Henry L. Chambers, Jr., *Technological Change, Voting Rights, and Strict Scrutiny*, 79 MD. L. REV. 191, 193–201 (2019) (discussing current structure for restricting the right to vote); *see also* Chambers, *supra* note 27, at 224–25 (discussing the need to justify rights restrictions more generally).

128. *See* Ross, *supra* note 38, at 1708 (noting the drift away from property restrictions on the right to vote and toward providing the right to vote more broadly to members of the political community).

129. The Twenty-sixth Amendment limits age-based voting restrictions for citizens eighteen years old and older. *See* U.S. CONST. amend. XXVI; *see also* Black, *supra* note 119, at 212–14 (discussing prelude to Twenty-sixth Amendment's ratification).

the right to vote to women based on their sex? Even if a state could stop citizens from voting for a reason supposedly related to voting (qualifications or what interest the state thinks a person should have in an election before being allowed to vote), the state almost certainly should not have been allowed to restrict voting based on sex.[130] Barring women from voting because of sex would be theoretically sensible only if the state conceded that society treated women so badly or kept them away from the knowledge or interest in the system necessary for voting that voting would be inconsistent with being a women in American society. That ought to have been an impossible burden to meet, even in 1875.

The focus of the analysis would shift. The *Minor* Court considered history to determine whether voting was a right of citizenship. The suggested analysis might consider history only to determine what justification a state thought it had to refuse women the right to vote based on their sex, and whether the justification remained acceptable. As important, the question would need to be considered while asking if a state's justification for denying women the right to vote would have seemed reasonable if women had been consulted as they were being disenfranchised.

Given the principles underlying the Declaration of Independence and the Preamble, the Thirteenth Amendment could have been deemed to have done what the Fourteenth Amendment did (and more). Ending America's slave society should have affected rights more than it did. If the Thirteenth Amendment had been taken seriously, the Fourteenth Amendment might not have been necessary. If the Thirteenth Amendment had been taken seriously, neither the Fifteenth Amendment nor the Nineteenth Amendment may have been necessary. The Thirteenth Amendment could have provided the protections the Fifteenth and Nineteenth Amendments provide. That would mirror today, as the Fourteenth Amendment arguably provides the protection the Fifteenth and Nineteenth Amendments provide, somewhat swallowing them in the process.[131] The legislation that has been passed in the wake of the Fifteenth Amendment arguably could be equally justified

130. Even today, when a state can find a legitimate basis for restricting the right to vote, it can restrict it. The constitutional protections for the right to vote are written as limitations on how the state can restrict the right to vote, not as an affirmative provision of the right to vote. *See, e.g.,* U.S. CONST. amend. XV.

131. However, the parallel treatment of the Fifteenth and Nineteenth Amendments may not be appropriate. *See* Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 GEO. J. L. & PUB. POL'Y 91, 94 (2022) ("Simply analogizing to the Fifteenth, without an independent analysis and holistic interpretation of the Nineteenth, ignores the unique constitutional history and public discourse around the ratification of the second federal voting amendment in 1920."). The conflation of the Fourteenth Amendment and the Fifteenth Amendment regarding the protection of minority voting rights can also be problematic. *See* Chambers, *supra* note 105, at 1424–29.

under Congress's Section 2 power under the Thirteenth Amendment jurisprudence or generally as legislation consistent with the Republican Guarantee Clause.[132] A transformative vision of the Reconstruction Amendments might not provide an absolute right to vote, but the amendments would limit how states could refuse the right to vote. If the justification required to limit a person's ability to vote were high enough, the right to vote would approximate an affirmative right.

Minor v. Happersett remains an important reminder of how America has defined citizenship and personhood rights. The case provided the Supreme Court an opportunity to rethink and revise how our founding documents should treat Americans through the newly-adopted Reconstruction Amendments. Instead, it took an incremental approach that embraced the injustice of the past and projected it into the future. In the wake of *Minor*, women could not protect themselves with the right to vote. They relied on the tender mercies of others. They were arguably no worse off, as that had been the situation in antebellum America. The U.S. Constitution may have provided some protection for women as citizens. However, interpreting the Reconstruction Amendments as transformative might have allowed women to help pass legislation that explicitly supported their ability to take care of themselves and secure their equal place in American society.

In a free society, denying the right to vote to free people (women) might be deemed antithetical to the principles of the polity, even if that society had denied free people (women) the right to vote when the society was a slave society operating under a virtually identical Constitution. The Thirteenth Amendment could have been read to be transformative or at least in a manner consistent with the text of our founding documents.[133] A transformative vision of the Thirteenth Amendment could have led the *Minor* Court to view the Fourteenth Amendment as a mere explanation or an explicit reminder of what the Thirteenth Amendment should have been

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132. Congress passed the Voting Rights Act pursuant to its Fifteenth Amendment powers. *See* South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) ("Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965."). However, a transformative vision of the Thirteenth Amendment would have placed the power to regulate voting in the Republican Guarantee Clause or other places in the Constitution relevant to voting.

133. Congress recognizes principles underlying our founding documents in various settings. In 22 U.S.C. § 7101(b), Congress finds that:

> One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.

22 U.S.C. § 7101(b)(22).

deemed to have done by banning slavery and destroying our slave society, reconstructing America by requiring the relationship between the people and their government (state and federal) be built on equality between and among citizens. That might not have guaranteed the right to vote, but it may have stopped the denial of the right to vote to women based solely on their sex.

Of course, the transformative interpretation of the Reconstruction Amendments is not law. The Supreme Court unsurprisingly continues to interpret the Reconstruction Amendments as incremental rather than as transformative.

III. *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

In *Dobbs v. Jackson Women's Health Organization*, while reviewing a Mississippi law that limited abortions after fifteen weeks of gestation to pregnancies involving medical emergencies or severe fetal abnormalities, the Supreme Court considered how the Fourteenth Amendment applies to a woman's right to obtain an abortion.[134] In upholding the law, the Court overturned *Roe v. Wade*[135] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[136] eliminating the right to an abortion under the United States Constitution. The *Dobbs* Court ruled the Constitution does not explicitly protect a right to abortion, and the Fourteenth Amendment does not implicitly protect such a right.[137] However, consistent with Fourteenth Amendment doctrine, a state's regulation of abortion is subject to rational basis review[138]—a level of review much easier to meet than the undue burden test that governed the right to abortion under *Casey*.[139] The *Dobbs* Court's approach to the right to abortion mirrored the *Minor* Court's approach to the right of women to vote. Both examined history to determine whether rights especially relevant to women that had been denied to women in the past could be exercised by women in the future. Both ignored the Thirteenth Amendment and used an incremental approach to the Reconstruction Amendments to decide the cases.

134. 597 U.S. 215, 232 (2022).

135. 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. at 302.

136. 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. at 302.

137. *Dobbs*, 597 U.S. at 231 ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.").

138. *Id.* at 301.

139. *Id.* ("[A law meets rational basis scrutiny and] must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."); *see also id.* at 390–91 (Breyer, J., dissenting) (noting *Casey*'s undue burden test).

A. The Dobbs *Majority*

The majority used a three-part approach to determine if the Constitution protects a right to an abortion. It noted:

> First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.[140]

The Fourteenth Amendment's Due Process Clause protects two types of rights: rights embedded in the first eight constitutional amendments[141] and other rights deemed so fundamental that they ought to be protected by the Liberty Clause.[142] The right to abortion is not of the first type. The analysis of the second type of right is somewhat circular, with rights being deemed fundamental when they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[143] The deeply rooted analysis requires an examination of whether the right at issue has been recognized in the past.[144]

The majority found the right to abortion not deeply rooted.[145] According to the majority, the right to abortion was created in the late twentieth century.[146] It argued abortion had been criminalized for centuries under the common law before *Roe*, meaning it could not have been a right.[147] The majority reviewed history, revisiting eight centuries to survey the views of legal commentators on abortion. The Court considered Henry de Bracton's thirteenth-century treatise that suggested that harming a woman to cause her an abortion after quickening was criminal, though that may tell us little

140. *Id.* at 234 (majority opinion).

141. Such rights originally applicable only against the federal government have been "incorporated" against state governments, functionally making them personal rights. *Id.* at 237.

142. *Id.*

143. *Id.* at 231 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

144. For a discussion of how the Court's test hearkens to tradition, see Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 333–36 (2022).

145. *Dobbs*, 597 U.S. at 250.

146. *Id.* at 241 ("Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.").

147. *Id.* at 245–46 (arguing the common law punished abortion non-uniformly, but never endorsed it). *But see id.* at 371 (Breyer, J., dissenting) (arguing early-term abortions had not been criminalized).

about a right to abortion or its absence.[148] The Court then considered Sir Edward Coke's seventeenth-century assertion that the abortion of a post-quickened fetus was criminal.[149] Sirs Matthew Hale's and William Blackstone's eighteenth-century views on the topic were also consulted.[150] The Court found the English common law's position that abortion after quickening was unlawful and could be criminal to have carried forward into American law.[151] It recognized that abortions before quickening (measured at approximately sixteen to eighteen weeks) had not always been criminal.[152] However, it found abortion had generally been regulated to a degree inconsistent with claiming a right to abortion.[153] The majority also considered how the states in our Union regulated abortion in the nineteenth and twentieth centuries, finding abortion had been criminalized in the United States for most of that time.[154] Not until *Roe v. Wade*[155] was decided did the Court find a right to abortion.[156] The Court's historical research was unsurprising. Legal control over women and their bodies is not new. The Court's analysis does not consider whether abortion laws were an attempt to control women in a manner consistent with the times, but inconsistent with a serious commitment to women's liberty.

The Court additionally found no support for the argument that the right to abortion is part of a broader right protected under the Constitution. The majority mocked the *Roe* Court's approach to finding a right to abortion, claiming the Court had been "remarkably loose in its treatment of the

148. *Id.* at 242 (majority opinion) (noting the criminalization of the striking or poisoning of a woman to cause her an abortion after time of quickening).

149. *Id.* at 242–43.

150. *Id.* at 243 (discussing abortion after quickening).

151. *Id.* at 241 ("At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions.").

152. *Id.* at 243 ("Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*."). The Court may overread that point. *See* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 203 (2024) ("Before quickening, the common law did not consider abortion a crime, and that might suggest that there actually was a common-law tradition of not interfering with women's decision to have an abortion before quickening.").

153. *Dobbs*, 597 U.S. at 245 ("In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.").

154. *Id.* at 248 ("In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening." (citation omitted) (footnote omitted)).

155. 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. at 302.

156. *Dobbs*, 597 U.S. at 241 ("Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.").

constitutional text."[157] It suggested the *Roe* Court's search for support for a right to abortion required that it ground the right in a right to privacy that could only be found by looking for it in multiple other amendments, suggesting a motivated search.[158] The majority's argument is somewhat surprising and disappointing. Determining whether a right that is not explicitly stated in the Constitution can be found implicitly in the Constitution will necessarily require a search. The search should be grounded in the Constitution's text and the principles that can be drawn from the text,[159] but it also requires context. A right can be grounded in the principles manifest in the constitutional text rather than based on explicit text. This may be so especially when the constitutional text being analyzed is unclear.

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[160] The amendment could have multiple meanings.[161] The amendment could mean the people may retain some rights against the federal government or state governments that the Constitution does not mention. That is, specific and discernible rights listed in a document somewhere may not be lost merely because the Constitution fails to mention them explicitly.[162] Alternatively, the amendment can be read to mean that given how protective of life, liberty, and property the Constitution is, the people may enjoy some rights related to life, liberty, and property that may not be listed in the Constitution or any other document or law.[163] That allows constitutional interpretation that would embrace broader and different rights

157. *Id.* at 235.

158. *Id.*

159. For a brief discussion of using principles derived from constitutional text to interpret the Constitution, see Henry L. Chambers, Jr., *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92, 108–113 (2009).

160. U.S. CONST. amend. IX.

161. For an open-ended discussion of the Ninth Amendment, see Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 CALIF. L. REV. 2129 (2010).

162. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 2 (2006) ("The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before; and its existence argued against a latitudinarian interpretation of federal powers.").

163. *See* Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 982 (2025) ("After all, members of the First Congress assumed that fundamental rights could be grounded not only in enacted legal texts but also in natural and customary law. As the Ninth Amendment indicates, they believed that the fundamentality and content of rights were not necessarily tied to their enactment through the Article V process.") (footnotes omitted).

than had been explicitly recognized by the federal or state governments.[164] The second approach does not treat the text loosely, it merely interprets it differently. By using the Ninth Amendment to explore the implications of other text in the Constitution, the *Roe* Court's approach takes constitutional text at least as seriously as the *Dobbs* majority. The "deeply rooted/ordered liberty" analysis the majority is willing to adopt and defend may be no more reliant on text than the Ninth Amendment analysis the majority rejects.

Indeed, the *Dobbs* majority struggles to explain why rights, such as the right to contraception, that are entrenched in the broader right to liberty are not placed at risk by its decision. The Court argues that abortion involves ending potential life, and that states are allowed to regulate the end of potential life in a way they may not regulate other rights related to privacy, liberty, and freedom.[165] The additional factor of the end of potential life can explain why the right to abortion is not absolute, but not why there is no constitutional right to abortion at all. Other rights the majority suggests are safe from elimination were found using the same process the *Roe* Court used to find the right to abortion.[166] Deeming a right to not exist necessarily means the subject matter related to the right can be regulated by the state.[167] Rights adjudication becomes a zero-sum game.

With the right to abortion stripped of protection, states are free to regulate abortion. Abortion may be regulated, though it cannot be regulated irrationally.[168] That is a small limitation on states. The Court notes abortion

164. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 374 (2022) (Breyer, J., dissenting) ("The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning.").

165. *Id.* at 257.

166. *See* Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233, 1242–43 (2023) ("[T]he step from revoking the right to abortion to revoking the right to contraception might seem like a leap. But reading these cases with fresh eyes after *Dobbs* reveals concerning parallels, pointing to vulnerabilities in the rights articulated in both *Griswold* and *Eisenstadt*. *Dobbs* questions the right to privacy generally and emphasizes the relevance of ongoing public debate. Contraception remains a contentious public and political issue. In addition, *Dobbs* rejected several arguments for abortion that also underly the right to contraception." (footnotes omitted)); James G. Hodge, Jr., *Federalism and Liberty: Reaching Constitutional Accord*, 72 U. KAN. L. REV. 163, 194 (2023) ("The rejection of the right to abortion access is a pronounced departure from long-standing reliance on the scope of non-textual liberty protections via substantive due process. Worse still is the potential for the Court to dial back other liberty interests. Despite assurances from the *Dobbs* Court's majority that its reasoning is limited solely to abortions, manifold other liberty interests, including rights to contraception, sexual intimacy, and marital equality, may be at risk of reconsideration.").

167. *Dobbs*, 597 U.S. at 409 (Breyer, J., dissenting) ("Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States.").

168. However, what constitutes rational basis may be subject to dispute over time. *See* Mary Ziegler, *Reversing the Reversal of* Roe*: State Constitutional Incrementalism*, 99 N.Y.U. L. REV. 2082, 2100 (2024) (hypothesizing challenges to *Dobbs*'s rational basis requirement).

is not subject to heightened scrutiny that would apply to sex-based regulation.[169] Though abortion may be a procedure only women undergo, the majority argues, heightened scrutiny would be appropriate only if a specific regulation is a pretext for invidious discrimination against women.[170] In the absence of such discrimination, abortion may be regulated just as any health measure is regulated, subject to rational basis review.[171]

B. The Dobbs *Dissent*

The dissent's analysis also embraced an incremental approach to the Fourteenth Amendment, focusing on how long the right to abortion had already been recognized under the Constitution. The dissent noted the right to abortion had existed for fifty years, becoming so engrained that eliminating it betrayed the Court's principles and may have forfeited some of the Court's legitimacy.[172] However, the dissent noted the right to an abortion was not absolute. The balancing of a woman's right against the state's interest in protecting potential life in *Roe*'s trimester structure provided a recognition of competing claims.[173] The refusal to consider the rights of the woman carrying the fetus, the dissent claimed, made the majority's position problematic.[174] The lack of concern for the rights of the woman is the issue.[175]

The dissent's reliance on the half-century of protection for the right to abortion makes its approach incremental. The dissent claimed the right to abortion, or the state's noninterference with abortion early in a pregnancy, was well-established,[176] but it recognized the right to an abortion was not established in 1868 when the Fourteenth Amendment was ratified.[177] However, the dissent disdained the majority's search for a centuries-old

169. *Dobbs*, 597 U.S. at 236 "([A] State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications.").

170. *Id.*

171. *Id.* at 237 ("[L]aws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.").

172. *Id.* at 417 (Breyer, J., dissenting).

173. *Id.* at 360 (noting the balance between the rights of the women and the protection of fetal life before and after viability).

174. *Id.* ("[The majority] says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs.").

175. *Id.* ("An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions.").

176. *Id.* at 371 ("Common-law authorities did not treat abortion as a crime before 'quickening'—the point when the fetus moved in the womb.").

177. *Id.* at 384 ("According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century.").

right to abortion, suggesting if that search proved the right to abortion was not deeply rooted in ordered liberty, any right without origins as far back as the mid-1800s would be suspect.[178] The dissent criticized placing women's liberty in the hands of men in the late 1700s or mid-1800s.[179] Requiring a court to locate women's rights in an era when women were explicitly treated as second-class citizens is problematic.[180] The degraded societal position of women coupled with their inability to vote at that time made their interests easy to ignore.[181]

The dissent provided a transformative flavor to its opinion, locating freedom principles in the Fourteenth Amendment that could as easily been deemed to have been resident—and may fit better—in a transformative Thirteenth Amendment.[182] The dissent considered more generally what rights must be provided to a person for that person to be treated as a full American.[183] That notion is arguably embedded in the Fourteenth Amendment but, as importantly, also exists in the implications of being in a post-slavery society created by the Thirteenth Amendment where the freedom principles underlying the Declaration of Independence and the Constitution may provide additional rights to citizens and persons.[184]

The dissent suggests the power over one's body is a manifestation of liberty.[185] Taking power over one's body away from women by ending the constitutional right to abortion is problematic.[186] The dissent suggests that

178. *Id.* at 363.

179. *Id.* at 372 ("If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.").

180. *See id.* at 373 ("Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.").

181. *Id.* at 372 ("Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase 'We the People.'").

182. *Id.* at 365 ("We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.").

183. *Id.* ("*Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American.").

184. *Id.* at 362 ("[O]ne result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens.").

185. *See id.* at 379 ("Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments.").

186. *See id.* at 381 (noting the *Casey* Court's argument: "Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.").

when the right is framed as the gender-neutral power over one's body, the majority can see the liberty interest; when the right is framed as the right to abortion—the power over a woman's body—the *Dobbs* majority only sees the potential life located in the fetus.[187]

C. Dobbs *and a Transformative Vision of the Reconstruction Amendments*

Dobbs was a missed opportunity to rethink America's relationship with the Reconstruction Amendments and American democracy more generally. Rethinking would require a change in approach and likely a change in doctrine, but the Supreme Court appears willing to rethink doctrine when it desires.[188] The Thirteenth and Fourteenth Amendments could be substantially rethought in an incremental or transformative manner.[189] Scholarship linking the Thirteenth Amendment's ban on involuntary servitude to protection for sexual autonomy and abortion rights exists.[190] The Fourteenth Amendment provides a basis for treating laws that fundamentally restrict women's freedom as unconstitutional.[191] These lines of thought could easily dovetail into a more serious discussion of the basis for abortion rights than the *Dobbs* majority's narrow search for a centuries-old right to abortion.[192] Indeed, the lines of thought could overtake the *Dobbs* dissent's assertion that the half-century of the right to abortion created a right that could not be rescinded. To be clear, the dissent's approach is an incremental use of the Thirteenth and Fourteenth Amendments in that it flows from a standard reading of the amendments

187. *Id.* at 370 ("The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life.").

188. *See* Trump v. United States, 603 U.S. 593 (2024) (broadening presidential immunity through separation of powers analysis); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (expanding the Second Amendment's scope).

189. *See, e.g.*, Michele Goodwin, *Distorting the Reconstruction: A Reflection on* Dobbs, 34 YALE J.L. & FEMINISM 30, 30 (2023) ("This Essay's thesis is that the record of American slavery extended beyond physical labor in cotton fields to wealth maximization in forced reproduction. It argues that the intent of the Thirteenth and Fourteenth Amendments included freeing Black women from forced reproduction.").

190. *See* sources cited *supra* note 90.

191. Such laws could support a finding of intentional discrimination based on sex barred under the Fourteenth Amendment. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (discussing how legislation's effects can support a finding of discrimination even when the legislation is facially neutral).

192. *See* Tsesis, *supra* note 90, at 1647 ("Yet, the framers' unwillingness to apply the fundamental legal concepts to women does not undermine Congress's current ability to exercise the Thirteenth Amendment's authority to end any form of subordination predicated on gender.").

and the principles that directly relate to them—the right to control one's labor and one's body—without much consideration of what additional Declaration-based principles might illuminate the amendments' meaning.

The *Dobbs* Court could have read the Thirteenth and Fourteenth Amendments in a transformative manner, as attempts to provide equal procedural and substantive citizenship consistent with principles embedded in the Declaration of Independence and the Constitution.[193] The majority and the dissent could have done so without much change in their approach. Both used principles to find rights that were not explicitly stated in the amendment but were tightly or loosely bound to the principles the justices found to be expressed in the amendment.[194] A transformative approach would differ in two ways. First, it would explicitly consider whether the broader principles that illuminate the Declaration and the Preamble would provide specific rights to people or limit how the government could control people. Second, it would look explicitly to today to determine what rights a person must have to function fully in today's world. A transformative approach would not view the past as the place to find a specific right. The point is not necessarily to find a right to abortion. It is to determine if a right to control one's reproduction, which may include an abortion in some circumstances, is necessary to function fully in America today consistent with the promises embedded in our founding documents. That may seem difficult to do, but it is not improper to do.

The Court will have additional opportunities to view the Reconstruction Amendments as transformative. When it does, the Court should directly confront the question: What rights must a person enjoy to be or have the potential to be a fully actualized citizen and person in a post-slavery America based on the broadest equality principles ostensibly embedded in the Declaration of Independence and the Constitution? The question does not consider in which clause of the Fourteenth Amendment a right can be found or whether the federal or any state government has provided a specific

193. *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1836–37 (2006) ("Congress's enforcement power under the Thirteenth Amendment not only aims to prevent interference with fundamental rights, which is the extent of Congress's authority under the Fourteenth Amendment, but also enables the federal government to actualize the ideals of the Declaration of Independence and the Preamble." (footnotes omitted)).

194. The majority embraces the right to contraception. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231, 256 (2022). The dissent would retain the right to abortion. *Id.* at 360 (Breyer, J., dissenting).

right in the past.[195] The question focuses on today and current democratic principles.[196]

The *Dobbs* majority ruled: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[197] The *Dobbs* majority suggested women can protect their interests and themselves through their vote.[198] That is ironic because the *Dobbs* Court's approach to rights discovery tracks the *Minor* Court's approach, which allowed the continued rejection of women's right to vote. Nonetheless, the right to vote provides, in part, the ability to protect oneself from onerous laws. Without the vote, citizens cannot force the state to stop denying them various rights. However, voting may be insufficient.[199] Even when successful, voting to protect rights is less preferred than having those rights protected by the Constitution against possible infringement by a local or state majority.

CONCLUSION

Minor v. Happersett considered women's suffrage. *Dobbs v. Jackson Women's Health Organization* considered the right to abortion. Both took a standard approach to rights discovery. In both cases, the Court functionally asked whether the right at issue existed before determining whether the right could be protected moving forward. That approach necessarily triggered an historical search for rights. Continuing to use an historical approach solely is problematic. A search for rights to determine if they have been provided continuously over centuries or even over decades is problematic when the relevant time frame includes decades or centuries when women were treated as second-class citizens at best, with virtually no opportunity to protect their

195. Some may argue that the approach suggests interpretation untethered to text. However, when text and principle meet, new rights can be created or found. *See* Ross, *supra* note 38, at 1764 ("[R]epublican government has evolved to mean popular sovereignty as participatory self-government. Under this definition, members of the polity have a fundamental right to vote for their representatives."); *see also* Shapiro, *supra* note 126, at 185 ("The government should be elected by at least some of the People—although of course, the Framers' definition of republican self-government accommodated both slavery and the exclusion of all women from the electorate." (footnote omitted)).

196. *See* Shapiro, *supra* note 126, at 186 ("American identity is intimately connected to a belief in democracy, a word that today unambiguously encompasses representative government.").

197. *Dobbs*, 597 U.S. at 232.

198. The majority explicitly noted that citizens are supposed to try to convince one another, then vote. *Id.*

199. Some women and men today may be unwilling to consider limitations on abortion rights to be limitations on the core freedoms of women. That may not be surprising. *See id.* at 373 (Breyer, J., dissenting) ("To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy.").

interests.[200] Looking into history to determine whether rights of specific value to women were widely provided is odd. Engaging in a search for equality is difficult when one is looking through a history of exclusion and discrimination, intentional and unintentional.[201]

When considering the rights of groups that have been historically treated poorly, rights discovery should focus on the future. In a post-slavery society governed by documents with freedom and democracy principles embedded in them, a better approach to rights discovery would be to ask what rights a person must enjoy to live fully as a free citizen in today's America.[202] That inquiry reaches further than the liberty principles embedded in the Fourteenth Amendment. It requires taking the Reconstruction Amendments seriously and possibly treating them as transformative rather than incremental. That may sound radical, but the approach flows from reading our founding documents anew and through a lens not clouded by centuries of inequality, including slavery, misogyny, and discrimination against women.[203] The approach does not require radical transformation; it requires the willingness to take the political principles embedded in our founding documents seriously.[204]

It gives courts more latitude to shape society, but that latitude tracks the principles embedded in our founding documents.[205] It encourages legislatures to build an America worthy of its founding documents. Legislatures and courts have avoided grappling with the principles

200. An historical inquiry will necessarily privilege how former generations decided to shape the world rather than how the text they passed should be applied today. The Court has recently noted the expected application of a law's drafters does not always define how the law will be interpreted. *See* Bostock v. Clayton Cnty., 590 U.S. 644 (2020) (interpreting Title VII to encompass forms of sexual orientation discrimination though the statute's drafters did not expect that application).

201. Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 806 (2024) ("[T]he majority's adherence to a history-and-tradition analysis binds constitutional interpretation to a less democratic past in which very few Americans were meaningful participants in the production of law and legal meaning.").

202. In some contexts, our government is quick to speak of freedom and equality. *See* 22 U.S.C. § 8201 ("Congress finds the following: (1) The United States Declaration of Independence, the United States Constitution, and the United Nations Universal Declaration of Human Rights declare that all human beings are created equal and possess certain rights and freedoms, including the fundamental right to participate in the political life and government of their respective countries.").

203. This would be easier to do were the Constitution viewed as much as a political document as a legal one. For a discussion of the distinction, see Henry L. Chambers, Jr., *Presidential Constitutional Interpretation, Signing Statements, Executive Power, and* Zivotofsky*,* 87 U. COLO. L. REV. 1183, 1201–06 (2016).

204. The *Dobbs* dissent edges in that direction. *Dobbs*, 597 U.S. at 376 (Breyer, J., dissenting) ("For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."). The *Dobbs* majority would likely ironically reject the approach as "unprincipled." *See id.* at 240 (majority opinion).

205. Reinvigorating the principles underlying the documents rather than blindly adopting the documents would be sensible. *See* Schauer, *supra* note 72, at 636 (noting both that the Declaration of Independence could become law and that the wisdom of adopting it as law is unclear).

underlying those documents for centuries. The present is a good time to start the process. If legislatures take the lead, courts may have little to do in the area. Whatever is done may push America toward a more perfect Union. According to our Constitution, that is our goal.