Article

Rescinding Rights

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INTRODUCTION

In the wake of the Trump Administration's three Supreme Court appointments, many onlookers—from legal scholars and commentators, to historically disadvantaged groups, to broader cross-sections of the American public—expect that the retooled Court may now have the votes to accelerate a long-awaited shift in jurisprudence that could undermine a litany of current civil rights and equality protections.[1] A diversified portfolio of long-entrenched and newly secured rights alike are seen by many as imperiled: reproductive rights,[2] LGBTQ

1. *See* Adam Liptak, *New Justice Will Have Little Power to Thwart Supreme Court's Rightward Lurch*, N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/us/politics/new-justice-supreme-court.html [https://perma.cc/S52P-J66K] ("[T]here is no reason to think the new justice [replacing Justice Breyer, who announced his retirement on January 26, 2022] will be able to slow the court's accelerating drive to the right. . . . Facing no perceived headwinds, the conservative majority seems ready to go for broke."); Oliver Knox, *Breyer's Retirement Won't Change the Supreme Court's Conservative Bent*, WASH. POST (Jan. 26, 2022), https://www.washingtonpost.com/politics/2022/01/26/trumps-mark-supreme-court-could-soon-hand-conservatives-some-major-victories [https://perma.cc/NBL3-TBWP] (predicting "far-reaching" conservative victories in the future despite the appointment of a new, left-leaning Justice to replace Stephen Breyer).

2. The Supreme Court recently heard arguments in *Dobbs v. Jackson Women's Health Organization*, a case involving Mississippi's law banning virtually all abortions after fifteen weeks of gestation, with no exceptions in cases of rape or incest. Dobbs v.

rights,[3] race- and ethnicity-centered protections,[4] voting rights,[5] and

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Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (granting writ of certiorari). The case is widely noted as a potential occasion for the Court to overrule *Roe*. *See, e.g.*, B. Jessie Hill & Mae Kuykendall, *Uprooting* Roe, HOUS. L. REV. 50, 50 (2022) ("[T]he U.S. Supreme Court is likely poised to overturn *Roe* . . . ."); Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game [https://perma.cc/PD85-S253] ("A majority of Americans want to keep abortion legal, but the Justices may well overturn Roe anyway.").

The Court also recently refused to block a Texas law banning abortions at approximately six weeks of pregnancy and delegating enforcement to private individuals against anyone who "performs, aids, or abets an abortion after the detection of a fetal heartbeat." S. B. 8 § 3 (to be codified at Tex. Health & Safety Code Ann. §§ 171.201(1), 171.204(a), 171.208(a) (West 2021)). The law remains in effect while under challenge. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (ruling that lawsuit by abortion providers can proceed against state medical licensing officials but not state-court judges and clerks and leaving the law in place while the lawsuit proceeds in the lower courts).

3. The court narrowly avoided taking a firm position on religious-based objections to LGBTQ non-discrimination laws when it recently decided *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). The Court unanimously held that the City of Philadelphia violated the First Amendment's Free Exercise Clause by requiring Catholic Social Services (CSS), a foster care agency in the City, to certify same-sex couples as foster parents. *Id.* at 1882. Chief Justice Roberts, writing for the Court, found that the City's contract with CSS was not subject to deferential review under *Employment Division v. Smith*, 494 U.S. 872 (1990), because the contract provision outlining rejection of referrals was not generally applicable due to the City's ability to grant exemptions to the non-discrimination policy. *Fulton*, 141 S. Ct. at 1878–79. Because the City offered no compelling reason for denying an exception to CSS, the refusal to contract with CSS constituted a violation of the First Amendment. *Id.* at 1882; *see also* Madeleine Carlisle & Belinda Luscombe, *Supreme Court Sides with Catholic Agency in LGBTQ Foster Care Case–But Avoids Major Religious Freedom Questions*, TIME (June 17, 2021), https://time.com/6074119/supreme-court-foster-care-ruling-fulton-philadelphia [https://perma.cc/KS5B-J5N5] ("[*Fulton*] reflects the importance of religious liberty in this Supreme Court . . . [which] has a very consistent, steady stream of broadly construing religious freedom rights, even at the potential sacrifice of LGBTQ rights." (second alteration in original)).

4. *See* Chiraag Bains, *Amy Coney Barrett Could Bring Down Decades of Anti-Discrimination Law*, SLATE (Oct. 26, 2020), https://slate.com/news-and-politics/2020/10/barrett-supreme-court-race-discriminatory-laws.html [https://perma.cc/8EUU-L9PH]; Into America, *Into Amy Coney Barrett's Record on Race*, MSNBC (Oct. 19, 2020), https://www.msnbc.com/podcast/amy-coney-barrett-s-record-race-n1243947 [https://perma.cc/HB6C-KE5L].

5. *See* Mondaire Jones, *What Amy Coney Barrett Means for the Future of Voting Rights*, NATION (Oct. 26, 2020), https://www.thenation.com/article/society/barrett-voting-rights-act [https://perma.cc/2FW3-7XM3]; *see also infra* notes 370–87 and accompanying text (discussing, among other things, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2370 (2021)).

more.[6] The Court's rapid rightward lurch has prompted these concerned observers to table any frustrations with the sluggish pace of *new*, affirmative progress in favor of a more immediate fear that the fruits of past equality efforts may soon be diminished. The concern, in essence, is this: What rights might the new Court seek to unmake? And what could possibly stop it?[7]

Of course, even prior to the appointments of Justices Gorsuch, Kavanaugh, and Barrett, the Court's inclination to enthusiastically enforce equality and related norms had long since receded from its Warren-era high-water mark.[8] Throughout the Roberts era, substantive

6. *See* Knox, *supra* note 1 (predicting conservative victories in the Supreme Court on a range of issues that include vaccine mandates, environmental protection, affirmative action, and gun rights); *see also* Christina Coleburn, Roe *May be the First Domino to Fall in the Series of Fundamental Rights*, HARV. C.R.-C.L. L. REV. (Dec. 2, 2021), https://harvardcrcl.org/roe-may-be-the-first-domino-to-fall-in-the-series-of-fundamental-rights [https://perma.cc/5L94-YBWN]; Jordan S. Rubin, *Ruling on 'Gruesome' Execution Case Exposes High Court Rifts*, BLOOMBERG L. (Apr. 1, 2019) https://news.bloomberglaw.com/us-law-week/ruling-on-gruesome-execution-case-exposes-high-court-rifts-3 [https://perma.cc/7LUH-J6PE]; Lawrence O. Gostin, Wendy E. Parmet & Sara Rosenbaum, *The US Supreme Court's Rulings on Large Businesses and Health Care Worker Vaccine Mandates: Ramifications for the COVID-19 Response and the Future of Federal Public Health Protection*, 327 JAMA 713, 713 (2022) ("The Court curtailed the government's ability to respond to the [COVID-19] pandemic and may have also severely limited the authority of federal agencies to issue health and safety regulations." (citing NFIB v. Dept. of Labor, 142 S. Ct. 661 (2022) (per curiam))).

7. From a different perspective, the Supreme Court has been, or appears poised to become, *more* rights-protective on matters such as the First Amendment, property rights, and economic due process. *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (invalidating an executive order by the governor of California limiting attendance at places of worship in order to stem the spread of the virus that causes COVID-19); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (striking down an executive order imposing occupancy restrictions on places of worship to stem the spread of the virus that causes COVID-19); Cedar Point Nursery v. Hassid, 141 S. Ct. 844 (2020) (granting certiorari to decide whether a regulation allowing union organizers to access agricultural growers' property without notice constitutes a per se physical taking under the Fifth Amendment); *see also* Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1381–84 (2019) (noting how the Trump Administration's embrace of economic due process can be maximized by nominating judges to the federal judiciary); Leah Litman, *A Conservative Judge Just Made It Even Harder to Stop Covid*, WASH. POST (Sept. 17, 2020), https://www.washingtonpost.com/outlook/2020/09/17/conservative-judge-just-made-it-even-harder-stop-covid [https://perma.cc/JJ7J-A33W] (noting a Trump-appointed federal judge's invocation of *Lochner* to invalidate an executive order in Pennsylvania requiring statewide business shutdowns).

8. *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 66 (noting that although the Warren Court's constitutional jurisprudence systematically dismantled Jim Crow, "post-Warren Court constitutional doctrine often turned back toward pre-Warren standards"); *see also* Michael Vitiello, *Arnold*

Equal Protection arguments have routinely been met with judicial indifference. This was often the case (despite a few notable exceptions)[9] during Justice Kennedy's long tenure as the so-called median Justice[10] and remained during Chief Justice Roberts's brief stint as median Justice.[11] There is no reason to believe it will cease to be the case with an extra Justice slotted to the Chief's right, creating a revolving "median pool" from which, depending on the issue, Justices Kavanaugh, Gorsuch, or Barrett may emerge to supply any given swing vote. In fact,

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Loewy, Ernesto Miranda, Earl Warren, and Donald Trump: Confessions and the Fifth Amendment, 52 TEX. TECH L. REV. 63, 74 (2019) (arguing that the post-Warren "Court's case law has continued to chip away at the core protections" of criminal defendants' *Miranda* rights); David A. Logan, *Still Standing After All These Years: Five Decades of Litigation Under the Fair Housing Act and the Supreme Court Still Can't Say for Sure Who Is Protected*, 23 ROGER WILLIAMS U. L. REV. 169, 200–01 (2018) ("[A]s the increasingly conservative justices on the Rehnquist and Roberts Courts have had to decide what to do with the liberal decisions of the Warren and Burger Courts, some say that the result has been 'stealth overruling.'"); *cf.* Pamela S. Karlan, Foreword, *Democracy and Disdain*, 126 HARV. L. REV. 1, 13 (2012) ("The Warren Court's most consequential decisions reflect the view that democracy requires a level of egalitarian inclusion, even in the face of competing property rights.").

9. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (granting foreign national Guantanamo Bay detainees constitutional protections to challenge the legality of their detention through habeas corpus proceedings despite a federal statute seeking to strip habeas jurisdiction); United States v. Windsor, 570 U.S. 744 (2013) (invalidating under the Fifth Amendment a provision of the Defense of Marriage Act restricting the federal definition of the word "marriage" to different-sex couples only); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing the right to marry for same-sex couples under the Fourteenth Amendment).

10. *See, e.g.*, Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 254 (2019) (describing the late Rehnquist/early Roberts era as one in which "[t]he Supreme Court's conservative majority . . . began to use judicial review energetically, to protect the rights of states, commercial advertisers, and conservative Christians; to limit liberal civil rights laws; and to strike down liberal affirmative-action programs and campaign-finance regulations"); Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265 (2019) (lamenting the 5-4 decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Shelby County v. Holder*—both of which Kennedy joined—as expressing a myopic view of history that undermined long-standing commitments to equality); *see also* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding the Trump Administration's third rollout of a ban on foreign arrivals from largely Muslim-majority countries—Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).

11. Benjamin Pomerance, *The King in His Court: Chief Justice John Roberts at the Center*, 83 ALB. L. REV. 169, 229 (2019) ("Equal protection and due process concerns raised by minority groups rarely resonate with [Chief Justice Roberts], leading to a catalog of extreme skepticism from the Chief Justice in this area of focus."); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that extreme partisan gerrymandering claims presented political questions beyond the reach of the federal courts).

there is very good reason to think just the opposite.[12]

Still, for all the current (and foreseeable future) Court's apparent disinclination toward substantive equality arguments, hope may not be entirely lost for those seeking to preserve existing statutory and constitutional rights from revocation. During prior periods of rightward drift, the Court has often invoked procedural or institutional reasons to freeze in place rights already secured by marginalized groups through legislative, executive, or judicial processes. This is "non-retrogression," a dynamic that supplies friction dissuading the Court from reverting to what might otherwise be a perfectly lawful state of affairs were it not for some kind of reliance on the current state of affairs.

Although, in recent years, concepts surrounding non-retrogression have been revisited and applied to contemporary rights litigation with renewed enthusiasm,[13] scholars have yet to probe more deeply, or develop more broadly, a theoretical and doctrinal framework for examining non-retrogression in the range of jurisprudential contexts in which it arguably arises. This Article demonstrates that courts have in fact embraced a much broader, more flexible non-retrogression principle over the years to preserve the status quo where rights are concerned. And, despite the view of some scholars that non-retrogression is nothing more than a shadow doctrine through which substantive goals masquerade as procedural principles,[14] this Article argues that courts absolutely do—and should—seize upon certain procedural and jurisprudential surrogates for substance as a bulwark to rights rescission.

Non-retrogression documents an intersection of process and substance that has gone unnoticed among legal scholars: one grounded not in the rights invoked by plaintiffs, but rather in a judicial concern with good procedure, orderliness, judicial manageability, and, at times, a respect for the current state of constitutional culture,

12. *See supra* notes 2–6.

13. *See, e.g.*, Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365, 1412 (2015) (noting that one such concept—vested rights—has "recently entered the constitutional mainstream in the marriage litigation context"); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1875 (2013) ("Recently . . . the Court has accepted the principle that longstanding programs create reliance interests that Congress is not free to disturb.").

14. John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1235–37 (1988) ("Arguments for non-retrogression necessarily pursue a substantive agenda, but they do so by stealth and indirection, without explicit statement of the value to be served. By feinting toward procedure, non-retrogression disguises substance.").

irrespective of (or even despite) a particular judge's or Justice's substantive predispositions. And because the dynamic of non-retrogression is couched largely in non-substantive law, its triggering does not require a cultural or legal consensus to have formed in support of a given constitutional norm—such as heightened scrutiny for the group at hand or a comparable regime of protection.

In mapping non-retrogression's domain beyond the cramped boundaries imposed by its early scholarly skeptics, this Article articulates a broader and more pliable non-retrogression principle than has previously been contemplated. It traces non-retrogression's ancestry from America's infancy all the way through modern cases in which courts, even as they have typically not *explicitly* invoked non-retrogression, have nonetheless struck down acts of rights rescission by way of a range of principles and values that form the foundation of a broader non-retrogression framework envisioned in this Article. The result is a set of discernable jurisprudential norms—of procedural and jurisprudential "surrogates"[15] for underlying substantive aims—that together constitute this more dynamic strain of non-retrogression. The non-retrogression principle spans the individual reliance interests that convinced a Court unwilling to treat President Trump's race-laden diatribes as dispositive animus[16] to nonetheless protect those Dreamers imperiled by the Administration's attempt to rescind the Deferred Action for Childhood Arrivals (DACA) program as one such "surrogate."[17] It finds expression in the broader societal and cultural reliance cited by a Court openly ambivalent about *Miranda*'s[18]

15. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1659–65 (1992) (arguing that the intersection of due process and equal protection analysis has allowed the judicial examination of the procedures employed by political branches in the immigration and detention contexts to operate as a "surrogate" protector of substantive individual rights).

16. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2417–18 (2018) (cataloguing President Trump's anti-Muslim public statements before holding that, notwithstanding this record, the Trump Administration's travel ban passed rational basis muster).

17. *Compare* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–16 (2020) (holding that President Trump's statements "fail to raise a plausible inference that the rescission was motivated by animus"), *with id.* at 1917 (Sotomayor, J., concurring in part and dissenting in part) ("[T]hen-candidate Trump's declarations that Mexican immigrants are 'people that have lots of problems,' 'the bad ones,' and 'criminals, drug dealers, [and] rapists' . . . 'create the strong perception' that the rescission decision was 'contaminated by impermissible discriminatory animus.'" (internal citations omitted)).

18. Miranda v. Arizona, 384 U.S. 436 (1966).

substantive validity as grounds to nonetheless uphold it.[19] And it finds further force in the civic reliance interest implicated where prior rights-affirming interpretations of civil rights statutes are assimilated into subsequent readings of later-enacted statutes.[20]

Notwithstanding this Article's focus on the fate of equality rights favored by progressives, non-retrogression is not a one-way ratchet: its concepts would also complicate the rescission of rights typically associated with conservatism (gun rights being the prime example) if the Court's balance of power ever shifts back to progressives' advantage.[21] These diverse settings underscore the ways in which a core aspect of due process—the notion that the state cannot take something away from its subjects without demonstrating a good reason,[22] and its embedded property[23] and reliance values[24]—can function as

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19. Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

20. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545–46 (2015) ("The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims [when enacting the FHA] against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.").

21. *See infra* Part IV.C.

22. *See* Motomura, *supra* note 15, at 1632; Super, *supra* note 13, at 1780. The so-called "due process revolution" began with *Goldberg v. Kelly*, in which the Court mandated trial-type procedures prior to the government's cessation of statutory welfare benefits. 397 U.S. 254, 264 (1970). Even after the Court backtracked in subsequent cases, it left behind mechanisms for procedural due process to continue to operate as a tool for rights protection. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (adopting a three-part balancing test based on the individual's interest at stake, a cost-benefit analysis of additional procedures, and the government's interest to determine what process is due); Motomura, *supra* note 15, at 1651–53.

23. The intersection of property and rights dates back to the Vested Rights Doctrine, which achieved peak prominence in the 18th and 19th centuries, "prohibit[ing] or otherwise limit[ing] the revocation of certain existing rights, usually in contract and property." Konnoth, *supra* note 13, at 1368; *see, e.g.*, Marbury v. Madison, 5 U.S. 137, 172 (1803) ("[T]he applicant has . . . a vested legal right, of which the executive cannot deprive him."). The doctrine continues to do important work in areas such as land use, where the doctrine is deployed as an end-run around environmental and safety regulations. *See* Steve P. Calandrillo, Chryssa Deliganis & Christina Elles, *The Vested Rights Doctrine: How a Shield Against Injustice Became a Sword for Opportunistic Developers*, 78 OHIO ST. L.J. 443, 454 (2017).

24. *See* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 736 (2017) (char

an unheralded proxy for substantive constitutional protection when the thing that the state is attempting to take from its subjects is a *right*. And the dynamic extends well beyond a judicial respect for certain reliance interests. Through an analysis of several prominent Supreme Court and seminal lower court decisions over the past few decades, this Article uncovers a larger story: an increasingly conservative judiciary's willingness—despite its general resistance to equality arguments grounded in animus, privacy, disparate impact, or other substantive grounds—to occasionally freeze in place a rights-affirming status quo when other, overriding jurisprudential issues are at stake. That set of jurisprudential concerns can include subordinated groups' expectations that rights protected by previous courts or the political branches should not be revoked—as in the Court's use of federal preemption to strike down an Arizona statute seeking to undermine federal discretion over how to prioritize immigration enforcement resources in pursuit of "attrition" of undocumented Arizonians.[25] It includes the avoidance of arbitrary government action, as illustrated by the federal courts' broad rejection of Trump Administration regulations expanding the definition of foreign nationals ineligible for immigration relief based on the receipt of public assistance.[26] And it includes the invalidation of state constitutional amendments that strip

acterizing non-retrogression as vindicating individuals' "settled expectations"); Konnoth, *supra* note 13, at 1405–07 (echoing the role of reliance interests in non-retrogression).

25. Arizona v. United States, 567 U.S. 387, 395 (2012) (also noting the "expectation[]" interests among foreign nationals at stake in the case).

26. City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 981 F.3d 742, 762 (9th Cir. 2020) (deeming policy shift arbitrary and capricious under the APA); *accord* Cook Cnty. v. Wolf, 962 F.3d 208, 228–29, 233 (7th Cir. 2020) (affirming an injunction not under the APA's arbitrary and capricious standard, but because the rule fell outside the bounds of the INA); New York v. U.S. Dep't of Homeland Sec., 969 F.3d 42, 74–81, 88 (2d Cir. 2020) (affirming an injunction under the arbitrary and capricious standard and as contrary to the INA, but cabining the scope of the lower court injunction to a more limited geographical range of New York, Connecticut and Vermont). *Contra* CASA de Md., Inc. v. Trump, 971 F.3d 220, 245, 256 (4th Cir. 2020) ("[T]he text and structure of the INA yield a clear answer: the term 'public charge' is naturally read as meaning just that—someone who produces a money charge upon the public for support or care. And the DHS Rule comports with this reading."). The Fourth Circuit granted a rehearing *en banc* of *Casa de Maryland v. Trump*, 981 F.3d 311 (4th Cir. 2020), but the case was subsequently voluntarily dismissed by the Biden Administration. *See* Inst. For Constitutional Advoc. & Prot., *Casa v. Trump*, GEO. L., https://www.law.georgetown.edu/icap/our-work/defending-immigrants-and-sanctuary-cities/casa-v-trump [https://perma.cc/RJ5E-XT53] ("In March 2021, DHS determined that continuing to defend the [rule at issue in *Casa de Maryland*]

protections against sexual orientation discrimination that citizens had enacted through the ordinary give and take of the political process and accordingly had come to rely upon as actual and durable.[27]

Non-retrogression is not merely about reliance interests; at a deeper level, it preserves the integrity of law against arbitrary shifts in government personnel whose unorthodox beliefs endanger settled legal understandings developed over time.[28] Non-retrogression is also grounded in the idea that courts take seriously citizens' evolving "understanding and expectations"[29] around rights when there are good reasons to do so. Unlike stare decisis, which ensures intra-judiciary continuity irrespective of whether the rescission of prior rights is at issue,[30] non-retrogression is more closely tethered to foundational (if fluctuating) due process concerns.[31] Because such rule-of-law values may at times demand the recognition of rights previously ignored (if not denied) by the Court, non-retrogression can serve as an engine of rights expansion where stare decisis, left to its own devices, would counsel conservatism.[32]

To be sure, this Article tells a correlative, not a causal, story. Even as it dusts for non-retrogression's fingerprints across decades of rights jurisprudence, it does not purport to suggest that these rulings

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against litigation was neither in the public interest nor an efficient use of limited government resources, and the Department of Justice voluntarily dismissed its appeals of judicial decisions invalidating or enjoining enforcement of the Rule.").

27. *See infra* notes 147–71.

28. Non-retrogression thus recalls British theorist A. V. Dicey's conception of law as "utterly different from the maxims of arbitrary power." A. V. Dicey, Droit Administratif *in Modern French Law*, 17 LAW Q. REV. 302, 311 (1901). For Dicey, the rule of law "means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government." ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (10th ed. 1959); *see also* Mark D. Walters, *Public Law and Ordinary Legal Method: Revisiting Dicey's Approach to* Droit Administratif, 66 U. TORONTO L.J. 53, 75 (2016) (noting Dicey's abhorrence for "the despotism implicit in the claims made for an extraordinary 'law of state' allowing the executive to set law aside whenever it wanted, merely by invoking the *salus populi*").

29. T. R. S. Allan, *Dworkin and Dicey: The Rule of Law as Integrity*, 8 OXFORD J. LEGAL STUD. 266, 272 (1988) (book review).

30. The similarities and differences between non-retrogression and stare decisis are explored at greater length *infra* Part II.E.3.

31. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring) (describing due process as serving the tandem—if potentially incommensurate—ends of "arriving at truth" while "generating the feeling, so important to a popular government, that justice has been done").

32. *See infra* notes 260–67 and accompanying text.

are the work of a deliberate doctrinal hand. Rather, this Article simply observes, as others have observed before, that regressive smoke has not always been accompanied by retrogressive fire.[33] Compiling examples that span across eras, contexts, and substantive judicial ideologies, it demonstrates that Courts have routinely employed a variety of doctrinal and procedural means in service of non-retrogression ends.

While non-retrogression is flexible enough to extend across different rights contexts, it is less reliable than its more overt doctrinal avatars. For example, while, as discussed in Part II.E, non-retrogression may manifest through stare decisis, it may also be negated by similar-sounding rhetoric. In such cases, the Court uses stare decisis as a veil to nominally uphold a right while substituting the doctrine for a new, less protective formulation in place of the purportedly affirmed precedent. As noted in Part III, this phenomenon is of particular concern in the reproductive rights and criminal procedure contexts.

Nevertheless, this Article illustrates one sense in which judicial underenforcement of equality norms[34] can actually, under the right circumstances, encourage progress: by delegating the doling out of such rights to the political branches, and then erecting procedural barriers to retrogression,[35] courts may effectively permit progressive regimes to *make* new rights more freely than their less-progressive successors can *unmake* them (provided, of course, that courts

33. *See, e.g.*, Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 1–2, 10–11 (1972) (commenting, in the Burger Court's early years, that despite forebodings of a post-Warren "dramatic turnabout," the 1971 Term produced a transformation "less dramatic and more complex" than the "root-and-branch abandonment of the interventionist new equal protection" that many had anticipated: "There was no drastic rush to the right. The changes were marginal, not cataclysmic. . . . And in a considerable number of cases, Warren Court principles were embraced and applied"). *But see supra* notes 8 and 10.

34. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978) (suggesting that if the Supreme Court is in a weak position to fully enforce certain norms of constitutional law, the political branches have the prerogative to more fully enforce those norms, "regulat[ing] . . . behavior by standards more severe than those imposed by the federal judiciary").

35. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 343 (1976) (citing, among other authorities, Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1281 (1975) (evaluating the extent to which procedural due process should constrain administrative actors)).

underenforcing on the front end actually follow through with non-retrogression on the back end).[36] Fundamentally, as this Article documents, these cases illustrate that non-retrogression's impact continues to outpace the recognition it has received among commentators and to defy the limitations that have been placed upon it by the few scholars who have engaged with it. At this tenuous moment in history, it is a tradition the current Court would do well to heed, even as it has ominously signaled its intent to do otherwise.

The balance of this Article proceeds as follows: Part I provides a broad scholarly account of non-retrogression, including its early articulation through the vested rights doctrine and subsequent evolution. Part II, the heart of the Article, provides a detailed mapping across the many legal contexts in which non-retrogression forms and gets articulated—including procedural due process, preemption, stare decisis, discriminatory intent, arbitrary-and-capricious review under the APA, and statutory canons such as ratification and clear statement rules. Part III notes, however, that the non-retrogression principle has faced limits in domains that include statutory voting rights and constitutional abortion and criminal procedure cases. Nevertheless, Part IV details why, in the mine run of cases, non-retrogression has advanced well beyond the modest reach imagined by its early skeptics and why its heightened impact has import in future cases of imperiled or threatened rights. Lastly, this Article concludes as it begins, noting how the status-quo-affirming features of non-retrogression (or its absence) may have important implications for the future of the rights landscape as we currently know it.

I. THE SCHOLARSHIP OF NON-RETROGRESSION

The basic concept of "non-retrogression" is not new. Its application in certain statutory contexts is by now familiar—most notably in Section 5 of the Voting Rights Act (VRA),[37] but also under federal environmental law's "nondegradation" standard.[38] Likewise, in narrow

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36. Likewise, as noted above, the non-retrogression principle is so firmly embedded in judicial culture that a more progressive future iteration of the Court might find it difficult to unmake rights secured under more conservative regimes. *See infra* Part IV.C.

37. *See* Beer v. United States, 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

38. *See* Jeffries & Levinson, *supra* note 14, at 1215 n.10 ("For the past few decades, federal regulatory regimes controlling air and water pollution have implemented a

constitutional settings, such as the Court's Takings Clause jurisprudence, it is routine to see the status quo ante deployed as a constitutional baseline.[39] In contrast to these relatively confined uses, since the late 1960s the Court has occasionally appeared to wield non-retrogression as a freestanding, if implicit, rule.[40] Early scholarly treatments disapproved of the practice, reflecting suspicions that mere policy preferences explained its use and skepticism of the possibility of coherent application beyond specific substantive settings.[41] While non-retrogression has long been discussed in the statutory voting rights context,[42] and a few commentators have occasionally (if at times reluctantly) tracked it into other substantive arenas,[43] these accounts pale in comparison to the doctrine's broader aspirations. In that spirit, this Article lays out a more ambitious framework for contemplating non-retrogression's role in constitutional and quasi-constitutional rights cases.

A. The Early Skeptical Take

The literature around non-retrogression first surfaced in a string of mid- to late-1970s articles[44] discussing the Court's opinion in *Beer*

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nondegradation policy, freezing in place some historical baseline of air or water quality as a floor that must at least be preserved absent some compelling social or economic value in polluting above this level.").

39. *See id.* at 1234 n.91 ("In takings cases . . . the Constitution protects the expectations of a private party in an existing (and not constitutionally compelled) state of affairs."); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 153 (1993) (observing that the Takings and Contracts clauses "have defined property by reference to status quo baselines, not to holdings under an independently defined conception of appropriate rights").

40. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 389–91, 393 (1969) (holding unconstitutional a city charter amendment that both suspended an existing fair housing ordinance and required referendum approval of any similar ordinance in the future, because the latter "place[d] special burdens on racial minorities within the governmental process"); *see also* Jeffries & Levinson, *supra* note 14, at 1216–17 (describing the trigger of unconstitutionality in *Hunter* and similar cases as "movement from a position where some unit of state [or local] government could benefit minorities . . . to a position where it could not").

41. *See generally* Jeffries & Levinson, *supra* note 14. Jeffries and Levinson allow that an "emerging national consensus" and "constitutional policy" may have justified the use of non-retrogression to fight racial discrimination, but they insist that subsequent extensions of the principle lack an equivalent substantive basis. *See id.* at 1225–26, 1231, 1233–34.

42. *See supra* note 37 and accompanying text.

43. *See supra* notes 38–39 and accompanying text.

44. *See, e.g.*, *Race-Conscious Reapportionment*, 91 HARV. L. REV. 284, 287 (1977) (describing the non-retrogression principle used by the Court in *Beer v. United States*);

v. United States, in which the Court interpreted Section 5 of the VRA to forbid any "*retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."[45] The first abstraction of the term to a broader constitutional or quasi-constitutional protection against rights rescission appears to be Douglas Laycock's somewhat skeptical aside in a 1981 article *Taking Constitutions Seriously*, quipping that if the Framers had intended any sort of broader non-retrogression to guide constitutional interpretation, surely they could have found a way to say so in the document itself.[46]

The first prominent expression of non-retrogression as an overarching constitutional obstacle to rights rescission is a 1998 article by John Jeffries and Daryl Levinson entitled, appropriately enough, *The Non-Retrogression Principle in Constitutional Law*.[47] There, the authors look—again, unsympathetically—upon what they call a "peculiar" trend among courts to base the constitutionality of a given government action upon "the state of affairs that existed before the change."[48] From there, the authors provide an extensive critique of a perceived growing non-retrogressive judicial tendency. For them, this tells the story of a federal judiciary that has lost its way.

Notwithstanding their overall critique of non-retrogression, Jeffries and Levinson acknowledge its legitimacy in the singular context of race.[49] Although they worry about the doctrinal incoherence caused

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Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 578 (1978) (describing the *United Jewish Organizations* plurality opinion's application of *Beer*'s non-retrogression principle); Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 HARV. L. REV. 1847, 1850 (1978) (detailing non-retrogression as the "separate standard for Voting Rights Act cases"). The term is also used in the context of international human rights treaties. *See, e.g.*, Rebecca J. Cook, *U.S. Population Policy, Sex Discrimination, and Principles of Equality Under International Law*, 20 N.Y.U. J. INT'L L. & POL. 93, 133 (1987) (applying concept of non-retrogression to "human rights treaties[, which] are perceived to require progressive advancement towards human rights goals and assurance that human rights not be reduced").

45. Beer v. United States, 425 U.S. 130, 141 (emphasis added).

46. Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 350 (1981) (book review) (suggesting that references to "preexisting rights" or "rights heretofore enjoyed" in the language of the Ninth Amendment "would have been the obvious way to express a *nonretrogression* principle *if that had been intended*" (emphasis added)).

47. Jeffries & Levinson, *supra* note 14; *see also* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1078 n.100 (2002) (characterizing Jeffries and Levinson as having borrowed their principle from voting rights terminology).

48. Jeffries & Levinson, *supra* note 14, at 1211–12.

49. *Id.* at 1215–23.

by a substantively untethered jurisprudence, they see the race context as offering a recognized "constitutional policy"[50] with a substantive grounding that makes judicial non-retrogression legitimate. Given the present-day doctrinal limitations in advancing the fight against private racial discrimination, they conclude that non-retrogression in the race context makes "practical sense."[51] Because the same overarching constitutional norms are not present in contexts in which non-retrogression is used, especially *Romer v. Evans*[52]—a case involving sexual orientation discrimination—they find the broader use of non-retrogression, and *Romer* in particular, "adrift in judicial activism, habituated to movement but with no idea where to go."[53] In short, Jeffries and Levinson take a dim view of a broader non-retrogression norm in constitutional law.

B. LATER, MORE FAVORABLE APPROACHES: NON-RETROGRESSION IN THE VESTED RIGHTS DOCTRINE

More recent approaches to non-retrogression have expanded it beyond the narrow boundaries imposed by its early skeptics. While the bulk of the literature drawing on Jeffries and Levinson spends less time engaging in *what* exactly non-retrogression analysis is, instead simply acknowledging *that* it exists,[54] a few scholars have delved

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50. *Id.* at 1231.

51. *Id.* at 1215, 1223.

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

53. Jeffries & Levinson, *supra* note 14, at 1234. For a discussion of how *Romer* illustrates a critical dividing line between stare decisis and non-retrogression, see *infra* Part II.E.3.

54. *See, e.g.*, Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CAL. L. REV. 697, 702 (2010) (citing Jeffries and Levinson's article for the proposition that "[t]he Supreme Court has interpreted the antidiscrimination principle to prohibit this sort of retrogression in various areas of constitutional law"); *Justice Ruth Bader Ginsburg Symposium on International Women's Rights: Promoting Global Equality for Women Through the Law*, 34 WOMEN'S RTS. L. REP. 106, 160 (2013) (citing Jeffries and Levinson for the simple proposition that "[n]on-retrogression means you cannot go back"); Jocelyn Benson, *Turning Lemons into Lemonade: Making* Georgia v. Ashcroft *the* Mobile v. Bolden *of 2007*, 39 HARV. C.R.-C.L. L. REV. 485, 486 n.7 (2004) ("[Jeffries and Levinson] define[] retrogression as allowing a jurisdiction to 'extend protection beyond what the Constitution requires' but forbidding it to 'retreat from that extension once made.'"); Conor O'Mahony, *If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 214 (2014) (finding "Proposition 8 effectively violated the principle of non-retrogression" as defined by Jeffries and Levinson); Donald P. Harris, *An Unconventional Approach to Reviewing the Judicially Unreviewable: Applying the Dormant Commerce Clause to Copyright*, 104 KY. L.J. 47, 70 n.175 (2016) ("Jeffries and

deeper. Craig Konnoth provides a comprehensive and detailed inquiry into the vested rights doctrine that picks up right where Jeffries and Levinson's story left off. While recognizing Jeffries and Levinson's dismissal of the non-retrogression principle as representing "no more than judicial policymaking,"[55] Konnoth brings a far different outlook, enthusiastically tracing the deep historical antecedents to modern-day non-retrogression all the way through several prominent cases decided after publication of Jeffries and Levinson's article.

1. The Vested Rights Doctrine and Its Limits

The doctrine of vested rights, which "prohibits or otherwise limits the revocation of certain existing rights, usually in contract and property,"[56] dates back to the Nation's infancy and was one of the "leading doctrines of American Constitutional Law before the Civil War."[57] Cited "repeatedly on the floor of the Convention of 1787"[58] and in foundational case law from the late 1700s and early 1800s,[59] some have argued that the doctrine was elemental in elaborating upon

Levinson argue that defining judicial activism is more nuanced and depends upon, among other things, whether the legislation takes away rights rather than extends rights."); Ruby J. Garrett, *A Call for Prophylactic Measures to Save "Souls to the Polls": Importing a Retrogression Analysis in § 2 of the Voting Rights Act*, 2015 U. CHI. LEGAL F. 633, 665 n.209 (2015) (citing Jeffries and Levinson in support of the notion that "[r]etrogression has been successful in other areas of the law" beyond voting rights).

55. Konnoth, *supra* note 13, at 1371.

56. *Id.* at 1368.

57. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 247 (1914).

58. *Id.* at 255.

59. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 172 (1803) ("[T]he applicant has . . . a vested legal right, of which the executive cannot deprive him."); Ogden v. Saunders, 25 U.S. 213, 238 (1827) ("[T]he legislature of the State cannot interfere, by law, in the particular case of A. or B., to injure or impair rights which have become vested under contracts."); Bowman v. Middleton, 1 S.C.L. 252, 252 (1792) ("[I]t was against common right, as well as against Magna Charta, [for a South Carolina legislative body] to take away the freehold of one man, and vest it in another; and that too, to the prejudice of third persons, without any compensation, or even a trial by a jury of the country, to determine the right in question."). In a 1914 piece discussing the origins of constitutional law, Professor Corwin argued that vested rights' role in American jurisprudence dates back even further, citing case law from the 1780s either "simply assum[ing]" the doctrine's existence or "invok[ing] similar principles." Corwin, *supra* note 57, at 255–56 (citing Symbury Case, Kirby 444 (1785); Ham v. McClaws, 1 S.C.L. 93 (1789)); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall) 304, 310 (C.C.D. Pa. 1795) ("The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law. . . . The legislature, therefore, had no authority to make an act devesting one citizen of his freehold, and vesting it in another, without a just compensation.").

the divisions and limitations of state power envisioned in the Constitution.[60] Essentially, through the vested rights doctrine, the judiciary empowered itself to nullify executive and legislative intrusions onto the property or contractual rights of their constituents.[61] Under this doctrine, such intrusions would be void, not under any specific constitutional provision, but rather "under the general principles of Constitutional Law held to underlie all constitutions."[62]

Whether an intrusion had occurred depended upon the extent to which the right had "vested" in its owner. Under the common law, vesting could occur by "right, title, or time."[63] Correspondingly, under the post-U.S. Constitution vested rights doctrine, the traditional avenue to a vested right was through so-called "formalities" that closely tracked core property and contractual principles: outward expressions of inner possessory or transactional states of mind such as consideration, consent, and so on.[64]

Beyond (1) formalities, courts developed two additional factors held to be probative of whether vesting had occurred: (2) time—the notion that the longer a person possesses a thing, the more that thing assimilates into the person's sense of self and becomes dearer to part with, and (3) reliance—the notion that, where possession of something has influenced subsequent behavior, the person's claim to that thing is worthy of heightened protection.[65] Each of these three factors related to the fundamental connection between the person and the thing, and helped evaluate whether that bond was sufficient to constitute a vested right.[66] Crucially, under the vested rights doctrine, once that threshold was crossed, the right would become "part of the individual, no matter the legal regime"[67] and would "no longer [be] dependent . . . upon the common law or statute under which it may have been acquired."[68]

60. Corwin, *supra* note 57, at 255–57.

61. *Id.*

62. *Id.* at 258.

63. Konnoth, *supra* note 13, at 1388 (quoting 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 122 (Samuel E. Thorne trans., 1998) (1235–1240)).

64. *Id.* at 1388–89. Formalities contribute to vesting through (1) encouraging reliance, (2) instilling a "sense of legitimate entitlement" in the putative rights holder, and (3) "recognizing the mutual dignity of both promises." *Id.* at 1413.

65. *Id.* at 1406–07.

66. *Id.* at 1406.

67. *Id.* at 1405.

68. Golden v. Parker, 138 P.3d 285, 290 (Colo. 2006) (quoting Ficarra v. Dep't of Regul. Agencies, Div. of Ins., 849 P.2d 6, 15 (Colo. 1993)).

While early invocations of vested rights tended to cling tightly to traditional property and contractual contexts, over time, the doctrine has been explored and considered more broadly, particularly as the legal definition of property has expanded to "include all legally defined interests."[69] To some, the idea of vested rights stands as forebearer to 20th-century expansions of substantive due process.[70] Others dispute this lineage, noting that, unlike the vested rights doctrine, substantive due process is expressly constitutionally grounded, thus questioning whether vested rights ever truly presented an operative mechanism for courts to check the political branches.[71] Craig Konnoth has identified traces of it in 21st-century same-sex marriage claims brought by plaintiffs retroactively stripped of their right to marry[72] and in mid-century successful challenges to the revocation of "vested" (as characterized in scholarly literature, but not by the Court) welfare benefits.[73] He even takes on the fascinating exercise of reframing the Court's 2012 invalidation of the Affordable Care Act's state-funding Medicaid provision. For Konnoth, the Court's undue coercion analysis is clearer and more robust, though not ultimately persuasive, when viewed through the lens of vested rights—the states' vested rights in established Medicaid funding (albeit something the federal government had never been obligated to offer in the first place).[74]

For one scholar at least, the link between vested rights and nonretrogression is clear.[75] Edward Foley establishes this link narrowly—in the context of voting rights.[76] For Foley, the Due Process

69. *See* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 114 (1993).

70. *See* Laura Inglis, *Substantive Due Process: Continuation of Vested Rights?*, 52 AM. J. LEGAL HIST. 459, 460 (2012) ("Corwin portrays vested rights as the immediate forerunner to substantive due process.").

71. *See id.* at 461. Konnoth's strongest argument against grounding vested rights in substantive due process is that substantive due process creates non-existing rights, while vested rights is about preserving the existing. If no right existed, then vested rights can offer no protection—and that is not the case with substantive due process. Konnoth, *supra* note 13, at 1374.

72. Konnoth, *supra* note 13, at 1416; Evans v. Utah, 21 F. Supp. 3d 1192, 1209 (D. Utah 2014) ("[T]he State must demonstrate some state interest in divesting Plaintiffs of their already vested marriage rights.").

73. Konnoth, *supra* note 13, at 1418 (emphasizing that "the Court did not invoke the time, reliance, or formality factors of typical vested rights analysis").

74. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012).

75. *See* Foley, *supra* note 24, at 731–38 (arguing that vested rights, a due process outgrowth, prevents the roll-back of voting rights).

76. *See id.*

Clause's inherent "fair play" paradigm encapsulates vested rights.[77] Because procedural due process has been judicially expanded to apply to more and more areas,[78] Foley has no qualms using it in the voting context, where vested rights prevent, in his eyes, the retrogression of pre-existing voting rights.[79]

2. Probing (and Expanding) Non-Retrogression's Frontiers

The differences between these two non-retrogression strains—one tethered to vested rights, the other connected to broader and more flexible procedural and jurisprudential protections against rights revocation—are numerous. First, the vested rights doctrine's utility is handcuffed[80] by its allegiance to principles of ownership: in the vested rights context, "*owning* a right connects the right to, and embeds the right in, the individual," and this *ownership* "represents a philosophical and psychological connection between an individual and the right."[81] In practice, this construct has proved limiting.[82] So, by contrast, this Article champions an approach that focuses less on whether the claimant to a rescinded right can be said to have a property-like or ownership interest in the putative right, and more on whether the rescinding of that right implicates the same jurisprudential values that courts typically seek to animate or protect within the antecedent doctrine of vested rights. To be sure, a property or contractual interest could be *among* these values, but the set need not be *limited* to those contemplated under vested rights. Instead, it may include procedural safeguards or deficiencies, reliance interests, stability, institutionalism, and other "small-c" conservative values that animate the vested rights doctrine.[83]

Relatedly, while the vested rights doctrine does take stock of reliance interests, it can do so only as far as those reliance interests help

77. *Id.*

78. *Id.* at 692.

79. *Id.* at 731–38.

80. Indeed, the doctrine's limited ability to protect rights holders, and the resulting need for more robust protections, is perhaps best evidenced by the rise of substantive due process to fill that void.

81. Konnoth, *supra* note 13, at 1375 (emphasis added).

82. *See* Super, *supra* note 13, at 1868–69 ("To obtain protection under the Takings Clause, the Court still required that rights be 'vested,' defining that term so formalistically as to exclude most of what came to be known as the New Property."); *see also* Kainen, *supra* note 69, at 105 ("The notion of vested rights acquired under existing law was narrower than the universe of all legal interests defined by the law existing at the time of past transactions or considerations.").

83. *See infra* Part II.

create a bona fide vested interest in the right—a three-pronged calculus in which the requisite formality and time inquiries dilute the reliance prong's impact.[84] By contrast, in this Article's approach, reliance interests (and related jurisprudential concerns) *alone* can trigger a judicial voiding of putative political branch rights retrogression.[85] Thus, for example, where an unformalized right may only have existed for a short time span, and therefore may not plausibly have "vested," it might nonetheless trigger the protections envisioned in this Article's approach, provided it induces sufficient reliance.

Finally, the vested rights doctrine differs from this Article's proposed approach in one simple, but crucial way: courts don't generally use it.[86] The limited modern examples cited above[87] illustrate both the exceptions that prove the rule and, in fact, the rule itself. Not only are vested rights examples rare, but many of those would-be rare examples do not actually invoke the doctrine at all. Thus, even if vested rights principles may occasionally inform decisionmakers' thought processes, they do not end up supporting the actual decisions themselves.[88] There may be any number of reasons (some of which are discussed in this Article) why courts are loath to rely upon vested rights, and hesitant to advertise the rare occasions on which they do so. But, regardless of the *why*, the *what* and the *how* matter. It matters that vested rights is a dormant doctrine.[89] Accordingly, in contrast to the vested rights doctrine, this Article seeks to meet courts where they already are: articulating the procedural, reliance, and other jurisprudential values that courts are actually, expressly, sensitive to, and illuminating how those values prevent courts from rescinding rights they might not otherwise deem worthy of protection in the first place.[90]

II. MAPPING NON-RETROGRESSION

Even as the vested rights analysis has diminished, other doctrines have emerged to carry the non-retrogression baton. In recent cases

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84. *See supra* Part I.B.

85. *See infra* Part II.

86. *See* Konnoth, *supra* note 13, at 1368 ("A mainstay of constitutional litigation in the nineteenth century, the doctrine was rarely invoked after the passage of the Reconstruction Amendments except in specialized areas of litigation involving, for example, zoning and pensions."). Indeed, as Konnoth notes, "courts do not necessarily rely on formal constitutional doctrines when they resist rights revocation." *Id.* at 1369.

87. *See supra* notes 72–74 and accompanying text.

88. *See supra* note 70.

89. *See supra* Part I.B; Konnoth, *supra* note 13, at 1368.

90. *See infra* Part II.

spanning an array of substantive settings—immigration, reproductive rights, LGBTQ rights, criminal procedure, employment, housing, and more—the Court has repeatedly intervened, largely on non-substantive grounds, to restore a preexisting baseline of substantive protection. Most of the cases share a telltale procedural whipsaw: the grant of an entitlement to some marginalized group, a subsequent attempt to rescind the grant, and judicial rejection of the attempted rescission.[91] Crucially, this pattern is not confined to settings where a cultural or legal consensus has already crystalized in support of a substantive goal—such as suspect-class status for the group at hand or some comparable protection regime.[92] The underlying reasons vary—from procedural due process[93] to federal preemption rules,[94] from stare decisis[95] to animus doctrine,[96] and from the arbitrary-and-capricious standard under the APA[97] to interpretative canons of construction such as clear statement rules to congressional ratification[98]—with corresponding effects on the baseline restoration's permanence. Through these cases, a unifying non-retrogression theme has become sufficiently discernible to preserve constitutional and quasi-constitutional baselines even before a substantively unsympathetic Court.

A. PROCEDURAL DUE PROCESS

The doctrine of procedural due process has often functioned as a "surrogate" for substantive protections that courts have invoked to

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91. Notably, a successful Section 5 claim need not fit this pattern, except in the theoretical sense that one's current ability to exercise the electoral franchise necessarily reflects a prior grant of rights, no matter how stingy. *Cf.* Beer v. United States, 425 U.S. 130, 138 (1976) (holding that certain components of New Orleans's governance structure predating Section 5's enactment lay beyond Section 5's reach). The cases identified in this Article therefore embody principles—particularly, that the government should not arbitrarily or unpredictably go back on its word—that the generally unilinear nature of Section 5 non-retrogression cannot fully capture.

92. On the other hand, non-retrogression is not irrelevant in contexts where the substantive foundation is relatively solid, as the Court's stare decisis holdings demonstrate. *See infra* text accompanying notes 235–57.

93. *See infra* Part II.A.

94. *See infra* Part II.B.

95. *See infra* Part II.E.

96. *See infra* Part II.C.

97. *See infra* Part II.D.

98. *See infra* Part II.F.

prevent the rescission or taking of individual rights.[99] Indeed, in certain contexts, courts have invoked procedural due process in ways that have clouded—perhaps unintentionally—the line between procedure and substance.[100] This has significant implications for non-retrogression. For one, while the vested rights doctrine, even when active, typically applied to economic rights only,[101] early non-retrogression procedural due process cases established footholds in both the economic[102] and non-economic rights contexts.[103] Second, procedural due process has built upon vested rights' ability to safeguard rights that otherwise enjoyed no underlying standalone constitutional protection.

This latter dynamic was accelerated by the Court's 1970 *Goldberg v. Kelly* decision,[104] which kicked off what would become known as the "due process revolution."[105] In *Goldberg*, the Court concluded that

99. Motomura, *supra* note 15, at 1628 (discussing the immigration context specifically); *see also* Foley, *supra* note 24, at 731–38 (arguing that due process prevents the retrogression of voting rights).

100. *See generally* Motomura, *supra* note 15; *see also* Landon v. Plasencia, 459 U.S. 21, 33 (1982) (noting, in the context of procedural due process decisions concerning the rights of foreign nationals, that the Court in fact was issuing rulings of substantive constitutional law).

101. *See supra* Part I.B.1; Kainen, *supra* note 69, at 105.

102. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 362 (1886) (holding that to functionally compel operational laundromats run by Chinese nationals to shutter would be to "depriv[e] such parties of their property without due process of law"); *see also* Russian Volunteer Fleet v. United States, 282 U.S. 481, 483 (1931) (citing *Yick Wo v. Hopkins* and *Wong Wing v. United States* in support of the Court's holding that a non-enemy foreign national was "entitled to the protection of the Fifth Amendment" and therefore due "just compensation" for the U.S. government's wartime requisitioning of two pre-existing shipbuilding contracts); Home Ins. Co. v. Dick, 281 U.S. 397, 407 (1930) (holding that a Texas statute could not invalidate pre-existing contractual rights for out-of-state parties without violating the Due Process Clause); Wynehamer v. People, 13 N.Y. 378, 398 (1856) ("When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision [the Due Process Clause] expressly to shield private rights from the exercise of arbitrary power.").

103. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228 (1896) (holding that the political branches may not punish non-citizens with hard labor without due process); Kwock v. White, 253 U.S. 454, 457 (1920) (holding that procedural due process requires judicial intervention in cases where U.S. citizens have been deprived of their right to re-enter the country by way of "manifestly unfair" administrative proceedings, while finding that this threshold had not been met in this case's factual circumstances).

104. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

105. Motomura, *supra* note 15, at 1632; *see also* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1300 (1975) (noting the trend, after *Goldberg v. Kelly*,

even as New York City residents held no underlying substantive "right" to certain welfare benefits, the government could not rescind those benefits without affording the beneficiaries trial-type procedures.[106] In doing so, it "rejected wooden reliance on the right-privilege distinction in the context of a procedural due process claim,"[107] opening the door for new classes of "rights" with no standalone constitutional protection to nonetheless be constitutionally shielded from retrogression—again, much like the vested economic rights of yore,[108] and yet now unencumbered by vested rights' economic-only purview.[109]

Even as the Burger Court moved quickly to "sap[] *Goldberg* of much of its vitality,"[110] procedural due process has managed to remain, at times, an operative and versatile constraint on rights retrogression.[111] The question, of course, is *when* and *how* can this happen? Clues may be found in perhaps the most prominent case *limiting* the reach of *Goldberg*. Under *Mathews v. Eldridge*, procedural due process concerns arise where the government's attempts to deprive constituents of an interest or benefit raise certain *procedural* red flags.[112] Nevertheless, the definition of what counts as "procedural" under

to transplant protections to "one area after another" by asking, "'If there, why not here?'"); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 888 (2015) (noting expansion of due process protections after *Goldberg* to the contexts of government employment, public schools, prisons, utilities, and alcohol consumption). *See generally id.* (noting transplantation of procedural due process protections to immigration and national security cases involving the rights of non-citizens).

106. *Goldberg*, 397 U.S. at 264.

107. Motomura, *supra* note 15, at 1651.

108. *See* Konnoth, *supra* note 13, at 1386 ("Under the [Vested Rights] doctrine, a failure to provide the right in the first place merits no constitutional scrutiny. However, revocation of the right once vested (if even possible) demands the accouterments of due process."). In this sense, the vested rights doctrine is perhaps as much a philosophical forebearer to modern procedural due process as it is more commonly recognized to have been for modern substantive due process. *See, e.g.*, Kainen, *supra* note 69, at 111–12; Inglis, *supra* note 70, at 460.

109. Kainen, *supra* note 69, at 105.

110. Super, *supra* note 13, at 1780 (citing Atkins v. Parker, 472 U.S. 115, 128–29 (1985) and Mathews v. Eldridge, 424 U.S. 319, 349 (1976)). The Rehnquist court would further limit *Goldberg*. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 60–61 (1999).

111. *See also* Super, *supra* note 13, at 1875–77 (mining traces of unspoken procedural due process and Takings Clause analysis, by way of reliance, in the Court's 2012 Affordable Care Act decision striking down the federal government's threat to withdraw Medicaid benefits, and in the Ninth Circuit's rejection of Proposition 8's attempt to deprive California same-sex couples of their previously intact right to marry).

112. *Eldridge*, 424 U.S at 335.

Mathews's three-part test can easily overlap into the domain of substantive rights protections.[113]

Indeed, the *Mathews* test has proven vital to preserving constitutional rights in a range of cases and contexts. For example, in *Landon v. Plasencia*, the Court, applying *Mathews*, mandated a hearing before permitting the government to exclude a lawful permanent resident returning to the United States from a brief sojourn abroad.[114] Engaging an interpretation of the applicable immigration regulations, the Court admitted that its decision, however "procedural," was actually one of substantive "constitutional law"[115]—namely, "the right 'to stay and live and work in this land of freedom'"[116] and "the right to rejoin [one's] immediate family"—both of which were protected through due process balancing.[117]

After 9/11, the Court again made due process a non-retrogressive vehicle when it applied *Mathews* to protect a U.S. citizen detainee in *Hamdi v. Rumsfeld*.[118] The Court recognized that, even when it came to suspected enemy combatants, procedural due process remained a vehicle for safeguarding "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[119] When the Supreme Court revisited the question of habeas protections for non-citizen detainees at Guantanamo Bay in *Boumediene v. Bush*, it again looked to *Mathews* for inspiration, noting "that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings," a concept that "accords with our test for procedural adequacy in the due process context" under *Mathews*.[120]

What does this mean for non-retrogression specifically? Importantly, it suggests that courts may be most inclined to push back against rights retrogression when the putative rescinder has encroached upon judicially valued concerns that extend *beyond* (but potentially overlap with) the substantive benefit or right itself. With the

113. *See generally* Landau, *supra* note 105 (discussing how *Mathews*'s consideration of harm to the individual and related interests under its procedural due process balancing test practically requires substantive analysis of the rights of foreign nationals where their rights are raised).

114. Landon v. Plasencia, 459 U.S. 21, 37 (1982).

115. *Id.* at 33.

116. *Id.* at 34.

117. *Id.*

118. Hamdi v. Rumsfeld, 542 U.S. 507, 529–35 (2004).

119. *Id.* at 529.

120. Boumediene v. Bush, 553 U.S. 723, 781 (2008).

passage of time, and increasingly within recent constitutional and statutory cases, such a picture of non-retrogression has come further into view, across a range of doctrinal arenas, as courts have implicitly if not explicitly resisted rights retrogression through non-substantive jurisprudential principles.

B. Preemption

Outside of procedural due process, preemption doctrine in immigration law—and in particular the invalidation of state efforts to enforce federal immigration policy—has become another important locus of non-retrogression. Despite undocumented immigrants' lack of suspect-class protection and the often prohibitively heavy burden of proving discriminatory purpose in immigration cases, courts have treated the federal government's underenforcement of its own laws as engendering cognizable reliance interests among individuals spared from removal.[121] An "institutional competence" concern—specifically, that states will be unable or unwilling to avoid arbitrary or invidious enforcement decisions—reinforces these otherwise removable individuals' "right to be left alone" for as long as the federal government sees fit to leave them alone.[122]

This idea has important application in a group of recent cases challenging state immigration restrictions. Although these laws affect Latinx communities almost exclusively, the Supreme Court's discriminatory intent standard proves too high a bar for a successful equal protection challenge,[123] and courts have refused to recognize undocumented immigrants as a "suspect class" deserving strict scrutiny.[124] Yet, where states seek to enforce immigration laws against undocumented immigrants whom the federal government has chosen to leave alone, effectively expanding enforcement to a broader group of people than the federal policy, courts have preserved the preexisting state of affairs—often referencing certain "rights" threatened under

121. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 395–97 (2012).

122. *See* Motomura, *supra* note 15, at 1646.

123. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 538–42 (M.D. Pa. 2007) (finding no equal protection violation because plaintiffs failed to prove any discriminatory purpose).

124. *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976) (holding that undocumented foreign nationals lack the same "colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens"); Reginald Oh, *Dehumanization, Immigrants, and Equal Protection*, 56 CAL. W. L. REV. 103, 130 (2019) (criticizing the Court's "dehumaniz[ing]" rationale for declining to consider undocumented adults to be a suspect class).

state legislation—through the doctrine of preemption. *Arizona v. United States* well illustrates this idea,[125] as do a host of lower-court rulings decided around the same time as *Arizona.*[126]

In *Arizona*, the Supreme Court invalidated three provisions of an Arizona statute known as S.B. 1070,[127] by which the state sought "attrition" of the state's undocumented immigrant population through unilateral enforcement of federal immigration law.[128] Given S.B. 1070's apparent targeting of Arizona's Latinx community,[129] the case might plausibly have turned on animus doctrine or related equal protection principles.[130] Instead, in an opinion by Justice Kennedy, the Court looked mainly to the federal government's "broad, undoubted

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125. Arizona v. United States, 567 U.S. 387 (2012).

126. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 764–72 (N.D. Tex. 2007); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1054–57 (S.D. Cal. 2006).

127. The statute's nickname refers to the version introduced in the Arizona Senate. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The *Arizona* Court invalidated Section 3 (codified at ARIZ. REV. STAT. ANN. § 13–1509(A)), which created a state misdemeanor for non-compliance with federal immigrant-registration requirements, 567 U.S. at 403; Section 5(C) (codified at ARIZ. REV. STAT. ANN. § 13-2928(C)), which went beyond federal law by making it a misdemeanor for an undocumented immigrant to seek or engage in work in Arizona, *id.* at 407; and Section 6 (codified at ARIZ. REV. STAT. ANN. § 13-3883(A)(5)), which guaranteed warrantless arrest where an officer has probable cause to believe that an individual is removable under U.S. law, *id.* at 410. The Court upheld Section 2(B) (codified at ARIZ. REV. STAT. ANN. § 11–1051(B) (West 2012)), which required officers, in some circumstances, to verify detainees' immigration status with the federal government, *id.* at 415.

128. *Arizona*, 567 U.S. at 393 (quoting S.B. 1070's uncodified Section 1, which specified that the bill's purpose was to "discourage and deter the unlawful entry and presence of [undocumented foreign nationals] and economic activity by persons unlawfully present in the United States").

129. *See Frequently Asked Questions About the Arizona Racial Profiling Law*, ACLU, https://www.aclu.org/other/frequently-asked-questions-about-arizona-racial-profiling-law [https://perma.cc/HXJ9-YDUE] ("In the early studies we've seen on the impact of local police engaging in enforcement of immigration laws, there have been clear spikes in the targeting of Latinos for minor, misdemeanor offenses . . . .").

130. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (invalidating Colorado ballot initiative removing non-discrimination protections from gay, lesbian, and bisexual persons as "inexplicable by anything but animus toward the class it affects"); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (invalidating a Texas anti-sodomy law on animus grounds); United States v. Windsor, 570 U.S. 744, 770 (2013) (invalidating the Defense of Marriage Act's refusal to recognize valid same-sex marriages as predicated upon animus); *Chapter Four: Animus and Sexual Regulation*, 127 HARV. L. REV. 1767, 1767 (2014) (noting that the Court has recently shown "awareness of—and antagonism toward—government actions fueled by animus toward sexual minorities" and that "anti-gay animus has played a recurring and pivotal role in the landmark trio of *Romer v. Evans*, *Lawrence v. Texas*, and, most recently, *United States v. Windsor*" (footnotes omitted)).

power over the subject of immigration" and to Congress's authorization of a removal system in which "broad [Executive Branch] discretion" is a "principal feature."[131] Because three of S.B. 1070's provisions either conflicted with existing federal law or trespassed on a vacant field that only Congress could occupy,[132] federal preemption principles required their invalidation.[133]

Within its seemingly dry preemption analysis, the Court noted how immigration policy affects "the *perceptions and expectations* of [foreign nationals] in this country who seek the full protection of its laws."[134] From there, the Court noted how prosecutorial discretion—namely, the decision not to exercise the government's full enforcement authority against deportable foreign nationals—"embraces immediate human concerns."[135] Specifically:

> Unauthorized workers trying to support their families, for example, likely pose less danger than [those] . . . who commit a serious crime. The equities of an individual case may turn on many factors, including whether the [foreign national] has children born in the United States, long ties to the community, or a record of distinguished military service.[136]

In this sense, *Arizona* is as much about attending to certain immigrants' vested interest in continuing to participate in American community life as it is about federal preemption doctrine.[137] While in the Court's own telling, *Arizona* concerned those "who do not have a lawful right to be in this country,"[138] the practical impact of the decision was to restore an effective "right" created or strengthened by the federal government's discretionary reallocation of enforcement resources, which were likely influenced by the increasingly common use of prosecutorial discretion[139] and the then-newly announced DACA

131. *Arizona*, 567 U.S. at 394, 396.

132. *See id.* at 399.

133. *Id.* at 403, 407, 410.

134. *Id.* at 395 (emphasis added).

135. *Id.* at 396.

136. *Id.*

137. Kennedy suggests that the benefits of honoring this reliance interest are mutually felt: "The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here." *Id.* at 416.

138. *Id.* at 392–93.

139. The U.S. government has repeatedly noted that resource constraints require the prioritization of enforcement resources for "promotion of national security, border security, public safety, and the integrity of the immigration system." *See* Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011)

policy.[140] The case therefore stands as a core example of the Court's application of non-retrogression principles, preserving the status quo to safeguard a de facto "right to be left alone" under federal policy for undocumented foreign nationals that states cannot so easily rescind through their legislative processes.[141]

C. Animus

In a series of decisions typically classified under the animus heading, courts have offset their hesitance to make clear pronouncements on the content of LGBTQ rights by articulating an unusually expansive

https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/8ERF-V2W4]; *see also* U.S. Dep't of Justice, *Immigration and Naturalization Service Fact Sheet on Prosecutorial Discretion Guidelines* (Nov. 17, 2000) available at https://www.aila.org/infonet/ins-memo-on-prosecutorial-discretion [https://perma.cc/GW8X-XFPM] ("Prosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone."); Memorandum from Doris Meissner, Comm'r of Immigr. and Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000) https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf [https://perma.cc/A2FW-KVH2].

140. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/XVL8-RS6B].

141. An earlier example of this line of reasoning appeared in *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part and rev'd in part*, 724 F.3d 297 (3d Cir. 2013), a U.S. district court decision on a challenge to local ordinances enacted by the city of Hazleton, Pennsylvania. Among other provisions, the ordinances banned employment and harboring of undocumented immigrants and required tenants to obtain occupancy permits, which would issue only upon proof of lawful residence. *Id.* at 484–85. The *Hazleton* plaintiffs argued both that the law violated equal protection and that it was preempted by federal law. *Id.* The court rejected the equal protection challenge because the ordinances were facially neutral and it found insufficient evidence of discriminatory intent. *Id.* at 539–40. It sustained the preemption challenge, however, noting that the federal law balanced the goal of finding and removing undocumented immigrants against the burden on employers and workers and the possibility of accidentally removing authorized immigrants or citizens. *Id.* at 531. The ordinances conflicted with federal law, according to this reasoning, because they "assume[d] that the federal government seeks the removal of all undocumented [foreign nationals]" and thereby put too much weight on the "find and remove" side of the equation. *Id.* *Hazleton*, like *Arizona*, invoked preemption to provide certain de facto rights to undocumented foreign nationals who would otherwise be devoid of constitutional protection—a recurring theme in other lower-court opinions as well. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 764–72 (N.D. Tex. 2007); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1054–57 (S.D. Cal. 2006).

understanding of reliance: in recently granted rights,[142] in the traditional federal-state division of power,[143] in an uninterrupted proliferation of statutory antidiscrimination protections,[144] and so on. Beginning with *Romer v. Evans*[145] and culminating in *Obergefell v. Hodges*,[146] the Supreme Court has vindicated a host of rights for LGBTQ individuals and couples through a string of oblique doctrinal protections that travel under the non-retrogression banner.

1. *Romer v. Evans*

Justice Kennedy's opinion for the Court in *Romer* found unconstitutional animus behind an amendment to the Colorado Constitution[147] nullifying existing antidiscrimination protections for gays, lesbians, and bisexuals and prohibiting any state or local government institution from protecting Coloradans from sexual orientation discrimination.[148] Because Amendment 2 was "inexplicable by anything but animus toward the class it affect[ed],"[149] it failed what the Court implied was rational basis scrutiny, for "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[150] Animus was therefore a crucial consideration in *Romer*, but not to the exclusion of non-retrogression themes. Rather, the Court's formulation of animus doctrine is informed and supplemented by at least two non-retrogression principles—one narrow, one far more expansive.

First, the Court faulted Colorado for constitutionalizing the question of what protections gays, lesbians, and bisexuals could demand from all levels of government, removing it from the ordinary give and take of democratic politics and thereby "impos[ing] a special disability upon those persons alone."[151] It was Amendment 2's "general an-

142. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 629 (1996).
143. *See* United States v. Windsor, 570 U.S. 744, 772 (2013).
144. *See Romer*, 517 U.S. at 628.
145. *Id.*
146. Obergefell v. Hodges, 576 U.S. 644 (2015).
147. COLO. CONST. art. II, § 30b, *invalidated by* Romer v. Evans, 517 U.S. 620 (1996).
148. *Romer*, 517 U.S. at 623–24, 634–36.
149. *Id.* at 632.
150. *Id.* at 634 (alteration in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
151. *Id.* at 631. "Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimina-

nouncement" stripping gays, lesbians, and bisexuals from legal protections at all levels of government[152] that sealed the Court's inference of unconstitutional animus.[153] Such reasoning is consistent with a line of precedent[154] distinguishing "mere repeal"[155] of antidiscrimination protections from a "retreat to a higher and presumably less favorable level of political decision,"[156] with the latter raising special constitutional concerns.[157] The Court did not explicitly espouse this higher-level-repeal theory of equal protection—unlike the Colorado Supreme Court,[158] whose judgment *Romer* affirmed on different grounds.[159] But it is implicit in the Court's holding that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[160]

This higher-level repeal theory of *Romer* is admittedly narrow; it might be read to create a safe harbor for a revocation of rights that

tion only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability." *Id.*; *see also id.* at 633 (noting that Amendment 2 violated "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance").

152. *Id.* at 635.

153. *Id.* at 634–35 (noting that the Amendment produced "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it").

154. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

155. *Hunter*, 393 U.S. at 390 n.5.

156. Jeffries & Levinson, *supra* note 14, at 1217.

157. *Id.* at 1217–18.

158. Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *aff'd*, 517 U.S. 620 (1996). *Reitman*, *Hunter*, and *Seattle* each concerned racial discrimination. *See, e.g.*, *Hunter*, 393 U.S. at 391 (objecting to the placement of "special burdens on racial minorities within the governmental process"). But in *Evans* the Colorado Supreme Court interpreted the higher-level-repeal standard to be trans-substantive, 854 P.2d 1270 at 1279–80, relying on Justice White's contention in *Hunter* that "the State may [not] disadvantage *any particular group* by making it more difficult to enact legislation in its behalf," 393 U.S. at 393 (emphasis added).

159. *Romer*, 517 U.S. at 626 ("We . . . now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court."). *But see id.* at 640 (Scalia, J., dissenting) ("The Court's entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal 'rational basis' analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level."); Jeffries & Levinson, *supra* note 14, at 1229 ("*Romer* seems most nearly understandable as an extension of the *Hunter* ban on higher-level repeals to laws protecting homosexuals.").

160. *Romer*, 517 U.S. at 633.

merely restores the status quo ante.[161] But an expansive notion of reliance-adjacent interests also appeared to influence the *Romer* Court, potentially rendering even "mere repeal"[162] of established rights constitutionally problematic. This "reliance" analysis reflected more than the question of whether gay, lesbian, and bisexual Coloradans had begun organizing their lives around "specific legal protection[s]"[163] previously attained, a strain of reliance protection that motivated the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[164] Although that concern was certainly implicit in *Romer*,[165] the Court fixated instead on Amendment 2's rejection of an "emerging tradition" and "consistent pattern"[166] on which the affected community, and society in general, may have come to rely: enactment of state and municipal antidiscrimination laws against an ever-expanding list of private entities not covered by common-law innkeeper duties, for the benefit of an ever-expanding list of groups lacking suspect-class protection under the Fourteenth Amendment.[167]

Because the "Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations,"[168] and given the Court's own limited application of "heightened equal protection scrutiny,"[169] the "emerging tradition" and "consistent pattern" was one of expansion only—not contraction—and Amendment 2 violated that norm.[170] The state could not upend that expectation without running afoul of a theory of equal protection grounded in non-retrogression themes, particularly given that its actions were so clearly "born of animosity toward the class of persons

161. *See* Jeffries & Levinson, *supra* note 14, at 1218, 1229–30 ("The Court sees the mere repeal of laws or policies beneficial to minorities not as racial discrimination but as a retreat to a permissible position of neutrality.").

162. *Hunter*, 393 U.S. at 390 n.5.

163. *Romer*, 517 U.S. at 627.

164. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *see infra* notes 237–49 and accompanying text.

165. *Romer*, 517 U.S. at 627 ("The change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching . . . on its own terms . . . .").

166. *Id.* at 628.

167. *Id.* at 627–29 ("[Colorado's state and municipal laws] set forth an extensive catalog of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation.").

168. *Id.* at 628.

169. *Id.* at 629.

170. *Id.* at 628.

affected."[171]

2. *Perry v. Brown*

The Ninth Circuit replicated *Romer*'s blend of animus and non-retrogression reasoning in *Perry v. Brown*,[172] which considered a ballot measure, Proposition 8, that amended California's constitution to eliminate an extant right to same-sex marriage in the state.[173] The Supreme Court eventually vacated the Ninth Circuit decision on other grounds,[174] but the case provides a useful case study in non-retrogression analysis. In holding the ballot measure violative of the Equal Protection Clause, the Ninth Circuit appeared to lean heavily on animus doctrine: "Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships."[175] But it was a version of animus doctrine inflected by non-retrogression themes. For instance,

171. *Id.* at 634. The Court did not precisely explain why Amendment 2's short-circuiting of this tradition was of *constitutional* significance. But a plausible between-the-lines reading is that the grant of protection to gays, lesbians, and bisexuals by even a limited number of municipalities gave rise to a reasonable expectation that the time had come for statutory coverage. A similar subtext may be inferred, decades later, from the Court's affirmation in *Bostock v. Clayton County*, that Title VII extends to LGBT individuals. *See* 140 S. Ct. 1731 (2020). Although, as it had in *Romer*, the Court avoided framing its decision in these terms, it again vindicated LGBT Americans' reliance upon protection from discrimination in the basic precincts of public and private life. *Id.* A majority of the Court may well have agreed that, having recently secured protections against discrimination in the marriage context in *Obergefell v. Hodges*, 576 U.S. 644 (2015), and in the military context through the statutory repeal of "Don't Ask, Don't Tell" as well as the executive rescission of the ban on transgender military service (halted by the Trump Administration and restored under the Biden Administration), LGBT individuals could reasonably have expected to be protected against the sort of employment (and other) discrimination barred under Title VII. *See* Jim Garamone, *Biden Administration Overturns Transgender Exclusion Policy*, U.S. DEP'T OF DEF. (Jan. 25, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2482048/biden-administration-overturns-transgender-exclusion-policy [https://perma.cc/2AN4-Y99F]; Press Release, Lloyd J. Austin III, Sec'y of Def., Statement by Secretary of Defense Lloyd J. Austin III on Transgender Service in the Military (Jan. 25, 2021), https://www.defense.gov/News/Releases/Release/Article/2481568/statement-by-secretary-of-defense-lloyd-j-austin-iii-on-transgender-service-in [https://perma.cc/946E-RWZX] ("[A]ll transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination.").

172. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

173. *Id.* at 1063.

174. The Court held that Proposition 8's private defenders lacked Article III standing to appeal the district court decision that invalidated the Act. Hollingsworth v. Perry, 570 U.S. 693 (2013).

175. *Brown*, 671 F.3d at 1095.

the court cited *Romer* for the proposition that "the Equal Protection Clause protects minority groups from being targeted for the *deprivation of an existing right* without a legitimate reason."[176] And it noted with disapproval that Proposition 8 had "constitutionalize[d]" the deprivation at issue: absent judicial intervention, gays and lesbians in California could unwind the "special disability" imposed on them "'only by enlisting the citizenry of [the state] to amend the State Constitution' for a second time,"[177] as opposed to seeking judicial intervention or engaging the ordinary political process. Finally, the court was unmoved by the gratuitous nature of the withdrawn right, for *Romer* had established that "the people of a state may [not] by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others in the state."[178]

3. *United States v. Windsor*

Another case in the *Romer* mold is *United States v. Windsor*,[179] which invalidated the exclusion of same-sex couples from the definition of marriage for purposes of federal law. Applying animus scrutiny,[180] the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), as both the legislative history[181] and statutory text[182] revealed a bare purpose "to injure" same-sex couples through

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176. *Id.* at 1076 (emphasis added).

177. *Id.* at 1081 (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).

178. *Id.* at 1082 n.14.

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

180. The Court restated the rule that "'a bare . . . desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Id.* at 770 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)). And for purposes of diagnosing such animus, the Court observed that "'[d]iscriminations of an unusual character' especially require careful consideration." *Id.* (quoting *Romer*, 517 U.S. at 633). There is a wealth of scholarship surrounding rational basis with bite. *See* Gunther, *supra* note 33, at 20–22 (assessing the difference between traditional rational basis review and newer, more stringent applications of rational basis review); Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 335 (2013).

181. *Windsor*, 570 U.S. at 770–71. The Court cited, inter alia, the House Report's admission "that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.'" *Id.* at 771 (quoting H.R. REP. NO. 104-664, at 12–13 (1996)).

182. *Id.* at 771 ("Were there any doubt of [the purpose suggested by DOMA's legislative history], the title of the Act confirms it: The Defense of Marriage.").

"interference with the equal dignity of [their] marriages."[183] This conclusion, however, was inseparable from the Court's treatment of the reliance interests that DOMA threatened. Subject to constitutional rights guarantees, marriage regulation had "long been regarded as a virtually exclusive province of the States"—with the marriage definition "the foundation" of that power.[184] DOMA, by "depart[ing] from this history and tradition of reliance on state law," could have the effect of "creating two contradictory marriage regimes within the same State"[185] and, in so doing, virtually rescinding the existing marriage rights recognized by states like New York. DOMA's departure from tradition therefore undercut "the stability and predictability of basic personal relations the State ha[d] found it proper to acknowledge and protect."[186]

DOMA's incompatibility with non-retrogression principles helps explain why, as Justice Scalia observed in dissent, the majority's explanation was seemingly out of step with ordinary doctrinal categories of substantive protection.[187] But if, as the majority wrote, "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import,"[188] and DOMA undercut the plaintiff's reliance on that status, then *Windsor* could be decided without reaching the ultimate question of whether the constitutional right to marry extended to same-sex couples.[189]

4. Non-Retrogression versus Intent-Based Constitutional Doctrines

Some potential advantages of non-retrogression over animus doctrine are the former's avoidance of an intent-based inquiry that

183. *Id.* at 769–70.

184. *Id.* at 766 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

185. *Id.* at 768, 772.

186. *Id.* at 772.

187. *Id.* at 792–93 (Scalia, J., dissenting) (expressing confusion as to whether the Equal Protection Clause or the Due Process Clause provided the basis for decision).

188. *Id.* at 768 (majority opinion).

189. *See id.* at 775 (confining the holding's coverage to "same-sex marriages made lawful by [a] State"); *see also id.* at 811 (Alito, J., dissenting) ("Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms."); *id.* at 793 (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

can be extremely difficult to parse and its potential to fortify representation-reinforcement theories of equal protection.[190] First, because the animus inquiry is largely if not entirely grounded in an investigation of governmental intent, the analysis often turns on subjective and highly contested assessments of motivation. Indeed, legislatures have found ways to mask malicious intent with neutral language that makes it hard for courts to use intent-based doctrines as an effective tool in rooting out discriminatory motivation.[191] For these reasons (among others), animus can be a shifting standard that leads to inconsistent (if not contradictory) results.[192] Non-retrogression has the advantage of avoiding those pitfalls while allowing for broader, trans-substantive application.

In a similar vein, *Romer* presents a missed opportunity for the Supreme Court to underscore the relationship between non-retrogression and the principle of representative reinforcement, as was well demonstrated in the Colorado Supreme Court's ruling. The Colorado court held Amendment 2 unconstitutional not merely for repealing and prohibiting laws protecting the LGBTQ community from discrimination, but because it procedurally effected a higher-level repeal of antidiscrimination laws for gays, lesbians, and bisexuals.[193] This latter aspect—the requirement that a class appeal to a higher order of protection—is central to a non-retrogression analysis, and one that the

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190. John Hart Ely's theory of representation reinforcement expands on Justice Stone's famous Footnote Four from *United States v. Carolene Products Co.*, which identified three kinds of defects in the democratic process that may warrant judicial correction: facial contraventions of specific constitutional prohibitions, restrictions on the political processes through which undesirable legislation might ordinarily be repealed, and legislation directed at "discrete and insular minorities." 304 U.S. 144, 152 n.4 (1938); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–77 (1980). According to Ely, the hallmark of a proper equal protection jurisprudence is the guarantee of access to democratic political processes, not the vindication of identifiable substantive values. *Id.* at 73–77, 92. In keeping with this tradition, he contends that courts in equal protection contexts should mainly confine themselves to two goals: "clearing the channels of political change" and "correcting certain kinds of discrimination against minorities." *Id.* at 73–75.

191. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997) (arguing that the intent doctrine "insulates many, if not most, forms of facially neutral state action from equal protection challenge"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) ("If legislators have the wit . . . to avoid words like 'race' or the name of a particular racial group in . . . their legislation, the courts will generally apply ordinary rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group.").

192. *See infra* note 431.

193. *See infra* notes 195–99.

U.S. Supreme Court largely refused to confront squarely.[194] Instead, the *Romer* Court displaced the Colorado court's intent-indifferent[195] analysis, which had turned on the straightforward observation that "the normal political processes no longer operate to protect these persons."[196] The state's highest court identified a "fundamental right to participate equally in the political process" as the common thread woven through a diverse set of precedents concerning reapportionment, minor party rights, voting rights, and issue-specific departures from normal legislative procedure.[197] Concluding that Amendment 2 probably violated this right—it rendered gays, lesbians, and bisexuals unable "to appeal to state and local government for protection against discrimination . . . like any other members of the electorate"[198]—the court declared the amendment subject to strict scrutiny.[199]

D. Administrative Action

The above cases thwarted governmental attempts to revoke rights via legislation or constitutional amendment, but courts have applied non-retrogression principles in administrative contexts, too. As noted previously, *Mathews v. Eldridge*,[200] which addressed the question of what process is due before the government may deprive an individual of property via administrative adjudication,[201] has come to stand for the principle that courts must take seriously an individual's interest in the status quo before terminating (or seizing) rights and liberties via legislation or administrative rulemaking upon which that individual relies.[202] A related principle, sounding less in due process

194. *See supra* notes 151–60 and accompanying text.

195. *See* Evans v. Romer, 854 P.2d 1270, 1273–75 (Colo. 1993) (declining to take up the trial court's invocation of a "right not to have the State endorse and give effect to private biases"), *cert. denied*, 510 U.S. 959 (1993).

196. *Id.* at 1285.

197. *Id.* at 1276–77.

198. *Id.* at 1286.

199. *Id.*

200. Mathews v. Eldridge, 424 U.S. 319 (1976); *see supra* notes 22, 110–20 and accompanying text.

201. *Eldridge*, 424 U.S. at 332 (treating the respondent's "interest . . . in continued receipt of [Social Security disability] benefits [as] a statutorily created 'property' interest protected by the Fifth Amendment").

202. *Id.* at 335 (holding that "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest").

and more in administrative procedure more generally, also has the effect of promoting non-retrogression when applied to agency revocations of rights. As discussed below, this idea is borne out in the Supreme Court's *Regents* decision regarding DACA and lower court rulings striking down regulations preventing foreign nationals who have accepted public benefits from receiving immigration benefits.[203]

1. *Department of Homeland Security v. Regents of the University of California*

A case in point is *Department of Homeland Security v. Regents of the University of California*,[204] in which the Court threw out the Trump Administration's attempt to rescind the DACA program—announced several years earlier by the Obama Administration.[205] The respondents had mounted an equal protection challenge to the rescission, citing an array of statements from President Trump as evidence of discriminatory animus.[206] While only Justice Sotomayor would have allowed that claim to proceed,[207] a majority of the Court invalidated the rescission as arbitrary and capricious under the APA.[208] Among the decisive factors[209] was the government's failure to consider, prior to rescission, whether DACA's announcement and implementation had given rise to "legitimate reliance" on its continuation.[210] The gov-

203. As noted, the public charge regulations in immigration have since been eliminated by the Biden Administration. *See infra* note 219.

204. 140 S. Ct. 1891 (2020).

205. *Id.* at 1901–02 (describing memoranda issued by the Department of Homeland Security in 2012 and 2014 that shielded certain undocumented foreign nationals who entered the United States as minors from removal and made them eligible for various federal benefits, including work authorization).

206. *Id.* at 1915–16.

207. *Id.* at 1917–18 (Sotomayor, J., concurring in part and dissenting in part) ("[T]he Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.").

208. *Id.* at 1912–15.

209. The Court also cited the agency's failure to consider the feasibility of decoupling DACA's forbearance component from its benefits component, in violation of the rule of *Motor Vehicle Manufacturers Association of the United States*, *Inc. v. State Farm Mutual Automobile Insurance Co. Regents*, 140 S. Ct. at 1911–13 (citing 463 U.S. 29, 37–38, 43, 46–47, 51 (1983)). In *State Farm* terms, this failure was comparable to the National Highway Traffic Safety Administration's total rescission of its either/or passive-restraints policy without consideration of an airbags-only policy. *Id.*

210. *Regents*, 140 S. Ct. at 1913 (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996)).

ernment attempted to justify that omission on the theory that the original DACA Memorandum's disclaimer of substantive rights and notice of impermanence had prevented any "legally cognizable reliance interests" from taking root.[211] But the Court rebuffed this argument, concluding that it had been the government's responsibility to establish "in the first instance" why any potential reliance interests were entitled to little or no weight.[212] Because the Department of Homeland Security (DHS) had failed to engage that inquiry, the Court invalidated DACA's rescission under the general rule that, "[w]hen an agency changes course . . . it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'"[213] This line of reasoning prevailed in spite of the Attorney General's prior determination that DACA was contrary to law and always had been—a finding the Attorney General "of course" had power to render.[214] Thus, notwithstanding the Court's formal rejection of respondents' substantive claim, non-retrogression principles had a powerful practical impact on DACA recipients' effective legal footing vis-à-vis the government.

2. Public Charge Cases

Shifting from the deportation to the naturalization context, immigrants likely to become "public charge[s]" have been considered inadmissible to the United States and ineligible for permanent residency for as long as immigration has been a subject of comprehensive federal regulation.[215] In guidance promulgated in 1999, the legacy Immigration and Naturalization Service (INS) clarified that the "public charge" category encompasses only those individuals "likely to become primarily dependent on the government for subsistence."[216] This formulation expressly excluded supplemental assistance for food, healthcare, or housing—a policy choice "consistent with over a

211. *Id.* (quoting Reply Brief for Petitioners at 16–17, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589)).

212. *Id.* at 1913–14.

213. *Id.* at 1913 (quoting Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016)).

214. *Id.* at 1903, 1910.

215. *See* City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 981 F.3d 742, 749 (9th Cir. 2020) (citing Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214 (1882)).

216. *Id.* (quoting Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999)).

century of judicial and administrative decisions interpreting the public charge bar."[217] In 2019, however, DHS broke with this longstanding tradition, broadening "public charge" to include anyone likely to receive non-cash supplemental assistance from the federal government for a specified period of time.[218] Before the Biden Administration reversed this policy in 2021,[219] the policy was invalidated by the federal courts. In *City and County of San Francisco v. USCIS*,[220] the Ninth Circuit deemed this policy shift arbitrary and capricious.[221] Beyond faulting DHS's threadbare examination of the fiscal and public-health consequences of the new policy,[222] the court found that the agency had failed to explain why the findings underpinning the old standard no longer held true—a failure that took on extra weight given the "'serious reliance interests' engendered by over two decades of reliance on the [1999] Guidance."[223]

The court did not articulate precisely what reliance interests DHS had threatened by upsetting the "longstanding, settled understanding"[224] of the public charge concept. But a societal dependance on the abandoned definition is visible in DHS's insistence that states and municipalities could soften the anticipated fiscal impacts by "reforming their operations."[225] Likewise, the threat to individuals who had organized their lives in reliance on the subsistence standard is evident in the court's explanation that, under the new policy, "a single mother with young children who DHS foresees as likely to participate in three [non-cash federal assistance] programs for four months could not get a green card."[226] The court did not absolutely preclude revocation of

217. *Id.* at 761.

218. *Id.* at 749.

219. U.S. Dep't of Homeland Sec., Citizenship & Immigr. Servs., Public Charge Letter to Interagency Partners (Apr. 12, 2021) https://www.uscis.gov/sites/default/files/document/notices/SOPDD-Letter-to-USCIS-Interagency-Partners-on-Public-Charge.pdf [https://perma.cc/L6KV-LSRN] ("The 2019 public charge rule is no longer in effect . . . . Continuing to defend the 2019 Public Charge Rule . . . was neither in the public interest nor an efficient use of limited government resources.").

220. *City & Cnty. of San Francisco*, 981 F.3d 742 (9th Cir. 2020).

221. *Id.* at 762; *accord* Cook Cnty. v. Wolf, 962 F.3d 208, 228–29, 233 (7th Cir. 2020); New York v. U.S. Dep't. of Homeland Sec., 969 F.3d 42, 74–81, 88 (2d Cir. 2020). *Contra* CASA de Md., Inc. v. Trump, 971 F.3d 220, 245, 256 (4th Cir. 2020). For further discussion, see *supra* note 26 and accompanying text.

222. *City & Cnty. of San Francisco*, 981 F.3d at 760.

223. *Id.* at 761 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

224. *Id.* at 753.

225. *Id.* at 754.

226. *Id.* at 749.

qualifying immigrants' long-established entitlement to supplemental assistance, but DHS needed a "more detailed justification" to give it effect.[227] *San Francisco* thus further demonstrates the arbitrary-and-capricious standard's non-retrogressive impact.

3. Non-Retrogression and the Process/Substance Tension in the APA

To the extent that non-retrogression analysis spans both procedural tests under the APA and procedural due process, it highlights an important extent to which both sets of arguments can serve as "surrogates" for substantive judicial review courts are less willing to engage.[228] Indeed, immigration scholars have long understood how substantive constitutional claims are mediated through the lens of process.[229] More generally, courts have often invoked process as the basis for more muscular review of governmental action in an array of substantive arenas that commonly require large amounts of deference.[230] This approach may be attributable to the judiciary's own overreach concerns: on this view, procedural arguments avoid "judicial encroachment upon the [substantive] purview of the political branches."[231]

Indeed, one finds a broad overlap of procedural and substantive grounds throughout the lower court DACA rescission cases. The rationales include a failure to engage in interagency dialogue, providing scant legal justification for administrative action, and other blatant

227. *Id.* at 761 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)). The Second Circuit reached a similar result in *New York v. U.S. Department of Homeland Security*, 969 F.3d 42, 82 (2d Cir. 2020) ("[W]here, as here, DHS anchors its decision to change its interpretation in the perceived shortcomings of the prior interpretation, and then fails to identify any actual defect, it has not provided a 'reasoned explanation' for its actions . . . ."), as did the Seventh Circuit in *Cook County v. Wolf*, 962 F.3d 208, 233 (7th Cir. 2020) ("DHS did not adequately consider the reliance interests of state and local governments . . . .").

228. *See* Motomura, *supra* note 15, at 1629–30.

229. *Id.* at 1630 (noting that strategically framing immigration claims through a procedural lens "greatly enhances the likelihood that a constitutional challenge to an immigration decision will succeed").

230. *See supra* notes 114–20 and accompanying text; *see also* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 675–98 (2009) (noting how procedural devices such as discovery, standards of review, evidentiary requirements, and procedural due process have been instrumental to resolving major national security cases after 9/11).

231. Motomura, *supra* note 15, at 1646.

process flaws.[232] Some lower courts have gone further, inferring animus from the combination of both the policy's disparate impact on Latinx persons (and Mexicans in particular)[233] and its unusual procedural history.[234]

E. STARE DECISIS

Even where the Court remains committed in substance to its earlier announcement of a right, the doctrine of stare decisis advances non-retrogression principles by raising the degree of difficulty in uprooting established protections. In this way, non-retrogression may reinforce the rationale for reaffirmation—a case in point being *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[235] *Casey*, and to a somewhat lesser extent *Dickerson v. United States*,[236] exemplify how Supreme Court Justices invoke various norms associated with non-retrogression—including reliance interests, respect for the current state of constitutional culture, and vaguer concepts of judicial administrability, orderliness, and manageability—to lock in place judicial decisions they would not have initially supported.

1. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Casey*, a plurality of the Court reaffirmed the "central holding"

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232. *See* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 844 (2018). Courts have found the Trump Administration's arguments for rescinding DACA to be "based on a flawed legal premise" and otherwise lacking in a "reasoned explanation." Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1037, 1044–45 (N.D. Cal. 2018) (noting that the government never substantiated its conclusion that DACA was illegal or improperly adopted by Congress); *see also* Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 420 (E.D.N.Y. 2018) (granting nationwide injunction and noting that plaintiffs would likely succeed on the merits of their challenge given a string of procedural flaws underling the DACA rescission policy), *vacated and remanded sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

233. Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 298 F. Supp. 3d 1304, 1314–15 (N.D. Cal. 2018) (decision granting in part and denying in part government's motion to dismiss).

234. After reaffirming DACA only months before its rescission, the program was then "hurriedly cast aside on what seems to have been a contrived excuse . . . suggest[ing] that the normal care and consideration within the agency was bypassed." *Id.* at 1315. Such a "strange about-face, done at lightning speed" and in conjunction with the President's repeated and documented expressions of disparagement toward immigrants, indicated that the DACA rescission policy was motivated by a discriminatory purpose. *Id.*

235. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

236. Dickerson v. United States, 530 U.S. 428 (2000).

of *Roe v. Wade*[237] that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[238] Of course, it would be an overstatement to describe *Casey* solely as a non-retrogression decision, given the Court's defense of the liberty and equality interests that underpin a pregnant person's right to choose.[239] But a complementary aspect of the Court's reasoning acknowledged the separate and independent significance of safeguarding the status quo through a conception of stare decisis[240] that drew fire from the dissenting Justices.[241]

In keeping with abortion's place among "the most intimate and personal choices a person may make in a lifetime,"[242] the Court's stare decisis inquiry focused less on the internal integrity of the Court's decisions over time—a standard feature of stare decisis jurisprudence—and more on the need to protect individuals who had acted in reliance on *Roe* from "serious inequity."[243] And it defined this personal interest broadly, declining to "limit cognizable reliance to specific instances of sexual activity."[244] Instead, in finding that the reliance interests weighed heavily in favor of reaffirming *Roe*, the Court accounted for the fact that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[245] This capacious formulation of individual reliance reinforces,

237. Roe v. Wade, 410 U.S. 113 (1973).

238. *Casey*, 505 U.S. at 879.

239. *See id.* at 852 ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.").

240. *Id.* at 853. ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

241. *See id.* at 944, 957 (Rehnquist, C.J., dissenting) (criticizing the joint opinion for "its newly minted variation on *stare decisis*" couched in "generalized assertions about the national psyche").

242. *Id.* at 851 (majority opinion).

243. *Id.* at 855.

244. *Id.* at 856.

245. *Id.*

and draws force from, the Court's broader concerns with social stability[246] and preoccupation with its own reputation.[247] But it also stretches further into the domain of non-retrogression by emphasizing rights revocation as a kind of independent harm. As *Casey*'s opening line intones: "Liberty finds no refuge in a jurisprudence of doubt."[248] Likewise, social stability and judicial integrity are elusive where rights are easily revocable.

2. *Dickerson v. United States*

In *Dickerson v. United States*,[249] the Court confirmed the continuing validity of the rule of *Miranda v. Arizona*,[250] which requires certain warnings to be given if a criminal suspect's statements are to be admitted into evidence.[251] After dispensing with the government's argument that the *Miranda* Court did not intend to announce a constitutional rule,[252] Chief Justice Rehnquist wrote that stare decisis prevented its abrogation: "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."[253] Finding no "special justification"[254] for deviating from these principles, the Court emphasized something resembling a societal reliance interest: "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[255] Along these lines, with virtually no original analysis of the question and little evident enthusiasm, the Court reaffirmed that the Constitution mandates *Miranda* warnings.[256] Dickerson could therefore demand suppression of a statement

246. *See id.* at 867 ("[T]he Court's interpretation of the Constitution [in a case like *Roe*] calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.").

247. *See id.* at 866 ("The legitimacy of the Court would fade with the frequency of its vacillation.").

248. *Id.* at 844.

249. Dickerson v. United States, 530 U.S. 428 (2000).

250. Miranda v. Arizona, 384 U.S. 436 (1966).

251. *See Dickerson*, 530 U.S. at 431–32.

252. *Id.* at 437–38.

253. *Id.* at 443.

254. *Id.* (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996)).

255. *Id.*

256. *See id.* at 433, 435 (citing "the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment" as the "two constitutional bases for the requirement that a confession be voluntary to be admitted into

he had given to FBI interrogators[257] because an earlier Court had empowered suspects in his position to do so, and because suspects and society in general had come to rely on that right's continuing availability.

3. Contrasting Non-Retrogression with Stare Decisis

As these cases illustrate, there are obvious and impactful areas of overlap between stare decisis and non-retrogression. At a very high level of generality, both principles promote consistency, stability, and predictability[258]—instilling a predisposition in courts to find that whatever was, and is, should continue to be. There is also frequent overlap between the interests each principle seeks to promote, particularly a shared concern for reliance interests among affected persons.[259]

However, the two principles are neither coextensive nor interchangeable: each extends beyond the other's scope and (depending on the circumstances) may either reinforce or undercut the other's mission. Stare decisis, of course, applies in a multitude of situations where the rescission of prior rights is not at issue.[260] Likewise, non-retrogression may produce a result in the absence of a prior decision re-

evidence," and explaining that *Miranda* rested on the conclusion "that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements").

257. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received *Miranda* warnings before being interrogated. *See id.* at 432.

258. *See* June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

259. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (citing the fact that, since *Roe*, people had acted "in reliance on the availability of abortion" in its decision to reaffirm *Roe*); *June Med. Servs.*, 140 S. Ct. at 2134–35 (Roberts, C.J., concurring) (noting the role of reliance interests in determining whether precedent should be overturned); *Dickerson*, 530 U.S. at 443 (noting that *Miranda* had become "part of our national culture" in determining that no special circumstances sufficient to overturn *Miranda*'s precedent existed).

260. *See, e.g.*, Hilton v. S.C. Pub. Rys. Comm'n., 502 U.S. 197, 201–03 (1991) (invoking stare decisis to reaffirm that the Federal Employers' Liability Act authorizes suit for damages of state-owned railroads); Allen v. Cooper, 140 S. Ct. 994 (2020) (relying on stare decisis in the context of copyright infringement); Gamble v. United States, 139 S. Ct. 1960 (2019) (holding that the criminal defendant did not bring sufficient grounds to overrule 170 years of precedent holding that the Double Jeopardy Clause allows successive prosecutions by separate sovereigns); Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000) (relying on stare decisis for statutory interpretation of 28 U.S.C. § 1331 as incorporated into the Medicare Act).

quiring that result, and even in contravention of a prior decision favoring the opposite result. This misalignment ultimately derives from a fundamental difference in outlook. While stare decisis is often couched in terms of external interests like reliance, its ultimate aims reflect inwards: it is the means through which the judiciary protects its own institutional legitimacy, "avoid[ing] . . . arbitrary discretion in the courts"[261] and insulating its learned distinction from "the political and legislative process."[262] Non-retrogression, by contrast, is motivated less by institutionalism than by concern for a bundle of externally oriented rule-of-law values and civic expectations.

Thus, for example, when the Supreme Court protected Dreamers from the Administration's sudden cancellation of the DACA program in *Regents*, it honored the principle that law should be sturdy enough to withstand the arbitrary whims of shifting administrative personnel,[263] and that foreign nationals who lack the same constitutional protections as citizens are still entitled to organize their lives around the expectation that government will keep its word.[264] Similarly, *Romer* embodies the Dworkinian notion that integrity in judicial interpretation demands the "coherent and principled extension of past political decisions even when judges profoundly disagree about what this means."[265] Not only did the *Romer* Court accommodate reasonable reliance interests and guard against the civic whiplash induced by the rescission of recently bestowed rights, it also assimilated a vulnerable group within an "emerging tradition" and "consistent pattern" of incremental expansion in antidiscrimination protections.[266] That it did so despite a line of case law vigorously opposing the judicial derivation of LGBTQ rights[267] suggests a crucial distinction between non-retrogression and stare decisis: non-retrogression may promote the "emerging tradition" of rights expansion where stare decisis would tend to thwart social change.

Of course, this is not to say that the doctrines always work at

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261. *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

262. *Id.* (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944)).

263. *See supra* notes 28–29 and accompanying text.

264. *See supra* notes 204–14 and accompanying text.

265. RONALD DWORKIN, LAW'S EMPIRE 134 (1986).

266. Romer v. Evans, 517 U.S. 620, 628 (1996).

267. *See id.* at 636 (Scalia, J., dissenting) (accusing the Court of "contradict[ing]" its holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a Georgia anti-sodomy law as applied exclusively to same-sex conduct, "a decision, unchallenged here, pronounced only 10 years ago")).

cross-purposes: where the tenets of stare decisis favor a preexisting right holder, non-retrogression is still available to provide justificatory power. This dynamic is best exemplified by *Casey*, where the Court appears to have rejected a "jurisprudence of doubt" not merely for the sake of internal consistency, but to avoid the "serious inequity" that would result from liberty's contraction.[268] In such cases, a stare decisis doctrine stripped of the non-retrogression principle cannot fully capture the Court's motivations.

Beyond their limitations in applicability and purpose, the two principles also diverge in substance. The doctrinal limitations of stare decisis are well-defined, even as cases testing those limitations often incite ardent disagreement.[269] Those limitations: the Supreme Court may overturn precedent only when "some special justification" warrants such a departure.[270] That justification must go "beyond whether the [preceding] case was decided correctly," instead looking to factors such as the prior decision's administrability, any "subsequent factual and legal developments," and, once again, any reliance interests it has induced.[271]

Non-retrogression's outer bounds have not been so neatly articulated. Because it has often operated as something of a stealth doctrine,[272] informing decisions without express attribution, there is no

268. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844, 855 (1992).

269. Indeed, this controversy itself supplies an important *functional* difference between stare decisis and non-retrogression. Stare decisis is, as is well-documented, a profoundly controversial doctrine, at least in practice. It is often invoked in culturally impactful cases in which the Court, and the country, are bitterly divided. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) ("Far from believing that *stare decisis* compels this result, I believe we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any *sane* supporter of government by the people." (second emphasis added)). It is a concept that judicial nominees are routinely asked about in confirmation hearings. *See* Mary Ziegler, *The Secret Code of the Amy Coney Barrett Hearing*, ATLANTIC (Oct. 14, 2020), https://www.theatlantic.com/ideas/archive/2020/10/secret-code-senate-confirmation-hearings/616704 [https://perma.cc/D96C-J8BL]. It is, for lack of a more elegant term, a "hot-button" issue. Non-retrogression, for better or worse, is not. This likely has practical implications for how and when it can be applied, particularly where it is applied silently.

270. *Dickerson*, 530 U.S. at 429.

271. June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

272. *Cf.* Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765 (2013).

body of caselaw explicitly articulating its rules of engagement. If anything, it may function as a legal chameleon—taking on the guise of the doctrine it sits atop in any given instance. In a case invoking stare decisis, that may indeed be stare decisis doctrine. In a case where non-retrogression is animated through administrative concerns, it may be the rules articulated through the Administrative Procedure Act (APA).[273] Or alternatively, non-retrogression may reveal itself through preemption doctrine[274] or animus analysis.[275] Finally, it may don the resilient cloak of its forebears, including the all-but-immovable property-like nature of the vested rights doctrine[276] or the robust protections afforded under procedural due process.[277]

F. Statutory Interpretation

A final application of the Court's concern for non-retrogression principles arises in court decisions of statutory interpretation. As explored below, the doctrine of ratification (or legislative reenactment) as well as clear statement rules illustrate an important sense in which judicial underenforcement of equality norms,[278] combined with a respect for the status quo, may both encourage progress while freezing it in place: by delegating the doling out of such rights to the political branches, and then erecting procedural barriers to retrogression,[279] courts may effectively permit progressive regimes to *make* new rights more freely than their less-progressive successors can *unmake* them.

1. Congressional Ratification

A prime example is *Lorillard, Division of Loew's Theatres, Inc. v. Pons*,[280] in which the Court recognized a right to a jury trial in private actions under the Age Discrimination in Employment Act (ADEA) of

273. *See supra* notes 204–27 and accompanying text.

274. *See supra* notes 121–41 and accompanying text.

275. *See supra* notes 142–99 and accompanying text.

276. *See supra* notes 54–90 and accompanying text.

277. *See supra* notes 99–120 and accompanying text.

278. *See* Sager, *supra* note 34, at 1227 (suggesting that if the Supreme Court is in a weak position to fully enforce certain constitutional norms, the political branches have the prerogative to more fully enforce those norms, "regulat[ing] . . . behavior by standards more severe than those imposed by the federal judiciary").

279. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 343 (1976) (citing, among other authorities, Friendly, *supra* note 105 (evaluating the extent to which Due Process procedural barriers should constrain administrative actors)).

280. Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978).

1967,[281] despite the lack of express statutory authorization[282] or unambiguous guidance in the legislative history.[283] For a unanimous Court, Justice Marshall inferred the existence of the contested right from the long-established private right to a jury trial under the Fair Labor Standards Act (FLSA).[284] In enacting ADEA's enforcement scheme, Congress had sought to duplicate much of the existing FLSA framework—with targeted variations where a new approach was deemed necessary.[285] The Court construed this "selectivity" to "strongly suggest[] that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA"[286]—including the private right to a jury trial.[287] This construction reflected a modification of the presumption that Congress is aware of and adopts "an administrative or judicial interpretation of a statute . . . when it re-enacts [the] statute without change."[288] Here, although Congress had enacted a new law, it incorporated preexisting statutory provisions with long-settled meaning. In such circumstances, the Court concluded that "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[289] The upshot of these complementary presumptions is that a court's statutory interpretation has significant staying power, perhaps even extending beyond the confines of the statute it interprets—unless and until Congress musters enough votes to disavow it. Therefore, where a settled statutory interpretation validates an individual right, as was the case in *Lorillard*, ratification doctrine serves non-retrogression ends.

281. 29 U.S.C. § 621 et seq. (1970 & Supp. V).

282. *Lorillard*, 434 U.S. at 577 ("[T]he ADEA contains no provision expressly granting a right to jury trial . . . .").

283. *Id.* at 582 n.10 ("Senator Javits made the only specific reference in the legislative history to a jury trial. . . . It is difficult to tell whether Senator Javits was referring to the issue in ADEA cases . . . .").

284. 29 U.S.C. § 201 et seq; *see Lorillard*, 434 U.S. at 580 ("Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held.").

285. *Lorillard*, 434 U.S. at 581 ("[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.").

286. *Id.* at 582.

287. *See id.* at 582–83.

288. *Id.* at 580.

289. *Id.* at 581.

Another example of the interaction between ratification and non-retrogression is *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[290] which held that disparate-impact claims are cognizable under the Fair Housing Act (FHA).[291] The plaintiffs filed suit under FHA Sections 804(a)[292] and 805(a),[293] alleging that the state agency responsible for the distribution of federal low-income housing credits had disproportionately allocated credits to developers in predominantly Black urban areas, entrenching segregated housing patterns.[294] In allowing this disparate-impact claim to proceed, the Court made two relevant observations. First, the relevant FHA language closely resembled language in both Title VII of the Civil Rights Act of 1964 and the ADEA that the Court had already interpreted to support disparate-impact liability.[295] Second, in 1988, Congress reenacted the relevant FHA language with knowledge that nine Courts of Appeals had unanimously construed it to support disparate-impact claims[296]—"convincing support for the conclusion that Congress accepted and ratified" an identical construction.[297] On the basis

290. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

291. 42 U.S.C. § 3601 *et seq*.; *Inclusive Cmtys. Project*, 576 U.S. at 545–46.

292. Section 804(a) provides that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

293. Section 805(a) provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a).

294. *Inclusive Cmtys. Project*, 576 U.S. at 526.

295. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (interpreting Title VII's "otherwise adversely affect" language to establish disparate-impact liability); Smith v. City of Jackson, 544 U.S. 228 (2005) (interpreting identical language in the ADEA to accomplish the same). Taken together, the Court interpreted *Griggs* and *Smith* to mean that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions," assuming no inconsistency with statutory purpose. *Inclusive Cmtys. Project*, 576 U.S. at 533. The FHA's "otherwise make unavailable" language satisfied this test, in that "the operative text looks to results." *Id.* at 534.

296. *Inclusive Cmtys. Project*, 576 U.S. at 535–36.

297. *Id.*

of these observations,[298] the Court ruled disparate-impact claims cognizable under the FHA,[299] with clear non-retrogression implications. Lower-court recognition of a purported statutory right, plus a subsequent act of implicit ratification by Congress, had served to constrain the Supreme Court's assessment of the right's claimed existence—as had the Court's own inference of a similar right in adjacent statutory contexts. The effect was to ensure FHA plaintiffs' continued access to a powerful theory of liability capable of "counteract[ing] unconscious prejudices and disguised animus that escape easy classification as disparate treatment." [300] Sounding an additional non-retrogression theme, the Court noted toward the end of the opinion: "In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims." [301] Indeed, something like a civic reliance interest had sprung up around disparate-impact liability in the period between the lower federal courts' initial treatment of the issue and the Supreme Court's validation of their findings.

The Court took a similar approach in *Bank of America Corp. v. City of Miami*,[302] relying on principles of stare decisis and ratification to confirm Miami's standing to bring suit under the FHA.[303] The city claimed that two defendant banks' racially discriminatory lending practices had led to disproportionately high foreclosure rates among minority borrowers, which in turn both reduced tax revenue and increased the need for municipal services to remedy the resulting setbacks.[304] To satisfy the Court's statutory standing requirement, Miami needed to demonstrate that the alleged harms were "arguably within

298. The rule of superfluity also influenced the Court's analysis, in that the FHA's 1988 amendments included certain carveouts from liability that would be superfluous unless disparate-impact liability were the statutory default. *Id.* at 537–39. And the Court separately assessed and confirmed disparate-impact liability's consistency with the FHA's purpose to "eradicate discriminatory practices within a sector of our Nation's economy." *Id.* at 539–45.

299. *Id.* at 545–46.

300. *Id.* at 540. The Court constrained the effect of its holding somewhat by requiring that a plaintiff whose disparate-impact claim is based on a statistical disparity identify a "policy or policies causing that disparity." *Id.* at 542–43.

301. *Id.* at 546.

302. Bank of Am. Corp. v. City of Mia., 137 S. Ct. 1296 (2017).

303. *Id.* at 1305.

304. *Id.* at 1301–02.

the zone of interests" that Congress intended the FHA to protect.[305] The FHA empowers any "aggrieved person"—that is, "any person who . . . claims to have been injured by a discriminatory housing practice"—to bring suit under its provisions.[306] And the Court had long read that category[307] broadly, construing it to encompass, for example, white tenants deprived of the benefits of interracial association by discriminatory rental practices,[308] a village deprived of tax revenue and racial balance by racial-steering practices,[309] and a nonprofit organization drained of resources by its fight against housing discrimination.[310] Moreover, when Congress reenacted the relevant FHA language in 1988, it acted with knowledge of these holdings[311]—a sequence the Court interpreted to indicate congressional ratification of the proposition that "plaintiffs similarly situated to [Miami] have a cause of action under the FHA."[312] As in *Inclusive Communities Project*, the Court took care to narrow the right it recognized—specifically, by requiring more than mere foreseeability to establish proximate cause.[313] Nonetheless, *Bank of America* further exemplifies ratification doctrine's non-retrogressive impact: reenactment of an ambiguous statute ratifies prior judicial pronouncements on the rights contained therein, which in turn stymies revocation absent a congressional about-face.

2. Clear Statement Rules

Principles of non-retrogression have also loomed large where courts have invoked clear statement rules in statutory interpretation. In immigration, the Supreme Court has required Congress to manifest a clear and unambiguous intent before terminating core rights such as access to courts and protection from deportation relief upon which immigrants and their families have long relied. In *Immigration and*

305. *Id.* at 1302–03 (emphasis removed) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)).

306. *Id.* at 1303 (quoting 42 U.S.C. § 3602(i)).

307. Technically, the category of "aggrieved person" had been "person aggrieved" prior to a 1988 amendment. *Id.* The main precedents establishing the breadth of the FHA's zone of interests interpreted the pre-1988 terminology.

308. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–12 (1972).

309. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 110–11 (1979).

310. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

311. *Bank of Am.*, 137 S. Ct. at 1303–04.

312. *Id.* at 1303.

313. *Id.* at 1305; *see supra* notes 290–301 and accompanying text.

Naturalization Service v. St. Cyr,[314] the Court interpreted two statutes—the Antiterrorism and Effective Death Penalty Act (AEDPA)[315] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[316]—to preserve the status quo in the face of congressional measures expanding the range of deportable offenses,[317] curbing judicial review of various immigration-related cases,[318] and eliminating avenues for relief from deportation.[319]

Non-retrogression was especially important with respect to one provision in particular—Section 340(b) of IIRIRA—which eliminated a form of deportation relief for foreign nationals convicted of certain offenses, including aggravated felonies, drug offenses, specific weapons or national security violations, or multiple crimes of moral turpitude.[320] *St. Cyr* held that, absent unambiguous congressional intent, this provision was inapplicable to foreign nationals who, having pleaded guilty to enumerated offenses prior to the law's effective date, were no longer eligible for relief from deportation.[321] Informed by "familiar considerations of fair notice, reasonable reliance, and settled expectations,"[322] the Court held that IIRIRA was inapplicable in the case of plea agreements taken prior to the law's effective date given the important reliance interests of foreign nationals who enter plea

314. Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289 (2001).

315. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

316. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

317. *See* 1 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE §§ 2.04[14][b][vi], [14][c] (2012).

318. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 22 (5th ed. 2009).

319. Section 440(d) of AEDPA identified a broad set of offenses for which convictions make a foreign national ineligible for discretionary waiver of deportation. 110 Stat. at 1277 (amending 8 U.S.C. § 1182(c)). Section 304-240B(b) of IIRIRA, 110 Stat. at 3009-597, repealed Section 212(c) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1182(c) (1994), which bestowed broad discretion upon the Attorney General to grant deportation waivers. Section 304(b) also replaced this relief with a narrower cancellation of removal provision, 110 Stat. at 3009-594 (creating 8 U.S.C. § 1229(b)). This provision gives the Attorney General discretion to cancel removal for only a narrow class of foreign nationals. *Id.* A foreign national convicted of any aggravated felony is ineligible for cancellation of removal. *Id.*

320. IIRIRA § 304-240A(a), 110 Stat. at 3009-594; Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 326 (2001).

321. *St. Cyr*, 533 U.S. at 314–26. The respondent, a lawful permanent resident, pleaded guilty to sale of a controlled substance—an aggravated felony—prior to the effective date of IIRIRA. *Id.* at 293. Because the agency did not initiate deportation proceedings until after the law took effect, St. Cyr was apparently no longer eligible for a discretionary wavier of deportation. *Id.*

322. *Id.* at 321 (quoting Landgraf v. Usi Film Prods., 511 U.S. 244, 270 (1994)).

agreements with a "belief in their continued eligibility for . . . [immigration] relief."[323] In "[t]he absence of a clearly expressed statement of congressional intent,"[324] interpreting IIRIRA to eliminate discretionary waivers of deportation for those who pleaded guilty prior to the law's taking effect would create a significant "potential for unfairness" for foreign nationals who relied "upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose [discretionary] relief."[325]

The principle of non-retrogression played a prominent role within a second aspect of *St. Cyr*, where the Court, again applying clear statement rules, found that Congress's stripping of judicial review within the Immigration and Nationality Act (INA) did not alter preexisting habeas relief.[326] Although the government noted that AEDPA plainly called for the "elimination of . . . habeas corpus,"[327] the Court preserved it, ruling that AEDPA did not displace general habeas relief under another statute, 28 U.S.C. § 2241.[328] In protecting court access for deportable foreign nationals, the Court provided institutional and historical—if not constitutional—rationales for preserving the status quo. First, the Court required a clear statement of congressional intent to repeal habeas jurisdiction.[329] Moreover, "[h]abeas courts . . . regularly answered questions of law that arose in the context of discretionary relief," and given that important tradition, the Court refused to find that the elimination of a more specific habeas corpus provision in the INA worked a general habeas strip under the conventional habeas statute.[330] Seeking to avoid "a departure from historical practice in immigration law," the Court preserved the writ given its longstanding

323. *Id.*; *see id.* at 325 ("Prior to AEDPA and IIRIRA, [foreign nationals] like St. Cyr had a significant likelihood of receiving . . . relief. . . . [And] respondent, and other [foreign nationals] like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial . . . .").

324. *Id.* at 314.

325. *Id.* at 323.

326. *Id.* at 298–314.

327. *Id.* at 308.

328. *Id.* at 298, 314 (rejecting the Immigration and Naturalization Service's argument that jurisdiction to hear St. Cyr's habeas petition was repealed by the AEDPA and IIRIRA).

329. *Id.* at 299, 305 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

330. *Id.* at 307, 310.

fixture as something that "has always been available to review the legality of Executive detention."[331]

3. Political Branch Constitutional Enforcement

These cases of statutory interpretation are just some of the avenues through which the political branches are empowered—through positive and negative action—to further non-retrogressive ends. Congress and the executive may use their respective legislative and administrative tools to forge other paths to expand enforcement of constitutional norms, particularly when the judiciary elects not to enforce those norms to their full constitutional limit.[332] The non-retrogression principle paves the way for rights expansions to occur in this manner, while simultaneously erecting roadblocks to any political branch efforts to diminish rights.[333]

Of course, non-retrogression need not be limited to instances where the political branches have elected to fully enforce rights (as in the case of non-discrimination statutes). It may also activate as a bulwark to political branch efforts at rescinding or diminishing rights, as reflected in *St. Cyr*'s response to AEDPA and IIRIRA.[334] In either instance, non-retrogression has a role to play. But it is perhaps *most* impactful in scenarios where the courts have limited the bite, scope, or enforcement of constitutional equality norms, leaving gaps for the political branches to fill by extending rights through legislative or regulatory channels.

At a glance, this model would seem to have obvious vulnerabilities. Without judicial support, are not political expansions of rights under one regime subject to regressive reversal by its successors? The

331. *Id.* at 305.

332. *See* Sager, *supra* note 34.

333. Of course, the political branches typically cannot enforce the Constitution *beyond* the Court's calibration. *See* Boerne v. Flores, 521 U.S. 507, 519 (1997) (invalidating portions of the Religious Freedom Restoration Act that sought to enforce First Amendment norms in contravention of prior Supreme Court caselaw and remarking that Congress can "enforce a constitutional right" but cannot "chang[e] what the right is"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88–91 (2000) (holding that Congress's attempt to abrogate states' Eleventh Amendment immunity for Age Discrimination in Employment Act violations exceeded its constitutional authority to remedy substantive rights violations and was instead an improper attempt to "substantively redefine the States' legal obligations with respect to age discrimination"); Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (similar holding as *Kimel* with respect to the Americans with Disabilities Act). By contrast, non-retrogression can activate even earlier, at the moment rights appear subject to revocation. *See infra* Part IV.B.

334. *St. Cyr*, 533 U.S. at 289.

answer to that question is, of course, yes—they are. But this is why non-retrogression is potentially so powerful: it *supplies* the judicial support necessary to obstruct this dynamic. Thus, where courts may, for example, allow their application of the Equal Protection Clause to be "significantly informed" by "institutional concerns" that temper their functional enforcement of the Clause,[335] non-retrogression offers a subtler mechanism for them to safeguard *other* branches' efforts to give full voice to Equal Protection.[336] In other words, even where courts may not have the conviction to do so themselves, non-retrogression encourages other branches to carry the torch—not just by affording them space to make progress on the front end, but by supplying judicial reinforcement of that progress on the back end.

III. NON-RETROGRESSION'S LIMITS

Notwithstanding non-retrogression's prevalence and reach, the Supreme Court has not always applied it, or—worse—it has merely paid lip service to its broader ideals while altering the underlying legal rule to apply in future cases. In constitutional cases involving abortion and *Miranda* rights, the Court has espoused the institution-affirming "pragmatic benefits" of stare decisis all the while gutting those hallowed cases of their core meaning and import.[337] In statutory voting rights cases, the Court's overriding commitment to other constitutional values has produced decisions that undermine the non-retrogressive principles embedded within the very heart of the statute.[338]

A. DILUTING ABORTION AND *MIRANDA* RIGHTS

1. Abortion Rights

In *June Medical Services L.L.C. v. Russo*,[339] the Court assessed the constitutionality of a Louisiana statute[340] requiring abortion providers to maintain local hospital admitting privileges.[341] Only four years

335. Sager, *supra* note 34, at 1217–18 (defining "institutional concerns" as those informed by the "propriety or capacity" of courts to enforce a provision, as distinguished from "analytical," substantive interpretations of a provision's actual meaning).

336. *See, e.g.*, *supra* notes 162–71, 205 and accompanying text.

337. *See, e.g.*, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment).

338. *See infra* notes 370–87 and accompanying text.

339. 140 S. Ct. 2103 (2020).

340. LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) (West 2020).

341. *June Med. Servs.*, 140 S. Ct. at 2112.

earlier, in *Whole Woman's Health v. Hellerstedt*,[342] the Court had struck down a "nearly identical" Texas statute under *Casey*'s undue burden standard—a chronology that Chief Justice Roberts found dispositive notwithstanding his continuing disagreement with the earlier result.[343] Concurring in the judgment in *June Medical*, Roberts reiterated his objections to the reasoning of the *Whole Woman's Health* majority (now reduced to four by Justice Kennedy's departure)[344] but concluded that stare decisis required invalidation of the Louisiana statute.[345] While conceding that "[*s*]*tare decisis* is not an 'inexorable command,'"[346] Roberts suggested that only "special circumstances" can justify departure from the general mandate "to treat like cases alike."[347] That is, whatever his feelings about the reasoning in *Whole Woman's Health*, he insisted that, "for precedent to mean anything, [stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly."[348]

But the Chief Justice's emphasis on the importance of adhering to precedent in this single case did not assure consistency or stability in the Court's abortion jurisprudence. Despite Roberts's professed allegiance to prior cases, his *June Medical* concurrence watered down the standard of review for abortion restrictions in a way that makes it almost unrecognizable from, if not irreconcilable with, *Casey*. Most seriously, Roberts denied the central premise of *Whole Woman's Health* that requires "courts 'to weigh the law's asserted benefits against the burdens it imposes on abortion access.'"[349] Labeling such analysis a kind of "balancing test" that makes "'equality of treatment . . . impossible to achieve,'"[350] Roberts found that test to be without meaning and utterly inconsistent with *Casey*.[351] Instead, the Chief Justice reframed *Casey* as a case requiring only that a Court determine whether the law places a substantial obstacle in the path of a person choosing

342. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

343. *June Med. Servs.*, 140 S. Ct. at 2141–42 (Roberts, C.J., concurring).

344. *Id.* at 2133 (Roberts, C.J., concurring) ("I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided.").

345. *Id.* at 2141–42.

346. *Id.* at 2134 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020)).

347. *Id.*

348. *Id.*

349. *Id.* at 2135 (disputing the plurality's reading of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016)).

350. *Id.* at 2135 (quoting Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989)).

351. *See id.* at 2139.

to obtain an abortion.[352] By adopting a legal rule consistent with the *June Medical* dissenters—indeed, one that does not require courts to examine whether abortion regulations provide actual benefits—Roberts signaled that he is prepared to join his (now) five more conservative colleagues the next time around,[353] upholding abortion restrictions that provide no health benefits while simultaneously restricting abortion access.[354]

2. *Miranda* Rights

Similar to *June Medical*, the Court in *Berghuis v. Thompkins*[355] claimed to reaffirm the constitutional right at issue while altering the legal framework in a way that significantly undermined its practical significance. Unlike the non-retrogression-based rationale used to uphold the validity of *Miranda* rights in *Dickerson v. United States*,[356] the *Thompkins* Court weakened *Miranda* by reading in the requirement that criminal suspects affirmatively state their intent to remain silent[357]—something *Miranda* never required.

In *Thompkins*, the police placed the defendant into custody as a suspect in a fatal shooting.[358] While in custody, the police provided Thompkins with a waiver form that listed his *Miranda* rights and warnings.[359] Thompkins declined to sign the waiver form and was largely silent for nearly three hours of intense custodial interrogation.[360] After three hours of fruitless probing, police interrogators asked him, "Do you pray to God to forgive you for shooting that boy

352. *Id.* at 2136.

353. And Roberts may have signaled an openness to overturning *Casey* all together. While conceding that *Casey*'s undue burden standard governed the Court's review of abortion restrictions in *June*, he openly suggested, if not invited, a frontal challenge to *Casey* by noting that "[n]either party . . . asked us to reassess the constitutional validity of that standard," something he impliedly seemed open to reviewing in the future. *Id.* at 2135.

354. During the *Dobbs* oral argument, *see supra* note 2, Chief Justice Roberts appeared to suggest that Mississippi's fifteen-week abortion ban was supportable under current abortion jurisprudence. *See* Transcript of Oral Argument at 39–40, 53–54, 67–68, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19-1392) (intimating that fifteen weeks is an "appropriate line" that preserves the "fair choice" to terminate a pregnancy under existing precedents notwithstanding the challenged law's failure to preserve the right to pre-viability abortions).

355. Berghuis v. Thompkins, 560 U.S. 370 (2010).

356. *See supra* Part II.E.2.

357. *Thompkins*, 560 U.S. at 388–89.

358. *Id.* at 374.

359. *Id.* at 374–75.

360. *Id.* at 375–76.

down?" Thompkins replied "yes."[361] Despite his refusal to expressly waive his *Miranda* rights and his near silence in the face of a three-hour interrogation, Thompkins's one-word response was admitted into evidence and used against him at trial, where he was subsequently convicted of first-degree murder and sentenced to life imprisonment without parole.[362] The Court affirmed the interrogation and the conviction.[363]

Justice Kennedy, writing for a 5-4 majority, stated that the Court was reaffirming *Miranda*'s core ruling.[364] However, in significantly expanding the implied waiver doctrine, the *Thompkins* Court "turn[ed] *Miranda* upside down" and arrived at result that is contrary to a fair reading of *Miranda*.[365] Under *Miranda*, an interrogation must cease if an individual held in custody "*indicates in any manner* . . . that he wishes to remain silent" or "states that he wants an attorney."[366] The majority never mentioned the important "indicates in any manner" language from *Miranda*. Instead, in dramatically reshaping the practical significance of the *Miranda* right to remain silent, the Court found that suspects held in custody must speak to claim their right to silence.[367] Indeed, Thompkins's statements seem to be clearly inadmissible under the original *Miranda* standard.[368] Through this decision, the Court diluted a significant constitutional right while claiming to

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361. *Id.* at 376.

362. *Id.* at 378.

363. *Id.* at 389–91.

364. *Id.* at 383 (citing Dickerson v. United States, 530 U.S. 428, 443–44 (2000)).

365. *Id.* at 412 (Sotomayor, J., dissenting); *see also* Charles Weisselberg & Stephanos Bibas, *The Right to Remain Silent*, 159 U. PA. L. REV. ONLINE 69, 70 (2010) (featuring a debate between Professors Weisselberg and Bibas in which the former argues that *Thompkins* "fully undermined *Miranda*'s safeguards and will significantly alter police practices").

366. Miranda v. Arizona, 384 U.S. 436, 473–74 (1966) (emphasis added).

367. *See Thompkins*, 560 U.S. at 409 (Sotomayor, J., dissenting). Indeed, *Miranda* contemplated the exact question at issue in *Thompkins* over the admissibility of statements obtained after lengthy interrogation, stating, "the fact of lengthy interrogation . . . before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 384 U.S. at 476. The Court explained that "the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so" and that this "is inconsistent with any notion of a voluntary relinquishment of the privilege." *Thompkins*, 560 U.S. at 396–97 (Sotomayor, J., dissenting) (citing *Miranda*, 384 U.S. at 476).

368. *See Thompkins*, 560 U.S. at 412 (Sotomayor, J., dissenting); *see also* Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 19 (2010) ("It is impossible to reconcile the Supreme Court's decision in *Berghuis v. Thompkins* with *Miranda v. Arizona*.").

uphold it—as it had done in *June Medical*.[369] As the next section will demonstrate, the Court has acted similarly in the statutory voting rights context.

B. Non-Retrogression and the Voting Rights Act

Counterintuitively, non-retrogression has lost significant footholds in its native *statutory* voting rights context, even while expanding its trans-substantive footprint across the rest of the rights landscape. *Shelby County v. Holder* illustrates this incongruity.[370] When the Court invalidated the preclearance formula under Section 4 of the VRA,[371] it mooted Section 5 preclearance—the very part of the Act the Court had interpreted as proscribing "retrogression" in the effective enfranchisement of racial minorities,[372] and which had in turn vaulted the term "non-retrogression" into the mainstream of voting rights literature.[373] Hence, while most commentators of *Shelby County* have panned the decision as an unprincipled interpretation of Congress's power under the Fourteenth Amendment,[374] the decision is equally incorrect for undermining the norm of constitutional non-retrogression that has become a fixture of constitutional rights doctrines.

As it defanged statutory non-retrogression, *Shelby County* fell below the narrower construction of constitutional non-retrogression—turning the principle on its head. If, as Jeffries and Levinson explain,[375]

369. Justice Gorsuch's dissent in *Pavan v. Smith* further demonstrates how one can pay lip service to precedent while plotting its effective destruction. 137 S. Ct. 2075 (2017). In a straightforward application of the same-sex marriage right announced in *Obergefell v. Hodges*, 576 U.S. 644 (2015), *Pavan* invalidated an Arkansas law that (1) allowed state officials to omit birth mothers' female spouses from the birth certificates of children conceived through anonymous sperm donation but (2) required the inclusion of identically situated male spouses. *Pavan*, 137 S. Ct. at 2078. In dissent, Justice Gorsuch wrote that *Obergefell*, "[t]o be sure," requires states to recognize same-sex marriages. *Id.* at 2079. But he expressed befuddlement at how a "birth registration regime based on biology" could be read to offend that requirement, given that "rational reasons exist" for such a framework. *Id.* It therefore appears that Gorsuch would interpret *Obergefell*'s prohibition on differential access to the "constellation of benefits that the States have linked to marriage" as leaving room for discrimination grounded in legislators' notions of biology. *Obergefell*, 576 at 670, 675–76. This enormous carveout, while purportedly consistent with settled precedent, would deprive *Obergefell* of much of its equalizing power.

370. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

371. *Id.* at 530, 542–57.

372. Beer v. United States, 425 U.S. 130, 141 (1976).

373. *See supra* Part I.A.

374. *See, e.g.*, Dawn Johnsen, Windsor*,* Shelby County*, and the Demise of Originalism: A Personal Account*, 89 IND. L.J. 3, 5–6, 20–24 (2014).

375. *See infra notes* 390–406 and accompanying text.

non-retrogression activates when a group already enjoying judicial solicitude loses a protected interest via a "higher" level of political process than was used to grant the interest in the first place, Congress had flipped the script under the VRA by more fully enforcing voting rights—not rescinding them. Just a few years prior, Congress had reauthorized the preclearance formula, in part because "[v]olumes of evidence supported Congress's determination that the prospect of retrogression was real."[376] Nevertheless, in the face of that policy judgment—one declared at the same (statutory) level of political power as the original VRA—the Court elevated its own reading of the factual record over Congress's and struck the VRA down[377]—"open[ing] the floodgates" to future attempts to rescind voting rights.[378] Not only has this aspect of *Shelby County* been criticized as "hardly . . . an exemplar of restrained and moderate decisionmaking,"[379] but it also highlights an incongruity between the proliferation of non-retrogression in the constitutional context and its retrenchment in the statutory domain.

Even more recently, the Court in *Brnovich v. Democratic National Committee*[380] picked up where *Shelby County* left off, facilitating the retrogression of voting rights. *Brnovich*, among the wave of post-*Shelby County* cases now compelled to be brought under the more defendant-friendly Section 2 of the VRA, tasked the Court with evaluating the (statutory) lawfulness of two restrictive voting measures enacted in Arizona—a state previously subject to the now-discarded

376. *Shelby Cnty.*, 570 U.S. at 590 (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

377. *Id.* at 553–54 (majority opinion) ("Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh § 2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." (internal citations omitted)).

378. *See The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/MV4X-AJLN] ("The effects were immediate. Within 24 hours of the ruling, Texas announced that it would implement a strict photo ID law. Two other states, Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred because of federal preclearance.").

379. *Shelby Cnty.*, 570 U.S. at 587 (Ginsburg, J., dissenting).

380. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

VRA preclearance requirements.[381] Writing for the Court, Justice Alito emphasized the state's right to prioritize interests other than voting rights through what he characterized as "modest" and "small" burdens on ballot access,[382] despite evidence that both policies in question "disproportionately affect minority citizens' opportunity to vote."[383] The specific so-called state interest in question here: the familiar ballot-access boogieman of voter fraud.[384]

The Court, however, was apparently disinclined to treat the prospect of voter fraud with the same skepticism it mustered for plaintiff's disparate impact evidence. As Justice Kagan noted in dissent, not only did the majority's approach permit states to "not even show that the discriminatory rule it enacted is necessary to prevent the fraud it purports to fear,"[385] but—as the majority readily conceded—it also invited them to trumpet anti-fraud rationales without evidence of any actual threat of fraud.[386] In doing so, the Court further distanced its contemporary voting rights doctrine from its non-retrogression origins, arming states increasingly inclined[387] to slash voting rights with a readymade VRA alibi, and further eroding the non-retrogression principles that once formed the bedrock of post-Civil Rights Movement voting rights jurisprudence.

If *Shelby County* and *Brnovich* represented an intersection of non-retrogression's past and present, they also, fittingly enough, left the Court at something of a crossroads. Even as the Court has allowed itself to graze further afield from non-retrogression's roots, contemporary forces have aligned to underscore non-retrogression's importance—and the perils its absence could pose. Part IV will explore

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381. *Id.* at 2370 (Kagan, J., dissenting).

382. *Id.* at 2344 (majority opinion).

383. *Id.* at 2366 (Kagan, J., dissenting).

384. *Id.* at 2365 ("Throughout American history, election officials have asserted anti-fraud interests in using voter suppression laws.").

385. *Id.* at 2372.

386. *Id.* at 2348 (majority opinion); *see also* Richard L. Hasen, Opinion, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html [https://perma.cc/5P3M-6XT9] ("Thanks to Brnovich, a state can now assert an interest in preventing fraud to justify a law without proving that fraud is actually a serious risk, but at the same time, minority voters have a high burden: They must show that the state has imposed more than the 'usual burdens of voting.'").

387. *See Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Dec. 21, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 [https://perma.cc/S9TU-CGHM] ("Between January 1 and December 7[, 2021], at least 19 states enacted 34 laws restricting access to voting.").

non-retrogression's modern frontiers, highlighting prominent examples of rights at risk of unraveling, and discussing the protective role an unshackled non-retrogression could play in the battles to come.

IV. NON-RETROGRESSION'S MOMENT

The dynamic of non-retrogression just analyzed has numerous implications. First, a reconsideration of the early scholarly misgivings over non-retrogression seems warranted, as the caselaw has stretched well beyond the overly rigid, formulaic conceptions in the early literature, rendering the initial, more skeptical takes on non-retrogression inaccurate on both descriptive and normative grounds. Second, non-retrogression could influence new settings, including *constitutional* voting rights battles where a court's application of non-retrogression principles could make a big difference in future disputes. Finally, while non-retrogression has a progressive valence when the Court drifts rightward, it is not a one-way ratchet and could prevent a future liberal court from rescinding conservative rights.

A. Unshackling Non-Retrogression

The current literature around non-retrogression has tethered it to a concept that may incompletely describe the Court's objectives outside the statutory Section 5 VRA context. For their part, Jeffries and Levinson begin their account with *Beer*'s statutory application of the non-retrogression principle under the VRA.[388] While noting this standard's "shortcomings"—particularly, the seeming arbitrariness of forbidding only new instances of old "evils"—they conclude that the VRA's overriding objective of "increasing minority political power" supplies it with sufficient logic and coherence.[389]

The only *constitutional* non-retrogression cases that Jeffries and Levinson find to be comparably grounded in some "substantive foundation"[390] are *Reitman v. Mulkey*,[391] *Hunter v. Erickson*,[392] and *Washington v. Seattle School District No. 1*.[393] In *Reitman*, the Court invalidated a California voter initiative that, by establishing a state

388. *See* Jeffries & Levinson, *supra* note 14, at 1213–15. Although they mention federal environmental law's "nondegredation" principle in passing, their focus is the non-retrogression standard embedded in VRA Section 5. *Id.* at 1215 n.10.

389. *Id.* at 1214.

390. *Id.* at 1226.

391. 387 U.S. 369 (1967).

392. 393 U.S. 385 (1969).

393. 458 U.S. 457 (1982).

constitutional right to engage in housing discrimination, repealed recently enacted fair housing laws and prohibited their reenactment.[394] In *Hunter*, a voter-driven amendment to the Akron city charter met the same fate, having invalidated all existing fair housing ordinances in the city and requiring referendum approval of new ones.[395] And in *Seattle*, the Court invalidated a Washington state voter initiative prohibiting the kind of busing program that a Seattle school district had recently initiated to unwind de facto segregation.[396]

Jeffries and Levinson identify an unspoken[397] principle of non-retrogression as the common thread connecting these cases,[398] but it is a much narrower version of the principle than Section 5 of the VRA requires—and one whose legitimacy is limited to the singular context of race.[399] In each case, the Court contrasted "mere"[400] or "simple"[401] repeal of a gratuitous substantive entitlement with what Jeffries and Levinson describe as a "retreat to a higher and presumably less favorable level of political decision."[402] Only the latter mode of rollback, and specifically the imposition of "special burdens . . . within the governmental process,"[403] raised constitutional concerns.[404] In short, under Jeffries and Levinson's generally disapproving[405] construction of non-

394. *Reitman*, 387 U.S. at 374, 380–81.

395. *Hunter*, 393 U.S. at 386–87, 393.

396. *Seattle Sch. Dist.*, 458 U.S. at 461–64, 487.

397. *See* Jeffries & Levinson, *supra* note 14, at 1215 ("In each of these cases, non-retrogression was the operative rule; yet in each the Court tried to find some other basis for decision.").

398. *Id.* at 1217 ("In each of these cases, the trigger of unconstitutionality was retrogression . . . .").

399. *See supra* notes 49–51 and accompanying text.

400. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 376 (1967); *Hunter*, 393 U.S. at 390 n.5.

401. *See, e.g.*, *Seattle Sch. Dist.*, 458 U.S. at 485 n.29.

402. Jeffries & Levinson, *supra* note 14, at 1217.

403. Hunter v. Erickson, 393 U.S. 385, 391 (1969). The unedited quote refers exclusively to racial minorities, but, as noted *supra* at note 158, Justice White suggested broader application by noting further that "[a] State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393 (emphasis added).

404. Jeffries & Levinson, *supra* note 14, at 1217–18 ("In a sense, these cases involve double retrogression: first, withdrawal of some substantive entitlement (such as fair housing protections), and second, retreat to a higher and presumably less favorable level of political decision. Although these two levels of retrogression occurred in tandem, it apparently was the second that the Supreme Court found so objectionable.").

405. Jeffries and Levinson levy a number of criticisms at non-retrogression, as they

retrogression, a state, having stuck its foot forward, may pull it back, but it may not step onto a higher political plane and, from that elevated platform, leap back in the other direction.[406]

However, it is unclear whether or how the Court's construction of *statutory* retrogression adequately grounds an understanding of the "free-standing procedural principle"[407] that Jeffries and Levinson deride. Notably, none of the cases that Jeffries and Levinson include in the Court's emerging non-retrogression canon cite *Beer* explicitly[408]—indeed, they do not mention "retrogression" in any form—and neither do any of the cases that this Article stirs into the mix. "Non-retrogression" is a name with different meanings—one in the narrow, VRA context, and another the constitutional and quasi-constitutional contexts described in this Article. And the latter definition—the basis of this Article—deserves more sympathetic treatment than what the conventional literature currently allows.

Moreover, and more generally, the few scholars who have engaged with non-retrogression have tended to discard its proceduralist

had constructed it. First, as a general matter, non-retrogression "does not cure existing evils; it only forbids new ones." *Id.* at 1214. Second, it yields, at best, incoherent results—a court may treat the same action as "lawful in one county but not in its neighbor" or arbitrarily anoint "a particular state of affairs as a baseline and then insist[] that departure from that baseline is somehow unconstitutional"—and, at worst, "constitutionally perverse" results where government attempts to retreat from constitutionally suspect policies *themselves* become constitutionally suspect. *Id.* at 1214, 1225–26, 1234. Third, they note that, carried to its logical end, the focus on operation has the unworkable result of rendering all higher-level governmental decisions "constitutionally suspect." *Id.* at 1220–21 (citing subsequent Supreme Court precedent indicating that the Justices "did not really mean" this). And further, by allowing discriminatory motive to invalidate even same-level repeals, the analysis can turn on "paper thin" distinctions of what constitutes sufficient discriminatory intent. *Id.* at 1218–19. Finally, the authors stress that non-retrogression is a disingenuous attempt to smuggle a substantive agenda through the courts under procedural guise. *Id.* at 1235.

406. *See supra* note 404 and accompanying text.

407. *Id.* at 1234.

408. Jeffries and Levinson's critique is grounded in the narrow conception based on the Court's holding in *Beer v. United States*, in which the Court upheld a redistricting plan for the city of New Orleans that appeared likely to increase Black representation on the city council, though less dramatically than would have been possible under alternative maps. 425 U.S. 130, 135–37, 141–42 (1976) (noting that Section 5 of the Voting Rights Act forbids any "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). Because the plan was at least minimally "ameliorative," it could not be said to dilute or abridge the right to vote on account of race. *Id.* at 141. This purely directional understanding of Section 5 was controversial from the outset—Justice Marshall's *Beer* dissent noted that "[s]ome changes just do not lend themselves to comparison in positive or negative terms"—but for better or worse it has survived. *Id.* at 153 n.12 (Marshall, J., dissenting).

and institutionalist trappings[409] as the stalking horse for the substantive agenda of an activist Court.[410] Jeffries and Levinson's critique of the reasoning behind cases like *Romer* is illustrative. *Romer*'s facts were "precisely analogous to the *Reitman* line of cases"—except that sexual orientation was in issue instead of race, a distinction that Jeffries and Levinson liken to "Mount Everest."[411] Indeed, only ten years before *Romer*, in *Bowers v. Hardwick*,[412] the Court had declined to recognize the right to consensual same-sex sexual activity,[413] which Jeffries and Levinson understood to render sexual orientation "constitutionally insignificant."[414] A second-order effect, in their view, should have been to immunize anti-gay state action against a non-retrogression challenge; without a "substantive foundation" comparable to the race-equality mandate underlying *Reitman* and *Seattle*, "there is no way to tell the difference between progress and regress. One direction is as good as another."[415] Nonetheless, the Court invalidated Amendment 2 on grounds that Jeffries and Levinson interpret as extending "the *Hunter* ban on higher-level repeals to laws protecting homosexuals."[416] While noting the susceptibility of Justice Kennedy's opinion to multiple readings,[417] they construe his silence on *Bowers* to disclaim a

409. *See* Jeffries & Levinson, *supra* note 14, at 1234.

410. *See id.* at 1240. From discrete uses of statutory non-retrogression that they deem sensible, *see id.* at 1213–15, Jeffries and Levinson derive the broad conclusion that non-retrogression only makes sense when some "authoritative institution has declared (or everyone has agreed upon) a substantive goal." *Id.* at 1215 ("Ratcheting change in one direction is a coherent legal strategy if and only if one knows which way to go."). Although they grudgingly concede that the first batch of Supreme Court cases to flirt with a constitutional theory of non-retrogression met this standard, they argue that the doctrine soon thereafter became unmoored from any identifiable "normative premise," *id.* at 1226–28, which led to "truly incoherent" consequences. *Id.* at 1223.

411. *Id.* at 1226.

412. 478 U.S. 186 (1986).

413. *Id.* at 192 (refusing to recognize "a fundamental right [of] homosexuals to engage in acts of consensual sodomy").

414. Jeffries & Levinson, *supra* note 14, at 1226. They consider and reject attempts to reconcile *Bowers* and *Romer* along conduct-status lines, not least because such reconciliation "reduces *Romer* to triviality." *Id.* at 1229 ("We think it unlikely that . . . rewriting Amendment 2 to bar special protection for persons who have engaged in homosexual conduct would resolve the deeply-felt antipathies to this provision.").

415. *Id.* at 1226–27.

416. *Id.* at 1229.

417. *Id.* at 1227–28 ("Any attempt to understand *Romer* requires some creativity in reading the Court's opinion. Our approach is no exception. . . . Justice Kennedy's opinion for the Court never pins down precisely what is wrong. At each crucial point, a vague epithet takes the place of a comprehensible reason . . . .").

grant of protected status on the basis of sexual orientation,[418] and they reject an "animus" theory of the case given the evident hostility behind laws of the kind that *Bowers* blessed.[419] Ultimately, with *Bowers* still good law, Jeffries and Levinson feel constrained to read *Romer* in terms of *Reitman-Hunter-Seattle* non-retrogression—an outcome they deem "hopelessly confused" in the absence of a constitutional predicate requiring unidirectional movement on LGBTQ rights.[420]

However incomplete that description of *Romer*—the actual entitlement trigger entailed both the specific ordinances at issue and an "emerging tradition" of steadily expanding antidiscrimination protections[421]—Jeffries and Levinson's traditionalist notion of non-retrogression has the advantage of rendering their claims testable. Allowing that Justice Kennedy's vision of the "true line of progress"[422] might one day be proven "prophetic,"[423] they in effect argue that the ultimate test of *Romer* will be its reception in the political culture—specifically, whether it enjoys the unblemished career of *Hunter*[424] or rather tells a "cautionary tale" in the manner of *Roe v. Wade*[425] or *Furman v. Georgia*.[426]

With the benefit of over twenty years' hindsight, it is now plain that *Romer* has stood the test of time. In fairly rapid succession, the Court has prohibited anti-sodomy legislation,[427] invalidated the exclusion of same-sex couples from the federal definition of marriage,[428] and recognized the fundamental right of marriage for same-sex couples[429]—providing at least a partial answer to Jeffries and Levinson's question of whether "the future will reveal the rightness of preserving

418. *Id.* at 1229.

419. *Id.* at 1228.

420. *Id.* at 1230–31.

421. *See* Romer v. Evans, 517 U.S. 620, 628 (1996); *see also supra* notes 166–71 and accompanying text.

422. Jeffries & Levinson, *supra* note 14, at 1246 (quoting ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (2d ed. 1978)).

423. *Id.* at 1245.

424. *Id.* at 1247 (noting the enactment of "broad prohibitions against private racial discrimination" in concluding that, "[a]s of this date, *Hunter* looks like a good bet").

425. Roe v. Wade, 410 U.S. 113 (1973).

426. Furman v. Georgia, 408 U.S. 238 (1972). On *Roe* and *Furman*, Jeffries and Levinson argue that "hindsight has not been kind to" the Court's "prediction" that the country would move "toward acceptance and liberalization of abortion rights and toward disapproval and abolition of the death penalty." Jeffries & Levinson, *supra* note 14, at 1247.

427. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

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

429. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

antidiscrimination protection for gays and lesbians."[430] And the Court for better or worse has transplanted *Romer*'s core insights of government neutrality and respect for equal dignity from the antidiscrimination cases in which it originated to other constitutional arenas, including First Amendment objections to state antidiscrimination laws and executive branch immigration policy.[431]

It is important to pin down what the future has revealed, and by extension the nature of *Romer*'s vindication. Jeffries and Levinson would likely argue that the United States was nearer to an "emerging national consensus"[432] on LGBTQ rights than was foreseeable when they wrote their article—and that *Romer* therefore joins *Reitman*, *Hunter*, and *Seattle* as a defensible application of the non-retrogression principle. But if so, they would only be upgrading *Romer* from "analytically incoherent[,] substantively pointless,"[433] and "hopelessly confused"[434] to a case that "made practical sense."[435] Their critique of *Romer* as an "intellectual shell game"[436] would remain intact, as would their broader criticism that non-retrogression "substitute[s] a purportedly positive question—how things used to be or how they will be—for the normative question of how they should be."[437]

430. Jeffries & Levinson, *supra* note 14, at 1245. Suspect-class status remains elusive, however, meaning that "legally tolerated discrimination against homosexuals [has not] soon become[] as anachronistic as racial segregation in the Jim Crow South . . . ." *Id.*

431. *See* Masterpiece Cakeshop, Ltd., v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (invalidating order of the Colorado Civil Rights Commission for lacking "religious neutrality" toward a confectioner that refused to serve a same-sex couple); Trump v. Hawaii, 138 S. Ct. 2392, 2420–23 (2018) (invoking rational basis review to sustain presidential proclamation restricting U.S. entry to foreign nationals from eight countries, notwithstanding plaintiffs' contention that the policy was based on anti-Islamic animus); *id.* at 2423–24 (Kennedy, J., concurring) (attributing to the majority an acknowledgement that the proclamation would be invalidated if it failed the *Romer* standard and were deemed "inexplicable by anything but animus") (internal citation omitted)).

432. Jeffries & Levinson, *supra* note 14, at 1225 (arguing that cases such as "*Reitman* and *Hunter* reflect, and may be thought justified by, an emerging national consensus, codified by federal civil rights statutes banning race discrimination in employment, education, housing, public accommodations, and other 'private' settings"); *cf. Lawrence*, 539 U.S. at 572 (recognizing an "emerging awareness" that consenting adult persons should be left free to make their own decisions about their private sexual lives).

433. Jeffries & Levinson, *supra* note 14, at 1215.

434. *Id.* at 1231.

435. *Id.* at 1215.

436. *Id.* at 1236.

437. *Id.* at 1245.

This image of non-retrogression as a procedural cloak concealing grand substantive schemes is difficult to square with *Romer*'s alleged resemblance to the Warren-era progressive traditionalists—whose role as the "midwi[ves] of a utopian future"[438] was hardly covert. Jeffries and Levinson by turns criticize *Romer* for coyly avoiding a definitive statement on *Bowers*'s continuing effect[439] and accuse it of reprising the Warren Court's alleged over-willingness to "resolve . . . issues of grand principle."[440] For the latter charge, they rely on Alexander Bickel for the contention that courts should primarily "make law interstitially by resolving concrete issues of individual justice . . . ."[441] But this is arguably what *Romer* did, because for better or worse the Court avoided either issuing a pronouncement on fundamental privacy rights or declaring sexual orientation a suspect classification. Instead, it confined itself to the plight of a discrete set of individuals whose newly granted rights had been snatched away in a manner that not only suggested animus,[442] but also placed them at a marked political disadvantage[443] and undermined their reliance on progressivism's onward march.[444] Under a properly broad conception of non-retrogression principles, these interests were worthy of vindication, meaning that the justice of *Romer* need not turn on whether and how rapidly "legally tolerated discrimination against homosexuals [is becoming] as anachronistic as racial segregation in the Jim Crow South."[445] Perhaps Jeffries and Levinson cannot be faulted for failing to foresee that the "Everest"[446]-scale difference between LGBTQ rights and racial-minority rights would soon be reduced to a hillock, but their overly constricted model of non-retrogression inadequately captures the set of values the doctrine can serve in any substantive context.

Of course, the Court can have independently valid procedural grounds for delivering an opinion sounding in non-retrogression themes, while nonetheless being aware of the decision's potential to

438. *Id.* at 1246.

439. *Id.* at 1227 ("*Romer* did not purport to overrule *Bowers.* In a remarkable act of intellectual evasion, the Court did not even cite that decision. If one takes the Court at its word, *Romer* leaves *Bowers* intact.").

440. *Id.* at 1246.

441. *Id.*

442. Romer v. Evans, 517 U.S. 620, 632 (1996).

443. *Id.* at 631.

444. *Id.* at 627–29.

445. Jeffries & Levinson, *supra* note 14, at 1245.

446. *Id.* at 1226.

reshape history. Jeffries and Levinson's account of non-retrogression—as "a relatively low-cost way . . . to further social change, allowing the Justices to cast themselves not as revolutionaries, but rather as ushers or shepherds, intervening only when a state strays from the path of progress"[447]—is therefore appealing. And the picture they paint is not necessarily unattractive. For one thing, Jeffries and Levinson themselves claim that they "would cheerfully accept" an interpretation of *Romer* as having overturned *Bowers*, as "[i]t is no part of [their] argument that *Bowers* was correctly decided."[448] But perhaps the choice in 1996 was not between non-retrogression and overturning *Bowers*, but rather between non-retrogression and no remedy whatsoever. If so, non-retrogression at least had the benefit of buying a disfavored group some time. From a Bickelian perspective, while LGBTQ people's broader political and legal cause was still struggling to gain momentum, *Romer* offered protection against at least a subset of the civic insults that heightened scrutiny or fundamental rights analysis protect against—namely, arbitrary and/or animus-based rights rescissions, compounded by disdain for the reliance interests those rights had engendered. It is not prophecy to believe that such harms demand redress as they arise, so Jeffries and Levinson's skepticism that "the Justices are gifted prophets"[449] seems inapt. Insofar as an opinion grounded in principles "contains an implicit prediction"[450] about the future, the cost of being wrong will be low. But the cost of abandoning non-retrogression for lack of a substantive foundation could be high—especially for classes beset by harms today and who hope to build a substantive foundation for greater protection in the future. Particularly in an era of deep judicial skepticism of substantive equality claims, non-retrogression principles are an indispensable tool.

B. NON-RETROGRESSION AND VOTING RIGHTS BATTLES

A further question at the intersection of statutory and constitutional non-retrogression is whether the latter could play a role in preserving the status quo around access to the franchise. The dormancy of Section 5 non-retrogression appears greatly weakened after *Shelby County* and is particularly worrisome in light of the current flood of

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447. *Id.* at 1245.
448. *Id.* at 1227.
449. *Id.* at 1246.
450. *Id.* at 1245.

proposals to restrict voting access percolating in the states.[451] At 440 bills and counting, in forty-nine states, the pending legislation—a reaction to unprecedented voter turnout in the 2020 election—collectively takes aim at vote-by-mail and simplified registration policies, while aggressively promoting voter ID requirements and voter roll purges.[452] But, to the extent these changes work a retrogression in voting power by historically disadvantaged groups, it is conceivable that mainstream constitutional non-retrogression, if articulated to its full potential, could compensate for the absence of statutory non-retrogression under Section 5.

A fairly recent Sixth Circuit decision, *Obama for America v. Husted*, illustrates how that dynamic might work.[453] In 2005, Ohio adopted no-fault absentee voting and in-person early voting, in part to avoid recurrence of the egregiously long wait times that had plagued the prior year's general election.[454] In the years that followed, Ohioans enthusiastically took up these expanded voting options, submitting approximately 105,000 in-person early ballots in the three days preceding Election Day 2008.[455] Early voting proved disproportionately popular with women, the elderly, low-income and less educated individuals, and—of critical importance here—African Americans.[456] Notwithstanding these democratizing effects, or perhaps because of them, between 2011 and 2012 Ohio eliminated the ability of non-military voters to vote in-person during the three days preceding an election day.[457] Against that background, the Sixth Circuit in *Obama for America* deemed the plaintiffs likely to succeed on their equal protection challenge and upheld the district court's preliminary injunction against the voting-access rollback.[458]

In thwarting a state's attempt to rescind a constitutional gratuity,

451. *See Voting Laws Roundup: December 2021*, *supra* note 387.

452. *Id.*

453. Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012).

454. *Id.* at 426.

455. *Id.*

456. *Id.* at 426–27. The cited data on African American voters is primarily confined to Cuyahoga and Franklin Counties—home to Cleveland and Columbus, and Ohio's two most populous counties. *See id.* at 440–41 (White, J., concurring).

457. *Id.* at 427 (majority opinion). The state of affairs challenged in *Obama for America* was the output of a convoluted series of events: omnibus revisions to Ohio's election laws, technical corrections of the omnibus bill, a petition placing the omnibus bill's repeal on the 2012 ballot, legislative repeal of the omnibus bill but not of its technical fixes, and the secretary of state's interpretation of the contradictory muddle that remained. *Id.*

458. *Id.* at 436–37.

Obama for America had a distinct non-retrogression flavor.[459] But the variety of non-retrogression it espoused was notably "selective,"[460] as Edward Foley has explained: "Rollback for all voters would be okay. Expansion of extra opportunities for military voters, without any roll-back for non-military voters, would seemingly also be okay. . . . It is keeping the opportunities the same for military voters, while cutting back those opportunities for everyone else, that the majority cannot accept."[461] Foley is skeptical that a broader non-retrogression principle might apply to election law,[462] a perspective that other scholars share.[463] So it might appear that state legislators hoping to limit access to the polls need not worry about non-retrogression, provided they avoid the kind of differential rollback that Ohio attempted to implement.

On the other hand, Judge White's concurrence in *Obama for America* reveals how a reliance-inflected version of the non-retrogression principle can be positioned as a bulwark against a much broader swath of voting-rights rescissions.[464] After rejecting an equal-convenience voting right in the abstract, Judge White insisted that the condition of Ohio's non-military voters not be "divorced from reality"—

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459. This is particularly true of the district court's approach to the case: "'[I]n-person early voting' is a voting term that had included the right to vote in person through the Monday before Election Day, and, now, thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person." Obama for Am. v. Husted, 888 F. Supp. 2d 897, 907 (S.D. Ohio 2012) (emphasis removed). But as Edward Foley notes, the Sixth Circuit "essentially embraced" the district court's reasoning. Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH L. REV. 1836, 1845 (2013).

460. Foley, *supra* note 459, at 1846; *see also Obama for Am*., 888 F. Supp. 2d at 910 ("[W]here the State has authorized in-person early voting through the Monday before Election Day for all voters, 'the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.'" (emphasis removed) (quoting Bush v. Gore, 531 U.S. 98, 104–05 (2000))).

461. Foley, *supra* note 459, at 1846.

462. *See* Edward B. Foley, *Two Big Cases Ready for Major Appellate Rulings*, ELECTION L. @ MORITZ (Sept. 30, 2012), https://web.archive.org/web/20121010213551/http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9779 ("[T]he revocation of previously available opportunities may make no difference if a State was not obligated to grant those opportunities in the first place, and the State has simply returned to a situation it was entitled to be in initially.").

463. *See* Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH L. REV. 1865, 1881 (2013) ("Nor was there any authority [pre-*Obama for America*] for the idea that once a state enacted a period of early voting, the Constitution would bar the state from contracting it. No such 'nonretrogression' principle applied to the routine choices each jurisdiction makes when it comes to the mechanics and details of voting.").

464. Obama for Am. v. Husted, 697 F.3d 423, 437–38 (6th Cir. 2012).

namely, that voting in Ohio had since 2005 featured "extended in-person absentee-voting opportunities [responsive to the 2004 debacle], the substantial exercise of that right, and the boards of Ohio's largest counties' reliance on the availability of such voting."[465] Within that specific factual context, the state's "eleventh-hour changes" threatened at least two reliance interests: the interest of county election boards that had not had adequate time to prepare for an Election-Day crush, and the interest of those voters who for the better part of a decade had relied on extended poll access "for the exercise of their franchise."[466] Judge White concluded that the latter concern, lest courts "ignore reality," is "properly considered" under the applicable Supreme Court doctrine,[467] which the Court has recognized to be a "flexible standard"[468] requiring courts to make "hard judgment[s]"[469] where voting rights and state interests clash. Particularly given her acknowledgment that this burden would be disproportionately borne by Ohio's African American voters, Judge White's reasoning suggests an approach to voting-rights litigation that might resonate with the Supreme Court's demonstrated concern for non-retrogression principles.[470] While by no means an adequate substitute for Section 5, constitutional non-retrogression provides a framework for voters whose reliance interests in preexisting voting-access rights are subject to revocation. Of course, given the Roberts Court's most recent approaches to voting rights more generally,[471] it is unlikely that the current Court would incorporate *Obama for America*'s non-retrogression

465. *Id.* at 441.

466. *Id.* at 441–42.

467. *Id.* at 442. The modern constitutional standard for assessing restrictions on voting rights and ballot access—so-called *Anderson-Burdick* balancing—weighs "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . against the precise interests put forward by the State as justifications for the burden . . . taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks removed) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)). More specifically, the extent of the burden determines "the rigorousness of [the Court's] inquiry," *id.* at 434, with "severe" restrictions triggering strict scrutiny, *id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)), and "reasonable, nondiscriminatory restrictions" requiring only heightened review, *id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

468. *Burdick*, 504 U.S. at 434.

469. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008).

470. *Obama for Am.*, 697 F.3d at 440 (noting studies indicating the disproportionate reliance interests of African American voters in Cuyahoga and Franklin Counties, and the likely disproportionate impact of rollback).

471. *See supra* notes 370–87 and accompanying text.

analysis when evaluating constitutional challenges to the right to vote.[472]

C. NON-RETROGRESSION AND CONSERVATIVE RIGHTS

Non-retrogression, in theory, could guard against the revocation of rights no matter the rights' political hue. For example, in the event that the Court's center of gravity one day shifts back in a leftward direction, conservatives will argue that non-retrogression should entrench the gun rights regime that the Court created in *District of Columbia v. Heller*.[473] *Heller's* endorsement of an individual right to possess handguns in the home for self-defense purposes[474]—as distinct from a right tethered to militia service—was arguably no less novel than *Roe's* declaration of a right to terminate one's pregnancy.[475] And it is unlikely that many liberal-leaning prospective Justices would have signed onto *Heller's* reasoning had they been on the Court in 2008.[476] Nonetheless, an argument can be made that, in the intervening years, an evidently growing number of Americans have "made

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472. Not only did the *Brnovich* Court rebuff any mention of non-retrogression in the context of Section 2 of the VRA, *see supra* notes 380–87 and accompanying text, but the Court in *Crawford v. Marion County Election Board*—the Court's most recent application of *Anderson-Burdick* balancing—failed to incorporate a non-retrogression analysis, instead focusing on the relative burdens imposed by Indiana's voter ID law as compared to the state's claimed need to stamp out in-person voter fraud. *Crawford*, 553 U.S. at 198–200.

473. District of Columbia v. Heller, 554 U.S. 570 (2008).

474. *Id.* at 635 (invalidating the District of Columbia's ban on handgun possession in the home under the Second Amendment). Two years later, the Court confirmed that the right announced in *Heller* applies against the states by way of the Fourteenth Amendment. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

475. *See* John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, ATLANTIC (May 14, 2019), https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272 [https://perma.cc/PK28-PV3Q] ("Throughout most of American history there was no federal objection to laws regulating the civilian use of firearms. When I joined the Supreme Court in 1975, both state and federal judges accepted the Court's unanimous decision in *United States v. Miller* as having established that the Second Amendment's protection of the right to bear arms was possessed only by members of the militia and applied only to weapons used by the militia.").

476. *See id.* (describing *Heller* as "unquestionably the most clearly incorrect decision that the Supreme Court announced during my tenure on the bench"); Adam Winkler, *The Court After Scalia: Would a Liberal Supreme Court Overturn Heller?*, SCOTUSBLOG (Sept. 6, 2016), https://www.scotusblog.com/2016/09/the-court-after-scalia-would-a-liberal-supreme-court-overturn-heller [https://perma.cc/JU4D-BE8P] (placing *Heller* "near the top of the list of Roberts Court decisions [many liberals] would like to see reversed").

choices that define their views of themselves and their places in society in reliance on the availability of"[477] firearms. Already by 2017, half of American gun owners considered their weapons to be important to their sense of identity, with nearly three-quarters describing the right to bear arms as essential to their sense of freedom.[478] Against that backdrop, the year 2020 witnessed a massive surge in gun purchases by first-time buyers—including, ominously, many self-professed "anti-gun" people who felt compelled to arm themselves.[479] Particularly if, as seems likely, the Court is poised to extend *Heller* to curtail the regulation of firearms carried outside the home,[480] a future liberal-majority Court would encounter a country awash in guns[481]—and a populace arguably accustomed to the easy exercise of their newfound Second Amendment rights.[482] In view of the reliance interests engendered by such an atmosphere, non-retrogression principles could impede a future Court's desire to bless the rescission of rights granted by *Heller* and its progeny.

477. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

478. Kim Parker, Juliana Menasce Horowitz, Ruth Igielnik, J. Baxter Oliphant & Anna Brown, *America's Complex Relationship with Guns: An In-Depth Look at the Attitudes and Experiences of U.S. Adults*, PEW RSCH. CTR. (June 20, 2017), https://www.pewresearch.org/social-trends/2017/06/22/guns-and-daily-life-identity-experiences-activities-and-involvement [https://perma.cc/5LYE-C2YZ]. Additionally, in a sign of the depth of social connection that gun ownership provides, eighty-seven percent of gun owners reported being friends with more than a few fellow gun owners. *Id.*

479. Marc Fisher, Miranda Green, Kelly Glass & Andrea Eger, *'Fear on Top of Fear': Why Anti-Gun Americans Joined the Wave of New Gun Owners*, WASH. POST (July 10, 2021), https://www.washingtonpost.com/nation/interactive/2021/anti-gun-gun-owners/ [https://perma.cc/G993-9L3J] (reporting that first-time buyers accounted for between one- and two-fifths of overall gun sales in 2020, contributing to a seven percent spike in the overall rate of gun ownership—"the biggest jump in recent decades"). The Washington Post quoted one gun dealer as saying, "One lady came in here in tears, with her teenagers, and she said, 'This goes against everything I believe in, but I need my family to learn how to protect themselves.'" *Id.*

480. *See* Adam Liptak, *Justices' Questions Suggest New York Gun Control Law Is Unlikely to Survive*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/us/politics/supreme-court-guns-second-amendment.html [https://perma.cc/C79V- VWSJ].

481. *See* Henry Grabar, *You Can't Have an Open-Carry Democracy*, SLATE (Jan. 13, 2021), https://slate.com/news-and-politics/2021/01/guns-capitol-riot-trump-crisis.html [https://perma.cc/H36Z-J6JR] ("For a decade, we've been slowly adjusting to the new role of guns in public life. We've redesigned schools, installed metal detectors at every theater and arena, and endured horrific massacres . . . .").

482. *See id.* (decrying the armed show of force against Michigan's COVID-19 emergency measures as proof of the "oxymoron of open-carry democracy").

CONCLUSION

Non-retrogression has assumed an unusual, and in some ways paradoxical, position among constitutional forces—having garnered significant scholarly treatment in the narrow voting rights context while escaping the attention of all but a small few in the broader constitutional context. Even among those small few, and particularly among those who first undertook to articulate the principle's role beyond voting rights, there have perhaps been more cynics than believers. But scholarly efforts in the 1990s to cabin non-retrogression's descriptive and normative potential have proven premature: subsequent case law has catapulted non-retrogression well beyond the limited confines imagined by the principle's initial, reluctant heralds.

These recent doctrinal developments have joined forces with other longstanding jurisprudential traditions and bedrock constitutional concepts to substantiate a modern non-retrogression principle that is divorced from any particular context while also eminently applicable to one rather urgent context: projecting just how far the retooled Court will go in rescinding rights. It injects perhaps a dash of optimism into what, for many, is an understandably worrisome outlook, suggesting that the new Court, no matter how substantively hostile to rights-affirming rulings of prior Courts it can be, may at times be more likely to conform to those decisions than ordinarily believed—depending, of course, on how far it ultimately strays from its predecessors' commitment to non-retrogression. In the meantime, the question remains whether and to what extent the Court will allow itself to be guided by its own longstanding model of non-retrogression, and where, by contrast, it will be satisfied greenlighting the recission of those rights that hang in the balance.