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THE SUPREME COURT  
2021 TERM

FOREWORD:  
RACE IN THE ROBERTS COURT

*Khiara M. Bridges*

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INTRODUCTION

When it comes to people of color, the Roberts Court treats “racism” as if it is an objective fact — out there in the world, apparent to anyone who stumbles upon it. The Roberts Court invites observers to believe that it is just using simple common sense when it identifies, or refuses to identify, something as racism.

The crux of the Roberts Court’s apparent racial common sense is that racism against people of color is what racism looked like during the pre-Civil Rights Era — in the bad old days. The ways in which white people protected white supremacy back then, and the forms that white supremacy took . . . that is racism. So racism is eugenics. Racism is genocide. Racism is racists disarming formerly enslaved black people to render them helpless and easily killed. Racism is a bigoted prosecutor trying to convict an innocent black man of murder. Racism is the wholesale exclusion, by law or practice, of black citizens from jury rolls. Racism is deeply held views about nonwhite people’s “natural” violent tendencies. Racism is self-described white supremacists cleverly designing nonunanimous jury rules that silence the voices, and nullify the votes, of black people. Racism is Japanese internment camps. Racism is literacy tests and poll taxes and certificates of good moral standing as qualifications to vote. When confronted with a claim of racial discrimination, the Roberts Court appears to be simply determining whether the alleged discrimination resembles what the country did in the pre-Civil Rights Era. If the Court sees a resemblance between the present-day harm and the racism of yesteryear, the Court provides relief. If it sees no resemblance, it provides no relief.

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This Foreword intervenes to observe that the Roberts Court’s impoverished conceptualization of what “counts” as racism against people of color is a strategy that the Court deploys to accomplish regressive ends. It permits the Court to do nothing to destabilize and disestablish the country’s existing racial hierarchy. Essentially, the Court provides a remedy to people of color seeking relief from racially burdensome laws and policies only when the racism embedded in the challenged law or policy is so closely tied to white supremacy that it would be embarrassing for the Court to do nothing. The Roberts Court’s racial common sense is a tactic that allows the Court to do no more than the absolute bare minimum and, in so doing, maintain a modicum of legitimacy.

Of note, in its project of ridding the present only of vintage instrumentalities of racism, the Roberts Court does not cabin itself to the Equal Protection Clause. In fact, the Court’s recent Terms reveal that it typically does not use the Equal Protection Clause to remedy nonwhite claimants’ racial injuries. Instead, the Court uses other parts of the Constitution — the Second Amendment, the Sixth Amendment, and the Due Process Clause — to provide redress to nonwhite people. As this Foreword argues, this partially explains *Dobbs v. Jackson Women’s Health Organization*<sup>1</sup>: there, the Court used the Due Process Clause to “protect” black people from what conservative actors have proposed is a genocide perpetrated by abortion providers.<sup>2</sup> This also partially explains *New York State Rifle & Pistol Ass’n v. Bruen*<sup>3</sup>: there, the Court used the Second Amendment to “protect” black people from what conservative actors have proposed is a racist disarmament that began in the Reconstruction Era South.<sup>4</sup> This Foreword intends to alert race scholars that they will not fully comprehend the Court’s grasp of race and racism if they focus solely on equal protection cases, or voting rights cases, or criminal procedure cases. Not only is the Court invoking race across these domains, it is invoking race outside of these domains as well. This Foreword endeavors to map the Court’s understanding of racism more fully, showing connections and disconnections — consistency and contradiction — across otherwise-siloed areas of constitutional law.<sup>5</sup>

While the Justices who have authored the Court’s recent race cases likely would deny that they have a theory of racism that informs their practice of identifying what is and is not racism, they most certainly do.

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<sup>1</sup> 142 S. Ct. 2228 (2022).

<sup>2</sup> See *id.* at 2256 n.41.

<sup>3</sup> 142 S. Ct. 2111 (2022).

<sup>4</sup> See *id.* at 2151.

<sup>5</sup> In this way, this Foreword is engaged in mapping what Professor Russell Robinson calls “*doctrinal intersectionality*,” which he defines as “juxtaposing doctrinal domains that are often thought of as distinct in search of new insights and frameworks.” Russell K. Robinson, *Justice Kennedy’s White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1030 (2019). This enterprise “[p]lac[es] cases from different silos in conversation with each other [to] make visible broader projects that a Justice or coalition of Justices may pursue without naming the project as such.” *Id.*

A theory lies beneath the Roberts Court's racial common sense. It is theory masquerading as no-theory.

First, racism was much more complicated in the pre-Civil Rights Era than the racial theory that the Roberts Court embraces. That is, the Roberts Court's theory of racism is partial. It is incomplete. It is true that racial hierarchy in the pre-Civil Rights Era was sustained through overt bigotry as well as facially race-neutral laws that either were intended to harm people of color or were applied in a discriminatory manner. However, racial hierarchy was also sustained through facially race-neutral laws and policies that neither had an underlying discriminatory intent nor were discriminatorily applied. As Professor Katie Eyer has recently explained, during the pre-Civil Rights Era, racial segregation in the North certainly was accomplished through "nominally 'colorblind' Jim Crow policies, which were intended to (and did) instantiate segregation and discrimination."<sup>6</sup> But it was also produced through "truly 'de facto'" processes.<sup>7</sup> Some portion of racial segregation in the North was achieved "without purposefully racial state intervention."<sup>8</sup> Thus, if the Roberts Court is willing to remedy contemporary racial injuries when they recall pre-Civil Rights Era racism, and if racial inequality in the pre-Civil Rights Era was effectuated through facially race-neutral laws that were not intended to produce and reproduce racial hierarchy (alongside other more invidiously motivated devices and processes), then the Roberts Court should be willing to remedy contemporary racial injuries generated through facially race-neutral laws and policies that are not designed to reconstitute racial inequality. In other words, the Roberts Court should be keen to strike down, or at least be skeptical of, all laws that have a harmful disparate impact on

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<sup>6</sup> Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1038 (2019) (reviewing ELIZABETH GILLESPIE MCRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* (2018); JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY* (2018)).

<sup>7</sup> *Id.* at 1037.

<sup>8</sup> *Id.* An example might be helpful. Imagine a school whose student body is all white because the neighborhood from which it draws its student body is all white. Further, imagine that the neighborhood is all white because the housing is expensive, and people of color, whose inherited racial disadvantage has left them immiserated, cannot afford to purchase homes in the neighborhood. In this example, the school would be segregated by "truly 'de facto'" processes — "without purposefully racial state intervention." *Id.* Some portion of Northern segregation was the result of processes like these. Of course, the other portion of Northern segregation was the result of the more familiar "nominally 'colorblind'" laws and policies that were designed to generate segregation. *Id.* at 1038; see also Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 121 (2018) ("Thinkers of race have told a historical narrative in which the nation used to have a problem with individualist discrimination until the Civil Rights Movement and the civil rights revolution happened; now we have a problem with institutional discrimination. . . . [I]t might be useful [for race scholars] to demonstrate the simultaneity of individualist and structural discrimination in the pre-civil rights past.").

people of color without regard to whether there is evidence that an intent to harm motivated the law. The Roberts Court, of course, is not. In this way, the Roberts Court's theory of pre-Civil Rights Era racism is abridged. Perhaps even more than being abridged, the Roberts Court's theory of pre-Civil Rights Era racism is convenient.

Second, the Roberts Court invites observers to believe that it is engaged in a perfectly objective, atheoretical inquiry into whether a claim of racial discrimination “looks like” what happened in the pre-Civil Rights Era. However, the Roberts Court's methodology of finding racism by looking for resemblances between the alleged contemporary discrimination and what they did in the bad old days is a value-laden, interpretive exercise. The determination that something “looks like” something else is not at all obvious, and it is not at all value neutral. To a lot of observers, the Muslim travel ban looked like the Japanese exclusion order.<sup>9</sup> To a lot of observers, voter identification requirements, the closure of polling places, and limitations on early voting look like literacy tests, poll taxes, and the necessity of providing certificates of good moral standing in order to cast a ballot.<sup>10</sup> The Roberts Court, however, has refused to see — or more likely, refused to acknowledge — the resemblance in both contexts. Further, while the Court searches for similarity between the racial injuries for which contemporary nonwhite claimants seek relief and the racial injuries that nonwhite people endured during the pre-Civil Rights Era, it is not at all consistent about the level of specificity at which its analysis is operating. In the context of voting, the Court's analysis operates at a painfully high degree of specificity: while voting restrictions were certainly techniques that actors used during the pre-Civil Rights Era to injure people of color, the specific use of voter identification laws, for example, was not. Hence, the Roberts Court sees no racial injury in present-day voter identification laws that it is willing to remedy. Meanwhile, in the context of abortion, the Court's analysis operates at an astronomically high level of generality: to the Roberts Court, the elevated rates of abortion among black people look like a genocide.<sup>11</sup> A more granular analysis, of course, would reveal no relevant likeness between present-day practices of abortion and genocide. Nevertheless, the Court saw a racial injury that it gladly remedied through its decision in *Dobbs*.<sup>12</sup> In short, the Court

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<sup>9</sup> See, e.g., Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019).

<sup>10</sup> See, e.g., Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 66 (2020).

<sup>11</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022) (referencing Justice Thomas's concurrence in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019) (per curiam)); see also *Box*, 139 S. Ct. at 1782–84 (Thomas, J., concurring) (“The use of abortion to achieve eugenic goals is not merely hypothetical.” *Id.* at 1783.).

<sup>12</sup> See *Dobbs*, 142 S. Ct. at 2256 n.41 (“A highly disproportionate percentage of aborted fetuses are Black.”).

toggles back and forth in the level of generality that it applies in assessments of whether a contemporary injury “looks like” a pre-Civil Rights Era injury — further proof that the Court strategically deploys its racial theory to accomplish particular ends.

We add a layer of complexity when we consider the Court’s understanding of white claimants’ allegations of racial discrimination. When white claimants allege racial discrimination, the Court does not look for resemblances to what happened in the pre-Civil Rights Era. The Court is willing to recognize racism against white people even when the technique of the alleged racial disenfranchisement is thoroughly modern — having no apparent antecedent in the bad old days of the nation’s formal racial caste system.<sup>13</sup> Of course, the Court may say that the racial injuries that white claimants allege, and for which the Court is willing to provide relief, mirror the racism that occurred during the pre-Civil Rights Era. We see this in the affirmative action context: in the Court’s next Term, a conservative majority is likely to say that affirmative action programs keep white and Asian students out of competitive colleges and universities in a way that is indistinguishable from Alabama Governor George Wallace standing in front of the schoolhouse door and keeping black students out of white schools.<sup>14</sup> The discovery of a resemblance is a matter of interpretation, after all.

But other areas of law — namely, the Roberts Court’s approach to disparate impact doctrine — make it apparent that when it comes to white claimants, the Court is not wedded to eliminating racial discrimination only when the Court believes that the technique of racial disenfranchisement harkens back to what bad actors did in the bad old days. In the disparate impact context — as in the context of affirmative action — the Court demonstrates a special sensitivity to the feelings, expectations, and experiences of white people.<sup>15</sup> That is, the Court finds racism when white people *feel like* they have been victims of racism, effectively exempting white claimants from having to show similarity

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<sup>13</sup> In a sense, this is unsurprising. Save for certain groups of white people whose whiteness was in question, racism against white people in the pre-Civil Rights Era did not exist. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995) (chronicling the racialization of Irish people from nonwhite to marginally white to fully white). White people were the racially dominant group during this time, after all. If the Court required contemporary white claimants to show that their racial injuries resemble pre-Civil Rights Era racism *against white people*, there would never be relief because, again, racism against white people in the pre-Civil Rights Era did not exist. Accordingly, the Court may have to look beyond the pre-Civil Rights Era to be able to provide relief to aggrieved white claimants alleging a racial injury.

That said, in the interest of equity, the Court might require contemporary white claimants to allege an injury that recalls pre-Civil Rights Era racism *against people of color*. In the alternative, it might follow the approach it has taken with respect to white claimants and release claimants of color from the requirement of alleging an injury that recalls pre-Civil Rights Era racism. It has chosen neither of these options, instead maintaining divergent requirements for white and nonwhite claimants.

<sup>14</sup> See *infra* section IV.A, pp. 133–53.

<sup>15</sup> See *infra* section IV.B, pp. 154–67.

between their alleged injuries and the injuries inflicted during the pre-Civil Rights Era. When one considers this in light of the Court's willingness to remedy nonwhite claimants' racial injuries only when they bring to mind the pre-Civil Rights Era — and when one considers that the Court has never thought nonwhite people's feeling that they have been victims of racism answered the question of whether they have experienced a constitutionally relevant injury — one sees the depth of the inequality found in the Roberts Court's jurisprudence.

We might be tempted to explain this disjuncture — with the Court being loath to provide remedies for nonwhite people unless their injuries remind the Court of pre-Civil Rights Era racism, but simultaneously being amenable to providing remedies for white people's altogether “new” racial injuries — in terms of the Court's equal protection jurisprudence and its dissimilar treatment of laws that contain an explicit racial classification versus facially race-neutral laws that have a disparate racial impact.<sup>16</sup> However, equal protection doctrine can only partially account for the disconnection that this Foreword observes.

To explain: the Court has long interpreted the Equal Protection Clause to require deference from the judiciary when it reviews facially race-neutral laws that have a disparate negative impact on a racial group.<sup>17</sup> Absent a showing that the law was passed with a discriminatory intent — that the lawmaker passed the law “at least in part ‘because of,’ not merely ‘in spite of’”<sup>18</sup> the disparate impact that it will have — courts must use deferential rational basis review when an aggrieved party challenges the law.<sup>19</sup> The result of this doctrine is to remove from the purview of constitutional remedy facially race-neutral laws and processes that reproduce racial hierarchies that were established during the

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<sup>16</sup> See Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 2–3 (2013) (“When minorities challenge laws of general application[,] . . . plaintiffs must show that government acted for a discriminatory purpose, a standard that doctrine has made extraordinarily difficult to satisfy. . . . By contrast, when members of majority groups challenge state action that classifies by race[,] . . . plaintiffs do not need to demonstrate, as a predicate for judicial intervention, that government has acted for an illegitimate purpose.”); IAN HANEY LÓPEZ, DOG WHISTLE POLITICS 87 (2014) [hereinafter HANEY LÓPEZ, DOG WHISTLE POLITICS] (explaining that the Court's equal protection doctrine has coalesced to “condemn all corrective uses of race, but [to be] blind to racial discrimination against minorities”); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1828–33 (2012) [hereinafter Haney-López, *Intentional Blindness*] (explaining how the Court's equal protection doctrine has become bifurcated into an extremely strict domain that governs affirmative action and an extremely permissive domain that governs discrimination against nonwhite people); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 86–87 (2019) (“[T]he Court has imposed a high burden of proof on government efforts to redress historical racism, requiring that the government prove a compelling interest in order to defeat plaintiffs' claims. . . . By contrast, the Supreme Court has required that victims of state segregation, profiling, or punishment on the basis of race prove discriminatory government purpose — in other words, shifting the burden of proof onto the plaintiffs of color.”).

<sup>17</sup> See *Washington v. Davis*, 426 U.S. 229, 247–48 (1976).

<sup>18</sup> *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>19</sup> *Id.* at 272.

period of formal racial inequality.<sup>20</sup> This jurisprudence makes it extremely likely that nonwhite claimants seeking a judicial reprieve from a racially burdensome law will lose.<sup>21</sup>

At the same time, the Court has established that it will review with strict scrutiny any law that contains a racial classification on its face — even when that law was passed with “benign” motives and has racially equitable ends.<sup>22</sup> Thus, the judiciary approaches laws that are intended to dismantle the nation’s racial hierarchy with the same degree of constitutional skepticism as it does laws that are designed to reproduce and protect it.<sup>23</sup> Consequently, facially race-conscious affirmative action laws that may unsettle white people’s racial advantages in hiring and college admissions are deemed constitutionally suspect and are much more likely to be struck down.<sup>24</sup> This jurisprudence increases the likelihood that white claimants seeking a judicial reprieve from a law that they experience as racially burdensome will win.<sup>25</sup>

However, this equal protection jurisprudence cannot entirely explain the phenomenon this Foreword observes, whereby the Court provides redress for nonwhite people’s racial injuries only when those injuries remind the Court of the bad old days of formal white supremacy while refusing to require the same of white claimants.<sup>26</sup> First, as this Foreword demonstrates, the Court has not cabined to the Equal Protection Clause its demand that nonwhite people demonstrate that “old-school” racism is at work. Rather, this Foreword shows that the Court stands willing to interpret various parts of the Constitution — the Second Amendment, the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment — in ways that are responsive to

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<sup>20</sup> See Haney-López, *Intentional Blindness*, *supra* note 16, at 1784.

<sup>21</sup> See *id.* (stating that parties that must show that racially burdensome, facially neutral laws were motivated by discriminatory intent “almost invariably lose”).

<sup>22</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>23</sup> In his concurrence in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), Justice Thomas described his sense that there is a “‘moral [and] constitutional equivalence’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . In each instance, it is racial discrimination, plain and simple.” *Id.* at 240–41 (Thomas, J., concurring) (alteration in original) (citations omitted) (quoting *id.* at 243 (Stevens, J., dissenting)). Scholars have contested the construction of equivalents between invidious and benign uses of race in law. See Roberts, *supra* note 16, at 79 (“It is how racial categories are used — whether to support racism or contest it — that matters to their political significance.”); Mario L. Barnes, *The More Things Change . . .: New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2090–91 (2016) (suggesting that denying that there is a difference between benign and invidious uses of race “makes those who are interested in asserting that race matters the problem” and that “[t]hose that believe in race-consciousness therefore become the new slaveholders, segregationists, and discriminators,” *id.* at 2091).

<sup>24</sup> See Roberts, *supra* note 16, at 86.

<sup>25</sup> See Haney-López, *Intentional Blindness*, *supra* note 16, at 1784 (“Plaintiffs challenging affirmative action under colorblindness virtually always win . . .”).

<sup>26</sup> See *id.* at 1789.



nonwhite people's racial injuries when they are reminiscent of the pre-Civil Rights Era. Second, if nonwhite people's racial injuries have this characteristic, the Court is willing to recognize, and provide remedies for, nonwhite people's racial injuries *even when the challenged law is facially race-neutral and was not motivated by discriminatory intent*. This is what the Court did in *Dobbs*: it reversed *Roe v. Wade*<sup>27</sup> in order to, among other things, be able to say that it saved black people from a genocide that abortion providers were perpetrating, albeit unintentionally, through facially race-neutral laws that permit abortion. This is what the Court did in *Bruen*: it struck down the facially race-neutral licensing scheme at issue in the case in order to, among other things, be able to say that it saved black people from a racist disarmament that began at the end of Reconstruction. The Court has been willing to strike down facially race-neutral laws when the Court can frame the law as having harmed people of color.

It deserves repeating that in light of the Court's development and deployment of doctrines and stratagems that allow it to leave racial stratification and subordination in the United States basically untouched, only the most naïve should believe that the Court actually sought to protect black people by deciding *Dobbs* and *Bruen* in the way that it did. The Court "protects" people of color only when it serves conservative ends. In *Dobbs* and *Bruen*, the protectionist rationale justified the reversal of *Roe* and an expansive interpretation of the Second Amendment; hence, the Court invoked it.

To be clear, from a racial justice perspective, the Roberts Court's jurisprudence is ghastly. Judicial responsiveness to nonwhite people's racial injuries only when those injuries harken back to the pre-Civil Rights Era means that nonwhite people cannot expect the courts to intervene in the race-neutral processes that do most of the heavy lifting of reproducing racial disadvantage and reiterating racial hierarchy in the post-Civil Rights Era.<sup>28</sup> Further, requiring nonwhite people's racial injuries to have a similarity to past techniques of racial disenfranchisement allows the Court to implicitly declare that racism against people of color is a thing of the past; it permits the Court to deny the existence and persistence of structural racism.<sup>29</sup> In essence, the Court's requirement that nonwhite people's racial injuries bear a resemblance to pre-

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<sup>27</sup> 410 U.S. 113 (1973).

<sup>28</sup> Scholars have made this observation when critiquing the Court's requirement that plaintiffs show that a law was motivated by discriminatory intent in order to receive heightened scrutiny under the Equal Protection Clause. See Roberts, *supra* note 16, at 85 ("[A] framing of racism . . . [that requires] biased perpetrators discriminating against individual victims . . . mischaracterize[s] how institutionalized racism . . . works to uphold the racial order."); Haney-López, *Intentional Blindness*, *supra* note 16, at 1784 (arguing that the Court's equal protection jurisprudence ignores "the obvious truth that discrimination has evolved since the civil rights era and no longer exclusively takes the form of hooded bigotry").

<sup>29</sup> See Haney-López, *Intentional Blindness*, *supra* note 16, at 1865–66.

Civil Rights Era racism is part of a scheme that allows the Court to assert that any racism against people of color that exists today is a lingering, marginal relic of a bygone period — as opposed to a phenomenon that we continually reproduce through the choices that we make about how to organize society.<sup>30</sup> Further still, judicial responsiveness to white people’s “new” racial injuries means that white people receive judicial and constitutional solicitude not afforded to nonwhite people. It also means that most explicitly race-conscious efforts to disrupt the systems and processes that have made it so that people of color are at the bottom of most measures of social well-being will not survive judicial review.<sup>31</sup>

To summarize this Foreword’s argument: the Roberts Court has adopted a contrived, “common sense” approach to what counts as racism against people of color. This approach allows the Court to maintain a small measure of legitimacy by doing the bare minimum with respect to addressing racial subordination. The Court is willing to remedy racial discrimination against people of color only when, in the Court’s view, the discrimination bears a strong likeness to the racism that was practiced during the pre-Civil Rights Era. When the Court encounters an instance of racial discrimination that bears this resemblance, it remedies the racial injury. Notably, it increasingly refuses to use the Equal Protection Clause to provide this relief, instead using other parts of the Constitution to remedy the injury. Be that as it may, the Court’s understanding of racism is woefully impoverished, and strategically so: it causes the Court to overlook devastating harms to people of color when those harms do not harken back to “old-school” racism. Further, the Court often fails to recognize discrimination against people of color that does, in fact, fit its own crabbed definition of racism. To add insult to injury, the Court does not require white claimants to allege racial injuries that remind of the pre-Civil Rights Era. Instead, it stands willing to remedy alleged racial discrimination against white claimants even when that discrimination takes more modern, more novel, more improvisatory forms.

This Foreword makes this argument in four Parts. Part I examines *Dobbs* and *Bruen*. The analysis of *Dobbs* shows that the Court failed to appreciate that the reversal of *Roe* is devastating to black people with the capacity for pregnancy.<sup>32</sup> That is, the Court refused to recognize

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<sup>30</sup> See *id.* at 1784.

<sup>31</sup> See Roberts, *supra* note 16, at 77 (“[T]he Court has applied strict scrutiny to invalidate race-based government efforts aimed at eliminating the vestiges of slavery and Jim Crow.”).

<sup>32</sup> In recognition of the fact that cis women are not the only people who can become pregnant, this Foreword uses the language of “people with the capacity for pregnancy” or similar phrases so as to avoid erasing trans men and nonbinary people from the population of people that pregnancy regulations affect. See generally Sara Prager, *Transgender Pregnancy: Moving Past Misconceptions*,

that allowing states to criminalize abortion care inflicts a racial injury on black people. The Court’s racial common sense rendered this injury invisible: through the Court’s eyes, the injury does not resemble what white supremacists did in the pre–Civil Rights Era. At the same time, conservative arguments that abortion is a form of genocide and a tool of eugenics resonated with the Roberts Court. Genocide and eugenics are classic — indeed, paradigmatic — forms of racist violence practiced during the pre–Civil Rights Era. Because the Court could see a resemblance between genocide and black people’s higher rates of abortion, the Court remedied the “injury” by reading abortion rights out of the Due Process Clause.

Similarly, the analysis of *Bruen* shows that the Court failed to appreciate that a broad interpretation of the Second Amendment that permits the proliferation of guns in public spaces will be devastating to black communities. That is, the Court refused to recognize that allowing guns to go unregulated will inflict a racial injury on black people. As in *Dobbs*, the Court’s racial common sense rendered this injury invisible: through the Court’s eyes, failure to regulate guns does not resemble what white supremacists did in the pre–Civil Rights Era. At the same time, the Court in *Bruen* perceived a racial injury in black people’s disarmament by gun regulations like those at issue in the case. The Court could see a similarity between the alleged harm those regulations inflict and the racial injury inflicted during the days of formal white supremacy, when black people were also subjected to disarmament. Because the conservative supermajority in *Bruen* perceived a parallel between the form that white supremacy took in the pre–Civil Rights Era and the harm that it believed “may issue” jurisdictions produced, it recognized the latter as racism. As such, the Court interpreted the Second Amendment to remedy this “injury.”

Part II examines several of the Court’s recent criminal procedure cases in which the Court used the Sixth Amendment to provide relief to black claimants. The sole reason for the black claimants’ success was that the Court saw resemblances between the alleged injury and the techniques of racism that were employed in the days of formal white supremacy. Indeed, the racism at issue in these cases was so closely tied to white supremacy that had the Roberts Court failed to provide relief, it might have lost whatever is left of its legitimacy.

Part III examines *Trump v. Hawaii*<sup>33</sup> and *Shelby County v. Holder*.<sup>34</sup> These cases reveal that although the Court pretends to be engaged in an objective inquiry into whether a claim of racial discrimination bears a

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HEALTHLINE (Oct. 22, 2020), <https://www.healthline.com/health/pregnancy/transgender-pregnancy-moving-past-misconceptions> [<https://perma.cc/BY7C-K3ZE>]. When referring to historical periods during which “women,” in particular, were denied rights vis-à-vis “men,” this Foreword uses the language of “women.”

<sup>33</sup> 138 S. Ct. 2392 (2018).

<sup>34</sup> 570 U.S. 529 (2013).

significant likeness to the tools that white supremacists used to sustain the nation's racial hierarchy in the pre-Civil Rights Era, the inquiry is profoundly politically motivated. Indeed, politics and the desire for an outcome that aligns with the Republican Party platform appear to overdetermine the inquiry. Reasonable observers have argued that the racial injury inflicted by the Muslim travel ban is virtually identical to the injury inflicted by the Japanese internment during World War II.<sup>35</sup> Reasonable observers have argued that the racial injury inflicted by the forced desuetude of the Voting Rights Act of 1965<sup>36</sup> preclearance apparatus and the subsequent proliferation of techniques that make it difficult for unprivileged people to vote are virtually identical to the injury inflicted by the "tests and devices" that white supremacists once deployed to disenfranchise black people.<sup>37</sup> Yet the Court has been unwilling to acknowledge the likeness.

To illustrate the contrast between what the Court requires of nonwhite and white claimants, Part IV analyzes two racial injuries that white claimants have alleged: affirmative action and disparate impact liability. This analysis reveals that the Court will provide relief to white claimants even when they have not alleged an injury that bears a resemblance to racial disenfranchisement during the pre-Civil Rights Era. The Court is willing to redress their racial injuries even when they have no apparent historical antecedent. A brief conclusion follows.

## I. RACE IN THE ROBERTS COURT'S OCTOBER 2021 TERM: UNCOVERING RACIST ANACHRONISMS

### A. *Dobbs v. Jackson Women's Health Organization*

In *Dobbs v. Jackson Women's Health Organization*, the Court upheld Mississippi's ban on abortions after fifteen weeks of pregnancy and, in the process, overturned *Roe v. Wade*.<sup>38</sup> Justice Alito, writing for a five-

<sup>35</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting); Katyal, *supra* note 9, at 644.

<sup>36</sup> Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301).

<sup>37</sup> See, e.g., Klarman, *supra* note 10; Jamelle Bouie, Opinion, *If It's Not Jim Crow, What Is It?*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/opinion/georgia-voting-law.html> [<https://perma.cc/BF6H-UBY8>]; Gillian Brockell, *Some Call Voting Restrictions Upheld by Supreme Court 'Jim Crow 2.0.' Here's the Ugly History Behind That Phrase.*, WASH. POST (July 2, 2021, 7:00 AM), <https://www.washingtonpost.com/history/2021/07/02/jim-crow-voting-restrictions-supreme-court/> [<https://perma.cc/RW6T-BMZP>].

<sup>38</sup> 142 S. Ct. 2228, 2284–85 (2022). In their petition for certiorari, petitioners asked the Court to overrule *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), only to the extent that those decisions prohibited states from banning abortion prior to viability. Petition for Writ of Certiorari at i, 15, *Dobbs* (No. 19-1392). However, in their brief on the merits, petitioners asked the Court to reverse *Roe* altogether. Brief for Petitioners at 1, *Dobbs* (No. 19-1392). We can explain the evolution of the petitioners' request from an evisceration of *Roe* (through an elimination of the viability line) to the eradication of *Roe* (through its reversal) in terms of a

person majority, argued that *Roe* was “egregiously wrong” and as such, the Court was not bound by stare decisis to respect it as precedent.<sup>39</sup> Chief Justice Roberts concurred in the judgment, contending that the Court should go no further than to discard the viability line and permit states to proscribe abortion at the moment that the pregnant person has had a “reasonable opportunity”<sup>40</sup> to terminate the pregnancy — which, in Chief Justice Roberts’s view, occurs by the fifteenth week of pregnancy in nonexceptional cases.<sup>41</sup>

*Dobbs* declared that *Roe* erred when it interpreted the Fourteenth Amendment’s Due Process Clause to protect a right to terminate a pre-viability pregnancy insofar as that clause protects only rights that are “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”<sup>42</sup> For the *Dobbs* majority, the country’s laws in 1868 — the year that the Fourteenth Amendment was ratified — determine whether abortion rights can be so characterized.<sup>43</sup> After canvassing abortion regulations in and around 1868,<sup>44</sup> the majority concluded that abortion rights are not part of the nation’s “history and tradition,”<sup>45</sup> as “[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.”<sup>46</sup>

The painfully obvious point to make is that people with the capacity for pregnancy were not part of the body politic during the period of the nation’s history that the majority believes is decisive of the constitutional inquiry. Women could not vote in the country for another half-century after 1868.<sup>47</sup> As Justices Breyer, Sotomayor, and Kagan explained in their dissent:

“[P]eople” did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women’s liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers — both

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change in the Court’s personnel: in the time separating the filing of the petition for certiorari and the filing of the brief on the merits, Justice Ginsburg had died, and the Senate had confirmed Justice Barrett as her replacement. See *Justice Ruth Bader Ginsburg Passes, Justice Amy Coney Barrett Seated as Replacement*, AM. BAR ASS’N (Jan. 25, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court) [<https://perma.cc/ZV6Z-RKMT>] (noting Justice Ginsburg’s death on September 18, 2020 and Justice Barrett’s confirmation on October 26, 2020).

<sup>39</sup> *Dobbs*, 142 S. Ct. at 2243.

<sup>40</sup> *Id.* at 2310–11 (Roberts, C.J., concurring in the judgment).

<sup>41</sup> See *id.*

<sup>42</sup> *Id.* at 2242 (majority opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

<sup>43</sup> See *id.* at 2252–53.

<sup>44</sup> *Id.* (observing that “[b]y 1868 . . . 28 out of 37 [states] had enacted statutes making abortion a crime even if it was performed before quickening”).

<sup>45</sup> *Id.* at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

<sup>46</sup> *Id.* at 2242–43.

<sup>47</sup> See U.S. CONST. amend. XIX.

in 1868 and when the original Constitution was approved in 1788 — did not understand women as full members of the community embraced by the phrase “We the People.”<sup>48</sup>

Because women could not participate in the democratic process, one could reasonably assume that their interests were not reflected in *any* of the nation’s laws, including the criminal laws that the *Dobbs* majority read as foreclosing a constitutional right to terminate a pregnancy. Thus, the majority’s choice to privilege the year 1868 and to attempt to divine the meaning of the Constitution by looking at the nation’s practices during that time is a choice to privilege an era characterized by the formal exclusion of women and people capable of pregnancy.

This is not to argue that had women enjoyed full citizenship at the time that the Fourteenth Amendment was ratified, abortion would have been perfectly legal in every state. (Perhaps this is why the majority observed that criminal abortion laws remained on the books for “‘another half-century’ after women gained the constitutional right to vote in 1920”<sup>49</sup> and that “more than half of the States [today] have asked us to overrule *Roe* and *Casey*.”<sup>50</sup> The point may be that state governments have criminalized, or wanted to criminalize, abortion even when women were able to participate in the political processes that generated those governments.) In fact, it is likely true that only a minority of people during the mid-nineteenth century rejected traditional gender norms<sup>51</sup> — norms that, at least with respect to white people,<sup>52</sup> proclaimed that every person with a uterus was a woman, all women ought

<sup>48</sup> *Dobbs*, 142 S. Ct. at 2324–25 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>49</sup> *Id.* at 2260 (majority opinion) (quoting *id.* at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting)).

<sup>50</sup> *Id.*

<sup>51</sup> Nevertheless, we ought to recognize that there were, indeed, people who rejected traditional gender norms during this time. See Reva Siegel, *The Trump Court Limited Women’s Rights Using 19th-Century Standards*, WASH. POST (June 25, 2022, 3:12 PM), <https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards> [https://perma.cc/TP4M-CDUK] (observing that there is “plenty of evidence that Americans in the 19th century demanded autonomy in decisions about parenthood” and stating that “[t]hese demands were passionately expressed in the abolitionist and woman’s suffrage movements”).

<sup>52</sup> See, e.g., ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 5–7 (1983) (“[T]he slave woman was first a full-time worker for her owner, and only incidentally a wife, mother and homemaker.” *Id.* at 5 (quoting KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 343 (1956))); *id.* at 6–7 (“[A] premium was placed on the slave woman’s reproductive capacity . . . [but] [t]his did not mean, however, that as mothers, Black women enjoyed a more respected status than they enjoyed as workers. Ideological exaltation of motherhood — as popular as it was during the nineteenth century — did not extend to slaves.”); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 54 (2000) (“African-American women who were the wives and daughters of able-bodied men often withdrew from both field labor and domestic service in order to concentrate on domestic duties in their own homes. In doing so they were ‘severely criticized by whites for removing themselves from field labor because they were seen to be aspiring to a model of womanhood that was inappropriate to them.’” (quoting Bonnie Thornton Dill, *Our Mothers’ Grief: Racial Ethnic Women and the Maintenance of Families*, 13 J. FAM. HIST. 415, 422

to be wives, and all wives ought to be mothers.<sup>53</sup> Because many, if not most, women during this period subscribed to a narrative about sex and gender that tenaciously linked womanhood and motherhood, it is likely true that criminal abortion laws — which doggedly insist upon yoking womanhood and motherhood — would have been on the books in many states even if women had been able to vote for those who passed the laws.<sup>54</sup>

It remains true, though, that the decision to privilege the nation’s “history and tradition” in 1868, when women did not enjoy full citizenship, *guarantees* a finding that the Constitution does not protect abortion rights.<sup>55</sup> When one settles on 1868 as the relevant year for the purpose of interpreting what the Constitution requires vis-à-vis people with the capacity for pregnancy, one has overdetermined the inquiry. Indeed, a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read the Constitution as silent on abortion rights.

It is worth emphasizing that Justice Alito (and four other Justices) *decided* to privilege the year 1868 when interpreting the Constitution with respect to abortion rights. Justice Alito could have decided not to engage in a historical inquiry at all. He has done it before. In his dissent in *Fisher v. University of Texas at Austin (Fisher II)*,<sup>56</sup> in which the Court upheld the constitutionality of the school’s facially race-conscious admissions program, Justice Alito (and Chief Justice Roberts and Justice Thomas, who joined the dissenting opinion) did not look to what was happening in the country in 1868 to divine the meaning of the Equal

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(1988)); DOROTHY ROBERTS, *KILLING THE BLACK BODY* 10 (1997) (“From the moment they set foot in this country as slaves, Black women have fallen outside the American ideal of womanhood. . . . The nineteenth-century image of the True Woman was delicate, refined, and chaste . . . precisely the opposite of those [attributes] that characterized Black women.”); *id.* at 8 (“For three centuries, Black mothers have been thought to pass down to their offspring the traits that marked them as inferior to any white person. . . . A popular mythology that portrays Black women as unfit to be mothers has left a lasting impression on the American psyche.”).

<sup>53</sup> See ROBERTS, *supra* note 52, at 10 (“[T]he True Woman . . . was perfectly suited to the home, where she served as mother and wife.”).

<sup>54</sup> Justices Breyer, Sotomayor, and Kagan acknowledged this reality in their dissent. See *Dobbs*, 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy.”).

<sup>55</sup> However, it might concede too much to state that privileging the nation’s history and tradition in 1868 guarantees a finding that the Constitution does not protect abortion rights. For an argument that looking to “history and tradition” does not overdetermine the constitutional inquiry, see Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 49) (on file with the Harvard Law School Library) (arguing that the “history-and-traditions” standard is “standardless” and “the kind of law that a Court made to change law makes to change law,” and contending that “the *Dobbs* case offers no criteria for choosing which laws constitute a relevant history and tradition in the next case, allowing the decision maker to do as the *Dobbs* Court did in this case — to look out over a crowd and pick friends”).

<sup>56</sup> 136 S. Ct. 2198 (2016).

Protection Clause and to determine whether affirmative action programs are consistent with it.<sup>57</sup> In fact, the opinion engaged in no investigation of history whatsoever. As Justice Alito made a choice to eschew a historical inquiry in the context of affirmative action — likely because that inquiry would lead to results that he does not like — Justice Alito made a choice to embrace a historical inquiry in the context of abortion. This is true because the inquiry led him to the outcome — the reversal of *Roe* — that he so desperately wanted.

The method of constitutional interpretation that the *Dobbs* majority chose to employ — interpreting the Constitution to protect only those behaviors and practices that were protected in 1868 — does not bode well for the persistence of other fundamental rights that earlier iterations of the Court have found in the Due Process Clause. As the dissent put it, “[t]he majority could write just as long an opinion showing, for example, that until the mid-20th century, ‘there was no support in American law for a constitutional right to obtain [contraceptives].’”<sup>58</sup> Likewise, in 1868, there was no support in American law for a constitutional right to engage in consensual sex with an adult of the same sex, or a constitutional right to marry someone of the same sex. Thus, the *Dobbs* majority’s protestations that its holding does not unsettle *Griswold v. Connecticut*,<sup>59</sup> *Lawrence v. Texas*,<sup>60</sup> and *Obergefell v. Hodges*<sup>61</sup> — as those precedents do not involve the destruction of fetal life — ring a bit hollow.<sup>62</sup> The methodology of constitutional interpretation that the majority deployed to return the question of abortion’s legality to the states could just as easily be deployed to do the same with regard to the legality of contraception, same-sex sex, and same-sex marriage.<sup>63</sup> One could make the same point about the right to be free from

<sup>57</sup> See *id.* at 2215 (Alito, J., dissenting).

<sup>58</sup> *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting) (second alteration in original) (quoting *id.* at 2248 (majority opinion)).

<sup>59</sup> 381 U.S. 479 (1965).

<sup>60</sup> 539 U.S. 558 (2003).

<sup>61</sup> 135 S. Ct. 2584 (2015).

<sup>62</sup> *Dobbs*, 142 S. Ct. at 2257–58 (claiming that the reversal of *Roe* “does not undermine” the substantive due process cases — including *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding a fundamental right to parent one’s child in the manner that one sees fit), *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (finding a fundamental right for the married individual to access contraception), *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding a fundamental right for the unmarried individual to access contraception), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (suggesting the existence of a fundamental right to be free from compelled sterilization) — on which *Roe* relied); *id.* at 2261 (accusing the dissent of “stok[ing] unfounded fear that our decision will imperil” *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*); *id.* at 2277–78 (“[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

<sup>63</sup> Justice Thomas’s concurrence, which continues Justice Thomas’s practice of heavily citing his own prior opinions, pointedly called for the reversal of all the Court’s substantive due process precedents. *Id.* at 2304 (Thomas, J., concurring) (arguing for the elimination of substantive due process “from our jurisprudence at the earliest opportunity”).



coerced sterilization;<sup>64</sup> indeed, when asked the question in 1927, the Court did not believe the Constitution protected such a right.<sup>65</sup>

The majority opinion in *Dobbs* is not the first to interrogate history. The majority opinion in *Roe* — which seven Justices joined — engaged in an in-depth, lengthy investigation into the history of thought around fetal life and abortion practices, ultimately finding that this history supports the existence of a fundamental right to terminate a previability pregnancy.<sup>66</sup> Likewise, the *Dobbs* dissent observed that abortion was legal long after the Founding (for people who were not enslaved), at least until the middle of the second trimester.<sup>67</sup> States did not pass the Victorian Era criminal laws that Justice Alito cited until the nineteenth century.<sup>68</sup> The *Dobbs* majority, however, argued that the *Roe* majority got the history wrong.<sup>69</sup> According to the *Dobbs* majority, the *Dobbs* dissenters also got the history wrong.<sup>70</sup> (The brief filed by historians got the history wrong, too, in the majority’s estimation.<sup>71</sup>) The existence of other perfectly plausible histories of abortion suggests that the *Dobbs* majority’s decision to elevate as right and true the historical account that it provides in its opinion is not the apolitical exercise that the majority pretends it to be. Instead, it is an exercise that is fraught with values, convictions, preferences, and, perhaps most of all, power.

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<sup>64</sup> See *Skinner*, 316 U.S. at 541–42.

<sup>65</sup> See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>66</sup> See *Roe v. Wade*, 410 U.S. 113, 129–52 (1973).

<sup>67</sup> See *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“[E]mbarrassingly for the majority[,] early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before ‘quickening’ — the point when the fetus moved in the womb. And early American law followed the common-law rule.” (footnotes omitted)); see also Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 3, *Dobbs* (No. 19-1392) [hereinafter Brief for American Historical Association] (noting that “stricter statutes [were] enacted in the 1840s to 1850s,” long after the American founding); JAMES C. MOHR, ABORTION IN AMERICA 73 (1978) (“To document fully the pervasiveness of the quickening doctrine in the United States through the 1870s would take scores, if not hundreds, of pages of references. It was simply a fact of American life.”). As one court put it in 1849: “It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. *In contemplation of law* life commences at the moment of quickening,” for there is “no precedent, no authority” for treating “the mere procuring of an abortion by the destruction of a *foetus* unquickened, as a crime against the person or against God and religion.” *State v. Cooper*, 22 N.J.L. 52, 54–55 (N.J. 1849).

<sup>68</sup> See *Dobbs*, 142 S. Ct. at 2248 (“American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions.”).

<sup>69</sup> *Id.* at 2240, 2249.

<sup>70</sup> See *id.* at 2259–60.

<sup>71</sup> See *id.* at 2253 n.34 (“The *amicus* brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but the brief incorrectly excludes West Virginia and Nebraska from its count.”); *id.* at 2255 (dismissing the argument made in the *amicus* brief for the American Historical Association that abortion regulations during the nineteenth century were, in part, a product of a “fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to ‘shir[k their] maternal duties’” (alteration in original) (quoting Brief for American Historical Association, *supra* note 67, at 20)).

Another notable aspect of the majority opinion, unrelated to its treatment of history, is that it professed to embrace no “theory of life.”<sup>72</sup> The majority said that one of the many errors that the *Roe* majority and the *Dobbs* dissenters made is that they, quite illegitimately, adopted the theory that the fetus is not a life.<sup>73</sup> The *Dobbs* majority averred that it will not replicate that error, taking no side on the question of when life begins. Instead, it will return the question to the states, permitting states the latitude to enshrine one view or the other in their criminal and civil laws.<sup>74</sup> A couple of things are worth mentioning on this point.

First, the language that the majority opinion used suggests that the Justices who signed onto it have some views about when life begins. While not at all as gratuitous as other opinions in which Justices have expressed disdain for abortion,<sup>75</sup> the *Dobbs* majority opinion employed the language of those who believe themselves to be champions of fetal life. There are references to “abortionists” in both the syllabus and the majority opinion.<sup>76</sup> There is a brief, but graphic, description of the dilation and evacuation abortion procedure.<sup>77</sup> There are lots of mentions of “wombs” (and no mentions of “uteruses”).<sup>78</sup> There are numerous citations to “unborn human being[s].”<sup>79</sup> Certainly, the opinion does not read as perfectly agnostic on the question of when life begins.<sup>80</sup>

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<sup>72</sup> *Id.* at 2261 (quoting *id.* at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting)) (“Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.”).

<sup>73</sup> *Id.* (arguing that the dissent would “impose on the people” the theory that the fetus lacks “even the most basic human right — to live — at least until an arbitrary point in a pregnancy has passed”).

<sup>74</sup> *Id.* at 2279.

<sup>75</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 135–40 (2007) (describing the dilation and extraction abortion procedure in great detail); *id.* at 144 (referring to obstetricians who provide abortion care as “abortion doctors”); *id.* at 147 (referring to a uterus as a “womb”); *id.* at 160 (referring to people who have terminated their pregnancies as “mothers” and to a fetus as an “unborn child”).

<sup>76</sup> *Dobbs*, 142 S. Ct. at 2236 (syllabus); *id.* at 2250, 2254 (majority opinion).

<sup>77</sup> *Id.* at 2244 (quoting MISS. CODE ANN. § 2(b)(i)(8)).

<sup>78</sup> *Id.* at 2241–44, 2249, 2251, 2268, 2270, 2281.

<sup>79</sup> *Id.* at 2234, 2236, 2243–44, 2257–58, 2284.

<sup>80</sup> Of course, some of the Justices’ personal views on when life begins are well known. See Josh Salman & Kevin McCoy, *Supreme Court Nominee Amy Barrett Signed Anti-Abortion Letter Accompanying Ad Calling to Overturn Roe v. Wade*, USA TODAY (Oct. 1, 2020, 7:51 PM), <https://www.usatoday.com/story/news/2020/10/01/amy-barrett-signed-anti-abortion-letter-alongside-anti-roe-v-wade-ad/5880595002> [<https://perma.cc/W3N8-2WYG>] (“Barrett was among hundreds who signed an anti-abortion letter that accompanied a January 2006 newspaper ad calling for ‘an end to the barbaric legacy of Roe v. Wade.’ . . . Barrett and her husband Jesse’s names appear under the message, ‘We, the following citizens . . . oppose abortion on demand and defend the right to life from fertilization to natural death.’”); Peter Smith, *Anti-Roe Justices a Part of Catholicism’s Conservative Wing*, AP NEWS (June 30, 2022), <https://apnews.com/article/abortion-supreme-court-catholic-ee063f7803eb354b4784289ce67037b4> [<https://perma.cc/HCB5-9JNM>] (noting that Justices Alito, Thomas, Gorsuch, Kavanaugh, and Barret voted to overturn *Roe* and that all five Justices — as well as Chief Justice Roberts, who balked at overturning *Roe* but voted to uphold the abortion restriction anyway — were raised Catholic, and that “[f]ive of the six justices still identify as Catholic”).

Second, while the opinion may not overtly embrace a theory of life, it is not atheoretical. That is, it certainly has a theory. And this theory is that pregnant people's plans, desires, dreams, ambitions, aspirations, and prayers are not more significant than fetal life.<sup>81</sup> This theory is that pregnant people can be subordinated to the fetuses that they carry.<sup>82</sup> This is not the absence of a theory. This is not an example of the Court being "scrupulously neutral."<sup>83</sup> There is no neutral position. The Court has taken a side.<sup>84</sup> It has sided with those who believe that it is legitimate to force birth.

It deserves emphasizing that with *Dobbs*, the Court has not at all "g[otten] out of [the] area" of abortion.<sup>85</sup> It will be adjudicating disputes about the legality of abortion regulations for quite some time. *Dobbs* declared that the proper standard for reviewing abortion regulations is rational basis review and that courts should ask whether a challenged regulation is rationally related to a legitimate governmental interest.<sup>86</sup> Reasonable people have questions:

Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality? . . . Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions?<sup>87</sup>

This list is not exhaustive. Do abortion regulations that make no exception for survivors of rape and incest satisfy rational basis review? If abortion regulations must make exceptions for the pregnant person's

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<sup>81</sup> See *Dobbs*, 142 S. Ct. at 2261 ("The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life.")

<sup>82</sup> The *Dobbs* dissenters would phrase the majority's theory in terms of the rightlessness of women. *Id.* at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that the majority proposes that "from the very moment of fertilization, a woman has no rights to speak of").

<sup>83</sup> *Id.* at 2305, 2310 (Kavanaugh, J., concurring).

<sup>84</sup> *Id.* at 2328 (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that with the *Dobbs* decision, the Court is "taking sides[] against women who wish to exercise the right, and for States . . . that want to bar them from doing so").

<sup>85</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the Court should overrule *Roe* because "[w]e should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining").

<sup>86</sup> *Dobbs*, 142 S. Ct. at 2283.

<sup>87</sup> *Id.* at 2336–37 (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4032931> [<https://perma.cc/4DK5-VP6K>]).

health to satisfy rational basis review, does mental health count? What if the mental health crisis that the pregnant person faces jeopardizes their physical health, that is, they may become suicidal? If a person's religious beliefs counsel that they should undergo an abortion, do abortion restrictions violate their First Amendment rights?<sup>88</sup> On the question of whether states can prohibit persons from traveling to states where abortion is legal, Justice Kavanaugh said that he would answer that question in the negative "based on the constitutional right to interstate travel";<sup>89</sup> but do four other Justices agree with him?<sup>90</sup> Can states that have criminalized abortion prohibit out-of-state physicians from prescribing misoprostol and mifepristone to their residents?<sup>91</sup> Does federal law preempt state law in this context?<sup>92</sup> Can the federal government lease federal land to abortion providers within the borders of states that have criminalized abortion, and, if so, are the state's criminal abortion laws inapplicable to those abortion providers?<sup>93</sup> The legal questions that *Dobbs* leaves open are numerous. As long as the practice of abortion exists, the Court will be in the business of adjudicating disputes about its regulation. *Dobbs* simply ushers in the next stage of adjudication.

*I. Eulogy for Roe.* — There should be no doubt that the demise of *Roe v. Wade* inflicts a racial injury — albeit one that, in the Court's view, does not recall the pre-Civil Rights Era and, as a consequence, is unrecognizable as an injury within the Court's results-oriented approach to identifying racism against people of color. As a eulogy to *Roe*, this section describes the source and shape of this racial injury with precision.

Black people turn to abortion care more frequently than other racial groups.<sup>94</sup> Indeed, black people's abortion rates are three to four times white people's rates.<sup>95</sup> This is a direct result of black people's higher

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<sup>88</sup> The district court in *Harris v. McRae*, 448 U.S. 297 (1980), thought so. See *McRae v. Califano*, 491 F. Supp. 630, 742 (E.D.N.Y. 1980).

<sup>89</sup> *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

<sup>90</sup> The answer to this question is likely yes, in large part because the Court decided *Saenz v. Roe*, 526 U.S. 489 (1999), which recognized a fundamental right to travel, under the Privileges or Immunities Clause. *Id.* at 498, 501. Thus, *Saenz* is a decision that even Justice Thomas, who has been the most outspoken about his antipathy towards substantive due process, can support. See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring); see also *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) (stating his belief that the Court ought to have relied on the "Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause," when holding that states are bound by the Eighth Amendment's Excessive Fines Clause).

<sup>91</sup> See Cohen, Donley & Rebouché, *supra* note 87, at 70.

<sup>92</sup> See *id.* at 38–39.

<sup>93</sup> See *id.* at 59.

<sup>94</sup> See Brief of Reproductive Justice Scholars as Amici Curiae Supporting Respondents at 15–16, *Dobbs* (No. 19-1392).

<sup>95</sup> See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1791 (2019) (Thomas, J., concurring).

rates of unintended pregnancy,<sup>96</sup> which have several causes. First, the higher rates of unintended pregnancy are a function of the higher rates of poverty among black people.<sup>97</sup> Indigent people have higher rates of unintended pregnancy because poverty makes reproductive healthcare and effective contraception more difficult to access.<sup>98</sup> Second, the higher rates of unintended pregnancy among black people capable of pregnancy are a function of their decreased ability to control the conditions under which they have sex — their inability to insist upon the use of the contraception to which they have access.<sup>99</sup> Indeed, there is evidence that there are higher rates of intimate partner violence among black women,<sup>100</sup> a statistic that is a function of the disproportionate burdens of poverty that they bear.<sup>101</sup> Black people capable of pregnancy are also more likely than their nonblack counterparts to experience rape during the course of their lives.<sup>102</sup> Additionally, black people capable of pregnancy are more likely than their nonblack counterparts to experience reproductive coercion, where sexual “partners actively try to impregnate their partner against their wishes, interfere with contraceptive use,” hassle their partner not to use contraception, or sabotage condom usage.<sup>103</sup> Higher incidences of intimate partner violence, sexual assault, and reproductive coercion among black people capable of pregnancy undoubtedly contribute to their increased frequency of unintended pregnancy.

Moreover, a frequently cited reason that individuals give for terminating an unintended pregnancy is that they cannot afford to have a child at that time.<sup>104</sup> Thus, the unequal burden of poverty that black people bear renders them more likely to face an unintended pregnancy in the first instance and, in the second instance, to lack the funds thought

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<sup>96</sup> Brief of Reproductive Justice Scholars as Amici Curiae Supporting Respondents, *supra* note 94, at 21.

<sup>97</sup> See *id.* at 5, 8–9; cf. *Dobbs*, 142 S. Ct. at 2345 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do.”).

<sup>98</sup> Brief of Reproductive Justice Scholars as Amici Curiae Supporting Respondents, *supra* note 94, at 5.

<sup>99</sup> Charvonne N. Holliday et al., *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 WOMEN’S HEALTH ISSUES 205, 206 (2018).

<sup>100</sup> See ASHA DUMONTHIER, CHANDRA CHILDERS & JESSICA MILLI, INST. FOR WOMEN’S POL’Y RSCH., THE STATUS OF BLACK WOMEN IN THE UNITED STATES 119 (2017), <https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17> [<https://perma.cc/G5F7-LALT>] (noting that while 31.5% of all women experience physical violence by an intimate partner, more than 40% of black women endure such violence).

<sup>101</sup> See Carolyn M. West, *Black Women and Intimate Partner Violence: New Directions for Research*, 19 J. INTERPERSONAL VIOLENCE 1487, 1487 (2004) (noting that when controlling for income levels, “racial differences in rates of partner abuse frequently disappear, or become less pronounced”).

<sup>102</sup> See DUMONTHIER, CHILDERS & MILLI, *supra* note 100, at 120–21.

<sup>103</sup> Holliday et al., *supra* note 99, at 206.

<sup>104</sup> See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 112, 115 (2005).

necessary to carry the pregnancy to term and raise the child. Thus, when states are permitted to use the criminal or civil law to make abortion inaccessible, states render unavailable healthcare upon which black people — for myriad complicated, oftentimes tragic reasons — disparately rely.

Of course, abortion prohibitions are not invariably successful in making unwanted pregnancies end in birth, as many people carrying an unwanted pregnancy will be able to circumvent a legal restriction on abortion. Until Congress passes a federal law that proscribes abortion in the entire country,<sup>105</sup> people living in states that are hostile to abortion can travel to a state or jurisdiction where abortion services are still available.<sup>106</sup> Indeed, in the months leading up to the Court's decision in *Dobbs*, many states prepared for the Court's reversal of *Roe* by passing laws that sought to make it easier for the state to absorb the inevitable influx of people from other jurisdictions seeking safe and legal abortions.<sup>107</sup> However, those who are able to avoid abortion restrictions in

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<sup>105</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (noting the possibility that the federal government may one day proscribe abortion in the entire country).

<sup>106</sup> After the Supreme Court permitted Texas's S.B. 8, Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2021)), to go into effect in September 2021 — effectively ending legal abortions after six weeks of pregnancy in the state — Texans flocked to neighboring states to obtain abortion care. See Madison Feller, *Texans Are Now Traveling 7x Further than Patients from Other States for Abortion Care*, ELLE (Mar. 21, 2022), <https://www.elle.com/culture/career-politics/a39476032/texas-abortion-law-patients-travel-planned-parenthood-data> [<https://perma.cc/KJ7F-NK62>] (“Planned Parenthood centers in surrounding states saw a 39 percent increase in the number of patients with a Texas zip code seeking abortion care.”). Some abortion clinics in Oklahoma reported a 2500% increase in patients from Texas. Press Release, Planned Parenthood, New Planned Parenthood Data Highlight the Far-Reaching Impact of Texas Abortion Ban (Feb. 24, 2022), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/new-planned-parenthood-data-highlight-the-far-reaching-impact-of-texas-abortion-ban> [<https://perma.cc/H8YZ-3MDF>]. One abortion clinic in Kansas reported that after S.B. 8 went into effect, half of its clients came from Texas. See *United States v. Texas*, 566 F. Supp. 3d 605, 680 (W.D. Tex. 2021).

<sup>107</sup> See, e.g., Gabriella Borter, *Maryland Lawmakers Pass Measure Expanding Abortion Access*, REUTERS (Mar. 30, 2022, 1:30 PM), <https://www.reuters.com/world/us/maryland-lawmakers-pass-measure-expanding-abortion-access-2022-03-30> [<https://perma.cc/PS9W-4VWX>]; Rachel La Corte, *Washington State Governor Signs Bill that Prohibits Texas-Style Abortion Lawsuits*, PBS (Mar. 17, 2022, 2:16 PM), <https://www.pbs.org/newshour/politics/washington-state-governor-signs-bill-that-prohibits-texas-style-abortion-lawsuits> [<https://perma.cc/2QUT-STYZ>]; *Lamont Signs Reproductive Rights Bill into Law*, NBC CONN. (May 5, 2022, 5:54 PM), <https://www.nbcconnecticut.com/news/politics/lamont-signs-historic-reproductive-rights-bill-into-law/2778128> [<https://perma.cc/HL2B-CH3Q>]; Shawna Mizelle & Amy Simonson, *Colorado Governor Signs Bill to Protect Access to Abortion*, CNN (Apr. 4, 2022, 9:19 PM), <https://www.cnn.com/2022/04/04/politics/colorado-abortion-rights-bill-governor-jared-polis-signs> [<https://perma.cc/CT5T-ZV7Y>]. States opposed to abortion have responded with laws that endeavor to make it illegal for their residents to travel to another state to obtain abortion services. See Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow.*, POLITICO (Mar. 19, 2022, 7:00 AM), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539> [<https://perma.cc/FQE4-JVFE>]; see also Tyler Kingkade, *Idaho Lawmakers Seek to Punish Parents*

their states of residence tend to have some degree of class privilege<sup>108</sup> — a fact that was also true in the pre-*Roe* era.<sup>109</sup> The people who can travel out-of-state to obtain abortions are able to absorb the transportation costs.<sup>110</sup> They are able to take paid time off from their jobs or to afford sacrificing the wages they might have earned.<sup>111</sup> They are able to arrange and pay for childcare.<sup>112</sup> In these ways, poverty and a lack of resources impose obstacles to the travel that allows for the circumvention of abortion restrictions.<sup>113</sup> Because black people are disproportionately impoverished and bereft of resources, they will be able to

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*Who Take Trans Youth to Other States for Health Care*, NBC NEWS (Mar. 9, 2022, 8:44 PM), <https://www.nbcnews.com/news/us-news/idaho-trans-health-care-youth-bill-rcna19287> [<https://perma.cc/38EP-WW7K>] (describing legislation that uses similar tactics to criminalize parents seeking gender-affirming care for their trans children). Indeed, the struggle about whether and how states can regulate abortions that occur outside of their borders is the “new abortion battleground.” Cohen, Donley & Rebouché, *supra* note 87; see also Lydia Wheeler & Patricia Hurtado, *Abortion-Travel Bans Are “Next Frontier” with Roe Set to Topple*, BLOOMBERG L. (May 4, 2022, 5:36 AM), <https://news.bloomberglaw.com/health-law-and-business/abortion-travel-bans-emerge-as-next-frontier-after-roes-end> [<https://perma.cc/9BA5-X6EP>].

<sup>108</sup> Abortion funds attempt to help indigent people overcome the financial and logistical barriers to obtaining abortion care. See Greg Rosalsky, *The Fight to Fund Abortions in Post-Roe America*, NPR (July 5, 2022, 6:30 AM), <https://www.npr.org/sections/money/2022/07/05/1109080841/the-fight-to-fund-abortions-in-post-ro-america> [<https://perma.cc/2WF5-FFXS>].

<sup>109</sup> David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 834 (1999) (“Even before *Roe*, . . . there were hundreds upon hundreds of doctors in this country who secretly performed abortions for women whom they knew and who could pay.”); Sarah Elvins, *A Guide from the Past on Traveling to Get an Abortion*, WASH. POST (June 27, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/06/27/guide-past-traveling-get-an-abortion/> [<https://perma.cc/AZ64-YZ9G>].

<sup>110</sup> See Liza Fuentes et al., *Women’s Experience Seeking Abortion Care Shortly After the Closure of Clinics Due to a Restrictive Law in Texas*, 93 CONTRACEPTION 292, 295 (2016).

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318–19 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (acknowledging that “women lacking financial resources will suffer from” the *Dobbs* decision because they will not be able to afford to travel “to a distant State for a procedure” and naming the lack of “money or childcare or the ability to take time off from work” as restraints on the ability of poor people to “find ways around the State’s assertion of power”).

Poverty is not the only impediment to travel that people face. People with mental or physical disabilities may find travel difficult or unmanageable. NAT’L P’SHIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOC. NETWORK, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES 10 (2021), <https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-abortion.pdf> [<https://perma.cc/YK9K-GAU3>]. Survivors of intimate partner violence may be rendered immobile insofar as they may need to conceal their whereabouts from an abusive partner. See Eleanor Klibanoff, “I Can’t Have One More Baby with This Man”: Some Domestic Violence Victims See Abortion as Vital Option that Would Be Lost Post-Roe, TEX. TRIB. (June 24, 2022, 9:00 AM), <https://www.texastribune.org/2022/06/24/domestic-violence-abortion/> [<https://perma.cc/37K6-9LBJ>]. Young people may need to hide their destination from a parent. See Sara Sirota, *Teenagers Already Face Extra Barriers to Abortion Care. It’s About to Get Worse.*, THE INTERCEPT (June 19, 2022, 8:00 AM) <https://theintercept.com/2022/06/19/abortion-minors-parents-ro-/> [<https://perma.cc/CGF7-ARPK>]. The necessity of crossing an immigration checkpoint may make it impossible for an undocumented person to travel. See Sofia Ahmed, *Abortion Worries Heightened for Unauthorized Immigrants in the U.S.*, REUTERS (July 5,

bypass abortion restrictions less frequently than their nonblack counterparts. That is, black people will be forced to carry pregnancies to term and give birth more frequently than people of other races. In this way, the fall of *Roe* inflicts a racial injury.

Further, when abortion is unavailable and a person is forced to carry a pregnancy to term and give birth, the riskiness of that endeavor varies across states<sup>114</sup> — and across racial groups.<sup>115</sup> In Mississippi, which saw fit to ask the Court to strike down *Roe* and force pregnant people to give birth against their will, black people are more than two-and-a-half times more likely than their white counterparts to die from a pregnancy-related cause.<sup>116</sup> Nationally, black people are three to four times as likely as their white counterparts to die during pregnancy, childbirth, or the postpartum period.<sup>117</sup> In this way, the reversal of *Roe* inflicts a racial injury insofar as it allows states to criminalize a tool that helps black people keep their lives.

Unquestionably, we should expect that some people unable to travel to obtain safe and legal abortions out-of-state will attempt to terminate their pregnancies themselves. For decades, the coat hanger has been a symbol of this possibility — a representation of the injury and death that result when people too unprivileged to avoid state coercion insist

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2022, 12:50 PM), <https://www.reuters.com/world/us/abortion-worries-heightened-unauthorized-immigrants-us-2022-07-05> [<https://perma.cc/5YFV-VFJZ>] (“The U.S. Border Patrol maintains a network of some 110 checkpoints along U.S. roads . . . Fear of being caught at a [sic] immigration checkpoint and possibly deported makes it ‘virtually impossible’ for many people living in the country [undocumented] to travel across state lines . . .”).

<sup>114</sup> See Brief for Respondents at 28, *Dobbs* (No. 19-1392) (noting that while “[c]hildbirth is [now] 14 times more likely than abortion to result in death[,]’ . . . [t]he comparative risk is even higher in Mississippi, where it is about 75 times more dangerous to carry a pregnancy to term than to have an abortion” (second alteration in original) (quoting *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016))).

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* at 28 n.8 (noting that the maternal mortality ratio for black women in Mississippi is 51.9 deaths per 100,000 live births, while the ratio for white women is 18.9 deaths per 100,000 live births).

<sup>117</sup> See Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth. Shalon Irving’s Story Explains Why*, NPR (Dec. 7, 2017, 7:51 PM), <https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why> [<https://perma.cc/TD2X-XWNR>] (citing *Pregnancy Mortality Surveillance System (PMSS)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> [<https://perma.cc/G3WK-VQ8P>]). Black people are also twice as likely as white people to suffer severe maternal morbidity, in which “a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure — like a hysterectomy, blood transfusion, or mechanical ventilation — to avoid death.” Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1242–43 (2020); see also Andreea A. Creanga et al., *Racial and Ethnic Disparities in Severe Maternal Morbidity: A Multistate Analysis, 2008–2010*, 210 AM. J. OBSTETRICS & GYNECOLOGY 435.e1, 435.e6 (2014).



upon the reproductive autonomy the government has denied them.<sup>118</sup> However, the advent of medication abortion — misoprostol and mifepristone — might diminish the danger involved in terminating one’s own pregnancy.<sup>119</sup> The use of misoprostol and mifepristone as abortifacients is exceedingly safe when the individual ingests the medication at earlier stages of pregnancy.<sup>120</sup> Thus, we face the possibility that self-managed abortion after the fall of *Roe* will be less deadly than it was before the Court handed down the decision in 1973.<sup>121</sup>

However, while people who self-manage their abortions in 2022 and beyond might be more likely to survive the attempt, there has been a significant development in the United States since 1973 that makes the endeavor perilous nevertheless: the number of people in jails and prisons has grown tremendously. The incarcerated population has quadrupled in the last forty years, with close to two million people confined in jails and prisons today.<sup>122</sup> “The U.S. federal and state governments lock up more people and at higher rates than do any other governments in the world, and they do so today more than they did at any other period in U.S. history.”<sup>123</sup> This is to say that the country currently is much more willing than it was in the generations that preceded *Roe* to turn to jails and prisons to address its social problems, real or imagined.<sup>124</sup>

Moreover, there now exists precedent for criminally punishing pregnant people for suffering adverse pregnancy outcomes — a precedent that simply did not exist during the era of criminal abortion laws that

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<sup>118</sup> See Rebecca J. Rosen, *Consider the Coat Hanger*, THE ATLANTIC (Aug. 23, 2012), <https://www.theatlantic.com/technology/archive/2012/08/consider-the-coat-hanger/261413> [https://perma.cc/BZ45-7CWY]. The dissent by Justices Breyer, Sotomayor, and Kagan in *Dobbs* recounts the horrors of unsafe abortion:

The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers.

*Dobbs*, 142 S. Ct. at 2345 n.27 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>119</sup> See Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111, 1121 (2020).

<sup>120</sup> See *id.* at 1123 (“A medication abortion is safe and legal — according to advocates and health professionals — when the abortion is done within legal and medical time limits, provided by the legally required health professional, and done with medication received from a pharmacy.” (footnotes omitted)).

<sup>121</sup> Of course, we should expect class and racial disparities in terms of who can access medication abortion in states that have proscribed abortion. See Vanessa Williamson & John Hudak, *The War on Abortion Drugs Will Be Just as Racist and Classist*, BROOKINGS INST. (May 9, 2022), <https://www.brookings.edu/blog/fixgov/2022/05/09/the-war-on-abortion-drugs-will-be-just-as-racist-and-classist> [https://perma.cc/57D4-R36A].

<sup>122</sup> See Roberts, *supra* note 16, at 12 (“In the last forty years, the U.S. incarcerated population exploded from about 500,000 to more than two million.”).

<sup>123</sup> *Id.* at 12–13.

<sup>124</sup> See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

preceded *Roe*.<sup>125</sup> In the 1980s, during the crack cocaine scare, states began to use creative interpretations of the criminal law to prosecute black people who used the drug during their pregnancies.<sup>126</sup> Prosecutors claimed that they sought to punish them for harming, or potentially harming, their babies.<sup>127</sup> Arrests and prosecutions for substance use

<sup>125</sup> It bears noting that although pregnant people were not subjected to punishment by formal criminal legal systems in the era of criminal abortion laws that preceded *Roe*, women and girls who had abortions nevertheless were punished, albeit informally. See LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 114 (1997) (“The penalties imposed upon women for having illegal abortions were not fines or jail sentences, but humiliating interrogation about sexual matters by male officials . . .”). Indeed, in the pre-*Roe* era, unmarried women and girls who became pregnant were punished, in the expansive sense of the term, for daring to have sex outside of marriage. See generally RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE*

(2d ed. 2000) (describing the racially targeted punishments against unmarried black women and girls that were rife before the Court’s decision in *Roe*, including the imposition of heavy sexual stigma and exclusion from school, public housing, and welfare benefits, and explaining that unmarried white women and girls were punished through the coerced removal of their children).

<sup>126</sup> Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 775 (2020). During oral arguments in *Dobbs*, Justice Thomas appeared to raise the question of whether the right to an abortion recognized in *Roe* permits states to punish pregnant people who use controlled substances. Transcript of Oral Argument at 49, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). Referring to the Court’s decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), Justice Thomas asked:

Shortly, some years after we decided *Casey*, we had a case out of South Carolina, I believe, and it involved a woman who had been convicted of criminal child neglect because she ingested cocaine during pregnancy, and her case was post-viability, so it doesn’t fit in the facts of this case. If she had ingested cocaine pre-viability and had the same negative consequences to her child, do you think the state had an interest in enforcing that law against her?

*Id.*

<sup>127</sup> Although some of the people prosecuted for cocaine use during pregnancy had suffered poor outcomes, many others had given birth to perfectly healthy babies. See Bridges, *supra* note 126, at 811. Thus, in the latter set of cases, prosecution could not be justified by the claim that the pregnant person injured their baby. In the absence of a perceptible injury, prosecution could be justified only by the claim that the pregnant person exposed their baby to the *risk* of harm. If states felt comfortable punishing people for exposing their fetuses and babies to the *risk* of harm, it seems odd to suppose that they would not feel comfortable punishing people who end fetal life altogether through abortion.

It deserves underscoring that there is only disputed evidence that prenatal exposure to cocaine causes permanent injuries to babies. *Id.* at 818. Indeed, prosecutors have never been able to establish a causal connection between cocaine use during pregnancy and a poor birth outcome. *Id.* Instead, the evidence shows that it is much more likely that the poverty in which the pregnant person lived caused the harm to the fetus. See Susan FitzGerald, “*Crack Baby*” *Study Ends with Unexpected but Clear Result*, PHILA. INQUIRER (July 21, 2013), [https://www.philly.com/philly/health/20130721\\_Crack\\_baby\\_study\\_ends\\_with\\_unexpected\\_but\\_clear\\_result.html](https://www.philly.com/philly/health/20130721_Crack_baby_study_ends_with_unexpected_but_clear_result.html) [https://perma.cc/R4AB-DRPK] (quoting neonatologist Hallam Hurt concluding that “[p]overty is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine”). As I have summarized elsewhere:

The longitudinal studies that have been conducted on children who had been exposed to cocaine in utero show that they do not differ from children who did not sustain in utero

during pregnancy continue to the present, many of which target people who have used opioids while pregnant.<sup>128</sup> Further, criminal punishment of pregnant people who have suffered adverse birth outcomes occurs outside of the context of substance use. Police accused a woman who fell down the stairs of attempting to kill her fetus.<sup>129</sup> Prosecutors brought charges against a pregnant woman who attempted suicide.<sup>130</sup> They brought charges against a pregnant woman who suffered a miscarriage after being shot in the abdomen during an altercation.<sup>131</sup> They have also brought charges against pregnant people who have suffered *no* adverse outcome: a pregnant woman faced charges for endangering her fetus after she drove her car without wearing a seatbelt and tried to avoid arrest by the police officer who pulled her over.<sup>132</sup> This is all to say that if there was ever a period of time when pregnant people were not conceptualized as subjects who ought to be punished for harms, or risks of harms, to their fetuses, that era has passed.

Although abortion rights opponents currently claim to consider the pregnant person who has an abortion to be a victim and the person who performs or facilitates access to the abortion to be the victimizer,<sup>133</sup> we might be skeptical about the sincerity, or permanency, of this belief in

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exposure to cocaine. These studies establish that while cocaine may have a nominal effect on children exposed to it in utero, poverty, by far, bears the greatest responsibility for infant morbidity and mortality.

Bridges, *supra* note 126, at 818 (footnotes omitted).

<sup>128</sup> See Bridges, *supra* note 126, at 810.

<sup>129</sup> See *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously*, ACLU ME. (Feb. 11, 2010, 5:04 PM), <https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously> [<https://perma.cc/9AH5-4CH3>].

<sup>130</sup> See Jessica Mason Pieklo, *Legal Wrap: Finally Some Justice for Bei Bei Shuai*, REWIRE NEWS GRP. (Aug. 6, 2013, 9:14 AM), <https://rewire.news/article/2013/08/06/legal-wrap-finally-some-justice-for-bei-bei-shuai> [<https://perma.cc/QM2C-TVTK>].

<sup>131</sup> See Holly Yan & Madeline Holcombe, *A Pregnant Woman Shot in the Stomach Is Indicted in Her Unborn Child's Death*, CNN (June 28, 2019, 8:13 PM), <https://www.cnn.com/2019/06/27/us/alabama-pregnant-woman-shot-in-stomach-manslaughter-indictment-trnd/index> [<https://perma.cc/6TEL-UHQM>].

<sup>132</sup> See *Deputy: Pregnant Woman Tries to Evade Arrest*, GREENEVILLE SUN (Nov. 11, 2014), [https://www.greenevillesun.com/xml/nitf/deputy-pregnant-woman-tries-to-evade-arrest/article\\_fec891ba-1860-5cce-9b5d-2ff25df4b236.html](https://www.greenevillesun.com/xml/nitf/deputy-pregnant-woman-tries-to-evade-arrest/article_fec891ba-1860-5cce-9b5d-2ff25df4b236.html) [<https://perma.cc/3ZZD-LD5G>].

<sup>133</sup> See Melissa Repko, *Anti-Abortion States Split on How to Enforce Ban, Whether to Prosecute Doctors, Surveil Women*, CNBC (June 27, 2022, 10:26 AM), <https://www.cnbc.com/2022/06/26/anti-abortion-states-split-on-how-to-enforce-ban-whether-to-prosecute-or-surveil-doctors.html> [<https://perma.cc/6PRF-VDNY>] (noting that the South Dakota governor said that “the state will not file criminal charges against women who get the procedure” and “I don’t believe women should ever be prosecuted”). *But see* Cat Zakrzewski et al., *Texts, Web Searches About Abortion Have Been Used to Prosecute Women*, WASH. POST (July 3, 2022, 9:20 AM), <https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution> [<https://perma.cc/V86J-SLS4>] (“Women have been punished for terminating pregnancy for years.”).

light of our current practice of punishing pregnant people for contributing to, or simply creating the risk of, negative pregnancy outcomes.<sup>134</sup> Thus, *Roe*'s demise creates circumstances under which black people, who disproportionately rely on abortion services, will be overrepresented among those who are exposed to criminal punishment for attempting to self-manage their abortions.

Importantly, even if black people's abortion rates were on par with the abortion rates of nonblack people, and even if black people attempted to self-manage abortion despite the threat of criminal punishment as frequently as people of other races, we should fully expect that black people will be more frequently arrested, prosecuted, indicted, and convicted for breaking the law; we should also expect them to serve longer sentences when convicted than their nonblack counterparts. We should have this expectation because black people presently are more likely than their nonblack counterparts to be arrested, prosecuted, indicted, and convicted for the same conduct, and they serve longer sentences when convicted than their nonblack counterparts, even when controlling for relevant factors.<sup>135</sup>

Thus, the size and muscularity of the carceral state — as well as the attention that the carceral state gives to pregnant people who behave in nonnormative ways — have increased drastically since the pre-*Roe* era of criminal abortion laws. And so the fall of *Roe* ushers black people into a regime in which they are likely to engage in criminalized behavior more frequently and in which their racial unprivilege makes them more likely to be swept into the apparatus of the criminal legal system.<sup>136</sup> In this way, the fall of *Roe* inflicts a racial injury.

One last point deserves mention: the *Dobbs* majority argued that it was simply returning the question of abortion's legality back to the states.<sup>137</sup> It argued that *Roe* had stripped political majorities in the

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<sup>134</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (observing that states may decide to "criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion").

<sup>135</sup> See SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/VXH6-QPBY>].

<sup>136</sup> Relevantly, "[t]he female incarceration rate has grown twice as quickly as the male incarceration rate over the past few decades, and black women are twice as likely as white women to be behind bars." Roberts, *supra* note 16, at 13. Professor Dorothy Roberts observes that the United States has a history of meting out harsher punishment to black women, writing that "[t]he wildly disparate treatment of white women and black women arrested for similar crimes is mind-boggling: for example, [b]etween 1908 and 1938, only four white women were ever sentenced to the chain gang in Georgia, compared with almost two thousand Black women." *Id.* at 32 (second alteration in original) (quoting Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1262 (2012)).

<sup>137</sup> See *Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

states of the ability to weigh the state's interest in protecting fetal life against the pregnant individual's interest in controlling what happens to their body and life.<sup>138</sup> The majority offered that some of these political majorities might strike the balance of interests differently than what the Court did in *Roe*.<sup>139</sup> It argued that it was illegitimate for the Court to deny these majorities the ability to give the results of their interests-balancing the force of law in their states.<sup>140</sup> This argument is deceitful, as it obscures the dramatic retrenchment of voting rights currently taking place in the country — a retrenchment that the Court has greenlit and permitted.<sup>141</sup>

With several Republican-dominated states actively endeavoring to disenfranchise people of color and others who would likely vote for Democratic candidates,<sup>142</sup> it is dishonest to claim that in the aftermath of *Roe*'s demise, state abortion laws will simply be reflections of the will of the state's political majority. Instead, state abortion laws will be reflections of the will of the majority of people who managed to cast a ballot in the state.

Consider Mississippi, whose fifteen-week abortion ban set the stage for the Court's decision in *Dobbs*.<sup>143</sup> One set of researchers ranked Mississippi among the worst states in terms of state-imposed obstacles to voting.<sup>144</sup> Thus, we might be skeptical about whether Mississippi's fifteen-week abortion ban actually represents the will of the people in the state.

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<sup>138</sup> See *id.* at 2257.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* (“Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.”).

<sup>141</sup> See Zach Montellaro, *The Supreme Court Has Chipped Away at the Voting Rights Act for 9 Years. This Case Could Be the Next Blow.*, POLITICO (June 27, 2022, 4:31 AM), <https://www.politico.com/news/2022/06/27/supreme-court-voting-rights-act-00042478> [https://perma.cc/D6RQ-2USN]. For a more in-depth discussion of the Court’s refusal to protect voting rights, see *infra* section III.B, pp. 120–33.

<sup>142</sup> See Klarman, *supra* note 10, at 9, 48, 53, 66; Jane C. Timm, *19 States Enacted Voting Restrictions in 2021. What’s Next?*, NBC NEWS (Dec. 21, 2021, 7:02 AM), <https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342> [https://perma.cc/3JVU-2XUJ].

<sup>143</sup> See *Dobbs*, 142 S. Ct. at 2234.

<sup>144</sup> See Scot Schraufnagel et al., *Cost of Voting in the American States: 2020*, 19 ELECTION L.J. 503, 508 (2020) (noting that “Mississippi had been ranked 50th in 2016, and now moves up marginally to 47th place” on a list of states ranked in terms of the costs of voting). The “cost of voting index” considers the obstacles to voting that individuals have to navigate both in terms of registering to vote and casting a ballot. See *id.* at 504. It incorporates an exhaustive set of factors, including whether same-day registration, online voter registration, early voting, and mail-in voting are allowed; whether persons who have been convicted of a felony are permitted to register; and whether, where, and to what extent the state has reduced the number of polling stations. See *id.* at 505.

Consider Texas, which passed a six-week abortion ban, S.B. 8,<sup>145</sup> that the Court permitted to be largely insulated from federal judicial review due to its private enforcement mechanism.<sup>146</sup> Researchers have ranked Texas as the worst state in terms of obstacles to voting.<sup>147</sup> As such, we ought to be skeptical that S.B. 8 actually represents the will of a majority of Texans.

Again, several Republican-dominated state legislatures have been trying to make it as difficult as possible for people of color to vote. Thus, we should be incredulous that the people of color whose bodies will be governed by abortion prohibitions and regulations will have been able to participate in the marginally democratic processes that produced these laws. This is why one is reasonable if one is not comforted by the *Dobbs* majority's declaration that although women could not vote in 1868,<sup>148</sup> that defining year of our nation's "history and tradition," well, at least they can vote now.<sup>149</sup> One is reasonable if one is not reassured by the majority's happy pronouncement that "[w]omen are not without electoral or political power."<sup>150</sup> One is reasonable if one is not soothed by the majority's recitation of statistics that show that "the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so."<sup>151</sup> That is, one is reasonable if

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<sup>145</sup> Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2021)); see also Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the U.S. Supreme Court Takes No Action*, TEX. TRIB. (Sept. 1, 2021), <https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court> [<https://perma.cc/5F3U-9J9E>].

<sup>146</sup> See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532, 534–35 (2021).

<sup>147</sup> See Schraufnagel et al., *supra* note 144, at 508 (noting that Texas now represents the state with "the most restrictive electoral climate"). The researchers note that Texas clinches the title because it "has an in-person voter registration deadline 30 days prior to Election Day, has reduced the number of polling stations in some parts of the state by more than 50 percent, and has the most restrictive pre-registration law in the country." *Id.*

Relevantly, the ACLU of Texas examined prosecutions by the Texas Attorney General's Election Integrity Unit, which "investigate[s] and prosecute[s] the increasing allegations of voter fraud" in the state. *Election Integrity*, OFF. OF THE ATT'Y GEN., <https://www.texasattorneygeneral.gov/initiatives/election-integrity> [<https://perma.cc/7GH5-QTCG>]. The ACLU reported that although black and Latinx individuals comprised only 44% of the Texas population in the 2018 census, "72% of [the] prosecutions appear to have targeted Black and Latinx individuals," with "45% of the prosecutions appear[ing] to have targeted Black and Latinx women in particular." ACLU TEX., RACIAL DISPARITIES IN PAXTON'S ELECTION INTEGRITY UNIT PROSECUTIONS 1 (2021), [https://www.aclutx.org/sites/default/files/oag\\_election\\_integrity\\_unit\\_analysis.pdf](https://www.aclutx.org/sites/default/files/oag_election_integrity_unit_analysis.pdf) [<https://perma.cc/22ZT-9VGY>]. "86% of the prosecutions involved offenses allegedly occurring in counties with majority non-white and Latinx populations." *Id.* Significantly, "[t]he vast majority of these prosecutions consist of unproven allegations, either because the case remains pending or because it was resolved without trial." *Id.* at 1 n.1. So not only does Texas make it difficult to vote, it also is keen on prosecuting people of color who do manage to vote.

<sup>148</sup> See *Dobbs*, 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>149</sup> See *id.* at 2253–54, 2277 (majority opinion).

<sup>150</sup> *Id.* at 2277.

<sup>151</sup> *Id.*

one is skeptical of vulnerable black people's ability to vote for the governments that will enact abortion restrictions. In this way as well, the fall of *Roe* inflicts a racial injury.

Nevertheless, the racial injury exacted by this regime — a complex that prevents people of color from joining in its creation, and then brutally coerces them to give birth, while promising them harsher penalties if they are caught trying to avoid the coercion — is not one that is cognizable as a racial injury within the Roberts Court's theory of racism. In the Roberts Court's view, the techniques by which this injury is inflicted bear little resemblance to the things that white people did back in the pre-Civil Rights Era to protect white supremacy. That is, within the racial common sense that the Roberts Court wields as a weapon, the racial injury that the fall of *Roe* metes out does not count as racism.

Some might argue that the Court could not have considered the truly devastating racial harms inflicted by the decision to reverse *Roe* because the doctrine precludes it. These observers might remind us that the Roberts Court has inherited precedents from the Burger and Rehnquist Courts that make the disparate racial impacts of the reversal of *Roe* neither here nor there under the Equal Protection Clause — absent, of course, evidence that there is a bad actor behind every criminal abortion law who endeavors to harm black people. They might claim that the Court ignored race in *Dobbs* because it was bound by precedent that makes irrelevant the disparate racial impact of facially race-neutral laws. This argument misses a few things.

First, the Roberts Court does not appear to consider itself particularly bound by *stare decisis*. As a case in point, the Court in *Dobbs* was willing to discard a precedent that had existed for nearly half a century. Indeed, in support of its argument that it is not unusual — or even a big deal — for the Court to overturn precedent, the *Dobbs* majority itemized all of the Court cases that it believed reversed a prior decision.<sup>152</sup> Again, the Roberts Court does not appear to feel terribly constrained by precedent. If so inclined, the Roberts Court could jettison *Washington v. Davis*,<sup>153</sup> decided three years after *Roe*, which held that plaintiffs must provide evidence that discriminatory intent lay beneath a law with harmful racial impacts before courts can review it with strict scrutiny.<sup>154</sup> If so inclined, the Court could jettison *Personnel Administrator v. Feeney*,<sup>155</sup> decided six years after *Roe*, which narrowly defined “discriminatory purpose” such that evidence of disparate racial impact alone

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<sup>152</sup> *Id.* at 2263–64, 2263 n.48. The dissent refuted the majority's analysis of these decisions. *Id.* at 2333–34, 2337, 2341 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>153</sup> 426 U.S. 229 (1976).

<sup>154</sup> *Id.* at 239–40.

<sup>155</sup> 442 U.S. 256 (1979).

could not satisfy the standard.<sup>156</sup> That is, if so inclined, the Roberts Court could abandon the precedents that constrain courts from considering the disproportionate racial burdens that laws impose and, in so doing, allow itself the jurisprudential space to contemplate the tragic racial harms inflicted by the decision to reverse *Roe*. Instead, the Roberts Court has gleefully retained these cases.

Second, and even more interestingly, we have proof that *Davis* and *Feeney* have not constrained Justices from considering the racial impacts of *Roe*. This proof is the fact that Justices have *already* considered racial impacts in the context of abortion. As explored below, Justice Thomas has made arguments about the illegitimacy of *Roe* that have looked to the disparate racial impacts of abortion rights, arguing that abortion rights are tools by which a genocide is being committed against black people.<sup>157</sup> Justice Thomas was not making an argument that abortion rights violate the Equal Protection Clause because they disparately impact black people (insofar as black people disproportionately rely on abortion services). Instead, he was making an argument about the proper interpretation of the Due Process Clause. That is, he encouraged the Court to interpret the Due Process Clause as silent on abortion rights because, as he sees it, abortion rights lead to a black genocide. He was willing to remedy this imagined racial injury not with the Equal Protection Clause, but rather with an interpretation of the Due Process Clause. This Foreword argues that the references to race contained in the *Dobbs* majority opinion support the conclusion that a majority of Justices agreed with Justice Thomas's framing of the issue.

When this Foreword gives a eulogy for *Roe* that describes with clarity the racial injury that *Dobbs* inflicts, it imagines a Court, in a faraway future, that considers the catastrophic racial harms that result when abortion is inaccessible. It imagines a Court that interprets the Due Process Clause, or other parts of the Constitution,<sup>158</sup> to protect abortion

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<sup>156</sup> *Id.* at 279; Haney-López, *Intentional Blindness*, *supra* note 16, at 1795 (noting that after *Davis*, “intent could be inferred from a given action’s foreseeable impact” but that *Feeney* foreclosed this approach); see also HANEY LÓPEZ, *DOG WHISTLE POLITICS*, *supra* note 16, at 86 (noting the infrequency with which the Court has found laws that possess the narrowly defined version of discriminatory intent).

*Hunter v. Underwood*, 471 U.S. 222 (1985), is the only case known to this author in which a post-*Feeney* Court struck down a facially race-neutral law after finding that discriminatory intent motivated it. *Id.* at 233 (invalidating Alabama’s felony disenfranchisement provision contained in the state constitution because it “was motivated by a desire to discriminate against blacks on account of race”). But, as Eyer explains, the law at issue hails from “an era in which intent was not understood to be a valid basis for striking a law, and thus lawmakers did not hide their racial intent.” Eyer, *supra* note 6, at 1045 n.219 (citing *Underwood*, 471 U.S. 222).

<sup>157</sup> See *infra* pp. 59–61.

<sup>158</sup> See Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [https://perma.cc/74K5-W9YS] (making a



rights in order to avoid producing this racial injury. This Court is easy to imagine because the current Court is already engaged in the project of interpreting the Due Process Clause — and other parts of the Constitution — to remedy racial injuries. But, of course, it has different ideas about what qualifies as a racial injury, as the discussion below explores.

2. *Race in the Court's Abortion Caselaw, More Generally.* —

(a) *Liberal Invocations of Race.* — As the above section makes plain, the failure to protect abortion rights generates a distinct type of racial injustice. Although this is true, the Court has only rarely mentioned race in its abortion jurisprudence — even when there was a liberal majority on the Court.<sup>159</sup> Indeed, the fifty-page majority opinion in *Roe* made only passing mention of race. The entirety of *Roe*'s discussion of race consisted of the Court's declaration of its awareness that abortion is a sensitive subject and that “population growth, pollution, poverty, and *racial overtones* tend to complicate and not to simplify the problem.”<sup>160</sup> Although Justice Marshall, a stalwart advocate for racial justice, sat on the bench at the time of the decision and signed onto the majority opinion,<sup>161</sup> *Roe* failed to excavate the racial significance of abortion rights and access.<sup>162</sup>

Justice Marshall was moved to mention race in his dissents in the abortion funding cases, however. In *Maher v. Roe*,<sup>163</sup> the Court upheld a Connecticut law that prohibited the expenditure of state funds for abortion care,<sup>164</sup> and in *Harris v. McRae*,<sup>165</sup> the Court upheld the federal

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Thirteenth Amendment argument in favor of a constitutional right to an abortion); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (making a Thirteenth Amendment argument in favor of a constitutional right to abortion); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (making an equal protection argument in favor of a constitutional right to an abortion).

<sup>159</sup> See Mary Ziegler, *Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 30 (2013) (noting that “questions of race . . . receded into the background” of the *Roe* opinion).

<sup>160</sup> *Roe v. Wade*, 410 U.S. 113, 116 (1973) (emphasis added).

<sup>161</sup> *Id.* at 115.

<sup>162</sup> If *Roe*'s virtual silence on race is due, in part, to Justice Marshall's failure to recognize the significance of abortion rights to racial justice, we might explain this failure in terms of what Professor Kimberlé Crenshaw observed in her foundational writings on intersectionality: “[R]acism as experienced by people of color who are of a particular gender — male — tends to determine the parameters of antiracist strategies.” Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991). Thus, Justice Marshall may have been unable to recognize that racism that impacts black women and others capable of pregnancy is a racial justice issue.

<sup>163</sup> 432 U.S. 464 (1977).

<sup>164</sup> *Id.* at 474.

<sup>165</sup> 448 U.S. 297 (1980).

version of that prohibition, the Hyde Amendment.<sup>166</sup> The Hyde Amendment makes it impossible for low-income people to rely on their health insurance, namely Medicaid, to cover the costs of abortion care except in cases of rape or incest, or when continuation of the pregnancy poses a threat to the person's life;<sup>167</sup> it also means that native people cannot turn to the Indian Health Service, the agency that the United States created to fulfill its obligation to provide healthcare to them, for abortion care except in these narrow circumstances.<sup>168</sup> In his dissent in *Harris*, Justice Marshall argued that the Hyde Amendment both infringed the abortion right recognized in *Roe* and violated the Equal Protection Clause because the funding prohibition would disproportionately harm women of color, as "minority" women were more likely than white women to be indigent and, therefore, beneficiaries of Medicaid.<sup>169</sup> Justice Marshall also observed that the funding restriction would impose a heavier burden on nonwhite women because they "obtain abortions at nearly double the rate of whites."<sup>170</sup> As the discussion above demonstrates, there is a lot to say about race and abortion. Nevertheless, Justice Marshall chose to say relatively little.

In subsequent cases, however, the Court chose to say even less. The almost sixty-page opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>171</sup> reaffirmed what it called "the essential holding" of *Roe*<sup>172</sup> but made no mention of the racial dimensions of abortion and abortion rights. The same is true of the Court's decision in *Whole Woman's Health v. Hellerstedt*,<sup>173</sup> in which the Court struck down a Texas law that imposed onerous requirements on abortion facilities and

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<sup>166</sup> Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, §§ 506-507, 128 Stat. 5, 409; see *Harris*, 448 U.S. at 326.

<sup>167</sup> Alina Salganicoff et al., *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Mar. 5, 2021), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services> [https://perma.cc/6MQ9-XF6D].

<sup>168</sup> *Id.* However, studies show that although Indian Health Service (IHS) facilities are permitted to provide abortion care in cases of rape or incest, IHS tends not to provide abortion care under any circumstances. See Rebecca A. Hart, *No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services*, 25 WIS. J.L. GENDER & SOC'Y 209, 236 (2010). This is due to a combination of the Hyde Amendment, which severely limits the funding available for abortion care in Indian Country, and the low levels of funding for IHS as a general matter. See *id.* (discussing a study that "demonstrated that, even if a Native American woman qualified for an abortion at IHS, the facility was unlikely to have the funding, staff, and/or equipment to perform the procedure"). This result is especially disturbing in light of the "startlingly high rate of sexual assault in Indian Country." *Id.* at 232.

<sup>169</sup> *Harris*, 448 U.S. at 343 (Marshall, J., dissenting) ("The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races.").

<sup>170</sup> *Id.*

<sup>171</sup> 505 U.S. 833 (1992).

<sup>172</sup> *Id.* at 846 (plurality opinion).

<sup>173</sup> 136 S. Ct. 2292 (2016).

providers.<sup>174</sup> The same is true of the Court’s decision in *June Medical Services v. Russo*,<sup>175</sup> in which the Court struck down a Louisiana law that was identical in all relevant respects to the law that the Court had held unconstitutional just four years earlier in *Hellerstedt*.<sup>176</sup>

Indeed, until 2019, the Court’s abortion jurisprudence evinced a sense that race was, by and large, irrelevant to the legal question at issue. However, things shifted in 2019 when Justice Thomas filed his concurring opinion in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*,<sup>177</sup> which regarded a challenge to an Indiana law prohibiting providers from performing abortions when the pregnant person seeks the abortion solely because of the fetus’s race, sex, or disability status.<sup>178</sup> Justice Thomas’s opinion in *Box* is remarkable not only because it represents the most in-depth (albeit highly disputed) exploration

<sup>174</sup> *Id.* at 2300. The majority may have made an oblique reference to race when it cited the lower court’s finding that the restrictions imposed by the law at issue “erect a particularly high barrier for poor, rural, or disadvantaged women.” *Id.* at 2302 (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014)). Here, the Court refused to name race explicitly, requiring the reader to know that the “poor” women indicated are disproportionately nonwhite and the “disadvantage” referenced is perhaps racial disadvantage.

<sup>175</sup> 140 S. Ct. 2103 (2020).

<sup>176</sup> *Hellerstedt*, 136 S. Ct. at 2300; see *Russo*, 140 S. Ct. at 2112–13. One could read Justice Sotomayor’s partial dissent in *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021), as invoking race. *Id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part). The case involved Texas S.B. 8, which, as discussed above, left enforcement of a six-week abortion ban entirely to private citizens. See *supra* pp. 51–52. The Court held that a pre-enforcement challenge in federal court against state court judges, state court clerks, and the state attorney general could not proceed; however, the lawsuit could proceed against executive licensing officials, who would be responsible for taking enforcement actions against providers who violated the law. *Jackson*, 142 S. Ct. at 539. In so holding, the Court allowed the architects of the law largely to shield from federal judicial review a law that intentionally and unequivocally violated binding Court precedent. See Howard M. Wasserman & Charles W. “Rocky” Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1032 (2022) (“The law is clearly constitutionally invalid under the Supreme Court’s prevailing reproductive-freedom jurisprudence . . .”). Justice Sotomayor dissented in part, arguing that the scheme was reminiscent of stratagems that slaveholders in the nineteenth-century South pursued in an effort to protect their peculiar institution. *Jackson*, 142 S. Ct. at 550–51 (Sotomayor, J., concurring in the judgment in part and dissenting in part). She wrote that S.B. 8 “is a brazen challenge to our federal structure. It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to ‘veto’ or ‘nullif[y]’ any federal law with which they disagreed. . . . The Nation fought a Civil War over that proposition . . .” *Id.* (alteration in original). She explained that after the Civil War, Congress was moved to pass section 1983 in order to provide people — meaning, of course, people of color — in the South with a tool to vindicate their federally protected rights, as state courts were either powerless to protect those rights or delighted that they were being violated. See *id.* at 551 (quoting 42 U.S.C. § 1983).

In comparing S.B. 8 to these particular challenges to federal supremacy — scenes from the tortured path of a nation that once instituted a racial caste system to one that has adopted a system of formal racial equality — Justice Sotomayor might have intended to invoke the fact that S.B. 8, and abortion restrictions as a general matter, have a racial dimension. If this was, in fact, Justice Sotomayor’s aim, the reference to race in her partial dissent was oblique, and most readers will likely miss the point that abortion rights and restrictions have a racial salience.

<sup>177</sup> 139 S. Ct. 1780 (2019) (per curiam).

<sup>178</sup> *Id.* at 1783 (Thomas, J., concurring).

of the racial dimensions of abortion in the Court's abortion jurisprudence, but also because it marks the moment when the racial politics of abortion shifted in the *Supreme Court Reporter*. With Justice Thomas's concurrence, the racial demographics of abortion stopped being deployed in constitutional litigation as a fact of little significance or, in the alternate, as evidence in favor of abortion rights; instead, those demographics started being deployed as evidence of abortion's unlawfulness.<sup>179</sup> Of course, Justice Thomas had an opportunity to wax philosophical about race and abortion in *Box* only because antiabortion lawmakers in Indiana had passed a law that purported to ban abortions sought solely on account of the fetus's race.<sup>180</sup> Proponents of the law justified such race-selective abortion bans in Indiana and elsewhere by claiming that black people's disproportionate utilization of abortion care was evidence that racist actors were nefariously, and genocidally, targeting black people for abortion care.<sup>181</sup> This is to say that political actors had already weaponized the racial geography of abortion, thereby providing Justice Thomas with an opportunity to inscribe that weaponization into constitutional law.

(b) *Conservative Invocations of Race*. — As noted above, black people are overrepresented among those who receive abortions in the United States.<sup>182</sup> This is true for a variety of reasons — most of them involving black people's disproportionate vulnerability.<sup>183</sup> However, conservative political actors have leveraged the racial demographics of abortion care in the United States in the service of an incremental assault on *Roe*.<sup>184</sup> This leveraging has taken the form of race-selective

<sup>179</sup> See *id.* at 1791.

<sup>180</sup> See *id.* at 1783, 1792.

<sup>181</sup> See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 548–49 (2016) (noting that supporters of Arizona's race-selective abortion ban asserted that the higher rate of abortion among black women "was the result of a desire to reduce the population of black people," *id.* at 548, and that abortion providers "were accused of 'targeting' black women for abortions," *id.* at 549).

<sup>182</sup> See *supra* notes 94–113 and accompanying text.

<sup>183</sup> See *supra* notes 94–113 and accompanying text.

<sup>184</sup> Believing that it was unlikely that the Court would overrule *Roe* outright in the first few decades after the decision was handed down, many abortion opponents concluded that regulations that would incrementally chip away at the right articulated in *Roe* would pave the path to the decision's demise. See, e.g., Sarah Pulliam Bailey, *The Surprising Battle over "Heartbeat Bills" Among Activists Who Oppose Abortion*, WASH. POST (Apr. 12, 2019, 10:09 AM), <https://www.washingtonpost.com/religion/2019/04/12/surprising-battle-over-heartbeat-bills-among-activists-who-oppose-abortion/> [<https://perma.cc/UYQ9-B5JG>] ("For decades, established antiabortion leaders pushed for incremental steps toward chipping away at abortion through state laws . . ."); Justin Franz, *States Aim to Chip Away at Abortion Rights with Supreme Court in Mind*, KAISER HEALTH NEWS (Mar. 2, 2021), <https://khn.org/news/article/anti-abortion-legislation-conservative-states-gnaw-at-roe-wade-destination-supreme-court/> [<https://perma.cc/7UE2-D8QJ>]; Arya Sundaram, *Why Texas Abortion Opponents Aren't Leading the Charge to Overturn Roe v. Wade*, TEX. TRIB. (May 10, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/10/texas->

abortion bans. These bans begin with the recognition that black people have higher rates of abortion than their nonblack counterparts.<sup>185</sup> However, instead of understanding that those rates are a reflection of black people’s marginalization, proponents of race-selective abortion bans claim that those rates reflect a diabolical plot to decimate the black race through abortion.<sup>186</sup> Professor Mary Ziegler provides the example of the legislative debate around Arizona’s race-selective abortion ban, which “turned on whether or not there was evidence that abortion providers associated with or were themselves racists.”<sup>187</sup> She notes that “proponents of the bill stressed the supposed financial connections of Planned Parenthood to individuals seeking to reduce the size of minority populations.”<sup>188</sup> Race-selective abortion bans, then, purport to thwart this plot by making it a crime for abortion providers and other third parties to target black people for abortion care.<sup>189</sup> It is worth making plain that proponents of race-selective abortion bans reject structural racism as an explanation for black people’s higher abortion rates.<sup>190</sup> Instead, they explain these rates in terms of individualist racism — that is, racism practiced by bad actors acting badly. Race-selective abortion bans impose liability on the bad actors whom they imagine foist abortion care onto unwitting black people.

In *Box*, Justice Thomas authored a concurrence in which he voiced full-throated support for the idea that black people are the objects of a

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anti-abortion-groups-arent-leading-charge-overturn-roe-v-wade [https://perma.cc/9TWN-93U8] (“[T]hree of Texas’ biggest anti-abortion groups want to avoid legislation that takes direct aim at *Roe v. Wade*, fearing such an approach could backfire . . . . Instead, they want to take a more incremental approach with bills that would erode abortion protections more slowly.”). Indeed, *Dobbs* represents the success of that strategy, with the majority opinion expressly stating that the decision to overrule *Roe* and *Casey* is supported by states’ continuing to pass laws — like race-, sex-, and disability-selective abortion bans — that purport to reveal the lack of clarity surrounding the contours of the abortion right. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2274 (2022) (stating that circuit courts have “disagreed on whether a State may regulate abortions performed because of the fetus’s race, sex, or disability”).

<sup>185</sup> See, e.g., Shaw, *supra* note 181, at 566–67 (explaining that Arizona’s race-selective abortion ban “was driven by the higher rate of abortions among black women as compared to white women,” *id.* at 567).

<sup>186</sup> See Khiara M. Bridges, *The Dysgenic State: Environmental Injustice and Disability-Selective Abortion Bans*, 110 CALIF. L. REV. 297, 334 (2022) (discussing how proponents of race-selective abortion bans claim that such laws are needed “because abortion providers are targeting [black people] as part of a nefarious, well-funded plan to prevent black children from being born”).

<sup>187</sup> Ziegler, *supra* note 159, at 6.

<sup>188</sup> *Id.*

<sup>189</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3603.02 (2018) (making it a felony to “[p]erform[] an abortion knowing that the abortion is sought based on the . . . race of the child or the race of a parent of that child” and to “[s]olicit[] or accept[] monies to finance a . . . race-selection abortion”).

<sup>190</sup> See, e.g., Bridges, *supra* note 186, at 360 (“[Justice Thomas] ignored the fact that *structural racism* — in the form of laws and policies that result in black people’s coming to bear disproportionate burdens of poverty, as well as laws and policies that deny impoverished people access to basic healthcare, including contraception — provides a better explanation of black peoples’ disproportionate reliance on abortion care.”).

plot that aims to annihilate the black race through abortion.<sup>191</sup> Justice Thomas’s rendering of history proposes that birth-control advocates, the most famous of whom is Margaret Sanger, were also eugenicists.<sup>192</sup> According to Justice Thomas, Sanger — who, it is true, often used racist rhetoric<sup>193</sup> — sought to reduce black rates of reproduction.<sup>194</sup> Hence, according to Justice Thomas, Sanger and her comrades set up clinics in black communities that offered contraceptive services.<sup>195</sup> Of course, Justice Thomas ignored the reality that many black people capable of pregnancy desperately wanted the means to control the number and spacing of their pregnancies.<sup>196</sup> That is, Justice Thomas ignored that many black people capable of pregnancy not only welcomed these clinics in their communities, but also worked alongside Sanger and actors like her to ensure that black people who needed and wanted contraception could access it.<sup>197</sup>

Justice Thomas’s concurrence speciously drew a direct line from Sanger’s efforts to ensure that black people could access contraception to the higher abortion rates among black people today.<sup>198</sup> He saw an unbroken continuum between the work that Sanger did to ensure that contraception was available to black people in Harlem who wanted it and the fact that today, “there are areas of New York City in which black children are more likely to be aborted than they are to be born alive — and are up to eight times more likely to be aborted than white children in the same area.”<sup>199</sup> In so doing, Justice Thomas elided that

<sup>191</sup> See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1788 (2019) (Thomas, J., concurring).

<sup>192</sup> See *id.* (“[T]he campaign for Birth Control [was] not merely of eugenic value, but [was] practically identical in ideal with the final aims of Eugenics.” (second and third alterations in original) (quoting Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., Oct. 1921, at 5)).

<sup>193</sup> See ROBERTS, *supra* note 52, at 72, 78–79.

<sup>194</sup> See *Box*, 139 S. Ct. at 1788 (Thomas, J., concurring) (discussing Sanger’s efforts to bring birth control to black people).

<sup>195</sup> See *id.* (“Sanger herself campaigned for birth control in black communities. In 1930, she opened a birth-control clinic in Harlem. Then, in 1939, Sanger initiated the ‘Negro Project,’ an effort to promote birth control in poor, Southern black communities.” (citation omitted)).

<sup>196</sup> ROBERTS, *supra* note 52, at 82.

<sup>197</sup> See, e.g., Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2040 (2021) (“[S]cholars have noted that increased access to birth control was not simply thrust upon the Black community in an unwelcome attempt to reduce the Black birthrate . . .”).

<sup>198</sup> See *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (“Eight decades after Sanger’s ‘Negro Project,’ abortion in the United States is also marked by a considerable racial disparity. The reported nationwide abortion ratio . . . among black women is nearly 3.5 times the ratio for white women.”).

<sup>199</sup> *Id.*

many proponents of birth control in Sanger's day, including Sanger herself, opposed abortion.<sup>200</sup>

Importantly, the worldview that Justice Thomas's concurrence reflects rejects the framing of the relationship between abortion rights and racial justice that reproductive justice activists and scholars have proposed. While the latter have argued that there is a positive relationship between abortion rights and racial justice, the *Box* concurrence articulated a worldview in which the reverse is true. In this view, abortion rights are techniques by which a genocide is being committed; accordingly, racial justice demands the elimination of abortion rights and access.

It is imperative to recognize that although Justice Thomas has endorsed originalism,<sup>201</sup> his analysis in *Box* is irrelevant to an originalist interpretation of the Constitution. Sanger's intentions in the twentieth century and present-day racial disparities in abortion rates are immaterial to the question of the original public meaning of the Constitution. This suggests that for Justice Thomas, originalism is not an inexorable command, but rather a strategy that he deploys when it leads to the preferred result. Justice Thomas's decidedly nonoriginalist concurrence in *Box* provides invidious explanations for disparities that, as this Foreword shows, can be understood quite differently. When those disparities are framed in a way that suggests the impropriety of abortion, Justice Thomas proposes that they are relevant to the constitutional inquiry, and originalism gets tossed to the wayside. When those disparities are framed in a way that suggests the necessity of abortion, Justice Thomas undoubtedly would argue that they are irrelevant to the constitutional inquiry. Why? Because originalism requires an interrogation into the meaning of the Constitution at the time of its adoption. The hypocrisy is staggering.

It deserves underscoring that Justice Thomas and the conservative political actors whose views he shares are willing to see racism as the force behind black people's disproportionate turn to abortion care.<sup>202</sup> They can see racism in this context, of course, because it justifies the reversal of *Roe*, which they have coveted for decades. That is, they

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<sup>200</sup> To his credit, Justice Thomas explicitly states that Sanger distinguished birth control from abortion, believing the former to be necessary and the latter to be a travesty:

For Sanger, “[contraception] means health and happiness — a stronger, better race,” while “[abortion] means disease, suffering, [and] death.” Sanger argued that “nothing short of contraceptives can put an end to the horrors of abortion and infanticide,” and she questioned whether “we want the precious, tender qualities of womanhood, so much needed for our racial development, to perish in [the] sordid, abnormal experiences” of abortions. In short, unlike contraceptives, Sanger regarded “the hundreds of thousands of abortions performed in America each year [as] a disgrace to civilization.”

*Id.* at 1789 (third, fourth, and fifth alterations in original) (citations omitted) (quoting MARGARET SANGER, *WOMAN AND THE NEW RACE* 25, 29, 126, 129 (1920)).

<sup>201</sup> See Book Note, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1431 (2008) (reviewing CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007)).

<sup>202</sup> See *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring).

conceptualize the disparate impact of a law — in this case, laws permitting abortion — as the stuff of a racial injustice. Now, insofar as race-selective abortion bans are premised on the idea that there are, in fact, actors out there targeting black people for abortion care, the worldview that Justice Thomas describes appears to suppose that some portion of black people’s higher abortion rates is attributable to malevolent individuals. However, the worldview does not suppose that the higher rates can be *entirely* explained in terms of these bad actors. Justice Thomas’s *Box* concurrence did not argue that genocidal actors have penned all contemporary laws authorizing abortion; the opinion did not make an argument that discriminatory intent lies beneath all of today’s abortion regulations. Instead, it contended that, “[w]hatever the reasons” for black people’s overreliance on abortion care, laws making abortion available to black people effect a genocide.<sup>203</sup>

In the context of abortion, Justice Thomas shows an apparent willingness to interpret the Constitution — in this case, the Due Process Clause of the Fourteenth Amendment — to remedy a racial injury, the perpetration of a genocide, that is being inflicted by facially race-neutral laws. However, when asked to interpret the Equal Protection Clause or other legislation intended to address racial inequality, he has been deeply unwilling to remedy racial injuries inflicted by facially race-neutral laws. Consider as an example his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>204</sup> in which he argued that “racial imbalance” in schools sounds no constitutional alarms.<sup>205</sup> He wrote an entire paragraph expounding the argument that “racial imbalance is not . . . unconstitutional in and of itself.”<sup>206</sup> But, when we shift to the case of abortion, racial imbalance, in and of itself, suggests genocide and, consequently, the unconstitutionality of laws permitting abortion. Professor Melissa Murray incisively explains this inconsistency, writing:

Justice Thomas’s evidence of abortion’s “eugenic potential” flows from the disproportionate incidence of abortion within the Black community. Yet, in other contexts — capital punishment, employment — the disparate impact of race-neutral laws on racial minorities, by itself, is insufficient to establish an equal protection violation. Justice Thomas underscored this point just four years prior to *Box* in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* . . . [H]e cautioned against “automatically presum[ing] that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination[.]”

<sup>203</sup> *Id.* (“Whatever the reasons for these disparities [in abortion rates], they suggest that, insofar as abortion is viewed as a method of ‘family planning,’ black people do indeed ‘tak[e] the brunt of the ‘planning.’” (quoting David Dempsey, *Dr. Guttmacher Is the Evangelist of Birth Control*, N.Y. TIMES (Feb. 9, 1969), <https://www.nytimes.com/1969/02/09/archives/dr-guttmacher-is-the-evangelist-of-birth-control-dr-guttmacher-is.html> [https://perma.cc/79L7-LN49])).

<sup>204</sup> 551 U.S. 701 (2007).

<sup>205</sup> *Id.* at 749–50 (Thomas, J., concurring).

<sup>206</sup> *Id.*



[However,] Justice Thomas had no trouble associating disproportionately high rates of abortion in the Black community with eugenics and the desire to limit Black reproduction. . . . [Justice Thomas] rejects the notion that racism is to blame for racially imbalanced outcomes even as he, in the context of abortion, defends it as the most likely cause of racial imbalance.<sup>207</sup>

If we read Justice Thomas’s *Box* concurrence in conversation with his other opinions that pertain to race and racial discrimination, we see that he is willing to do more for people of color through the Due Process Clause than the Equal Protection Clause. Indeed, this Foreword’s analysis shows that as the Roberts Court interprets it, the Equal Protection Clause is likely the weakest of the antidiscrimination tools vis-à-vis people of color that the Constitution contains. This is true although the Framers in 1868 intended the clause to make people of color equal citizens of the body politic; this is true although the majority of Justices that comprise the conservative wing of the Roberts Court purport to embrace originalism as the proper method for interpreting the Constitution. As wielded by the Roberts Court, other parts of the Constitution — the Due Process Clause, the Second Amendment, and the Sixth Amendment — do more by way of antidiscrimination than the Equal Protection Clause.

The “abortion is black genocide” argument does not appear prominently in the *Dobbs* majority opinion. But it is certainly there.<sup>208</sup> In a footnote, the majority opinion stated that amicus briefs pointed out that “some such supporters [of liberal access to abortion] have been motivated by a desire to suppress the size of the African-American population.”<sup>209</sup> It continued, tellingly: “And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black.”<sup>210</sup> In refusing to discuss the myriad reasons for black people’s higher abortion rates — even though that information was available to the Court in other amicus briefs<sup>211</sup> — the majority opinion implicitly endorsed the “abortion is black genocide” argument. It implied that the argument is worth mentioning as valid. It implied that the argument is not worth dismissing out of hand as propaganda.

Further, after explaining that with the reversal of *Roe*, rational basis review is now the appropriate test for determining the constitutionality of abortion regulation, the majority opinion gave a short, presumably

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<sup>207</sup> Murray, *supra* note 197, at 2097 (footnotes omitted) (quoting *Box*, 139 S. Ct. at 1787 n.4 (Thomas, J., concurring)).

<sup>208</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022).

<sup>209</sup> *Id.* (citing Brief for African-American, Hispanic, Roman Catholic and Protestant Religious and Civil Rights Organizations and Leaders Supporting Petitioners at 14–21, *Dobbs* (No. 19–1392)).

<sup>210</sup> *Id.*

<sup>211</sup> See Brief of Reproductive Justice Scholars as Amici Curiae Supporting Respondents, *supra* note 94. The brief describes how, in Mississippi for example, black women disproportionately experience poverty, intimate partner violence, reproductive coercion, uninsurance, and lack of access to reproductive health resources, namely contraception, in comparison to women of other races. *Id.*

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nonexhaustive list of legitimate governmental interests that may sustain an abortion regulation.<sup>212</sup> Included in this itemization was the state interest in “the prevention of discrimination on the basis of race.”<sup>213</sup> In this way, *Dobbs* installs as legitimate the view that black people’s higher abortion rate is a function of racists duping them into terminating their pregnancies. *Dobbs* establishes that far from being a fantasy of conservative ideologues or a narrative that political actors tell to try to secure black people’s opposition to abortion, it is legitimate to think that black people have higher rates of abortion in part because genocidal actors are out to get them. *Dobbs* announces that it is legitimate to hear about racial disparities in abortion rates and think of genocide. This is an astonishing declaration.

This Foreword proposes that these references to race in the *Dobbs* opinion represent the Court’s implicit acceptance of Justice Thomas’s invitation to interpret the Due Process Clause to remedy the alleged racial injury that abortion rights and access inflict.<sup>214</sup> The Court embraces and elevates this injury narrative solely because it legitimates the Court’s favored policy intervention — the reversal of *Roe*.

Now, if the Court in *Dobbs* set out to remedy the racial injury it proposes is inflicted by black people’s access to safe and legal abortion, we should note that this racial injury — which Justice Thomas previously described as a genocide in an opinion that the *Dobbs* majority approvingly cites<sup>215</sup> — is easily recognizable as a racial injury to a Court that pretends that it can see racism only in phenomena that resemble what bad actors did in the bad old days. This explains the Roberts Court’s willingness to understand the phenomenon as an injury (if it was, in fact, being inflicted upon people of color today): genocides are the stuff that archetypical white supremacists have perpetrated upon others in their fight for racial purity. It is racism in its most classic form.

We ought to contrast the Court’s ability to see the racism in a “genocide” made possible by *Roe* with its inability to see the racism, described above, made possible by *Dobbs*. In the racial common sense that the Court wields like a weapon, the confluence of tragedy that the inaccessibility of safe and legal abortion generates is not racism. The disaster does not remind the Court of what actors did in the pre-Civil Rights Era to maintain their hallowed racial hierarchy.

Over the next Terms, the Court will hand down decisions that will shape American life in myriad and profound ways. As it goes about this project, it will also shape the way that Americans think and talk about race. Our conversations about racism will be impoverished when they

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<sup>212</sup> *Dobbs*, 142 S. Ct. at 2284.

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* at 2256 n.41.

<sup>215</sup> *Id.*

are being molded by a Court that pretends to believe that racism happens only when there is a group perpetrating a genocide, or a bigoted prosecutor attempting to convict a black man of murder despite the overwhelming evidence of his innocence, or self-identified white supremacists convening to craft rules that protect white dominance, or governments creating internment and concentration camps, or states requiring literacy tests as a qualification to vote and providing grandfather clauses as a work-around. Indeed, we should consider how *Dobbs* has already influenced our national conversation about race and racism. *Dobbs* said not a word about the numerous and compounded racial harms that are inflicted when safe and legal abortion is inaccessible. But imagine an alternative ending to the story of *Dobbs*. What if, in the process of upholding *Roe*, the Court had identified, with care and clarity, the contours of the racial injury that is exacted when states are permitted to criminalize abortion? The extensive, oftentimes breathless news coverage that accompanied the official (and unofficial<sup>216</sup>) release of *Dobbs* might have reported on that injury. News outlets might have explained that the Court upheld *Roe* because the majority linked abortion access to racial justice. Laypersons might have understood that there is a compelling argument that abortion rights are necessary if racial equality is to be achieved. Imagining this alternative ending brings into relief how the actual *Dobbs* decision — and its choice to strategically invoke race in the way that it did (and did not) — has already influenced our national conversation about race and racism.

It is unfortunate, to say the least, that the racial common sense that the Roberts Court practices only recognizes nonwhite people's racial injuries when they are reminiscent of pre-Civil Rights Era racism. However, this constraint of vision becomes even more maddening when one observes that the Roberts Court does not require the same of white people's racial injuries. The Court does not demand that white claimants' injuries "look like" the racism that occurred during the days of the nation's formal racial caste system. In cases involving white plaintiffs who claim to have been harmed on account of their race, the Roberts Court has been willing to recognize — and willing to remedy — these alleged harms even though they have no obvious historical analogues.

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<sup>216</sup> Alexandra DeSanctis, *What to Make of Politico's Report of a Dobbs Leak*, NAT'L REV. (May 2, 2022, 9:30 PM), <https://www.nationalreview.com/corner/what-to-make-of-politicos-report-on-the-dobbs-leak> [https://perma.cc/3M5C-4KL4]; Melanie Israel, *Here's What to Watch Following Dobbs Draft Leak*, DAILY SIGNAL (May 4, 2022), <https://www.dailysignal.com/2022/05/04/heres-what-to-watch-following-the-dobbs-draft-leak> [https://perma.cc/3JN9-FK35]; *Summary and Analysis of Leaked Jackson Women's Health Organization v. Dobbs Opinion*, NAT'L WOMEN'S L. CTR. (May 10, 2022), <https://nwlc.org/resource/summary-and-analysis-of-leaked-jackson-womens-health-organization-v-dobbs-opinion> [https://perma.cc/3JFT-D2QS]; Morgan Winsor, *Nation Reacts to Leaked Draft Supreme Court Decision that Could Overturn Roe v. Wade*, ABC NEWS (May 3, 2022, 10:22 AM), <https://abcnews.go.com/Politics/nation-reacts-leaked-draft-supreme-court-decision-overturn/story?id=84463079> [https://perma.cc/9EMW-BA6N] ("Politicians and organizations are reacting to an unprecedented leaked [*Dobbs*] draft opinion . . .").

Part IV analyzes this insight by exploring the Court's cases on affirmative action and disparate impact discrimination.<sup>217</sup> Before getting there, however, the next section examines the Court's decision in *Bruen*. The examination reveals that like *Dobbs*, *Bruen* eschewed recognizing that allowing guns to go unregulated will mete out a racial injury on black people because, like the circumstances present in *Dobbs*, the injury did not recall the racism of yesteryear. However, the *Bruen* majority saw a racial injury in *disallowing* black people from possessing guns — an injury that calls to mind the form that white supremacy took in the bad old days.

### B. New York State Rifle & Pistol Association v. Bruen

In *New York State Rifle & Pistol Association v. Bruen*, the Court struck down a New York state gun licensing regime that required applicants to demonstrate that they had a “special need” to carry a weapon outside of the home for self-defense.<sup>218</sup> The Court held that laws that require individuals to make this demonstration before they can engage in public carry of handguns violate the Second Amendment.<sup>219</sup>

As Justice Thomas's majority opinion explained, forty-three states are “shall issue” jurisdictions in which lawmakers have established “objective criteria” that authorities look to when determining whether to issue a public-carry license to an applicant.<sup>220</sup> If an applicant meets these “objective” requirements, authorities presumably issue the license as a matter of course.<sup>221</sup> The other jurisdictions, called “may issue” jurisdictions, granted some discretion to authorities as to whether to issue a public-carry license to an applicant.<sup>222</sup> In New York, authorities granted licenses for unrestricted public carry of firearms only when the applicant could show that “proper cause exists”; further, proper cause exists only when the applicant can “demonstrate a special need for self-protection distinguishable from that of the general community.”<sup>223</sup> Because this standard made it difficult, if not impossible, for ordinary

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<sup>217</sup> See *infra* Part IV, pp. 133–67.

<sup>218</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022) (“[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.”). Interestingly, Justice Thomas, who wrote the opinion for the Court, did not specify whether the Second Amendment applies to the states through the Due Process Clause or the Privileges or Immunities Clause. Because of Justice Thomas's well-known distaste for substantive due process, we can safely assume that he believes that the Privileges or Immunities Clause is the proper vehicle for applying the Second Amendment to the states. See, e.g., *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2304 (Thomas, J., concurring) (contending that substantive due process should be eliminated “from our jurisprudence at the earliest opportunity”). That he did not specify as much in his *Bruen* majority opinion suggests that some of the Justices who joined the opinion disagree with this use of the Privileges or Immunities Clause.

<sup>219</sup> *Bruen*, 142 S. Ct. at 2122.

<sup>220</sup> *Id.* at 2123.

<sup>221</sup> See *id.*

<sup>222</sup> *Id.* at 2123–24.

<sup>223</sup> *Id.* at 2123 (quoting *Klenosky v. N.Y.C. Police Dep't*, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).

citizens to carry a handgun outside the home to defend themselves against unknown threats and assailants,<sup>224</sup> the Court struck down the licensing regime. Several aspects of the majority opinion are notable.

First, the majority portrayed the seven “may issue” jurisdictions as outliers, hopelessly out of step with the rest of the country with respect to gun rights.<sup>225</sup> But, as the dissent observed, more than twenty-five percent of the people in the United States reside in these jurisdictions — the District of Columbia, California, Hawaii, Maryland, Massachusetts, New Jersey, and New York.<sup>226</sup> Further, these jurisdictions contain some of the most populous areas in the nation: “New York City, Los Angeles, San Francisco, the District of Columbia, Honolulu, and Boston.”<sup>227</sup> Thus, these jurisdictions might have good reason to be less permissive with respect to allowing residents to carry guns in public spaces.<sup>228</sup>

Second, instead of interpreting the demands of the Second Amendment by investigating the contemporary role of guns in society and querying whether certain regulations could lower the costs of the glut of firearms in the nation,<sup>229</sup> the Court interpreted the amendment’s requirements by focusing on the history of gun regulations.<sup>230</sup> The Court’s canvas of history led it to conclude that at the relevant time — whether that is 1791 or 1868<sup>231</sup> — individuals had the right to carry arms in public, and thus, public carry of firearms is constitutionally protected activity today.<sup>232</sup> However, *Bruen* reiterates the lesson that *Dobbs*

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<sup>224</sup> See *id.* at 2145.

<sup>225</sup> See *id.* at 2123–24 (“[O]nly six States and the District of Columbia have ‘may issue’ licensing laws . . .”).

<sup>226</sup> *Id.* at 2172–73 (Breyer, J., dissenting).

<sup>227</sup> *Id.* at 2173.

<sup>228</sup> See *id.* (“[D]ensely populated urban areas face different kinds and degrees of dangers from gun violence than rural areas.”).

<sup>229</sup> See *id.* (“The data show that stricter gun regulations are associated with lower rates of firearm-related death and injury. . . . [S]tudies have shown that ‘may issue’ licensing regimes . . . are associated with lower homicide rates and lower violent crime rates than ‘shall issue’ licensing regimes.” (citations omitted)).

<sup>230</sup> See generally *id.* at 2138–56 (majority opinion) (surveying the history of firearm regulations in England and the United States from 1285 onwards).

<sup>231</sup> The Court did not resolve whether, for originalist purposes, the constitutionally significant year for the question it faced was 1791, when the Second Amendment was ratified, or 1868, when the Fourteenth Amendment was ratified. See *id.* at 2131–32 (“[R]egulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868.” *Id.* at 2132.); see also *id.* at 2163 (Barrett, J., concurring) (observing that the “lack of support for New York’s law in either [1791 or 1868] makes it unnecessary to choose between them”).

<sup>232</sup> See *id.* at 2156 (majority opinion) (“At the end of this long journey through the Anglo-American history of public carry, we conclude that . . . [t]he Second Amendment guarantee[s] to ‘all Americans’ the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008))).

teaches: the Court's historical investigation is not the value-free, apolitical exercise that the Court pretends it to be.<sup>233</sup> While the *Bruen* majority believed that the history of gun regulations establishes a constitutional right to public carry, the dissent examined that same history and arrived at a different conclusion.<sup>234</sup> Where the majority saw a past during which individuals were free to bear arms in most public places at most times, the dissent saw a past in which it was not rare for governments to prohibit citizens from bearing weapons in public areas.<sup>235</sup> Thus, while the majority proposed that it was engaged in a neutral exercise of simply looking at what the nation did in the past, it instead elevated one plausible account of history over another.<sup>236</sup>

Third, the majority opinion subtly suggested that gun violence is not a problem in the United States. The opinion referred to "firearm violence in densely populated communities" as a "*perceived* societal problem" and "handgun violence" as an "*alleged* societal problem."<sup>237</sup> It is one thing to believe that the right to public carry exists notwithstanding the social problems that the right produces or to which the right might contribute. It is another thing entirely to deny the existence of the problems in the first instance.

Fourth, and most startlingly, the majority opinion established a highly deferential test for determining whether a regulation runs afoul of the Second Amendment.<sup>238</sup> The Court expressly rejected the means-

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<sup>233</sup> See *supra* section I.A, pp. 34–65; see also *supra* p. 39 (“[T]he *Dobbs* majority’s decision to elevate as right and true the historical account that it provides in its opinion is not the apolitical exercise that the majority pretends it to be.”).

<sup>234</sup> See *Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting) (“The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular.”).

<sup>235</sup> Compare *id.* at 2156 (majority opinion), with *id.* at 2181 (Breyer, J., dissenting).

<sup>236</sup> See *id.* at 2180 (Breyer, J., dissenting) (citing two experts’ historical accounts that “reach[ed] conflicting conclusions based on the same sources” and observing that “history, as much as any other interpretive method, leaves ample discretion” to choose a self-serving interpretation).

Unsurprisingly, there are elements of the majority’s historical investigation that are quite blatantly subjective — where the results-oriented nature of the enterprise is conspicuous. As the dissent wrote, when the majority encounters historical facts that it does not like:

[T]he Court finds a reason to discount the historical evidence’s persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here.

*Id.* at 2190.

<sup>237</sup> *Id.* at 2131 (majority opinion) (emphases added).

<sup>238</sup> In concurrence, Justice Alito appeared perplexed as to why Justice Breyer would even mention gun violence and mass shootings in his dissent. See *id.* at 2157 (Alito, J., concurring). Others might find it similarly perplexing that the Court felt it possible to talk about gun rights without saying a word — even in a footnote — about the high rates of gun-related deaths and injury found within the United States. See, e.g., *id.* at 2164 (Breyer, J., dissenting) (“The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.”).

end test that several appellate courts had adopted in the wake of the Court's decisions in *District of Columbia v. Heller*<sup>239</sup> and *McDonald v. City of Chicago*,<sup>240</sup> which requires the reviewing court to first determine whether the regulation applies to “activity falling outside the scope of the right as originally understood.”<sup>241</sup> If there is an affirmative answer to this question, the regulation should be upheld.<sup>242</sup> However, if there is a negative answer to this question, the reviewing court has to ask whether the law regulates conduct implicating the “core” Second Amendment right — the right to possess a gun in the home for self-defense.<sup>243</sup> If so, then the court should uphold the law only if it survives strict scrutiny.<sup>244</sup> If not, the court should uphold the law if it survives intermediate scrutiny.<sup>245</sup>

The Court explicitly rejected this means-end test and instead selected a standard that asks whether the Second Amendment's “plain text” applies to an individual's behavior.<sup>246</sup> (The part of the Second Amendment's “plain text” referencing a “well regulated Militia”<sup>247</sup> is curiously irrelevant, per *Heller*.<sup>248</sup>) If the individual's conduct is covered, then the government must show that a regulation that restricts that behavior is “consistent with the Nation's historical tradition of firearm regulation.”<sup>249</sup> If the government cannot show that its regulation is “consistent with” those that governments had enacted and enforced in 1791 or 1868, then the regulation runs afoul of the Second Amendment.<sup>250</sup>

It is not an exaggeration to describe this standard as creating a “super-right.”<sup>251</sup> In other areas of constitutional law, a finding that a regulation implicates or burdens a fundamental right does not end the inquiry. Instead, doctrines that the Court has fashioned oftentimes require reviewing courts to subject a burdensome regulation to strict scrutiny, upholding it if they find that the regulation is narrowly tailored to accomplish a compelling governmental interest.<sup>252</sup> In the First

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<sup>239</sup> 554 U.S. 570 (2008).

<sup>240</sup> 561 U.S. 742 (2010).

<sup>241</sup> *Bruen*, 142 S. Ct. at 2126 (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (quoting *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018)).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 2129–30.

<sup>247</sup> U.S. CONST. amend. II.

<sup>248</sup> *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (reading the “prefatory clause” of the Second Amendment as irrelevant to the scope of the individual right to bear arms).

<sup>249</sup> *Bruen*, 142 S. Ct. at 2130.

<sup>250</sup> *See id.*

<sup>251</sup> Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 624 (2019).

<sup>252</sup> *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

Amendment context, courts consider the type of protected speech that is burdened and how much the speech is burdened when determining whether to apply intermediate or strict scrutiny when reviewing the law.<sup>253</sup> And in the context of abortion, the Court fashioned the “undue burden test,” requiring reviewing courts to uphold regulations that burdened the fundamental right to abortion as long as they did not impose a “substantial obstacle” to a person’s ability to terminate a pregnancy.<sup>254</sup> But the *Bruen* Court, in requiring courts to strike down gun regulations even when they might be narrowly tailored to accomplish the most compelling of governmental interests, has rendered the right to bear arms the most protected of rights in the Constitution. After *Bruen*, the Second Amendment right to keep and bear arms is, at least in the context of handguns, “unlimited,” despite the Court’s explicit statement to the contrary in *Heller*.<sup>255</sup>

In the coming years, the Court will have to determine the contours of this super-right. For example, the historical evidence suggests that in 1786, at least one state government prohibited individuals from bringing firearms into fairs and markets.<sup>256</sup> Consequently, according to *Bruen*’s own rule, the Second Amendment does not protect this conduct. But what is the twenty-first century equivalent of the eighteenth- and nineteenth-century fair and market? Can states prohibit public carry at football games and other sports events? In restaurants and bars? At protests and demonstrations? And what about the constitutionality of

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<sup>253</sup> Compare, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661–62 (1994) (applying intermediate scrutiny to federal statute requiring cable news providers to carry local broadcast stations, in light of the unique characteristics of cable and the statute’s low risk of suppressing speech based on its content), with *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (applying strict scrutiny to state statute levying tax on general-interest magazines, but not newspapers or religious, professional, trade, or sports journals).

<sup>254</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion).

<sup>255</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The majority argued that *Heller* eschewed an inquiry into the means and ends of a regulation. See *Bruen*, 142 S. Ct. at 2129. But *Heller* did not engage in means-ends scrutiny because it believed that it did not have to: it stated that the gun regulation at issue would have failed “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.” *Heller*, 554 U.S. at 628; see *id.* at 628–29. Thus, the Court did not need to establish whether strict or intermediate scrutiny, or some other test, was appropriate when evaluating the constitutionality of a gun regulation. The *Bruen* majority dismissed this language in *Heller*, arguing that it “‘was more of a gilding-the-lily observation about the extreme nature of D.C.’s law’ than a reflection of *Heller*’s methodology or holding.” *Bruen*, 142 S. Ct. at 2129 n.5 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1277 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). It is fascinating that no federal appellate court believed that Justice Scalia, who authored the *Heller* majority opinion, was “gilding the lily” when he wrote those words; instead, every appellate court confronting the issue appeared to agree that Justice Scalia was simply stating that it was unnecessary for the Court to articulate the proper test for evaluating gun regulations, given that the challenged law would fail any tier of scrutiny. See *id.* at 2174 (Breyer, J., dissenting) (“[E]very Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment.”).

<sup>256</sup> See *Bruen*, 142 S. Ct. at 2144 (describing a 1786 Virginia statute prohibiting any person from “go[ing] or rid[ing] armed by night [or] by day, in fairs or markets, or in other places, in terror of the Country” (quoting An Act Forbidding and Punishing Affrays, ch. 21, 1786 Va. Acts 33)).



background checks? The majority opinion did not express skepticism about the legitimacy of licensing regimes that allow authorities to assess whether an applicant should be denied a license because of a mental illness or a violent history.<sup>257</sup> But these regimes are modern innovations: such restrictions did not exist in 1791 or 1868.<sup>258</sup> Because the nation does not have a historical tradition of regulating firearms in this way, does that mean that the Second Amendment protects the right of individuals to possess firearms without undergoing such screening? Does the Second Amendment’s “unqualified command”<sup>259</sup> obligate governments to grant licenses without background checks, *Heller*’s protestations to the contrary notwithstanding?<sup>260</sup> Further, *Heller*, *McDonald*, and *Bruen* all apply to handguns.<sup>261</sup> The Court will have to determine, eventually, whether the Second Amendment protects the right of individuals to possess assault rifles and other weapons of war.

*I. Gun Control: Liberal Invocations of Race.* — In arguing that the Second Amendment does not protect an individual right to carry a firearm outside of the home, liberal proponents of gun restrictions have never hesitated to observe the racial geography of gun violence. While the *Bruen* respondents mentioned the racial demographics of gun deaths neither in their brief to the Court nor in oral arguments, a number of amicus briefs encouraged the Court to interpret the metes and bounds of the right to bear arms in light of the reality that guns snatch away the lives of black people — particularly, young black men — with the most jarring of frequencies. The amicus brief that the NAACP Legal Defense Fund (LDF) submitted is one example.<sup>262</sup> The brief observes that black people are “ten times more likely than white Americans to die from gun violence.”<sup>263</sup> The LDF brief also provides evidence that

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<sup>257</sup> *Id.* at 2138 n.9 (stating that “shall issue” jurisdictions, which the Court discussed approvingly, “often require applicants to undergo a background check or pass a firearms safety course”).

<sup>258</sup> See Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. *Heller* and *Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376, 1379 (2009) (stating that laws prohibiting felons and the mentally ill from possessing firearms were first introduced near the beginning of the twentieth century).

<sup>259</sup> *Bruen*, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

<sup>260</sup> See *Heller*, 554 U.S. at 626–27, 627 n.26 (stating that background checks for mental health issues and felony convictions are “presumptively lawful,” *id.* at 627 n.26).

<sup>261</sup> See *id.* at 629; *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *Bruen*, 142 S. Ct. at 2122.

<sup>262</sup> Brief of the NAACP Legal Defense & Education Fund, Inc., and the National Urban League as Amici Curiae in Support of Respondents at 1, *Bruen* (No. 20-843) [hereinafter LDF Brief] (“LDF has advocated for interpretations of the Second Amendment that fully acknowledge its implications for Black people and other people of color. . . . The effects of gun violence on Black Americans are particularly acute, as Black people, and specifically Black men, are disproportionately likely to experience a gun injury or death.”).

<sup>263</sup> *Id.* at 17.

gun restrictions work: they are associated with a reduction in gun violence and therefore may save black lives.<sup>264</sup> In essence, LDF entreated the Court to consider the death that gun violence produces in black communities when answering the question of whether New York State’s licensing regime runs afoul of the Second Amendment. In this way, the LDF brief invoked race in a way that is consistent with the way that liberals — including the three liberal Justices who dissented in *Bruen*<sup>265</sup> — traditionally have invoked race in the struggle over gun

rights and gun control.<sup>266</sup> That is, the brief, and the *Bruen* dissenters, argued that a permissive interpretation of the Second Amendment and the attendant proliferation of guns inflict a racial injury inasmuch as black people experience the devastation of gun violence in ways unfelt by other communities.<sup>267</sup>

The racial injury exacted by an interpretation of the Second Amendment that would permit the proliferation of guns is not cognizable as such within the racial common sense that the Roberts Court has adopted. It does not resemble pre-Civil Rights Era racism. It does not bear a likeness to the things that actors once did to maintain the nation’s

<sup>264</sup> See *id.* at 4 (“Research demonstrates that jurisdictions that limit handgun possession report fewer gun-related homicides and violent crimes. This is especially true in the nation’s most populous urban areas, where Black people and other people of color — and especially young Black men — disproportionately suffer from injury or death due to gun violence.”).

<sup>265</sup> See *Bruen*, 142 S. Ct. at 2165 (Breyer, J., dissenting) (“[T]he consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular.”).

<sup>266</sup> See JENNIFER CARLSON, BRENNAN CTR. FOR JUST., BEYOND LAW AND ORDER IN THE GUN DEBATE: BLACK LIVES MATTER, ABOLITIONISM, AND ANTI-RACIST GUN POLICY 8 (2021) (“Supporters of gun control often intimate a natural alliance between anti-racist politics and gun control, given the striking disparities in gun violence victimization across race . . .”).

<sup>267</sup> Liberal proponents of gun control have begun to observe that racial unprivilege makes the Second Amendment right to bear arms less meaningful to people of color. Professors Joseph Blocher and Reva Siegel have noted that white people can carry guns in public — even in a menacing manner — without enduring violent reprisals from police officers or private actors. See Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 193–94 (2021) (stating that when groups of armed white men gathered in the Michigan legislature in 2020 to protest COVID-19 restrictions, none of them were arrested “despite plausibly violating a variety of legal prohibitions and threatening public officials,” *id.* at 193). Meanwhile, black people who carry guns in public are at a great risk of harm, as long-standing narratives connecting blackness with danger construct gun-wielding black people as an imminent threat to public safety. *Id.* at 195 (contrasting the response to the Michigan protests with “the crushing public and private violence inflicted on many people attending Black Lives Matter protests throughout the spring and summer of 2020, often justified on the basis that a particular victim appeared ‘intimidating,’ especially if armed”); see also Shaun Ossei-Owusu, *The Itchy Trigger Finger of Clarence Thomas*, BALLS & STRIKES (Nov. 4, 2021), <https://ballsandstrikes.org/scotus/clarence-thomas-bruen-recap> [<https://perma.cc/X8UC-63L5>] (“From colonial times through the twenty-first century . . . the Second [Amendment] has consistently meant this: The second a Black person exercises that right, the second they pick up a gun to protect themselves (or not), their life . . . could be snatched away in that same fatal second.” (second alteration in original) (quoting CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 8 (2021))).

racial hierarchy. Because of this, it is not racism to the Court and, as such, warrants no remedy.

Quite interestingly, *Bruen* provided an occasion for one set of progressive lawyers to invoke race in a way that challenged the relationship between race and gun control that liberals traditionally have proposed. While liberals have tended to deploy race in arguments in favor of gun control measures, the Bronx Defenders teamed up with other public defenders to file an amicus brief deploying race in an argument *against* the gun regulation at issue.<sup>268</sup> The purpose of the Defenders brief was to make visible what often goes unobserved when people talk about gun control: the country uses police, prosecutors, prisons, and probation officers to enforce gun restrictions.<sup>269</sup> Further, if we understand these entities as violent institutions to the poor, nonwhite people who are disproportionately subject to their authority, we see that violence is on both sides of the gun control equation.<sup>270</sup> When guns proliferate in disadvantaged, vulnerable communities, lives are destroyed — the point that the LDF brief makes. However, the Defenders brief reminds us that when we use the apparatus of the criminal legal system to stem the proliferation of guns in disadvantaged, vulnerable communities, lives are also destroyed.<sup>271</sup> People of color are harassed through stop-and-frisk hunts for unlicensed firearms;<sup>272</sup> search warrants are executed in ways that traumatize those affected; individuals are incarcerated in dirty, unsafe jails and prison; people have to live their lives saddled with the

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<sup>268</sup> Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners at 5, *Bruen* (No. 20-843) [hereinafter Defenders Brief].

<sup>269</sup> See CARLSON, *supra* note 266, at 3 (observing that “taking a stand on guns” has often required “colluding with the racist and racializing apparatus of the American criminal justice system”). The use of the criminal legal system for gun control measures is not inevitable. As Professor Jennifer Carlson notes, there are examples of “what an abolitionist approach to gun violence — [efforts] that at the very least decenter[] the criminal justice system — might look like.” *Id.* at 8. These examples deploy “community-embedded organizations” that intervene in the conflicts that so often end in gun violence. *Id.*

<sup>270</sup> See Defenders Brief, *supra* note 268, at 31–32 (“[W]e are mindful that the right to keep and bear arms has ‘controversial public safety implications.’ . . . But what these stories and our experience illustrate is that New York’s licensing requirements . . . themselves have controversial public safety implications.” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010))).

<sup>271</sup> The brief also argues that not only is the New York licensing regime racist in its effects, it is also classist: applicants for a license must pay over \$400 in fees, “pricing out indigent people.” *Id.* at 8.

<sup>272</sup> See Radley Balko, *Shaneen Allen, Race and Gun Control*, WASH. POST (July 22, 2014, 2:51 PM), <https://www.washingtonpost.com/news/the-watch/wp/2014/07/22/shaneen-allen-race-and-gun-control> [<https://perma.cc/F3VX-GLBA>] (“It’s also worth noting that the crime control policy most well-known, widely loathed and roundly condemned by racial justice activists — the New York Police Department’s stop-and-frisk policy — is at heart a gun control initiative.”). It is likely true that being stopped and frisked harms individuals even when the search does not uncover an unlicensed weapon. See *infra* pp. 106–09.

devastating consequences of having been convicted of a “violent felony.”<sup>273</sup> In essence, there are several ways to destroy a life — through a bullet, but also through a terrorizing carceral system. Further, the Defenders brief makes it clear that, on the whole, the enforcement of gun restrictions through the carceral system destroys nonwhite people’s lives:

In 2020, while Black people made up 18% of New York’s population, they accounted for 78% of the state’s felony gun possession cases. Non-Latino white people, who made up 70% of New York’s population, accounted for only 7% of such prosecutions. . . . [A]ccording to NYPD arrest data, in 2020, 96% of arrests made for gun possession under [the challenged statute] in New York City were of Black or Latino people. This percentage has been above 90% for 13 consecutive years.<sup>274</sup>

While the Defenders brief makes an important intervention into the national conversation about race and gun control — we ought to be aware that as guns yield victims, using the criminal legal system to control access to guns yields victims as well — the racial injury that the brief identifies is not cognizable as such within the Roberts Court’s racial common sense.<sup>275</sup> The harms of New York’s licensing regime that the brief describes — harms poor people of color disproportionately feel — are real. However, they are not reminiscent of the techniques that actors once used to enforce white supremacy.<sup>276</sup> As the Roberts Court chooses to perceive it, there is nothing racist about the banal violence that the Defenders brief describes.

Fascinatingly, conservative opponents of gun restrictions have argued that impeding ready access to guns harms people of color in ways that are cognizable as a racial injury within the Roberts Court’s racial common sense. As the next section explores, they have argued that contemporary gun restrictions function to disarm black people and, in so doing, generate an injury reminiscent of that which was inflicted in the

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<sup>273</sup> Defenders Brief, *supra* note 268, at 5–7. The brief explains that people in New York City who are caught with an unlicensed firearm are almost always charged with “second-degree criminal possession of a weapon, a ‘violent felony’ punishable by 3.5 to 15 years in prison.” *Id.* at 7; *see id.* at 6–7.

<sup>274</sup> *Id.* at 14–15 (footnotes omitted).

<sup>275</sup> This did not stop the petitioners in *Bruen* from mentioning the brief during oral arguments. Transcript of Oral Argument at 122, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (imploring the Court to “look at the amicus brief in our support by the Bronx Public Defenders and other public defenders”).

<sup>276</sup> Of note, the Defenders brief also suggests that the New York licensing regime is a racist holdover from the pre-Civil Rights Era inasmuch as there is evidence that the state legislature passed the regulation at issue at the turn of the twentieth century to specifically disarm black citizens and Italian immigrants. Defenders Brief, *supra* note 268, at 5 (“[V]irtually all our clients whom New York prosecutes . . . are Black or Hispanic. And that is no accident. New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities. That remains the effect of its enforcement by police and prosecutors today.”). For a discussion of Justice Alito’s interest in this history, see *infra* note 312.

pre-Civil Rights Era — when white supremacists denied black people access to guns and left them vulnerable to slaughter.

2. *Gun Rights: Conservative Invocations of Race.* — In more recent years, conservative proponents of expansive gun rights have argued in favor of their position by claiming that gun control measures wrongly deny people of color the right to defend themselves. Notably, conservatives once argued for expansive gun rights by claiming that gun control measures wrongly deny *white* people the right to defend themselves against *people of color*.<sup>277</sup> The law-and-order rhetoric in favor of capacious gun rights that politicians began to use in the 1960s was racialized.<sup>278</sup> The rhetoric, always implicitly, accused people of color of being the threat to law and order; it identified nonwhite people as those who committed the crime that made the streets unsafe (for white people) to walk at night. The language of law-and-order proposed that denying white people the right to bear arms was tantamount to throwing them to the black and brown criminal wolves.<sup>279</sup>

This conservative argument about race and guns has shifted. As noted above, conservative proponents of expansive gun rights now have begun to argue that gun restrictions are identical in all relevant respects to the policies and practice that cruelly disarmed black people in the days of Redemption and Jim Crow, and that their persistence inflicts a redressable racial injury on people of color. This argument was not explicitly inscribed into our constitutional law until *McDonald v. City of Chicago* — the *second* gun rights case that the Court has heard in the modern era.<sup>280</sup> This claim makes no appearance in the first gun rights case, *District of Columbia v. Heller*.<sup>281</sup> In that case, the Court was asked to determine whether the Second Amendment protected a right to possess a gun in the home when that possession is unconnected to militia service.<sup>282</sup> The Court answered the question in the affirmative and, in

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<sup>277</sup> See Blocher & Siegel, *supra* note 267, at 199–200.

<sup>278</sup> See Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 235 (2008) (stating that law-and-order rhetoric allowed those who used it to engage in “forms of racial group assertion that could withstand charges of racism”).

<sup>279</sup> See Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 247 (2020) (“As gun control became part of the nation’s culture wars, it became increasingly clear that the ‘criminal’ classes — by which many gun rights advocates meant African-Americans and other minorities — needed to be disarmed, while law-abiding (white) citizens needed access to firearms for defense of self and family.”).

<sup>280</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 845–47 (2010) (Thomas, J., concurring in part and concurring in the judgment).

<sup>281</sup> See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008). Although *Heller* did not expressly invoke race often, race nevertheless is very much present in the opinion. See generally Siegel, *supra* note 278 (excavating the race story underlying *Heller*); Zick, *supra* note 279 (same).

<sup>282</sup> *Heller*, 554 U.S. at 577.

so doing, interpreted the first clause of the Second Amendment as nothing but excess verbiage.<sup>283</sup> Justice Scalia's majority opinion certainly invoked race and black people's experience with guns and gun violence.<sup>284</sup> However, the opinion discussed black people's experience not to claim that black people endure a constitutionally relevant injury when they are denied guns. Rather, the opinion recounted this experience solely in service of the argument that the Second Amendment right to bear arms is unconnected to military service and protects the ability of an individual — who may have no connection to, or interest in, militia service — to possess a firearm for self-defense in the home.<sup>285</sup>

The majority opinion explained that black people “were routinely disarmed by Southern States after the Civil War,” a happenstance that some contemporaneous observers argued “infringed blacks’ constitutional right to keep and bear arms.”<sup>286</sup> However, the majority noted the fact of black disarmament not because it wanted to make an argument that gun ownership is essential to black freedom. Neither did the opinion cite this fact in support of the proposition that all gun control, which has the effect of stripping black people of arms, is racist — a proposition that has circulated with greater frequency within popular and political discourse more recently.<sup>287</sup> Instead, the opinion cited this fact as support for the argument that the Second Amendment protects a right to possess

<sup>283</sup> The text of the Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

In arguing that the Second Amendment protects a right to *carry* a firearm outside of the home that is distinct from the right to bear a firearm in the home, the petitioners’ brief in *Bruen* observed that the Second Amendment protects “the right of the people to keep and bear Arms” and notes that the “phrase secures two distinct rights. Collapsing those two distinct rights would violate cardinal principles of interpretation and the bedrock principle of *constitutional* interpretation that the framers did not waste words in our founding document generally or in securing the fundamental rights of the people in particular.” Brief for Petitioners at 25, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843). The petitioners clearly did not recognize the irony of their argument: the Court’s decision in *Heller* to render irrelevant the Second Amendment’s reference to a “well regulated Militia” suggests that the Framers did, in fact, “waste words in our founding document.” *Id.*

<sup>284</sup> See *Heller*, 554 U.S. at 614–16.

<sup>285</sup> See *id.*

<sup>286</sup> *Id.* at 614.

<sup>287</sup> See Zick, *supra* note 279, at 260–61 (noting the increase in the popularity of the claim that “gun control is racist,” *id.* at 260, and observing the political ends to which the claim is put). This is not to say that the argument is new. People of color have long proposed that gun control measures are attempts to disarm black people and prevent them from protecting themselves against armed white people and/or challenging white authority. Observers of color have pointed to California’s Mulford Act, A.B. 1591, 1967 Leg., Reg. Sess. (Cal 1967), which was passed after the Black Panthers began to carry firearms openly in the state, as an example of powerful white actors enacting gun restrictions to marginalize nonwhite people by disarming them. See Zick, *supra* note 279, at 256 (“California adopted the Mulford Act to reign in the militant Black Panthers . . . [F]ederal legislators enacted the federal gun control law based on concerns about the Panthers as well as several urban race riots that shook the nation in the late 1960s.”). Conservative proponents of expansive gun rights have co-opted these arguments in recent years. See *id.*

firearms unconnected from military service, stating that those who argued that the disarmament of black people violated their constitutional rights were claiming that black people had a right to defend themselves as a general matter and were not claiming that “blacks were being prohibited from carrying arms in an organized state militia.”<sup>288</sup> For similar purposes, the majority invoked *United States v. Cruikshank*,<sup>289</sup> an 1876 case arising out of a massacre perpetrated by white supremacists in the post-Civil War South who had stripped a group of black men of their firearms before summarily executing them.<sup>290</sup> Upwards of 150 black men were murdered in this heinous act of racist violence.<sup>291</sup> The Court in *Cruikshank* held that the perpetrators of the violence could not be held responsible for violating their victims’ Second Amendment rights to bear arms, as the amendment restrained only the federal government, not private citizens.<sup>292</sup> Again, the *Heller* majority did not discuss the massacre as evidence that black people needed guns to protect themselves. Instead, it discussed *Cruikshank* for the sole purpose of noting that no one at the time of the decision had argued that “the victims had been deprived of their right to carry arms in a militia.”<sup>293</sup>

Things had shifted by the time the Court decided *McDonald*. In that case, the Court answered the question of whether the Second Amendment right recognized in *Heller* constrained the states as well as the federal government.<sup>294</sup> Did the Fourteenth Amendment’s Due Process Clause incorporate the Second Amendment? In answering that question in the affirmative, the Court did something that the majority in *Heller* did not dare to attempt: it engaged in a sweeping discussion of the criticality of gun rights to black liberation, presenting “a narrative that indelibly links race equality and gun rights as symbiotic.”<sup>295</sup> Justice

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<sup>288</sup> *Heller*, 554 U.S. at 614; see also ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK 48–49 (2001).

<sup>289</sup> 92 U.S. 542 (1876).

<sup>290</sup> *Heller*, 554 U.S. at 619–20.

<sup>291</sup> See Richard Rubin, *The Colfax Riot*, ATLANTIC MONTHLY (July/Aug. 2003), <https://www.theatlantic.com/magazine/archive/2003/07/the-colfax-riot/378556> [https://perma.cc/K5RK-RTDV].

<sup>292</sup> *Cruikshank*, 92 U.S. at 553.

<sup>293</sup> *Heller*, 554 U.S. at 620.

<sup>294</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

<sup>295</sup> Zick, *supra* note 279, at 245. This should not be read to argue that prior to *McDonald*, no one had argued that the Second Amendment ought to be interpreted in light of black people’s experience with disarmament. Indeed, amicus briefs filed in *Heller* made that claim. *Id.* at 248–50 (“In the run-up to *Heller*, scholars focused on the long history of racial and other forms of discrimination in the nation’s gun laws to develop an explicit civil rights narrative concerning the Second Amendment. . . . Briefs filed in . . . *Heller* . . . drew specific attention to the connection between the right to keep and bear arms and the ‘ugly history’ of African-American disarmament.”).

To be sure, the claim that the Second Amendment ought to be interpreted in light of black people’s experience with disarmament predates the Court’s modern gun rights litigation. Justice Thomas’s concurrence in *McDonald* relies on a 1991 law review article that recounts black people’s

Alito's opinion for the Court provided an extensive history of black people's inability to access guns during the days of chattel slavery, Reconstruction, and Jim Crow — an incapacity that left black people vulnerable to violence from private actors.<sup>296</sup> This partial history — which omitted discussion of the fact that at least some state legislatures during this time had enacted gun restrictions for the express purpose of denying white supremacists the weapons that they had been using to intimidate, maim, and kill black people<sup>297</sup> — was central to the majority's interpretation of the Fourteenth Amendment's Due Process Clause as preventing states from infringing upon the right of the individual to bear arms inside the home for the purpose of self-defense.<sup>298</sup>

Now, in one sense, it is not at all remarkable that *McDonald* focused on black people's experience with guns: the case required the Court to interpret an amendment that was written and ratified to secure rights for formerly enslaved black people. A jurist committed to originalism would be interested in what contemporaneous observers thought the Fourteenth Amendment was accomplishing — an interest that, in the context of the right to bear arms, would warrant an investigation into black people's experience with guns at the time of the amendment's passage.<sup>299</sup> However, Justice Alito's majority opinion exceeded this.

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experience with racist violence from the colonial times through the Civil Rights Movement, arguing that this experience explains why the thought and jurisprudence around the Second Amendment remained underdeveloped. See *McDonald*, 561 U.S. at 846, 857–58 (Thomas, J., concurring) (citing Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991)); Cottrol & Diamond, *supra*, at 359 (“Perhaps another reason the Second Amendment has not been taken very seriously by the courts and the academy is that for many of those who shape or critique constitutional policy, the state’s power and inclination to protect them is a given. But for all too many black Americans, that protection historically has not been available. Nor, for many, is it readily available today.”). The article, which reads like a love letter to guns in the service of black liberation, explicitly proposes that modern gun regulations are racist anachronisms. See *id.* at 354–55 (“[The purpose of] many gun control statutes, particularly of Southern origin . . . like that of the gun control statutes of the black codes, was to disarm blacks.”). But even as the Court in *McDonald* endorsed the importance of gun rights to black liberation, the argument that modern gun control measures were direct descendants of the Black Codes and Jim Crow proved to be a bridge too far for the Court. See Zick, *supra* note 279, at 251 (noting that the Court “did not expressly adopt” that argument in *McDonald*).

<sup>296</sup> See *McDonald*, 561 U.S. at 770–76.

<sup>297</sup> See LDF Brief, *supra* note 262, at 13 (“Republican lawmakers in other states likewise restricted the public carrying of firearms to protect Black citizens from the ‘dire problem’ of white-supremacist ‘gun violence against freedmen.’ . . . [S]tate legislatures readily relied on public carry restrictions and other firearm regulations to do so.” (quoting Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL’Y REV. 611, 616 (2006))); see also Mark Anthony Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 SMU L. REV. F. 169, 171 (2021) (observing that there is historical evidence that some states enacted gun regulations to protect black people from racist violence).

<sup>298</sup> See *McDonald*, 561 U.S. at 767.

<sup>299</sup> For the most part, the *McDonald* majority ignored that while some observers at the time of the Fourteenth Amendment’s passage may have thought that the amendment would guarantee



The point that it endeavored to make by plumbing this history at great depth appears to go beyond merely marshaling evidence that at the time the Fourteenth Amendment was adopted, people understood that it would protect black people's right to bear arms, or that the original public meaning of the Fourteenth Amendment was that it would shield black people from disarmament. Instead, the majority's claim appeared to be simpler than that. It appeared to be making an argument that black people needed guns to protect themselves from the racist violence that they faced. The contention appears to be that, whatever the original meaning of the Fourteenth Amendment, guns were good for black people. Full stop.

Moreover, for the majority, what was true in the bad old days of formal racial inequality is true today. The *McDonald* majority opinion referred to "[t]he plight of Chicagoans living in high-crime areas" whose representatives "called on the Governor to deploy the Illinois National Guard to patrol the City's streets."<sup>300</sup> It explained that these representatives "noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black."<sup>301</sup> It concluded that "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials."<sup>302</sup> In essence, the majority claimed that black people still need guns to protect themselves from the violence they face. Guns still are good for black people. Full stop.

Justice Thomas's abiding distaste for substantive due process led him to file a concurring opinion in which he argued that the right to bear arms is applicable against the states through the Fourteenth Amendment's Privileges and Immunities Clause, not the Due Process Clause.<sup>303</sup> Although Justice Thomas adopted a different textual basis for his argument than the majority, his concurrence is of the same mind that gun rights and gun possession are indispensable to black liberation.

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black people the right to bear arms to protect themselves from violence that private actors committed against them, others thought that the amendment would obligate states to protect black people as they protected white people from private violence. See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 65–66 (2017) ("Many Reconstruction legislators argued that the Fourteenth Amendment was necessary to ensure that recently freed slaves would receive state protection from private violence."). That is, an element of the injustice that the Fourteenth Amendment was designed to address was the state's inequitable withholding of its protection from black people facing violence from private actors. *But see McDonald*, 561 U.S. at 779 (rejecting claim that an outright ban on the possession of firearms that applied equally to black people and white people would have been acceptable, since such a law would have left firearms in the hands of state militia officers and local peace officers, who were committing violence against blacks in the South).

<sup>300</sup> *McDonald*, 561 U.S. at 789.

<sup>301</sup> *Id.* at 789–90.

<sup>302</sup> *Id.* at 790.

<sup>303</sup> *Id.* at 806 (Thomas, J., concurring).

Indeed, Justice Thomas's opinion was even more celebratory of guns as a tool and technique of black freedom:

The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, “[t]he ‘Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.’” . . . [At] times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. The experience left him with a sense, “not ‘of powerlessness, but of the ‘possibilities of salvation’” that came from standing up to intimidation.<sup>304</sup>

We ought to be extremely skeptical that any of the conservative Justices that signed the majority opinion in *McDonald* — with the possible exception of Justice Thomas — actually are concerned about black people's well-being. The jurisprudence that they author, affirm, and support — ranging from cases that have exonerated the Voting Rights Act to those that have reduced the power of the Equal Protection Clause to destabilize racial hierarchies — gives the lie to this claim. For this reason, we ought not to believe that the Justices in the *McDonald* majority truly care whether gun ownership is, indeed, fundamental to black liberty and equality. Instead, one is reasonable if one concludes that the Court embraced this narrative solely because it licenses the result that it wanted to reach in the case.

The centrality of this argument in *McDonald* — that gun ownership is fundamental to black freedom — might explain why the petitioners in *Bruen* were so willing to deploy black people's experience with racialized gun violence in making the argument that the licensing regime at issue in the case infringed the Second Amendment right to carry arms outside of the home.<sup>305</sup> Their merits brief contained pre-Civil Rights

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<sup>304</sup> *Id.* at 857–58 (citation omitted) (quoting Cottrol & Diamond, *supra* note 295, at 354). The reverence that Justice Thomas shows to black gun ownership in *McDonald* is consistent with the “black tradition of arms,” which figures guns as “both a practical tool for black self-defense and a symbol of black self-determination.” FORMAN, *supra* note 299, at 65. Indeed, an increasing number of black people may be embracing this tradition, as gun sales to black people shot up in 2020 in the combined wake of the instability that the pandemic, protests against police violence, and, probably more significantly, the counterprotests against police violence produced. See Curtis Bunn, *Why More Black People Are Looking for Safety in Gun Ownership*, NBC NEWS (June 14, 2022, 6:59 AM), <https://www.nbcnews.com/news/nbcblk/black-people-are-looking-safety-gun-ownership-rcna32150> [<https://perma.cc/F2GG-AV4W>] (noting that gun ownership among black people increased by fifty-eight percent in 2020).

<sup>305</sup> See Zick, *supra* note 279, at 233, 253; Frassetto, *supra* note 297, at 171 (“There is extensive historical evidence of laws regulating the carrying of weapons in public that were . . . enacted to apply neutrally but intended to protect the black population from racist attacks by whites.”). The argument that equality demands a broader interpretation of the Second Amendment has also appeared in the context of LGBTQ equality, see Zick, *supra* note 279, at 255, due, in part, to firearm violence being a significant concern for LGTBQ people, see ADAM P. ROMERO ET AL., UCLA SCH. OF L., WILLIAMS INST., GUN VIOLENCE AGAINST SEXUAL AND GENDER MINORITIES IN THE UNITED STATES 5 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Gun-Violence-Apr-2019.pdf> [<https://perma.cc/8WAA-HHE5>].

Era stories of black disarmament at the hands of white supremacists on public highways, as well as observers' fiery speeches that black people needed firearms, inside and outside of the home, to defend themselves from those who sought to safeguard the nation's racial hierarchy.<sup>306</sup> After detailing this history, the petitioners argued that "the Second Amendment would have been of little value to the freedman if it did not enshrine a right to both keep *and carry* arms, as the violence perpetrated against them was by no means confined to their homes."<sup>307</sup> Indeed, black people's need to carry guns outside of the home was a vital component of the *Bruen* petitioners' argument that the Second Amendment protects *everyone's* right to carry guns outside of the home.

The brief went on to argue that what was true in the past remains true today: the violence that black people currently face — this time perpetrated by other black people — makes gun ownership necessary for black health and well-being.<sup>308</sup> As the brief notes, a "Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."<sup>309</sup> To be clear, this was not a claim about the Second Amendment's original meaning. This was a claim about the Second Amendment as a policy matter: given the violent communities in which they live, the Court should interpret the amendment to permit black people to carry guns today.

During oral arguments in *Bruen*, Justice Alito in particular appeared receptive to the petitioners' efforts to frame gun rights and possession as an essential element of black safety and wellness, and he seemed amenable to the petitioners' invitation to interpret the Second Amendment in light of that framing.<sup>310</sup> Justice Alito asked the Solicitor General of New York to engage with a hypothetical involving "ordinary law-abiding citizens who feel they need to carry a firearm for self-defense"<sup>311</sup>:

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<sup>306</sup> Brief for Petitioners, *supra* note 283, at 9–13, 23–24, 36–37.

<sup>307</sup> *Id.* at 36.

<sup>308</sup> *See id.* at 39 ("[T]he need for self-defense is not and has not ever been confined to the home. That was true at the framing when the Republic was still relatively untamed, it was true in the wake of the Civil War when Congress acted to protect the rights of new citizens on the public highways, and it is true today."). The respondents attempted to answer the argument that black people need access to guns to save themselves from violence by observing that many states in the nineteenth century passed gun restrictions in order to protect black people from assault and murder. Brief for Respondents at 30, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) ("In some parts of the postbellum South, restrictions on publicly carrying firearms were critical for protecting freedmen from violence and intimidation perpetrated by whites. . . . Texas's reasonable-cause law, which passed in 1871 with the unanimous support of that State's Black legislators, helped to . . . protect freedmen against racial violence." (citation omitted)). In essence, while the petitioners framed gun restrictions as a contrivance that disarmed helpless black citizens, the respondents framed those same gun restrictions as a modus for preserving black lives.

<sup>309</sup> Brief for Petitioners, *supra* note 283, at 39 (quoting *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012)).

<sup>310</sup> *See* Transcript of Oral Argument, *supra* note 275, at 66–67.

<sup>311</sup> *Id.* at 66.

So I want you to think about people . . . who work late at night in Manhattan, it might be somebody who cleans offices, it might be a doorman at an apartment, it might be a nurse or an orderly, it might be somebody who washes dishes. None of these people has a criminal record. They're all law-abiding citizens. They get off work around midnight, maybe even after midnight. They have to commute home by subway, maybe by bus. When they arrive at the subway station or the bus stop, they have to walk some distance through a high-crime area, and they apply for a license, and they say: Look, nobody has told — has said I am going to mug you next Thursday. However, there have been a lot of muggings in this area, and I am scared to death. They do not get licenses, is that right?<sup>312</sup>

One could reasonably believe that Justice Alito's apparent solicitude for the low-wage workers of Manhattan is disingenuous. Indeed, just a

couple months prior to oral arguments in *Bruen*, Justice Alito was unwilling to protect these same workers from being evicted from the homes that they had to walk through "high-crime area[s]"<sup>313</sup> to reach.<sup>314</sup> (Similarly, we might disbelieve that Justice Alito is devoted to the happiness and well-being of LGBTQ people — even though he recounted in his *Bruen* concurrence the story of Austin Fulk, "a gay man from Arkansas" whose companion brandished and fired a gun, thus saving them from a vicious homophobic assault by attackers wielding baseball bats and tire irons.<sup>315</sup> That Justice Alito dissented in *Obergefell v. Hodges* and *Bostock v. Clayton County*<sup>316</sup> gives the lie to the supposition that he wants to ensure that LGBTQ people can thrive.<sup>317</sup> Likewise, we might disbelieve that Justice Alito is committed to the welfare of women — even though his *Bruen* concurrence recounted the story of a "woman [who] was brutally assaulted in the parking lot of a fast food restaurant in Jefferson City, Tennessee. Her assailant slammed her to the ground and began to drag her around while strangling her."<sup>318</sup> A bystander with a gun managed to stop the attack.<sup>319</sup> That Justice Alito wrote the majority opinion in *Dobbs*, which permits states to force this

<sup>312</sup> *Id.* at 66–67; see also *Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring) (expressing concern for those who "must traverse dark and dangerous streets in order to reach their homes after work or other evening activities"). As Professor Shaun Ossei-Owusu colorfully writes, Justice Alito's hypothetical during oral arguments suggests that his "primary experience with the New York City subway system came from watching Grandmaster Flash's dystopian 'The Message.'" Ossei-Owusu, *supra* note 267.

<sup>313</sup> Transcript of Oral Argument, *supra* note 275, at 67.

<sup>314</sup> See *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam) (granting application to vacate a stay on judgment overturning a nationwide eviction moratorium).

<sup>315</sup> *Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring).

<sup>316</sup> 140 S. Ct. 1731 (2020); *id.* at 1754 (interpreting Title VII to protect gay and transgender people from employment discrimination).

<sup>317</sup> See *id.* at 1754 (Alito, J., dissenting); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting).

<sup>318</sup> *Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring).

<sup>319</sup> *Id.*

same woman to bear a child had this assault resulted in a pregnancy, gives the lie to the supposition that he wants to protect women from trauma.<sup>320</sup> Justice Alito’s invocation of the plight of the office cleaners, orderlies, and dishwashers of Manhattan<sup>321</sup> is not evidence of his concern for the borough’s “essential workers,” but rather of the narrative that he elevated in his *McDonald* majority opinion: for Justice Alito, black disarmament is consistent with black injury and death, and gun possession is vital to black people’s well-being.<sup>322</sup> His invocation of Manhattan’s beleaguered working class, populated as it is by people of color,<sup>323</sup> is a sign of his inclination to interpret the Second Amendment in light of this racial framing.

Justice Thomas’s majority opinion in *Bruen* continued the story that *McDonald* told in which guns figure as an essential tool and technique of black liberation.<sup>324</sup> The opinion described black people who “had ‘procured great numbers of old army muskets and revolvers, particularly in Texas,’ and ‘employed them to protect themselves’ with ‘vigor and audacity.’”<sup>325</sup> It proposed that black people needed these guns inasmuch as the “government was inadequately protecting them.”<sup>326</sup> It spoke of black people who felt that possessing a firearm was necessary if they wanted to participate in politics; these individuals “nearly all sle[pt] upon their arms at night, and carr[ie]d] concealed weapons during the day.”<sup>327</sup> It told of racist officials who had attempted to disarm, or at least penalize, black people who carried firearms in public, fining them for violating ordinances related to public carry while refusing to subject white people to the same penalties.<sup>328</sup> It reported that, after the Civil War, there had been an “outpouring of discussion of the [right to keep and bear arms] in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.”<sup>329</sup> The opinion can be read to argue that the reason for this “outpouring of discussion” is that the public back then understood, as the majority wisely understood today, that black people need guns to be truly free and equal in America.<sup>330</sup> And so, there is an irony in Justice

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<sup>320</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

<sup>321</sup> See Transcript of Oral Argument, *supra* note 275, at 67.

<sup>322</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 776 (2010).

<sup>323</sup> See *Manhattan Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/boroughs/manhattan-population> [<https://perma.cc/TF6S-G7Y2>].

<sup>324</sup> See *supra* note 295 and accompanying text.

<sup>325</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2151 (2022) (quoting S. EXEC. DOC. NO. 39-43, at 8 (1866)).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 2152 (quoting H.R. EXEC. DOC. NO. 40-329, at 40 (1868)).

<sup>328</sup> *Id.* at 2152 n.27.

<sup>329</sup> *Id.* at 2150 (alteration in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

<sup>330</sup> See *id.*

Alito's accusation in his concurring opinion that the dissent simply believes that "guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit."<sup>331</sup> This irony is that Justice Alito — and the five other Justices in the *Bruen* supermajority — are keen to profess that *guns are good*.<sup>332</sup> They have found useful an account that offers that guns are necessary for black people engaged in the struggle for freedom and equality. They embrace this account, of course, because it legitimates the result that they would like to reach.

This Foreword reads *Bruen* as the Court interpreting the Second Amendment in light of this narrative of black people's experience with gun possession. One of the justifications for the Court's interpretation of the Constitution to protect a broad right to keep and bear arms is that black people need such a right in order to be truly free, in the Court's view. This reading of *Bruen* proposes that the Court reasoned that in the aftermath of the Civil War, black people did not enjoy a robust right to bear arms. This right was not protected.<sup>333</sup> And they were maimed and killed as a consequence thereof.<sup>334</sup> In this narrative, contemporary laws that function to disarm black people produce an injury reminiscent of the one that was inflicted in the pre-Civil Rights Era. Modern laws that disarm black people, like those enforced in "may-issue" jurisdictions, leave black people to be maimed and killed (this time, of course, by other black people).<sup>335</sup> Because the conservative supermajority in *Bruen* allowed itself to perceive a similarity between the racial injury inflicted during the days of formal white supremacy and the harm that it considered "may-issue" jurisdictions to mete out, it recognized the latter as racism. Recognizing as much, the Court interpreted the Second Amendment to remedy this injury.<sup>336</sup>

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Before concluding the analysis of gun rights, we ought to observe that people who maintain that guns are essential to black liberation might endeavor to complicate the way that race is positioned in the national conversation around gun violence and gun regulation — similar to those who deploy the "abortion is black genocide" argument in the

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<sup>331</sup> *Id.* at 2160–61 (Alito, J., concurring).

<sup>332</sup> *See, e.g., id.* at 2151 (majority opinion).

<sup>333</sup> *Id.* ("After the Civil War, of course, the exercise of this fundamental right [to bear arms] by freed slaves was systematically thwarted.")

<sup>334</sup> *See id.* (describing testimony before the Joint Committee on Reconstruction "noting how a black man in Tennessee had been murdered on his way to get book subscriptions, with the murderer taking, among other things, the man's pistol") (citing H.R. EXEC. DOC. NO. 40-329, at 36 (1868)).

<sup>335</sup> *See id.* at 2159 (Alito, J., concurring) ("Some briefs were filed by members of groups whose members feel that they have special reasons to fear attacks." (citing Brief for Black Guns Matter et al. as Amici Curiae in Support of Petitioners, *Bruen* (No. 20-843); Brief for Amicus Curiae National African American Gun Association, Inc., in Support of Petitioners, *Bruen* (No. 20-843))).

<sup>336</sup> *Id.* at 2156 (majority opinion).

context of the abortion debate.<sup>337</sup> They might seek to create uncertainty around whether racial justice requires an expansive or narrow Second Amendment right to bear and carry arms. However, unlike in the abortion context, the answer to the question of what racial justice requires is difficult in the context of guns.

Although it is debatable, to say the least, that black freedom and equality hinge on black people's possession of firearms, it is not at all debatable that gun violence, as well as the nation's use of prisons and police to curb gun violence, have been devastating to black people and communities.<sup>338</sup> Black people are ravaged when guns proliferate, and they are ravaged when the nation uses the carceral system to contain the proliferation of guns.<sup>339</sup> Professor Shaun Ossei-Owusu captures this tension when he writes that "any ruling offered by the Court [in *Bruen*] will be disastrous for Black people."<sup>340</sup> An alternative decision in *Bruen* — one that allowed states to regulate the availability of guns through the criminal legal system — would leave black communities to be policed and punished by institutions that reasonable people have identified as adverse to those communities.<sup>341</sup> Further, it "leaves people who live in overpoliced or underpoliced neighborhoods all but powerless to protect themselves where the state fails to do so."<sup>342</sup>

Meanwhile, the actual decision in *Bruen* will lead to an increase in guns in public places.<sup>343</sup> And, as Ossei-Owusu explains, "Black folks and members of other marginalized communities will bear the brunt of such a shift. Black women are disproportionately impacted by intimate partner gun violence."<sup>344</sup> While young black men between the ages of fifteen and thirty-four comprise only two percent of the population, they account for "37% of gun homicide fatalities."<sup>345</sup> Further, *Bruen* does

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<sup>337</sup> See *supra* section I.A.2, pp. 55–65.

<sup>338</sup> Defenders Brief, *supra* note 268, at 5 ("The consequences for our clients are brutal. New York police have stopped, questioned, and frisked our clients on the streets. They have invaded our clients' homes with guns drawn, terrifying them, their families, and their children. They have forcibly removed our clients from their homes and communities and abandoned them in dirty and violent jails and prisons for days, weeks, months, and years. They have deprived our clients of their jobs, children, livelihoods, and ability to live in this country. And they have branded our clients as 'criminals' and 'violent felons' for life."); see also *Bruen*, 142 S. Ct. at 2165 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[T]he consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular.");

<sup>339</sup> See CARLSON, *supra* note 266, at 2 (noting that the "tough on crime" agenda in the 1980s and 1990s led to a growth in prison population, "disproportionately with people of color").

<sup>340</sup> Ossei-Owusu, *supra* note 267.

<sup>341</sup> See generally DERECKA PURNELL, *BECOMING ABOLITIONISTS* (2021).

<sup>342</sup> Ossei-Owusu, *supra* note 267.

<sup>343</sup> See Brief for Respondents, *supra* note 308, at 43–44.

<sup>344</sup> Ossei-Owusu, *supra* note 267.

<sup>345</sup> EDUC. FUND TO STOP GUN VIOLENCE & COAL. TO STOP GUN VIOLENCE, *A PUBLIC HEALTH CRISIS DECADES IN THE MAKING: A REVIEW OF 2019 CDC GUN MORTALITY DATA 14* (2021), <http://efsgv.org/2019CDCdata> [<https://perma.cc/5L77-YVQV>].

not eliminate the dangers attendant to the presumption that black people are armed and dangerous — even when we might presume, after *Bruen*, that a greater percentage of black people carrying firearms will be carrying them legally: “One can only shudder at the prospect of police officers, who already say they feel threatened by Black skin, operating under the presumption that a Black person they encounter on the beat is legally strapped.”<sup>346</sup>

Again, it is unclear what racial justice requires. But a Court that weighs these concerns when determining the metes and bounds of the Second Amendment will likely arrive at a better decision than a Court that deploys a fanciful, empirically unsupported idea of gun possession as the key to black salvation to legitimate its preferred legal result.

## II. PROTECTING PEOPLE OF COLOR FROM RELICS OF RACISM: CRIMINAL JURIES

A tour through the Court’s recent criminal procedure cases provides ample support for the argument that the only racial injuries endured by people of color for which the Roberts Court is willing to provide relief are those that recall the racism that was perpetrated during the pre-Civil Rights Era. This Part focuses on *Flowers v. Mississippi*,<sup>347</sup> *Ramos v. Louisiana*,<sup>348</sup> and *Peña-Rodriguez v. Colorado*<sup>349</sup> — cases that demonstrate the narrowness of the Roberts Court’s conception of what “counts” as racism against people of color.<sup>350</sup> While *Flowers* involved a

<sup>346</sup> Ossei-Owusu, *supra* note 267.

<sup>347</sup> 139 S. Ct. 2228 (2019).

<sup>348</sup> 140 S. Ct. 1390 (2020).

<sup>349</sup> 137 S. Ct. 855 (2017).

<sup>350</sup> The Court’s decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), also demonstrates that the Court will provide relief for racial discrimination against people of color only when, in the Court’s view, it bears a resemblance to pre-Civil Rights Era racism. Duane Edward Buck, a black man convicted of murder, was sentenced to death following a hearing in which his own lawyer called to the stand an expert witness, Dr. Walter Quijano, who had submitted a report declaring that there was a correlation between Buck’s race and a propensity for violence. *Id.* at 768–69. The prosecution used this testimony to argue that Buck likely would act violently in the future — a factor in support of a death sentence. *Id.* at 782 (Thomas, J., dissenting). The Court held that the defense attorney’s decision to call Quijano violated Buck’s Sixth Amendment right to the effective assistance of counsel. *Id.* at 775 (majority opinion). It is undeniable that pre-Civil Rights Era racism is on display in *Buck*. As Professors Angela Onwuachi-Willig and Anthony Alfieri have observed, the expert invoked a tried-and-true trope — that of the black man with an innate, inescapable, inevitable proclivity for violence. See Angela Onwuachi-Willig & Anthony V. Alfieri, *(Re)Framing Race in Civil Rights Lawyering*, 130 YALE L.J. 2052, 2096 (2021) (“In *Buck*, the race-coded conduct of Buck’s trial attorney goes too far for the colorblind dogma of Chief Justice Roberts in evoking Gates’s Redeemer trope of the *ruthless, homicidal black savage*.”). For centuries, actors have deployed this particular fantasy of racial biology in the project of black dehumanization. See *id.* at 2081 (writing that the “racialized scientific evidence” that Quijano offered summoned the stereotype of “black-male bestial violence”). It is therefore unsurprising that the Roberts Court recognized as a racial injury the defense counsel’s inexplicable decision to call Quijano to the stand. *Id.* The intervention that this Foreword makes is to observe that the Court’s decision to remedy this injury



*Batson*<sup>351</sup> challenge and, therefore, the Equal Protection Clause,<sup>352</sup> *Ramos* and *Peña-Rodriguez* instead involved the Sixth Amendment.<sup>353</sup> The latter set of cases reveals that the Roberts Court is willing to redress racial injuries outside of the Equal Protection Clause. The only requirement — an intentionally difficult requirement to satisfy — is that the injury must look like the injuries that were inflicted on people of color during the bad old days of formal racial inequality.

#### A. *Jury Selection*: *Flowers v. Mississippi*

In *Flowers v. Mississippi*, the Court overturned the conviction and death sentence of a black man accused of murdering three white people and one black person in the small southern town of Winona,

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through the Sixth Amendment is consistent with a more general practice by which the Roberts Court uses other parts of the Constitution, and not the Equal Protection Clause, to provide relief to people of color who have endured race-based injury. Further, this Foreword intervenes to clarify that it is *only* when the racial injury bears a resemblance to the racism that was regnant during the pre-Civil Rights Era — as it did in *Buck* — will the Roberts Court recognize it as racial injury and provide a remedy.

Professor Daniel Harawa’s analysis of *Timbs v. Indiana*, 139 S. Ct. 682 (2019), suggests that the case also serves as evidence that the Court will recognize a racial injury for people of color only when the contemporary racial discrimination recalls the techniques that produced racial hierarchy during the pre-Civil Rights Era. See Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court’s Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 705–07 (2022). In *Timbs*, the Court held that the Excessive Fines Clause of the Eighth Amendment was incorporated against the states via the Fourteenth Amendment’s Due Process Clause. See *Timbs*, 139 S. Ct. at 687. In the course of arguing that observers throughout the nation’s history have appreciated the threat that excessive fines pose to liberty, Justice Ginsburg’s opinion for a unanimous Court explained that the Black Codes that many Southern states had enacted after the Civil War contained provisions with “draconian fines for violating broad proscriptions on ‘vagrancy’ and other dubious offenses.” *Id.* at 688. She wrote that “[w]hen newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor.” *Id.* at 689 (citations omitted). Harawa observes, correctly, that the Court was not obligated to explore the “racist history of fining practices around the time the Fourteenth Amendment was ratified” to decide the legal question before it. Harawa, *supra*, at 701. He argues that the Court felt compelled to say something about race in the wake of a growing public conversation about racial inequality. See *id.* at 697–98. However, Harawa argues, the Court recognizes only “in-your-face Jim Crow-styled racism.” *Id.* at 704. He concludes that because the practice of levying excessive fines after the Civil War was, precisely, “in-your-face Jim Crow-styled racism,” *id.*, the Court felt empowered to mention it, *id.* at 704–05.

If we adapt Harawa’s insight into the framework that this Foreword offers, we might propose that in *Timbs*, the Court was willing to recognize and remedy a racial injury that people of color endure — the imposition of ruinous, immiserating fines as part of, or ancillary to, criminal punishment — because the Court saw a resemblance between the contemporary practice and the techniques that actors used during the pre-Civil Rights Era to reinforce and sustain the nation’s racial caste system. All of the Justices on the Court — conservatives and liberals alike — were able to perceive the injury and were prepared to provide relief for it. See *Timbs*, 139 S. Ct. at 686–87. Of note, the exploration in Justice Thomas’s concurring opinion of the use of excessive fines to subjugate formerly enslaved black people after the Civil War is even more extensive than that contained in the majority opinion. *Id.* at 697–98 (Thomas, J., concurring).

<sup>351</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>352</sup> See *Flowers*, 139 S. Ct. at 2238.

<sup>353</sup> See *Ramos*, 140 S. Ct. at 869; *Peña-Rodriguez*, 137 S. Ct. at 1394.

Mississippi.<sup>354</sup> Curtis Flowers, the defendant, had been prosecuted by the same district attorney, Doug Evans, in six trials over the course of thirteen years.<sup>355</sup>

During jury selection in the sixth trial, the defense raised a *Batson* objection<sup>356</sup> to the prosecution's exercise of peremptory challenges against several black prospective jurors.<sup>357</sup> The trial court rejected the *Batson* motion, and the jury ultimately returned a guilty verdict and sentenced Flowers to death.<sup>358</sup> The Mississippi Supreme Court upheld the conviction, but the U.S. Supreme Court reversed, finding that the state court had erred when it failed to find that the prosecution violated the Equal Protection Clause by striking one of the black potential jurors.<sup>359</sup> Justice Thomas dissented.<sup>360</sup>

The majority led by noting that while the Court was called upon only to determine the constitutionality of the peremptory challenges in the sixth trial, Evans had struck forty-one of forty-two black prospective jurors over the course of the several trials.<sup>361</sup> As one observer explains, “[o]nly where there were more black potential jurors than the State had

<sup>354</sup> *Flowers*, 139 S. Ct. at 2235, 2237–38.

<sup>355</sup> See Maurice Possley, *Curtis Flowers*, NAT'L REGISTRY OF EXONERATIONS (Sept. 4, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5808> [<https://perma.cc/6W92-5MBD>]. Flowers was first arrested in 1996, and the first trial was in 1997. See *Flowers v. State*, 773 So. 2d 309, 312–13 (Miss. 2000) (en banc). His sixth trial was in 2010. See *Flowers v. State*, 158 So. 3d 1009, 1023 (Miss. 2014) (en banc), *vacated*, 136 S. Ct. 2157 (2016). The Supreme Court overturned his conviction and death sentence in 2019. *Flowers*, 139 S. Ct. at 2228, 2235, 2237–38. It would be another year before the state dismissed the case and released him. Possley, *supra*. Thus, Flowers was in custody for a total of twenty-three years.

<sup>356</sup> In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court established the test for finding racial discrimination in the use of peremptory challenges in violation of the Equal Protection Clause. *Id.* at 93–94, 98. The Court explained that the defendant must first make out a prima facie case by showing that the circumstances under which a juror was struck support an inference that the prosecutor intended to discriminate against the juror on account of race. *Id.* at 93–94. Once the showing has been made, the state must offer a facially race-neutral reason for the strike. *Id.* at 94. If the state meets this burden, the defendant must then prove that the race-neutral reason offered for the strike is pretextual. *Id.* at 98. The *Batson* test “has failed to meaningfully reduce the racist use of peremptory strikes,” as “prosecutors routinely conjure up race-neutral reasons for striking potential jurors . . . that courts rarely ‘second-guess.’” Recent Order, *Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020* (Ariz. 2021), 135 HARV. L. REV. 2243, 2248 (2022) (quoting *Batson*, 476 U.S. at 106 (Marshall, J., concurring)); *id.* (“Courts have accepted as satisfactory explanations under *Batson* the fact that stricken Black jurors had ‘unkempt hair’ and a beard; rented rather than owned their home; lived in a neighborhood where exposure to drug trafficking was likely; nodded at the defendant’s brother outside the courtroom; and ‘wore a beret one day and a sequined cap the next.’” (footnotes omitted)).

<sup>357</sup> See *The Supreme Court, 2018 Term — Leading Cases*, 133 HARV. L. REV. 242, 354–55 (2019). As Professor Paul Butler explains, peremptory strikes allow the attorneys in criminal trials to “remove prospective jurors. Traditionally, peremptory strikes could be exercised ‘for any reason or no reason at all,’ but *Batson* and its progeny prohibit race- and gender-based strikes.” Paul Butler, *Mississippi Goddamn: Flowers v. Mississippi’s Cheap Racial Justice*, 2019 SUP. CT. REV. 73, 74 (2020) (quoting *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O’Connor, J., concurring)).

<sup>358</sup> *The Supreme Court, 2018 Term — Leading Cases, supra* note 357, at 354.

<sup>359</sup> See *Flowers*, 139 S. Ct. at 2235.

<sup>360</sup> *Id.* at 2252–53 (Thomas, J., dissenting).

<sup>361</sup> *Id.* at 2235 (majority opinion).

peremptory strikes or the trial court granted a *Batson* challenge did a black juror serve.”<sup>362</sup>

In the sixth trial, Evans struck five of the six black prospective jurors.<sup>363</sup> His justification for striking black prospective juror Carolyn Wright was that she had worked with Flowers’s father and knew several of the individuals involved in the case.<sup>364</sup> However, while “Wright had some sort of connection to 34 people involved in Flowers’ case, . . . three white prospective jurors — Pamela Chesteen, Harold Waller, and Bobby Lester — also knew many individuals involved in the case. Chesteen knew 31 people, Waller knew 18 people, and Lester knew 27 people.”<sup>365</sup> In light of Evans’s removal of Wright while accepting similarly situated white jurors — set in the larger context of a series of trials in which appellate courts had concluded that Evans had engaged in prosecutorial misconduct<sup>366</sup> and impermissibly used peremptory strikes to remove prospective black jurors<sup>367</sup> — the Court found that discriminatory intent lay behind Evans’s peremptory strike of Wright and reversed Flowers’s conviction and death sentence.<sup>368</sup>

The facts in *Flowers* could be the plot of a movie set in the Jim Crow South. They certainly harken back to the pre-Civil Rights Era. As Professor Daniel Harawa describes it, Evans appears to be a “living

<sup>362</sup> *The Supreme Court, 2018 Term — Leading Cases*, *supra* note 357, at 354. Butler has observed that the race of the jurors mattered tremendously in Flowers’s trials. See Butler, *supra* note 357, at 75. Indeed, the “race of the jurors . . . determined the outcome of each trial.” *Id.* When there was one or no black people on the jury, the jury voted to convict; however, when there were three or more black people on the jury, there were mistrials after the jury failed to reach a unanimous decision. See *id.*; see also Proposed Brief of Amicus Curiae the Honorable Gavin Newsom in Support of Defendant and Appellant McDaniel at 67, *California v. McDaniel*, 493 P.3d 815 (Cal. 2021) (No. 21-7455) [hereinafter Gavin Newsom Amicus Brief] (“[T]he presence of Black jurors . . . substantially reduce[s] the likelihood of a death sentence. . . . In the absence of any Black male jurors, death sentences were imposed in 71.9% of Black defendant/White victim cases . . . as compared to 42.9% of those cases with one Black male on the jury . . . .” (citations omitted)). This fact leads Butler to make the provocative point that perhaps Evans’s apparent desire to produce all-white or nearly all-white juries in each of Flowers’s trials does not reveal that Evans is racist, but rather “is a lawyer . . . who wanted to win his case.” Butler, *supra* note 357, at 101. Whether or not Evans is a bigot, the six trials to which he subjected Flowers reveal a tension: there is the *Batson* rule, which requires ostensible colorblindness in juror selection, and there is the reality that race matters in criminal courtrooms. Compare *id.* at 75 (noting that the majority opinion in *Flowers* “extolled the virtues of color-blindness in a case where color meant everything”), with *id.* at 82 (arguing that the “mandate” of “official color-blindness” enforced by *Batson* and the Court’s equal protection jurisprudence generally “is not in the best interests of racial minorities”).

<sup>363</sup> *Flowers*, 139 S. Ct. at 2235.

<sup>364</sup> *Id.* at 2249.

<sup>365</sup> *Id.* (citation omitted) (explaining that “the State did not ask Chesteen, Waller, and Lester individual follow-up questions about their connections to witnesses”).

<sup>366</sup> The misconduct included “improper questioning of witnesses and the introduction of impermissible other-crimes evidence.” Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 799 n.48 (2020).

<sup>367</sup> See *id.* (noting that when the Mississippi Supreme Court reversed Flowers’s conviction and death sentence in the third trial, a plurality had concluded that impermissible racial motivations explained at least two of the peremptory strikes).

<sup>368</sup> See *Flowers*, 139 S. Ct. at 2235.

caricature of a racist prosecutor” who tried “to pin a mass murder on an innocent Black man.”<sup>369</sup> All signs suggest that Evans endeavored to construct an all-white jury by any means necessary and, in so doing, deployed a technique used during the pre-Civil Rights Era to bring down the full force of the law upon a black person who had been accused of harming a white person.<sup>370</sup> In *Flowers*, we witness “in-your-face Jim Crow-styled racism,”<sup>371</sup> thus explaining why a majority of the Court had no difficulty recognizing that there would be a racial injury if it allowed the verdict in Curtis Flowers’s sixth trial to stand. Indeed, doing nothing would have called into question what remains of the Court’s legitimacy.

Even Justice Alito, whom Court observers have fairly described as a “racism skeptic,”<sup>372</sup> was persuaded that Evans’s behavior over the course of Flowers’s six trials qualified as racism. In a concurring opinion, Justice Alito argued that Evans’s choice to repeatedly prosecute Flowers made the case far from ordinary, “and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County.”<sup>373</sup> Justice Alito explained that he was moved to join the majority only because “this is a highly unusual case. Indeed, it is likely one of a kind.”<sup>374</sup> In this way, Justice Alito performed a confession. He divulged why the Roberts Court provides relief to people of color only when they can allege an injury that reminds of the racism perpetrated during the pre-Civil Rights Era: this racism will only infrequently happen in the post-Civil Rights present. In most cases, the Court will be able to defer to prosecutors.<sup>375</sup>

<sup>369</sup> Harawa, *supra* note 350, at 710.

<sup>370</sup> It is true that one of the victims in the quadruple homicide was black. *Flowers*, 139 S. Ct. at 2236. However, we have reason to wonder whether the race of the other three victims explains Evans’s behavior. That is, we have reason to wonder whether Evans would have been moved to prosecute Flowers six times if the four victims had all been black.

<sup>371</sup> Harawa, *supra* note 350, at 704.

<sup>372</sup> See Ossei-Owusu, *supra* note 267; see also Ian Millhiser, *Justice Alito’s Jurisprudence of White Racial Innocence*, VOX (Aug. 13, 2020, 9:27 AM), <https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury> [<https://perma.cc/DW9T-Y6S3>] (noting that a “common thread animating Alito’s opinions . . . is that he views allegations of racial animus with extreme skepticism”).

<sup>373</sup> *Flowers*, 139 S. Ct. at 2252 (Alito, J., concurring). We might wonder about what Justice Alito meant when he wrote that it was “risky,” *id.*, for Evans to prosecute Flowers once again in the same county. What “risks” did Justice Alito have in mind? Did Justice Alito believe that it was “risky” to prosecute Flowers again because a subsequent prosecution might reveal that Evans’s relentless pursuit of a criminal conviction of Flowers was debased in some sense? Would it not be a *good* thing for the debasement behind a prosecution to come to light?

<sup>374</sup> *Id.* at 2251.

<sup>375</sup> Recent Order, *supra* note 356, at 2248 (noting that courts, including the Supreme Court, “rarely ‘second-guess’” the facially race-neutral reasons “prosecutors routinely conjure up” for striking nonwhite jurors (quoting *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring))); see also *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (accepting a prosecutor’s explanation that he struck a black juror because of his “unkempt hair,” *id.* at 766, and beard).

Notably, Justice Thomas disagreed with his colleagues on the Court that Evans’s behavior in Flowers’s multiple trials qualified as racism.<sup>376</sup> In his dissent — the majority of which Justice Gorsuch joined — Justice Thomas spent a lot of time disputing that the racism on display in Flowers’s several trials was blatant enough to reach *Batson*’s purposeful-discrimination bar.<sup>377</sup> However, he ultimately acknowledged that his principal problem was with the *Batson* test itself: he would have overturned *Batson* and interpreted the Fourteenth Amendment to allow prosecutors — and, most importantly, defendants — to engage in race-based peremptory challenges.<sup>378</sup> In Justice Thomas’s view, *Batson* and its demand of colorblindness in the jury composition process deny that “racial biases, sympathies, and prejudices still exist” and, in so doing, forbid “black defendants from striking potentially hostile white jurors.”<sup>379</sup> So in an argument that is patently inconsistent with the one that he makes in the context of affirmative action, Justice Thomas proposed that racial justice for people of color requires a rule that permits actors to be explicitly race conscious.<sup>380</sup>

When the majority in *Flowers* insisted that it was “break[ing] no new legal ground” by finding a *Batson* violation and overturning the defendant’s conviction,<sup>381</sup> we can read this as simply reiterating the Court’s commitment to remaining solely interested in — and providing remedies only when confronted with — racism that harkens back to the bad old days of the nation’s formal racial caste system. For this reason, Professor Paul Butler’s words ring especially true: “*Flowers* should not be celebrated. It is more consistent with the Supreme Court’s work of maintaining racial subordination than eliminating it.”<sup>382</sup> If the Court stays true to this particularly narrow understanding of what constitutes

<sup>376</sup> *Flowers*, 139 S. Ct. at 2253 (Thomas, J., dissenting).

<sup>377</sup> *Id.* at 2266–69.

<sup>378</sup> See *id.* at 2271 (arguing that “race matters” and race-based peremptory challenges are “one of the most important tools to combat prejudice in [defendants’] cases”).

<sup>379</sup> *Id.* at 2274.

<sup>380</sup> Compare *id.* (“The racial composition of a jury matters . . .”), with *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting) (“The Constitution abhors classifications based on race . . .”).

<sup>381</sup> *Flowers*, 139 S. Ct. at 2251.

<sup>382</sup> Butler, *supra* note 357, at 109. Professor Lis Semel, a capital defense attorney, has remarked on the Court’s practice of granting relief to defendants only in the most extraordinary of circumstances:

As one who was fortunate enough to participate in a few of these cases, I do not want to understate their significance. We need these victories, not only for the individual clients whose convictions were reversed, but because we have given them legs that the Court did not anticipate. Make no mistake. These decisions on racial bias are the crumbs. Between every Thomas Miller-El, Allen Snyder, Miguel Pena-Rodriguez, Dwayne Buck, and Timothy Foster, people are dying. The opinions offer the Justices an opportunity to be self-congratulatory about racial bias and bigotry in the most limited way, and leave true justice undone.

Elisabeth Semel, Keynote Address at the University of California Berkeley School of Law Capital Case Defense Seminar 16 (Feb. 15, 2019) (on file with the Harvard Law School Library).

a racial injury, then “[w]e should not expect the Roberts Court to issue any consequential opinions that will undermine white supremacy.”<sup>383</sup>

### B. *Jury Unanimity*: *Ramos v. Louisiana*

In *Ramos v. Louisiana*, the Court was faced with the question of whether the Sixth Amendment was incorporated against the States such that they, like the federal government, were forbidden from allowing convictions by nonunanimous verdicts in criminal trials.<sup>384</sup> In an earlier case, *Apodaca v. Oregon*,<sup>385</sup> decided a half-century ago, a splintered Court answered this question in the negative.<sup>386</sup> Thus, the Court in *Ramos* had to decide whether to overturn a nearly fifty-year-old precedent and impose the Sixth Amendment’s requirement of jury unanimity on the States.<sup>387</sup> A majority of Justices voted to do so.<sup>388</sup>

The opening paragraphs of Justice Gorsuch’s majority opinion posed a question: “Why do Louisiana and Oregon allow nonunanimous convictions?”<sup>389</sup> As it turns out, at least part of the answer is that lawmakers in Louisiana and Oregon sought to diminish the power that racial minorities would have when serving on juries.<sup>390</sup> In Louisiana, the state’s constitutional convention met in 1898,<sup>391</sup> following the Court’s decision in *Strauder v. West Virginia*,<sup>392</sup> which invalidated a law that forbade black people from serving on juries.<sup>393</sup> Knowing that an express prohibition on black jury service would be struck down, Louisiana lawmakers sought out race-neutral means for accomplishing the same

<sup>383</sup> Butler, *supra* note 357, at 109.

<sup>384</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020). The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. CONST. amend. VI.

<sup>385</sup> 406 U.S. 404 (1971), *overruled by Ramos*, 140 S. Ct. 1390.

<sup>386</sup> In *Apodaca*, four Justices interpreted the Sixth Amendment to require unanimous juries in federal criminal trials and the Fourteenth Amendment to incorporate this requirement against the states. *See id.* at 414 (Stewart, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 356, 380 (1972) (Douglas, J., dissenting) (Justice Douglas’s dissent in *Apodaca* was first published in *Johnson* — a companion case). Four other Justices interpreted the Sixth Amendment to permit nonunanimous juries. *Apodaca*, 406 U.S. at 404 (plurality opinion). Justice Powell filed an opinion, concurring in the judgment, in which he argued that the Sixth Amendment requires jury unanimity, but asserted that the Fourteenth Amendment did not incorporate this right. *Johnson*, 406 U.S. at 366, 371 (Powell, J., concurring in the judgment). Thus, in *Apodaca*, five Justices found that the Sixth Amendment required jury unanimity in federal criminal cases, and five found that the Fourteenth Amendment did not require the same in state courts.

<sup>387</sup> *See Ramos*, 140 S. Ct. at 1397.

<sup>388</sup> *See id.* at 1408.

<sup>389</sup> *Id.* at 1394.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 1417 (Kavanaugh, J., concurring).

<sup>392</sup> 100 U.S. 303 (1880).

<sup>393</sup> *Id.*

end.<sup>394</sup> They found such a means in the nonunanimous jury rule.<sup>395</sup> Because of the racial demographics of the state, black people would invariably be a numerical minority on any jury venire.<sup>396</sup> As long as a prosecutor ensured that no more than two black people from the venire were empaneled, the black jurors could be outvoted and, consequently, robbed of their ability to produce a mistrial by refusing to vote to convict.<sup>397</sup> Meanwhile, Oregon adopted its nonunanimous jury rule in 1934 after a Jewish person who had been prosecuted for murder was convicted only of manslaughter because one holdout juror had refused to vote to convict the defendant of the more serious crime.<sup>398</sup> Notably, both States readopted these rules decades later in contexts that were devoid of the virulent racism under which the rules were originally fashioned.<sup>399</sup>

Although this history was important to the majority — the majority clearly stated that *Apodaca*'s precedential weight is attenuated because the Court failed to confront the history when it decided the case<sup>400</sup> — it is unclear precisely how the history informed the *Ramos* Court's decision to overturn *Apodaca* and apply the Sixth Amendment to the States.<sup>401</sup> It is apparent that the Court did not believe that the history was decisive of the legal question before it: the Court explained that “a jurisdiction

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<sup>394</sup> *Ramos*, 140 S. Ct. at 1394.

<sup>395</sup> They also found race-neutral ways to disempower nonwhite people through other devices as well, enlisted through the entire process from jury composition to juror selection. See ELISABETH SEMEL ET AL., BERKELEY LAW DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX 2 (2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf> [<https://perma.cc/H99N-RZYF>] (noting that in order to exclude black people from jury rolls after *Strauder*, jurisdictions employed a variety of tactics, including “institut[ing] ‘vague requirements’ for jury service — ‘such as intelligence, experience, or good moral character’” (quoting EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 10 (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/4FMA-GJNU>])).

<sup>396</sup> See *Ramos*, 140 S. Ct. at 1394.

<sup>397</sup> *Id.*

<sup>398</sup> See Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1598 n.21 (2018); see also *Ramos*, 140 S. Ct. at 1394 (“Adopted in the 1930s, Oregon’s rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities on Oregon juries.’” (quoting *State v. Williams*, No. 15-CR-58698 app. at 104 (Or. Cir. Ct., Dec. 15, 2016), App. 104)).

<sup>399</sup> Justice Sotomayor faulted the legislatures in Louisiana and Oregon for not wrestling with the racist origins of the rules at the time of their re adoption. See *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring). She appeared to suggest that the constitutionality of the rules would be more assured had the legislatures acknowledged their racist origins — and perhaps denounced the original architects’ intent to nullify the voices of nonwhite people — before ultimately deciding to reenact the rule. *Id.* (proposing that “perhaps . . . where a legislature actually confronts a law’s tawdry past in reenacting it[,] the new law may well be free of discriminatory taint”).

<sup>400</sup> See *id.* at 1401 n.44 (majority opinion).

<sup>401</sup> See Emily Coward, *Ramos v. Louisiana and the Jim Crow Origins of Nonunanimous Juries*, N.C. CRIM. L. (Apr. 29, 2020, 12:26 PM), <https://nccriminallaw.sog.unc.edu/ramos-v-louisiana-and-the-jim-crow-origins-of-nonunanimous-juries> [<https://perma.cc/RE5E-BGDB>] (stating that it was uncertain how the “Jim Crow history influence[d] the justices’ resolution of the legal questions before them in *Ramos*”).

adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment.”<sup>402</sup> But the majority was unsettled by the *Apodaca* Court’s failure to confront this history.<sup>403</sup> The *Ramos* majority seemed to have wanted the *Apodaca* Court to excavate the history, to examine it, and to insist that considerations about the constitutionality of the nonunanimous jury rule take place in the shadow of the history.<sup>404</sup>

Because the *Ramos* majority did not explain just how the rule’s racist origins informed its decision to apply the Sixth Amendment against the States and overturn *Apodaca*, it left itself open to the charge that its discussion of the racist history was purely gratuitous. This was precisely the accusation that Justice Alito lobbed against the majority in his dissent.<sup>405</sup> Justice Alito was convinced that the rule’s origins in formal white supremacy were wholly irrelevant to the legal question before the Court.<sup>406</sup> For Justice Alito, this was true for two reasons. First, Louisiana and Oregon reenacted the rules decades later under circumstances that were not obviously racist.<sup>407</sup> Second, there were racially benign justifications for the rule.<sup>408</sup> In Justice Alito’s view, if the rules’ origins were ever relevant to the constitutional question, these subsequent reenactments rendered the rules’ genesis in formal white supremacy immaterial.<sup>409</sup> Justice Alito argued that the majority’s decision to discount the later readoptions and their purported ability to cleanse the rules of their problematic beginnings effectively “tars Louisiana and Oregon with the charge of racism”<sup>410</sup> and, in so doing, participates in the “rhetoric” that has “sullied” public discourse today.<sup>411</sup> It does not take a careful reader to detect the fervor with which Justice Alito made

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<sup>402</sup> *Ramos*, 140 S. Ct. at 1401 n.44.

<sup>403</sup> *See id.* at 1405.

<sup>404</sup> *See id.* (arguing that “*Apodaca* was gravely mistaken” because, among other reasons, it “spent almost no time grappling with . . . the racist origins of Louisiana’s and Oregon’s laws”). While the majority opinion left open the possibility that the rule’s racist origins were relevant to the first-order question of whether the Fourteenth Amendment incorporated the rule against the states, Justice Kavanaugh’s concurrence clearly took the position that the rule’s racist origins were relevant to the second-order question of *stare decisis*, that is, whether *Apodaca* as precedent should be respected or whether the Court should overturn it. *See id.* at 1418 (Kavanaugh, J., concurring) (stating that “on the question whether to overrule[,] the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view”).

<sup>405</sup> *See id.* at 1426 (Alito, J., dissenting).

<sup>406</sup> *See id.*

<sup>407</sup> *See id.*

<sup>408</sup> *See id.* (noting a purpose of “judicial efficiency” (quoting *State v. Hankton*, 122 So. 3d 1028, 1038 (La. Ct. App. 2013))).

<sup>409</sup> *See id.* at 1426–27 (“For this reason, the origins of the Louisiana and Oregon rules have no bearing on the broad constitutional question that the Court decides. That history would be relevant if there were no legitimate reasons why anyone might think that allowing nonunanimous verdicts is good policy. But that is undeniably false.”).

<sup>410</sup> *Id.* at 1425.

<sup>411</sup> *Id.* at 1426.



this argument. The passion with which he derided the majority for talking about racism without adequately explaining the relevance of racism leaves Justice Alito himself open to the charge that he simply takes offense when people talk about racism (at least when the discussion of racism does not serve conservative policy ends).<sup>412</sup> That being said, perhaps the most remarkable thing about Justice Alito's dissent is not the contempt that he showed the majority for talking about racism; that derision of race talk might be expected from Justice Alito.<sup>413</sup> Most remarkable may be the fact that Justice Kagan joined Justice Alito's impassioned denouncement of talking about race in public. Of course, Justice Kagan knew how to *not* join a portion of an opinion; she declined to join the part of Justice Alito's dissent that expressed glee at the prospect of overturning other longstanding precedents.<sup>414</sup> Nevertheless, Justice Kagan chose to affix her support to the section of Justice Alito's opinion that conceptualized acknowledging race and racism as "contributing to the worst current trends."<sup>415</sup>

The absence of a clear explanation of the connection between the racist origins of the nonunanimous jury rule and the Court's decision to overturn *Apodaca* is not the only shortcoming in the majority opinion in *Ramos*. Perhaps more significantly, the majority opinion failed to engage with the contemporary effects of the rule<sup>416</sup> — a failure that Justice Kavanaugh's concurring opinion, to its credit, did not replicate.<sup>417</sup> Had the majority opinion investigated those effects, it would have discovered

<sup>412</sup> As one commentator argues:

Even if the discussion of the racist history of the laws in the other opinions is ultimately dicta, the suggestion that this discussion is irrational or uncivil is troubling, even alarming. It seems appropriate, to say the least, to inform readers, who may otherwise be ignorant of the legal history, of the racial animus that originally motivated the laws at issue and the racist purposes that they did and may still serve.

Nina Varsava, Essay, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 119 n.2 (2021); see also Millhiser, *supra* note 372; Leah Litman, *The Supreme Court Is Split on How to Talk About Race*, SLATE (Apr. 22, 2020, 6:53 PM), <https://slate.com/news-and-politics/2020/04/supreme-court-racism-ramos-v-louisiana.html> [<https://perma.cc/N374-UB2Z>]; Coward, *supra* note 401.

<sup>413</sup> See Litman, *supra* note 412.

<sup>414</sup> See *Ramos*, 140 S. Ct. at 1393 (syllabus); see also *id.* at 1440 (Alito, J., dissenting).

<sup>415</sup> *Id.* at 1427; see *id.* at 1393 (syllabus).

<sup>416</sup> See Harawa, *supra* note 350, at 704 (observing that the Court in *Ramos* "acknowledged the racist history of the laws and practices in th[e] case[] but did not identify how that racism still manifests today").

<sup>417</sup> See *Ramos*, 140 S. Ct. at 1417–18 (Kavanaugh, J., concurring) (stating that "[i]n light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors," *id.* at 1417, and noting that "[t]hen and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors," *id.* at 1418). While Justice Kavanaugh discussed the rule's consequences, the quality of this discussion did not meet Justice Alito's standards. See *id.* at 1427 n.8 (Alito, J., dissenting) (noting that Justice Kavanaugh "opine[s] that allowing such verdicts works to the disadvantage of African-American defendants, but the effect of various jury decision rules is a complex question that has been the subject of much social-science research, none of which the opinion even acknowledges").

that the rule continues to work precisely as the white supremacists who crafted it wanted it to work. That is, the rule frequently renders black jurors' votes insignificant.<sup>418</sup> An analysis of data from over 5000 criminal trials over a six-year period in Louisiana reveals that "black jurors are more likely than white jurors to cast 'empty votes' (i.e., dissenting votes that are overridden by supermajority verdicts)."<sup>419</sup> Indeed, black jurors were more than twice as likely as white jurors to cast a dissenting vote that a supermajority would ultimately override.<sup>420</sup> Further, the rule disadvantages black defendants, who are more likely than white defendants to be convicted by nonunanimous verdicts.<sup>421</sup> As such, "just as originally intended, Louisiana's non-unanimous jury provision over-empowered White jurors while disempowering Black jurors, while at the same time benefiting White defendants and disadvantaging Black ones."<sup>422</sup> However, the *Ramos* majority did not engage with these facts — although the Court had the information before it.<sup>423</sup> Instead, it disconnected the racist origins of the rule from the work that the rule presently does to burden black people.<sup>424</sup> And so, while we do not know how the "Jim Crow history influence[d] the [J]ustices' resolution of the legal questions before them in *Ramos*,"<sup>425</sup> we do know that the racist effects of the rule were unimportant to this resolution.<sup>426</sup> At the very least, those effects were not important enough to mention even in passing — even in a footnote.

We might read *Ramos* as a case in which a majority of Justices recognized a racial injury and was willing to remedy it. And so people who are interested in racial justice might be pleased with the decision. But the form of the racial injury that the Court perceived is key — and is cause for pessimism about what the Court is inclined to do in the service of racial justice. The majority's deafening silence about the present-day effects of the nonunanimous jury rule makes it unwise to propose that the majority conceptualized the racial injury as, simply, a race-neutral rule that disparately impacts racial minorities. The majority's focus on the white-supremacist origins of the rule suggests that it conceptualized the racial injury in *Ramos* exceedingly narrowly: the persistence of a racist anachronism. That is, the majority saw a holdover from the pre-Civil Rights Era.<sup>427</sup> The majority did not need to steep itself in critical

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<sup>418</sup> See Frampton, *supra* note 398, at 1621–22.

<sup>419</sup> *Id.* at 1622.

<sup>420</sup> See *id.* at 1638.

<sup>421</sup> See *id.* at 1622.

<sup>422</sup> Harawa, *supra* note 350, at 708 (citing Frampton, *supra* note 398, at 1636–37).

<sup>423</sup> See, e.g., Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner at 16–18, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2019) (No. 18-5924); Brief of Law Professors and Social Scientists as Amici Curiae in Support of Petitioner at 10–11, *Ramos* (No. 18-5924).

<sup>424</sup> See Harawa, *supra* note 350, at 708.

<sup>425</sup> Coward, *supra* note 401.

<sup>426</sup> See Harawa, *supra* note 350, at 708.

<sup>427</sup> See *Ramos*, 140 S. Ct. at 1394.

theory for it to see racism in the rule, as its passage in Louisiana was accompanied by well-known tools of white supremacy — poll taxes, literacy tests, and grandfather clauses.<sup>428</sup> Indeed, the Louisiana iteration of the rule was the brainchild of people who had convened for the express purpose of “establish[ing] the supremacy of the white race”;<sup>429</sup> it had been “one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”<sup>430</sup> On the majority’s reading, a relic from the days when the country proudly enforced its racial caste system had been trafficked into the present.<sup>431</sup> The majority recognized the persistence of this racist archaism as a racial injury. Accordingly, it did the bare minimum by interpreting the Constitution to provide a remedy for this harm.<sup>432</sup>

The Court saw an injury — most acutely felt by nonwhite people — for which it was willing to provide relief. However, the vehicle that the Court used to provide this relief was an interpretation of the Sixth Amendment and the Fourteenth Amendment’s Due Process Clause.<sup>433</sup> It is instructive to imagine what would have happened had the non-unanimous jury rule been challenged under the Equal Protection Clause. There is an excellent chance that the rule would have survived under the cramped equal protection doctrine that the Roberts Court has inherited and contentedly retained.<sup>434</sup> Because the rule is facially race-neutral, equal protection doctrine requires courts to scrutinize it with rational basis review absent proof that legislators passed it with discriminatory intent.<sup>435</sup> The majority in *Ramos*, of course, acknowledged that the rule, in its original iteration in Louisiana and Oregon, was passed with discriminatory intent.<sup>436</sup> However, in the context of an equal protection challenge, would five members of the Court be willing to bypass the more recent motivations of those who readopted the rule generations later and hold that the racist intent that existed in the hearts of the self-proclaimed white supremacists who first adopted the rule a century ago

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<sup>428</sup> *See id.*

<sup>429</sup> *Id.* (quoting OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (New Orleans, H.J. Hearsey 1898)).

<sup>430</sup> *Id.* at 1417 (Kavanaugh, J., concurring).

<sup>431</sup> *See id.* at 1394 (majority opinion).

<sup>432</sup> *Id.* at 1395.

<sup>433</sup> *See* Coward, *supra* note 401 (observing that the Court’s rebuke of the racism in *Ramos* occurred “outside the usual equal protection approach”).

<sup>434</sup> However, as one commentator notes, Justice Sotomayor suggested in her concurrence that she may have found that the law violated the Equal Protection Clause. *See id.* (observing that Justice Sotomayor “referenc[ed] the analogous case of *United States v. Fordice*, 505 U.S. 717, 729 (1992), which held that policies “traceable” to a State’s de jure racial segregation and that still “have discriminatory effects” offend the Equal Protection Clause”).

<sup>435</sup> *See* *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>436</sup> *Ramos*, 140 S. Ct. at 1394.

is more constitutionally relevant? It is unlikely.<sup>437</sup> Justice Alito, alongside Chief Justice Roberts and Justice Kagan, who both joined Justice Alito's dissent, clearly believed that the discriminatory intent that underlay the original rules was neither here nor there.<sup>438</sup> It would be surprising if, in the context of an equal protection challenge, Justices Thomas and Gorsuch would not believe the same.<sup>439</sup>

If *Ramos* struck down the nonunanimous jury rule in part because lawmakers intended to discriminate against black people when they imagined the rule a century and a half ago, then the Court is disposed to do more under the Sixth Amendment than it is under the Equal Protection Clause. That is, *Ramos* reveals a Court that is prepared to engage in careful archaeological digs into laws to unearth fossilized animus. It bears repeating that the Roberts Court has never used the Equal Protection Clause to take such an active approach to investigating and addressing the injustices that disadvantaged racial groups experience.

### C. *Juror Bias*: Peña-Rodriguez v. Colorado

The 2017 case of *Peña-Rodriguez v. Colorado* provides another example of the Roberts Court's inclination to address the racial injuries that people of color endure only when those injuries summon the racism that was practiced during the pre-Civil Rights Era. In the case, the Court held that the Sixth Amendment guarantee of an impartial jury requires that the no-impeachment rule — which forbids the comments that jurors make during deliberations from being used to call a verdict into question after the jury has entered it<sup>440</sup> — must yield to evidence

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<sup>437</sup> *But see* *Hunter v. Underwood*, 471 U.S. 222, 232–33 (1985) (striking down a facially race-neutral felon-disenfranchisement provision in the Alabama Constitution after finding that lawmakers enacted it in 1901 with discriminatory intent and rejecting the argument that the “events occurring in the succeeding 80 years had legitimated the provision,” *id.* at 233).

<sup>438</sup> *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting).

<sup>439</sup> Professor Thomas Frampton has argued that Louisiana's and Oregon's nonunanimous jury rules would fail under an equal protection challenge. *See* Frampton, *supra* note 398, at 1599. But he acknowledges that, with regard to Louisiana, the rule's readoption in later constitutional conventions might be considered by some to attenuate the strength of the argument that discriminatory intent motivates it. *See id.* at 1652 n.283 (noting that a “possible rejoinder” to the claim that discriminatory intent motivates Louisiana's nonunanimous jury rule is the argument that “although a discriminatory motive may have influenced the initial adoption of nonunanimous verdicts in Louisiana, subsequent constitutional conventions (in 1913, 1921, and 1974) readopting the measure — and partial amelioration of the rule by shifting from 9–3 verdicts to 10–2 verdicts in 1974 — were not so infected with racial prejudice”); *see also* Eyer, *supra* note 6, at 1072 (observing that courts tend to “focus[] on whether the plaintiff can prove racial intent in . . . a contemporary reenactment or application of” a provision that might have been originally enacted with explicitly racist motivations). He also acknowledges that the evidence of discriminatory intent as a motivation for Oregon's rule is far from clear. Frampton, *supra* note 398, at 1598 n.21 (noting that “the evidence of discriminatory intent is significantly more circumstantial in Oregon than in Louisiana”).

<sup>440</sup> *See* *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017) (explaining the no-impeachment rule).

that a juror made unambiguously racist statements during jury deliberations.<sup>441</sup> After *Peña-Rodriguez*, state and federal rules that prohibit courts from receiving evidence about the wildly racist things that jurors said or did during deliberations violate the Sixth Amendment, and courts are permitted to consider whether the defendant should be granted a new trial in light of the evidence.<sup>442</sup>

The case arose from the trial of a man of Mexican descent who was convicted of crimes related to the sexual assault of two teenage girls.<sup>443</sup> After the jury returned a guilty verdict, two jurors submitted affidavits testifying that during deliberations, another juror made statements about Mexican men's propensity for sexual violence against women.<sup>444</sup> The affidavits alleged that the juror, H.C., explained that after having worked in law enforcement, he had come to appreciate that "Mexican men [have] a bravado that caused them to believe they could do whatever they wanted with women."<sup>445</sup> According to the affidavits:

H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement and further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." . . . H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."<sup>446</sup>

The jurors' affidavits also related H.C.'s opinion that he did not believe the defendant's witness, who had corroborated the defendant's alibi, because the witness was "an illegal."<sup>447</sup>

The Court held that the no-impeachment rule, a version of which has been enacted by all fifty states and the federal government<sup>448</sup> — ran afoul of the Sixth Amendment insofar as it prohibited the trial judge from hearing the jurors' testimony about H.C.'s statements.<sup>449</sup> Justice Kennedy, writing for the Court, did not deny that important policy reasons supported the no-impeachment rule: the rule does vital work to facilitate robust dialogue in the jury room, protect jurors from post-trial harassment from losing parties seeking to upset a verdict, and ensure verdict finality.<sup>450</sup> However, for the majority, these policy aims were not

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<sup>441</sup> *Id.* at 869.

<sup>442</sup> *Id.* at 870 (declining to "decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted").

<sup>443</sup> *Id.* at 861–62.

<sup>444</sup> *Id.* at 862.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* (citation omitted).

<sup>447</sup> *Id.* The Court noted that the witness had testified that he was not, in fact, undocumented. *See id.*

<sup>448</sup> *See* Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CALIF. L. REV. 2121, 2128 (2021) (making this observation).

<sup>449</sup> *Peña-Rodriguez*, 137 S. Ct. at 869.

<sup>450</sup> *Id.* at 885.

dispositive; the necessity of purging racism from the “administration of justice” outweighed them.<sup>451</sup>

One of the most notable aspects of the Court’s holding is that in the Court’s own words, only racism that is “egregious,”<sup>452</sup> “unmistakable,”<sup>453</sup> and “blatant”<sup>454</sup> is sufficient to overcome the no-impeachment rule.<sup>455</sup> It almost certainly includes statements about the way individuals from racialized groups “just are.” It presumably includes unambiguous expressions of hatred toward particular racialized categories of people. It likely includes racial epithets or racist slurs. However, less egregious, less unmistakable, less blatant — that is, more modern — expressions of racial animus or aversion remain subject to the no-impeachment rule.<sup>456</sup> The exception crafted in *Peña-Rodriguez* probably does not apply to racist dog whistles, for example.<sup>457</sup> Similarly, the holding likely leaves defendants with a Sixth Amendment right that does not shield them from the harmful effects of unchecked implicit biases in their trials.<sup>458</sup> To frame it in the terms that this Foreword offers, the only racism against people of color that the Court seems willing to recognize is racism that recalls the racism prevalent during the days of the nation’s formal racial caste system. In this light, it is entirely unsurprising that the Court was prepared to interpret the Sixth Amendment to forbid evidentiary rules that shield this type of pre-Civil Rights Era racism — but not its more modern iterations — from review.

Tellingly, in reasoning about the necessity of the holding that it announced in the case, the majority opinion observed how white supremacists in the postbellum South had once used the mechanism of the

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<sup>451</sup> *Id.* at 868.

<sup>452</sup> *Id.* at 870.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 871.

<sup>455</sup> *See id.* at 870–71.

<sup>456</sup> *See id.* Justice Alito, writing in dissent, worried that the majority’s holding would reach subtler forms of racism nevertheless. *See id.* at 884 (Alito, J., dissenting) (wondering if “suggestive statements” about racialized groups will fall within the newly created exception to the no-impeachment rule).

<sup>457</sup> *See generally* HANEY LÓPEZ, DOG WHISTLE POLITICS, *supra* note 16, at 100–03 (defining “dog whistle” racism).

<sup>458</sup> Professor Carrie Leonetti asks all the right questions when she wonders whether the Court will begin to craft caselaw that addresses “the more nefarious, systemic, and common implicit biases that pervade the system,” Carrie Leonetti, *Smoking Guns: The Supreme Court’s Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 MARQ. L. REV. 205, 211 (2017):

What about credibility determinations that are infused with stereotype-congruent responses to witnesses or parties of color — e.g., a jury’s determination of whether a defendant acted in self-defense, a judge’s determination of the legally permissible amount of force in apprehending a putatively “dangerous” suspect of color, or a lawyer’s use of subconscious stereotypes during the exercise of peremptory challenges? How should courts deal with well-documented implicit biases in the criminal-justice system like racially biased “misremembering” and the “shooter bias”?

*Id.* at 230–31 (footnotes omitted).

criminal trial jury to maintain their beloved racial hierarchy.<sup>459</sup> Justice Kennedy wrote that “[a]lmost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans.”<sup>460</sup> Here, Justice Kennedy appeared to see an analogue between juries during the pre-Civil Rights Era and a contemporary jury in which a juror has uttered an “egregious[ly],”<sup>461</sup> “unmistakabl[y],”<sup>462</sup> and “blatant[ly]”<sup>463</sup> racist statement. Justice Kennedy interpreted the Sixth Amendment as demanding a reform to the mechanism — the no-impeachment rule — that would otherwise allow contemporary juries to bear a family resemblance to the obviously racist juries of yesteryear.<sup>464</sup>

The displays of racism that will fall into the exception to the no-impeachment rule will be vanishingly rare.<sup>465</sup> This is because, as Harawa states, “[w]e have largely moved away from explicit epithets.”<sup>466</sup> We now live in an era where norms have shifted such that one only infrequently encounters bigots who are outright with their bigotry in public spaces.<sup>467</sup> And so there is a palpable irony in the Court’s declaration that the no-impeachment rule must yield to overt racial bias — and not to other forms of juror bias or misconduct — because racial bias is pervasive in a way that other species of bias and misconduct are not. The *Peña-Rodriguez* majority explained that the Court had occasion to consider the propriety of an exception to the no-impeachment rule in two prior cases.<sup>468</sup> In *Tanner v. United States*,<sup>469</sup> the Court upheld the no-impeachment rule in the face of evidence that several jurors in a federal criminal trial had drunk alcohol, smoked marijuana, and ingested cocaine; some were so intoxicated that they fell asleep during the proceedings.<sup>470</sup> In *Warger v. Shauers*,<sup>471</sup> the Court again upheld the rule in the face of evidence that a juror had lied during voir dire; in a case involving a car accident, the juror did not disclose that her daughter

<sup>459</sup> See *Peña-Rodriguez*, 137 S. Ct. at 867.

<sup>460</sup> *Id.* (quoting James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004)).

<sup>461</sup> *Id.* at 870.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 871.

<sup>464</sup> See *id.* at 869.

<sup>465</sup> Indeed, the Court was well aware of this. See *id.* at 871 (writing that the exception to the no-impeachment rule will be “limited to rare cases”). The Court appears to have designed the rule with this outcome in mind.

<sup>466</sup> Harawa, *supra* note 448, at 2134.

<sup>467</sup> See *id.*

<sup>468</sup> See *Peña-Rodriguez*, 137 S. Ct. at 858.

<sup>469</sup> 483 U.S. 107 (1987).

<sup>470</sup> *Id.* at 127; see also *id.* at 115–16.

<sup>471</sup> 574 U.S. 40 (2014).

had caused a car crash, making her sympathetic to the defendant.<sup>472</sup> In *Peña-Rodriguez*, the Court argued that the bias and misconduct in *Tanner* and *Warger* were different in kind from the racial bias against which the Sixth Amendment protects.<sup>473</sup> Justice Kennedy wrote that while the behavior in *Tanner* and *Warger* was “troubling and unacceptable,” it was “anomalous.”<sup>474</sup> Those cases involved “a single jury — or juror — gone off course.”<sup>475</sup> However, contended Justice Kennedy, “[t]he same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.”<sup>476</sup> And here is the irony: in the post–Civil Rights Era, the displays of racism that fall within the exception to the no-impeachment rule that the Court crafted in *Peña-Rodriguez* are, in fact, anomalous. When a juror openly philosophizes in a room of strangers about the misogynistic violence that is part and parcel of Mexican masculinity, we are dealing with a juror who has “gone off course.” In this respect, the bigoted jurors for whom the racial bias exception to the no-impeachment rule will be triggered are akin to coke-snorting, beer-chugging, marijuana-smoking jurors; they are akin to a juror who, in a case involving a car accident, lies about her daughter’s involvement in a car accident. While the Court declared that it must make an exception to the no-impeachment rule for racial bias because “if left unaddressed, [it] would risk systemic injury to the administration of justice,”<sup>477</sup> there was nothing systemic about the reform that the Court made in *Peña-Rodriguez*. It will capture only the errant bigot and nothing more.<sup>478</sup>

In fact, the majority appeared to be aware that its holding would leave untouched most of the racism in criminal trial juries. It wrote that the progress that the nation has made to extirpate race-based discrimination “underlies the Court’s insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted

<sup>472</sup> *Id.* at 42–43.

<sup>473</sup> See *Peña-Rodriguez*, 137 S. Ct. at 868. Justice Alito’s dissent, arguing that the Sixth Amendment does not require an exception to the no-impeachment rule when a juror expresses overt racial bias, rested on the conviction that any difference between racism and other kinds of bias is not constitutionally significant. See *id.* at 883 (Alito, J., dissenting) (comparing a racist juror to a juror with a strong preference for a sports team); see also Leonetti, *supra* note 458, at 225 (“The oral arguments before the Court in *Peña-Rodriguez* focused almost entirely over whether and to what extent race was ‘different’ in a way that warranted an exception to the ordinary rules of verdict non-impeachment.”).

<sup>474</sup> *Peña-Rodriguez*, 137 S. Ct. at 868.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> As the Court saw it, the problem was that H.C. had expressly articulated his anti-Mexican bias — not the fact that a person with anti-Mexican bias had been empaneled as a juror in a criminal trial. See Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 748 (2019) (“[T]he Court is not suggesting that the presence of a racist juror is itself a violation of the Sixth Amendment.”).



in egregious cases like this one.”<sup>479</sup> This statement is a confession: in the Court’s view, less “blatant,” more subtle racial prejudice is not antithetical to the functioning of the jury system. Modern forms of racism remain lodged in the cogs and wheels of the “administration of justice,” completely undisturbed by the Court’s holding in *Peña-Rodriguez*.<sup>480</sup>

Also of note, and providing support for this Foreword’s thesis, is that while the majority opinion waxed poetic about the Equal Protection Clause<sup>481</sup> — beginning its discussion of the reasoning behind its holding with the declaration that “[t]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States”<sup>482</sup> — *Peña-Rodriguez* was not an equal protection case. Indeed, it was “unquestionably a Sixth Amendment decision.”<sup>483</sup> In it, the Court used the Sixth Amendment to take an exceedingly — and intentionally — modest step in the right direction when it comes to addressing racial injustice in the criminal legal system.<sup>484</sup> It is notable, then, that if *Peña-Rodriguez* was actually an equal protection case, it would have come out very differently. In an equal protection case, the defendant would have had to challenge Colorado’s version of the no-impeachment rule — a facially race-neutral law that may have disparate impacts on nonwhite people<sup>485</sup> — and he would have had to show that a discriminatory intent motivated Colorado’s

<sup>479</sup> *Peña-Rodriguez*, 137 S. Ct. at 871.

<sup>480</sup> Perhaps unsurprisingly, given the narrowness of the Court’s holding and its requirement of a showing that racial bias was a “significant motivating factor,” *id.* at 869, of a juror’s vote, *Peña-Rodriguez* has not led to an exception to the no-impeachment rule even in cases involving egregious demonstrations of racism. See Harawa, *supra* note 350, at 714 (noting that a lower court found that an exception to the no-impeachment rule was not warranted in the face of evidence that a white juror called another white juror a “n\*\*\*\*r lover” for expressing sympathy towards the Black defendant); Harawa, *supra* note 448, at 2148 (noting that a lower court held that evidence that a juror said that a Salvadoran defendant likely committed murder because of his nationality was subject to the no-impeachment rule). Writing four years after the *Peña-Rodriguez* decision, Harawa observes that “only one court has applied it to order a new criminal trial based on juror racial bias.” *Id.* at 2123.

<sup>481</sup> See *The Supreme Court, 2016 Term — Leading Cases*, 131 HARV. L. REV. 223, 273 (2017) (describing Justice Kennedy’s majority opinion as “fus[ing] principles from the Equal Protection Clause and the Sixth Amendment”); Harawa, *supra* note 448, at 2132 (describing the Court in *Peña-Rodriguez* as establishing that “racial bias during jury deliberations . . . transgresses not just the Sixth Amendment, but also the Fourteenth Amendment”); Jolly, *supra* note 478, at 751 (writing that the majority’s “holding seems to sound more in concepts drawn from the Fourteenth Amendment than it does in the Sixth Amendment”).

<sup>482</sup> *Peña-Rodriguez*, 137 S. Ct. at 867 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Analogously, Semel notes that when it comes to *Batson*, “[a]lmost every Supreme Court case on peremptory challenges begins with the following language: ‘For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.’” Semel, *supra* note 382, at 16.

<sup>483</sup> Jolly, *supra* note 478, at 750.

<sup>484</sup> See *Peña-Rodriguez*, 137 S. Ct. at 869.

<sup>485</sup> In order to show a disparate impact, the defendant would have had to demonstrate that jurors in cases involving nonwhite defendants have made, or were more likely to make, overt statements evidencing racial animus than jurors in cases involving white defendants. This, of course, would be an extremely difficult phenomenon to demonstrate.

adoption of the law.<sup>486</sup> It is reasonable to conclude that the defendant would not have been able to make this showing and, as such, the Colorado no-impeachment rule would have lived on. Thus, we can observe that when it comes to taking the limited step toward racial equity in criminal trials that the Court took in *Peña-Rodriguez*, the Sixth Amendment does more in service of this cause than does the Equal Protection Clause.<sup>487</sup> Despite the fact that the combined intent and spirit of the Equal Protection Clause is to rectify racial injustice in American life, the Court's precedents have woefully immiserated the Equal Protection Clause, leaving other parts of the Constitution more capable of doing the racial justice work that the Equal Protection Clause clearly was designed to do.

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*Flowers*, *Ramos*, and *Peña-Rodriguez* show that the Roberts Court will provide relief to people of color when they are facing racial discrimination that is reminiscent of the racism that was practiced during the pre-Civil Rights Era. While those of us who are interested in racial justice might rejoice whenever a racial injury is remedied, the Roberts Court's approach to racism is no cause for celebration, the positive outcomes in *Flowers*, *Ramos*, and *Peña-Rodriguez* notwithstanding. We have to keep in mind just what the Court is not seeing when it only sees racism that smacks of the days of formal white supremacy.

Consider the Court's recent decision in *Kansas v. Glover*,<sup>488</sup> in which the Court held that a police officer had reasonable suspicion to stop a vehicle after running the license plate number and discovering that the owner of the vehicle had a revoked license.<sup>489</sup> The Court concluded that it was "common sense" for a police officer to assume that the person driving a vehicle is the vehicle's owner.<sup>490</sup> In so holding, the Court disregarded "common community experience[, which] suggests people

<sup>486</sup> See *Washington v. Davis*, 426 U.S. 229, 240 (1976).

<sup>487</sup> See Coward, *supra* note 401 (noting that *Peña-Rodriguez* "was not an equal protection case" and wondering if "the [J]ustices are more likely to consider racism as relevant when ruling on Sixth Amendment challenges involving the right to a jury trial").

Just a couple of decades ago, the position was reversed, and the Equal Protection Clause did more than the Sixth Amendment did in the service of racial justice. In *Holland v. Illinois*, 493 U.S. 474 (1990), the Court held that the Sixth Amendment did not prohibit a prosecutor's use of peremptory strikes to remove black potential jurors from a jury — although the Court in *Batson* had held that the practice was impermissible under the Equal Protection Clause. See *id.* at 478. And of course, the Court has long established that the Fourth Amendment is uninterested in racial equality, directing complainants seeking to challenge racism in policing towards the Equal Protection Clause. See *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.")

<sup>488</sup> 140 S. Ct. 1183 (2020).

<sup>489</sup> *Id.* at 1188.

<sup>490</sup> See *id.*

often drive vehicles registered to their family members.”<sup>491</sup> The result of *Glover* is to release police officers from the obligation of confirming, or at least trying to confirm, that a vehicle’s driver somewhat resembles the vehicle’s owner.<sup>492</sup> This is something that police officers are fully capable of doing; as Justice Sotomayor argued in her lone dissent, the Court’s cases “are rife with example of officers who have perceived more than just basic driver demographics,”<sup>493</sup> like drivers who have appeared “very stiff and nervous,”<sup>494</sup> have matched an informant’s description of an individual who allegedly had been selling narcotics,<sup>495</sup> and have “appeared to be of Mexican descent.”<sup>496</sup> By allowing officers to stop drivers without making some effort to verify that the owner of the vehicle is, indeed, driving the vehicle, the Court diminished the showing required to establish reasonable suspicion — permitting the police even more latitude to detain, and investigate, motorists.

The law enforcement conduct that the Court approved in *Glover*, and thus permitted to proliferate, is injurious. The burden that vehicle stops impose can be significant. They “‘interfere with freedom of movement, are inconvenient, and consume time.’ Worse still, they ‘may create substantial anxiety’ through an ‘unsettling show of authority.’”<sup>497</sup> Moreover, “[o]nce pulled over, motorists are then subject to the police’s considerable authority; they can be ordered out of the car, questioned in an intimidating way, and, in the same intimidating manner, asked to ‘consent’ to a search of their car.”<sup>498</sup>

Importantly, *Glover* exacerbates the injury already inflicted on people of color by virtue of the fact that they are disproportionately subject to vehicle stops.<sup>499</sup> As Professor Sarah Seo explains, “[m]any licenses are suspended or revoked not on public safety grounds but for a whole

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<sup>491</sup> *The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 501 (2020).

<sup>492</sup> See *Glover*, 140 S. Ct. at 1196 (Sotomayor, J., dissenting) (“The consequence of the majority’s approach is to absolve officers from any responsibility to investigate the identity of a driver where feasible.”).

<sup>493</sup> *Id.* (citing *Heien v. North Carolina*, 547 U.S. 54, 57 (2014); *United States v. Arvizu*, 534 U.S. 266, 270 (2002); *United States v. Ross*, 456 U.S. 798, 801 (1982); *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975)).

<sup>494</sup> *Id.* (quoting *Heien*, 547 U.S. at 57).

<sup>495</sup> *Id.* (citing *Ross*, 456 U.S. at 801).

<sup>496</sup> *Id.* (quoting *Brignoni-Ponce*, 422 U.S. at 875).

<sup>497</sup> *Id.* at 1198 (quoting *Delaware v. Prouse*, 440 U.S. 648, 657 (1979)).

<sup>498</sup> Sarah A. Seo, *The Originalist Road Not Taken in Kansas v. Glover*, AM. CONST. SOC’Y SUP. CT. REV. 143, 146 (2020), <https://ssrn.com/abstract=3943943> [<https://perma.cc/C4DA-UBzZ>].

<sup>499</sup> See Gavin Newsom Amicus Brief, *supra* note 362, at 40 (citing studies that show that “Black Americans are ‘more likely to be stopped by police than white or Hispanic residents, both in traffic stops and street stops,’” *id.* (quoting Alexi Jones, *Police Stops Are Still Marred by Racial Discrimination, New Data Shows*, PRISON POL’Y INITIATIVE (Oct. 12, 2018), <https://prisonpolicy.org/blog/2018/10/12/policing> [<https://perma.cc/U3XQ-58J9>]), and that, “[o]nce stopped, Black drivers are ‘far more likely to be searched and arrested’ than White drivers,” even though “police find contraband at a lower rate when they search Black drivers as compared to White drivers,” *id.* (citing SENT’G PROJECT, *supra* note 135, at 5)).

host of reasons that mainly have to do with poverty: failure to pay parking tickets, court fees and fines, or child support.”<sup>500</sup> Moreover, the number of persons with suspended licenses has increased as jurisdictions have used license suspensions as a means of raising revenue.<sup>501</sup> Thus, the holding in *Glover* “increase[s] the likelihood of a police encounter for impoverished drivers or friends and family borrowing their cars.”<sup>502</sup> Because people of color disproportionately bear the burdens of poverty in this country,<sup>503</sup> they will be overrepresented among those whose licenses have been suspended or revoked due to poverty; we can conjecture that they will be overrepresented among those driving the cars of friends or family members whose licenses have been suspended or revoked. In essence, *Glover* sanctions a practice that will disparately subject people of color to state detention, coercion, and subjugation. However, because these vehicle stops do not evoke the racial disenfranchisement practiced during the pre-Civil Rights Era, the Court refused to provide a remedy for them.

A similar analysis might be conducted of *Utah v. Strieff*.<sup>504</sup> The case involved a police officer who, without reasonable suspicion, stopped a man, Edward Strieff, who had just left a home that the officer had been surveilling for drug activity.<sup>505</sup> During the illegal stop, the officer asked Strieff for identification.<sup>506</sup> A police dispatcher ran Strieff’s name through a database, revealing that Strieff had an outstanding arrest warrant for a traffic violation.<sup>507</sup> The officer arrested him, and during a search incident to that arrest, the officer found methamphetamine and drug paraphernalia on Strieff’s person.<sup>508</sup> Strieff argued that the contraband was inadmissible as it was discovered subsequent to an illegal stop.<sup>509</sup> The Court held that the discovery of a preexisting arrest warrant during an unconstitutional stop attenuated the connection between the illegal stop and the incriminating evidence uncovered during a

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<sup>500</sup> See Seo, *supra* note 498, at 145–46.

<sup>501</sup> See *id.* at 146.

<sup>502</sup> *Id.*

<sup>503</sup> See *Poverty in America Continues to Affect People of Colour Most*, ECONOMIST (Sept. 26, 2019), <https://www.economist.com/special-report/2019/09/26/poverty-in-america-continues-to-affect-people-of-colour-most> [<https://perma.cc/6VAK-3E3S>]; John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/Z4R5-UR9E>] (noting there were “historically low poverty rates for Blacks and Hispanics in 2019,” but “even with these gains, Blacks and Hispanics continue to be over-represented in the population in poverty relative to their representation in the overall population”).

<sup>504</sup> 136 S. Ct. 2056 (2016).

<sup>505</sup> *Id.* at 2059–60.

<sup>506</sup> *Id.* at 2060.

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> See *id.*

search incident to the arrest; consequently, the evidence was not subject to the exclusionary rule.<sup>510</sup>

There should be no doubt that *Strieff*, and the practice that it sanctions, is toxic to people of color. The exclusionary rule is designed to deter unconstitutional police conduct — like stops without reasonable suspicion and seizures without probable cause — by making any evidence obtained by virtue of the unconstitutional conduct inadmissible.<sup>511</sup> By dramatically weakening the exclusionary rule and permitting the admission of evidence obtained under problematic circumstances, *Strieff* makes it more likely that police officers will engage in unconstitutional conduct. Indeed, as Justice Kagan wrote in dissent, the Court’s holding “practically invites” police officers to stop individuals without reasonable suspicion and take their chances<sup>512</sup> — wagering that an identification check will reveal that the individual stopped is one of the millions of people in the country today with an outstanding arrest warrant.<sup>513</sup> While, as a general matter, there is a decent likelihood that a police officer would discover that a detained individual has an outstanding arrest warrant,<sup>514</sup> the likelihood increases depending on the city or neighborhood in which the police officer is working. Poor people often are saddled with outstanding arrest warrants — many times for infractions related to their poverty.<sup>515</sup> Thus, police officers in low-income neighborhoods have better chances of stopping individuals with a warrant than do police officers in more affluent neighborhoods. As Justice Sotomayor noted in her oft-talked about dissent, 16,000 of the 21,000

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<sup>510</sup> See *id.* at 2063. The Court argued that the outstanding arrest warrant was a “critical intervening circumstance that [was] wholly independent of the illegal stop,” thus attenuating the connection between the stop and the discovery of the incriminating evidence. *Id.* However, many scholars have criticized the Court’s analysis. See, e.g., Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives> [<https://perma.cc/K8ZE-G94J>] (arguing that “intervening circumstances” are “outside event[s] that change[] what is expected to happen” and observing that discovering an outstanding arrest warrant is an intervening circumstance only “if you didn’t expect *Strieff*” — or any other individual subject to a police stop — “to have a warrant out for his arrest”).

<sup>511</sup> See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (“[T]he purpose of the exclusionary rule ‘is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

<sup>512</sup> *Strieff*, 136 S. Ct. 2073 (Kagan, J., dissenting).

<sup>513</sup> *Id.* at 2068 (Sotomayor, J., dissenting) (“The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses.”).

<sup>514</sup> See LEE ANN SLOCUM ET AL., *WARRANT ENFORCEMENT IN LOUISVILLE METRO AND THE CITY OF ST. LOUIS FROM 2006–2019: A CROSS-SITE ANALYSIS* 3 (2020) (“In St. Louis, 14% of arrests in 2019 were for bench warrants only, and 39% of arrests involved at least one bench warrant.”).

<sup>515</sup> See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2141 (2017) (“[A] substantial number of people have open warrants, often for the most minor of infractions, often for noncriminal violations of probation and parole conditions, and often because of their poverty.”).

residents in Ferguson, Missouri — a city in which approximately twenty-four percent of the population lived in poverty in 2020<sup>516</sup> — had an outstanding arrest warrant when the Department of Justice investigated the city’s police department.<sup>517</sup> *Strieff*, then, “authorizes tremendous power,”<sup>518</sup> as it means that the exclusionary rule simply would not apply to seventy-six percent of Ferguson residents subjected to unconstitutional stops. Police officers certainly are incentivized to roll the dice and stop whomever they want whenever they want.<sup>519</sup> In many cases, the odds will be in their favor.

It is essential to bear in mind that stops are harmful, even when they do not lead to arrest, injury, or death.<sup>520</sup> They have the potential to degrade the person detained.<sup>521</sup> After all, the stop communicates that someone in a position of power, a police officer, believes that the detained individual “look[s] like a criminal.”<sup>522</sup> The potential of stops to demean is more likely to be realized when these stops are concentrated

<sup>516</sup> *QuickFacts: Ferguson City, Missouri*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/fergusoncitymissouri> [<https://perma.cc/NDL8-SLXT>].

<sup>517</sup> See *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting).

<sup>518</sup> Bell, *supra* note 515, at 2141.

<sup>519</sup> While Justice Thomas, writing for the *Strieff* majority, suggested that the possibility of civil liability will deter police officers from stopping individuals without reasonable suspicion and betting that the individual has an outstanding arrest warrant, *Strieff*, 136 S. Ct. at 2064, it is likely that he overstated civil liability’s deterrent effect. The probability of a successful civil suit is incredibly small. See Katherine A. Macfarlane, *Predicting Utah v. Streiff’s [sic] Civil Rights Impact*, 126 YALE L.J.F. 139, 141 (2016) (“Section 1983 is an inadequate surrogate for the exclusionary rule.”); see also Kerr, *supra* note 510 (“If you’re a police officer and you want to search a suspect . . . you just need to stop the suspect and ask for ID to see if he has an outstanding warrant. If there’s no warrant out for his arrest, you can let him go and he’s extremely unlikely to sue.”).

<sup>520</sup> See Gavin Newsom Amicus Brief, *supra* note 362, at 41 (stating that “[i]n 2018, police ‘were twice as likely to threaten or use force’ against people of color than White people during stops,” *id.* (quoting Jones, *supra* note 499), and that “Black men ‘are 2.5 times more likely than white men and boys to die during an encounter with cops,’” *id.* (quoting Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019, 5:00 AM), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men> [<https://perma.cc/G7KK-HFS6>])).

<sup>521</sup> See *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (noting that if an officer frisks an individual for weapons during a stop, the officer, in the presence of “onlookers,” “may ‘feel with sensitive fingers every portion of [your] body’” and that “[a] thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet” (alterations in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 17 n.13 (1968))); see also PAUL BUTLER, *Stop and Frisk: Sex, Torture, Control*, in LAW AS PUNISHMENT/LAW AS REGULATION 155, 164 (Austin Sarat et al. eds., 2011) (“The invasive aspect of the frisk — the ‘feel with sensitive fingers every portion of the prisoner’s body [including] the groin and the area about the testicles,’ . . . — makes the injury analogous to sexual harassment or misdemeanor sexual assault. Frisks are frequently experienced as offensive sexual touchings.” (alteration in original) (quoting *Terry*, 392 U.S. at 17 n.13)); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1546 (2017) (describing a brief that was filled with “concrete examples of the degrading, humiliating, and violent ways in which African Americans were experiencing stop-and-frisks on the ground”); Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (noting that black men might attempt to flee police because of the “desire to avoid the recurring indignity of being racially profiled” (emphasis added)).

<sup>522</sup> *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

among members of a marginalized racial group.<sup>523</sup> Indeed, the stop conveys that the individual, so frequently black, is part of a race considered to be a criminal class.<sup>524</sup> In fact, the stopped individual, so frequently black, oftentimes is forced to look like a criminal — compelled to “stand ‘helpless, perhaps facing a wall with [their] hands raised.’”<sup>525</sup> In Justice Sotomayor’s words, the stops that *Strieff* allows to proliferate provide unambiguous, crystal-clear instruction to black people that they are “not . . . citizen[s] of a democracy but . . . subject[s] of a carceral state, just waiting to be cataloged.”<sup>526</sup> While Justice Sotomayor used the language of “second-class citizen[ship]” to describe the output of the conduct that *Strieff* validates,<sup>527</sup> Professor Monica Bell describes it in terms of “statelessness”<sup>528</sup>: the stops that *Strieff* absolves educate detained subjects of color that they are “unprotected by the law and its enforcers and marginal to the project of making American society.”<sup>529</sup> The stops tell black people that they are “subject only to the brute force of the state while excluded from its protection.”<sup>530</sup> At its simplest, the unconstitutional stops that the Court sanctioned in *Strieff* inflict a racial injury on black people.<sup>531</sup> However, because these stops did not remind the Court of racial disenfranchisement carried out during the pre-Civil Rights Era, the Court refused to acknowledge that they are, truly, a form of racism that deserves a remedy. It bears emphasizing that this result is the expected product of the Roberts Court’s racial common sense — explaining why the Court embraces it as its preferred theory of racism.

### III. DEFINING RACISM NARROWLY . . . AND THEN REFUSING TO SEE IT: A MATTER OF INTERPRETATION

This Part analyzes *Trump v. Hawaii*<sup>532</sup> and *Shelby County v. Holder*,<sup>533</sup> cases that reveal that although the Court purports to be en-

<sup>523</sup> See *id.* (noting that “it is no secret that people of color are disproportionate victims” of police stops and arrests).

<sup>524</sup> See Bell, *supra* note 515, at 2105 (developing the concept of “vicarious marginalization,” which proposes that “other people’s negative experiences with the police, whether those people are part of one’s personal network or not, feed into a more general, cultural sense of alienation from the police,” and that an individual’s sense of alienation from law enforcement “is born of the cumulative, collective experience of procedural and substantive injustice”).

<sup>525</sup> *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (quoting *Terry*, 392 U.S. at 17).

<sup>526</sup> *Id.* at 2071.

<sup>527</sup> *Id.* at 2069; see also Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 947–67 (2002) (theorizing that the terrifying and humiliating encounters that the author has had with the police have instructed him on what it means to be a black American citizen).

<sup>528</sup> Bell, *supra* note 515, at 2150.

<sup>529</sup> *Id.* at 2057.

<sup>530</sup> *Id.*

<sup>531</sup> See *id.* at 2140 (arguing that the Court’s decision in *Strieff* “blessed police discretion to behave in ways that denigrate and alienate minority populations”).

<sup>532</sup> 138 S. Ct. 2392 (2018).

<sup>533</sup> 570 U.S. 529 (2013).

gaged in a value-neutral inquiry into whether a claim of racial discrimination “looks like” the racism that was practiced during the pre-Civil Rights Era, this inquiry is far from objective. Values — specifically, political values — inform whether the Court will find a resemblance. Differently stated, the Court has embraced an exceedingly narrow definition of racism. By its own constrained definition, the Court should have recognized the travel ban at issue in *Trump v. Hawaii* and the techniques of voter disenfranchisement that *Shelby County* permitted to develop as racism. Nevertheless, the Court refused to recognize as much. This would be inexplicable if the results in both contexts were not perfectly aligned with the goals of the Republican Party.<sup>534</sup>

A note before beginning the analysis of *Trump v. Hawaii*: although the plaintiffs in *Trump v. Hawaii* brought a claim of religious discrimination,<sup>535</sup> this Foreword analyzes the case as involving racial discrimination. This is not an analytical error. Religion and race are not mutually exclusive categories. Indeed, religious groups can be racialized.<sup>536</sup> This is certainly true in the case of Muslim people.<sup>537</sup>

In arguing that the travel ban inflicts a racial injury on the Muslim people who have been denied entry to the United States, this Foreword rejects traditional understandings of race that rely on pseudoscientific demarcations of the world’s population into four (or five) races — that is, African, European, Asian, and Native American (and sometimes Pacific Islander or Oceanian).<sup>538</sup> This paradigm of race tends to suppose that biological difference separates the world’s races — that the individuals within a racial group are genetically similar to one another and dissimilar to those in racial outgroups. However, the weight of good science rejects the proposition that humanity can be divided into four

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<sup>534</sup> See Nash Jenkins, *Republicans Are Thrilled with the Supreme Court’s Decision Upholding Trump’s Travel Ban*, TIME (June 26, 2018, 5:40 PM), <https://time.com/5322856/trump-travel-ban-republicans> [<https://perma.cc/NHL3-G959>].

<sup>535</sup> *Trump v. Hawaii*, 138 S. Ct. at 2406 (“Plaintiffs further claimed that the Proclamation violates the Establishment Clause . . . because it was motivated not by concerns pertaining to national security but by animus toward Islam.”).

<sup>536</sup> See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 275–99 (2019).

<sup>537</sup> See SAHAR AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* 89–112 (2021) (detailing the history of American treatment of enslaved African Muslims and Muslim immigrants, who were often portrayed as barbaric or uncivilized, and subjected to racialized violence).

<sup>538</sup> See, e.g., *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> [<https://perma.cc/FL7V-8KAZ>] (categorizing people into “White” (including people from “Europe, the Middle East, or North Africa”), “Black or African American,” “American Indian or Alaska Native,” “Asian,” or “Native Hawaiian or Other Pacific Islander” racial categories); Isabelle Charmantier, *Linnaeus and Race*, LINNEAN SOC’Y LONDON (Sept. 3, 2020), <https://www.linnean.org/learning/who-was-linnaeus/linnaeus-and-race> [<https://perma.cc/SVF4-CGJB>] (detailing taxonomist Carl Linnaeus’s classification of the human species into four varieties often referred to by others as the four races); Brittany Kenyon-Flatt, Opinion, *How Scientific Taxonomy Constructed the Myth of Race*, SAPIENS (Mar. 19, 2021), <https://www.sapiens.org/biology/race-scientific-taxonomy> [<https://perma.cc/J4A6-XJSU>].



or five (or ten or fifty) discrete groups united by genetic similarity.<sup>539</sup> So we must ask the question, “when ‘scientific’ definitions of race are rejected as pseudoscience, what is left of race?”<sup>540</sup> The answer at which I have arrived in previous scholarship is that “race is a term that purports to denote essentialized difference that is frequently, though not always, based in biology.”<sup>541</sup> Accordingly, “the way that one determines whether a term is racial (and, thus, whether a group defined by that term is a racial group) is . . . to ask about how the term is used.”<sup>542</sup> If individuals are using the term to index a population that they imagine to be deeply and irreducibly different from other populations, “then one has stumbled upon a race.”<sup>543</sup>

The willingness of jurists, scholars, and other observers to describe the internment of Japanese people during World War II as “racist” suggests that they, too, have rejected pseudoscientific constructs of race and, instead, have embraced an understanding of race that looks to how the group is imagined within political and popular discourse.<sup>544</sup> If one embraces this approach to race, it is simply wrong to argue that the Japanese internment did not involve discrimination on the basis of race, as some have claimed<sup>545</sup>: the argument denies that Japanese people had been racialized at the time of World War II. The characteristic that united the people of Japanese descent incarcerated in concentration camps during World War II was their membership in a group that people in power conceived of as fundamentally, and dangerously, different from white Americans.<sup>546</sup> Thus, these actors considered people of

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<sup>539</sup> See, e.g., Kenyon-Flatt, *supra* note 538 (“These completely faulty ideas continue to shape how some people think about race today — as a biological fact rather than as a social construct.”); Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue> [<https://perma.cc/L8RB-LCZ8>] (“[T]he mainstream belief among scientists is that race is a social construct without biological meaning.”).

<sup>540</sup> See Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 *FORDHAM L. REV.* 21, 36 (2013).

<sup>541</sup> *Id.* at 37 (emphasis omitted).

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

<sup>544</sup> See *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (deriding the majority for engaging in a “legalization of racism”); see also Katyal, *supra* note 9, at 644 (describing *Korematsu* as involving “explicit race-based classifications”).

<sup>545</sup> See, e.g., Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 *MICH. L. REV.* 47, 83 (2019) (arguing that “the Japanese American internment was not a government policy executed ‘explicitly on the basis of race,’ as opposed to national origin” and arguing that the internment was “predicated — facially and explicitly — upon national origin rather than race”); Jamal Greene, *Is Korematsu Good Law?*, 128 *YALE L.J.F.* 629, 635 (2019) (noting that “the labels ‘Japanese’ and ‘of Japanese descent’ do not describe a ‘race’ in the usual sense,” but rather “describe a national origin”).

<sup>546</sup> See Katyal, *supra* note 9, at 644 (noting that General John DeWitt, who issued the exclusion order, had “described people of Japanese ancestry as ‘subversive,’ part of ‘an enemy race,’ and members of ‘a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong

Japanese descent to be a race — and they treated people of Japanese descent accordingly.

When then-candidate Donald Trump proposed that there is a group of people who simply “hate[]” the United States and its citizens — a people who find it “‘very hard’ . . . to assimilate into Western culture” and, consequently, ought to be excluded from nations that have adopted this “culture”<sup>547</sup> — he implied that there is a fundamental and fixed difference that distinguishes these hateful and hate-filled people from others. In so doing, Trump constructed “Muslims” as a racial group.<sup>548</sup> Indeed, he considered Muslim people to be a race — and then treated them accordingly.

#### A. Trump v. Hawaii

In his campaign for the presidency, Trump made plain his sense that Muslim people pose a threat to the United States. Indeed, he candidly stated his belief that “Islam hates us.”<sup>549</sup> He promised that, if elected, he would respond to the “great hatred towards Americans by large segments of the Muslim population”<sup>550</sup> by instituting a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”<sup>551</sup> One week after his inauguration as President, he issued an executive order, a travel ban, that temporarily suspended the entry of nationals from several Muslim-majority countries as well as the admission of all refugees for 120 days, except those from Syria, who were banned indefinitely.<sup>552</sup> The order provided that once the admission of refugees recommenced, religious minorities in Muslim-majority countries — that is, non-Muslims —

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ties of race, culture, custom, and religion” (quoting *Korematsu*, 323 U.S. at 236–37 (Murphy, J., dissenting)); Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 693 (2019) (stating that General DeWitt said that “even for [Japanese] American citizens, the ‘racial strains are undiluted’ and ‘a Jap is a Jap’” (quoting J.L. DEWITT, U.S. ARMY, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 34 (1943))).

<sup>547</sup> Katyal, *supra* note 9, at 644 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2417, 2437 (2018) (Sotomayor, J., dissenting)).

<sup>548</sup> See also Bridges, *supra* note 540, at 39 (concluding that “‘Muslim’ is a racial term (and ‘Muslim people’ a race) because it is used to denote essentialized difference”); Khaled A. Beydoun, *Viewpoint: Islamophobia has a Long History in the US*, BBC NEWS (Sept. 29, 2015), <http://www.bbc.com/news/magazine-34385051> [<https://perma.cc/EJ5W-U6S7>] (arguing that courts have “mutated [Islam] into a political ideology, and most saliently, a homogeneous race”).

<sup>549</sup> Jenna Johnson & Abigail Hauslohner, “*I Think Islam Hates Us*”: A Timeline of Trump’s Comments About Islam and Muslims, WASH. POST (May 20, 2017, 3:16 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [<https://perma.cc/XPX8-CKHK>].

<sup>550</sup> Eli Stokols & Daniel Strauss, *Donald Trump Calls for “Total and Complete Shutdown of Muslims” Coming to U.S.*, POLITICO (Dec. 7, 2015, 8:07 PM), <https://www.politico.com/story/2015/12/donald-trump-shutdown-of-muslims-216504> [<https://perma.cc/ET8C-79QY>].

<sup>551</sup> Johnson & Hauslohner, *supra* note 549.

<sup>552</sup> See Klarman, *supra* note 10, at 219.

would be given priority.<sup>553</sup> After the initial order was enjoined and a second iteration had been in effect for several months,<sup>554</sup> President Trump issued the version of the executive order that the Court ultimately upheld in *Trump v. Hawaii*. This iteration of the travel ban suspended entry of foreign nationals from six Muslim-majority nations in addition to North Korea and Venezuela.<sup>555</sup> The Trump Administration claimed that the Department of Homeland Security had headed a “worldwide, multi-agency review” of the procedures by which countries vetted applicants who sought to travel to the United States; this review also assessed the reliability of the information about applicants that those governments shared with the United States.<sup>556</sup> The Administration asserted that the countries subject to the travel ban had deficient procedures and information-sharing protocols.<sup>557</sup> It argued that in order to protect national security, the United States had to prohibit these countries’ nationals from entering.<sup>558</sup> Several plaintiffs challenged the order, arguing that it exceeded the President’s statutory authority under the Immigration and Nationality Act and violated the Establishment Clause insofar as animus against a disfavored religious group, Muslims, comprised its heart.<sup>559</sup>

“Deference” is the drumbeat pulsing beneath the majority opinion upholding the order — the theme that ties it together.<sup>560</sup> Signs that the Court is going to completely defer to the executive branch come early in the opinion.<sup>561</sup> After describing how the Trump Administration purported to complete a holistic review of the adequacy of the information that foreign governments give about their nationals seeking to enter the United States, the Court wrote that “the President issued the Proclamation before us — Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the

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<sup>553</sup> See *id.*

<sup>554</sup> See *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/YLJ7-4Z2L>].

<sup>555</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2405 (2018). The travel bans had shifted over their three iterations. For example, not only did the third order add North Korea and Venezuela — two countries that are not predominately Muslim — to the list of countries whose nationals would be denied entry, but it also removed Iraq, which is a majority-Muslim nation, from the list of banned countries on account of the work that its government had done to fight ISIS in the nation. See *id.* The third order also provided that the list of prohibited nations would be periodically revised. See Huq, *supra* note 545, at 67. Pursuant to this provision, the Administration removed Chad in 2018. See *id.*

<sup>556</sup> *Trump v. Hawaii*, 138 S. Ct. at 2404, 2408. As Professor Aziz Huq notes, the Court declined to interrogate whether the review process “in fact deliberated to determine an outcome that was not *ex ante* preordained.” Huq, *supra* note 545, at 74–75.

<sup>557</sup> *Trump v. Hawaii*, 138 S. Ct. at 2404–05.

<sup>558</sup> See *id.* at 2405.

<sup>559</sup> *Id.* at 2406.

<sup>560</sup> See Katyal, *supra* note 9, at 642 (describing the “very-near-blind deference to the executive branch” in *Trump v. Hawaii*).

<sup>561</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2403 (“[T]he President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks.”).

United States by Terrorists or Other Public-Safety Threats.”<sup>562</sup> The Court then, quite tellingly, stated, “The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present ‘public safety threats.’”<sup>563</sup> The issue, of course, is that there is a compelling argument that the title of the Proclamation indicated nothing of relevance. There is a compelling argument that the Proclamation was not responding to concerns about “vetting procedures” or “deficiencies in the information” that countries provide about their nationals.<sup>564</sup> That is, there is a compelling argument that the Proclamation was responding to Trump’s campaign promise to shut U.S. borders to Muslims, a group of people that he said possessed a “great hatred towards Americans.”<sup>565</sup> In other words, the Court’s suggestion that the title of the Proclamation provided an accurate description of what the Proclamation sought to do indicates that the Court was ready and willing to take the Administration’s word for pretty much everything concerning the travel ban.<sup>566</sup>

When the Court turned to the First Amendment challenge, it emphasized that the Proclamation was facially neutral; indeed, “Islam” and “Muslims” had been carefully scrubbed from its text.<sup>567</sup> Over the objections of the government, the Court acknowledged Trump’s statements evidencing anti-Muslim animus in the lead-up to issuing the order. The majority opinion quoted proud declarations from a Trump advisor that the travel ban was designed to put Trump’s desire to ban Muslims from entering the United States into a form that was legal — a form that would pass constitutional scrutiny.<sup>568</sup> For the majority, the legal question before it was what significance it ought to give those expressions when “reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”<sup>569</sup>

The answer at which the Court arrived is that express articulations of Islamophobia do not warrant heightened scrutiny, instead demanding

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<sup>562</sup> *Id.* at 2404.

<sup>563</sup> *Id.*

<sup>564</sup> *Id.*; see also, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.) (en banc), *vacated*, 138 S. Ct. 353 (2017) (describing the Executive Order previous to Proclamation No. 9645 that also instituted a travel ban as “an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination”).

<sup>565</sup> Stokols & Strauss, *supra* note 550.

<sup>566</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2421 (“[W]e cannot substitute our own assessment for the Executive’s predictive judgments on such matters . . .”).

<sup>567</sup> See *id.* at 2418 (stating that the order “is facially neutral toward religion”).

<sup>568</sup> See *id.* at 2417 (quoting a Trump advisor who explained, on national television, that Trump had asked the advisor to “[s]how [him] the right way to do it legally” after Trump had initially described the effort as a “Muslim ban”). The opinion goes on to explain that the advisor “assembled a group of Members of Congress and lawyers that ‘focused on, instead of religion, danger. . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.’” *Id.* (alterations in original).

<sup>569</sup> *Id.* at 2418.

only a slight peeling back of the facial neutrality of the order.<sup>570</sup> This is perplexing because, as Professor Michael Klarman notes, “one of the most well-established principles of equal protection and free exercise doctrine is that government action that is facially neutral but motivated by discriminatory racial or religious animus, respectively, is subject to strict scrutiny and presumptive invalidation.”<sup>571</sup> The *Trump v. Hawaii* Court’s dismissal of this precedent means, then, that it was willing to do less than it would do under standard equal protection (and First Amendment) doctrine.<sup>572</sup> Rejecting the applicability of that long-standing principle, as well as the Establishment Clause precedents that also reflect it, the *Trump v. Hawaii* majority was moved to use a rational basis review that asked “whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve the vetting processes,” explaining that it “will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”<sup>573</sup> By inventing and then deploying this test, the Court rendered irrelevant the extrinsic evidence of Trump’s anti-Muslim bigotry that it had just acknowledged.<sup>574</sup> Instead, it “assesse[d] the Proclamation as if it had randomly dropped out of the sky.”<sup>575</sup> It ultimately found that the “entry suspension has a legitimate grounding in national security concerns, quite apart from religious hostility” and, consequently, upheld the order.<sup>576</sup> This result is completely predictable given the deference that characterizes the entire majority opinion and the flaccidity of the standard of review that it chose to deploy.<sup>577</sup> In so holding, the Court created a doctrine that essentially

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<sup>570</sup> See *id.* at 2420 (“For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.”).

<sup>571</sup> Klarman, *supra* note 10, at 220.

<sup>572</sup> See Mark Tushnet, *Trump v. Hawaii: “This President” and the National Security Constitution*, 2018 SUP. CT. REV. 1, 2 (2019) (writing that in *Trump v. Hawaii* “facial neutrality operates as an absolute screen to shield badly motivated actions from anything but the most minimal scrutiny” and noting that this approach “is dramatically at odds with the way facial neutrality has operated in other cases, where facially neutral statutes can be invalidated if they result from discriminatory animus”); see also Huq, *supra* note 545, at 101 (“It is difficult to think of any other instance in which the Court has recognized the impermissible motives for a policy’s adoption — and then upheld the policy anyway.”).

<sup>573</sup> *Trump v. Hawaii*, 138 S. Ct. at 2420.

<sup>574</sup> In an apparent effort to outdo himself, Justice Thomas was the only Justice willing to deny that the extrinsic evidence constituted proof of anti-Muslim bigotry. See *id.* at 2424 (Thomas, J., concurring) (stating that “even on its own terms, the plaintiffs’ proffered evidence of anti-Muslim discrimination is unpersuasive”); see also Katyal, *supra* note 9, at 653 (“But in focusing on the four corners of the Proclamation, the Court ignored the tainted influence of the President’s comments on the Proclamation itself.”).

<sup>575</sup> Katyal, *supra* note 9, at 653.

<sup>576</sup> *Trump v. Hawaii*, 138 S. Ct. at 2421.

<sup>577</sup> In a particularly ironic moment, the Court observed that it has rarely struck down a policy under rational basis review. *Id.* at 2420 (“Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.”). It

releases the Executive from the antidiscrimination requirements of the First, Fifth, and Fourteenth Amendments when the Executive purports to act to protect national security.<sup>578</sup> Ironically, national security is a context wherein antidiscrimination constraints might be especially warranted, inasmuch as “assessments of national security threat have been and continue to be rooted in racial prejudice.”<sup>579</sup>

Justice Sotomayor’s dissent argued that the majority’s decision — with the unexplained, unwarranted deference that it gave to the executive branch and its willingness to allow the assertion that the law aims to protect national security to thwart any meaningful judicial review of it<sup>580</sup> — mirrors *Korematsu v. United States*<sup>581</sup> in the most damning respects. She wrote:

In *Korematsu*, the Court gave “a pass [to] an odious, gravely injurious racial classification” authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group’s supposed inability to assimilate and desire to harm the United States. And as here, there was strong evidence that impermissible hostility and animus motivated the Government’s policy.<sup>582</sup>

One might read Justice Sotomayor’s dissent as faulting the majority for its willful refusal to see the resemblance between the racial violence

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then cited *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), for the proposition that the Court will strike down a law when it “lack[s] any purpose other than a ‘bare . . . desire to harm a politically unpopular group.’” *Trump v. Hawaii*, 138 S. Ct. at 2420 (quoting *Moreno*, 413 U.S. at 534). However, a legitimate purpose justified the law at issue in *Moreno* — namely, the desire to minimize fraud in the receipt of food stamp benefits. *Moreno*, 413 U.S. at 535. Of course, the Court in that case denied that the challenged policy adequately pursued that purpose in large part *because of the extrinsic statements of a lawmaker revealing that a desire to discriminate against “hippies” had motivated the policy.* *Id.* at 537 (“[T]he challenged classification simply does not operate so as rationally to further the prevention of fraud. . . . Indeed, as the California Director of Social Welfare has explained: . . . ‘It is my understanding that the Congressional intent of the new regulations are specifically aimed at the “hippies” and “hippie communes.”’”). Had the Court in *Trump v. Hawaii* actually followed *Moreno*, it would have permitted Trump’s numerous Islamophobic statements to defeat the claim that excluding nationals from countries with inadequate vetting procedures was a legitimate purpose motivating the travel ban.

<sup>578</sup> See Huq, *supra* note 545, at 51 (writing that “a discrepant Article II authority to discriminate is in tension with the prevailing view that constitutional antidiscrimination provisions under the Fifth and Fourteenth Amendments bind equally all official actors, whether federal or state”).

<sup>579</sup> Zainab Ramahi, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 108 CALIF. L. REV. 557, 584 (2020).

<sup>580</sup> *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting) (“Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that ‘it is essential that there be definite limits to [the government’s] discretion,’ as ‘[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.’” (alterations in original) (quoting *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting))).

<sup>581</sup> 323 U.S. 214 (1944).

<sup>582</sup> *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (alteration in original) (citations omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting)).

inflicted upon people of Japanese descent during World War II — that is, the incarceration of more than 100,000 people in concentration camps for no reason other than their Japanese ancestry<sup>583</sup> — and the racial violence inflicted by the closing of the borders to millions of innocent people for no reason other than their religion or race.<sup>584</sup> Indeed, for many, the similarities between the two violent policies are apparent.<sup>585</sup> Both involved “demagogic politicians” who stoked “popular animus” against disfavored groups.<sup>586</sup> Both involved inhumane treatment of a racial group that politically powerful people had constructed as a threat.<sup>587</sup> Both involved the Court allowing the existence of a threat to be the basis for presuming a particular group’s dangerousness, instead of requiring a showing that that group or a particular individual within the group actually posed a danger.<sup>588</sup> Both involved cruelties heaped

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<sup>583</sup> A bit of history: After the Japanese government bombed Pearl Harbor, thereby thrusting the United States into World War II, President Franklin D. Roosevelt issued an executive order that authorized military personnel to identify areas from which “any or all persons may be excluded.” Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Shortly thereafter, General John DeWitt, a frank racist vis-à-vis people of Japanese descent, see Katyal, *supra* note 9, at 644, identified the Pacific coast as a military area from which people of Japanese descent, including both Japanese nationals as well as American citizens, were to be excluded, Huq, *supra* note 545, at 57. He argued that the risk that they would engage in “espionage” and “sabotage,” assisting Japan in an invasion of the West Coast, justified their exclusion from the area. *Id.* Over 100,000 people of Japanese descent — approximately seventy percent of whom were U.S. citizens — were ultimately incarcerated in ten concentration camps in the United States for a period that would exceed three years. *Id.* In *Korematsu v. United States*, the Court upheld Fred Korematsu’s conviction for refusing to report to an assembly center following the exclusion order. *Korematsu*, 323 U.S. at 223.

<sup>584</sup> See *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

<sup>585</sup> The similarities between the two events are even apparent to *Trump himself*. See Katyal, *supra* note 9, at 645 (stating that Trump “likened his proposed ban during the campaign to the internment at issue in *Korematsu*, ‘noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II’” (quoting *Trump v. Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting))).

<sup>586</sup> Klarman, *supra* note 10, at 222. As Klarman explains, “a majority of Republicans . . . view Muslims as a national security threat per se, which is how many Americans saw people of Japanese descent in 1942.” *Id.* (footnotes omitted).

<sup>587</sup> See John Yuasa, *From Japanese-American Internment Camps to the Muslim Ban: The Terrible Consequences of Discriminatory Executive Orders*, NAT’L IMMIGR. L. CTR. (July 27, 2017), <https://www.nilc.org/2017/07/26/japanese-american-internment-camps-muslim-ban-terrible-consequences-discriminatory-executive-orders> [<https://perma.cc/G8FZ-WJ9L>] (“[T]he government’s position was that national security required this policy on internment. However, . . . the broad historical causes were ‘race prejudice, war hysteria and a failure of political leadership.’ Now, for no other reasons than prejudice, national security hysteria, and a failure of political leadership, the president has decided that people attempting to escape persecution by coming to the United States present a national security risk — solely for being Muslim.” (quoting COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: PART 2: RECOMMENDATIONS 5 (1983))); Christopher Dunn, *Column: The Muslim Travel Ban and the Japanese Internment: An Ugly History Repeats Itself*, NYCLU (Aug. 7, 2018), <https://www.nyclu.org/en/publications/column-muslim-travel-ban-and-japanese-internment-ugly-history-repeats-itself> [<https://perma.cc/C9EU-TS7A>].

<sup>588</sup> As Huq explains, “there was a substantial national security threat lurking in the background” of the *Trump v. Hawaii* decision. Huq, *supra* note 545, at 84. However, the standard of review that

upon foreign nationals and U.S. citizens alike.<sup>589</sup> Both involved the confinement of a despised people inside of detention facilities — as, in the case of the travel ban, “[p]resenting for entry at a U.S. border without what is deemed appropriate documentation often leads immediately to detention.”<sup>590</sup> Both involved a Court that was willing to sanction that confinement by proclaiming the authority of the executive branch in matters of national security.<sup>591</sup>

the Court deployed did not require it to “parse carefully the origin of the threat or link that threat to the policy’s targets.” *Id.* It was “enough for the government to identify *some* threat without any evidence linking that threat to the coercively targeted population with precision or predictive heft.” *Id.* As he convincingly argues:

[T]here is no doubt that terrorist organizations such as the Islamic State do, in fact, operate from Syria and Yemen. . . . The corrosive acid of deference . . . ate completely away at any demand for particularity as to whether *these* men, women, and children had acted in such a way as to deserve coercion.

*Id.* at 85 (citations omitted).

<sup>589</sup> The Court in *Trump v. Hawaii* attempted to disavow the relevance of *Korematsu* by emphasizing that the latter involved coercive treatment of U.S. citizens while the former involved coercive treatment of foreign nationals. See *Trump v. Hawaii*, 138 S. Ct. at 2423 (noting that *Korematsu* concerned the “forcible relocation of U.S. citizens to concentration camps” while the instant case involved a policy that simply denies “certain foreign nationals the privilege of admission”). Of course, in emphasizing that *Korematsu* involved the forcible relocation of *U.S. citizens*, one could read the Court as suggesting that in some circumstances, the forcible relocations of noncitizens on the basis of race would be legal. See Greene, *supra* note 545, at 634 (noting that “a racial classification of noncitizens would not necessarily” be illegal). This, of course, is a disturbing suggestion.

However, more broadly, the Court is factually wrong about the citizenship status of those affected by the laws at issue in *Korematsu* and *Trump v. Hawaii*. Although the majority of those incarcerated in concentration camps during World War II were U.S. citizens, tens of thousands were foreign nationals. See *Yamamoto & Oyama*, *supra* note 546, at 714. Thus, the *Trump v. Hawaii* Court erred when it proposed that the law at issue in *Korematsu* did not implicate foreign nationals. Moreover, the *Trump v. Hawaii* Court erred when it suggested that the travel ban does not implicate U.S. citizens. As Huq notes, the ban prevents the reunification of families. See Huq, *supra* note 545, at 97–98. “The harms thereby inflicted on U.S. citizens kept apart from families who remain trapped in physically perilous environments are very far from trivial.” *Id.* at 98. Thus, both *Korematsu* and *Trump v. Hawaii* involve coercive treatment of both foreign nationals and U.S. citizens.

<sup>590</sup> Huq, *supra* note 545, at 91. Relevantly, Professor Jamal Greene wonders about the significance of the Court’s use of the term “concentration camps” when describing the wrong of *Korematsu*. See Greene, *supra* note 545, at 634. He writes that the term might “lessen[] the scope of what is being overruled.” *Id.* He asks, “[m]ight there be features even of a detention facility, or circumstances surrounding a detention decision, that make the ‘concentration camp’ label inapt?” *Id.* Greene’s questions provide insight into how the *Trump v. Hawaii* majority could have denied the similarity between the racial injury that it sanctioned and the racial injury of Japanese internment. The Court might believe that there are some “features” of the detention facilities into which individuals are placed when presenting at a U.S. border without proper documentation that makes confinement in them fundamentally dissimilar to confinement in a “concentration camp.” See *id.*

<sup>591</sup> See Katyal, *supra* note 9, at 649 (arguing that in both *Korematsu* and *Trump v. Hawaii*, the Court “adopted a posture of broad deference to the executive — even when individual constitutional rights are infringed — when the executive asserts that a policy is necessary to ensure the nation’s security”); Greene, *supra* note 545, at 639–40 (observing the same).

Professor Neal Katyal observes one important difference between *Korematsu* and *Trump v. Hawaii*: whereas in *Korematsu*, the Court had not been made aware of an intelligence report that had concluded that the “‘Japanese Problem’ ha[d] been magnified out of its true proportion, largely



Writing that “*Korematsu* has nothing to do with this case,”<sup>592</sup> the majority in *Trump v. Hawaii* rebuked Justice Sotomayor for seeing a racial injury in the travel ban in the first instance, and, in the second instance, suggesting that this purported racial injury is reminiscent of the one that *Korematsu* sanctioned.<sup>593</sup> For the majority, the laws at issue in the two cases were night and day: *Korematsu* involved an order that targeted individuals “solely and explicitly on the basis of race”; the instant case involved a facially neutral law.<sup>594</sup> *Korematsu* involved a “morally repugnant order” that required the “forcible relocation of U.S. citizens to concentration camps”;<sup>595</sup> the instant case involved a policy that simply denied “certain foreign nationals the privilege of admission.”<sup>596</sup> The majority, in dicta,<sup>597</sup> concluded with a denouncement: “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — ‘has no place in law under the Constitution.’”<sup>598</sup> But, although the Court renounced *Korematsu*, it nonetheless “replicat[ed] its ‘logic’ of unconditional deference to the President.”<sup>599</sup>

Professor Aziz Huq notes that one study found a forty-five percent decrease between 2016 and 2018 in the number of visas issued to nationals hailing from the Muslim-majority countries subject to the travel ban.<sup>600</sup> He writes that “so long as the travel ban is in effect, rates of movement from the enumerated countries will remain minimal.”<sup>601</sup> Once again, the United States is attempting to purify itself of people who it imagines pose a threat to the health, safety, and lives of

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because of the physical characteristics of the people,” Katyal, *supra* note 9, at 651 (quoting Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3033 (2013)), in *Trump v. Hawaii*, “President Trump’s anti-Muslim comments were littered across various media outlets, ‘plastered on the candidate’s website,’ and ‘staring everyone in the face,’” *id.* at 656 (quoting Ian Samuel & Leah Litman, *No Peeking? Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017), <https://takecareblog.com/blog/updated-a-guide-to-all-take-care-analysis-of-the-travel-ban> [<https://perma.cc/6Y3T-TQ4Q>]).

<sup>592</sup> *Trump v. Hawaii*, 138 S. Ct. at 2423.

<sup>593</sup> *See id.*

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> *See* Greene, *supra* note 545, at 629 (stating that the *Trump v. Hawaii* Court’s overruling of *Korematsu* is “dicta . . . as evidenced by the Court’s claim, in virtually the same breath, that ‘*Korematsu* has nothing to do with this case’” (quoting *Trump v. Hawaii*, 138 S. Ct. at 2423)).

<sup>598</sup> *Trump v. Hawaii*, 138 S. Ct. at 2423 (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

<sup>599</sup> Yamamoto & Oyama, *supra* note 546, at 691. As Greene has incisively observed, Justice Thomas’s decision to join the *Trump v. Hawaii* majority, even though he has approvingly cited *Korematsu* in his prior opinions, is evidence of *Trump v. Hawaii*’s consistency with the logic of *Korematsu*. *See* Greene, *supra* note 545, at 630 (“Justice Thomas’s prior favorable statements about *Korematsu* are difficult to reconcile with the claim that *Korematsu* is obviously wrong in all its particulars, and yet he was comfortable joining the *Hawaii* majority.”).

<sup>600</sup> Huq, *supra* note 545, at 76–77.

<sup>601</sup> *Id.* at 77.

Americans.<sup>602</sup> In 1944, the targets of that fear were the Japanese. In 2018, the targets were Muslims. In 2021, if the United States is still around, the target likely will have shifted to a new racialized bogeyman. *Trump v. Hawaii* ensures that the Court has the tools that it needs to sanction the next iteration of the same racial injury when the time is “right.”<sup>603</sup>

In sum, although the Roberts Court purported to be engaged in a value-free exercise of identifying the claims of racial discrimination that deserve relief by searching for resemblances to pre-Civil Rights Era racism, *Trump v. Hawaii* reveals that this exercise is far from neutral. Indeed, political commitments are embedded into the very fibers of the Court’s inquiry. That is, the Roberts Court has defined what counts as racism exceedingly narrowly. Even so, by its own definition, the travel ban is racist — bearing the strongest of likenesses to the Japanese exclusion order and their subsequent internment during World War II. Nevertheless, the Court refused to acknowledge the similarity. This is a result that one can reasonably explain in terms of a desire by the Roberts Court to produce a result in the case that aligned with the Republican Party’s desires.

### B. *Shelby County v. Holder*

*Shelby County v. Holder* — and the fallout from the Court’s decision in that case — reveals that the Court’s purportedly value-neutral search for racial discrimination that looks like the racism of yesteryear is, in reality, embedded with political values. To many observers, the techniques that Republican-dominated state legislatures are currently using to disenfranchise voters of color bear an undeniable resemblance to the techniques that white supremacists used in the pre-Civil Rights Era to disenfranchise voters of color.<sup>604</sup> However, the Roberts Court greenlit the use of those current techniques in *Shelby County*,<sup>605</sup> and then it has subsequently denied that they are manifestations of racism.<sup>606</sup> It bears noting that because *Shelby County* is about the scope of Congress’s powers, it sits in a different posture than *Trump v. Hawaii* and the other cases that this Foreword analyzes — cases that are all about claims of violations of constitutional rights. Yet this difference in posture only

<sup>602</sup> See Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> [https://perma.cc/LBW8-RC9M].

<sup>603</sup> See Huq, *supra* note 545, at 114 (“[B]ecause the government has a wide variety of close substitutes that can mimic many (although perhaps not quite all) of the internment’s effects while evading any formal parallelism, it has a broad capacity to circumvent any collision with the law.”); see also Yamamoto & Oyama, *supra* note 546, at 716 (making a similar observation).

<sup>604</sup> See, e.g., Adam Serwer, *Democracy Dies in Silence*, THE ATLANTIC (Oct. 31, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/florida-votings-rights-lawsuit/620567> [https://perma.cc/2UBS-TMBN].

<sup>605</sup> See *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

<sup>606</sup> See, e.g., *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021).

goes to show that there are many tools in the Court’s interpretive toolkit that it uses to reach the results that it wants.

The Republican Party has been on a campaign to make it difficult for people who likely would support Democratic candidates — nonwhite people, young people, low-income people, people with disabilities<sup>607</sup> — to vote.<sup>608</sup> Politically conservative actors assert that this campaign is necessary to prevent voter fraud<sup>609</sup> — a phenomenon that either does not exist or tenaciously resists its own empirical documentation.<sup>610</sup> Nevertheless, in the battle against a problem that presently exists in theory alone, Republican-controlled legislatures have restricted voting access for unprivileged communities, achieving this feat through means that include restrictive voter identification requirements,<sup>611</sup> restraints on voter registration,<sup>612</sup> limitations on early voting and mail voting,<sup>613</sup> restrictions on absentee and provisional

<sup>607</sup> See Jennifer Laszlo Mizrahi, *Results of New National Poll of Voters with and Without Disabilities*, RESPECTABILITY (Feb. 14, 2018), <https://www.respectability.org/2018/02/results-new-national-poll-voters-without-disabilities> [<https://perma.cc/L834-96SQ>]; *National Exit Polls: How Different Groups Voted*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/exit-polls-president.html> [<https://perma.cc/93HY-45WX>].

<sup>608</sup> See Amy Gardner et al., *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/> [<https://perma.cc/93KW-JA56>]; Julia Harte, *Factbox: Republicans Erect Voting Barriers in Politically Crucial U.S. States*, REUTERS (June 16, 2021, 4:20 PM), <https://www.reuters.com/world/us/republicans-erect-voting-barriers-politically-crucial-us-states-2021-06-16> [<https://perma.cc/84HY-YCGR>].

<sup>609</sup> Reid J. Epstein & Nick Corasaniti, *Republicans Push Crackdown on Crime Wave That Doesn’t Exist: Voter Fraud*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/us/politics/republican-voter-fraud.html> [<https://perma.cc/5YDQ-G97R>].

<sup>610</sup> See Klarman, *supra* note 10, at 50–51 (“[V]oter impersonation fraud is essentially a myth. . . . [In Texas,] only four instances of voter impersonation fraud had been successfully prosecuted in the state during the ten years preceding the passage of [a law that purported to shore up election integrity by making it even more difficult to vote] and the two years following its enactment.”).

<sup>611</sup> As Klarman notes, “the disparate racial and wealth effects of stringent voter identification laws are real.” *Id.* at 50. He writes of Texas:

Latino voters were between 46 and 120 percent more likely than white voters not to possess any form of government-issued identification [required by the law]. Obtaining the free voter identification card offered by Texas requires documentation, the cheapest form of which is a birth certificate that costs twenty-two dollars, and a trip to an office of the Department of Motor Vehicles. As of 2015, such offices did not exist in nearly one-third of Texas counties, especially those with large Latino populations. The nearest DMV office could be as far as 250 miles away.

*Id.* (footnotes omitted).

<sup>612</sup> See Matt Vasilogambros, *Republicans Threaten Voter Registration Volunteers with Crimes*, PEW TRUSTS (Aug. 11, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/11/republicans-threaten-voter-registration-volunteers-with-crimes> [<https://perma.cc/JT2A-Y9L3>]; Gardner et al., *supra* note 608 (noting a proposal to eliminate automatic registration for absentee voting, which would force voters to reapply each election cycle); Harte, *supra* note 608 (detailing pending legislation in Arizona that would ban automatic and Election Day voter registration).

<sup>613</sup> Gardner et al., *supra* note 608 (describing restrictions to mail and early voting proposed in forty-three states, including a bill in Arizona that would “require mail ballots to be postmarked by

ballots,<sup>614</sup> voter-roll purges,<sup>615</sup> and the closure of polling places in the neighborhoods that marginalized people call home.<sup>616</sup> Moreover, the Brennan Center for Justice has observed the development of a new species of voting restriction that focuses on election officials; these laws subject officials to criminal penalties if they assist an individual in the task of voting or attempt to stop “poll watchers” from intimidating voters or engaging in other disruptive behavior in a polling place.<sup>617</sup> Further, in a new — and sleep-robbing — development, legislators have introduced bills that would permit partisan actors to reject election results altogether.<sup>618</sup>

Observers have seen parallels between the Republican Party’s modern efforts to disenfranchise voters of color — who they assume will support Democratic candidates — and the campaign that white supremacists waged to do the same during the days of Jim Crow and formal

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the Thursday before Election Day”; similarly restrictive proposals in Pennsylvania; a proposal in Georgia to curtail early voting on weekends; a failed attempt in Tennessee to eliminate early voting entirely; and legislation in Iowa that reduces early voting hours and makes the deadline for mail ballots to arrive at local election offices earlier than it once was); Harte, *supra* note 608 (detailing legislation in Texas that would have “limited early voting hours”; a new law in Arizona that “remove[s] voters from the state’s ‘Early Voting List’ if they fail to submit an early ballot at least once every two election cycles”; and a proposal in Pennsylvania that would “eliminate the state’s permanent mail-voting list, forcing voters to apply for mail ballots before each election”).

<sup>614</sup> Gardner et al., *supra* note 608 (reporting that “[s]ixteen states currently require an excuse to vote absentee” and bills in six states would add this requirement); Harte, *supra* note 608 (describing proposals in Michigan and Texas that would add identification requirements to absentee voting; a new law in Florida that “limit[s] the use of absentee drop boxes to the early voting period” and requires absentee voters to “submit new proof of identity when requesting their ballots and reapply for absentee ballots in each new general election cycle”; a new Georgia law that “tighten[s] absentee ballot identification requirements”; and a new Iowa law that “impose[s] tighter deadlines for absentee ballots to be submitted”).

<sup>615</sup> See Klarman, *supra* note 10, at 53 (noting that voter roll purges “disproportionately impact people of color, the poor, and young people — all of whom are relatively more transient”).

<sup>616</sup> See Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Too Few Polling Places*, NPR (Oct. 17, 2020, 5:01 AM), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl> [https://perma.cc/JXY4-7542].

<sup>617</sup> See *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [https://perma.cc/9YKV-GMT2]. Election officials are not the only actors subject to criminal penalties under this new species of voting restriction. Quite infamously, Georgia has made it a misdemeanor for anyone to give out water or food within 150 feet of a polling place or twenty-five feet of any voter standing in line. GA. CODE ANN. § 21-2-414(a) (West 2021). While the law applies to everyone, the expectation is that it will disproportionately burden nonwhite people, who endure longer wait times than their white counterparts to cast a ballot. See Fowler, *supra* note 616; HANNAH KLAIN ET AL., BRENNAN CTR. FOR JUST., *WAITING TO VOTE* 3 (2020), <https://www.brennancenter.org/our-work/research-reports/waiting-vote> [https://perma.cc/C6DR-DCU2] (“Black and Latino Americans face longer wait times on Election Day than white voters.”).

<sup>618</sup> See Blake Hounshell & Nick Corasaniti, *A Hidden New Threat to U.S. Elections*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/07/22/us/politics/county-election-certify.html> [https://perma.cc/35TU-BU3G]; see also Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES, (Apr. 2, 2021) <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [https://perma.cc/Y74A-VJ8H].

racial inequality. As Klarman writes: “[W]hat the Republican Party has done in the first two decades of the twenty-first century . . . amounts to the most comprehensive assault on democratic governance since Jim Crow rule ended in the American South.”<sup>619</sup> Indeed, Professor Nicholas Stephanopoulos similarly finds the comparison to the Jim Crow Era appropriate, writing that “more voting restrictions have been enacted over the last decade than at any point since the end of Jim Crow”<sup>620</sup> and that franchise restrictions implemented by nearly half of states “amount to the most systematic retrenchment of the right to vote since the civil rights era.”<sup>621</sup>

One might read these observers as declaring that a racial injury identical in all relevant respects to the racism perpetrated during the pre-Civil Rights Era is occurring in dozens of states across the nation. Nevertheless, the Roberts Court has done nothing to stop states from inflicting the injury. This is not an exaggeration. As Stephanopoulos observes, the Roberts Court “has never nullified a law making it harder to vote.”<sup>622</sup> Indeed, the Roberts Court has, on the whole, sanctioned the Republican Party’s campaign to disenfranchise the voters that it disfavors, upholding numerous voting restrictions that have constrained the ability of people of color and others who are likely to vote for Democrats to exercise the franchise.<sup>623</sup> The Court has rubberstamped the Republican Party’s program of systematic voter disenfranchisement because it denies that the racial injury that the Republican Party is exacting on communities of color is a racial injury. It does not see — or claims not to see — the resemblance between what the Republican Party is doing today and what white supremacists did during the Jim Crow Era.

A direct line connects recent efforts to disenfranchise voters of color and the Court’s 2013 decision in *Shelby County v. Holder*.<sup>624</sup> In that

<sup>619</sup> Klarman, *supra* note 10, at 66.

<sup>620</sup> Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1569 (2019).

<sup>621</sup> *Id.* at 1578. Even without drawing the analogy to the Jim Crow Era, the effort to disenfranchise nonwhite and other marginalized voters is astounding.

<sup>622</sup> Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 160 (2020).

<sup>623</sup> Stephanopoulos argues that the Roberts Court’s record on voting rights cannot be explained in terms of either a commitment to judicial activism or judicial restraint; instead, he proposes that the effect of “improv[ing] Republican electoral prospects at every turn” unites the record. *Id.* at 181.

<sup>624</sup> See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2354 (2021) (Kagan, J., dissenting) (“[T]he problem of voting discrimination has become worse since that time — in part because of what this Court did in *Shelby County*.”); SOPHIA L. LAKIN ET AL., ACLU, THE CASE FOR RESTORING AND UPDATING THE VOTING RIGHTS ACT 4 (2021) (“[I]mmediately following *Shelby County*, many states, particularly those formerly covered by preclearance, passed voter suppression and other discriminatory voting laws unlike anything seen in a generation.”); Klarman, *supra* note 10, at 184 (“Within twenty-four hours of the decision [in *Shelby County*], Alabama had revived a bill previously blocked under preclearance that required photo identification for voting. Then, the state closed thirty-one driver’s license offices, some of the principal venues for obtaining such identification, which were disproportionately located in counties with large black populations.”)

case, the Court struck down the coverage formula contained in section 4(b) of the Voting Rights Act of 1965<sup>625</sup> (VRA), which identified the jurisdictions that are subject to preclearance.<sup>626</sup> Jurisdictions bound by the preclearance requirement, which itself is found in section 5 of the VRA, are required to get approval from the Attorney General or a federal court before making any change to their voting laws.<sup>627</sup> Federal authorities would approve a proposed change only if they found that it was neither motivated by discriminatory intent nor likely to have the effect of “‘diminishing the ability of any citizens of the United States,’ on account of race, color, or language minority status, ‘to elect their preferred candidates of choice.’”<sup>628</sup> When the VRA was passed in 1965, the coverage formula subjected to preclearance those jurisdictions that, as of November 1964, had implemented a “test or device” — such as literacy and knowledge tests, good moral character, residency, or property requirements, and the like — and in which fewer than half of eligible voters had registered or voted in the 1964 presidential election.<sup>629</sup>

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(footnotes omitted)); Kim Shayo Buchanan & Phillip Atiba Goff, *Racist Stereotype Threat in Civil Rights Law*, 67 UCLA L. REV. 316, 343 (2020) (“As soon as the Supreme Court freed them from the federal preclearance requirement, Texas and North Carolina adopted restrictive voting rules that district courts later found were motivated by discriminatory intent.”).

<sup>625</sup> Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (1965) (codified as amended at 52 U.S.C. § 10301).

<sup>626</sup> *Shelby County v. Holder*, 570 U.S. 529, 542–57 (2013). As scores of observers have explained, preclearance is an essential tool in the fight to realize the Fifteenth Amendment’s promises insofar as challenging changes to voting laws *after* they have been implemented is extremely time consuming. Several elections can take place under an illegitimate voting law before a court strikes it down. See LAKIN ET AL., *supra* note 624, at 33 (“Discriminatory laws that [were ultimately blocked remained] in place for months or even years while litigation proceeded — time in which other elections were held and hundreds of government officials were elected under discriminatory conditions.”). Further, as soon as the illegitimate law is struck down, an obstinate legislature, hellbent on voter disenfranchisement, can pass a new, ultimately illegitimate law to take the old law’s place — forcing challengers to engage in a high-stakes, never-ending game of electoral whack-a-mole. As the ACLU notes: “In 1963, the U.S. Commission on Civil Rights reported that the six years of enforcing the new federal voting rights laws were ‘ineffective’ at solving the problems they were aimed at addressing, citing the inherent delays in the judicial process.” *Id.* at 10.

Section 5 of the VRA, which forestalled the enforcement of illegitimate laws in the first instance, was highly successful at making the electoral landscape fairer than it would have been in its absence. See *id.* at 2 (noting that since section 5’s enactment in 1965, it has “successfully block[ed] more than 1,000 instances of discriminatory election rules advanced by state and local officials that would have weakened minority voting power or blocked minority voters from casting a ballot altogether”). The compelled dormancy of section 5, brought about by section 4(b)’s defeat in *Shelby County*, has made the electoral landscape a much more hostile place for people of color. See, e.g., Klarman, *supra* note 10, at 184 (“Between 2012 and 2018, states formerly covered by section 5 closed nearly 1,700 polling places.”).

<sup>627</sup> *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUST. (July 14, 2022), <https://www.justice.gov/crt/about-section-5-voting-rights-act> [<https://perma.cc/8WWT-WT89>].

<sup>628</sup> *Shelby County*, 570 U.S. at 549 (quoting 42 U.S.C. § 1973c(b)).

<sup>629</sup> *About Section 5 of the Voting Rights Act*, *supra* note 627.

The VRA was reauthorized several times after its initial passage in 1965.<sup>630</sup> The last time that it was reauthorized was in 2006, when a unanimous Senate voted to leave the statute in place.<sup>631</sup> However, the coverage formula had not been updated since the 1975 reauthorization.<sup>632</sup> When Congress reauthorized the VRA that year, it tweaked the formula slightly, subjecting to coverage those jurisdictions that, as of 1972, had implemented a voting “test or device” — amended to include the practice of supplying voting materials solely in English in places where over five percent of eligible voters did not speak the language — and had less than fifty percent voter registration or turnout.<sup>633</sup> When Congress reauthorized the Act in 1982 and 2006, it did not update the coverage formula.<sup>634</sup>

The Court’s reason for striking down the preclearance formula in *Shelby County* was that it was outdated. The Court argued that the formula capably identified states that had engaged in racist voter disenfranchisement in the past — in the bad old days.<sup>635</sup> And to its credit, the Court did not doubt that things were really bad back then. “Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites.”<sup>636</sup> But things had changed, said the Court. “[T]he conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”<sup>637</sup> Differently stated, “the era of big racism

<sup>630</sup> *Id.*

<sup>631</sup> Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2214 (2018) (noting that a unanimous Senate reauthorized the VRA in 2006). The statute received overwhelming support in the House as well. See Sarah A. Binder, *Reading Congressional Tea Leaves from the 2006 Renewal of the Voting Rights Act*, BROOKINGS INST. (July 1, 2013), <https://www.brookings.edu/opinions/reading-congressional-tea-leaves-from-the-2006-renewal-of-the-voting-rights-act> [https://perma.cc/PH9A-Q8NL] (“Reauthorization of the VRA took place ahead of schedule, passed by a House vote of 390–33 . . .”).

<sup>632</sup> *Shelby County*, 570 U.S. at 538–39.

<sup>633</sup> *Id.* at 538.

<sup>634</sup> *About Section 5 of the Voting Rights Act*, *supra* note 627.

<sup>635</sup> *Shelby County*, 570 U.S. at 535 (emphasizing that by 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide” (alterations in original) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203–04 (2009))).

<sup>636</sup> *Id.* at 545–46 (citations omitted). The disenfranchisement of black voters that the Court describes was the result of a rash of facially race-neutral laws that states in the former Confederacy passed after the end of Reconstruction to disenfranchise the thousands of black men who had voted in the years prior:

In Louisiana, for example, Black voter registration dropped from 130,334 in 1896 to 5,320 in 1900 and to 1,342 by 1904, representing a 96% decrease in Black registration. In South Carolina, Black registration decreased from 92,081 in 1876 to 2,823 in 1898, and in Mississippi it dropped from 52,705 in 1876 to 3,573 in 1898.

LAKIN ET AL., *supra* note 624, at 9 (footnotes omitted).

<sup>637</sup> *Shelby County*, 570 U.S. at 535.

is over.”<sup>638</sup> The VRA had been successful. The Court observed that in the jurisdictions that had once been the site of rank racial discrimination in voting, people of color were turning out in droves during elections, successfully casting ballots, and electing their candidates of choice.<sup>639</sup> (The Court ignored that people of color had turned out in droves, in part, because a black presidential candidate had been on the ballot.<sup>640</sup> It was in only those two elections — 2008 and 2012 — that the racial gap in voting significantly decreased in covered jurisdictions.<sup>641</sup> In prior elections, the gap persisted, and in subsequent elections, the gap has widened.<sup>642</sup> Further, in midterm elections, the gap has declined, but has

<sup>638</sup> Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1430 (2015).

<sup>639</sup> See *Shelby County*, 570 U.S. at 535 (stating that just four years before the decision, “the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide,” *id.* (alterations in original) (quoting *Holder*, 557 U.S. at 203–04), and that “[s]ince that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent,” *id.*).

<sup>640</sup> See MARK HUGO LOPEZ & PAUL TAYLOR, PEW RSCH. CTR., DISSECTING THE 2008 ELECTORATE: MOST DIVERSE IN U.S. HISTORY i, iii–iv (2009), <https://www.pewresearch.org/wp-content/uploads/sites/5/reports/108.pdf> [<https://perma.cc/AJH3-95ZL>] (“The electorate in [the 2008] presidential election was the most racially and ethnically diverse in U.S. history . . . . The nation’s three biggest minority groups — blacks, Hispanics and Asians — each accounted for unprecedented shares of the presidential vote in 2008.” *Id.* at i.); see also *id.* at iii–iv (“According to the exit polls in [the 2008] presidential election, the candidate preference of non-white voters was distinctly different from that of white voters. Nearly all (95%) black voters cast their ballot for Democrat Barack Obama. Among Latino voters, 67% voted for Obama . . . . Among Asian voters, 62% supported Obama . . . .”); Nadra Kareem Nittle, *How People of Color Helped Obama Win Reelection*, THOUGHTCO. (Mar. 21, 2021), <https://www.thoughtco.com/how-minority-voters-helped-obama-win-reelection-2834532> [<https://perma.cc/LC3T-YHK9>]; Peyton M. Craighill & Sean Sullivan, *The Wide Racial Gap in Obama’s Presidential Elections, in 2 Charts*, WASH. POST (Aug. 28, 2013, 12:19 PM), <https://www.washingtonpost.com/news/the-fix/wp/2013/08/28/the-wide-racial-gap-in-obamas-presidential-elections-in-2-charts> [<https://perma.cc/6WPB-LNX6>] (“The question moving toward 2016 is how and if turnout and the racial gap will shift without Obama, the nation’s first African American president, on the ballot.”).

<sup>641</sup> Kevin Morris & Coryn Grange, *Large Racial Turnout Gap Persisted in 2020 Election*, BRENNAN CTR. FOR JUST. (Aug. 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election> [<https://perma.cc/DQ4K-CE9B>] (“The difference between white and nonwhite voter turnout has remained relatively unchanged over the last six presidential elections, with a few notable fluctuations. In 2008 and 2012, Barack Obama was on the ballot. . . . [T]he gap between white and nonwhite voter turnout narrowed to 8 percentage points, the lowest since 1996.”); Kevin Morris et al., *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights> [<https://perma.cc/UJE2-WCDH>] (“While in 2012, just before the *Shelby County* decision, the white-Black turnout gap was shrinking in [jurisdictions previously covered by preclearance], and in many instances even briefly closed, this trend has reversed in the years since.”).

<sup>642</sup> Morris & Grange, *supra* note 641 (“[A]fter reaching that record low in 2012, the turnout gap expanded once again between white voters and nonwhite voters . . . .”); Morris et al., *supra* note 641 (“Between 2012 and 2020, the white-Black turnout gap grew between 9.2 and 20.9 percentage points across five of the six states originally covered by Section 5 of the Voting Rights Act.”).



never vanished entirely in the covered states.<sup>643</sup>) But according to the majority, the coverage formula contained in the 2006 reauthorization ignored this racial progress, disregarding the forty years of history that had transpired since its last update.<sup>644</sup> According to the Court, in order for the coverage formula to pass constitutional muster, Congress needed to craft it so that it identified the states that currently engage in behavior that warrants such a “drastic departure from basic principles of federalism . . . [and] the principle that all States enjoy equal sovereignty.”<sup>645</sup>

*Shelby County* rendered inoperable the section 5 preclearance requirement — “the crown jewel of the VRA”<sup>646</sup> — by striking down the triggering formula contained in section 4(b). Moreover, it struck down the triggering formula on account of the formula being tied to the racism of yesteryear.<sup>647</sup> However, the racism of yesteryear is the only racism that the Court recognizes as racism. That is, the Court is willing to see racism only when it confronts the techniques by which the nation’s formal racial caste system was erected and protected (for example, genocides, blatantly bigoted prosecutors, nonunanimous jury rules, Japanese internment, literacy tests, and grandfather clauses). *Shelby County* held that the triggering formula was unconstitutional because *that* racism is not happening as frequently as it once did in the same states and counties in which it once occurred.<sup>648</sup> *That* racism had been eliminated from

<sup>643</sup> Morris & Grange, *supra* note 641 (graphing the white-nonwhite turnout gap from 2012 to 2020 in midterm elections for the eight states the John Lewis Voting Rights Advancement Act (VRAA), S. 4263, 116th Cong. § 5 (2020), H.R. 4, 116th Cong. § 4 (2019), as introduced in 2019, would likely cover and showing that the gap has never vanished).

<sup>644</sup> See *Shelby County*, 570 U.S. at 531, 549, 552–53 (noting that the coverage formula had been reauthorized in 2006 “as if nothing had changed,” *id.* at 549). The majority ignored that the Congress that reauthorized the VRA in 2006 *did* consider whether the coverage formula adequately captured the jurisdictions that were likely to engage in regressive voter disenfranchisement. See LAKIN ET AL., *supra* note 624, at 17 (“In 2006 . . . Congress undertook an exhaustive two-year investigation to examine and document evidence of ongoing discrimination in the covered jurisdictions[,] . . . buil[ding] an extensive record of continuing discrimination in the covered jurisdictions since the 1982 reauthorization, largely consisting of evidence of vote dilution but also practices that denied or burdened the ability of minority voters to cast a ballot.”). *But see* Klarman, *supra* note 10, at 182 (“By 2013, Republican suppression of the votes of Democratic-leaning constituencies, such as people of color, was no longer limited to the South. . . . In that sense, the geographic coverage formula was indeed obsolete, and a sensible one written in 2013 would have looked different from the one in the 1965 Act . . .”). Moreover, the possibility that jurisdictions could be bailed in or out from the preclearance requirement helped to ensure that there was little overinclusiveness or underinclusiveness with respect to the jurisdictions that were subject to the preclearance requirement. See LAKIN ET AL., *supra* note 624, at 13 (explaining the bail-in and bail-out provisions of the VRA).

<sup>645</sup> *Shelby County*, 570 U.S. at 535. As some observers have noted, the Court seems more disturbed by the fact that the preclearance requirement means that some states will face hurdles to enacting laws that their sister states do not face than it is by the fact that some states might pass laws that disenfranchise individuals and make the country’s democracy undeserving of that label. See Buchanan & Goff, *supra* note 624, at 343 (“The equality interest of states in not being suspected of racism trumped the rights of Latinx and African-American citizens to be free from racial barriers to the vote.”).

<sup>646</sup> Stephanopoulos, *supra* note 622, at 170.

<sup>647</sup> *Shelby County*, 570 U.S. at 531.

<sup>648</sup> See *id.* at 559 (Thomas, J., concurring).

the electoral landscape.<sup>649</sup> In the absence of racist anachronisms, the Court declared victory over racism entirely and forced into dormancy the provision of the VRA that had brought the country to this point.<sup>650</sup>

To put a slightly different spin on it, the section 5 preclearance requirement presumes that a Jim Crow-type racism will persist in a covered jurisdiction unless proven otherwise. *Shelby County* revealed that this presumption is painfully uncomfortable to the Court, as the Court is convinced that Jim Crow-type racism is mostly a thing of the past.<sup>651</sup> And how does the Court know this? Well, it looked around and did not see any Jim Crow-type racism at the time of the decision.<sup>652</sup>

Of course, the consequence of the Court's decision in *Shelby County* has been an explosion of voting laws that, to scores of reasonable observers, look like Jim Crow-type racism.<sup>653</sup> To these eminently reasonable people, voter identification requirements look a lot like literacy tests. The closure of polling places looks a lot like poll taxes. Restrictions on early and absentee voting look a lot like certificates of good moral character. Voter roll purges look a lot like white primaries. The Roberts Court, of course, would deny the likeness — a denial that demonstrates that the discovery of a resemblance by the Court is a value-laden matter of interpretation, after all.

Further, it seems clear that political commitments inform the level of specificity at which the Roberts Court searches for likeness between the racial injuries for which contemporary nonwhite claimants seek relief and the racial injuries that nonwhite people endured during the pre-Civil Rights Era. With regard to voting, the Court looks for similarity at a granular level. It appears to be willing to find racism — narrowly

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<sup>649</sup> See *id.* at 535 (majority opinion).

<sup>650</sup> To be clear, the Court said nothing in *Shelby County* about the constitutionality of section 5, holding only that section 4(b)'s coverage formula was unconstitutional. See LAKIN ET AL., *supra* note 624, at 23 (noting that the majority opinion did not bear on the constitutionality of section 5, limiting its analysis and holding to section 4(b) alone).

<sup>651</sup> *Shelby County*, 570 U.S. at 552.

<sup>652</sup> *Id.* at 559 (Thomas, J., concurring) (“[C]ircumstances in the covered jurisdictions can no longer be characterized as ‘exceptional’ or ‘unique.’ ‘The extensive pattern of discrimination . . . no longer exists.’” (citations omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 226 (2009))).

<sup>653</sup> While Justice Ginsburg's dissenting opinion defended the constitutionality of section 4(b) by arguing that preclearance is necessary to prevent covered jurisdictions from creating and engaging in newer techniques of voter disenfranchisement, it proposed that racist ideas prevalent during the pre-Civil Rights Era motivate the current desire to disenfranchise voters of color. *Id.* at 584 (Ginsburg, J., dissenting). Justice Ginsburg cited an FBI investigation that recorded “conversations between members of the state legislature and their political allies” in which “[m]embers of the State Senate derisively refer to African-Americans as ‘Aborigines,’” *id.*, and discuss their goal to defeat a referendum regarding gambling because of a belief that “if the referendum were placed on the ballot, “[e]very black, every illiterate” would be “bused [to the polls] on HUD financed buses,” *id.* (alterations in original). When Justice Ginsburg noted that “[t]hese conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010,” she proposed that the racist convictions that underlay the racial injuries of yesteryear also lie beneath the contemporary racial injuries that the majority did not recognize as such. *Id.*

defined as what white supremacists did in the pre-Civil Rights Era — only when a jurisdiction deploys actual literacy tests,<sup>654</sup> poll taxes,<sup>655</sup> good moral character requirements,<sup>656</sup> and white primaries.<sup>657</sup> The Court seems to be looking for the identical techniques that white supremacists deployed in the days of Jim Crow to disenfranchise black people. Of course, if the Court conducted its analysis at a slightly more general level, the similarity between the past and the present would be apparent. When we consider the generality of the Court’s analysis in the context of abortion, we can more clearly see the arbitrariness of requiring agonizingly specific similarity in the voting context. As argued above, the *Dobbs* majority claimed (albeit implicitly) that the higher rates of abortion among black people resembled a genocide.<sup>658</sup> However, a more granular search for similarity would reveal no resemblance whatsoever. Thus, we see that the Court flits back and forth in the level of specificity that it applies in assessments of whether a contemporary claim of racial discrimination bears a likeness to a pre-Civil Rights Era injury — using the level of specificity that allows the Court to arrive at the results that it wants.

Although many commentators on the political left responded to *Shelby County* by entreating Congress to update the coverage formula,<sup>659</sup> there is reason for skepticism that the Roberts Court, as currently constituted, would find that an updated formula passes constitutional muster. Now, in some respects, there are reasons for optimism. First, the Court in *Shelby County* did not explicitly retreat from prior precedents establishing that rational basis review is appropriate when the Court assesses the constitutionality of laws passed by Congress that are designed to “effectuate the constitutional prohibition of racial discrimination in voting.”<sup>660</sup> Second, there are indications in *Shelby County* that the majority did not believe that it was sending Congress on a fool’s errand when it directed lawmakers to craft a formula that identifies which states currently engage in behavior that warrants a pre-clearance requirement. For example, the Court quite clearly stated that

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<sup>654</sup> *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

<sup>655</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>656</sup> *United States v. Mississippi*, 380 U.S. 128, 133, 143 (1965).

<sup>657</sup> *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944).

<sup>658</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022).

<sup>659</sup> See, e.g., LAKIN ET AL., *supra* note 624, at 3.

<sup>660</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); see also LAKIN ET AL., *supra* note 624, at 25 (“*Shelby County* did not disturb established precedent that Fifteenth Amendment enforcement legislation must meet a rational basis standard of review. . . . [And the Court approvingly] cited *Katzenbach* to reach its conclusion that the 1965 coverage formula was rational in practice and theory, while the reauthorization of the 2006 coverage formula was irrational.”). Of course, the Court’s skepticism that the coverage formula adequately addresses current needs signals a retreat from the deference that the Court historically has shown in this area. See *id.* (making this observation).

“voting discrimination still exists; no one doubts that.”<sup>661</sup> An optimist might read that statement as the Court insisting that Congress develop a formula that accurately identifies those jurisdictions in which “voting discrimination still exists” — as opposed to simply reauthorizing a formula that identifies those jurisdictions that engaged in voting discrimination in the past.

However, there are also reasons for pessimism. First, the Court in *Shelby County* was clear that whatever formula Congress fashions has to identify states with “exceptional conditions” that would warrant the preclearance requirement.<sup>662</sup> In light of all that we know about the Court’s limited understanding of racism, it is rational to believe that the Court is looking for a formula that identifies states that are engaging in pre-Civil Rights Era racism — with similarity between now and then analyzed with great specificity. To the extent that states have adapted their techniques of racial disenfranchisement, the Court may not be prepared to say that any formula — however updated it may be — is well crafted enough to satisfy the requirements of the Constitution.

The second reason for pessimism is that the preclearance requirement’s so-called “drastic departure from basic principles of federalism . . . [and] the principle that all States enjoy equal sovereignty” disturbed the *Shelby County* majority.<sup>663</sup> An updated triggering formula would do nothing to bring the preclearance requirement in line with the Court’s understanding of how federalism should work;<sup>664</sup> it would do nothing to assure the Court that a departure from the principle of equal state sovereignty — if the principle is even relevant in this context<sup>665</sup> — is warranted when some states would behave in undemocratic ways if left to their own devices. This is because the Court does not think that racism in election law is a present-day problem.<sup>666</sup>

Thus, there are reasons to worry that five Justices on the Court are ready to accept the invitation that Justice Thomas offered in his separate concurrence in *Shelby County*, a concurrence no other Justice joined at the time.<sup>667</sup> There, he argued that because the antiquated techniques of racial disenfranchisement that marred the electoral landscape at the

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<sup>661</sup> *Shelby County v. Holder*, 570 U.S. 529, 536 (2013).

<sup>662</sup> *Id.* at 557.

<sup>663</sup> *Id.* at 535.

<sup>664</sup> See Klarman, *supra* note 10, at 183 (“Chief Justice Roberts . . . noted that Congress was free to enact a new geographic coverage formula, though he expressed doubt that preclearance, as an ‘extraordinary departure’ from federalism principles, could be justified on any formula.” (quoting *Shelby County*, 570 U.S. at 557)).

<sup>665</sup> See *id.* at 181 (noting that the Court’s invocation of the principle of equal sovereignty may have been in error, as the principle “previously had been limited to the idea that new states admitted to the Union must enjoy the same rights and privileges as existing states”).

<sup>666</sup> *Shelby County*, 570 U.S. at 535.

<sup>667</sup> *Id.* at 557 (Thomas, J., concurring).

time of the VRA's passage had been vanquished, the entire preclearance provision contained in section 5 was unconstitutional.<sup>668</sup>

We have lived for close to a decade without the preclearance system, and, in the Court's eyes, the sky has not fallen. The Court will likely take the fact that people of color have been able to cast votes in elections without the preclearance regime for almost ten years as incontrovertible proof that we no longer need the regime.<sup>669</sup> In essence, there are many ways to gut the VRA. In *Shelby County*, the Court gutted the VRA by nullifying section 4(b). In its current iteration as the most conservative Supreme Court since the *Lochner* era, the Court may now be prepared to gut the VRA by striking down section 5 altogether.<sup>670</sup>

In sum, the Roberts Court has defined what counts as racism exceedingly narrowly — as the techniques of racial disenfranchisement employed during the pre-Civil Rights Era. On its own definition, the current conservative campaign to disenfranchise voters of color and others who would likely vote for Democratic candidates should count as racism: it looks like what actors did during the days of Jim Crow. The Roberts Court, however, claims not to see the resemblance, and it likely would strike down a preclearance regime that precludes states from engaging in the campaign. Values and political commitments are lodged in the cogs and wheels of an inquiry that the Court pretends is perfectly objective. *Shelby County* reveals as much.<sup>671</sup>

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<sup>668</sup> *Id.* at 559 (“The extensive pattern of discrimination that led the Court to previously uphold §5 as enforcing the Fifteenth Amendment no longer exists.” Section 5 is, thus, unconstitutional.” (citation omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203–04 (2009) (Thomas, J., concurring in part, dissenting in part))).

<sup>669</sup> Thanks to Professor Bertrall Ross for pointing me in the direction of this argument.

<sup>670</sup> See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, THE ATLANTIC (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330> [<https://perma.cc/3KLF-5HME>] (writing that recent proposals to restore and expand the coverage formula and revive the “preclearance regime” are “likely dead on arrival” because such proposals pursue “a voting-rights project that the Court no longer believes in” and observing that, if any of the proposed updates to the coverage formula are enacted, “this Court is extremely likely to find it unconstitutional”).

<sup>671</sup> There is another way to read *Shelby County*. This alternative reading focuses not on the Court's belief that section 4(b) and section 5 had made people of color whole, but on the Court's belief that the preclearance regime was inflicting a racial injury on white people. In this reading, *Shelby County* is not about people of color at all. Rather, the case is about the Court's desire to remedy a perceived racial injury that white people had been enduring. The argument — which this footnote only attempts to sketch — might begin by noting that all of the plaintiffs whose challenges to the VRA have made it to the Court were overwhelmingly white political bodies. Around the time of *South Carolina v. Katzenbach*, 38 U.S. 301 (1966), South Carolina was 65.1% white. See U.S. BUREAU OF THE CENSUS, *South Carolina*, in U.S. CENSUS OF POPULATION: 1960, at 42-19 (1961). Around the time of *City of Rome v. United States*, 446 U.S. 156 (1980), the city was 77.6% white. See U.S. BUREAU OF THE CENSUS, *Georgia*, in U.S. CENSUS OF POPULATION: 1960, *supra*, at 12-78. Around the time of *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), the city in which the jurisdiction was located was approximately 80% white. See Mark Sherman, *High Court Rules Narrowly in Texas Voting Rights Case*, HOUS.

The next Part shows that the Roberts Court does not constrain white claimants of racial discrimination in the same way that it constrains nonwhite claimants. That is, the Court is willing to recognize racism against white people even when there is no apparent resemblance to what actors did in the pre-Civil Rights Era to protect the nation's formal racial caste system. This Part demonstrates that in the contexts of affirmative action and disparate impact discrimination, the Court finds and remedies an alleged racial injury when white claimants *feel like* they have been injured on account of their race. In providing relief to white claimants even when their racial injuries do not recall the racism that was practiced during the pre-Civil Rights Era, the Court allows white claimants the ability to innovate and improvise around racial discrimination — an allowance that the Court simply does not afford to nonwhite claimants.

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CHRON. (June 22, 2009), <https://www.chron.com/news/nation-world/article/High-court-rules-narrowly-in-Texas-voting-rights-1633330.php> [<https://perma.cc/7VLM-XSUS>]. Around the time of *Shelby County*, the county was approximately 85% white. See *Shelby County Profiles 2012*, SHELBY CNTY. ALA. (Oct. 19, 2016), <https://www.shelbyal.com/DocumentCenter/View/419/2012-Profile-Summary> [<https://perma.cc/YZ8C-X77Z>]. The argument would then observe that the overwhelmingly white jurisdictions that have challenged the pre-clearance requirement have claimed that the provision infringes states' rights. See, e.g., *Shelby County v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 570 U.S. 529 (2013). The argument would consider that claims of states' rights historically have been linked to white supremacy. Christopher W. Schmidt, *Litigating Against the Civil Rights Movement*, 86 U. COLO. L. REV. 1173, 1205, 1215 (2015). Finally, the argument would analogize to the racial gerrymandering cases, in which white claimants argued that they were harmed when the VRA forced their state legislatures to consider race in the drawing of majority-minority districts. *Shaw v. Reno*, 509 U.S. 630, 637–38 (1993). The argument would be that as white people thought that they were being harmed in the gerrymandering context, they thought that they were being harmed in the preclearance context. The claim would be that the political bodies that challenged the preclearance regimes — using a rationale, states' rights, that has always been allied with white supremacy — were simply representing their white constituents' interests. See Jon Greenbaum, Alan Martinson & Sonia Gill, *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 854 (2014).

If this argument can be supported, and if we read *Shelby County* as a case that is about the Court's desire to relieve white people of a racial injury that they believed they had been enduring, then we see the stark difference between this alleged injury and the racial injuries endured by nonwhite people that the Court is willing to recognize. The preclearance requirement and its holding in abeyance of changes to voting laws do not resemble Jim Crow-Era racism. The requirement does not recall techniques that white supremacists once used to protect the nation's racial hierarchy. It is not reminiscent of the racism of yesteryear. As such, there is a consistency between *Shelby County* and the Court's approach to white racial injuries in the affirmative action and disparate impact contexts, discussed *infra* Part IV, pp. 133–67. In all three domains, the injuries that the Court recognizes as injuries do not bring to mind the techniques of racial disenfranchisement deployed in the pre-Civil Rights Era. White claimants' racial injuries can be “new” — having no obvious historical antecedent.

#### IV. PROTECTING WHITE CLAIMANTS FROM MODERN RACIAL INJURIES

##### A. *Affirmative Action in College Admissions*

The Court's affirmative action jurisprudence has evidenced a solicitude toward white people's experiences of facially race-conscious programs that seek to increase the enrollment of students from historically disadvantaged racial groups in colleges and universities. The Court has been concerned with whether white people — particularly the white people who, as a consequence of an explicitly race-conscious program, may not gain admission to their preferred college or university — believe these programs to be desirable, necessary, or fair.<sup>672</sup> Indeed, the Court has interpreted the Equal Protection Clause and other anti-discrimination provisions in light of white people's perceptions of the legitimacy of affirmative action — using their experiences with facially race-based admissions programs to distill what the Constitution and federal law demand and permit.<sup>673</sup>

We might draw an analogy to the Court's voting rights cases — specifically *Brnovich v. Democratic National Committee*,<sup>674</sup> in which the Court severely limited the reach of section 2 of the VRA.<sup>675</sup> In that case, the majority generated out of whole cloth a list of factors that courts should consider when determining whether a voting restriction makes the political process not “equally open” to minority persons and, in so doing, runs afoul of the law.<sup>676</sup> One of the factors is the state's interest in preventing fraud.<sup>677</sup> This state interest, according to the Court, is “strong,” as “[f]raud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.”<sup>678</sup>

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<sup>672</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) (arguing that the University of California (UC) Davis's facially race-conscious admissions program would “be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities”).

<sup>673</sup> See Siegel, *supra* note 16, at 31, 47–50 (arguing that “[e]qual protection law governing affirmative action makes the citizens' experience of the state central in the doctrine's structure and justifications,” *id.* at 31, and contrasting the Court's equal protection jurisprudence with its criminal procedure jurisprudence, the latter of which is unconcerned with how citizens of color experience policing and the carceral state).

<sup>674</sup> 141 S. Ct. 2321 (2021).

<sup>675</sup> *Id.* at 2364 (Kagan, J., dissenting). For a more in-depth exploration of *Brnovich*, see *infra* pp. 164–66.

<sup>676</sup> *Brnovich*, 141 S. Ct. at 2338 (majority opinion).

<sup>677</sup> *Id.* at 2340.

<sup>678</sup> *Id.* The language that the Court used in *Brnovich*, describing how important it is for (implicitly white) people to have confidence in election results, is similar to the language conservative Justices have used when describing how important it is for (implicitly white) people to believe that admissions and hiring processes are fair (to them). See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting) (“Preferment by race, when resorted to by the State, can be the most

We might read this factor as another example of the Court’s centering white people’s feelings when interpreting law. As discussed above, voter fraud occurs infrequently in the United States.<sup>679</sup> It certainly does not occur on the scale that the Republican Party has proposed<sup>680</sup> and an astonishingly large proportion of self-identified Republicans believe.<sup>681</sup> In identifying the state’s interest in preventing the largely manufactured phenomenon of voter fraud as a factor that determines the scope of the protections that section 2 offers — and in suggesting that states should be concerned with how (implicitly white) voters perceive the legitimacy of an election outcome — the *Brnovich* majority centered the experiences of white people, casting aside the experiences of people of color and members of other vulnerable groups who face barriers to voting that section 2 now is less capable of addressing.

As in *Brnovich*, the Court has interpreted the law’s demands vis-à-vis explicitly race-conscious admissions programs in light of white people’s perceptions and experiences of these programs. The Court has

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divisive of all policies, *containing within it the potential to destroy confidence in the Constitution and in the idea of equality.*” (emphasis added).

Sometimes, on a despairingly limited basis, the Court is willing to craft rules to buttress people of color’s confidence in the criminal legal system. For example, the Court has held that the Sixth Amendment demands an exception to the no-impeachment rule when a juror has made an egregious expression of racism. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868–69 (2017) (arguing that “[p]ermitting racial prejudice in the jury system damages ‘both the fact and the *perception*’ of the jury’s role as ‘a vital check against the wrongful exercise of power by the State,’” *id.* at 868 (emphasis added) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)), and stating that a “constitutional rule that racial bias in the justice system must be addressed — including, in some instances, after the verdict has been entered — is necessary to prevent a systemic *loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right,*” *id.* at 869 (emphasis added)); *see also* Frampton, *supra* note 398, at 1647 (“[T]he Court [in *Peña-Rodriguez*] appears to have recognized that the Sixth Amendment’s guarantees give rise to a compelling interest in countering the perception of a jury system tainted by racial bias.”).

<sup>679</sup> *See supra* notes 609–10 and accompanying text.

<sup>680</sup> *See, e.g., Arizona GOP Declares “Widespread Fraud” Contradicting New AG Report Finding No Mass Voter Fraud*, MSNBC (Apr. 9, 2022), <https://www.msnbc.com/american-voices/watch/arizona-gop-declares-widespread-fraud-contradicting-new-ag-report-finding-no-mass-voter-fraud-137398341740> [<https://perma.cc/8WGY-VBSS>]; Amy Gardner & Isaac Arsndorf, *More than 100 GOP Primary Winners Back Trump’s False Fraud Claims*, WASH. POST (Jun. 14, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/06/14/more-than-100-gop-primary-winners-back-trumps-false-fraud-claims> [<https://perma.cc/3FUA-S4WU>].

<sup>681</sup> *See 60% View Joe Biden’s 2020 Presidential Victory as Legitimate, Quinnipiac University National Poll Finds; 77% of Republicans Believe There Was Widespread Voter Fraud*, QUINNIPIAC UNIV. POLL (Dec. 10, 2020), <https://poll.qu.edu/Poll-Release?releaseid=3734> [<https://perma.cc/PEQ3-6N2Y>]; Kabir Khanna & Jennifer De Pinto, *What Drives Republican and Trump Voters’ Belief in Widespread Voter Fraud?*, CBS NEWS (July 21, 2021, 5:00 PM), <https://www.cbsnews.com/news/replicans-belief-voter-fraud-opinion-poll> [<https://perma.cc/2MZE-QQZF>] (discussing a survey that found that 69% of Republicans believed there was widespread voter fraud in the 2020 presidential election); *see also* Domenico Montanaro, *Most Americans Trust Elections Are Fair, But Sharp Divides Exist, A New Poll Finds*, NPR (Nov. 1, 2021, 5:01 AM), <https://www.npr.org/2021/11/01/1050291610/most-americans-trust-elections-are-fair-but-sharp-divides-exist-a-new-poll-finds> [<https://perma.cc/7X2Y-U3WV>] (finding that only 33% of Republicans will trust the 2024 federal election, regardless of who wins, due in part to “real cases of fraud”).



recognized as a racial injury white people's indignation, anger, resentment, and disappointment when denied a seat in an incoming class. Because *Grutter v. Bollinger*<sup>682</sup> currently is good law and race-based affirmative action admissions programs, if defended under the rhetoric of diversity, are constitutionally permissible, it is inaccurate to claim that the Court has been disposed to provide a wholesale remedy for this racial injury just yet. However, the Court's conclusion that affirmative action programs must be reviewed with strict scrutiny reveals the intense sympathy that it has for white people who feel aggrieved by such programs. Further, we might understand the imposition of significant limitations on affirmative action programs as the Court having remedied some portion of the racial injury that white claimants have alleged.<sup>683</sup>

The Court's decision to hear *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College*<sup>684</sup> and *SFFA v. University of North Carolina*<sup>685</sup> next Term represents an opportunity for the Court to overturn the precedent that has granted narrow permission to institutions to implement facially race-conscious admission programs. We should understand a decision overturning this precedent as not only the Roberts Court's installation of the view that the Constitution demands colorblindness of the nation's institutions, but also the Roberts Court's expanded readiness to provide redress for the racial injuries that aggrieved white people have claimed to experience.

Importantly, the racial injuries that white plaintiffs have insisted that they have endured — and the racial injuries that the exceedingly conservative Roberts Court has set itself up to remedy in next Term's affirmative action cases — are different in kind from the racial injuries alleged by nonwhite people that the Court is willing to remedy. The Court imposes different standards on white and nonwhite claimants. As the previous discussion demonstrated, the Court will provide relief for nonwhite people's racial injuries only when they resemble pre-Civil Rights Era racism. However, in the context of affirmative action, the conservative wing of the Court has always demonstrated a willingness to remedy white claimants' alleged injuries even when these injuries have no parallels to the injuries sustained during the days of formal white supremacy.<sup>686</sup> As the Roberts Court stands on the cusp of interpreting the Equal Protection Clause and federal antidiscrimination law to provide a comprehensive remedy for these "new" harms, the Court should be read as allowing white claimants a unique freedom to innovate in their articulation of redressable racial injuries. As the preceding

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<sup>682</sup> 539 U.S. 306 (2003).

<sup>683</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (holding that affirmative action programs that award a set number of points to applicants from underrepresented minority groups run afoul of the Equal Protection Clause).

<sup>684</sup> 142 S. Ct. 895 (2022).

<sup>685</sup> 142 S. Ct. 896 (2022).

<sup>686</sup> See, e.g., *Gratz*, 539 U.S. at 270.

discussion illustrates, this is a freedom that nonwhite claimants simply have not been permitted.

Now, the Roberts Court and its defenders would likely assert that there is no disparity between the demands that it imposes on nonwhite and white claimants. They would likely insist that the racial injuries that white claimants allege and for which the Court is willing to provide relief must also resemble the racism that occurred during the pre-Civil Rights Era. Indeed, next Term, a conservative majority may argue that affirmative action programs keep white and Asian American students out of competitive colleges and universities in a way that is perfectly identical to white schools' refusal to admit black students during the days of Jim Crow. That is, the Court may contend that contemporary affirmative action programs use race to favor some and disfavor others in a way that resembles in all relevant respects segregationists' use of race in the period of formal white supremacy. However, the Roberts Court's approach to disparate impact discrimination brings into greater relief what exactly it is doing with its affirmative action doctrine. The Court's cases involving disparate impact discrimination make clear that the Court does not require white claimants to allege an injury that resembles racial disenfranchisement of yesteryear. In the disparate impact context — as in the context of affirmative action — the Court demonstrates a special sensitivity to white people's feelings. To be clear, the Court finds racism when white people *feel like* they have been victims of racism — an allowance that it has never afforded to nonwhite claimants.

1. *Past Caselaw.* — The feelings of disappointed white applicants have figured prominently in the Court's affirmative action jurisprudence.<sup>687</sup> They are front and center in Justice Powell's lone opinion

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<sup>687</sup> Similarly, white people's feelings figure prominently in the manufactured culture war over what the Republican Party and other conservative pundits have called "Critical Race Theory." See generally Khiara M. Bridges, *Language on the Move: "Cancel Culture," "Critical Race Theory," and the Digital Public Sphere*, 131 YALE L.J.F. 767, 786–90 (2021) (describing "Critical Race Theory" as a forty-year-old advanced legal theory that explores the relationship between law and racial inequality and discussing conservative actors' recent co-optation of the term). In that debate, conservatives have argued that when white students are exposed to "critical race theory" in K-12 schools, they feel bad about themselves. See Ashton Pittman, *Gov. Reeves Claims Critical Race Theory "Humiliates" White People at Bill Signing*, MISS. FREE PRESS (Mar. 14, 2022), <https://www.mississippifreepress.org/21960/gov-reeves-claims-critical-race-theory-humiliates-white-people-at-bill-signing> [<https://perma.cc/YF6W-8D8L>]. Because of the supposed discomfort and guilt that "critical race theory" causes white students to feel, conservatives have argued that it runs afoul of existing antidiscrimination laws. See, e.g., 58 Mont. Op. Att'y Gen. 1, at 1 (May 27, 2021). At the very least, they argue, schools should be prohibited from exposing students to it.

For example, Austin Knudsen, the Montana Attorney General, issued a binding opinion holding that the teaching of "critical race theory" discriminates on the basis of race, color, or national origin in violation of a smattering of antidiscrimination laws, including the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. *Id.* Knudsen argued that "a school that permits, promotes, or endorses curricula or pedagogical methods that tell an individual that he or she should

in *Regents of the University of California v. Bakke*<sup>688</sup> — an opinion that forms the backbone of the affirmative action jurisprudence that would come subsequently. Justice Powell supported his argument that the Court should review even “benign” uses of race with strict scrutiny by noting how white people would feel when explicitly race-conscious laws designed to dismantle the nation’s racial hierarchy disadvantage them.<sup>689</sup> He argued that the “individuals burdened” — that is, white people — will view these efforts with “deep resentment.”<sup>690</sup> Such programs may “outrage” them.<sup>691</sup> Consequently, the government’s actions “may be perceived as invidious” by these aggrieved parties.<sup>692</sup> And that is the kicker. Because white people will “perceive” these benign uses of race as “invidious,” Justice Powell argued that the Court, as a matter of constitutional interpretation, ought to *treat* them as invidious — presuming their unconstitutionality and reviewing them with strict scrutiny. In this way, Justice Powell argued that the Court should give white people’s perceptions the force of law.<sup>693</sup> Twenty-five years later in *Grutter*, a majority of the Court adopted Justice Powell’s analysis as the law of the land, holding in the process that the pursuit of the educational benefits that flow from a diverse student body was a compelling governmental interest that could sustain a facially race-conscious law under strict scrutiny review.<sup>694</sup>

The diversity rationale attempts to assuage white people’s feelings of outrage and resentment. As an effort at conciliation, it proposes that perhaps we ought not focus too intently on the white people who have been denied admission to a college or university. Instead, we ought to focus on the white people who have gained admission. The diversity

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feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, almost certainly creates a racially hostile environment,” and, in so doing, violates federal and state antidiscrimination laws. *Id.* at 21. This opinion demonstrates Knudsen’s concern about classroom instruction that makes white students feel bad about their race, revealing parallels to the affirmative action and disparate impact discrimination contexts, wherein conservative actors have also centered white people’s feelings and have contended that those feelings ought to govern our understanding of the requirements of antidiscrimination laws.

<sup>688</sup> 438 U.S. 265 (1978).

<sup>689</sup> *See id.* at 294 n.34 (opinion of Powell, J.).

<sup>690</sup> *Id.*

<sup>691</sup> *Id.*

<sup>692</sup> *Id.*

<sup>693</sup> *See* Buchanan & Goff, *supra* note 624, at 364 (“[G]overnmental efforts to redress racial inequality can be invalidated based on white perceptions of racial victimization, whether real or hypothesized.”).

<sup>694</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). In the intervening years, the Court’s decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), gave conservative Justices opportunities to document their concern about white people’s feelings. *See, e.g., Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment) (arguing that facially race-conscious programs “provoke resentment among those who believe that they have been wronged by the government’s use of race”).

rationale proposes that these white people are properly conceptualized as the beneficiaries of affirmative action programs, as their learning environments are “livelier, more spirited, and simply more enlightening and interesting” than they would be without the presence of nonwhite students admitted pursuant to a race-based affirmative action program.<sup>695</sup> In essence, the diversity rationale attempts to comfort white people who lose out on coveted spots in an incoming class by assuring them that other white people — the ones who secured a seat — are winners.<sup>696</sup> This has been cold comfort to many aggrieved white people, a fact that might explain the diversity rationale’s likely defeat next Term in the Court’s decision in *Harvard*.

It is true that conservative Justices who are hostile to affirmative action have identified harms beyond the disappointed expectations of white applicants to justify the claim that facially race-conscious programs run afoul of the Equal Protection Clause and other anti-discrimination laws. For example, Justice Thomas has evinced a concern with the stigma that affirmative action programs may inflict on people of color in institutions that implement explicitly race-conscious programs<sup>697</sup> as well as the way such programs may disincentivize people of color from trying harder to achieve scholastically.<sup>698</sup> Justices have also argued that affirmative action programs are unconstitutional because they produce a strain on race relations — which is bad for everyone.<sup>699</sup> However, it is not unreasonable to believe that just below the veneer of an expressly articulated concern about the negative effects that affirmative action programs might have on society in general lies the real concern: white people do not like these programs because sometimes the programs operate to their detriment. As Professor Reva Siegel has

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<sup>695</sup> *Grutter*, 539 U.S. at 330.

<sup>696</sup> Additionally, the diversity rationale attempts to stave off feelings of aggrievement in white people by assuring them that they, too, might bring some diversity to an incoming class and, in so doing, benefit from a school’s affirmative action program. The requirement of individualized consideration of all students and a definition of diversity that sweeps beyond racial diversity make this possible. See *id.* at 334 (noting that permissible race-based affirmative action programs must allow for “individualized consideration of each and every applicant”); *id.* at 341 (stating that the affirmative action program at issue satisfies strict scrutiny because it “considers ‘all pertinent elements of diversity’” and it “select[s] nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants” (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.))).

<sup>697</sup> *Id.* at 373 (Thomas, J., concurring in part and dissenting in part) (arguing that because the University of Michigan Law School has a facially race-conscious admission program, and most black people admitted to the school benefit from this program, all black people at the school “are tarred as undeserving”).

<sup>698</sup> *Id.* at 377 (noting that in the years leading up to the litigation, black applicants to the University of Michigan Law School were “nearly guaranteed admission if they score above 155” on the LSAT and arguing that “[a]s admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score”).

<sup>699</sup> See Siegel, *supra* note 16, at 43 n.211 (stating that Justices have “justifi[ed] constitutional restrictions on affirmative action in terms of universal interests and common benefits”).

argued: “After years of criticism, the Justices have come to the view that the affirmative action decisions have more legitimacy (or persuasive authority) if the Justices emphasize the benefits that applying strict scrutiny provides to all, rather than the special protections it provides to some.”<sup>700</sup> Siegel notes how this change in perspective shifted the Court’s rhetoric: “Open discussion of the interests of whites and innocent third parties, so common in the earlier affirmative action cases[,] . . . has been abstracted and transmuted into discussion of individual dignity interests and common goods in avoiding balkanization.”<sup>701</sup> Although Justices who are hostile to affirmative action might use “universalizing language,”<sup>702</sup> the focus of their concern is very specific: white people whom facially race-conscious programs have harmed.

In sum, dismayed white people have claimed that affirmative action programs inflict a racial injury upon them, and the Court stands on the cusp of interpreting the Constitution and federal antidiscrimination law to provide a comprehensive remedy for this injury.<sup>703</sup> Now, while the Court only provides relief to people of color when their racial injuries recall the pre-Civil Rights days, reasonable people might believe that the racial injuries that white claimants allege in the affirmative action context are not at all reminiscent of this era: they seem “new,” a modern innovation. They seem like a product of the attempt to drag the nation from its pre-Civil Rights past to a fair and just future.

However, opponents of affirmative action would disagree. They would assert that there are undeniable parallels between using race to keep nonwhite students out of white schools in the days of Jim Crow and using race to keep white applicants out of colleges and universities today.<sup>704</sup> But if we closely interrogate the Court’s reasoning in the affirmative action cases — especially when we read them in light of the Court’s cases involving disparate impact discrimination — we see that the Court is deeply concerned with white people’s feelings of aggrievement. In this way, the Court is not involved in the project of providing relief only when it is reminded of the racism of yesteryear. Rather, it is providing relief when white people feel like they have been victims of racism — thereby releasing white claimants from the task of demonstrating similarity between their alleged injuries and the injuries sustained during the days of formal white supremacy. When one considers this pattern in light of the Court’s willingness to remedy black claim-

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<sup>700</sup> *Id.*

<sup>701</sup> *Id.* at 43.

<sup>702</sup> *Id.*

<sup>703</sup> See *infra* section IV.A.2, pp. 140–53 (discussing *SFFA v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022)).

<sup>704</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (opining that there is a “moral [and] constitutional equivalence” between Jim Crow laws and affirmative action programs (quoting *id.* at 243 (Stevens, J., dissenting))).

ants' racial injuries only when they recall the pre-Civil Rights Era — and when one considers that the Court has never deemed nonwhite people's feelings to be determinative of the question of whether they have experienced a constitutionally relevant injury — one sees the shockingly unequal direction in which the Roberts Court is taking its equal protection jurisprudence.

2. *SFFA v. President & Fellows of Harvard College*. — In *Fisher v. University of Texas at Austin*,<sup>705</sup> the Court considered the constitutionality of the University of Texas's race-based affirmative action program, in which race was a “factor of a factor of a factor” in the entire admissions scheme.<sup>706</sup> The Court upheld the program after concluding that it was a narrowly tailored pursuit of a compelling governmental interest in the educational benefits that flow from racial diversity within a student body.<sup>707</sup>

<sup>705</sup> 136 S. Ct. 2198 (2016).

<sup>706</sup> *Id.* at 2207 (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)). At the time of the *Fisher* litigation, more than three-fourths of the incoming class at the University of Texas was admitted through the “Top Ten Percent Plan,” *id.* at 2209, which Texas implemented after the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), held that Justice Powell's opinion in *Bakke* was nonbinding and explicit race consciousness in university admissions violated the Equal Protection Clause, *id.* at 944. The “Top Ten Percent Plan” sought to achieve racial heterogeneity in incoming classes by permitting students graduating in the top ten percent of their high school classes to enroll in the state's flagship universities. See David Hinojosa, *Since When Are Good Grades and Diversity a Bad Thing? — 7 Recommendations and the Texas Top Ten Percent Plan*, INTERCULTURAL DEV. RSCH. ASS'N (Feb. 2017), <https://www.idra.org/resource-center/since-good-grades-diversity-bad-thing-7-recommendations-texas-top-ten-percent-plan> [<https://perma.cc/9TGJ-CBSF>]; see also Amicus Brief of IDRA in Support of Respondents at 2–3, *Fisher II* (No. 14-981) (“While the State of Texas' Top Ten Percent law (TTP) recognizes the value of a student having completed a rigorous high school core curriculum and ranking in the top ten percent of his or her graduating class in grade point average, and it has helped increase the number of African-American and Latino students into the University of Texas at Austin (UT), the law was never intended to be the sole vehicle for expanding opportunities for Latino and African-American students and measuring their talents.”). Because of racial segregation in high schools, the plan ensured that some number of black and Latinx students would be able to attend the state's flagship universities, as the plan would ensure that students graduating in the top ten percent of their classes from predominately black or Latinx high schools would be admitted to these colleges. See Hinojosa, *supra*. The other roughly twenty-five percent of the University of Texas's incoming class was admitted based on the combination of a score reflecting the strength of an applicant's academic record and a score reflecting the “Personal Achievement Index,” or PAI. See *Fisher II*, 136 S. Ct. at 2205. One component of the PAI is the “Personal Achievement Score,” or PAS, which consists, in part, of an evaluation of “the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other ‘special circumstances.’” *Id.* at 2206. “Special circumstances” include many aspects of the applicant's life, including “the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race.” *Id.* As the majority opinion explained, “[r]ace enters the admissions process, then, at one stage and one stage only — the calculation of the PAS.” *Id.* at 2207.

<sup>707</sup> *Fisher II*, 136 S. Ct. at 2211, 2214. In *Fisher v. University of Texas at Austin (Fisher I)*, 570 U.S. 297 (2013), the Court remanded the case to the lower court after finding that the district court

With respect to the present discussion, the most notable aspect of *Fisher II* is Justice Alito’s originalism-free dissent, in which applicants of Asian descent make a recurring appearance, deployed solely to impugn the constitutionality and legitimacy of the University of Texas’s affirmative action program. Justice Alito used Asian American students, whom he described as victims of “discrimination,”<sup>708</sup> as proof that the school was being disingenuous when it said that it cared about admitting a certain number of Latinx and black students to ensure that they did not feel alienated or isolated in classes; he pointed out that there were even fewer students of Asian descent in most classrooms.<sup>709</sup> Justice Alito used Asian American students to deny that the University of Texas even cared about the purported benefits of student body diversity: the destruction of stereotypes and the creation of “cross-racial understanding” made possible by interpersonal collisions of people of different racial identities.<sup>710</sup> Justice Alito implied that if the school really believed that student body diversity produced these benefits, then it would have ensured that higher numbers of students of Asian descent were present in individual classrooms and in the institution at large.<sup>711</sup> Indeed, Justice Alito used students of Asian descent to charge the University of Texas with unsophistication in its conception of race; he pointed out that “students labeled ‘Asian American[.]’ seemingly include ‘individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population.’”<sup>712</sup> Justice Alito, correctly, argued that “[i]t would be ludicrous to suggest that all of these students have similar backgrounds and similar

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and court of appeals had improperly deferred to the University of Texas’s judgment that its affirmative action program was narrowly tailored to accomplish the goal of student body racial diversity. *Id.* at 314–15.

<sup>708</sup> *Fisher II*, 136 S. Ct. at 2228 (Alito, J., dissenting) (“[T]he Court’s willingness to allow this ‘discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education.’” (quoting Brief for the Asian American Legal Foundation & the Judicial Education Project as Amici Curiae in Support of Petitioner at 16–17, *Fisher II* (No. 11-345))).

<sup>709</sup> *See id.* at 2219–20 (“Even though UT’s classroom study showed that more classes lacked Asian-American students than lacked Hispanic students, UT deemed Asian-Americans ‘overrepresented’ based on state demographics.” (citation omitted)); *id.* at 2227 (“UT is apparently unconcerned that Asian-Americans ‘may be made to feel isolated or may be seen as . . . “spokesperson[s]” of their race or ethnicity.’” (omission and alteration in original)).

<sup>710</sup> *See id.* at 2227 (“In UT’s view, apparently, ‘Asian Americans are not worth as much as Hispanics in promoting “cross-racial understanding,” breaking down “racial stereotypes,” and enabling students to “better understand persons of different races.””).

<sup>711</sup> *See id.* (“[I]f UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT’s own study . . . demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic.”).

<sup>712</sup> *Id.* at 2229 (citation omitted) (quoting Brief for the Asian American Legal Foundation & the Judicial Education Project as Amici Curiae in Support of Petitioner, *supra* note 708, at 28).

ideas and experiences to share.”<sup>713</sup> But instead of using that insight to encourage, or oblige, the University of Texas to ensure that there was heterogeneity among the students of Asian descent that it admitted, Justice Alito used it as an argument against facial race consciousness in admissions as a general matter. Indeed, in his dissent, people of Asian descent were tools utilized to foil affirmative action.

The Court will decide *Harvard* during the October Term 2022.<sup>714</sup> The case is a challenge to race-based affirmative action brought by a nonprofit membership group that represents over 20,000 students opposed to facially race-conscious admissions programs.<sup>715</sup> (While SFFA purports to represent the interests of all people of Asian descent, most Asian Americans who have vocalized opposition to affirmative action are Chinese American.<sup>716</sup>) SFFA has argued that Harvard’s explicitly race-conscious admissions scheme violates Title VI of the Civil Rights Act of 1964.<sup>717</sup> In bringing this challenge, the plaintiff has accepted the invitation that Justice Alito offered in his dissent in *Fisher II*,<sup>718</sup> and it has framed affirmative action as inflicting a racial injury not solely on white applicants, but on Asian American applicants as well.

Although this section argues that the plaintiff in the *Harvard* litigation is misguided and the requested relief is dangerous, it nevertheless recognizes that people of Asian descent are a vulnerable minority who

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<sup>713</sup> *Id.* Professor Russell Robinson has observed that Justice Kennedy made a similar argument in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary*, 572 U.S. 291, 308 (2014), proposing that the difficulties involved in constructing racial categories counseled against adopting a rule that involved race. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 220–21 (2016). Robinson’s observation in his analysis of *Schuette* — that “conservative Supreme Court Justices are borrowing the left’s critiques of race . . . and incorporating them into conservative case law,” *id.* at 221 — seems equally applicable to Justice Alito’s commentary in *Fisher II* about the heterogeneity contained within the Asian racial category.

<sup>714</sup> SFFA v. President & Fellows of Harvard Coll., 142 S. Ct. 895, 895 (2022).

<sup>715</sup> See STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org> [<https://perma.cc/P82T-KYC9>].

<sup>716</sup> See Esther Wang, *Michael Wang Didn’t Get Into Harvard. He Thinks It’s Because He’s Asian.*, BUZZFEED NEWS (Oct. 13, 2018, 9:51 AM), <https://www.buzzfeednews.com/article/esther-wang/chinese-americans-harvard-affirmative-action-asian-americans> [<https://perma.cc/PM3R-3ZK7>].

<sup>717</sup> 42 U.S.C. §§ 2000d to 2000d-7; see SFFA v. President & Fellows of Harvard Coll., 980 F.3d 157, 163 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022). The Court has held that Title VI prohibits racial classifications that would be unconstitutional under the Equal Protection Clause. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.). SFFA has made similar arguments against the University of North Carolina’s race-based affirmative action program. See *Background — Admissions Case*, UNIV. OF N.C. AT CHAPEL HILL, <https://admissionslawsuit.unc.edu/lawsuit/background> [<https://perma.cc/YR3C-TZK8>] (detailing the litigation).

<sup>718</sup> See *Fisher II*, 136 S. Ct. at 2216 (Alito, J., dissenting).



have survived centuries of racial discrimination in this country.<sup>719</sup> Moreover, there is much heterogeneity among “Asians” as a racial group, and some subcategories of Asian Americans are intensely marginalized.<sup>720</sup> Colleges and universities should develop insightfully crafted, facially race-conscious admissions programs that recognize the particular marginalization of these subgroups of Asian Americans and facilitate their entrance into institutions of higher learning. Further, even the subcategories of Asian Americans who are doing well in terms of income and level of education are underrepresented in positions of power.<sup>721</sup> Further still, economic and educational privilege has not immunized individuals belonging to these subcategories from racism, nativism, and xenophobia.<sup>722</sup> Certainly, there is a precariousness in Asian Americans’ status.<sup>723</sup> This section recognizes this precariousness while also recognizing that it would be a racial injustice if the plaintiff in *Harvard* successfully dismantles race-based affirmative action in this country.

<sup>719</sup> See Jennifer Lee, *Asian Americans, Affirmative Action & the Rise in Anti-Asian Hate*, DAEDALUS, Spring 2021, at 180, 181–82 (“Less than a century ago, Asians were described as marginal members of the human race, full of filth and disease, and unassimilable. Confined to ethnic enclaves, barred from White schools, and denied U.S. citizenship, Asians were not extended the right to become naturalized citizens until . . . 1952.” (footnote omitted)).

<sup>720</sup> Compare KARTHICK RAMAKRISHNAN & FARAH Z. AHMAD, CTR. FOR AM. PROGRESS, STATE OF ASIAN AMERICANS AND PACIFIC ISLANDERS SERIES: A MULTIFACETED PORTRAIT OF A GROWING POPULATION 90 (2014), <https://americanprogress.org/wp-content/uploads/2014/09/AAPIReport-comp.pdf> [<https://perma.cc/X5LL-4B3S>] (explaining that the poverty rates for Hmong Americans and Bangladeshi Americans (who are racialized as Asian) are 27% and 21.1%, respectively), and Bic Ngo & Stacey J. Lee, *Complicating the Image of Model Minority Success: A Review of Southeast Asian American Education*, 77 REV. EDUC. RSCH. 415, 419 (2007) (explaining that fewer than half of Hmong Americans and Cambodian Americans have completed high school based on data from the 2000 U.S. Census), with PEW RSCH. CTR., THE RISE OF ASIAN AMERICANS 18 (2013) (explaining that 70% and 51% of Indian Americans (who are racialized as Asian) and Chinese Americans, respectively, have a college degree or higher, and that the median income of their households is approximately \$88,000 and \$65,000, respectively). See also Claire Jean Kim, *Are Asians the New Blacks?: Affirmative Action, Anti-Blackness, and the “Sociometry” of Race*, 15 DU BOIS REV. 217, 225 (2018) (“[T]he blanket presumption of group success exaggerates Asians’ socioeconomic status, disguises Asian poverty rates, and misses the fact that Asian success varies markedly by subgroup[.] (Southeast Asians who arrived in the U.S. as war refugees, for example, have statistical profiles that look very different from those of many East Asians and South Asians[.]”) (footnote omitted)); Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 717 (2019) (“[O]ther Asian subgroups, particularly those from southeast Asia with distinct stories of colonization and more recent histories of immigration, continue to face noteworthy levels of poverty and remain underrepresented across higher education.”).

<sup>721</sup> See Feingold, *supra* note 720, at 717 (“[C]ertain Asian ethnic groups, in the aggregate, have found relative success as measured by metrics such as household income and educational attainment. This success has not, however, translated to commensurate levels of representation in positions of privilege and prestige.” (footnote omitted)).

<sup>722</sup> See Lee, *supra* note 719, at 181 (“Trump’s racist and xenophobic ‘China virus’ rhetoric reanimated a century-old trope that Asians are vectors of filth and diseases, exposing . . . the precariousness of their status . . .”); *id.* at 195 (“In this defining political moment, [people of Asian descent] are learning that their perceived competence and moral worth are no shields from xenophobia and racism, and their elite degrees and respectability politics are no protection from anti-Asian hate.”).

<sup>723</sup> See *id.* at 194.

Professor Claire Jean Kim has conducted incisive analyses of the figuration of Asian Americans in the Court's affirmative action cases.<sup>724</sup> Although Asian Americans have only recently irrupted into the text of opinions — most prominently in Justice Alito's dissent in *Fisher II*<sup>725</sup> — Kim observes that they have always been around. She notes that Asian Americans lurked in the footnotes of Justice Powell's opinion in *Bakke* as “secret spoilers”<sup>726</sup> — a “potentially fatal problem for affirmative action.”<sup>727</sup> She writes:

Perhaps the most surprising thing about the Harvard case is that it took so long to emerge. If we look at *Regents of University of California v. Bakke* (1978) with fresh eyes, the seeds of the Harvard case are fully apparent there. Indeed the Harvard case is the predictable culmination of a particular racial logic initially laid out in *Bakke* and later solidified in *Grutter* and *Fisher (I and II)*. Put simply, this logic denies the specificity of Black subjection — the foundational role it has played in the nation's origins and history and its persistence today as a structural feature of society — and instead proffers a view of society as a noisy competition of comparably situated “ethnic” groups.<sup>728</sup>

In essence, a decision in *Harvard* to overturn *Grutter* will represent the logical conclusion of Justice Powell's assertion in *Bakke* that the United States is a “Nation of minorities”<sup>729</sup> — each group politically and socially indistinguishable from the others, none requiring more or less protection than any other group.<sup>730</sup>

<sup>724</sup> See Kim, *supra* note 720, at 217.

<sup>725</sup> See *Fisher II*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting).

<sup>726</sup> Kim, *supra* note 720, at 223.

<sup>727</sup> *Id.* at 222. Kim explains that although people of Asian descent were beneficiaries of the affirmative action program that was struck down in *Bakke*, their “enrollment in U.S. higher educational institutions rose significantly [after the decision was handed down], surpassing their rapidly growing percentage of the population.” *Id.* at 227. Consequently, they were “removed from existing affirmative action programs or not included in the formation of new ones.” *Id.* Today, people of Asian descent at selective colleges and universities are overrepresented in terms of the population generally but underrepresented in terms of the pool of applicants. See Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian-Americans*, NEW YORKER (Aug. 10, 2017), <https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans> [<https://perma.cc/88J6-VEPD>].

<sup>728</sup> Kim, *supra* note 720, at 219.

<sup>729</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1978) (opinion of Powell, J.). Professor Ian Haney López has conducted a particularly insightful analysis of this language in Justice Powell's *Bakke* opinion, the assumptions about race and ethnicity upon which it is based, and the ends to which Justice Powell intended it to be deployed. See Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1037 (2007) (“[To Powell,] [b]ecause the United States contained not dominant and subordinate races but a welter of ‘ethnically fungible’ groups . . . the Constitution could make no distinction among the beneficiaries or victims of racial classifications.”).

<sup>730</sup> See Lee, *supra* note 719, at 182–83 (“One sign [on SFFA's website] summons Dr. Martin Luther King Jr.'s famous ‘I have a dream’ speech but flips the script to read: ‘I Am Asian American. I Have A Dream Too.’ . . . In so doing, SFFA evokes a false equivalency of race, minoritized status, and moral deservingness.” *Id.* at 183.).

In *Harvard*, the plaintiff has challenged Harvard College’s facially race-conscious admissions program, alleging that the college engages in racial balancing in violation of decades of Court precedent; considers race as more than a “plus” factor in violation of *Grutter*; considers race in admissions although there are race-neutral alternatives;<sup>731</sup> and intentionally discriminates against applicants of Asian descent.<sup>732</sup> The plaintiff has specifically asked the Court to overturn *Grutter* and its holding that the pursuit of the educational benefits that student body diversity generates is a compelling governmental interest that can sustain a race-based admission program under strict scrutiny review.<sup>733</sup>

Harvard’s admission process is complicated, with many different ratings contributing to an applicant’s ultimate admission or rejection.<sup>734</sup> The “personal rating,” around which the litigation ought to center, “attempts to measure the positive effects applicants have had on the people around them and the contributions they might make to the Harvard community.”<sup>735</sup> It includes many factors, such as:

[T]he applicants’ intended major and career, the neighborhood in which they grew up, whether they were raised by a single parent who did not attend college, or raised by two parents who graduated from Harvard. It also allows admissions officers to consider whether the applicants are refugees, whether they had to work to support their families during high school, whether they hail from a rural background, and so on.<sup>736</sup>

When making the personal rating, admissions officers are asked to consider “an applicant’s perceived leadership, maturity, integrity, reaction to setbacks, concern for others, self-confidence, likeability, helpfulness, courage, kindness, and whether the student is a ‘good person to

<sup>731</sup> *Grutter* held that narrow tailoring requires institutions to engage in “serious, good faith consideration of workable race-neutral alternatives,” *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), but it does not require them to sacrifice “academic quality,” *id.* at 340. Differently stated, *Grutter* allows institutions to implement facially race-conscious programs after considering facially race-neutral alternatives and concluding that implementing those alternatives would result in a diminishment in the academic quality of the incoming class. *Id.* As the Court in *Fisher II* explained:

Though “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” or “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,” it does impose “on the university the ultimate burden of demonstrating” that “race-neutral alternatives” that are both “available” and “workable” “do not suffice.”

*Fisher II*, 136 S. Ct. 2198, 2208 (2016) (alterations in original) (citation omitted) (quoting *Grutter*, 539 U.S. at 339; *Fisher I*, 570 U.S. 297, 312 (2013)).

<sup>732</sup> See *SFFA v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 163 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

<sup>733</sup> See Petition for Writ of Certiorari at i, 21–22, *Harvard* (No. 20-1199); *id.* at 36 (“This case presents a unique opportunity to rectify *Grutter*’s error.”).

<sup>734</sup> See *Harvard*, 980 F.3d at 167.

<sup>735</sup> *Id.* at 168.

<sup>736</sup> Lee, *supra* note 719, at 185.

be around.”<sup>737</sup> These ratings, in which race is not supposed to factor,<sup>738</sup> are primarily “based on the applicant’s admissions essays, teacher and guidance counselor recommendations, accomplishments, and alumni interview report.”<sup>739</sup> The rating is a number between one and six, with one being the strongest.<sup>740</sup> Applicants of Asian descent receive weaker personal ratings than their white counterparts. While the average rating that admissions officers give to Asian American applicants is 2.82, white applicants’ average rating is 2.77.<sup>741</sup>

It is important to understand that white applicants — not black or Latinx applicants — benefit from the penalty that Harvard currently levies against applicants of Asian descent. SFFA is wholly aware of this fact. In its petition for certiorari, SFFA noted the “disparities that Asian Americans face compared to their white peers.”<sup>742</sup> The petitioner observed how “changing an applicant’s race from white to Asian lowers the[ir] personal rating to a statistically significant degree.”<sup>743</sup> Indeed, the First Circuit described SFFA’s “central allegation” as the claim that “Harvard discriminates against Asian American applicants in favor of white applicants.”<sup>744</sup> SFFA appears to take umbrage with

<sup>737</sup> *Harvard*, 980 F.3d at 168. As noted in the district court opinion, Harvard describes the personal rating as “summariz[ing] the applicant’s personal qualities based on all aspects of the application, including essays, letters of recommendation, the alumni interview report, personal and family hardship, and any other relevant information in the application.” *SFFA v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 183 (D. Mass. 2018) (quoting Local Rule 56.1 Statement of Undisputed Material Facts in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts 59–60, *Harvard*, 346 F. Supp. 3d 174 (No. 14-CV-14176) (ECF No. 420) [hereinafter *Harvard Facts*]). The personal rating is supposed to reflect the admissions officers’ assessment of the applicant’s “humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities.” *Id.* (quoting *Harvard Facts*, *supra*, at 59–60).

<sup>738</sup> While the instructions to admissions officers before 2018 did not state that race should not factor into the personal rating, they were modified “to explicitly say that ‘an applicant’s race or ethnicity should not be considered in assigning the personal rating’” after SFFA brought the lawsuit in 2018. *Harvard*, 980 F.3d at 169.

<sup>739</sup> *Id.* at 168.

<sup>740</sup> *See id.*

<sup>741</sup> *See Lee*, *supra* note 719, at 187.

<sup>742</sup> Petition for Writ of Certiorari, *supra* note 733, at 31.

<sup>743</sup> *Id.* at 38.

<sup>744</sup> *Harvard*, 980 F.3d at 185 n.23. The First Circuit explained that in order to make sense of the plaintiff’s claims, it had to reconstruct this central allegation into one that is not about Harvard discriminating against Asian American applicants to the benefit of white applicants, but rather one that “attack[s] the use of race to admit African American and Hispanic candidates, to the detriment of Asian American and white applicants.” *Id.*

It is significant that in SFFA’s motion for summary judgment, it quoted an expert who explained that “[a]n Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white — even including the biased personal rating. Excluding the biased personal rating . . . an Asian-American applicant’s change [sic] would increase to 34.7% if he were white.” Feingold, *supra* note 720, at 723 (omission in original) (quoting Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment at 10, *SFFA v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 183 (D. Mass. 2018) (No. 14-CV-14176)).

the aspects of Harvard’s admissions program that benefit white people, not black and Latinx people.

While race is not supposed to factor into the “personal rating” element of Harvard’s admissions process, there are other aspects of the process that are explicitly race conscious. Admissions officers can consider race when assessing an applicant’s “overall rating,”<sup>745</sup> which is “intended to summarize the strength of the application as a whole, although it is not determined by a formula and does not involve adding up the other ratings.”<sup>746</sup> Subcommittees can also consider race when making a recommendation to admit, reject, or waitlist an applicant.<sup>747</sup> Moreover, race can be a consideration in making “tips,” which are “plus factors that might tip an applicant into Harvard’s admitted class” and can be made at multiple points in the admissions process.<sup>748</sup> Further, admissions officers consider race during the “lop process,” in which the officers cull the larger pool of tentative admits and create the final list of students offered admission to the college.<sup>749</sup> Finally, throughout the entire admissions cycle, the Dean of Admissions provides statistics describing the projected racial demographics of the admitted class — statistics that are intended to inform some admissions decisions that the officers make.<sup>750</sup>

The plaintiff argues that Harvard intentionally discriminates against Asian Americans in its admissions process. But it is the use of the facially race-neutral “personal rating” that, as noted above, disadvantages applicants of Asian descent.<sup>751</sup> It is not clear how an element of an

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Essentially, SFFA understands that white people are the beneficiaries of the disadvantage forced upon applicants of Asian descent. Nevertheless, it does not seek to dismantle the element of the admissions program that produces this disadvantage.

<sup>745</sup> *Harvard*, 980 F.3d at 169.

<sup>746</sup> *Harvard*, 346 F. Supp. 3d at 183 (quoting *Harvard Facts*, *supra* note 737, at 64–65).

<sup>747</sup> See Recent Case, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), 134 HARV. L. REV. 2630, 2631 (2021).

<sup>748</sup> *Harvard*, 980 F.3d at 170.

<sup>749</sup> *Id.*

<sup>750</sup> See Recent Case, *supra* note 747, at 2631.

<sup>751</sup> See Feingold, *supra* note 720, at 726 (noting that the “facially race-neutral component of Harvard’s admissions process” is the “source of disparate treatment against Asians” — not race-based affirmative action); Jeena Shah, *Affirming Affirmative Action by Affirming White Privilege: SFFA v. Harvard*, 108 GEO. L.J. ONLINE 134, 134 (2020) (observing that “the lawsuit’s central claim had nothing to do” with race-based affirmative action, but rather the “race-neutral components of the admissions program”).

SFFA argued below that Harvard engages in intentional discrimination and as a result, the burden shifts to the institution to disprove that it intentionally discriminates. See *Harvard*, 980 F.3d at 195. In this way, SFFA proposed a change to existing strict scrutiny analysis of affirmative action programs, as current strict scrutiny doctrine does not require institutions to disprove intentional discrimination against any group. See Recent Case, *supra* note 747, at 2634 (“Incorporating allegations of intentional discrimination into such analysis would, without precedent, invalidate affirmative action programs unless a defendant can prove that they aren’t biased against any racial

admissions process that is not expressly race conscious constitutes intentional discrimination. In fact, SFFA concedes that “one likely explanation for why Asian Americans are penalized in the admissions process is Harvard’s ‘implicit bias.’”<sup>752</sup> Other observers agree, proposing that teachers and high school guidance counselors, or the alumni who conduct interviews, may have implicit biases against people of Asian descent<sup>753</sup> — a bias that consists of the unconscious belief that Asian Americans are “[t]echnically strong, but socially weak . . . hard-working students and diligent workers, but poor visionaries and implausible leaders.”<sup>754</sup> The theory is that this implicit bias leads actors to provide recommendations for Asian American applicants that are not as strong as those that they provide for white applicants, thereby diminishing Asian American applicants’ personal ratings.<sup>755</sup>

It is fascinating that SFFA concedes that implicit bias might be responsible for the weaker personal ratings that Asian American applicants receive. Race scholars began to take an interest in the phenomenon of implicit bias after the Court interpreted the Equal Protection Clause to require proof of discriminatory intent before it would review a racially burdensome law with heightened scrutiny.<sup>756</sup> Theorists of race have developed reams of scholarship illustrating how the discriminatory intent requirement fits uncomfortably with the fact of implicit bias: while discriminatory intent presupposes an awareness,

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minority.”). Harvard, in turn, argued that SFFA had misstated the test and that a claim of intentional discrimination requires proof of “racial animus” — proof that SFFA could not provide. *Harvard*, 980 F.3d at 195 n.34. The First Circuit provisionally adopted SFFA’s formulation of the legal test, stating that Harvard could succeed if it showed “that its discrimination was not intentional (i.e., it did not act with animus or ‘stereotyped thinking or other forms of less conscious bias’).” *Id.* at 196 (quoting *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999)). Using this test, the First Circuit held in Harvard’s favor. *Id.* at 164.

<sup>752</sup> See *Harvard*, 980 F.3d at 203.

<sup>753</sup> See Recent Case, *supra* note 747, at 2637 (“[A]ny penalties Harvard assigns to Asian American applicants are more likely to be a result of stereotyping or implicit bias.”); Harvey Gee, *Redux: Arguing About Asian Americans and Affirmative Action at Harvard After Fisher*, 26 ASIAN AM. L.J. 20, 27 (2019) (noting that an expert testified that “if there were any potential implicit bias, it could be traced to high school teachers and guidance counselors who write stronger recommendations for whites than for Asian Americans”); Shah, *supra* note 751, at 138 (“[A]t trial, Harvard’s dean of admissions ‘speculated that [Asian applicants’] lower personal ratings reflected the fact that high-school teachers and guidance counsellors’ support in recommendations is stronger for whites than for Asians.” (second alteration in original) (quoting Jeannie Suk Gersen, *At Trial, Harvard’s Asian Problem and a Preference for White Students from “Sparse Country,”* NEW YORKER (Oct. 23, 2018), <https://www.newyorker.com/news/our-columnists/at-trial-harvards-asian-problem-and-a-preference-for-white-students-from-sparse-country> [<https://perma.cc/9EXB-BEUW>])); see also Suk Gersen, *supra* (stating that “if there was indeed bias against Asians, it originated outside of Harvard,” but condemning Harvard for failing to “attempt to correct for it”).

<sup>754</sup> Lee, *supra* note 719, at 192.

<sup>755</sup> See Shah, *supra* note 751, at 138.

<sup>756</sup> See *Washington v. Davis*, 426 U.S. 229, 231 (1976).

implicit bias motivates individuals' actions without conscious awareness.<sup>757</sup> This is to say that many lawyers and scholars tend to conceptualize discriminatory intent and implicit bias as mutually exclusive.<sup>758</sup> In arguing that evidence of implicit bias supports a claim of intentional discrimination and that Harvard's admissions program ought to be struck down on that basis, SFFA is asking the Court to develop a nuance in its understanding of racial discrimination that it has refused to develop when black and Latinx people have requested it.<sup>759</sup>

It is possible to remedy the wrong committed against applicants of Asian descent and preserve the explicitly race-conscious aspects of Harvard's admissions program. As Professor Jeannie Suk Gersen puts it, "one can safely root against Harvard and in favor of race-conscious affirmative action at the same time."<sup>760</sup> This is true precisely because it

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<sup>757</sup> See, e.g., Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You?: Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1304 (2018) ("[T]he requirement of a discriminatory purpose in order to prove the existence of an equal protection violation fails to account for the reality of implicit bias."); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1055–56 (2017) (proposing reckless discrimination as a bridge between implicit bias and Title VII, which requires "intentional" discrimination," *id.* at 1055); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1004 (2006); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 352 (2007); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 198 (2018). But see Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1072–100 (2009) (canvassing cases to show that "in statutory and constitutional antidiscrimination doctrine, nothing much turns on the question of whether bias is conscious," *id.* at 1072, and arguing that the Court's understanding of "discriminatory intent," *id.* at 1075, captures implicit bias).

<sup>758</sup> Indeed, the lower court considered discriminatory intent and implicit bias to be mutually exclusive. While it found that "there had] been no showing of discriminatory intent or purpose," Shah, *supra* note 751, at 141 (quoting SFFA v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 191 n.56 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022)), it also "commented that Harvard's admissions process 'would likely benefit from conducting implicit bias trainings for admissions officers,'" *id.* (quoting *Harvard*, 397 F. Supp. 3d at 204). In other words, the lower court thought that it was possible for implicit bias to be present where discriminatory intent was absent.

<sup>759</sup> However, in a fascinating moment in the Court's opinion in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Court stated that discriminatory intent encompassed implicit bias. *Id.* at 2512 (explaining that "unconscious prejudices" fall under the umbrella of "disparate treatment" qua intentional discrimination). The majority opinion in *Inclusive Communities* marked the first time that the Court indicated that it had such nuance in its understanding of discriminatory intent. See Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1134 (2016) (noting that the Court's statement in *Inclusive Communities* that implicit bias is a form of discriminatory intent is "exceptionally important" because it "had never before explicitly held that actions driven by unconscious bias constitute intentional discrimination").

<sup>760</sup> Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, Is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018) [hereinafter Suk Gersen, *Anti-Asian Bias*], <https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case> [https://perma.cc/EC2W-H6F6].

is the race-blind “personal rating” that disadvantages applicants of Asian descent.<sup>761</sup> Harvard could eliminate the use of the “personal rating” as a factor in admissions — thereby eliminating the aspect of the process that harms Asian American applicants to the benefit of white applicants — and maintain the facially race-conscious elements of its process.<sup>762</sup> Indeed, there is a strong argument that *more* race consciousness is the solution to the problem. Harvard could recognize that the personal rating disadvantages applicants of Asian descent and correct for it — by discounting the rating’s significance in applications from Asian Americans specifically, for example.<sup>763</sup> Nevertheless, the plaintiff has requested that the Court overturn *Grutter* and prohibit explicit race consciousness in the admissions process altogether.<sup>764</sup> Again, this is a request that would leave in place the use of the “personal rating,” which is the element that penalizes Asian American applicants.<sup>765</sup>

Now, to be clear: Harvard’s admissions program is unfair to Asian American applicants, and they deserve a remedy. They have been wronged. However, the wrong that has been committed against Asian American applicants to Harvard is unrelated to the facially race-conscious aspects of Harvard’s admissions program. The elimination of the harm to applicants of Asian descent can coexist with the continued use of race in admissions at Harvard College.<sup>766</sup>

Although SFFA purports to represent the interests of applicants of Asian descent, one can make a convincing case that SFFA actually represents the interests of white applicants.<sup>767</sup> And this is simply because

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<sup>761</sup> See *id.*

<sup>762</sup> See Feingold, *supra* note 720, at 709–10 (explaining that the intentional discrimination claim is distinct from the claim attacking Harvard’s affirmative action policy and that the former, and not the latter, inflicts an “Asian penalty,” *id.* at 710).

<sup>763</sup> See *id.* at 732 (“Rather than colorblindness, a responsive remedy would necessitate the implementation of a race-conscious policy capable of redressing the specific harm of negative action underlying SFFA’s discrimination claim.”); see also *Harvard*, 980 F.3d at 196; Recent Case, *supra* note 747, at 2637 (observing that “explicit racial considerations . . . are often meant to work against[] stereotypes”).

<sup>764</sup> See Petition for Writ of Certiorari, *supra* note 733, at 20.

<sup>765</sup> See Feingold, *supra* note 720, at 729 (“SFFA asks the court to eliminate a dimension of Harvard’s admissions regime (affirmative action) that is not the source of the alleged Asian penalty . . . . There is, accordingly, little reason to believe that the requested relief, if granted, would redress the identified injury.”); see also Recent Case, *supra* note 747, at 2630, 2637 (observing that if stereo-typing or implicit bias is responsible for the diminished personal ratings that applicants of Asian descent receive, then “there is no reason to think eliminating explicit considerations of race from the admissions process would eliminate” the stereotyping or implicit bias that diminish Asian American applicants’ personal ratings, *id.* at 2637).

<sup>766</sup> See Feingold, *supra* note 720, at 710 (noting that SFFA has created “the illusion that one must choose between defending affirmative action and holding Harvard accountable for its alleged anti-Asian bias”).

<sup>767</sup> It may be important to note that the Harvard litigation did not begin with aggrieved applicants of Asian descent seeking out an attorney who could represent them in a legal challenge to the school’s admissions policy. Rather, it began after Edward Blum, who sponsored Abigail Fisher’s



SFFA has not asked the Court to remedy the injury to Asian American applicants in a way that will impose burdens on white applicants. Indeed, SFFA has requested relief that will conserve white benefit. Another way to think about it is to imagine that the plaintiff in the litigation were a group of white applicants. These hypothetical white plaintiffs would ask for the same relief that the actual plaintiff in the litigation has requested: they would ask for relief that allows them to retain the bonus that they receive from the penalty levied against applicants of Asian descent.

Because there are so few black and Latinx admittees,<sup>768</sup> the facially race-conscious elements of Harvard's admissions programs do not greatly reduce the likelihood that an Asian American applicant will be admitted to the school.<sup>769</sup> So when SFFA complains about the program's explicitly race-conscious components that have a small effect on Asian American students' chances of admission, while refusing to complain about the facially race-neutral component (i.e., the personal rating) that has a larger effect on their chances of admission, it does not appear to have Asian American applicants' interests at the top of mind. Indeed, when SFFA asks the Court to eliminate a policy that *does not* significantly injure students of Asian descent while refusing to ask the Court to eliminate a policy that *does* significantly injure them,<sup>770</sup> it is not representing the interests of Asian American applicants to Harvard. More likely, it is representing the interests of white people who believe that affirmative action programs unfairly give "their" seats in incoming classes to nonwhite people.

Further, SFFA is making an argument ostensibly on behalf of applicants of Asian descent that is all the more potent because applicants of Asian descent — as opposed to white applicants — are making it. As

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lawsuit against the University of Texas and founded SFFA, specifically sought out people of Asian descent to serve as plaintiffs in a lawsuit challenging Harvard's affirmative action program. *See id.* at 716. We might read this as Blum endeavoring to "identify Asian-American plaintiffs who could replace Whites as the face of affirmative action's ostensible victims" and, in the process, represent the interests of the white people whom explicitly race-conscious admissions policies allegedly victimize. *See id.*

<sup>768</sup> There were 302 "African American" and 250 "Hispanic or Latino" students of the 1984 total students admitted to the class of 2026. *See Admissions Statistics*, HARVARD COLL., <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/N7KB-ABHE>].

<sup>769</sup> *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002) (showing that because the number of "minorities" who apply to selective colleges is relatively small, admitting them at higher rates will not significantly lower the chances of admissions for those who do not benefit from race-conscious admissions programs).

<sup>770</sup> There is good evidence that eliminating the explicitly race-based elements of Harvard's admissions program will not accrue to the benefit of applicants of Asian descent. *See* Kim, *supra* note 720, at 228. Although the demise of these elements would result in an increase in the number of seats available to white and Asian American applicants, observers have argued that it would not "redound primarily to the benefit of Asian Americans, since the number of slots involved in affirmative action programs is too small to affect Asian American admissions rates in any notable way." *Id.*

Professor Jonathan Feingold puts it, “affirmative action challenges predicated on a narrative of White victimhood”<sup>771</sup> have been unsuccessful, having limited “normative appeal”<sup>772</sup> and, therefore, limited “doctrinal utility.”<sup>773</sup> However, when people of Asian descent challenge explicit race consciousness in admissions, white people stop being understood as the putative victims of such programs.<sup>774</sup> The controversy over affirmative action ceases to figure as a Manichean struggle between white victims and black beneficiaries.<sup>775</sup> Instead, it figures as a struggle between Asian victims and black beneficiaries. In this figuration, white people operate as “disinterested witnesses and third-party bystanders to a policy that presumptively pits different groups of color against one another.”<sup>776</sup> Even more harmfully, white people therefore appear to be “natural features of the Harvard landscape — presumed members of a university community admitted on their individual ‘merit.’”<sup>777</sup>

This Foreword argues that the injury that SFFA alleges bears little to no resemblance to the racism of the pre-Civil Rights Era — though SFFA tried its hardest to convince the Court of the opposite in its petition for certiorari, in which it argued that Harvard’s use of race in admissions keeps Asian American students out of the college in a way that is perfectly analogous to institutions’ use of race to exclude disfavored groups in the early twentieth century.<sup>778</sup>

This Foreword insists that the Court’s affirmative action cases should be read in conversation with its disparate impact discrimination cases, which the next section analyzes. If we read these cases together,

<sup>771</sup> Feingold, *supra* note 720, at 715.

<sup>772</sup> *Id.* at 716.

<sup>773</sup> *Id.* at 715.

<sup>774</sup> This might be another iteration of the shift that Siegel observes in which challenges to affirmative action are more compelling when they are not framed in terms of “innocent” white people, but rather “universal” concerns. See *supra* notes 699–702 and accompanying text.

<sup>775</sup> See Feingold, *supra* note 720, at 713 (“[A]ffirmative action is often viewed as a rigid, zero sum device that confers racial ‘preferences’ upon Black applicants to the detriment of their ‘innocent’ White counterparts.”). As Feingold notes, the fact that all of the plaintiffs in the affirmative action cases that the Court has heard in the past forty years have been white reinforces the idea that affirmative action involves a zero-sum battle between black and white people. See *id.* at 715–16.

<sup>776</sup> *Id.* at 719.

<sup>777</sup> *Id.*

<sup>778</sup> See Petition for Writ of Certiorari, *supra* note 733, at 4–5 (describing how in the 1920s, Harvard sought to reduce the number of Jewish students admitted to the school by refusing to rely entirely on standardized test scores and to implement a “holistic admissions system” instead, *id.* at 4, and then drawing a comparison to Harvard’s current admissions system); *id.* at 30 (“Jewish students were the first victims of holistic admissions, and Asian Americans are the main victims today.”); see also Suk Gersen, *supra* note 753 (“[In the early twentieth century, Harvard] introduced the consideration of qualitative factors such as personality and background . . . as part of the admissions process. . . . By the class of 1930, as a result of the new plan, Jewish students made up only ten per cent of Harvard’s undergraduates.”). Indeed, when the plaintiff highlights the “racist origins” of holistic admissions, it takes a cue from Justice Kavanaugh’s partial concurrence in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1417 (2020). See Petition for Writ of Certiorari, *supra* note 733, at 31. In that case, the “racist origins” of the law attenuated its legitimacy. See *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part).

we will see that the injury about which the Court cares in the affirmative action context is not the use of race to favor and disfavor racial groups — an injury that certainly would recall the techniques that entities used to protect the nation’s racial hierarchy during the days of Jim Crow. Instead, the injury about which the Court is concerned is hurt feelings and dashed expectations. This is a thoroughly modern injury, having no antecedent in the pre–Civil Rights Era. Moreover, the Court is poised to interpret the Constitution to provide a remedy for this racial injury. This is to say that while the Roberts Court is willing to provide relief to people of color only when they can allege injuries that resemble those that they endured during the pre–Civil Rights Era, it may not constrain SFFA in this way. To the extent that SFFA represents white interests, as argued above, the fact that the Court may free SFFA from this constraint demonstrates the Court’s willingness to let claimants protecting white interests be inventive, articulating “new” injuries that have no historical parallel or analogue.

Alternatively, to the extent that SFFA actually represents Asian American people’s interests, the litigation adds nuance to the foregoing analysis of the Court’s disparate requirements around racial injuries for white and nonwhite claimants. If the Court grants SFFA its requested relief next Term, then the Court will have remedied an alleged racial injury endured by people of color — in this case, Asian Americans — that does not recall the racism of yesteryear. This might reveal that the Court is willing to recognize nonwhite people’s modern racial injuries only when nonwhite people’s interests align with white interests.<sup>779</sup> That is, the Court may grant people of color a space to improvise around their articulation of racial injuries only when it accrues to white people’s advantage.

*B. Looking Beyond the October 2022 Term:  
The Imperiled Future of Disparate Impact Discrimination*

The Roberts Court’s approach to disparate impact discrimination provides another example of its willingness to redress the racial injuries alleged by white claimants even when those injuries are “new” — bearing no resemblance to the racism that was practiced in the pre–Civil Rights Era. An examination of the Roberts Court’s cases in this area of law leaves no doubt that when it comes to white claimants, the Court is amenable to providing relief even when the racial injuries that they allege do not harken back to what bad actors did in the days of formal white supremacy. In the disparate impact discrimination context, the

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<sup>779</sup> This would be an example of Professor Derrick Bell’s interest-convergence thesis. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980) (proposing that the country is most likely to accede to nonwhite people’s demands for racial justice when those demands align with white people’s interests).

Court evinces an abiding sensitivity to the feelings, expectations, and experiences of white people.<sup>780</sup> Indeed, the Court finds racism, and is willing to eliminate racism, when white people feel like they have been victims of racism.<sup>781</sup> This effectively exempts white claimants from the necessity of showing a resemblance between their alleged injuries and the injuries inflicted during the pre-Civil Rights Era.

As discussed in the previous section, the Court's decision to hear the challenge to Harvard's facially race-conscious affirmative action program next Term presents it with the opportunity to install the view that the Equal Protection Clause demands colorblindness — thus prohibiting institutions from considering race. Such a holding not only would be fatal to race-based affirmative action programs, but also would put disparate impact liability in jeopardy. There are three forms that the attack against disparate impact liability may assume. While these forms differ in terms of lethality to disparate impact claims of discrimination, they are all bad from a racial justice perspective.

The most destructive form would involve the Court declaring disparate impact liability unconstitutional under the Fourteenth Amendment's Equal Protection Clause, thereby preventing state and local governments, as well as Congress, from passing laws that recognize such liability. Justice Scalia suggested this was the correct interpretation of the Equal Protection Clause in his concurrence in *Ricci v. DeStefano*,<sup>782</sup> Justice Thomas did the same in his dissent in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>783</sup>

The intermediate form involves the Court overruling precedents, like *Inclusive Communities*, that recognize disparate impact liability under federal statutes. This path is not outside the realm of possibility, given the Roberts Court's disregard of the precedents that it has not liked. The *Dobbs* decision is a perfect example of this.<sup>784</sup>

The modest form involves the Court making it much harder for plaintiffs to prove disparate impact liability under statutes that recognize this form of discrimination. The Court has already taken this path in *Brnovich*.<sup>785</sup>

Notably, all of these methods of diminishing disparate impact liability represent efforts to protect white people from the perceived racial injury that they suffer when they are denied a disparate benefit over nonwhite people. This section explores each of these modalities of eroding disparate impact liability, beginning with an exploration of *Ricci*

<sup>780</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009) (holding that New Haven officials upset whites' "legitimate expectations" that exam results would determine firefighter promotions).

<sup>781</sup> See *id.* at 593.

<sup>782</sup> 557 U.S. 557 (2009); *id.* at 594–95 (Scalia, J., concurring).

<sup>783</sup> 135 S. Ct. 2507 (2015); *id.* at 2530–31 (Thomas, J., dissenting).

<sup>784</sup> See *supra* notes 38–39 and accompanying text.

<sup>785</sup> See *infra* notes 849–65 and accompanying text.

and Justice Scalia’s invitation to the Court to find disparate impact liability inconsistent with the demands of the Equal Protection Clause.

I. *The Most Destructive Path: Ricci v. DeStefano and the Unconstitutionality of Disparate Impact Liability.* — In *Ricci*, seventeen white firefighters and one Latinx firefighter sued government officials in New Haven, Connecticut, who had refused to certify the results of an exam intended to identify those who would be promoted to either lieutenant or captain in the city’s fire department.<sup>786</sup> The plaintiff firefighters argued that in refusing to certify the exam results, city officials had subjected them to disparate treatment in violation of Title VII.<sup>787</sup> However, the fact that no black or Latinx firefighter had scored high enough on the exam to be eligible for promotion was a significant factor in the decision not to certify the results.<sup>788</sup> Officials argued that if they had awarded promotions in line with the exam results, the city would have been vulnerable to liability under Title VII, which proscribes practices that have a disparate impact on protected racial groups.<sup>789</sup>

The Court ruled in favor of the challengers, finding that city officials had engaged in disparate treatment of the white and Latinx firefighters without a lawful justification,<sup>790</sup> as “[t]he City rejected the test results solely because the higher scoring candidates were white.”<sup>791</sup> The Court

<sup>786</sup> See *Ricci*, 557 U.S. at 563–66, 574.

<sup>787</sup> *Id.* at 575.

<sup>788</sup> See *id.* at 567–68, 572–73.

<sup>789</sup> See *id.* at 575. The Court first interpreted Title VII to recognize disparate impact discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See *id.* at 430. In 1991, Congress codified the principles articulated in *Griggs*, clarifying that plaintiffs can make out a prima facie violation of Title VII by identifying “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)). An employer can avoid liability by showing that the identified employment practice is “job related for the position in question and consistent with business necessity.” *Id.* An employer will lose nonetheless if the plaintiff can show that there exists “an available alternative employment practice that has less disparate impact and serves the employer’s legitimate needs.” *Ricci*, 557 U.S. at 578.

<sup>790</sup> Disparate treatment liability under Title VII often turns on different treatment of employees on the basis of race. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350 (2010). However, the City of New Haven did not treat white and nonwhite firefighters differently; it threw out the test results for everyone. See Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 245 (2010). In such a scenario, the disparate treatment that the Court finds objectionable must be due to the city’s motive. See Primus, *supra*, at 1360 (“Throwing out test results can be understood as facially neutral when the test results are thrown out for everyone; the discrimination, if any, lies in the motivation for that action.”). However, the city’s motive, arguably, was golden: it rejected the test results because it did not want to perpetuate racial hierarchies in firefighting. See *Ricci*, 557 U.S. at 610–11 (Ginsburg, J., dissenting). Accordingly, *Ricci* is a bit terrifying for those interested in racial justice, as it effectively holds that even the “benign” motive of producing more equitable outcomes will not rescue actors from statutory (and, possibly, constitutional) liability. See *infra* notes 813–22 and accompanying text.

<sup>791</sup> *Ricci*, 557 U.S. at 580. In making this claim, the Court ignored the myriad problems with the test that the city had identified — problems that included an arbitrary choice to weigh the

held that the city, and similarly situated employers in the future, could lawfully engage in such disparate treatment only if it had a “strong basis in evidence” that it would face disparate impact liability if it engaged in the challenged employment practice.<sup>792</sup> Finding that there was no strong basis in evidence for the New Haven officials to believe that they could not defend the exam as “job related” or argue that “equally valid and less discriminatory tests” were unavailable, the Court awarded summary judgment to the plaintiff firefighters.<sup>793</sup>

In reaching this conclusion, the Court was clear that it sought to remedy a racial injury that it believed the city had inflicted on the white firefighters. According to the Court, in refusing to certify the exam results and to award promotions based on them, the city had injured these firefighters by dashing their “legitimate expectations.”<sup>794</sup> The Court further stated that “[t]he injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process.”<sup>795</sup> Two points deserve mentioning. First, the Court’s solicitude for white test takers’ “legitimate expectations” made it completely oblivious to nonwhite test takers’ own expectations that they would have

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written portion of the exam more than the oral portion, the decision not to use an “assessment center” where evaluators could observe candidates responding to real-life scenarios, the failure to ensure that the test reflected firefighting practices and norms in New Haven specifically, and the inability of many test takers of color to access in a timely manner the study materials, which were expensive and had been on backorder. *See id.* at 613, 615 (Ginsburg, J., dissenting) (itemizing these problems with the test). That is, there was a convincing argument that the city rejected the test results not “solely because the higher scoring candidates were white,” *id.* at 580 (majority opinion), but rather because the exam’s disparate impact on nonwhite test takers made the city question whether the test accurately selected those who would excel in a lieutenant or captain position, *see id.* at 618 (Ginsburg, J., dissenting). In this framing of the city’s decision — and of the doctrine of disparate impact, more generally — the Title VII disparate impact provisions ensure that an employer’s practices are *merit selecting*, capably identifying the most meritorious candidates for jobs. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 121 (2010) (framing disparate impact doctrine in this way). This framing, which largely was missing from the conversation surrounding the *Ricci* litigation, proposes that the city declined to certify the exam results because it believed that the exam did not ascertain who would be best at the jobs in question. *See id.* at 97 (“[T]he media largely echoed the[] claim that the City had cast aside the search for the best candidates in pursuit of racial representation. The City’s position that it had acted, in fact, in defense of merit was largely lost in the debate.” (footnote omitted)).

<sup>792</sup> *See Ricci*, 557 U.S. at 563. The Court took the “strong basis in evidence” standard from its affirmative action caselaw, which provides that a government entity can institute a voluntary race-based affirmative action program if it has a “strong basis in evidence” that the program is necessary to cure past discrimination. *See id.* at 582 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). As Professors Cheryl Harris and Kimberly West-Faulcon explain, the Court’s decision to adopt the “strong basis in evidence” test “effectively imports strict scrutiny equal protection analysis into Title VII’s substantive provisions,” Harris & West-Faulcon, *supra* note 791, at 85, and, in the process, makes “it substantially more difficult for employers to assess when they can take action to avoid disparate impact,” *id.* at 100.

<sup>793</sup> *Ricci*, 557 U.S. at 592.

<sup>794</sup> *See id.* at 583–84.

<sup>795</sup> *Id.* at 593.

been evaluated by a tool that would have effectively identified who would be the best at the job.<sup>796</sup> Indeed, there were reasons to be skeptical that the test in question did that very thing.<sup>797</sup> Still, the Court subordinated nonwhite test takers' expectations to participate in a process that adequately recognized merit to white test takers' expectations to be promoted based on the results of the exam, however flawed, that they had taken.<sup>798</sup>

Second, it is stunning that the Court stands ready and willing to recognize white people's disappointed "expectations" as a racial injury at the same time that it refuses to see that myriad forms of violence — from the forced births that the Court's reversal of *Roe* greenlights to widespread voter disenfranchisement — are inflicting racial injuries on people of color.<sup>799</sup> It is simply stunning. Further, to put it into the framework that this Foreword offers, the Court's focus on white people's disappointed expectations releases white claimants from the obligation to allege an injury that recalls the racism of the pre-Civil Rights Era. The decision not to certify test results resembles no technique of racial disenfranchisement used during the pre-Civil Rights Era. It is a "new" injury — thoroughly modern. Such a description of an injury would doom a claim if people of color brought it. Yet the white plaintiffs in *Ricci* were successful. Indeed, the Court awarded them summary judgment.<sup>800</sup>

Further, future white plaintiffs who claim that disparate impact provisions of antidiscrimination laws have injured them are more likely than ever to be successful. This is because the Roberts Court, as currently constituted, is more likely than previous iterations of the Court to conceptualize a conflict between the Equal Protection Clause's proscrip-

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<sup>796</sup> In fact, the Court's solicitude for the plaintiffs' expectations makes it unmindful of *all* test takers' expectations to be evaluated by a tool that accurately identifies who will be best at the job.

<sup>797</sup> See *supra* note 791.

<sup>798</sup> See Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 685 (2015) (arguing that there is nothing inherently problematic about the *Ricci* Court's concern with the plaintiffs' expectations, but observing that "in too many cases involving overtly racial state action that violates citizen expectations of fair dealing," the expectations of people of color are not given much weight by the Court). Of course, the "irregular way" in which the City of New Haven attempted to comply with Title VII's disparate impact provisions — by "offering openly race-related reasons for changing promotion standards for an identified group of applicants who had already tested for the job" — undoubtedly contributed to the Court's inclination to sympathize with the plaintiffs and protect their expectations in the case. See *id.* at 682.

<sup>799</sup> The Court's recognition of the plaintiffs' upset expectations as an injury is even more astonishing because at the time of the litigation, the plaintiffs had not been denied promotions. No one else had been given "their" jobs. Indeed, many of the plaintiffs likely would have been awarded promotions pursuant to an alternative, more equitable test developed to evaluate candidates. See Primus, *supra* note 790, at 1357 ("[It is not] absurd to argue that no adverse employment action exists . . . when an employee seeking a promotion encounters a procedural setback that might or might not ultimately lead to the denial of a promotion.").

<sup>800</sup> See *Ricci*, 557 U.S. at 592.

tion of intentional discrimination and various antidiscrimination statutes' recognition of disparate impact liability — a conflict that the Equal Protection Clause must necessarily win.<sup>801</sup> In Justice Scalia's concurrence in *Ricci*, he wrote of a “war between disparate impact and equal protection”<sup>802</sup> — a war that observers two generations ago would have thought unimaginable, as the debates of that day centered on whether the Equal Protection Clause *itself* recognizes disparate impact discrimination.<sup>803</sup> But, in Justice Scalia's formulation, if the Equal Protection Clause forbids governments from discriminating on the basis of race, then it follows that the clause forbids governments from requiring other actors to discriminate on the basis of race — which disparate impact liability demands of these actors.<sup>804</sup> Of course, it all hinges on what we mean when we say that an actor “discriminates on the basis of race.”

Whether the Equal Protection Clause proscribes disparate impact liability depends on whether the clause forbids laws that are motivated by an intent to harm specifically, or race consciousness more generally. The Court's 1976 decision in *Washington v. Davis* established that a facially race-neutral law that has a disparate impact would not be treated as constitutionally suspect unless plaintiffs could show that a discriminatory intent underlay it.<sup>805</sup> In *Personnel Administrator v. Feeney*, the Court clarified that discriminatory intent means that an actor takes a course of action not merely in spite of, but rather because of the effect that it will have on the disparately impacted racial group.<sup>806</sup> Now, as an example, consider the Texas Ten Percent Plan,<sup>807</sup> which the state implemented after the Fifth Circuit held that explicitly race-based affirmative action programs violated equal protection guarantees.<sup>808</sup> The Ten Percent Plan is designed to leverage racial segregation in Texas high schools to secure the admission of black and Latinx students to

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<sup>801</sup> See Bagenstos, *supra* note 759, at 1125 (noting that “the Constitution trumps Title VII”).

<sup>802</sup> *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). While the majority decided the case on statutory grounds and, in so doing, avoided the constitutional question, the Court made clear that its reconciliation of the disparate treatment and disparate impact provisions of Title VII with the “strong basis in evidence test” did not answer the question of whether the statute's disparate impact provision is consistent with the Equal Protection Clause. *Id.* at 584 (majority opinion) (“We . . . do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. . . . [W]e need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.”).

<sup>803</sup> See Primus, *supra* note 790, at 1343 (“Once upon a time, the burning issue about equal protection and disparate impact was whether the Fourteenth Amendment itself embodied a disparate impact standard. . . . Until recently, therefore, the idea that a statutory disparate impact standard could violate equal protection was all but unthinkable.”).

<sup>804</sup> See *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (making this argument).

<sup>805</sup> See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>806</sup> *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>807</sup> TEX. EDUC. CODE ANN. § 51.803(a) (West 2020).

<sup>808</sup> See *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996).



selective colleges to which they would not otherwise be admitted.<sup>809</sup> The plan is facially race-neutral, but it is designed to have a beneficial disparate impact on black and Latinx students.<sup>810</sup> The argument that the facially race-neutral plan is not constitutionally suspect under existing Court precedents rests on the idea that the effort to achieve racial diversity in selective colleges or universities — or the effort to desegregate these institutions — is not a “discriminatory intent” within the meaning of *Davis* and *Feeney*.<sup>811</sup> If those cases establish that discriminatory intent means an intent to harm, one would be hard-pressed to describe the desire to integrate institutions or achieve other socially beneficial results as a desire to harm burdened racial groups.<sup>812</sup>

But, if the Equal Protection Clause proscribes race consciousness as a general matter, then actors that implement facially race-neutral policies that are designed to have a disparate impact with socially beneficial results would run into constitutional problems. Disparate impact requires actors to think about race — whether to avoid disparate impact liability under civil rights statutes more narrowly,<sup>813</sup> or to produce positive social outcomes more broadly.<sup>814</sup> For example, the city officials in *Ricci* thought about race when concluding that certifying the exam results would perpetuate racial hierarchies in the fire department.<sup>815</sup> The Texas lawmakers who implemented the Ten Percent Plan thought about race when they designed the program as a facially race-neutral alternative to race-based affirmative action programs.<sup>816</sup> Lawmakers who in-

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<sup>809</sup> See Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 257 (1999).

<sup>810</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 303–04 n.10 (2003) (Ginsburg, J., dissenting).

<sup>811</sup> See Bagenstos, *supra* note 759, at 1153 (observing that while *Davis* requires strict scrutiny for facially race-neutral laws with “an invidious discriminatory purpose,” *id.* at 1153, the Court has never found that “a facially neutral law that was intended to overcome segregation or close racial gaps” had an invidious discriminatory purpose, *id.*, and observing that it is likely that the Court will find such a purpose only in laws that have an intent “to segregate or exclude, rather than to integrate or close racial gaps,” *id.* at 1154).

<sup>812</sup> See Siegel, *supra* note 798, at 669 (arguing that the Court’s cases establish that discriminatory intent means “animus, malice, or intent to harm”); R. Richard Banks, Essay, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 578 n.28 (2003) (“The *Feeney* Court . . . seemed to equate discriminatory intent with malice.”); Haney-López, *Intentional Blindness*, *supra* note 16, at 1833–37 (stating that *Feeney* installed a “malice standard” as the test for discriminatory intent).

<sup>813</sup> See *Primus*, *supra* note 790, at 1363 (“[T]he threat of liability encourages employers to classify their employees or applicants by race so as to monitor their own compliance with the law.”).

<sup>814</sup> See *Norton*, *supra* note 790, at 233 (observing that if the Constitution proscribes disparate impact liability, “an even broader range of governmental action is at risk,” and identifying other at-risk programs, such as the Texas Ten Percent Plan and “certain health initiatives [that] address racial or gender disparities in access to or quality of health care”).

<sup>815</sup> *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009). It bears underscoring that the way the city officials in *Ricci* sought to comply with Title VII’s disparate impact provisions was highly irregular. See Siegel, *supra* note 798, at 681–82 (describing these irregularities).

<sup>816</sup> *Fisher I*, 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting) (“Texas’ percentage plan was adopted with racially segregated neighborhoods and schools at front and center stage.”).

creased Medicaid funding and coverage in an effort to reduce or eliminate racial disparities in maternal mortality thought about race when they designed the intervention.<sup>817</sup> Lawmakers who have directed funds towards community-based organizations and other social services instead of police departments as a response to police violence in communities of color thought about race when they fashioned the effort.<sup>818</sup> If the Court interprets the Equal Protection Clause to forbid race-thinking altogether, then it does not matter that these lawmakers' thoughts about race were benign — intended to achieve positive outcomes for people of color.<sup>819</sup> Indeed, there is precedent to support this view: in *City of Richmond v. J.A. Croson Co.*<sup>820</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>821</sup> the Court established that, with respect to laws with explicit racial classifications, there is no constitutional distinction between laws with benign versus invidious motivations; all are equally constitutionally suspect.<sup>822</sup>

<sup>817</sup> See Marlene Lenthang, *California Signs 'Momnibus Act' to Support Black Moms and Infants, Pay for Doulas, Extend Medicaid Coverage*, ABC NEWS (Oct. 6, 2021, 11:42 AM), <https://abcnews.go.com/US/california-signs-momnibus-act-support-black-moms-infants/story?id=80412678> [<https://perma.cc/AMG3-JS8A>]; News Release, U.S. Dep't of Health & Hum. Servs., HHS Applauds 12-Month Postpartum Expansion in California, Florida, Kentucky, and Oregon (May 25, 2022), <https://www.hhs.gov/about/news/2022/05/25/hhs-applauds-12-month-postpartum-expansion-in-california-florida-kentucky-and-oregon.html> [<https://perma.cc/7UKV-A2CW>].

<sup>818</sup> See Mike Bunge, *New Effort Underway to Defund the Police in Minneapolis*, KIMT (Dec. 2, 2021), [https://www.kimt.com/news/minnesota/new-effort-underway-to-defund-the-police-in-minneapolis/article\\_d12e3a69-7f4b-58da-a2f2-37684ff13883.html](https://www.kimt.com/news/minnesota/new-effort-underway-to-defund-the-police-in-minneapolis/article_d12e3a69-7f4b-58da-a2f2-37684ff13883.html) [<https://perma.cc/4EQ4-M5C4>]; Maya King, *"The World Is Looking at U.S.": Minneapolis Puts "Defund the Police" to a Vote*, POLITICO (Sept. 22, 2021, 4:30 AM), <https://www.politico.com/news/2021/09/22/minneapolis-reckoning-defund-the-police-513568> [<https://perma.cc/GN7N-2SHS>].

<sup>819</sup> The Court might consider constitutionally significant the fact that in some cases, race-thinking to achieve positive outcomes may deny an identified, presumably deserving white person of a limited good (for example, the unconventional way in which the City of New Haven sought to comply with Title VII's disparate impact provisions); meanwhile in other cases, race-thinking for benign ends may not have such characteristics (for example, the decision to increase Medicaid funding to address horrifying black maternal health outcomes). It is in the former context that the Court may be most inclined to interpret the Equal Protection Clause as prohibiting race consciousness. See Primus, *supra* note 790, at 1369 ("[C]enter-right constitutional actors have often drawn a distinction between race-conscious measures that visibly burden specific innocent parties and race-conscious measures intended to improve the position of disadvantaged groups but whose costs are more diffuse.").

<sup>820</sup> 488 U.S. 469 (1989).

<sup>821</sup> 515 U.S. 200 (1995).

<sup>822</sup> *Croson*, 448 U.S. at 500; *Adarand*, 515 U.S. at 225; see also Bagenstos, *supra* note 759, at 1120–21 (observing that *Adarand* "specifically rejects the argument that a good motive can avoid strict scrutiny"). Of course, most of the conversation around race-based affirmative action has focused on whether the *means* to achieve the goals that such programs pursue — that is, the explicit use of race to allocate opportunities — are legitimate. Most observers have assumed that the *ends* that the programs pursue are licit. See Primus, *supra* note 790, at 1352 ("Even facially classificatory affirmative action was considered to have a permissible *motive*: challenges to affirmative action programs generally focused on their chosen means . . .").

If the Equal Protection Clause prohibits race consciousness as a general matter, then “discriminatory intent” — which, according to *Davis*<sup>823</sup> and *Feeney*,<sup>824</sup> must motivate a facially race-neutral law with disparate impacts before courts will consider it to be constitutionally suspect — is not solely an intent to harm a particular racial group. Instead, “discriminatory intent” is simply considering race. In this view, a benign facially race-neutral law with disparate impacts is indistinguishable from a malign facially race-neutral law with disparate impacts<sup>825</sup> — which is indistinguishable from a benign law with an explicit racial classification, which is indistinguishable from a malign law with an explicit racial classification. All are constitutionally suspect and ought to be reviewed with strict scrutiny.

This interpretation, of course, is patently inconsistent with what the Court has said regarding narrow tailoring, which “allows, and even encourages, government to pursue the race-conscious end of diversity or equality of opportunity by means that do not classify individuals by race.”<sup>826</sup> It is inconsistent with Justice Scalia’s expressions of support for facially race-neutral efforts to achieve positive racial outcomes in the Court’s affirmative action cases.<sup>827</sup> It is inconsistent with Justice Kennedy’s articulated defense of the same in his concurrence in *Parents Involved*, where he wrote an ode to facially race-neutral efforts that might function to integrate schools.<sup>828</sup> It is inconsistent with the fact

<sup>823</sup> *Washington v. Davis*, 426 U.S. 229, 247 (1976) (holding that plaintiffs must show that lawmakers passed a racially burdensome law with a discriminatory purpose before courts will review the law with strict scrutiny).

<sup>824</sup> *Pers. Adm’r v. Feeney*, 442 U.S. 256, 272 (1979) (holding that a neutral law with disparate impact is unconstitutional only if the impact can “be traced to a discriminatory purpose”).

<sup>825</sup> See *Primus*, *supra* note 790, at 1353 (noting that over the years, “assumptions have changed” and “[a]s a result, the race-consciousness involved in disparate impact doctrine is now problematic as a matter of motive”).

<sup>826</sup> Siegel, *supra* note 798, at 670; see also *Fisher I*, 570 U.S. 297, 312 (2013) (“Narrow tailoring . . . involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.”).

<sup>827</sup> See, e.g., *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment). Justice Scalia argued that:

A State can, of course, act “to undo the effects of past discrimination” in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses — which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. . . . That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

*Id.*

<sup>828</sup> In his concurrence in *Parents Involved*, Justice Kennedy stated that elected officials: may pursue the goal of bringing together students of diverse backgrounds and races through [efforts that do not involve explicit racial classifications], including strategic site selection of new schools; drawing attendance zones with general recognition of the de-

that, throughout the litigation in *Fisher v. University of Texas at Austin* (*Fisher I*),<sup>829</sup> none of the conservatives on the Court questioned the constitutionality, or even the propriety, of the Texas Ten Percent Plan.<sup>830</sup> However, neither Justice Scalia nor Justice Kennedy sit on the Court anymore, and the Court is much more conservative today than it was even just a few years ago. Now more than ever, five Justices may be prepared to accept the invitation that Justice Scalia described in his *Ricci* concurrence<sup>831</sup> and resolve the engineered war between the Equal Protection Clause and the disparate impact theory of discrimination in a way that vanquishes the latter.

It is worth repeating that when Justice Scalia wrote in his *Ricci* concurrence of a “war between disparate impact and equal protection,”<sup>832</sup> his argument was premised on the supposition that the Constitution requires colorblind decisionmaking.<sup>833</sup> If the Court holds in *Harvard* next Term that the Equal Protection Clause requires colorblindness, then Justice Scalia’s argument would have even more traction on the Court than it did when he first articulated it. Indeed, even Chief Justice Roberts, who might be the most moderate of the Justices in the Court’s conservative bloc, has endorsed colorblindness — both in *Parents Involved*<sup>834</sup> and *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary*.<sup>835</sup> Thus, a holding in SFFA’s favor next Term would not bode well for the continued life of disparate impact claims. If the Equal Protection Clause prohibits it, then Congress, in addition to state and local governments, could not pass laws that recognize this form of liability.

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mographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

*Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>829</sup> 570 U.S. 297 (2013).

<sup>830</sup> See Siegel, *supra* note 798, at 674 (noting that none of the Justices raised questions in *Fisher I* about the constitutionality of the Ten Percent Plan).

<sup>831</sup> *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (asking “[w]hether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection” and suggesting that the two are incompatible with one another).

<sup>832</sup> *Id.* at 595.

<sup>833</sup> See *id.* at 594 (stating that “Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes” and concluding that this “type of racial decisionmaking is, as the Court explains, discriminatory”).

<sup>834</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>835</sup> 572 U.S. 291, 315 (2014) (Roberts, C.J., concurring) (chastising the dissent for disagreeing with his claim in *Parents Involved* that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” *id.* at 380 (Sotomayor, J., dissenting) (quoting *Parents Involved*, 551 U.S. at 748), and arguing that “it is not ‘out of touch with reality’ to conclude that racial preferences may . . . do more harm than good,” *id.* at 315 (majority opinion)).

Even more disastrously, facially race-neutral efforts designed to produce positive outcomes for people of color might be constitutionally suspect.

2. *The Intermediate Path: Reading Disparate Impact Liability Out of Federal Statutes.* — After Justice Scalia’s concurrence in *Ricci*, Court watchers wondered whether a majority of Justices was willing to interpret the Equal Protection Clause as inconsistent with disparate impact discrimination.<sup>836</sup> Many observers took the Court’s decision in *Inclusive Communities* as the Court’s answering in the negative the question of whether statutes recognizing disparate impact liability run afoul of the Equal Protection Clause.<sup>837</sup> There, the Court was asked to determine whether disparate impact claims may be brought under the Fair Housing Act.<sup>838</sup> Five Justices interpreted the statute as recognizing this form of discrimination — suggesting that the doctrine of disparate impact, as a general matter, was safe from constitutional challenge.<sup>839</sup> As Professor Samuel Bagenstos puts it, “if a majority of the Court had serious constitutional concerns about disparate impact claims *per se*, the Court would likely have avoided the constitutional problem by reading the statute not to provide for such claims.”<sup>840</sup> By reaching the decision that it did, Bagenstos argues, “the Court must therefore have rejected the argument that disparate impact law is unconstitutional.”<sup>841</sup> Indeed, only one dissenter, Justice Thomas, expressed the sense that disparate

<sup>836</sup> See, e.g., Steven Moore & Mark Risk, *Firefighter Plaintiffs Prevail in Landmark Supreme Court Case*, 37 ABA SECTION LAB. & EMP. L. 1, 13 (2009) (listing various commentators’ reactions to Justice Scalia’s concurrence in *Ricci*).

<sup>837</sup> See, e.g., Bagenstos, *supra* note 759, at 1115 (arguing that disparate impact, as defined in *Inclusive Communities*, “need not surrender to equal protection” and is consistent with prior equal protection doctrine); Stephanopoulos, *supra* note 620, at 1620, 1625 n.342 (noting that the main dissent in *Inclusive Communities* did not question the majority’s supposition that the framework for disparate impact claims is constitutional).

<sup>838</sup> Pub. L. No. 90-284, tits. VIII–IX, 82 Stat. 73, 81–90 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619); see *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015).

<sup>839</sup> See *Inclusive Communities*, 135 S. Ct. at 2512, 2525. The Court explained that disparate impact liability would pose “serious constitutional questions” if it were not “properly limited in key respects.” *Id.* at 2522. The Court went on to articulate several limitations on the principle, providing an ostensible roadmap for saving statutes that recognize disparate impact liability from constitutional infirmity. See *id.* at 2522–24. Although the Court’s decision to interpret the Fair Housing Act as recognizing disparate impact liability implied that a majority of Justices on the Court saw no insurmountable constitutional conflict between the doctrine and the Equal Protection Clause, the Court’s announcement of “constitutional limitations” on disparate impact liability represents a significant departure from the past — when everyone, including conservative actors hostile to disparate impact liability, assumed that the doctrine posed no constitutional problems. See Reva B. Siegel, *The Constitutionalization of Disparate Impact — Court-Centered and Popular Pathways: A Comment on Owen Fiss’s Brennan Lecture*, 106 CALIF. L. REV. 2001, 2014 (2018) (observing that in the Court’s decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989), which limited disparate impact claims under Title VII, “there was no hint whatsoever that the Equal Protection Clause limited disparate impact law”).

<sup>840</sup> Bagenstos, *supra* note 759, at 1128.

<sup>841</sup> *Id.*

impact doctrine may be unconstitutional.<sup>842</sup> Arguing that the doctrine proceeds from the unsubstantiated premise that absent discrimination, racial groups' representation in institutions would perfectly mirror their representation in society at large,<sup>843</sup> Justice Thomas wrote that "[d]isparate-impact liability is thus a rule without a reason, or at least without a legitimate one."<sup>844</sup> Conceptualized as a doctrine with only illegitimate reasons comprising its foundation,<sup>845</sup> disparate impact doctrine is patently unconstitutional within Justice Thomas's worldview.<sup>846</sup> Importantly, no other Justice joined his opinion.<sup>847</sup>

Although it was perfectly reasonable for supporters of disparate impact liability to breathe a sigh of relief after *Inclusive Communities*, those same supporters might need to watch the Court with bated breath over the next few Terms. Today's Court is a different institution from the one that decided *Inclusive Communities*. Justice Gorsuch has replaced Justice Scalia, Justice Kavanaugh has replaced Justice Kennedy, and Justice Barrett has replaced Justice Ginsburg.<sup>848</sup> The Court has moved significantly to the right — a shift that threatens the persistence of the doctrine of disparate impact.

Even if there are not yet five Justices prepared to find disparate impact liability unconstitutional under the Equal Protection Clause, there might be five Justices whose veneration of colorblindness leads them to be hostile to precedent that has interpreted statutes as recognizing this form of liability. A majority may be willing to reverse these decisions in order to prevent the spread of a theory of liability that requires race consciousness. If so, *Inclusive Communities* may have a target on its back.

3. *The Modest Path: Narrowing the Availability of Disparate Impact Liability Under Federal Laws.* — Last Term's *Brnovich* decision represents the most modest form that the Roberts Court's attack on disparate impact liability may take.<sup>849</sup> The case provided the first opportunity for the Court to interpret section 2 of the VRA in the context of a vote denial

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<sup>842</sup> See *Inclusive Communities*, 135 S. Ct. at 2526–32 (Thomas, J., dissenting).

<sup>843</sup> See *id.* at 2530.

<sup>844</sup> *Id.* at 2531.

<sup>845</sup> See *id.* at 2526.

<sup>846</sup> See *id.* at 2530.

<sup>847</sup> See *id.* at 2526.

<sup>848</sup> Writing shortly after the Court's decision in *Inclusive Communities*, Bagenstos predicted that "[i]f Justice Scalia is replaced by a Republican appointee, and a Republican president goes on to replace Justice Kennedy or one of the race liberals, the Court will quite likely hold, notwithstanding *Inclusive Communities*, that disparate impact laws are unconstitutional." Bagenstos, *supra* note 759, at 1167 (emphasis added). Bagenstos's prediction is even more likely to be accurate inasmuch as not only was Justice Scalia replaced by a Republican appointee (Justice Gorsuch), but a Republican president replaced Justice Kennedy (with Justice Kavanaugh) and "one of the race liberals" (Justice Ginsburg with Justice Barrett).

<sup>849</sup> See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340–41 (2021).

claim.<sup>850</sup> With a patent hostility toward the disparate impact theory of discrimination, the Court construed the provision in a way that was profoundly inconsistent with the statute’s text and intent, enfeebling the VRA as a protector of voting rights along the way.<sup>851</sup>

After the Court’s decision in *City of Mobile v. Bolden*,<sup>852</sup> holding that section 2 claims required a showing of intentional discrimination,<sup>853</sup> Congress amended the provision to clarify that it also prohibited laws that, although not motivated by discriminatory intent, had the effect of making it more difficult for people of color to participate in the political process.<sup>854</sup> Justice Alito, writing for the majority in *Brnovich*, ignored the statutory text<sup>855</sup> and the history of the VRA more generally,<sup>856</sup> interpreting the provision to require courts assessing whether a law runs afoul of section 2 to engage in an investigation of the governmental interests that the law pursues.<sup>857</sup> Justice Alito argued that the state’s interest in preventing voter fraud — a phenomenon that, as discussed above, exists mostly in the fantasies of those who subscribe to the Republican Party line<sup>858</sup> — helps to justify burdens on voting.<sup>859</sup> In requiring courts to balance the ability of voters to participate in the political process against the state’s interest in preventing fraud — even when there is no factual basis undergirding the state’s pursuit of the

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<sup>850</sup> Until *Brnovich*, claimants had turned to section 2 of the VRA mostly for vote dilution claims. See Richard L. Hasen, *The Supreme Court’s Latest Voting Rights Opinion Is Even Worse than It Seems*, SLATE (July 8, 2021, 10:16 AM), <https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html> [<https://perma.cc/6FHC-9Y2S>] (explaining that prior to *Brnovich*, the Supreme Court had interpreted section 2 several times “in the context of redistricting cases”). Section 2 became an important vehicle for vote denial claims after *Shelby County* effectively eviscerated section 5 of the VRA, which, until then, had protected against vote denial. See *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 323, 486 (2021) (explaining that after *Shelby County*, “lawyers and scholars correctly predicted that section 2 vote denial claims would percolate through the courts to fill the gap left by section 5’s invalidation”).

<sup>851</sup> See *Brnovich*, 141 S. Ct. at 2356 (Kagan, J., dissenting).

<sup>852</sup> 446 U.S. 55 (1980).

<sup>853</sup> *Id.* at 65 (plurality opinion).

<sup>854</sup> Congress amended the provision to clarify that any law that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” runs afoul of the VRA. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301(a)) (emphasis added). It also clarified that laws are inconsistent with the provision when a consideration of “the totality of circumstances” reveals that the political process is not “equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b).

<sup>855</sup> Hasen, *supra* note 850.

<sup>856</sup> See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court’s Voting-Rights Decision Was Worse than People Think*, THE ATLANTIC (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330> [<https://perma.cc/7CBD-35MZ>] (“*Brnovich* is so troubling and potentially destructive because it is not operating within the confines of the VRA project. The decision is a repudiation of the core aims of that project.”).

<sup>857</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2339 (2021).

<sup>858</sup> See *supra* notes 677–81 and accompanying text.

<sup>859</sup> See *Brnovich*, 141 S. Ct. at 2340.

interest<sup>860</sup> — the Court weakened the VRA and, as it relates to the present discussion, expressed antipathy for the doctrine of disparate impact.<sup>861</sup> Indeed, the majority made it crystal clear that its crabbed interpretation of section 2 was intended to ensure that the section does not embody a robust disparate impact rule. The majority criticized the dissent for attempting to make section 2 liability “turn almost entirely on just one circumstance — disparate impact.”<sup>862</sup> The majority called this “a radical project.”<sup>863</sup> However, one would not be unrealistic in concluding that the majority sees the doctrine of disparate impact itself as “a radical project.” In a result that should have surprised no one, the Court ultimately held that the voting restrictions at issue in the case were legitimate<sup>864</sup> — even though they disparately impacted people of color and made it more difficult for them to vote.<sup>865</sup>

In the eyes of champions of racial justice (and democracy), *Brnovich* is bad. But, as this section makes clear, it is the least bad form that an attack on the disparate impact theory of liability may take. Interpreting federal statutes to narrow the availability of disparate impact liability, which was the Court’s tactic in *Brnovich*, is better than holding that disparate impact liability itself runs afoul of the Equal Protection Clause. But, of course, *Brnovich* may just be a prelude to a more devastating assault on this theory of discrimination. Time will tell.

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Disparate impact discrimination, as reflected in several federal anti-discrimination laws, is intended to provide a remedy for nonwhite people’s racial injuries. However, since the Reagan Administration, conservative politicians, pundits, and observers have argued that laws that recognize disparate impact unjustly allocate to nonwhite people the goods to which white people are entitled.<sup>866</sup> That is, since the Reagan Administration, conservatives — including a young John Roberts and a

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<sup>860</sup> As Professor Richard Hasen explains:

Under Section 2 as intended, if a state passed a restrictive voting law and claimed it was necessary to stop voter fraud, the state would have to prove that this was the real justification and not a pretext for discrimination. It would have to offer real evidence of fraud. But Justice Alito’s opinion repeatedly says voter fraud is a risk, even though Arizona could not point to any fraud to justify its challenged laws. States don’t have to prove fraud at all.

Hasen, *supra* note 850.

<sup>861</sup> See *The Supreme Court, 2020 Term — Leading Cases*, *supra* note 850, at 481 (“*Brnovich* foretells further hostility to the disparate impact theory of discrimination . . .”).

<sup>862</sup> *Brnovich*, 141 S. Ct. at 2341.

<sup>863</sup> *Id.*

<sup>864</sup> See *id.* at 2343–44. The case involved Arizona provisions that prohibited third parties from collecting ballots and allowed for a voter’s entire ballot to be thrown out if they cast the ballot in the wrong precinct. *Id.* at 2330.

<sup>865</sup> See *id.* at 2366 (Kagan, J., dissenting).

<sup>866</sup> See Siegel, *supra* note 798, at 664–65 (discussing conservative opposition to disparate impact liability).



young Clarence Thomas, whose attacks on the theory of disparate impact discrimination in the 1980s propelled their ascents in the Republican Party<sup>867</sup> — have argued that disparate impact liability injures white people. The three possibilities discussed above all represent the Court’s disposition to remedy this injury to varying degrees. To be clear, the three possibilities all represent the Court’s disposition to conceptualize a doctrine that is designed to remedy nonwhite people’s racial injuries as a racial injury to white people and to remedy that injury.<sup>868</sup> Forecasting Justice Alito’s language in *Brnovich*, scholars once described such a holding as “radical.”<sup>869</sup> This label is apt. Such a holding would be quite radical. But it would be consistent with a Court that lets white claimants improvise in their articulation of racial injuries — proposing “new,” thoroughly modern injuries that have no analogues in the pre-Civil Rights Era. Indeed, white claimants who claim racial injuries born from the nation’s effort to move beyond its dreadful past have the attention of a Court that seems keen to save them from dashed expectations.

### CONCLUSION

This Foreword has argued that the Roberts Court’s racial common sense is a ruse. Presently, the Court recognizes and remedies racial discrimination against people of color only when it recalls the techniques that produced and protected the nation’s racial hierarchy during the pre-Civil Rights Era. This is a strategy that allows the Court to do as little as possible to disrupt the processes that sustain racial subordination today. Indeed, this tactic allows the Court to do the bare minimum and, in so doing, preserve whatever shreds of legitimacy it has managed to retain.

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<sup>867</sup> See Siegel, *supra* note 16, at 24, 26 n.129 (noting that as Special Assistant to the Attorney General, John Roberts argued in 1982 that if section 2 of the VRA proscribed laws that result in a disparate impact, it would impose a “quota system in electoral politics,” *id.* at 24 (quoting Memorandum from John Roberts, Special Assistant to the Att’y Gen., to the Att’y Gen., Talking Points for White House Meeting on Voting Rights Act (Jan. 26, 1982), <https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf> [<https://perma.cc/2FDT-BYS5>]), and explaining that in 1984, as chair of the Equal Employment Opportunity Commission, “Clarence Thomas attacked then-prevailing disparate impact standards on the grounds that they relied on a presumption that statistical disparities reflected discrimination when the disparity might reflect group differences,” *id.* at 26 n.129).

<sup>868</sup> See Harris & West-Faulcon, *supra* note 791, at 81, 82 (arguing that *Ricci*’s holding that an employer’s efforts to avoid disparate impact liability ran afoul of Title VII’s proscription of disparate treatment “reflects a doctrinal move towards converting efforts to rectify racial inequality into [a] white racial injury,” *id.* at 81, and that the case “turn[s] the remedies into racial injuries,” *id.* at 82).

<sup>869</sup> See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003) (noting the “very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection”); see also Primus, *supra* note 790, at 1350 (“From the traditional perspective of antidiscrimination law, the idea that disparate impact remedies are as a conceptual matter disparate treatment problems is a radical departure.”).

This Foreword has uncovered a number of features of the Roberts Court's approach to racism that allows us to make some predictions about rhetorical moves that we might expect to see in the Court's decision next Term in *Harvard*. *Bruen* and *Dobbs* instruct us that if the *Harvard* majority opinion evinces a concern about black injury, it will be in the service of conservative goals — that is, a holding that race-based affirmative action programs run afoul of the Equal Protection Clause and Title VI. Thus, we might expect some mention of the harm that conservative actors have argued is inflicted on people of color by race-based affirmative action — the purported stigma that accompanies the assumption that a black or Latinx student would not have been admitted to a college or university but for the explicitly race-conscious admission program,<sup>870</sup> or the disincentive against scholastic achievement that such programs are imagined to produce for black students.<sup>871</sup>

*Bruen* and *Dobbs* also instruct us that the Court will embrace an originalist interpretation of the Constitution only if it leads to the result that the Court would like to reach.<sup>872</sup> Thus, unless the Court can contrive an argument that facially race-conscious programs are inconsistent with the Equal Protection Clause's original public meaning in 1868 — a contrivance that is not outside the realm of possibility, given the Court's results-oriented analysis of history in *Bruen* and *Dobbs*<sup>873</sup> — we should not expect originalism to make an appearance in the Court's decision in *Harvard* next Term.

Outside of *Harvard*, we should expect the Court to continue its refusal to recognize racial discrimination in facially race-neutral laws that burden people of color. This is true even though the *Dobbs* majority implicitly accepted Justice Thomas's invitation to "save" black people from the racial discrimination — indeed, a "genocide" — enabled by facially race-neutral laws that permit abortion.<sup>874</sup> This is to say: the Court is perfectly capable of recognizing that racial discrimination can result from many different processes and that racial disenfranchisement is not just the result of laws that are motivated by discriminatory intent. The

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<sup>870</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) ("When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma . . .").

<sup>871</sup> *Id.* at 377 ("[T]he very existence of racial discrimination of the type practiced by the Law School may impede the narrowing of the LSAT testing gap. . . . As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score.")

<sup>872</sup> See, e.g., *supra* pp. 37–38, 141–42 (discussing Justice Alito's selective and inconsistent adherence to originalism); *supra* p. 61 (discussing Justice Thomas's selective and inconsistent adherence to originalism).

<sup>873</sup> See *supra* Part I, pp. 34–85; see also Siegel, *supra* note 55, at 49–55 (discussing the selective and decontextualized history provided in the *Dobbs* majority opinion and concluding that "[i]n *Dobbs*, originalist judges ventriloquize historical sources," *id.* at 55, and "[i]t is history that expresses judicial preferences as the nation's traditions," *id.*).

<sup>874</sup> See *supra* p. 64.

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Court simply refuses to deploy this insight in the service of undoing racial stratification in the nation.

The October Term 2021 has revealed the Court to be the most political of institutions — differing from Congress and the Executive only insofar as the Court still feels obligated to provide reasons for its outputs. The decisions that the Court will hand down over the coming Terms will be exemplars of motivated reasoning. The task of Court observers will be to identify this motivated reasoning and bring it to light. The hope is that we might help all who are willing to see that the Court is dangerously complicit in the deeply antidemocratic direction in which this nation is heading.