RACISM, ABOLITION, AND HISTORICAL RESEMBLANCE

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INTRODUCTION

Professor Khiara Bridges's Foreword[1] makes several stunning contributions to unlocking the mystifying logic behind the Roberts Court's jurisprudence on racial discrimination, which has consistently stymied, and even reversed, progress toward racial justice. First, Bridges identifies the test the Roberts Court uses to determine which racial injuries count as violations of the U.S. Constitution. To qualify as racial discrimination, harms experienced by people of color today must resemble those that white supremacists inflicted on people of color in the pre–Civil Rights Era. The challenged law or policy must bear some "resemblances" to techniques of racial disenfranchisement that existed "in the bad old days," Bridges explains.[2] I will call this crucial constitutional standard the historical-resemblance test. The crux of Bridges's critique of the Court's racial jurisprudence is that it deploys the historical-resemblance test to deny remedies for racial injuries to nonwhite people when it finds their claims are not reminiscent enough of slavery and Jim Crow, while failing to require any historical resemblance at all to remedy white people's racial injuries. Instead, the Court has recognized "new" types of racial harms experienced by white people as constitutional violations simply because those harms feel like racism to the white claimants.

By examining which claims the Court has recognized as racial injuries, Bridges reveals a second important and surprising aspect of the Court's discrimination jurisprudence. Bridges demonstrates that the Court is more likely to find constitutionally prohibited race discrimination under the Second Amendment, Sixth Amendment, and the Due Process Clause than under the Equal Protection Clause. The payoff of Bridges's analysis is in directing our attention to the full scope of the Roberts Court's approach to racism, tying together multiple seemingly disconnected domains of constitutional law. Bridges points out further that the Court is not engaging in a value-neutral determination when it remedies only instances of racial discrimination that remind it of "old-school" racism.[3] "A theory lies beneath the Roberts Court's racial

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[1] Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

[2] *Id.* at 27.

[3] *Id.* at 32.

common sense," writes Bridges.[4] "It is theory masquerading as no-theory."[5] Underlying the Roberts Court's analysis of what counts as a racial injury is its theory of what counts as racism.

Picking up on Bridges's insight that the Court's historical-resemblance test is governed by a theory of racism, it is constructive to delve into the relationship between theories of racism and reference to history as an analytical tool. Bridges's examination of the Court's deployment of the historical-resemblance test to deny people of color's racial-injury claims suggests that the Court's aim is not to examine history to promote racial justice; rather, its aim is to exploit a narrow historical narrative to maintain the status quo. Thus, the problem with the historical-resemblance test is not so much that the Court looks back to racial injustice during the pre–Civil Rights Era as how the Justices utilize their reference to history as an analytical tool. In other words, it is not the examination of resemblances between current racial injuries and those that occurred prior to the passage of civil rights laws that supports white supremacy. It is the Court's theory of racism that obscures the way in which white supremacy gets reproduced between the slavery and Jim Crow regimes and today. Indeed, it is the belief that the civil rights laws effected a clean break between the "bad old days" and today's supposedly raceless society that is at the heart of the Court's racial common sense. The reason why the Roberts Court's historical-resemblance test produces outcomes that impede rather than advance racial justice is because the Justices apply it according to a theory of racism that ignores the persistence of white supremacist structures after the civil rights revolution.

I want to complicate the relationship between theories of racism and historical resemblance even more by examining the reference to pre–Civil Rights history as an analytical means of challenging the current racial order. Bridges correctly calls us 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."[6] While Bridges focuses on the types of injuries that the Court misses by applying its historical-resemblance test, looking to the origins of today's seemingly race-neutral laws in pre–Civil Rights history can also help to shine a light on the continuities between racial injuries of the past and racial injuries these laws currently produce. Such an analysis can support the case not only for remedying contemporary racial injuries, but also for abolishing the laws, policies, and systems that cause them. Examining resemblances between current and past racial injuries is an analytical tool that can be used either to redress — and stop — harms caused by structural racism or to obscure them, depending on the theory of racism that underlies the analysis.

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[4] *Id.* at 26.

[5] *Id.*

[6] *Id.* at 104 (emphasis added).

In my Response, I explore the significance of historical-resemblance analysis in racial injury claims, elaborate the role that theories of racism play in reference to history as an analytical tool, and defend an analysis of the connections between pre–Civil Rights and post–Civil Rights forms of white supremacy as a compelling way to address current racial injuries. To further this project, I examine two radically different approaches to pre–Civil Rights history — the Roberts Court's historical-resemblance test, as explicated by Bridges, and prison abolitionists' reference to slavery and Jim Crow, which I discussed in my 2019 Supreme Court Foreword.[7] While abolitionists have analyzed the historical continuities between the modern prison-industrial complex and past white supremacist regimes, the Roberts Court uses its historical-resemblance test to erase them. At the heart of these radically divergent approaches to historical resemblance is the stark difference between their theories of racism, racial capitalism, and white supremacy. Grounded in an abolitionist theory of racism, referring to history as an analytical tool can deepen criticism of the Roberts Court's approach to racial injuries, bolster the call to abolish current systems that reproduce structural racism, and inspire contemporary movements for radical social change.

I. THE ROBERTS COURT'S EXPLOITATION OF HISTORY

Bridges persuasively points to a number of cases where the Court denied claims of racial discrimination by imposing a historical-resemblance test. Bridges's analysis shows that the Court exploits pre–Civil Rights history in a variety of ways to reach decisions that support the status quo and impede racial justice. Examining the Court's differing — and sometimes contradictory — uses of history clarifies that it is not the search for resemblances to pre–Civil Rights racism by itself that results in decisions that thwart racial discrimination claims, but the Court's view of the relationship between racist ideologies, structures, and practices from the past and racial injuries that persist today.

A. Distancing Today's Racial Injuries from Yesterday's Racist Motivations

A powerful way to dismiss contemporary racial injuries is to distinguish the benign motivations of their modern-day perpetrators from the blatantly contemptible motivations of historical racist actors. Pointing to the atrocities perpetrated by enslavers and eugenicists has proven to be an effective strategy for excusing today's racist practices, which seem to pale by comparison. The Roberts Court used this ploy in *Trump v.*

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[7] Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

Hawaii[8] when it stated that "*Korematsu* [*v. United States*[9]] has nothing to do with this case."[10] As Bridges points out, the majority "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."[11] The Court distinguished the internment order at issue in *Korematsu* from President Trump's Muslim ban on grounds that the former was a "morally repugnant order" that required the "forcible relocation of U.S. citizens to concentration camps," whereas the latter had merely denied "certain foreign nationals the privilege of admission."[12] The Court used the historical-resemblance test to excuse the racial injury inflicted on Muslims by framing the contemporary policy as less egregious and as explainable apart from racial animus.

The Roberts Court's comparison of a past racist policy with a current race-neutral one borrows from a familiar way of whitewashing racial science. In *Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century*, I pointed to a similar tactic of referring to historic scientific racism to justify the continued use of false biological concepts of race in scientific research.[13] After World War II, when mainstream science disavowed eugenics, which had become associated with the Nazi regime, racial scientists in the United States began to distinguish the ideological use of race for repressive purposes from their use of biological race for legitimate research. For these scientists, "the emerging civil rights ethos did not make racial science untenable," I noted.[14] "Rather, it made it imperative for scientists to detach their study of biological race from societal racism."[15] Contemporary scientists deflect criticism of their racial research by arguing that they are not applying biological race concepts to dehumanize and subjugate people like the Nazis did.[16] Defining scientific racism as the extreme and exceptional use of race to support racist ideas characterizes the problem as the corrupt misuse of racial thinking and absolves scientists who promote racial thinking without overtly racist motivations.[17] By distinguishing their study of race-based biological difference from pre–World War II scientific racism, post–World War II

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[8] 138 S. Ct. 2392 (2018).

[9] 323 U.S. 214 (1944).

[10] Trump v. Hawaii, 138 S. Ct. at 2423.

[11] Bridges, *supra* note 1, at 119.

[12] Trump v. Hawaii, 138 S. Ct. at 2423.

[13] DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 27, 43–49 (2011); *see also* JENNY REARDON, RACE TO THE FINISH: IDENTITY AND GOVERNANCE IN AN AGE OF GENOMICS 26–31 (2004).

[14] ROBERTS, *supra* note 13, at 47.

[15] *Id.*

[16] *Id.* at 292–95.

[17] *See id.* at 27.

scientists have been able to perpetuate racial concepts that were invented to support white supremacy and settler colonialism and that continue to cause racial injuries today.

B. Disconnecting Today's Racial Injuries from Yesterday's Racist Laws

Bridges also highlights the Court's use of the historical-resemblance test to disconnect the racial injuries suffered by people of color today from the laws and policies that officially upheld the white supremacist power structure prior to the civil rights revolution. Her discussion of the Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*,[18] striking down a New York gun-licensing law for violating the Second Amendment, offers an opportunity to interrogate why the Court recognizes some historical resemblances while failing to see others. Bridges observes that the Court "perceived a racial injury in black people's disarmament by gun regulations like those at issue in the case" while it "refused to recognize that allowing guns to go unregulated will inflict a racial injury on black people."[19] The Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, and other organizations filed an amicus brief in *Bruen* that also used a historical analysis to contest the constitutional validity of New York's gun regulation.[20] Pointing to the historical use of criminal law to contain black neighborhoods, they argued that the New York law would give police officers greater leeway to arrest black New Yorkers.[21] As Bridges observes, their brief "suggests that the New York licensing regime is a racist holdover from the pre–Civil Rights Era," which the legislature passed "to specifically disarm black citizens and Italian immigrants."[22] Bridges also notes that "[p]eople 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."[23]

What distinguished the amici's argument against the gun-control measure from the Court's rationale for striking it down was not the Court's reliance on a historical-resemblance analysis, for both looked back to the pre–Civil Rights Era for similarities between the impact of gun regulation on black people then and now. Rather, their historical analyses were grounded in differing understandings of the relationship between gun regulation and white supremacy across historical periods. The amici referred to history to forecast and forestall the New York

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[18] 142 S. Ct. 2111 (2022).

[19] Bridges, *supra* note 1, at 33.

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

[21] *Id.* at 5.

[22] Bridges, *supra* note 1, at 74 n.276 (citing Defenders Brief, *supra* note 20, at 5).

[23] *Id.* at 76 n.287.

law's facilitation of policing against black residents. By contrast, the Court cut off the relevance of black freedom struggles to its analysis by shifting its focus to contemporary gun violence in black neighborhoods. The Court's aim was to protect the interests of gun owners, not to further black rebellion against white supremacy. Not only are gun owners disproportionately white but the popularity of gun ownership in the United States is stoked by patriarchal notions of masculinity combined with white people's irrational fears of black violence — a far cry from supporting black people arming themselves in pursuit of liberation.[24]

Kansas v. Glover,[25] which expanded the constitutionally permissible power of police officers to stop vehicles,[26] provides another example of conflicting approaches to resemblances between forms of white supremacy over time. Relying on Justice Sotomayor's dissent in *Glover*,[27] Bridges argues that the vehicle stops that the majority found to be constitutional inflict grievous racial injuries on people of color, who are disproportionately pulled over by police and subjected to "state detention, coercion, and subjugation."[28] Bridges attributes the majority's refusal to remedy these injuries from vehicle stops to their failure to "remind the Court of racial disenfranchisement carried out during the pre–Civil Rights Era."[29] While it is true that the Court failed to see any resemblance, scholars have traced oppressive policing of black people such as pretextual vehicle stops to slave patrols that monitored and intimidated enslaved people and to the Black Codes enacted after the Civil War to criminalize black people's movements.[30] In fact, the practice of police stopping and arresting black drivers as they go about their everyday lives bears a striking resemblance to police officers stopping and arresting newly emancipated black people for appearing on the street simply on account of their race. As I summarized in my Foreword, "[r]acialized terror that bridged slave patrols, lynchings, and police whippings remained a feature of policing in the post–Civil Rights Era criminal punishment system."[31]

Similarly, Bridges notes that the nonunanimous jury rule, which the Court considered in *Ramos v. Louisiana*,[32] "continues to work precisely as the white supremacists who crafted it wanted it to work."[33] She

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[24] *See* JONATHAN M. METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND 41–57 (2019); CAROLYN LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE 1–17 (2017).

[25] 140 S. Ct. 1183 (2020).

[26] *See id.* at 1186.

[27] *Id.* at 1194 (Sotomayor, J., dissenting).

[28] Bridges, *supra* note 1, at 106.

[29] *Id.* at 109.

[30] See Roberts, *supra* note 7, at 20–29, and sources cited therein.

[31] *Id.* at 24.

[32] 140 S. Ct. 1390 (2020).

[33] Bridges, *supra* note 1, at 95.

criticizes the *Ramos* majority for decoupling "the racist origins of the rule from the work that the rule presently does to burden black people."[34] Here we see that it is helpful to recognize the pre–Civil Rights origins of the nonunanimous jury rule to understand why and how it inflicts a racial injury today. The Court's jurisprudential tactic of disconnecting the rule's origins from its current operation facilitates "[t]he majority's deafening silence about the present-day effects of the nonunanimous jury rule."[35] Thus, although the Roberts Court deploys a historical-resemblance test to deny remedies for racial injuries by disconnecting them from pre–Civil Rights Era laws, a historical analysis centered on connecting white supremacist practices across historical periods provides support for racial-injury claims.

C. The Court's Invention of History

A third strategic use of historical-resemblance analysis is to weave a distorted narrative of history — or simply to invent a history that never happened — in a way that supports the status quo. In *Dobbs v. Jackson Women's Health Organization*,[36] the majority adopted the false portrayal of resemblance between eugenics and abortion, previously fabricated by Justice Thomas, to support reversing *Roe v. Wade*'s[37] protection of reproductive freedom under the Fourteenth Amendment. Bridges discusses Justice Thomas's concurrence in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*,[38] which promoted "the idea that black people are the objects of a plot that aims to annihilate the black race through abortion" by tracing the higher rates of abortion in black communities today back to Margaret Sanger's placement of birth-control clinics in black neighborhoods during the eugenics era.[39] Justice Thomas is simply wrong on the history of eugenics. As Bridges points out, Sanger opposed abortion and "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."[40] Equally important is Justice Thomas's underlying misunderstanding of the relationship between birth control and eugenics, on one hand, and birth control and reproductive freedom, on the other. Governments have implemented birth-

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[34] *Id.* at 96 (citing Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 708 (2022)).

[35] *Id.*

[36] 142 S. Ct. 2228 (2022).

[37] 410 U.S. 113 (1973).

[38] 139 S. Ct. 1780 (2019) (per curiam).

[39] Bridges, *supra* note 1, at 59 (citing *Box*, 139 S. Ct. at 1788 (Thomas, J., concurring)); *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025 (2021); DOROTHY ROBERTS, KILLING THE BLACK BODY 57–89 (1997).

[40] Bridges, *supra* note 1, at 60 (citing Murray, *supra* note 39, at 2040); *see also* ROBERTS, *supra* note 39, at 79–89 (discussing Sanger's relationship with eugenicists and black people's advocacy for greater access to birth control).

control policies in the United States and globally both to advance individual freedom and societal equality and to regulate marginalized groups and devalue their procreation. For instance, eugenicists used compelled sterilization, which permanently deprives individuals of the capacity to bear children, as their preferred instrument of population control.[41] Similarly, because abortion affords people greater autonomy over their reproductive lives, restrictions on abortion intensify social, economic, political, and health inequities caused by compelled pregnancies.[42]

Black women have suffered the brunt of both types of birth control policies — those that coerce sterilizations and those that coerce births. Black women have been subjected disproportionately to various state measures that devalue their childbearing, including mass sterilization abuse under federally funded programs,[43] prosecutions for being pregnant and using drugs,[44] and welfare policies that deter recipients from having additional children.[45] Black women also disproportionately experience harm from compelled pregnancies because they are the most likely to seek abortions and the most likely to die from pregnancy-related causes.[46] Justice Thomas's equation of eugenicist population

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[41] *See* PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 41–87 (1991).

[42] *See generally* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 128–54 (2017); DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING — OR BEING DENIED — AN ABORTION 163–98 (2020); KATHRYN KOLBERT & JULIE F. KAY, CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM 6–19 (2021).

[43] *See generally* LINDA VILLAROSA, UNDER THE SKIN: THE HIDDEN TOLL OF RACISM ON AMERICAN LIVES AND ON THE HEALTH OF OUR NATION 34–39, 44–49 (2022).

[44] *See generally* ROBERTS, *supra* note 39, at 150–201; Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299 (2013).

[45] *See generally* ROBERTS, *supra* note 39, at 202–45. On the impact of oppressive reproductive-health policies on other women of color, see generally BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY (2019); ELENA R. GUTIÉRREZ, FERTILE MATTERS: THE POLITICS OF MEXICAN-ORIGIN WOMEN'S REPRODUCTION (2008); JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE FREEDOM (Haymarket Books 2016) (2004); Brianna Theobald, Opinion, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME (Nov. 28, 2019, 11:47 AM), https://time.com/5737080/native-american-sterilization-history [https://perma.cc/WWN5-7L93].

[46] *See* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER INST. (Aug. 6, 2008), https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture [https://perma.cc/N44Q-28LP]; Terri-ann Monique Thompson et al., *Racism Runs Through It: Examining the Sexual and Reproductive Health Experience of Black Women in the South*, 41 HEALTH AFFS. 195, 195 (2022); Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely Bear the Brunt of Abortion Limits*, TEX. TRIB. (June 30, 2022, 6:00 PM), https://www.texastribune.org/2022/06/30/texas-abortion-black-women [https://perma.cc/Z9YW-HFRT]; Anne Branigin & Samantha Chery, *Women of Color Will Be Most*

control with state protection of the right to abortion turns the impact of these policies on reproductive freedom — especially black women's reproductive freedom — on its head.

Moreover, Justice Thomas's argument relied on racist and sexist stereotypes about black women that have circulated since their enslavement to justify enacting coercive policies aimed at controlling their childbearing. In *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, first published in 1997, I elaborated a "long history of regulation of Black women's bodies — a history that was crucial to reproductive and racial politics in America."[47] The first laws enacted in the colonies treated black women as innately unrapeable and their children as innately enslaveable, laying the foundation for resilient notions of black women's hypersexuality and hyperfertility.[48] The belief that black women pass down a depraved lifestyle to their children persisted after the passage of the civil rights laws[49] through the circulation of popular icons of black maternal unfitness, such as the Welfare Queen,[50] and social scientific research, such as Daniel Patrick Moynihan's 1965 report *The Negro Family: The Case for National Action*,[51] fueling harsh welfare and law enforcement policies that continue to target black communities.[52]

In my preface to *Killing the Black Body*'s twentieth-anniversary edition, I discussed how, in February 2010, black women's higher abortion rates became a contentious tool of an antiabortion campaign. The campaign placed more than one hundred billboards nationwide accusing black women who sought abortions of genocide.[53] A giant billboard in New York's SoHo neighborhood displayed the image of a six-year-old black girl beneath the words: "THE MOST DANGEROUS PLACE

Impacted by the End of Roe*, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe [https://perma.cc/HD2F-AA4X].

47 ROBERTS, *supra* note 39, at xi (Vintage Books 2d ed. 2017).

48 *See id.* at 23 (1997); Dorothy Roberts, *Race*, *in* THE 1619 PROJECT: A NEW ORIGIN STORY 45, 49–54 (Nikole Hannah-Jones et al. eds., 2021); ANGELA Y. DAVIS, WOMEN, RACE & CLASS 6–7 (Vintage Books 1983) (1981); DEBORAH GRAY WHITE, AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH 28–29 (rev. ed. 1999); RACHEL A. FEINSTEIN, WHEN RAPE WAS LEGAL: THE UNTOLD HISTORY OF SEXUAL VIOLENCE DURING SLAVERY 16–47 (2019); Thelma Jennings, *"Us Colored Women Had to Go Through a Plenty": Sexual Exploitation of African-American Slave Women*, 1 J. WOMEN'S HIST. 45, 65–66 (1990).

49 *See generally* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 1–19 (2000).

50 *See generally* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 57–64 (2004).

51 OFF. POL'Y PLAN. & RSCH., U.S. DEPT. OF LAB., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965); *see also* HANCOCK, *supra* note 50, at 57–59 (discussing the connections between Moynihan's report and the "Welfare Queen" trope).

52 *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 63–179 (2016).

53 ROBERTS, *supra* note 39, at xiv–xv (Vintage Books ed. 2017).

FOR AN AFRICAN AMERICAN IS IN THE WOMB."[54] I discredited the false narrative that Justice Thomas later adopted in his *Box* concurrence by emphasizing the hypocrisy in its disparaging message about black women.

Far from grasping the dangers of the eugenics era, the abortion-as-black-genocide argument distorted that movement's history and, in fact, promoted its racist ideology. The billboards' statements declaring black women's wombs unsafe recalled eugenicist rhetoric advocating sterilization of women deemed unfit to bear children.[55] The antiabortion rhetoric diverted attention from the structural causes of racial disparities in abortion rates — poverty, lack of access to contraception, and inadequate sex education — that result in unwanted pregnancies. Instead, the campaign demonized black women by blaming them for "genocide" against their own communities and by suggesting they are incapable of making their own reproductive decisions.[56]

SisterSong Women of Color Reproductive Justice Collective responded to the billboard campaign by forming the Trust Black Women partnership with other reproductive-justice organizations, including SPARK Reproductive Justice NOW!, Sister Love, and Planned Parenthood of the Southeast Region.[57] Members of the partnership posted billboards in several cities with the competing message: trust black women to make decisions for themselves, their families, and their communities. These billboards remind us, yet again, that Justice Thomas invented a resemblance between the eugenicist promotion of birth control and access to abortion care to impede, not protect, black women's reproductive autonomy.[58]

II. COMPETING THEORIES OF RACISM

This review of the ways the Court uses the historical-resemblance test to deny remedies for racial injuries suggests that it is not the reference to pre–Civil Rights racism itself that supports maintaining the

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[54] Lisa Eadicicco & Larry McShane, *Anti-abortion Billboard by Life Always Goes Up in SoHo, Riles Up Pro-choice New Yorkers, Politicians*, DAILY NEWS (Feb. 23, 2011, 8:22 PM), https://www.nydailynews.com/new-york/anti-abortion-billboard-life-soho-riles-pro-choice-new-yorkers-politicians-article-1.138682 [https://perma.cc/M46Q-ZQT9].

[55] *Compare, e.g.*, *id.*, *with* REILLY, *supra* note 41, at 86–87.

[56] ROBERTS, *supra* note 39, at xv (Vintage Books ed. 2017); *see also id.* at 98–103 (1997) (discussing debates among black people throughout the twentieth century over the question of whether birth control is a form of black genocide).

[57] *See Centering Black Women's Issues & Leadership*, SISTERSONG, https://www.sistersong.net/centering-black-womens-issues-leadership [https://perma.cc/58C4-C56U]; *Our History*, TRUST BLACK WOMEN, https://trustblackwomen.org/our-roots [https://perma.cc/N8L9-JVQC].

[58] Justice Thomas's invented narrative also ignores the long history of white supremacist support for criminalizing abortion to increase births of white babies. *See* Alex DiBranco, *The Long History of the Anti-abortion Movement's Links to White Supremacists*, THE NATION (Feb. 3, 2020), https://www.thenation.com/article/politics/anti-abortion-white-supremacy [https://perma.cc/Y9H3-JZ6K].

status quo. Rather, an underlying theory of racism dictates the Court's view of the relationship between pre–Civil Rights racism and current racial injuries. Probing the Court's theory of racism helps not only to understand its historical-resemblance test but also to suggest a radically different view of pre–Civil Rights racism and the justification for remedying racial injuries.

A. Colorblindness

Examining why the Roberts Court homes in on the Civil Rights Era as the lodestar of its analysis is the key to understanding the theory of racism that undergirds its historical-resemblance test. The Court makes the Civil Rights Era the dividing line in its constitutional jurisprudence because it subscribes to the view that the landmark decision in *Brown v. Board of Education*[59] and the passage of the 1960s civil rights acts vanquished government racism in America.[60] According to this view, apart from rare acts of overt prejudice by individual officials, the new civil rights ethos has purged the government of its white supremacist past.[61] Any lingering instances of bigotry are aberrational vestiges of the pre–Civil Rights Era that stand out for their resemblance to racism during that bygone historical period.[62]

The Court's assumption that the civil rights revolution ended most instances of racism in America is especially evident in *Shelby County v. Holder*,[63] where the Court struck down a key provision of the Voting Rights Act[64] on grounds it was no longer needed to protect people of color against white supremacist barriers to political power.[65] But Bridges's analysis shows that this assumption permeates all of the Court's recent equal protection decisions. The Court's affirmative action opinions, for example, adopt a colorblind ideology holding that, because the civil rights laws put people of color and white people in positions of full equality, social policies that take race into account inflict

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[59] 347 U.S. 483 (1954).

[60] *See* Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334 (1988) (describing the view "that the goal of the civil rights movement — the extension of formal equality to all Americans regardless of color — has already been achieved" and that "[t]herefore, the vision of a continuing struggle under the banner of civil rights is inappropriate"); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–74 (1992).

[61] *See* Bridges, *supra* note 1, at 32.

[62] *See id.* at 23.

[63] 570 U.S. 529 (2013).

[64] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301).

[65] *See, e.g.*, *Shelby County*, 570 U.S. at 547 (observing that "[i]n the covered jurisdictions, '[v]oter turnout and registration rates now approach parity,'" "[b]latantly discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels," and pointing out that "[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years" (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (second alteration in original))).

a racial injury on white people.[66] The result is an equal protection jurisprudence that reverses the traditional *Carolene Products*[67] framework, which was based on a recognition of the disempowerment of racial minorities: "The Court typically strikes down race-conscious affirmative action measures as racially biased while upholding ostensibly race-neutral law enforcement practices that repress communities of color."[68]

Critical race theory contests colorblind ideology by demonstrating that racism didn't end with the Civil Rights Era victories.[69] Rather, racism is embedded in state institutions and systems that structurally disadvantage people of color without the need for de jure racial discrimination or overtly bigoted state actors.[70] Colorblindness is a conservative strategy to preserve white privilege in laws that appear race neutral on their face: "Much as Jim Crow racism served as the glue for defending a brutal and overt system of racial oppression in the pre–civil rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post–civil rights era," writes sociologist Eduardo Bonilla-Silva in *Racism Without Racists*.[71] A chief weapon of the current right-wing war against "critical race theory" is to deny that there are any historical resemblances to slavery and Jim Crow remaining in current U.S. institutions by literally erasing references to pre–Civil Rights Era oppression from classrooms and history books.[72]

The rule that racial injuries warrant remedy only when they remind the Court of racism practiced during the pre–Civil Rights Era is a recipe for disqualifying current racial injuries because racism is practiced differently today. Bridges notes that the Court selects an extremely narrow level of specificity at which it searches for likenesses between racial injuries inflicted before and after passage of the civil rights laws, looking

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66 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1766–77 (1993).

67 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

68 Roberts, *supra* note 7, at 87 (citing Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 44–51 (2013)).

69 *See, e.g.*, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xiii–xxxii (Kimberlé Crenshaw et al. eds., 1995); Angela Harris, *Foreword* to RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY, at xvi (3d ed. 2017); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011).

70 *See* STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION (1967) (coining the term "institutional racism"); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 3 (6th ed. 2021); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1456–57 (2016).

71 BONILLA-SILVA, *supra* note 70, at 4.

72 *See* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory [https://perma.cc/SK9G-YZ58]; Michael Powell, *In Texas, A Battle Over What Can Be Taught, And What Books Can Be Read*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html [https://perma.cc/N5EJ-9TJJ].

for "the identical techniques that white supremacists deployed in the days of Jim Crow to disenfranchise black people."[73] To be specific, the Court defines racism as overt acts of discrimination by individual state officials whose racially biased intentions are on display, ignoring how racism in the post–Civil Rights Era operates through institutions, systems, and structures. When a racial injury passes the Court's constricted historical-resemblance test, the resulting remedy puts only a miniscule dent in the status quo because it addresses only aberrational — and not structural — forms of discrimination. Bridges predicts that the Court's decision in *Peña-Rodriguez v. Colorado*,[74] for example, will have little impact on the no-impeachment rule's oppressive operation: "[I]n 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."[75] The reason the Court's historical-resemblance test is guaranteed to find very few constitutional violations is that modern racism is reproduced, not replicated.

B. The Historical Trajectory of White Supremacy

The Roberts Court's delinking of white supremacist practices before the Civil Rights Era from racial injuries that occur today, as well as critical race scholars' critique of colorblindness, suggests the importance of a historical analysis that ties together forms of white supremacy over time. Remedying racial injuries in the post–Civil Rights Era requires explaining how ostensibly race-neutral laws continue to subordinate people of color. The laws' impacts on the lives of people of color are racial *injuries* — harms that inflict a remediable injustice — not solely because they disproportionately disadvantage these groups but also because the laws help to maintain an unjust political hierarchy.[76] Without this historical understanding, the disadvantages that black people continue to experience even after their civil rights wins might appear to be the fault of their own deficiencies. The disadvantages might not seem like injuries at all; they might seem like self-inflicted wounds.

Examining the history of today's racial order reveals that white supremacy was not vanquished by abolitionist struggle, the Civil War, and the Reconstruction Amendments; rather, a campaign of white supremacist terror, laws, and Supreme Court decisions replaced Reconstruction with Jim Crow as the official regime. Likewise, white supremacy did not disappear after the defeat of Jim Crow and installment of civil rights laws; rather, a new white backlash crafted colorblind ideology as

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[73] Bridges, *supra* note 1, at 129.

[74] 137 S. Ct. 855 (2017).

[75] Bridges, *supra* note 1, at 102.

[76] Similarly, public-health experts distinguish between health *disparities* and health *inequities*. *See, e.g.*, COMM'N ON SOC. DETERMINANTS OF HEALTH, WORLD HEALTH ORG., CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH 1 (2008).

a way of obscuring and preserving racism embedded in legal institutions. In a process Professor Reva Siegel calls "preservation-through-transformation," the ideologies and policies that the state employs to maintain unequal racial regimes change as these regimes meet resistance.[77] Tracing the roots of today's facially neutral laws back to the slavery and Jim Crow regimes helps to explain why the injuries they inflict should be remedied. Rather than disconnect these injuries from the pre–Civil Rights forms of white supremacy, as the Roberts Court does, we should analyze the historical trajectory of white supremacy that connects race-neutral laws that produce current racial injuries to their foundation in prior white supremacist institutions.[78] Exposing this trajectory of white supremacy over historical periods explains how racial injuries are possible in a post–Civil Rights America.

I want to distinguish the historical analysis I am advocating for not only from the Roberts Court's historical-resemblance test, which denies remedies for current racial injuries, but also from two uses of pre–Civil Rights history to support remedies for racial injuries. First is the claim that current racial injuries should be remedied because they are caused by harms experienced by black people during the slavery era. The popular media and scientific journals have promoted the notion that black Americans have inherited trauma inflicted on their enslaved ancestors through some sort of biological or social mechanism.[79] One theory is that epigenetics, changes in gene expression, can cause the "intergenerational transmission of trauma" from enslaved Africans to their descendants.[80] This theory has not been scientifically validated and misrepresents the structural mechanisms by which white supremacy is

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[77] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113–14 (1997) (quoting Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996)).

[78] *See* Frank Edwards & Theresa Rocha Beardall, Presentation at Penn Population Studies Colloquium Series Fall 2022: The Durable Impacts of Historical Racial Institutions on Contemporary Family Policing and Family Separation (Sept. 13, 2022), https://www.youtube.com/watch?v=g2YQldfkUq4 [https://perma.cc/R7SW-SP4P] (arguing that historical trajectories of white supremacist and settler colonial projects during the Progressive Era impact contemporary policy outcomes); *see also* DYLAN RODRÍGUEZ, WHITE RECONSTRUCTION: DOMESTIC WARFARE AND THE LOGICS OF GENOCIDE 3, 7 (2021) (describing the notion of "White Construction" as "a historically persistent, continuous, and periodically acute *logic* of reform, rearticulation, adaptation, and revitalization," *id.* at 3, and white supremacy as "a *violence of aspiration* and *logic of social organization* that invents, reproduces, revises, and transforms changing modalities of social domination and systemic, targeted physiological and ecological violence," *id.* at 7).

[79] Janice Gassam Asare, *3 Ways Intergenerational Trauma Still Impacts the Black Community Today*, FORBES (Feb. 14, 2022, 6:08 PM), https://www.forbes.com/sites/janicegassam/2022/02/14/3-ways-intergenerational-trauma-still-impacts-the-black-community-today [https://perma.cc/D2KJ-TWAV]; Tori DeAngelis, *The Legacy of Trauma*, MONITOR ON PSYCH., Feb. 2019, at 36, 38.

[80] Lincoln Anthony Blades, *Trauma from Slavery Can Actually Be Passed Down Through Your Genes*, TEEN VOGUE (May 31, 2016), https://www.teenvogue.com/story/slavery-trauma-inherited-genetics [https://perma.cc/D5HB-5MBV].

reproduced in new forms that actively subordinate black people today.[81] Professor Saidiya Hartman captures this point beautifully in her description of the "afterlife of slavery," writing:

> "[I]f slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago."[82]

The harm that black people experience today is not the original trauma perpetrated by enslavers and inherited from enslaved ancestors; rather, black people are actively being harmed by structures and ideologies rooted in slavery and reproduced in new forms under current political conditions.

Second is the claim that current racial injuries should be remedied because white supremacists inflicted racial injuries in the past. In a recent *New York Times* opinion piece, *Focusing on Past Sins May Distract from Today's Injustices*, Jay Caspian Kang observes an "overabundance of history" in public discourse and criticizes "a new type of journalism in which historical research could take precedence over reportage."[83] Kang worries that so much emphasis on history is unnecessary to bring attention to current racial injuries and may even distract attention away from them. "History, in this moment, has an anesthetizing, diversionary effect," Kang writes.[84] "Most of the time, we can just process what happens as it happens and try to deal with the problem in front of us."[85] Far from diverting attention from the problems in front of us, the historical analysis I am advocating for spotlights their gravity by explaining their foundations in a trajectory of white supremacy. This type of historical analysis enhances our ability to deal with current injustices by tracing the roots and unmasking the designs of the policies, laws, and systems that perpetuate them.

Bridges suggests what differentiates varying uses of history as analytical tools in describing the Court's historical-resemblance test in *Ramos*: "*Ramos* reveals a Court that is prepared to engage in careful archaeological digs into laws to unearth *fossilized animus*."[86] By contrast, we can examine the relationship between pre–Civil Rights regimes and current racial injuries in precisely the opposite way. Rather than digging for ancient racial bias that has remained petrified over time, we

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[81] *See* Dorothy E. Roberts & Oliver Rollins, *Why Sociology Matters to Race and Biosocial Science*, 46 ANN. REV. SOCIO. 195, 202 (2020).

[82] SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007).

[83] Jay Caspian Kang, Opinion, *Focusing on Past Sins May Distract from Today's Injustices*, N.Y. TIMES, Aug. 26, 2022, at A18.

[84] *Id.*

[85] *Id.*

[86] Bridges, *supra* note 1, at 98 (emphasis added).

should investigate the design of policies, laws, and systems that reproduce white supremacy in new forms in our current society.

The majority's opinion in *Dobbs* provides a telling illustration. Bridges argues that the Court failed to recognize the disparate impact that abortion bans have on black women because "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."[87] Yet opening the theoretical lens to attend to white supremacy's historical trajectory reveals a striking connection between the exploitation of enslaved women's reproductive labor and the denial of reproductive autonomy imposed by abortion bans. Considering the violence inflicted on black women by compelling their pregnancies under bondage helps to elucidate the violence inflicted on pregnant people today by compelling them to give birth under abortion bans. Because enslavers had a vital economic stake in black women's childbearing, they made control of reproduction a central aspect of the slavery regime.[88] Enslavers claimed a property right in enslaved women's bodies and enslaved women's children from the moment of conception. A 1662 law passed by the Virginia Assembly giving the children born to black women and fathered by white men the status of their mothers permitted white men to enslave the children and to profit from raping enslaved women.[89]

Enslavers' legal control over black women's reproductive capacity and the law's failure to afford black women any legal right to bodily autonomy cast an archetype for laws that compel pregnant people to give birth. "Where is the precedent for the appropriation of a person's body by the state? Where did we learn in this country that the state could define a fetus as a distinct matter of law and property and state intervention?" asks historian Jennifer Morgan.[90] "We learned that from the long and violent history of hereditary racial slavery."[91] Although there are obvious distinctions between exploiting the reproductive labor of enslaved women and prohibiting abortion, there is also a profound resemblance in the denial of autonomy caused by compelled pregnancy.

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[87] *Id.* at 53.

[88] *See* ROBERTS, *supra* note 39, at 23; HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925, at 75–80 (1976); DAVIS, *supra* note 48, at 6–10; WHITE, *supra* note 48, at 98–104; JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 14, 35 (1985); Jennings, *supra* note 48, at 46.

[89] *See* Roberts, *supra* note 48, at 50; Jennifer L. Morgan, *Reproductive Rights, Slavery, and "*Dobbs v. Jackson," AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (Aug. 2, 2022), https://www.aaihs.org/reproductive-rights-slavery-and-dobbs-v-jackson [https://perma.cc/3LRY-ESWL].

[90] Morgan, *supra* note 89.

[91] *Id.*; *see also* Dána-Ain Davis, *Trump, Race, and Reproduction in the Afterlife of Slavery*, 34 CULTURAL ANTHROPOLOGY 26, 27–30 (2019).

We can fill out the trajectory of the foundational exploitation of enslaved women's reproductive labor with the history of policies punishing black women's childbearing throughout the twentieth century. Of particular significance is the prosecution of black women for being pregnant and using drugs launched during the so-called war on crack in the late 1980s.[92] Stoked by false depictions of "crack babies" as irredeemable monsters, the devaluation of black women's procreation turned the public health issue of drug use during pregnancy into a crime.[93] Over the ensuing decades, the fetal-personhood movement developed a unified legal strategy of criminalizing pregnancy outcomes while shutting down access to abortion services.[94] Legal theories crafted to prosecute black women set the stage for more widespread criminalization for fetal harm: by 2020, more than 1700 women were arrested, detained, or subjected to forced medical interventions because of pregnancy-related accusations.[95]

Over the same period, state legislatures enacted fetal-protection laws that criminalize pregnancy by giving fetuses the status of already-born children.[96] As states mounted legislative assaults on access to abortion, they constructed a legal apparatus to charge pregnant people criminally for putting their fetuses at risk, including for pregnancy losses. Women have been arrested both for stillbirths and for attempted abortions under the same fetal-protection laws.[97] By eliminating *Roe*'s protection of abortion before viability, which some courts considered a limitation on fetal-abuse prosecutions, *Dobbs* unleashed state power to criminalize

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[92] ROBERTS, *supra* note 39, at 150–201; MICHELE GOODWIN, POLICING THE WOMB 15–23 (2020).

[93] ROBERTS, *supra* note 39, at 153.

[94] *See* Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes [https://perma.cc/7CW4-GLLR]; Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70 (2015); Melissa Jeltsen, *The Coming Rise of Abortion as a Crime*, THE ATLANTIC (July 1, 2022), https://www.theatlantic.com/family/archive/2022/07/roe-illegal-abortions-pregnancy-termination-state-crime/661420 [https://perma.cc/7SBZ-5BCJ].

[95] *See Arrests and Prosecutions of Pregnant Women, 1973–2020*, NAT'L ADVOCS. FOR PREGNANT WOMEN (Sept. 18, 2021), https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020 [https://perma.cc/9ENA-UENS]; Paltrow & Flavin, *supra* note 44, at 300.

[96] *See* GOODWIN, *supra* note 92, at 28; Kate Zernike, *Is a Fetus a Person? An Anti-abortion Strategy Says Yes.*, N.Y. TIMES (Aug. 30, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/Z778-NPY4]; Erika Bachiochi, Opinion, *What Makes a Fetus a Person?*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/fetal-personhood-constitution.html [https://perma.cc/7L6Q-5CLP].

[97] Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-*Roe *America*, NPR (July 3, 2022, 5:27 AM), https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss [https://perma.cc/J7VS-YJF3].

pregnant people who fail to deliver a healthy baby.[98] Black women's historical experiences of reproductive violation help to illuminate both the intersection of laws that compel pregnancy and laws that criminalize pregnancy loss as well as why these intersecting policies inflict a racial injury. Black women experience a racial injury not only because they are more likely to seek abortions but also because they are more likely to be criminalized for their reproductive decisions.[99]

Bridges insightfully contrasts "the Court's ability to see racism in a 'genocide' made possible by *Roe* with its inability to see racism . . . made possible by *Dobbs*."[100] This contradiction in the Court's reasoning does not stem from looking to history as an analytical tool, but from basing its historical analysis on a theory of racism that ignores the historical white supremacist trajectory. Indeed, by looking to the long history of policies devaluing black women's childbearing, we can better understand the origins of the *Dobbs* decision, predict the racial injuries it will engender, and make a more compelling case for nullifying its holding. In short, a historical analysis grounded in a critical theory of racism and white supremacy supplies strong support for recognizing that abortion bans inflict a racial injury.

III. White Backlash and Historical Resemblance

Another significant insight Bridges provides in her Foreword is that the Roberts Court does not impose the historical-resemblance test on white people.[101] To provide a constitutional remedy, the Court does not require white claimants to demonstrate that their racial injuries bear any resemblance to those in the pre–Civil Rights Era.[102] Rather, white people need show only that they feel that they are victims of racism.

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[98] *See* Jia Tolentino, *We're Not Going Back to the Time Before Roe. We're Going Somewhere Worse*, New Yorker (June 24, 2022), https://www.newyorker.com/magazine/2022/07/04/we-are-not-going-back-to-the-time-before-roe-we-are-going-somewhere-worse [https://perma.cc/JWA9-XKFR]; Cary Aspinwall et al., *They Lost Pregnancies for Unclear Reasons. Then They Were Prosecuted.*, Wash. Post (Sep. 12, 2022, 6:22 PM), https://www.washingtonpost.com/national-security/2022/09/01/prosecutions-drugs-miscarriages-meth-stillbirths [https://perma.cc/P9WZ-MFLL].

[99] On the criminalization of black women generally, see Sarah Haley, No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity (2016); Andrea J. Richie, Invisible No More (2017); Beth E. Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation (2012). Prisons and detention centers, which incarcerate mostly women of color, deny reproductive freedom in multiple ways. *See* Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474, 1494 (2012); Elise Viebeck, *House Bars Abortions for Women in Immigration Detention Facilities*, The Hill (June 8, 2012, 5:41 PM), https://thehill.com/policy/healthcare/116575-house-bars-abortions-for-women-in-immigration-detention-facilities [https://perma.cc/PLM6-D2DJ]; Lauren Holter, *Detained Immigrant Women Are Facing a Grueling Abortion Struggle*, Bustle (May 10, 2017), https://www.bustle.com/p/detained-immigrant-women-are-facing-a-grueling-abortion-struggle-50388 [https://perma.cc/CRL2-C2NG].

[100] Bridges, *supra* note 1, at 64.

[101] *Id.* at 32.

[102] *See id.* at 133–68.

The Court's willingness to recognize racism against white people without finding historic resemblances, however, doesn't mean that a historical analysis is irrelevant to the Court's protection of white people's interests. Looking to history helps explain why the Court rules in favor of white claimants who seek protection against reverse discrimination and why the Court's reasoning is wrong.

In one sense, white people's racial injury claims are "new." Because the law explicitly protected white people during the slavery and Jim Crow eras, it would be incomprehensible for the Court to apply its narrow test — that injuries must be comparable to those inflicted in the past. White people's asserted racial injuries could not possibly mirror the violent, state-approved subjugation that black people experienced for most of U.S. history. In another sense, however, their claims are inextricably tied to the past. If we understand the historical trajectory of white supremacy, we can see how reverse discrimination claims are efforts to hold onto dominant status against threats brought about initially by the Civil War, which toppled chattel slavery, followed by the Civil Rights revolution, which toppled Jim Crow. White people don't claim to be harmed by people of color who have power to dominate them; they claim to be harmed by people of color who challenge white people's power to dominate. In the affirmative action cases, for example, the racial injury asserted by white plaintiffs is the violation of their entitlement to economic advantages based on their whiteness.[103] As Bridges puts it, "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."[104]

The appropriate historical comparison, then, is not to the type of racial injuries black people experienced under past white supremacist regimes but to white backlashes against the black liberation struggles that challenged those regimes. Just as today's racial injuries experienced by black people result from a white supremacist trajectory tracing back to slavery, so the racial injuries claimed by white people today result from a white supremacist trajectory tracing back to backlashes against Reconstruction and civil rights rebellion. Likewise, the current assault on critical race theory can be seen as a backlash to the global uprisings against police violence that erupted in the summer of 2020.

In her sobering discussion of the future of the Equal Protection Clause, Bridges warns that "facially race-neutral efforts designed to produce positive outcomes for people of color might be constitutionally suspect."[105] Because many white people perceive any gains in the status of people of color to be a loss of white privilege, they have been willing to oppose race-neutral policies, such as government-funded universal

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[103] *See* Harris, *supra* note 66, at 1766.
[104] Bridges, *supra* note 1, at 167.
[105] *Id.* at 162–63.

health care, that would benefit them because these policies would also benefit people of color.[106] Putting current complaints by aggrieved white people in this historical context clarifies why the Court recognizes them as racial injuries and why they do not constitute equal protection violations.

CONCLUSION: THE ABOLITIONIST SIGNIFICANCE OF HISTORY

White supremacy's historical trajectory has central significance in much of abolitionist theorizing. Many abolitionist scholars have connected the white supremacist practices of the pre–Civil Rights Era to modern policing, surveillance, and incarceration.[107] "Prison abolition theory has past, present, and future aspects, each of which animate activism simultaneously," I wrote in my Foreword.[108] "Prison abolitionists look back to history to trace the roots of today's carceral state to the racial order established by slavery and look forward to imagine a society without carceral punishment. Both are critical motivations for abolishing the prison industrial complex."[109] Abolitionists build a case for demolishing and replacing police and prisons in part by finding their foundational logics in past white supremacist regimes, helping to demonstrate that the current systems are designed to inflict racial injuries in the service of racial capitalism. Because its foundational logic remains the same even as its specific form mutates in response to current political conditions, the prison-industrial complex can't be reformed; it must be abolished.[110] Efforts to fix its problems, which are

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[106] METZL, *supra* note 24, at 11; Dorothy Roberts, *What Does Health Equity Require? Racism and the Limits of Medicare for All*, *in* WE OWN THE FUTURE: DEMOCRATIC SOCIALISM — AMERICAN STYLE 227 (Kate Aronoff et al. eds., 2020).

[107] *See, e.g.*, ABOLISHING CARCERAL SOCIETY 4 (Abolition Collective ed., 2018) (laying out a manifesto for "abolish[ing] a number of seemingly immortal institutions, drawing inspiration from those who have sought the abolition of all systems of domination, exploitation, and oppression — from Jim Crow laws and prisons to patriarchy and capitalism"); ANGELA Y. DAVIS, ABOLITION DEMOCRACY 35–37 (2005); Kim Gilmore, *Slavery and Prison — Understanding the Connections*, 27 SOC. JUST. 195, 195 (2000); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1185–99 (2015); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, in *Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1575, 1576 (2019); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–57 (2010) (tracing the history of mass incarceration from slavery to the 1990s).

[108] Roberts, *supra* note 7, at 19 (citing Rodríguez, *supra* note 107, at 1587).

[109] *Id.* (footnote omitted) (citing Rodríguez, *supra* note 107, at 1610–11).

[110] *See id.* at 42–43; PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 5 (2017); ALEX S. VITALE, THE END OF POLICING (2017); Rodríguez, *supra* note 107, at 1593; Mariame Kaba, *Prison Reform's in Vogue and Other Strange Things…*, TRUTHOUT (Mar. 21, 2014), https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things [https://perma.cc/T7LM-9LVJ]. I make a similar historical case for abolishing the child welfare system in DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD 85–124 (2022).

perceived as aberrational flaws, only legitimize and expand its oppressive power.[111]

While the Roberts Court uses its historical-resemblance test to erase the continuities between the modern prison-industrial complex and past white supremacist regimes, abolitionists highlight these continuities as grounds for ending racial harms. It is telling that Bridges and I both condemned the Court's decision in *Flowers v. Mississippi*[112] in our respective Forewords, despite the Court's reversal of Flowers's conviction for capital murder. Putting our analyses of *Flowers* in conversation helps to illuminate, on one hand, the errors in the Roberts Court's historical-resemblance test and, on the other hand, the advantages of a historical analysis grounded in abolitionist principles.

Bridges criticizes the Court's decision in *Flowers* for insisting on "break[ing] no new legal ground."[113] Its failure to expand racial justice by limiting prosecutorial power demonstrates again the Court's "particularly narrow understanding of what constitutes a racial injury," which relies on "racism that harkens back to the bad old days."[114] In my Foreword, I, too, denounce the Court's narrow reasoning in *Flowers*, by focusing on the historical function of all-white juries to uphold white supremacy. "Although the *Flowers* Court explicitly acknowledged that discriminatory jury selection violates the Fourteenth Amendment, its opinion lacked the features of the abolition constitutionalism that animated the Equal Protection Clause," I observed.[115]

> Missing from the Court's opinion is any discussion of the white supremacist logic behind keeping black people off juries, including the reason why West Virginia enacted the 1873 law at issue in *Strauder* allowing only white people to be jurors, and why prosecutors so routinely and relentlessly exclude black jurors from the capital trials of black defendants.[116]

By elaborating that history, I depart from Justice Kavanaugh's characterization of the problem with all white juries as "the harm that individual rogue prosecutors inflict on individual black citizens whom they wrongfully excluded from juries" and focus instead on "the way all-white juries have historically functioned as a legal institution to perpetuate racial subordination."[117]

An abolitionist approach to black people's historical resistance against white supremacy reveals another error in the Roberts Court's reasoning. The Court's historical-resemblance test ignores

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111 *See generally* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (2020); MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE. (2022).

112 139 S. Ct. 2228 (2019).

113 Bridges, *supra* note 1, at 91 (alteration in original) (quoting *Flowers*, 139 S. Ct. at 2251).

114 *Id.*

115 Roberts, *supra* note 7, at 96 (footnote omitted).

116 *Id.* (footnotes omitted).

117 *Id.* at 96–97.

the abolitionist activism and vision that animated the Fourteenth Amendment. In my Foreword, I argue for an abolitionist approach to the U.S. Constitution — an abolition constitutionalism — by examining antislavery abolitionists' interpretations of the Constitution and the partial incorporation of abolitionist principles into the Reconstruction Amendments.[118] The Roberts Court has carried forward a longstanding antiabolition jurisprudence that has obscured the abolitionist history of the Fourteenth Amendment and obstructed its transformative potential.[119] This disregard of abolition constitutionalism is particularly glaring in the majority's opinion in *Dobbs*. The Court's weak standard for the liberty guaranteed by the Fourteenth Amendment, applied to overturn *Roe* and deny protection for the right to abortion, bears no resemblance to the vision of slavery eradication, free labor, and equal citizenship that the Radical Republicans sought to install. Especially egregious is the *Dobbs* Court's failure to acknowledge the central importance of reproductive and family autonomy to the passage of the Reconstruction Amendments.[120] Abolitionists pointed to enslavers' exploitation of black women's bodies, control over black people's intimate lives, and separation of black families as among the worst evils the slavery system imposed.[121] They gained support for enacting the Reconstruction Amendments from poignant Congressional testimony by formerly enslaved people about the injuries they suffered from enslavers' domination of their reproductive decisions. In *Dobbs*, the Roberts Court eviscerated the history of struggle for reproductive justice that grounds the Fourteenth Amendment's meaning of liberty.

An abolitionist constitutionalism shows that referring to history as an analytical tool can support Bridges's criticism of the Roberts Court's historical-resemblance test and approach to racial injuries. As importantly, an abolitionist approach to the historical trajectory of white supremacy and resistance against it can inspire contemporary movements for radical change and bolster the call to dismantle current systems that reproduce racial injustice.

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[118] *See id.* at 54–71 (discussing the radical history and incorporation of abolitionist principles in the Reconstruction Amendments).

[119] *See id.* at 71–93 (discussing the Supreme Court's antiabolition jurisprudence).

[120] *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/NQ98-8B3L]; ROBERTS, *supra* note 110, at 95–96.

[121] *See generally* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997).