
COMPLICIT BIAS AND THE SUPREME COURT

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The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

— Justice Oliver Wendell Holmes (*Buck v. Bell*, 274 U.S. 200, 207 (1927)).

Complicit: involved with others in an illegal activity or wrongdoing.

— OXFORD AMERICAN DICTIONARY (3d ed. 2015).

Bias: prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

— OXFORD AMERICAN DICTIONARY (3d ed. 2015).

Complicit Bias:

(1) cognitive awareness of a past or present harm and conscious refusal to intercede with knowledge that the impact will prejudice another or others.

(2) to feel or show an inclination of protection toward an individual or group based on relationship, affinity, or group characteristics.

(3) further a harm through silence and inaction.

INTRODUCTION

Even as judges and courts serve as important safeguards and guardians against state and federal enforcement of unjust, harmful, and unconstitutional laws and discriminatory policies, they too may be fallible, weak in judgement and character, personally and professionally indifferent to systemic injustice, or corruptible.¹ As history demonstrates,

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¹ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173 (2012); see also Jodi Kantor & Jo Becker, *Former Anti-abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion->

judges may be complicit in perpetuating harms or furthering discrimination against vulnerable people, including racial minorities, women, individuals with disabilities, and people who identify as LGBTQ.² In other words, judges may possess cognitive awareness of a past or present harm against a vulnerable group and yet refuse to intervene to avert the continuance of harm or discrimination.

Judges may also refuse to acknowledge glaring injustices against vulnerable groups, denying appropriate relief related to past, ongoing, or future harms.³ Judges may inflict further harm through this purposeful inaction or silence. Ironically, legal scholarship generally sidesteps directly naming and developing theory to address these concerns.

As noted by Professor Jerry Kang: “[T]here is no inherent reason to think that judges are immune from implicit biases.”⁴ Highly visible United States Supreme Court cases, such as *Dred Scott v. Sandford*,⁵ *Buck v. Bell*,⁶ *Korematsu v. United States*,⁷ *Plessy v. Ferguson*,⁸ and *Bowers v. Hardwick*,⁹ among others, clarify this point. Judges are not immune to complicit, implicit, or explicit biases in the adjudicative

roe-wade.html [https://perma.cc/5C32-W6VS] (“In interviews and thousands of emails and other records . . . shared with The Times,” Reverend Rob Schenk, a former antiabortion leader, provided details regarding how he worked to “exploit the [Supreme Court’s] permeability,” gaining access to Supreme Court Justices “amenable to outreach” through “faith, through favors traded with gatekeepers and through wealthy donors to his organization, abortion opponents whom he called ‘stealth missionaries.’”); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

² See, e.g., *State v. Mann*, 13 N.C. (2 Dev.) 263, 267 (1829) (involving an enslaved Black woman who was not named in the legal dispute) (Ruffin, J., a slave owner himself) (ruling that the owner, leaser, or renter of an enslaved person is not liable for assault, battery, or even murder, in a case involving a slaver shooting and severely maiming a Black woman for her obstinance); *Minor v. Happersett*, 53 Mo. 58, 64–65 (1873) (finding that although the Constitution granted women citizenship, it did not provide them a right to vote); *Buck v. Bell*, 274 U.S. 200, 205, 207–08 (1927) (affirming the constitutionality of forced sterilization performed on an indigent, “feeble-minded,” female victim of rape); *Ward v. Ward*, 742 So. 2d 250, 251–52 (Fla. Dist. Ct. App. 1996) (affirming the grant of custody to a father who, although found guilty of murdering his first wife, successfully argued that his recently divorced wife was lesbian and thus unfit to rear their daughter); see also *State v. Paoella*, 554 A.2d 702, 708 (Conn. 1989) (holding that CONN. GEN. STAT. ANN. §§ 53a-70(a), 53a-70a(a) (West 1989), exonerate husbands who rape their wives).

³ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (5–4 decision) (“Against [a background in which many states have criminalized sodomy and still do], to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”); *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (5–4 decision) (holding that a death sentence was constitutionally imposed, despite robust empirical evidence that racial bias dramatically heightened the likelihood of sentencing the defendant to death if the perpetrator was Black and the victim white).

⁴ Kang et al., *supra* note 1, at 1146.

⁵ 60 U.S. (19 How.) 393 (1857) (involving an enslaved party).

⁶ 274 U.S. 200.

⁷ 323 U.S. 214 (1944).

⁸ 163 U.S. 537 (1896).

⁹ 478 U.S. 186 (1986).

process. The judicial process may be corrupted by partisanship and affected by external political or associational pressures and influence.¹⁰ Even if the rule of law operates as a safety valve to protect rights, at times it too is leaky and unreliable. Moreover, while the scholarship on implicit and explicit biases remains important, too little has been expressed about judges' complicit biases. These biases may incline judges toward advancing particular principles or causes based on their religious, political, or other beliefs and affiliations. This may happen even if the result is or appears outcome determinative, infringes on established rights, or perpetuates discrimination.

This Response takes up those concerns, building on the theory of complicit bias. As used here, complicit bias is comprised of three potentially overlapping elements. First, complicit bias can be shown where the actor is aware of a past, present, or future harm and does not intercede, with apparent knowledge that the impact will prejudice another. Second, the perpetrator shows an inclination to protect an individual or group based on relationship, affinity, or group characteristics. Third, the individual or institution furthers the harm through silence and inaction. The essay analyzes complicit bias by addressing the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.¹¹

As Professor Khiara Bridges observes in this year's Foreword,¹² in the Supreme Court's 2021 Term, the valves broke: the Supreme Court's conservative majority declared *stare decisis* inconsequential and incompatible with its evolving and conflicting originalist frameworks.¹³ Notably inconsistent, and lacking uniformity or coherence among themselves, the Court's conservative originalists extended their solicitude to states hungry to dismantle reproductive freedom.¹⁴ Justice Thomas warned that his aim included all privacy protections save interracial marriage,¹⁵ a feature of the Court's protection that safeguards marriages relevant to his personal life.¹⁶

According to Justice Thomas, "substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution,'" and as such, "in future cases [the Court] should reconsider all of [its] substantive due

¹⁰ David Russell, *Politicization in the Federal Judiciary and Its Effect on the Federal Judicial Function*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 21, 26 (2017).

¹¹ 142 S. Ct. 2228 (2022).

¹² Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

¹³ *Id.* at 53.

¹⁴ See Jesus Jiménez & Nicholas Bogel-Burroughs, *What Are Abortion Trigger Laws and Which States Have Them*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/25/us/trigger-laws-abortion-states-roe.html> [https://perma.cc/G634-8TYV].

¹⁵ See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

¹⁶ See Kelsey Reichmann, *Thomas Didn't Mention Interracial Marriage, And that's Worth Talking About*, COURTHOUSE NEWS SERV. (July 13, 2022), <https://www.courthousenews.com/thomas-didnt-mention-interracial-marriage-and-thats-worth-talking-about> [https://perma.cc/4AEM-UKKD].

process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.¹⁷ Citing his concurrences as legal authority, Justice Thomas claimed that “any substantive due process decision is ‘demonstrably erroneous.’”¹⁸ He urged that the Court has “a duty to ‘correct the error’” established in more than 150 years of precedent.¹⁹ Despite tepid assurances from Justice Alito’s majority opinion and Justice Kavanaugh’s concurrence that other fundamental privacy protections such as contraception access and marriage equality remain protected,²⁰ those guardrails are unreliable at best. Unfortunately, the risks for women’s health are not insignificant. Nor were they unforeseeable.

In her gripping Foreword, Bridges provides carefully argued insights. She reasons that the Court’s willingness to see race discrimination is cabined to “objective” or “common sense” race discrimination cases and outcomes.²¹ As she explains it, the laws that undergird the “objective” or “common sense” cases of racism represent “‘old-school’ racism”²² or artifacts from “the bad old days of the nation’s formal racial caste system.”²³ This “pre-Civil Rights Era racism”²⁴ involved objective sadism, overt cruelties, and insidious violations of the legal order by self-avowed white supremacists and nationalists unabashed in decrying school integration, opposing interracial marriage, and supporting “separate but equal” laws.²⁵ Bridges argues that this old-school archetype of racism problematically serves as the standard for the Roberts Court’s interpretation or methodology for adjudicating contemporary claims of racial discrimination, which no longer resemble the types of overt racial discrimination inflicted by Commissioner Theophilus Eugene “Bull” Connor, Governor Orval Faubus, or Governor George Wallace.²⁶ Worryingly, according to Bridges, if the old racism is the standard for understanding contemporary racism, then remediable racism will be confined to matters and frameworks of the old: “eugenics[,] . . . genocide[,] . . . racists disarming formerly enslaved black

¹⁷ *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2564 (2015) (Thomas, J., concurring in the judgment)) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

¹⁸ *Id.* (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in the judgment)).

¹⁹ *Id.* (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1984–85 (2019) (Thomas, J., concurring)).

²⁰ *See id.* at 2242–43 (majority opinion); *id.* at 2309 (Kavanaugh, J., concurring).

²¹ Bridges, *supra* note 12, at 24.

²² *Id.* at 32.

²³ *Id.* at 28.

²⁴ *Id.* at 27.

²⁵ *See id.* at 24–34; David Pilgrim, *What Was Jim Crow*, FERRIS STATE UNIV.: JIM CROW MUSEUM (2012), <https://www.ferris.edu/HTMLS/news/jimcrow/what.htm> [<https://perma.cc/6XVW-6XJE>].

²⁶ *See* Bridges, *supra* note 12, at 24–34; EQUAL JUST. INITIATIVE, “*Segregation Forever*”: *Leaders of White Supremacy*, in *SEGREGATION IN AMERICA* 70, 76, 78–79 (2018).

people to render them helpless and easily killed,” or similarly “a bigoted prosecutor trying to convict an innocent black man of murder.”²⁷

To expound upon Bridges’s theory, in the Roberts Court, remediable racism takes the shape of “an extraordinary problem” under “exceptional conditions.”²⁸ Yet this is relative. While Bridges very likely views the alarmingly high rates of Black maternal mortality and morbidity as an “extraordinary problem” occurring under “exceptional conditions,”²⁹ at least five Justices ostensibly do not.³⁰ Given this, what constitutes “extraordinary” and “exceptional” in the Roberts Court?

In the context of voting rights, the Roberts Court has recognized “literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like” as fitting into a remediable form of racial discrimination.³¹ Pre-Voting Rights Act³² physical abuses in the form of aggressive canines and law enforcement brandishing and using weapons against *potential* Black voters qualify as meeting the threshold of “extraordinary” and “exceptional.”³³ At the same time, continued voter suppression — in the form of systemic and persistent partisan gerrymandering,³⁴ racial gerrymandering,³⁵ mandated payment of fines and fees as a condition to

²⁷ Bridges, *supra* note 12, at 24.

²⁸ *Shelby County v. Holder*, 570 U.S. 529, 534, 557 (2013).

²⁹ See generally Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1279 n.228 (2020).

³⁰ Compare sources cited *infra* notes 277–79 and accompanying text, with *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240, 2243 (2022).

³¹ *Shelby County*, 570 U.S. at 537, 545–46.

³² Voting Rights Act of 1965, 52 U.S.C. §§ 10101, 10301–10702.

³³ See *Shelby County*, 570 U.S. at 544, 549; *Congress and the Voting Rights Act of 1965*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/voting-rights-1965> [<https://perma.cc/8QWU-M2ZF>] (“On March 7, 1965, peaceful voting rights protesters in Selma, Alabama[,] were violently attacked by Alabama state police. News cameras filmed the violence in what became known as ‘Bloody Sunday.’ Many Americans and members of Congress began to wonder if existing civil rights laws would ever be properly enforced by the local authorities.”); *Birmingham, Alabama, Protests*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/multimedia/birmingham-protests.html> [<https://perma.cc/PW3A-WNGA>].

³⁴ See Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), <https://www.americanprogress.org/article/impact-partisan-gerrymandering> [<https://perma.cc/G8F2-B83T>]; Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 12, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/YA7B-3QYR>].

³⁵ See LaQuita Howard, *Racial Gerrymandering and the 2021–2022 Redistricting Process*, LEAGUE OF WOMEN VOTERS (Mar. 31, 2022), <https://www.lwv.org/blog/racial-gerrymandering-and-2021-2022-redistricting-process> [<https://perma.cc/E9K7-9F9B>].

vote,³⁶ deceptive robocalls,³⁷ barriers to assistance,³⁸ voter intimidation,³⁹ strict voter identification laws, the broadscale and strategic closing of voter registration sites, ex-felon disenfranchisement laws, lack of early voting, and polling place relocations and reductions⁴⁰ — apparently falls short. Seemingly, this is because contemporary discrimination may fall short of the pain still viscerally felt from “Bull” Connor’s unleashing of fire hoses, dogs, and law enforcement on Black women and men.⁴¹

In *Shelby County v. Holder*,⁴² the Court did not deny the existence of voter discrimination, but it was unwilling to acknowledge modern racism in voting laws.⁴³ Notably, the Chief Justice in that majority opinion never used the term “racism” and barely referenced “racial discrimination” in a case where both were at the heart of the litigation before the Court.⁴⁴ Perhaps this is because the Roberts Court has latched on to the belief that “[o]ur country has changed.”⁴⁵ In other words, according to Bridges, “[t]he 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.”⁴⁶

This essay responds to Bridges’s compelling Foreword. In the Foreword, she makes several key claims. First, Bridges argues that the Roberts Court “stands willing to interpret various parts of the Constitution — the Second Amendment, the Sixth Amendment, and the

³⁶ See Malia Brink, *Fines, Fees, and the Right to Vote*, AM. BAR ASS’N (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/fines-fees-and-the-right-to-vote [<https://perma.cc/T5HJ-ABUB>].

³⁷ See, e.g., Tony Romm & Isaac Stanley-Becker, *Suspicious Robocall Campaign Warning People to “Stay Home” Spooks Voters Nationwide*, WASH. POST (Nov. 3, 2020, 5:48 PM), <https://www.washingtonpost.com/technology/2020/11/03/robocall-election-day> [<https://perma.cc/2MHG-9FV4>].

³⁸ See Fabiola Cineas, *Why It’s Now Illegal for Some Voters with Disabilities to Cast a Ballot*, VOX (Apr. 28, 2022, 2:10 PM), <https://www.vox.com/23043567/voters-with-disabilities-voting-barriers-restrictive-laws> [<https://perma.cc/AK5Q-PKP8>]; Press Release, Ctr. for Am. Progress, *Disabled Voters Still Face Systemic Barriers to Casting Ballots; CAP Report Urges Officials to Improve Access* (July 8, 2021), <https://www.americanprogress.org/press/release-disabled-voters-still-face-systemic-barriers-casting-ballots-cap-report-urges-officials-improve-access> [<https://perma.cc/28VL-WGDU>].

³⁹ See, e.g., Neil Vigdor & Jon Hurdle, *Election Officials Say Efforts to Intimidate Voters Are Widening*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/us/politics/voting-intimidation-democracy.html> [<https://perma.cc/C6PA-7XZU>].

⁴⁰ See *Block the Vote: How Politicians Are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), <https://wp.api.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020> [<https://perma.cc/5DV2-TCVH>].

⁴¹ Connor, *Theophilus Eugene “Bull,”* STANFORD UNIV.: MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/connor-theophilus-eugene-bull> [<https://perma.cc/54Z7-B5TZ>].

⁴² 570 U.S. 529 (2013).

⁴³ See *id.* at 536, 547–49, 551, 553–54.

⁴⁴ See generally *id.*

⁴⁵ *Id.* at 557.

⁴⁶ Bridges, *supra* note 12, at 24.

Due Process Clause of the Fourteenth Amendment — in ways that are responsive to nonwhite people’s racial injuries when they are reminiscent of the pre–Civil Rights Era.”⁴⁷ As such, the Roberts Court, “among other things,” was willing to “save[] black people from a genocide that abortion providers were perpetrating, albeit unintentionally, through facially race-neutral laws that permit abortion.”⁴⁸ Or, as in *New York State Rifle & Pistol Ass’n v. Bruen*,⁴⁹ the Court was willing to strike 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.”⁵⁰ That is, when the Court fixates on anti-Black racism looking like Governor Wallace physically blocking Vivian Malone and James Hood from entering the University of Alabama in order to prevent their integration of the university,⁵¹ it sophomorically ignores racism’s adaptability and mutations. Like the virus that it is, racism produces variants, including some more infectious and perilous than others, often requiring new vaccines and remedies.

Second, Bridges argues the Court makes different demands of white litigants that claim racial discrimination than of nonwhites. She explains that “judicial responsiveness to white people’s ‘new’ racial injuries means that white people receive judicial and constitutional solicitude not afforded to nonwhite people.”⁵² Where nonwhite people must show Jim Crow–type overt conduct to successfully seek remedies for race discrimination, white petitioners need not show odious stereotypes, stigmas embedded in law, or vile and violent enforcement carried out by the government or its agents against them.⁵³ As a result, she explains, “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.”⁵⁴

Third, and most devastatingly, Bridges posits that “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.”⁵⁵ Bridges is not new to studying the law’s negative externalities in the lives of poor, pregnant women. Across carefully

⁴⁷ *Id.* at 30–31.

⁴⁸ *Id.* at 31.

⁴⁹ 142 S. Ct. 2111 (2022).

⁵⁰ Bridges, *supra* note 12, at 31.

⁵¹ See *Fifty Years Ago: The Stand in the Schoolhouse Door*, NAACP LEGAL DEF. FUND (June 11, 2013), <https://www.naacpldf.org/press/fifty-years-ago-the-stand-in-the-schoolhouse-door> [https://perma.cc/D2WW-8EJJ].

⁵² Bridges, *supra* note 12, at 32.

⁵³ See *id.*

⁵⁴ *Id.* at 31.

⁵⁵ *Id.* at 32.

researched books and copiously detailed law review articles, she time and again has urged centering the lives of Black and Brown women in discourse on reproductive health and rights and has argued for the use of a reproductive justice framework to analyze the law's failure to show solicitude toward low-income women of color.⁵⁶ In her Foreword, Bridges expands on those intuitions and instincts to include a more generalizable critique and description of the Court's review of racial discrimination, a particularly relevant endeavor given the Court's recent Term. Accordingly, to Bridges, the Roberts Court shows its theory of racism, even while it claims to be "atheoretical" in its race jurisprudence.⁵⁷ Bridges marks this as "theory masquerading as no-theory" — a theory she describes as both "incomplete"⁵⁸ and "convenient."⁵⁹ How then does one make sense of the Court's methodology or theory of law? And is the Roberts Court unique in its masquerading? Is there a framework that might connect the Roberts Court to its predecessor Courts, which equally showed a lack of solicitude for the lives of women generally, and women of color particularly?

This essay characterizes the Court's grievously wrong rulings in its 2021 Term abortion cases as manifestations of complicit bias. It takes seriously an overlooked — even unnamed — phenomenology involving third parties who do not act when harms occur, even when they could do so or arguably have a duty to do so. It argues that in cases involving sex, race, and gender discrimination, action or *inaction* by third parties, including by courts, may cause harm. Furthermore, that action or inaction may be linked to personal or professional interest in, affinity toward, loyalty to, benefit from, or relationship to the perpetrator, which may be state legislatures as well as individuals.

This essay offers a new conceptual framework, namely "complicit bias," to address circumstances wherein people fail to act — even people presumably of goodwill. This distinct conceptual framework complements and expands the recognized theoretical frames of implicit bias and explicit bias. It suggests that those useful and important frames fail to capture an important third rail. Unlike those who engage in implicit bias (being cognitively unaware of prejudiced thoughts and behaviors),⁶⁰ individuals who engage in complicit bias are cognitively aware of the

⁵⁶ See, e.g., KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017); KHIARA BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011); Bridges, *supra* note 29; Khiara Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 772 (2020); Khiara Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449 (2019); Khiara Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457 (2013).

⁵⁷ Bridges, *supra* note 12, at 27.

⁵⁸ *Id.* at 26.

⁵⁹ *Id.*

⁶⁰ See Kang et al., *supra* note 1, at 1128–32 (2012) (providing a scientific overview of implicit bias).

specific prejudice, discrimination, and injustice at issue. However, unlike actors engaged in explicit bias, the complicitly biased may not be engaged in purposeful acts to discriminate or harm.⁶¹ Rather, individuals or institutions that engage in complicit bias occupy a third category. They are those who fail to correct or acknowledge the discriminatory harms inflicted on vulnerable individuals despite awareness of the inappropriate, unethical, or illegal conduct.

This essay proceeds in three Parts. Part I briefly lays out the contours of complicit bias theory. Part II argues that complicit bias has been a pillar of American jurisprudence by tracing the longer arc of complicit bias in judicial decisionmaking. Part III turns to the real-world implications and impacts of judicial complicit bias. It offers an overview of the dangerous but predictable aftermath of the Supreme Court's decision in *Dobbs*. It asks: Why, with the unsurprising likelihood of pregnancy-related injuries and harms in the wake of abortions bans, did the Court accord such solicitude to Mississippi? The essay then concludes.

I. COMPLICIT BIAS

The racial heuristics that Bridges brings to light invite more than a reflection on the Court's mishandling of sex and race, which it presents as neutral, fair, and rigorous in its canvassing of history but which Bridges describes as intentionally harmful.⁶² Rather, the Roberts Court's decisions reveal complicit bias and must be addressed by a framework that takes into account the Court's knowledge of unjust outcomes and participation in the predictable injuries experienced by those harmed by its jurisprudence. Notably, while this bias could reasonably be analyzed as implicit or explicit sexism or racism — and the discrimination produced by the intersection of racism and sexism — this essay introduces and offers another approach.

Complicit bias makes a positive argument, building from prior works.⁶³ It includes instances wherein people of goodwill and good faith fail to act. It makes no assumptions about the motivations of members of the Court. In other words, to identify and bring attention to complicit bias in the judiciary, one need not evaluate the internal mental *processes* of judges. Instead, the conditions or elements of complicit bias can be less probingly discerned. First, complicit bias can be shown where the

⁶¹ See *id.* at 1129 (describing explicit bias as attitudes and stereotypes that are “consciously accessible through introspection and endorsed as appropriate by the person who possesses them”).

⁶² See Bridges, *supra* note 12, at 25 (describing the Court's narrow definition of racism as a “tactic that allows the Court to do no more than the absolute bare minimum”).

⁶³ See, e.g., Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1286 (2018) (book review); Michele Goodwin, *Complicit Bias: Sexual Harassment and Communities that Sustain It*, HUFFPOST (Dec. 12, 2017), https://www.huffpost.com/entry/complicit-bias-sexual-harassment-and-communities-that_b_5a2e238de4bod7c3f262244f [https://perma.cc/Y65V-HF45].

actor is aware of a past, present, or future harm and does not intercede, with apparent knowledge that the impact will prejudice another. Second, the perpetrator (individual or institution) shows an inclination to protect an individual or group based on relationship, affinity, or group characteristics. Third, the individual or institution furthers the harm through silence and inaction.

A. *Complicit Bias in Society*

Complicit bias manifests at multiple levels of law and society. I name four: the individual, institutional, contractual, and associational. A relative who decides not to intervene to protect the victim in matters of family violence or lend credibility to the victim's claims may be complicitly biased at the individual level.⁶⁴ A religious organization that denies known, credible reports of sexual assaults committed by its leadership and employees may be complicitly biased at the institutional level.⁶⁵ People with contractual relationships with an institution may seek to maximize their interests by denying any ethical or moral responsibility to act in instances of known institutional abuse. Yet, by remaining silent, they may further contribute to the pain and suffering of victims who know that the perpetrator is aware.⁶⁶

In the case of Harvey Weinstein, studio executives, actors, actresses, and those looking to do business with his company were allegedly aware of his assaults on women.⁶⁷ Among these were people that had contractual relationships with his company. As one actress wrote, "the most

⁶⁴ See Alexandra Topping, "No Support": Domestic Abuse Survivors on Feeling Ignored by Police, THE GUARDIAN (Oct. 20, 2021, 10:58 AM), <https://www.theguardian.com/society/2021/sep/17/no-support-domestic-abuse-victims-on-being-ignored-by-police> [https://perma.cc/US2C-9G6U]; Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 187 (1983) ("The mother's whole security and life adjustment and much of her sense of adult self-worth demand a trust in the reliability of her partner. To accept the alternative means annihilation of the family and a large piece of her own identity."); Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*, 59 AM. J. ORTHOPSYCHIATRY 197 (1989) (noting that lack of support following childhood sexual violence may trigger more psychological harm for the victim than the abuse itself); Melissa Platt et al., *A Betrayal Trauma Perspective on Domestic Violence*, in 1 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 185, 186 (Evan Stark & Eve S. Buzawa eds., 2009) ("She may be further betrayed when the institutions and communities she turns to for support fail to validate her experience and fail to provide access to necessary resources."); IMOGEN PARKER, A LINK IN THE CHAIN: THE ROLE OF FRIENDS AND FAMILY IN TACKLING DOMESTIC ABUSE 26 (2015), <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Linkinthechain.pdf> [https://perma.cc/G24M-ND8Y] ("Friends and family are more likely to be aware of abuse than anyone else. The British Crime Survey of victims found more than two thirds (71 per cent) of individuals who experienced domestic abuse last year told someone personally close to them, compared to just one third (33 per cent) who told an official (police for example) . . .").

⁶⁵ See Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html> [https://perma.cc/4PDK-N25X].

⁶⁶ See *Harvey Weinstein: Did Everyone Really Know?*, BBC (Oct. 12, 2017), <https://www.bbc.com/news/entertainment-arts-41593384> [https://perma.cc/C4K3-Z487].

⁶⁷ *Id.*

disgusting thing” was that “[e]veryone knew what Harvey was up to and no one did anything.”⁶⁸ Entities that contracted with Weinstein’s studio were placed on notice about his abuse, and while they had no legal obligation to report him, their personal interests in profiting off of their relationships with Weinstein (a form of complicit bias) may help to explain why they essentially did nothing at all.⁶⁹

Finally, associational complicity may be triggered by one’s involvement with a group, association, or fraternity. In such instances there may be multiple reasons that one does not act, but among them may be loyalty or solidarity to the brotherhood or sisterhood of the organization. In the wake of #MeToo, numerous examples fit these categories. Below, a few are briefly identified.

1. *Philadelphia Catholic Archdiocese*. — A damning 2018 grand jury report concluded that in Pennsylvania alone, Catholic priests abused more than one thousand children.⁷⁰ According to an investigative report by Laurie Goodstein and Sharon Otterman, “[b]ishops and other leaders of the Roman Catholic Church in Pennsylvania covered up child sexual abuse by more than 300 priests over a period of 70 years, persuading victims not to report the abuse and law enforcement not to investigate it.”⁷¹ In a case of such widespread abuses, there is also widespread complicit bias at every layer. The silence of so many individuals could translate into law as innocence while at the same time projecting negative stereotypes on the victims who come forward.

2. *Penn State’s Response to Jerry Sandusky*. — Such widespread complicit bias was on display in the case involving young men who came forward to report sexual abuses, assaults, and rapes carried out by retired football coach Jerry Sandusky at his home on the campus of the Pennsylvania State University (Penn State) and while away at off-campus football games.⁷² Sandusky claimed that the young men lied and were seeking to exploit the legal system to unjustly enrich themselves at his expense.⁷³

⁶⁸ *Id.*

⁶⁹ See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/4A9T-C7B9>] (explaining that at least “[s]ixteen former and current executives and assistants at Weinstein’s companies” were aware of Weinstein’s conduct).

⁷⁰ Goodstein & Otterman, *supra* note 65.

⁷¹ *Id.*

⁷² Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012), <https://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html> [<https://perma.cc/233Y-LBSG>].

⁷³ Jim Avila & Colleen Curry, *Penn State “Victim” Was Retaliating Against a Tough Mentor, Lawyer Claims*, ABC NEWS (Nov. 22, 2011, 12:08 PM), <https://abcnews.go.com/US/penn-state-suspects-lawyer-victim-lied-felt-important/story?id=15007125> [<https://perma.cc/P3H9-UES3>] (“[W]hat Jerry believes happened is that this young guy got tired of Jerry pushing. Jerry believes

When Penn State's President, Graham Spanier, downplayed eye-witness allegations made by a graduate student — who worked in the university's football program — that Sandusky inappropriately showered with a naked child in a Penn State locker room,⁷⁴ was that plain incompetence? Dereliction of responsibility as a university administrator? A breach of a civil legal duty? A crime? All of the above? Prosecutors eventually charged Spanier with conspiracy and the failure to properly report suspected abuse, in addition to perjury, obstruction, and endangering the welfare of children.⁷⁵ Prosecutors also referred to Spanier's actions as part of a "conspiracy of silence."⁷⁶ Ultimately, a Dauphin County jury convicted Spanier on a single count of child endangerment, which he unsuccessfully appealed.⁷⁷ But was the University's President culpable of something else not yet identified in legal discourse?

As a cognitive matter, why had Spanier and others not come forward given the gravity of the witness account? Had Spanier, Joe Paterno — the revered head coach — and numerous others ignored allegations spanning decades "to preserve the reputation of the venerated football program"?⁷⁸ If they had, clearly that involved some level of cognitive processing. Arguably, multiple colleagues of Sandusky's who were proximate to and informed about the harms, but under no legal obligation to report them, were guilty of complicit bias in this case.⁷⁹

that what happened was this young guy said, you know what, gee, if I say Jerry did something to me, that's the end of my relationship with Jerry.' Amendola alleges the victim has changed and embellished his story in response to the attention he received from prosecutors."); Michael R. Sisak, *Sandusky Defense: Victims Lying for Financial Benefit*, THE TIMES-TRIBUNE (Scranton, Pa.) (Apr. 15, 2020), https://www.thetimes-tribune.com/news/sandusky-defense-victims-lying-for-financial-benefit/article_328ca5ba-a45d-550e-8be8-7ebb529289co.html [<https://perma.cc/29DC-CJWJ>].

⁷⁴ See Michael Sokolove, *The Trials of Graham Spanier, Penn State's Ousted President*, N.Y. TIMES (July 16, 2014), <https://www.nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html> [<https://perma.cc/EHP6-MWH9>]; *Penn State Ex-President Reports to Jail in Sandusky Scandal*, ASSOCIATED PRESS (June 10, 2021), <https://apnews.com/article/pa-state-wire-jerry-sandusky-graham-spanier-sexual-abuse-child-endangerment-3381510116034e07575c303775467ac8> [<https://perma.cc/8TMJ-6LKQ>] ("A judge upheld Spanier's sentence last month and ordered him to begin serving at least two months in the county jail by July 9 for a single misdemeanor conviction of endangering the welfare of children.").

⁷⁵ *Graham Spanier Arraigned over Penn State Jerry Sandusky Case*, THE GUARDIAN (Nov. 7, 2012, 10:33 AM), <https://www.theguardian.com/world/2012/nov/07/graham-spanier-penn-state-jerry-sandusky> [<https://perma.cc/V4Q4-SEKN>].

⁷⁶ *Id.*

⁷⁷ Charles Thompson, *Where Are the Key People in the Sandusky Child Sex Abuse Scandal Now?*, PITT. POST-GAZETTE (Mar. 31, 2021), <https://www.post-gazette.com/news/crimecourts/2021/03/31/Where-are-the-key-people-in-the-Sandusky-child-sex-abuse-scandal-now/stories/202103310106> [<https://perma.cc/P2D2-3TFF>] ("[The child endangerment] charge was all that was left of a far-reaching obstruction of justice case that was largely thrown out by a state Superior Court panel based on what the judges found were gross violations of attorney/client privilege in the grand jury investigation.").

⁷⁸ *See id.*

⁷⁹ *Id.* (providing updates on the various individuals directly and indirectly involved in Sandusky's sexual abuse scandal).

3. *Correcting for Complicit Bias.* — On August 3, 2021, President Joe Biden confirmed that he stood by his prior statements that Governor Andrew Cuomo should resign if the New York Attorney General’s inquiry found credible evidence of sexual harassment by the New York Governor.⁸⁰ President Biden, a key sponsor and author of the Violence Against Women Act of 1994⁸¹ (VAWA) and Chair of the Senate Judiciary Committee during Justice Thomas’s Supreme Court confirmation hearings,⁸² is no stranger to the political minefields surrounding sexual harassment allegations. In 1999, then-Senator Biden “argued strongly against the need to depose additional witnesses or seek new evidence” in the investigation related to President Bill Clinton’s impeachment trial.⁸³

In a memorandum to fellow Senate Democrats penned two decades ago, then-Senator Biden stressed that a full impeachment proceeding, including calling on additional witnesses against President Clinton following allegations of sexual impropriety with a White House intern, could adversely affect the country⁸⁴:

In light of the extensive record already compiled, it may be that the benefit of receiving additional evidence or live testimony is not great enough to outweigh the public costs (in terms of national prestige, faith in public institutions, etc.) of such a proceeding. While a judge may not take such considerations into account, the Senate is uniquely competent to make such a balance.⁸⁵

At the time, then-Senator Biden’s legal assertions and broader commentary related to President Clinton’s impeachment received little pushback. Men dominated the demographic makeup of the Senate and

⁸⁰ David Smith, *Biden Calls on Cuomo to Quit After Damning Sexual Harassment Report*, THE GUARDIAN (Aug. 3, 2021, 5:20 PM), <https://www.theguardian.com/us-news/2021/aug/03/biden-cuomo-white-house-sexual-harassment-investigation> [https://perma.cc/99BW-2WT6].

⁸¹ Email from Vice President Joe Biden to Those Signed Up to Receive Updates from the White House (Sept. 13, 2014) (available at *Vice President Biden: “20 Years Ago Today,”* WHITE HOUSE: PRESIDENT BARACK OBAMA (Sept. 13, 2014, 6:57 PM), <https://obamawhitehouse.archives.gov/blog/2014/09/13/vice-president-biden-20-years-ago-today> [https://perma.cc/7ZL7-43GJ]) (referring to VAWA as his “proudest legislative achievement”).

⁸² Sheryl Gay Stolberg & Carl Hulse, *Joe Biden Expresses Regret to Anita Hill, But She Says “I’m Sorry” Is Not Enough*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/politics/joe-biden-anita-hill.html> [https://perma.cc/9M9P-BW4D].

⁸³ John Bresnahan & Burgess Everett, *Biden Argued Against Witnesses in 1999 Impeachment Trial Memo*, POLITICO (Jan. 30, 2020, 11:54 PM) <https://www.politico.com/news/2020/01/30/joe-biden-impeachment-witness-109730> [https://perma.cc/3KHP-HERT] (reporting that in 1999, then-Senator Biden circulated a memorandum to fellow Democrats that argued that “the Senate need not hold a ‘full-blown’ trial” (quoting Memorandum from Joseph Biden, U.S. Sen., to the Democratic Caucus, Arguments in Support of a Summary Impeachment Trial (Jan. 5, 1999) (available at <https://static.politico.com/1e/c3/c1f5boe64288babba06da2e401a/0247-001.pdf> [https://perma.cc/MXB4-HZZ7])).

⁸⁴ Memorandum from Joseph Biden, U.S. Sen., to the Democratic Caucus, *supra* note 83.

⁸⁵ *Id.*

House of Representatives, including in the Democratic Party.⁸⁶ When then-Senator Biden compared the impeachment of President Clinton to a “lynching,” Democrats in his party said very little.⁸⁷ In fact, several congressmen referred to Republican efforts to impeach President Clinton as a “lynching,” part of a “lynch mob” mentality, or a conspiracy carried out by conservative lawmakers.⁸⁸

However, by 2019, the nation’s mood and tolerance for looking the other way in matters of sex scandals had shifted.⁸⁹ This came in the wake of a national reckoning with sexual harassment and assault, triggered by public scandals and chilling allegations involving prominent celebrities, judges, and various public figures and politicians, including

⁸⁶ See Katherine Schaeffer, *The Changing Face of Congress in 7 Charts*, PEW RSCH. CTR. (Mar. 10, 2021), <https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress> [https://perma.cc/C3FS-ZSAD].

⁸⁷ Cf. Matt Viser & Cleve Wootson Jr., *After Criticizing Trump, Joe Biden Apologizes for Using “Partisan Lynching” in 1998*, WASH. POST (Oct. 23, 2019, 11:01 AM), https://www.washingtonpost.com/politics/after-criticizing-trump-joe-biden-apologizes-for-using-partisan-lynching-in-1998/2019/10/23/32349202-f597-11e9-a285-882a8e386a96_story.html [https://perma.cc/S2UR-URE3].

⁸⁸ The *Washington Post* identified at least a handful of instances in which past and current congressmen compared President Clinton’s impeachment to a lynching or lynch mob. See *id.* (“Danny K. Davis (Ill.), Gregory W. Meeks (N.Y.), Jim McDermott (Wash.), Charles B. Rangel (N.Y.) and Jerrold Nadler (N.Y.) . . . talked about a ‘lynching’ or ‘lynch mob’ when it came to Clinton’s impeachment.”).

⁸⁹ See The Atlantic Culture Desk, *The 7 Most Defining #MeToo Moments of 2019*, THE ATLANTIC (Dec. 12, 2019), <https://www.theatlantic.com/entertainment/archive/2019/12/most-defining-metoo-moments-2019/603490> [https://perma.cc/J3TB-PVN8] (“#MeToo has woven itself into American culture . . .”); see also ANNA BROWN, PEW RSCH. CTR., MORE THAN TWICE AS MANY AMERICANS SUPPORT THAN OPPOSE THE #METOO MOVEMENT 4 (2022) (“As the five-year anniversary of #MeToo approaches, Americans see some changes in how sexual harassment and assault are handled in the workplace. Seven-in-ten U.S. adults — including majorities across demographic groups and partisan lines — say that, compared with five years ago, people who commit sexual harassment or assault in the workplace are now more likely to be held responsible for their actions. And about six-in-ten say that those who report harassment or assault at work are now more likely to be believed. These views are echoed even by a majority of those who oppose the #MeToo movement overall.”).

Harvey Weinstein,⁹⁰ Bill Cosby,⁹¹ Matt Lauer,⁹² Justice Kavanaugh,⁹³ and Judge Kozinski.⁹⁴

Whether responding to the #MeToo climate or a heated race for the United States presidency, President Biden publicly shifted too. He apologized for claiming that the impeachment of President Clinton could be equated to a “partisan lynching.”⁹⁵ And, in the case of Governor

⁹⁰ See Farrow, *supra* note 69 (“In the course of a ten-month investigation . . . thirteen women [interviewed] said that, between the nineteen-nineties and 2015, Weinstein sexually harassed or assaulted them.”).

⁹¹ See Graham Bowley, *Bill Cosby Loses Appeal of Sexual Assault Conviction*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2019/12/10/arts/television/bill-cosby-appeal-sexual-assault.html> [<https://perma.cc/H8SP-2PHH>]; see also Charlie Savage, *Bill Cosby’s Release from Prison, Explained*, N.Y. TIMES (Oct. 14, 2021), <https://www.nytimes.com/2021/07/01/arts/television/bill-cosby-conviction-overturned-why.html> [<https://perma.cc/5ZE4-T6L2>].

⁹² See Daniel Arkin, *Brooke Nevils Clearly Described Rape or Sexual Assault by Matt Lauer in NBC Meeting, Ronan Farrow Says*, NBC NEWS (Oct. 11, 2019, 11:06 AM), <https://www.nbcnews.com/news/us-news/brooke-nevils-unambiguously-described-rape-matt-lauer-nbc-meeting-ronan-n1064986> [<https://perma.cc/R8YA-62EX>] (“[Brooke] Nevils has accused Lauer of raping her in a hotel room in Russia during the 2014 Sochi Olympics. . . . Lauer was fired by NBC News . . . following Nevils’ complaint to the company.”).

⁹³ See Haley Sweetland Edwards, *How Christine Blasey Ford’s Testimony Changed America*, TIME (Oct. 4, 2018, 6:10 PM), <https://time.com/5415027/christine-blasey-ford-testimony> [<https://perma.cc/NG73-6DVR>] (“Ford’s testimony slowed the machinery of political power when it was fully in gear. . . . [T]he chairman of the Judiciary Committee[] congratulated Ford on her bravery. President Trump . . . called Ford . . . a ‘credible witness’ Within hours, three Republican governors and the American Bar Association had called for a delay on Kavanaugh’s confirmation vote. . . . That’s a marked shift from 1991, when Americans sided with then Supreme Court nominee Clarence Thomas after Anita Hill accused him of sexual harassment.”); Deborah Bloom, *Sexual Assault Victims Are Reliving Their Trauma, Triggered by Kavanaugh Hearing*, WASH. POST (Sept. 28, 2018, 6:26 AM), <https://www.washingtonpost.com/health/2018/09/28/sexual-assault-victims-are-reliving-their-trauma-triggered-by-kavanaugh-hearing> [<https://perma.cc/QR5H-QKAJ>] (“Painful. Gut-wrenching. Heartbreaking. Unbearable. That’s how women described listening to Thursday’s Senate Judiciary Committee hearing, where Christine Blasey Ford testified that Supreme Court nominee Brett M. Kavanaugh had sexually assaulted her when they were both in high school.”); Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html> [<https://perma.cc/P8VE-AR8G>] (“A few hours later, Judge Kavanaugh delivered a blistering, scorched-earth defense. Speaking through tears at points, he denied that he assaulted Dr. Blasey — ‘I am innocent of this charge!’ — and denounced a partisan ‘frenzy’ bent on destroying his nomination, his family and his good name.”).

⁹⁴ See Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [<https://perma.cc/A438-FT66>] (“A former clerk for Judge Alex Kozinski said the powerful and well-known jurist, who for many years served as chief judge on the U.S. Court of Appeals for the 9th Circuit, called her into his office several times and pulled up pornography on his computer, asking if she thought it was photoshopped or if it aroused her sexually.”).

⁹⁵ Viser & Wootson, *supra* note 87. In an interview with news anchor Wolf Blitzer, then-Senator Biden remarked:

Even if the president should be impeached, history is going to question whether or not this was just a partisan lynching or whether or not it was something that in fact met the standard, the very high bar, that was set by the founders as to what constituted an impeachable offense.

Id.

Cuomo, President Biden did not hesitate to distance himself and call for the Governor's resignation.⁹⁶ One could argue that this simply reflected good judgment and political shrewdness. Was this also a public rejection of complicit bias? Arguably so.

*B. Complicit Bias as an Internal Supreme Court
Phenomenon and Problem*

Consider an internal case of complicit bias and the Supreme Court. In an empirical study examining fifteen years of Supreme Court oral arguments, Professor Tonja Jacobi and Dylan Schweers show not only that “conservative justices interrupt the liberal justices more than twice as often as vice versa” but also that “women do not have an equal opportunity to be heard on the highest court in the land.”⁹⁷

In fact, as more women join the Supreme Court, “the reaction of the male justices has been to increase their interruptions of the female justices.”⁹⁸ As Jacobi and Schweers's study shows, the interruptions are not insignificant:

Many male justices are now interrupting female justices at double-digit rates per term, but the reverse is almost never true. In the last 12 years, during which women made up, on average, 24% of the bench, 32% of interruptions were *of* the female justices, but only 4% were *by* the female justices.⁹⁹

Overall, male Justices interrupt their female colleagues “approximately three times as often as they interrupt each other during oral arguments.”¹⁰⁰ Jacobi and Schweers note that even “[d]uring the Senate hearings on whether he should become the next associate justice of the Supreme Court, Neil Gorsuch,” who was otherwise even tempered, “showed his cards in one regard: He could not help repeatedly interrupting the liberal female senators.”¹⁰¹

Jacobi and Schweers also conducted research across multiple Terms to test how their hypothesis has fared historically. They analyzed oral argument data from the 1990, 2002, and 2015 Terms to assess whether “the same patterns held when there were fewer female justices on the court.”¹⁰² Their review yielded the following findings:

In 1990, with one woman on the bench (former Justice Sandra Day O'Connor), 35.7% of interruptions were directed at her; in 2002, 45.3% were directed at the two female justices (O'Connor and Ruth Bader Ginsburg);

⁹⁶ See Smith, *supra* note 80.

⁹⁷ Tonja Jacobi & Dylan Schweers, *Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates*, HARV. BUS. REV. (Apr. 11, 2017), <https://hbr.org/2017/04/female-supreme-court-justices-are-interrupted-more-by-male-justices-and-advocates> [<https://perma.cc/UAH7-7PV7>].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

in 2015, 65.9% of all interruptions on the court were directed at the three female justices on the bench (Ginsburg, Sonia Sotomayor, and Elena Kagan). With more women on the court, the situation only seems to be getting worse.¹⁰³

Jacobi and Schweers's research contributes to a robust discourse on women in the workplace and offers an important lens into the broader field by exposing and linking a ubiquitous workplace harm¹⁰⁴ with the Supreme Court. Even while the authors make no predictions or normative conclusions about what their findings mean for the outcomes of cases, there are substantive and symbolic takeaways.

Substantively, if women Justices are silenced during oral arguments, important insights may not surface because the process takes place only once in most cases. Even though the Justices' roles extend beyond oral arguments, including to private deliberations, cross-examining lawyers presumably aids judicial review and clarifies the facts and law in a case. Clearly, male Justices value the oral argument process because they ask questions and expect lawyers to answer them. For example, Professor Lawrence Wrightsman's illuminating study on oral arguments at the Supreme Court notes that "Chief Justice Marshall took full advantage of the talent before the Court; he encouraged extended arguments, established no time limits, and sometimes enabled a single lawyer to speak for 2 or 3 days."¹⁰⁵

Thus, although it is not clear what Jacobi and Schweers's findings mean for the substantive outcomes in the cases heard by the Court, certain harms to the legal process flow from these interactions, which silence the questions and perspectives of the female Justices.

Symbolic problems can also be identified. By frequently interrupting their female colleagues, male Justices signal to other Court officers that their female colleagues are undeserving of the respect accorded male

¹⁰³ *Id.*

¹⁰⁴ Cf. Francesca Gino, *Why Hillary Clinton Gets Interrupted More than Donald Trump*, HARV. BUS. REV. (Sept. 20, 2016), <https://hbr.org/2016/09/why-hillary-clinton-gets-interrupted-more-than-donald-trump> [<https://perma.cc/7R8E-M9SC>] (reviewing studies showing that women are more likely than men to be interrupted).

¹⁰⁵ LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT 11 (2008). When Justice O'Connor proposed in 1981 that the Justices "dispense with oral arguments" for recently accepted cases, *id.* at 8, "Justice Lewis Powell responded, 'I could agree with Sandra's proposed change [but] my only concern is that we might abuse this privilege. I believe in the utility of oral argument, and also in the symbolism it portrays for the public. Accordingly, if the rule is changed, I would hope that we could use this option sparingly,'" *id.* at 9 (alteration in original) (quoting JOAN BISKUPIC, SANDRA DAY O'CONNOR 120 (2005)). Even as Chief Justice Burger and then-Justice Rehnquist supported the idea, *id.* at 8–9, Justice Brennan "was adamantly opposed," writing, "Dear Chief: I could *not* agree to Sandra's proposed change. . . . I expect my reaction is influenced by my New Jersey experience [and] the [past] practice of the [state's] highest court in deciding almost all cases on briefs without oral argument. The low quality of final judgments was traced directly to that practice . . . [.] Thus the New Jersey Supreme Court rule [now] requires oral argument of every case granted review. . . . I feel so strongly about this that I must publicly dissent if the rule is changed," *id.* at 9 (omissions and first, second, third, and fifth alteration in original) (quoting BISKUPIC, *supra*, at 120).

Justices. Potentially, this has a trickle-down effect even beyond the Court. However, this problem is particularly acute within the Court itself. Strict guidelines govern Supreme Court oral arguments, requiring that lawyers cease their argument when a Justice speaks.¹⁰⁶ However, male lawyers cause “10% of all interruptions that occur in court (excluding justices interrupting advocates, which is standard procedure).”¹⁰⁷ Notably, “[i]n contrast, interruptions by female advocates account for approximately 0%.”¹⁰⁸

At the Supreme Court, this is not only a sex problem but also a sex-and-race problem. This sex-and-race issue became glaringly apparent after Justice Sotomayor joined the Court. In 2015, male attorneys interrupted Justice Sotomayor more than any other Justice. In fact, “male advocates interrupting Justice Sotomayor was the most common form of interruption[] of any justice, accounting for 8% of all interruptions in the court.”¹⁰⁹

Finally, businesses and industries assume that as workplaces become more numerically inclusive of women, like the Court has, the behaviors that push women out and hold them back from advancement will lessen.¹¹⁰ In reality, such behaviors may actually worsen in some instances due to active complicit bias.

II. THE HISTORICAL CASE: COMPLICIT BIAS AS A PILLAR OF JURISPRUDENCE

In the wake of its 2021 Term, confidence in the Court has waned,¹¹¹ likely due to the public’s perception of personal or political influences infecting the Court’s judicial process and decisions. According to an Annenberg Public Policy Center study conducted after the 2021 Term: “Over half (53%) [of Americans] have little or no trust in the Supreme Court to operate in the best interests of the American people, up 22 percentage points since 2019.”¹¹² Further, “[h]alf of U.S. adults (50%,

¹⁰⁶ SUP. CT. OF THE U.S., GUIDE FOR COUNSEL IN CASES TO BE ARGUED 9 (2021).

¹⁰⁷ Jacobi & Schweers, *supra* note 97.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., JESS HUANG ET AL., MCKINSEY & COMPANY, WOMEN IN THE WORKPLACE 2019, at 3 (2019).

¹¹¹ See Jared Gans, *Confidence in Supreme Court Is at Lowest Level in 50-Year Recorded History, Gallup Poll Finds*, THE HILL (June 23, 2022, 4:06 PM), <https://thehill.com/regulation/court-battles/3534955-confidence-in-supreme-court-is-at-lowest-level-in-50-year-recorded-history-gallup-poll-finds> [<https://perma.cc/A7TE-VGGH>].

¹¹² *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUB. POL’Y CTR. (Oct. 10, 2022), <https://www.annenbergpublicpolicycenter.org/over-half-of-americans-disapprove-of-supreme-court-as-trust-plummets> [<https://perma.cc/RWE3-YXVU>] (“[W]hen the public is asked whether Supreme Court justices are more likely to set aside their personal and political beliefs to make rulings based on the Constitution, the law, and the facts, just 40% say they are likely to do so.”); see also Adam Liptak, *An Extraordinary Winning Streak for Religion at the*

up from 35% in 2019) feel that Supreme Court justices ‘are just like any other politicians’ and ‘we cannot trust them to decide court cases in a way that is in the best interest of our country.’”¹¹³ Even according to sitting Justices, the Court appears vulnerable to public perceptions of undue influence. At an event sponsored by Northwestern Law School, Justice Kagan warned that “[w]hen courts become extensions of the political process, when people see them as extensions of the political process, once people see them as trying just to impose personal preferences on a society, irrespective of the law, that’s when there’s a problem.”¹¹⁴

At oral argument in *Dobbs*, Justice Sotomayor framed her concerns with the Court in a question: “Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?”¹¹⁵ Answering her own question, she responded: “I don’t see how it is possible.”¹¹⁶ To her point, the newly constituted conservative majority of the Court seemed poised, even at oral argument, to undermine eighty years of Court jurisprudence relating to autonomy, liberty, and privacy in family planning dating back to *Skinner v. Oklahoma ex rel. Williamson*¹¹⁷ and including *Griswold v. Connecticut*,¹¹⁸ *Eisenstadt v. Baird*,¹¹⁹ *Roe v. Wade*,¹²⁰ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹²¹ To drill down further, when Justices Kagan and Sotomayor warn of the public’s perception of political influence infecting the Court’s deliberations and holdings, judicial complicit bias should not be ignored.

That said, the problem of perceived or actual judicial complicity and complicit bias is not new. Historically, legal institutions — legislatures and courts — have been explicit and complicit in creating and preserving racial hierarchies.¹²² Indeed, the clearest examples of biases — complicit, explicit, and implicit — are revealed in law.¹²³ Yet it is not

Supreme Court, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> [<https://perma.cc/QC53-SZS3>] (“The court led by Chief Justice Earl Warren, from 1953 to 1969, supported religion just 46 percent of the time[,] . . . and [that] finally jumped to just over 81 percent under Chief Justice Roberts, who joined the court in 2005.”).

¹¹³ *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, *supra* note 112.

¹¹⁴ Nate Raymond & Andrew Chung, *U.S. Supreme Court Risks Its Legitimacy by Looking Political, Justice Kagan Says*, REUTERS (Sept. 14, 2022, 5:10 PM), <https://www.reuters.com/legal/us-supreme-court-risks-its-legitimacy-by-looking-political-justice-kagan-says-2022-09-14> [<https://perma.cc/4XFQ-DZYK>].

¹¹⁵ Transcript of Oral Argument at 15, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf [<https://perma.cc/74G9-M4RK>].

¹¹⁶ *Id.*

¹¹⁷ 316 U.S. 535 (1942).

¹¹⁸ 381 U.S. 479 (1965).

¹¹⁹ 405 U.S. 438 (1972).

¹²⁰ 410 U.S. 113 (1973).

¹²¹ 505 U.S. 833 (1992).

¹²² See generally, e.g., PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR (1951).

¹²³ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Buck v. Bell*, 274 U.S. 200, 207 (1927); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 412 (1857) (involving an enslaved party).

judicial decisions alone that instantiate and embed bias into law.¹²⁴ Law reflects the priorities of lawmakers. It codifies their impressions, expressions, platforms, and ultimately their values, principles, and even biases.¹²⁵ As Professor Frederick Schauer observes, “the legislative process is itself hardly devoid of its own pathologies,” not the least of which is political capture by lobbyists and special-interest groups.¹²⁶ Yet bias and pathology infect the judicial process too.

A. *A Tradition of Complicit Bias?*

A less sophisticated reading of the Supreme Court’s response to anti-abortion legislation might suggest that implicit or explicit sex biases are the only or most plausible explanation for its dismantling of *Roe v. Wade* and evisceration of abortion rights. After all, nearly all in the majority are male and nearly all in the majority are white. Their lack of solicitude for reproductive rights might therefore be fairly attributed to implicit biases that hinder their recognition of and appreciation for the significant civil liberty harms imposed against women and girls and against the communities most affected by such laws — Black and Brown women and girls.¹²⁷ Yet my point is not to deny the existence of past or present implicit or explicit biases among legislators or judges — something about which Bridges and I would agree. Rather, this essay highlights the value in recognizing and naming an objectively discernible behavior — the Court’s complicit bias.

On that front, observation tells us that the conservative Justices have cognitive awareness of the egregious harms inflicted by antiabortion legislation on women, girls, and people capable of becoming pregnant and that the Justices consciously refuse to intercede even with the knowledge that the legislation’s impact will be discriminatory and significant.¹²⁸

¹²⁴ For example, Black codes reflected the legal priorities of southern lawmakers shortly after the Civil War in preserving slavery through its transformation. Professor Eric Foner explains: “Virtually all the former Confederate states enacted sweeping vagrancy and labor contract laws, supplemented by ‘antienticement’ measures punishing anyone offering higher wages to an employee already under contract.” ERIC FONER, RECONSTRUCTION 200 (1988).

¹²⁵ See *id.* at 200–01.

¹²⁶ Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 912 (2006) (noting also pathologies of common law methodologies).

¹²⁷ See Kimberly Lonsway et al., *Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System*, 27 LAW & SOC. INQ. 205, 209 (2002) (“For example, only 4% of the attorneys in the Massachusetts survey reported ever having observed judicial intervention to address improper treatment of female attorneys, litigants, or witnesses. Similarly, 12% of the women and 7% of the men in the New York study had observed a judge intervening to address gender-biased misconduct.” (citations omitted)); Deborah Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2191 (1993); *Gender Roles Highlight Gender Bias in Judicial Decisions*, SCIENCEDAILY (Apr. 3, 2018), <https://www.sciencedaily.com/releases/2018/04/180403085049.htm> [<https://perma.cc/QH7B-PYZW>].

¹²⁸ See *e.g.*, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) (“Nationwide, childbirth is 14 times more likely than abortion to result in death”); see also June Med. Servs.

Lawyers, juries, and judges routinely assess bias to evaluate state of mind, determine culpability, gauge innocence or guilt, and protect the legitimacy of legal proceedings.¹²⁹ Depending on the matter at hand, lawyers, jurors, and judges may serve as key observers of the nature of prejudice.¹³⁰ As Kang's research underlines, individual and collective social biases may even project negative stereotypes on officers of the court — for example, that Asian people lack the qualities expected of good lawyers.¹³¹

Officers of the court may also intentionally or unintentionally infect legal proceedings with bias, thus undermining the integrity of law and the legal process. For example, *Batson v. Kentucky*¹³² illustrates that prosecutors sometimes deliberately and illegally exclude certain jurors based on race.¹³³ In *McCleskey v. Kemp*,¹³⁴ compelling empirical data indicated that Black defendants who kill white victims are more likely to receive the death penalty.¹³⁵ Equally, in cases involving rape, glaring disparities in sentencing based on the race of the perpetrator are well documented.¹³⁶

Furthermore, biases perpetuated by lawyers, juries, and judges that undermine the rule of law extend beyond race. Sex-based biases mark

L.L.C. v. Russo, 140 S. Ct. 2103, 2116 (2020) (“Act 620 does not advance Louisiana’s legitimate interest in protecting the health of women seeking abortions. Instead, Act 620 would increase the risk of harm to women’s health by dramatically reducing the availability of safe abortion in Louisiana.” (quoting *June Med. Servs. L.L.C. v. Kliebert*, 250 F. Supp. 3d 27, 87 (M.D. La. 2017), *rev’d sub nom.* *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *rev’d sub nom.* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103)).

¹²⁹ JERRY KANG, NAT’L CTR. FOR STATE CTS., IMPLICIT BIAS: A PRIMER FOR COURTS 2 (2009) (“Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities.”).

¹³⁰ See generally GORDON ALLPORT, THE NATURE OF PREJUDICE (1954) (providing a broad account of the emergence of prejudicial thinking from acquiring prejudice to sociocultural factors, groupthink, and preferential decisionmaking).

¹³¹ See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 888 (2010).

¹³² 476 U.S. 79 (1986).

¹³³ *Id.* at 89 (holding that a prosecutor cannot exclude potential jurors based on their race). *But see* *Swain v. Alabama*, 380 U.S. 202, 221–22 (1965) (finding no constitutional violation in a death penalty case where the prosecutor struck all six African Americans on the defendant’s jury panel but conceding that preemptory strikes based on race are unconstitutional).

¹³⁴ 481 U.S. 279 (1987).

¹³⁵ *Id.* at 306–08 (upholding the death penalty based on a troubling finding that the Eighth Amendment is not violated when purposeful racial discrimination cannot be proven, notwithstanding statistical evidence offered by the defendant and despite evident disparate racial impact).

¹³⁶ See, e.g., Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43, 43 (1965) (“Since 1908, when the electric chair was installed in the Virginia State Penitentiary, forty-one men have been executed for rape, thirteen for attempted rape, one for rape and robbery, and one for attempted rape and highway robbery. All of these men were Negroes.” (footnotes omitted)); Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. CMTY. PSYCH. 256 (2019).

the very foundations of American law. In *Bradwell v. Illinois*,¹³⁷ the Supreme Court upheld a discriminatory law barring women law school graduates from the practice of law,¹³⁸ thereby complicitly preserving the profession for men. The Court's role was not passive but rather proximate and complicit in the harming of women who sought to practice law: Justice Bradley claimed it "repugnant" for a woman to achieve "a distinct and independent" professional life.¹³⁹

Understanding the role of bias in society is not simply a lofty academic matter or concern; law frowns on biases because they introduce errors in judgment. Such errors privilege one set of beliefs, values, and outcomes over possible alternatives, which can harm the integrity of transactions; legal proceedings; and institutional, intimate, and professional relationships. Biases may also harm the political process and interfere with the advancement of democratic values and norms at local, national, and even international levels.

Consider Chief Justice Taney's opinion in *Dred Scott v. Sandford*. The case provides one of many useful historical lenses in American law and society through which racial bias and complicity can be traced, identified, and examined and their impacts mapped.¹⁴⁰ In that case, the Chief Justice opined that Black people in the United States, freed or not, "had no rights which the white man was bound to respect."¹⁴¹ To leave no further room for doubt, he claimed, "for more than a century," Black people had "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations."¹⁴²

To point out the Court's lingering project of complicity in furthering the practice of institutional racism, sexism, homophobia, and ableism is no insignificant matter. By doing so, efforts to dismantle injustice can be more thoughtfully targeted and approached. Again, in *Dred Scott*, according to the United States Supreme Court, Black people were not and could never become citizens of the United States.¹⁴³ Chief Justice Taney wrote: "[T]he [N]egro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."¹⁴⁴ The opinion remains hauntingly unambiguous. "[I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and

¹³⁷ 83 U.S. (16 Wall.) 130 (1873).

¹³⁸ See *id.* at 138–39.

¹³⁹ *Id.* at 141 (Bradley, J., concurring in the judgment).

¹⁴⁰ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406–12 (2011).

¹⁴¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (involving an enslaved party).

¹⁴² *Id.*

¹⁴³ *Id.* at 410.

¹⁴⁴ *Id.* at 407.

adopted” the Declaration of Independence.¹⁴⁵ For some scholars *Dred Scott* is the obvious embodiment of what Bridges would call the “bad old” law or cases.¹⁴⁶ While this is true, studying the obviously bad, old racial-inequality cases is crucially informative, including by identifying when decisions of the Court serve as barriers to racial justice and equality.

Nor does *Dred Scott* stand in isolation or as an aberration in Supreme Court jurisprudence and American law. To the contrary. Understandably, to the skeptical reader, both *Dred Scott* and Chief Justice Taney’s invectives might appear the anomaly that subsequent postbellum jurisprudence disproves. In part, they would be correct; the question of African American citizenship was settled by the Fourteenth Amendment’s ratification.¹⁴⁷ Yet the overt, explicit racial hostility grounding the Court’s opinion in *Dred Scott* simply transformed in the wake of constitutional protections.¹⁴⁸ In the *Civil Rights Cases*,¹⁴⁹ an 8–1 opinion rendered fifteen years after ratification of the Fourteenth Amendment, the Court stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.¹⁵⁰

In other words, lawful, explicit discrimination transformed into permissible “[m]ere discrimination[.]”¹⁵¹ That is, “[m]ere discriminations on account of race or color” that denied Black people access to accommodations and recreation while explicitly, purposefully, and specifically disenfranchising Black people were not sufficiently odious to be “regarded as badges of slavery.”¹⁵²

¹⁴⁵ *Id.* at 410.

¹⁴⁶ Bridges, *supra* note 12, at 28.

¹⁴⁷ See U.S. CONST. amend. XIV, § 1.

¹⁴⁸ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–20 (1997) (“White Americans who emphatically opposed slavery regularly disagreed about what it would mean to emancipate African-Americans. Some defined freedom from slavery as equality in civil rights; others insisted that emancipating African-Americans from slavery entailed equality in civil *and* political rights; but most white Americans who opposed slavery did not think its abolition required giving African-Americans equality in ‘social rights.’”).

¹⁴⁹ 109 U.S. 3 (1883); see also *Ex parte Virginia*, 100 U.S. 339, 358 (1880) (“Nothing . . . could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure, — than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws.”).

¹⁵⁰ *The Civil Rights Cases*, 109 U.S. at 25.

¹⁵¹ *Id.*

¹⁵² *Id.*

Sadly, the Court's canon is replete with opinions upholding laws discriminating on the bases of race,¹⁵³ sex,¹⁵⁴ and sexual orientation.¹⁵⁵ Equally, the Court has actively struck down civil rights laws (in whole or in part) intended to protect vulnerable groups.¹⁵⁶ It has reviewed cases involving profound expressions and patterns of racism and sexism and found no violation of the Constitution or civil rights laws despite odious racial and sexual impacts.¹⁵⁷

To understand the scope and scale of racial bias emanating from the Court and its complicity in legitimizing American racism, consider that in 1922, decades after the ratifications of the Thirteenth Amendment (abolishing slavery)¹⁵⁸ and the Fourteenth Amendment (instantiating equal protection in federal law),¹⁵⁹ the Supreme Court declared in *Ozawa v. United States*¹⁶⁰:

The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to

¹⁵³ See, e.g., *id.*; *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896); *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding an executive order excluding from certain areas and detaining Japanese Americans); *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).

¹⁵⁴ See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (affirming state legislation denying women the right to vote); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization law); *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a Michigan law that prohibited women from serving as bartenders); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (“[W]oman is still regarded as the center of home and family life.”); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (applying a deferential rationality standard to uphold a policy for promotions in the Navy that discriminated against male servicemembers); see also *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹⁵⁵ See, e.g., *Rowland v. Mad River Loc. Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (“[Gay men and women] have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely . . . to reflect deep-seated prejudice rather than . . . rationality.’” (alterations in original) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982))); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding, in a 5–4 opinion, a Georgia sodomy law that criminalized private oral and anal sex); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656, 661 (2000) (holding that the Boy Scouts’ ban on “openly” gay members was protected by the First Amendment).

¹⁵⁶ See, e.g., *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2343–44, 2348–49 (2021) (holding that Arizona’s out-of-precinct policy does not violate § 2 of the Voting Rights Act and that it was not enacted with a racially discriminatory purpose); *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (striking down § 4(b) of the Voting Rights Act); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (striking down a federal law to end child labor); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622, 625–26 (1842) (striking down a Pennsylvania law that sought to protect Black people from being kidnapped and returned to slavery as preempted by the federal Fugitive Slave Act); *The Civil Rights Cases*, 109 U.S. at 25 (opining that “[m]ere discriminations on account of race or color were not . . . badges of slavery” or, for that matter, unconstitutional under any other provision).

¹⁵⁷ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 306–08 (1987); *Washington v. Davis*, 426 U.S. 229, 246 (1976); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 637–43 (2007); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

¹⁵⁸ See U.S. CONST. amend. XIII, § 1.

¹⁵⁹ See *id.* amend. XIV, § 1.

¹⁶⁰ 260 U.S. 178 (1922).

confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.¹⁶¹

The Court reached a similar conclusion one year later in *United States v. Bhagat Singh Thind*.¹⁶²

In *Korematsu v. United States*, a decision that would further test the Court's record and review of policy-based race exclusions, the Court ruled that President Franklin Roosevelt's Executive Order 9066 — which empowered military officials to require Japanese Americans to leave their homes and move into “relocation” (or, more accurately, concentration) camps as a matter of national security¹⁶³ — did not exceed presidential or congressional war powers.¹⁶⁴ Writing for the majority, Justice Black opined that the President's evacuation order did not violate Fred Korematsu's Fifth Amendment rights nor inflict racial prejudice on those subjected to the removal order,¹⁶⁵ despite the fact that Korematsu was born in the United States and that the Constitution made him a citizen of the United States “by nativity and a citizen of California by residence.”¹⁶⁶ According to Justice Black, not all restrictions that target a particular “racial group” are unconstitutional.¹⁶⁷ The Court found that legal restrictions that curtail the rights of communities based on race may be permissible for “[p]ressing public necessity.”¹⁶⁸

In *Korematsu*, the Court's failure was not only its enforcement of an order that violated constitutional limitations but also its entrenchment of racist ideology. The role of the Court is to exercise judicial power, apply law, and adhere to the principles of the Constitution. Here, the Court not only became complicit in an explicit race-based policy but also became an impermissible instrument of military policy. As such, it ceased to be a civil court.¹⁶⁹

Despite the promise of *Brown v. Board of Education*,¹⁷⁰ striking down notorious “separate but equal” laws,¹⁷¹ that landmark decision did not remedy the Court of its racial blind spots nor cure it of susceptibility to bias in its deliberations and decisionmaking. Equally, *Brown* did not

¹⁶¹ *Id.* at 195; *see also id.* at 198 (unanimously holding a Japanese American man ineligible for citizenship because the legislature intended naturalization in the United States only for “free white persons”).

¹⁶² 261 U.S. 204 (1923); *see id.* at 209, 210, 213 (denying citizenship to Bhagat Singh Thind, a man of Indian parentage who argued that his Aryan lineage entitled him to the status of a white man in the United States).

¹⁶³ *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹⁶⁴ *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944).

¹⁶⁵ *See id.* at 223–24.

¹⁶⁶ *Id.* at 242–43 (Jackson, J., dissenting).

¹⁶⁷ *Id.* at 216 (majority opinion).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 247 (Jackson, J., dissenting).

¹⁷⁰ 374 U.S. 483 (1954).

¹⁷¹ *See id.* at 495.

foreshadow or trigger voluntary compliance at the state level of desegregation orders and racial equality.

As Justice Douglas opined more than a decade later in *Jones v. Alfred H. Mayer Co.*,¹⁷² “the existence of the institution [that] produced the notion that the white man was of superior character, intelligence, and morality” lived on in the cases before the Court.¹⁷³ According to Justice Douglas, policymakers had been equal participants in the notion that Black people “were little more than livestock — to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.”¹⁷⁴

Justice Douglas laid bare anti-Black laws and policies that lingered despite slavery’s abolition, the rise of the civil rights movement, social justice victories marked by the Civil Rights Act of 1964,¹⁷⁵ and the hard-fought triumph of the Voting Rights Act of 1965. In his surprisingly overlooked but ever timely concurrence, he wrote: “Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.”¹⁷⁶

Justice Douglas recited a litany of Supreme Court cases to “show how prejudices, once part and parcel of slavery, still persist.”¹⁷⁷ Equality, according to Justice Douglas, “has been delayed by numerous stratagems and devices,” most of which root in the law.¹⁷⁸ These cases did not evolve from thin air but were the consequence of unequal laws intended to further racial hierarchies and instantiate white supremacy. According to Justice Douglas:

We have seen contrivances by States designed to thwart Negro voting, *e.g.*, *Lane v. Wilson*. Negroes have been excluded over and again from juries solely on account of their race, *e.g.*, *Strauder v. West Virginia*, or have been forced to sit in segregated seats in courtrooms, *Johnson v. Virginia*. They have been made to attend segregated and inferior schools, *e.g.*, *Brown v. Board of Education*, or been denied entrance to colleges or graduate schools because of their color, *e.g.*, *Pennsylvania v. Board of Trusts; Sweatt v. Painter*. Negroes have been prosecuted for marrying whites, *e.g.*, *Loving v. Virginia*. They have been forced to live in segregated residential districts, *Buchanan v. Warley*, and residents of white neighborhoods have denied them entrance, *e.g.*, *Shelley v. Kraemer*. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy v. Ferguson*; public parks, *New Orleans [City]*

¹⁷² 392 U.S. 409 (1968).

¹⁷³ *Id.* at 445 (Douglas, J., concurring).

¹⁷⁴ *Id.*

¹⁷⁵ 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 2000a to 2000d-4a, 2000e to 2000h-6.

¹⁷⁶ *Alfred H. Mayer Co.*, 392 U.S. at 445.

¹⁷⁷ *Id.* at 449.

¹⁷⁸ *Id.* at 448.

Park Improvement Assn. v. Detiege; restaurants, *Lombard v. Louisiana*; [and] public beaches, *Mayor of Baltimore v. Dawson* . . .¹⁷⁹

A mere few years after *Jones v. Alfred H. Mayer Co.*, and nearly two decades post *Brown v. Board of Education*, Justice Douglas’s evocative concurrence would be tested in *Palmer v. Thompson*.¹⁸⁰ In that case, Jackson, Mississippi, closed all the public swimming pools in the city after the Fifth Circuit Court of Appeals ordered them desegregated.¹⁸¹ The city then rescinded its lease of a pool from the YMCA, which continued to permit only white people to use it.¹⁸² Thereafter, the mayor and city council officials refused to open any swimming pools on an integrated basis.¹⁸³

Despite compelling evidence that local officials closed the pools to avoid compliance with a federal order, the Supreme Court held that the city council did not create a “badge or incident” of slavery by closing all the pools instead of integrating them.¹⁸⁴ The Court opined that the city’s decision appeared race neutral and motivated by credible economic and safety considerations.¹⁸⁵ Thus, into the 1970s, the Supreme Court conceded to a “tired contention, one that [was] overworked in civil rights cases,”¹⁸⁶ that actions meant to obstruct desegregation affected Black and white people equally. The Court seemed to fear that (a) overwhelming racial strife would result from dismantling Jim Crow barriers — such that (b) violence would erupt from enforcing constitutional guarantees of equal protection and substantive due process — and (c) Southern cities would suffer significant economic consequences. *So whose interests did the Court protect?*

As both Justices Douglas and White articulated in separate dissenting opinions, the reality of the city’s action and the Court’s decision fell on Black citizens of Jackson, Mississippi. Justice Douglas wrote:

As stated at the outset of this opinion, by closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility, though pools were long a feature of the city’s segregated recreation program. . . . Closing the pools without a colorable nondiscriminatory reason was every bit . . . an official endorsement of the notion that Negroes are not equal to whites¹⁸⁷

¹⁷⁹ *Id.* at 445 (citations omitted).

¹⁸⁰ 403 U.S. 217 (1971).

¹⁸¹ *Clark v. Thompson*, 313 F.2d 637, 638 (5th Cir. 1963); see *Palmer*, 403 U.S. at 218–19.

¹⁸² *Palmer*, 403 U.S. at 222.

¹⁸³ See *id.* at 219; *id.* at 253 (White, J., dissenting).

¹⁸⁴ *Id.* at 226 (majority opinion) (finding “faint and unpersuasive” petitioner’s arguments that “the closing of the pools violated the Thirteenth Amendment”).

¹⁸⁵ *Id.* at 225.

¹⁸⁶ *Id.* at 265 (White, J., dissenting) (quoting *Palmer v. Thompson*, 419 F.2d 1222, 1232 (5th Cir. 1969) (Wisdom, J., dissenting)).

¹⁸⁷ *Id.* at 266–67; see also *id.* at 235 (Douglas, J., dissenting).

The front-page *New York Times* headline following the ruling, *Court Says Cities May Close Pools to Bar Racial Mix*, reflected the painful reality of the majority's racial blind spots and complicity.¹⁸⁸

B. Contemporary Challenges of Complicit Bias

Complicit bias offers a meaningful lens through which to understand real and existing harms. Consider the fact that the Court struck down key provisions in the Voting Rights Act,¹⁸⁹ which now contributes to the proliferation of voter suppression laws.¹⁹⁰ Arguably, the Court's decision in *Shelby County* set the stage for *Merrill v. Milligan*.¹⁹¹ It signaled conservative Justices' willingness to entertain future cases that attack race-conscious laws remedying past or present harms to Black people, including outside the voting context. For example, the Court permitted a harsh Texas abortion ban, S.B. No. 8¹⁹² (SB8), that disproportionately harms the interests of Latinx and Black women and girls, as well as people with disabilities, to a predictable, deadly degree.¹⁹³ And, in *Dobbs*, the Court accepted Mississippi's invitation to dismantle *Roe* and *Casey*.¹⁹⁴ Even before its ruling, there was only one clinic in the entire

¹⁸⁸ Fred P. Graham, *Court Says Cities May Close Pools to Bar Racial Mix*, N.Y. TIMES, June 15, 1971, at A1; see also Taunya Lovell Banks, *Still Drowning in Segregation: Limits of Law in Post-Civil Rights America*, 32 LAW & INEQ. 215, 217–19 (2014) (connecting the history of pool segregation and discrimination in the United States to the high rates of Black people unable to swim and racially disproportionate drownings as a result).

¹⁸⁹ See *Shelby County v. Holder*, 570 U.S. 529, 545–46, 556–57 (2013).

¹⁹⁰ See generally, e.g., THURGOOD MARSHALL INST., NAACP LEGAL DEF. FUND, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-SHELBY COUNTY, ALABAMA V. HOLDER; Richard L. Hasen, *The Supreme Court's Pro-partisanship Turn*, 109 GEO. L.J. ONLINE 50 (2020) (explaining that, after the Supreme Court's decision in *Shelby County*, the Court used "[t]hese three Supreme Court tools — willful ignorance of political reality, the presumption of legislative good faith, and animus laundering — [to] give self-interested government actors the ability to make partisan gerrymandering, racial gerrymandering, restrictive election laws, and minority vote dilution easier," *id.* at 52).

¹⁹¹ 142 S. Ct. 879 (2022) (mem.). In this case, the Court will consider whether Alabama's 2021 redistricting map for seven U.S. House of Representatives seats violate § 2 of the Voting Rights Act. See *Caster v. Merrill*, No. 21-cv-1536, 2022 WL 264819, at *1 (N.D. Ala. Jan. 24, 2022). The case presents the opportunity for the Roberts Court to strike down another key provision of the Act.

¹⁹² TEX. HEALTH & SAFETY CODE § 171.204 (2021).

¹⁹³ See Rachel K. Jones et al., *New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States that Do Not Border Texas*, GUTTMACHER INST. (Nov. 9, 2021), <https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortions-least-12-states-do-not-border> [<https://perma.cc/VNF4-WWHC>]; Lizzie Widdicombe, *A Reproductive-Rights Activist Explains the Realities of Abortion for Latina Women*, NEW YORKER (Jan. 26, 2022), <https://www.newyorker.com/news/as-told-to/a-reproductive-rights-activist-explains-the-realities-of-abortion-for-latina-women> [<https://perma.cc/RK98-7UQH>]; *LULAC Says Texas Law Against Access to Abortions Impacts Communities of Color*, LEAGUE OF UNITED LATIN AM. CITIZENS, https://lulac.org/news/pr/LULAC_Says_Texas_Law_Against_Access_To_Abortions_Impacts_Communities_Of_Color [<https://perma.cc/E79N-N6LP>].

¹⁹⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

state of Mississippi to serve a population of 1.538 million women that might desire or need to terminate a pregnancy.¹⁹⁵

Complicit bias as a concept or framework may provide the basis for shaping and reshaping remedies, be they legal, policy, or social. Specifically, three shifts are presaged with a turn to incorporating complicit bias into legal and social thought. First, this framework in law and society provides for an overdue attitudinal shift and the ability to mark associational silence and paralysis (or omission), as well as cover-up and commission, as complicit and harmful. Second, a critical examination of complicit bias in law reveals the weaknesses in turning to the Court to protect the interests of minorities, people of color, and unpopular groups. A close tracing of the Court's record on race and sex discrimination reveals the myriad ways in which the "Court has been an impediment to progressive government efforts regarding race by striking down laws," including "the Court's invalidating state laws to protect fugitive slaves, [and] its declaring the Missouri Compromise unconstitutional."¹⁹⁶

Third, embedding complicit bias within the fabric of law expands the manner in which harms may be perceived, adjudicated, and remedied. Such an expansion allows for the expression of harms to be analyzed beyond the constitutional law paradigm. For example, tort law, Title VII, and Title IX can be employed as analytic frameworks.¹⁹⁷ Retooling and expanding the lens through which harms are identified could allow for the redress of individualized harms that fall outside of those rooted in a status — race, sex, or LGBTQ status — keeping in mind that complicit bias is not necessarily rooted in the victim's sex, race, or other status.

The Court's record and public perception weather poorly in contemporary times. Indeed, *Dobbs* serves as a powerful case study in complicit bias, as discussed below. Notably, as Bridges points out, other cases in the 2021 Term and recent years, including *Bruen*, *Trump v. Hawaii*,¹⁹⁸ and *Shelby County*, reveal what she describes as the Court's "political values," which "inform whether the Court will find" racial discrimination in a given case.¹⁹⁹ Bridges posits that "although the Court purports to be engaged in a value-neutral inquiry into whether a claim of racial

¹⁹⁵ See *The Impact of the Supreme Court's Dobbs Decision on Abortion Rights and Access Across the United States: Hearing Before the H. Comm. on Oversight & Reform*, 117th Cong. 8 (2022) (statement of Michele Bratcher Goodwin, Chancellor's Professor, University of California, Irvine).

¹⁹⁶ ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 52 (2014).

¹⁹⁷ Government agents and nonagents may be liable for their failures to act in the face of sexual harassment. See *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) ("[T]he regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents."); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (school district may be liable under Title IX if it shows deliberate indifference to known teacher-to-student sexual harassment).

¹⁹⁸ 138 S. Ct. 2392 (2018).

¹⁹⁹ Bridges, *supra* note 12, at 110.

discrimination ‘looks like’ the racism that was practiced during the pre-Civil Rights Era, this inquiry is far from objective.”²⁰⁰ The Court “has embraced an exceedingly narrow definition of racism,” and by this “constrained definition,” the Court is likely to “recognize” or acknowledge and remedy racism when it furthers a political value and deny a remedy when the “contexts [are] not perfectly aligned with the goals of the Republican Party.”²⁰¹ Simply put, according to Bridges, values — specifically, *political* values — inform whether the Court will find and remedy a race-based harm.

Bridges’s claim has purchase on matters of sex equality and reproductive freedom too. Most devastatingly, the Court overturned *Roe* after granting certiorari in a case already settled by lower courts.²⁰² However, the Court did not simply overturn *Roe* but also engaged in an opportunistic reading of history that misleads and misinforms. The Court promised to provide a historical account and analysis to rebut *Roe* and *Casey* but chose weak branches on which to hoist its arguments and analysis. For example, as Bridges notes, the Court implied that abortion is part of the American legacy of eugenics and that this agenda sought to “suppress the size of the African-American population.”²⁰³ Likely, such misleading and misaligned analyses have been given added consideration in light of the fact that Justice Thomas, the Court’s only African American, male Justice, has been the progenitor of this inaccurate claim.²⁰⁴ Simply put, the claim is false.

Indeed, the Court misread its own jurisprudence (and complicit bias) in *Buck v. Bell*, which sanctioned eugenics in the United States.²⁰⁵ Notably, the case had nothing to do with Black women or girls but rather, poor white Americans. The Court’s misstep associating abortion

²⁰⁰ *Id.* at 109–10.

²⁰¹ *Id.* at 110.

²⁰² See *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619, 2619–20 (2021) (granting certiorari); Amy Howe, *Court Leaves Texas’ Six-Week Abortion Ban in Effect and Narrows Abortion Providers’ Challenge*, SCOTUSBLOG (Dec. 10, 2021, 2:11 PM), <https://www.scotusblog.com/2021/12/court-leaves-texas-six-week-abortion-ban-in-effect-and-narrows-abortion-providers-challenge> [<https://perma.cc/7BM8-X4CE>]; see also Andrea Romero & Amanda Septimo, *Texas Abortion Ban Leaves Latinx Community More Vulnerable*, REWIRE NEWS GRP. (Nov. 1, 2021, 8:30 AM), <https://rewirenewsgroup.com/article/2021/11/01/texas-abortion-ban-leaves-latinx-community-more-vulnerable> [<https://perma.cc/A92R-AES5>]. Judge Reeves had issued an order enjoining the law from going into effect. See *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018), *aff’d sub nom.* *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev’d*, 142 S. Ct. 2228 (2022). The order was upheld by a federal appeals court. See *Dobbs*, 945 F.3d at 269. Given that the Mississippi law was unconstitutional based on the holdings in *Roe* and *Casey*, the Supreme Court could have ignored Mississippi’s petition.

²⁰³ Bridges, *supra* note 12, at 63 (quoting *Dobbs*, 142 S. Ct. at 2256 n.41 (citing Brief for Amici Curiae African-American, Hispanic, Roman Catholic and Protestant Religious and Civil Rights Organizations and Leaders Supporting Petitioners at 14–21, *Dobbs* (No. 19-1392))); see *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782–84 (2019) (Thomas, J., concurring).

²⁰⁴ Bridges, *supra* note 12, at 54, 63; see *Box*, 139 S. Ct. at 1783–84 (Thomas, J., concurring).

²⁰⁵ See 274 U.S. 200, 205, 207–08 (1927).

with “black genocide”²⁰⁶ is clarified by consulting the Court’s decision in *Buck*, which Justice Thomas used to support the theory.²⁰⁷ Quite explicitly, Justice Holmes announced in that case: “Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child.”²⁰⁸

Nevertheless, the inaccurate claim that abortion advocacy is rooted in eugenics does a direct and deadly disservice to Black women, who are 3.5 times more likely to die due to maternal mortality than their white counterparts.²⁰⁹ In Mississippi, a Black woman is 118 times more likely to die by carrying a pregnancy to term than by having an abortion.²¹⁰ According to the Mississippi Maternal Mortality Report, Black women accounted for “nearly 80% of pregnancy-related cardiac deaths” in that state.²¹¹ The Court’s failure to address the predictable deaths, especially among Black women, that will unfold in states banning abortions after *Dobbs* reflects what Bridges argues is the “narrow” category of discrimination the Court will seek to remedy, which does not include harms related to the denial of reproductive freedom. It also reflects a disregard for the health and humanity of Black women. That is, the *Dobbs* decision purports to protect Black women from the coercive foil of eugenicists who seek to suppress their reproductive capacities through abortion.²¹² Horrifically, the Court’s remedy is to disempower Black women and people with the capacity for pregnancy by stripping them of the decision to reduce the risk of maternal mortality and morbidity by returning these matters to states with the most glaring maternal mortality rates in the industrialized world.²¹³

²⁰⁶ *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring).

²⁰⁷ *See id.* at 1786.

²⁰⁸ *Buck*, 274 U.S. at 205.

²⁰⁹ Marian F. MacDorman et al., *Racial and Ethnic Disparities in Maternal Mortality in the United States Using Enhanced Vital Records, 2016–2017*, 111 AM. J. PUB. HEALTH 1673, 1673 (2021).

²¹⁰ In Mississippi, between 2013 and 2016, the pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the white ratio of 18.9. MISS. STATE DEP’T OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT 2013–2016, at 12 fig.3 (addended 2021), https://msdh.ms.gov/msdhsite/_static/resources/8127.pdf [<https://perma.cc/H82G-4TN4>]. The national legal induced-abortion case-fatality rate from 2013 to 2017 was 0.44 legal induced-abortion-related deaths per 100,000 reported legal abortions. Katherine Kortsmitt et al., *Abortion Surveillance — United States, 2018*, MORBIDITY & MORALITY WKLY. REP. SURVEILLANCE SUMMARIES, Nov. 27, 2020, at 1, 29, <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf> [<https://perma.cc/T52H-RFAD>].

²¹¹ MISS. STATE DEP’T OF HEALTH, *supra* note 210, at 16.

²¹² *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022).

²¹³ *See* Jamila Taylor et al., *The Worsening U.S. Maternal Health Crisis in Three Graphs*, THE CENTURY FOUND. (Mar. 2, 2022), <https://tcf.org/content/commentary/worsening-u-s-maternal-health-crisis-three-graphs> [<https://perma.cc/YBR4-5PJG>].

Simply put, the Supreme Court took away women's right to save themselves from the risks associated with pregnancy.²¹⁴ Notably, the Court is not ignorant of the significant health risks associated with pregnancy. As recently as 2016, the Supreme Court articulated its awareness of the high risks associated with pregnancy and childbirth compared to abortion. In *Whole Woman's Health v. Hellerstedt*,²¹⁵ the Court stated: "Nationwide, childbirth is 14 times more likely than abortion to result in death."²¹⁶ However, the Court's conservative majority has now shown grave indifference to this predictable suffering and death.

Nor can the Supreme Court's conservative majority be credibly unaware of the particular contexts in which it has now stripped Black women of bodily self-defense and self-determination — ironically while claiming to advance such interests for Black men in *Bruen*.²¹⁷ Mississippi and many other antiabortion states share the legacies of profiting from American slavery and later propping up and defending Jim Crow.²¹⁸ Moreover, these states share alarming legacies of amplifying or inflicting physical, economic, and psychological violence against Black women and their offspring.²¹⁹ As federal district court Judge Reeves wrote in the 2018 order granting injunctive relief against the Mississippi law, "Fannie Lou Hamer's reporting" informed the nation about a dirty secret in Mississippi — that the state had "sterilized six out of ten black women in Sunflower County at the local hospital — against their will."²²⁰

It is this Mississippi, not an alternative, fairytale state, to which the Supreme Court gave its imprimatur. Mississippi is a state where Black women as well as Black men were lynched. The Equal Justice Initiative describes how Luther Holbert and an unidentified Black woman were "tortured and killed in Doddsville, Mississippi, a Sunflower County town in the Mississippi Delta," while hundreds of white people watched as their bodies were set aflame and burned after the lynching.²²¹

²¹⁴ See *Dobbs*, 142 S. Ct. at 2242 ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Fourteenth Amendment.").

²¹⁵ 136 S. Ct. 2292 (2016).

²¹⁶ *Id.* at 2315.

²¹⁷ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2151–52 (2022); see also Bridges, *supra* note 12, at 82–83.

²¹⁸ See Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [https://perma.cc/Q7LU-CD9M].

²¹⁹ See Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment at 23, *Jackson Women's Health Org. v. Carrier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018) (No. 18cv171).

²²⁰ *Jackson Women's Health Org.*, 349 F. Supp. 3d at 540 n.22.

²²¹ *On This Day — Feb. 07, 1904: Black Man and Woman Brutally Lynched in Mississippi Delta*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/feb/7> [https://perma.cc/97QB-YC29].

Until 2013, Mississippi had not ratified the Thirteenth Amendment, which abolished slavery in 1865.²²² Not until 1987 did “Mississippi voters repeal[] by a narrow 52 percent to 48 percent margin the state’s 1890 constitutional ban on interracial marriage.”²²³ It is the state where Black women were physically beaten for attempting to vote.²²⁴ As Professor Jesmyn Ward argues, “racism is ‘built into the very bones’ of Mississippi” and “thrive[s]” today.²²⁵ In a recent article in *The Atlantic*, Ward offers a firsthand, narrative account of racism in Mississippi from the perspective of a Black woman.²²⁶ She explains, it “has strangled us for hundreds of years. Under the thin veneer of mutability, the belief that anyone of African descent is inferior still flourishes.”²²⁷

Making clear what was at stake, Judge Reeves wrote that Mississippi “‘ranks as the state with the most [medical] challenges for women, infants, and children’ but is silent on expanding Medicaid.”²²⁸ He surmised that the “[abortion] legislation . . . is closer to the old Mississippi — the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries ‘so they may continue their service as mothers, wives, and homemakers.’”²²⁹

Finally, even while the Supreme Court performs a crucial role in advancing equality and protecting the interests of vulnerable groups, both its legacy of judicial review and contemporary jurisprudence reveal its critical role in legitimizing harmful racist and sexist laws. The Court has too often failed when vulnerable groups most relied on it to uphold their civil rights against unconstitutional practices and policies. As such, the Court too frequently abrogated its due process function to protect individual rights and to interpret the Constitution in an unbiased manner.

²²² See Ben Waldron, *Mississippi Officially Abolishes Slavery, Ratifies 13th Amendment*, ABC NEWS (Feb. 19, 2013), <https://abcnews.go.com/blogs/headlines/2013/02/mississippi-officially-abolishes-slavery-ratifies-13th-amendment> [<https://perma.cc/2Z57-TERL>].

²²³ Kathy Eyre, *Mississippi Still Far from Accepting Interracial Marriage*, AP NEWS (Nov. 28, 1987), <https://apnews.com/article/d57930264fd39578c14f3f64f2cec4e8> [<https://perma.cc/QRU9-CMZZ>].

²²⁴ Thomas A. Johnson, *Fannie Lou Hamer Dies; Left Farm to Lead Struggle for Civil Rights*, N.Y. TIMES, Mar. 15, 1977, at 40.

²²⁵ Jesmyn Ward, *Racism Is “Built into the Very Bones” of Mississippi*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/2018/02/jesmyn-ward-mississippi/552500> [<https://perma.cc/WU3A-5DRZ>].

²²⁶ See *id.*

²²⁷ *Id.*

²²⁸ Jackson Women’s Health Org. v. Currier, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018) (alteration in original), *aff’d sub nom.* Jackson Women’s Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *rev’d*, 142 S. Ct. 2228 (2022).

²²⁹ *Id.* (citing State v. Hall, 187 So. 2d 861, 863 (Miss. 1966)).

III. CRUEL REALITIES OF THE POST-*DOBBS* LANDSCAPE

Not insignificantly, the states at the center of abortion-related petitions to the Court — Texas, Kentucky, and Mississippi²³⁰ — bear the distinction of being well practiced in disenfranchising women of color through histories of enforced enslavement, Jim Crow, and modern-day discrimination.²³¹ These practices have been preserved and transformed through policing, arrests, prosecutions, sentencing, voter suppression, and discrimination in housing, education, and employment, among other forms of social and cultural suffering. Beyond their slave-economy-based heritage, these states also have in common a history of federal interventions to defend the constitutional interests and rights of people of color, women, and LGBTQ individuals. Or, stated differently, in common among these three states is their historically bold resistance to racial and sex equality and their criminalization of LGBTQ intimacy,²³² all of which might continue to persist save for federal intervention by the Court, Congress, or executive orders.²³³

²³⁰ See generally *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2022) (Texas); *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002 (2022) (Kentucky); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (Mississippi).

²³¹ See Donna Gosbee, *Jane Elkins*, HUM. RTS. DALLAS, <https://humanrightsdallasmaps.com/items/show/2> [<https://perma.cc/FG83-2GHH>]; *Margaret Garner*, KY. COMM'N ON HUM. RTS., <https://kchr.ky.gov/Hall-of-Fame/Pages/Margaret-Garner.aspx> [<https://perma.cc/L9NS-UKU9>]; *ACLU of Mississippi Shares U.N. Concerns About Human Rights Violations*, ACLU (Aug. 2, 2006), <https://www.aclu.org/press-releases/aclu-mississippi-shares-un-concerns-about-human-rights-violations> [<https://perma.cc/Z6N2-ASED>].

²³² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²³³ For example, in efforts to circumvent the Fifteenth Amendment, which established voting rights for African American men, Mississippi, Texas, and Kentucky enacted laws that purposefully suppressed African American voting. These laws included “white primaries” and poll taxes, making it almost impossible in some instances for African Americans to vote. These laws were later dismantled by the Voting Rights Act of 1965, 52 U.S.C. §§ 10101, 10301–10702. See, e.g., Ronald G. Shafer, *The “Mississippi Plan” to Keep Blacks from Voting in 1890: “We Came Here to Exclude the Negro,”* WASH. POST (May 1, 2021, 7:00 AM), <https://www.washingtonpost.com/history/2021/05/01/mississippi-constitution-voting-rights-jim-crow> [<https://perma.cc/RF84-HJRK>] (quoting Solomon Saladin Calhoun, President of the Mississippi convention to reform that state’s constitution in 1890). Similarly, in Texas, “[f]ollowing Reconstruction in the South, Texas banned African Americans from voting in party primaries in a law adopted in 1923.” Stephanie Lindquist, *Jim Crow Tactics Reborn: Texas Abortion Law Delegates Enforcement to Citizens*, MISS. FREE PRESS (Sept. 13, 2021), <https://www.mississippifreepress.org/15885/jim-crow-tactics-reborn-in-texas-abortion-law-deputizing-citizens-to-enforce-legally-suspect-provisions> [<https://perma.cc/TSB8-5GYI>]. The law was challenged and struck down by the Supreme Court in 1927. See *Nixon v. Herndon*, 273 U.S. 536, 541 (1927); see also *Smith v. Allwright*, 321 U.S. 649, 649 (1944) (striking a Texas law that allowed political parties to establish primaries that were exclusively white). Kentucky’s third constitution, ratified in 1850, “specifically require[d] all voters to be ‘white.’” *The Evolution of Voting in Kentucky*, FILSON HIST. SOC’Y, <https://filsonhistorical.omeka.net/exhibits/show/presidential-elections/the-evolution-of-voting-in-ky> [<https://perma.cc/BRC3-3XSQ>]. After ratification of the Fifteenth Amendment, Kentucky officials deployed various tactics to suppress Black enfranchisement, including violating the Enforcement Act of 1870 by refusing to receive and count the vote of a Black elector. See *United States v. Reese*, 92 U.S. 214, 227 (1875) (Clifford, J., dissenting) (“[T]he

The unprecedented overturn or annulment of a constitutional right blights the Court's 2021 Term and stands as a robust political victory for the former President, Donald Trump, who vowed to punish women who obtain abortions.²³⁴ President Trump also promised to appoint only judges committed to overturning of *Roe v. Wade*.²³⁵ Today, he publicly declares victory: that he delivered on those promises with key nominations to the Supreme Court²³⁶ and the aggressive filling of vacancies in lower federal courts.²³⁷ Perhaps the most significant test regarding President Trump's bold antiabortion agenda came in the 2021 Supreme Court Term.

The Supreme Court agreed to review several cases involving abortion bans or restrictions,²³⁸ including one from Texas — SB8 — that prohibits abortions after six weeks of pregnancy (a time at which most people do not know they are pregnant).²³⁹ The law effectively overturned *Roe* in Texas, leaving nearly seven million women of reproductive age in that state without access to abortion.²⁴⁰ For some, it was hindsight that exposed that case as setting the table for the Court's

Congress knew full well that cases would arise where the want of other qualifications, if not removed, might prevent the colored citizen from exercising the right of suffrage . . . and the intent and purpose of the second section of the act are to furnish to all citizens an opportunity to remove every such other disability to enable them to become qualified to exercise that right, and to punish persons and officers charged with any duty in that regard who unlawfully and wrongfully refuse or willfully omit to co-operate to that end." The state also enacted one of the strictest anti-enfranchisement laws, banning those convicted of felonies from voting. KY. ADVISORY COMM. TO THE U.S. COMM'N ON CIV. RTS., VOTING RIGHTS IN KENTUCKY: FELONS WHO HAVE COMPLETED ALL TERMS OF THEIR SENTENCES SHOULD HAVE THE RIGHT TO VOTE 2 (2009), <https://www.usccr.gov/files/pubs/docs/KYVotingRightsReport.pdf> [<https://perma.cc/8X6K-QYZR>].

²³⁴ Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes "Punishment" for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html> [<https://perma.cc/RZK5-98RE>].

²³⁵ Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 10:00 PM), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [<https://perma.cc/EG32-EPWG>].

²³⁶ Lauren Feiner & Dan Mangan, *Trump Takes Credit for End of Roe v. Wade After His 3 Supreme Court Justice Picks Vote to Void Abortion Rights*, CNBC (June 24, 2022, 6:59 PM), <https://www.cnbc.com/2022/06/24/roe-v-wade-decision-trump-takes-credit-for-supreme-court-abortion-ruling.html> [<https://perma.cc/YL22-XFEU>].

²³⁷ See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [<https://perma.cc/4PM8-9H2U>].

²³⁸ In *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002 (2022), the Court decided the question whether the Kentucky Attorney General vested with the power to defend state law should be permitted to intervene when no other state actor will defend a state statute after a federal court of appeals invalidated the law. The Court held that the Attorney General should have been permitted to intervene. *See id.* at 1014.

²³⁹ See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 529–30 (2022).

²⁴⁰ Chloe Atkins, *Texas Abortion Clinics Turning Away Patients as Strict New Law Takes Effect*, NBC NEWS (Sept. 1, 2021, 2:06 AM), <https://www.nbcnews.com/politics/politics-news/texas-abortion-clinics-turning-away-patients-ahead-draconian-new-law-n1278184> [<https://perma.cc/28KE-UHKC>].

ruling in *Dobbs*. For others, the law amplified and fortified a strategic, voluminous arsenal of targeted regulations of abortion providers (TRAP laws) enacted by Texas lawmakers to gut abortion access in their state,²⁴¹ notwithstanding material harms to women of color. These laws contributed to alarming rates of maternal mortality and morbidity, making the state the deadliest place in the developed world to be pregnant.²⁴²

Among its disturbing features, SB8 deputizes citizens to enforce its provisions, granting them authority to sue individuals who aid or abet in the termination of a pregnancy, recover awards of at least ten thousand dollars, and obtain or recoup attorneys' fees.²⁴³ Reminiscent of the Fugitive Slave Acts of 1793²⁴⁴ and 1850,²⁴⁵ SB8 places state interests firmly in the hands of citizens to spy upon, report, and track down those whose human rights hang in the balance.²⁴⁶ But the Court appeared handcuffed in its ability to intervene — or so it projected.²⁴⁷ A more cynical view is that the Court's refusal to intervene was intended as a precursor to *Dobbs* and the overturn of *Roe* and *Casey*. Another view is that it ultimately revealed the Court's complicity and bias.

Dobbs, which drew the most attention of any case in the 2021 Term, involved a fifteen-week Mississippi abortion ban.²⁴⁸ In his ruling granting an injunction against the law, district court Judge Reeves explained: “[T]his Court concludes that the Mississippi Legislature’s professed interest in ‘women’s health’ is pure gaslighting.”²⁴⁹ Judge Reeves noted that “[i]n its legislative findings justifying the need for this legislation, the Legislature cites *Casey* yet defies *Casey*’s core holding. The State ‘ranks as the state with the most [medical] challenges for women, infants, and children’ but is silent on expanding Medicaid.”²⁵⁰ Judge Reeves opined that “legislation like [Mississippi’s fifteen-week abortion

²⁴¹ See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

²⁴² Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged Off by Lawmakers*, TEX. OBSERVER (June 5, 2017, 6:04 PM), <https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities> [https://perma.cc/BW3R-5EKG]; Katha Pollitt, *The Story Behind the Maternal Mortality Rate in Texas Is Even Sadder than We Realize*, THE NATION (Sept. 8, 2016), <https://www.thenation.com/article/archive/the-story-behind-the-maternal-mortality-rate-in-texas-is-even-sadder-than-we-realize> [https://perma.cc/F7AM-H9CB].

²⁴³ TEX. HEALTH & SAFETY CODE § 171.208(a)–(b) (2021).

²⁴⁴ Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302–05 (repealed 1864).

²⁴⁵ Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (repealed 1864).

²⁴⁶ Aziz Huq, *What Texas’s Abortion Law Has in Common with the Fugitive Slave Act*, WASH. POST (Nov. 1, 2021, 10:42 AM), <https://www.washingtonpost.com/outlook/2021/11/01/texas-abortion-law-history-rights-suppressed> [https://perma.cc/5RCY-NKN9].

²⁴⁷ See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532–34, 537–39 (2021).

²⁴⁸ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (quoting MISS. CODE ANN. § 41-41-191 (2022)).

²⁴⁹ *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018), *aff’d sub nom. Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev’d*, 142 S. Ct. 2228 (2022).

²⁵⁰ *Id.* (second alteration in original).

ban] is closer to the old Mississippi — the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries ‘so they may continue their service as mothers, wives, and homemakers.’”²⁵¹

In fact, by providing no relief for survivors of sexual assault and by prohibiting abortions after fifteen weeks of pregnancy, the law challenged the core viability framework introduced by *Roe* and affirmed in *Casey*. Mississippi defended this law with the spurious claim that it sought to protect women’s health and well-being, even while, in Mississippi, it is nearly 118 times more dangerous for a Black woman to give birth than it is for the average American woman to have an abortion.²⁵²

Perhaps the most persuasive evidence of the deadly trap set for Black women by Mississippi lawmakers comes from the Mississippi Department of Health (MDH). The MDH’s most recent investigation of maternal health and mortality, the *Mississippi Maternal Mortality Report*, reported that Black women accounted for “nearly 80% of pregnancy-related cardiac deaths” in the state,²⁵³ despite the fact that Mississippi Attorney General Lynn Fitch forcefully claims that “[t]he Mississippi legislature enacted this law . . . to promote women’s health”²⁵⁴

The Court gave its imprimatur to Mississippi’s revised and strategically timed petition to dismantle abortion rights altogether. In doing so, it overlooked texts contradicting its arguments. The Court effectively ignored Reconstruction-era, abolitionist Framers of the Thirteenth and Fourteenth Amendments — who clearly debated the involuntary reproductive servitude and sexual exploitation of Black women and girls²⁵⁵ — unlike the eighteenth-century Framers, some of

²⁵¹ *Id.* (citing *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966)).

²⁵² In Mississippi, between 2013 and 2016, “the pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the White ratio of 18.9.” MISS. STATE DEP’T OF HEALTH, *supra* note 210, at 5. “The national legal induced abortion case-fatality rate for 2013–2017 was 0.44 legal induced abortion-related deaths per 100,000 reported legal abortions.” Kortsmit et al., *supra* note 210, at 7.

²⁵³ MISS. STATE DEP’T OF HEALTH, *supra* note 210, at 16.

²⁵⁴ Lawrence Hurley, *U.S. Supreme Court Takes Up Major Challenge to Abortion Rights*, REUTERS (May 17, 2021, 9:41 AM), <https://www.reuters.com/world/us/us-supreme-court-takes-up-case-that-could-limit-abortion-rights-2021-05-17> [<https://perma.cc/Z9UF-YH9H>].

²⁵⁵ Senator Charles Sumner’s thinly veiled references to the sexual violence commonly endured by enslaved people were on full display in his gripping speech to Congress in 1856. He cried that “hideous offspring” in the form of lust for new slave states was the result of the “crime” of slavery. Senator Charles Sumner, *The Crime Against Kansas* (May 19–20, 1856), in *SPEECH OF HON. CHARLES SUMNER, IN THE SENATE OF THE UNITED STATES, 19TH AND 20TH MAY, 1856*, at 5 (Boston, John P. Jewett & Co. 1856), <https://www.senate.gov/artandhistory/history/resources/pdf/CrimeAgainstKSSpeech.pdf> [<https://perma.cc/3UZM-VSKN>]. This crime included “the rape of a virgin Territory.” *Id.* He stated that “force” was “openly employed in compelling . . . this pollution, and all for the sake of political power.” *Id.* It was this “wickedness that ma[de] other public

whom themselves enslaved and sexually exploited Black girls and women.²⁵⁶ Justice Alito, author of the *Dobbs* majority opinion, ignored egregious rates of maternal mortality in the United States,²⁵⁷ confining any reference to pregnancy-related deaths to one paragraph discussing *Roe*-era concerns.²⁵⁸ Even in its claimed adherence to original meaning and history, the Court poorly engaged with both, showing a greater commitment to outcomes than accuracy and analysis.²⁵⁹ The result was a decision riddled with errors in history and law.²⁶⁰

The predictable species of laws unleashed or “triggered” in response to *Dobbs* extends well beyond truncating *Roe*’s viability framework. Now, lack of exceptions for rape and incest — a bridge lawmakers were unwilling to cross even a few years ago — is a feature rather than a bug of antiabortion laws.²⁶¹ Lawmakers argue for cruel punishments: fines, fees, and criminal sentences, including the death penalty, for violating

crimes seem like public virtues.” *Id.* at 5–6. In Senator Sumner’s view, the wickedness that he “beg[an] to expose [wa]s immeasurably aggravated by the motive which prompted it. Not in any common lust for power did this uncommon tragedy have its origin” but in a virgin rape “compelling it to the hateful embrace of Slavery.” *Id.* at 5. Two days later, Senator Sumner was severely caned in the halls of Congress. See “*The Crime Against Kansas*,” U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Crime_Against_Kansas.htm [<https://perma.cc/Z3RB-N9S3>].

²⁵⁶ More than a third of the delegates to the Constitutional Convention enslaved Black people; similarly, eight of the first twelve Presidents of the United States enslaved Black people. See, e.g., *How Should We Judge Our Nation’s Founders?*, CONST. RTS. FOUND. (2017), <https://www.crf-usa.org/images/t2t/pdf/HowShouldWeJudgeOurNation.pdf> [<https://perma.cc/RE9K-VUQD>]; Michael Henry Adams, *The Other Madisons Review: An Astonishing Story of a President’s Black Family*, THE GUARDIAN (July 19, 2020, 9:23 AM), <https://www.theguardian.com/world/2020/jul/19/the-other-madisons-review-president-black-family> [<https://perma.cc/V3HV-YQDS>] (“But Jefferson is known to have fathered children with Sally Hemings, a black woman he owned, and Washington, Madison and Monroe are reputed to have done the same, with women owned personally or by family members.”). For a discussion of the pervasiveness of enslavers’ sexual exploitation of and violence against enslaved women, see Cynthia Prather et al., *Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity*, 2 HEALTH EQUITY 249, 251 (2018); and Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 14 (2001).

²⁵⁷ See MISS. STATE DEP’T OF HEALTH, *supra* note 210.

²⁵⁸ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2268 (2022).

²⁵⁹ 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/LP9L-E968>].

²⁶⁰ See *id.*

²⁶¹ See, e.g., Jan Hoffman, *The New Abortion Bans: Almost No Exceptions for Rape, Incest or Health*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/health/abortion-bans-rape-incest.html> [<https://perma.cc/Q94A-R4U7>]; Fabiola Cineas, *Rape and Incest Abortion Exceptions Don’t Really Exist*, VOX (July 22, 2022, 4:20 PM), <https://www.vox.com/23271352/rape-and-incest-abortion-exception> [<https://perma.cc/F5F5-7VWF>]; Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest?*, THE ATLANTIC (Nov. 29, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/1/abortion-law-exceptions-rape-and-incest/620812> [<https://perma.cc/3JVE-CBTH>].

antiabortion proposals.²⁶² Implicated are core rule of law principles and values: freedom of speech, commercial speech, the right to travel, freedom of association, and freedom of religion.²⁶³

Suffering caused by the decision is already manifesting across the United States. For example, these harms exist in the form of a ten-year-old girl fleeing Ohio for Indiana to terminate a pregnancy caused by rape that likely began when she was nine.²⁶⁴ A woman in Wisconsin bled for more than ten days while experiencing an incomplete miscarriage as doctors waited until she was in sufficient distress and near death to intervene.²⁶⁵ In Louisiana, a woman was forced to carry to term a nonviable fetus developing without a skull.²⁶⁶ In Florida, a teenage girl was denied a judicial bypass to obtain an abortion based on the injudicious finding that she lacked the maturity to refuse being

²⁶² Giulia Carbonaro, *Anger as Louisiana Abortion Bill Could See Women Charged with Murder*, NEWSWEEK (May 6, 2022, 3:57 AM), <https://www.newsweek.com/anger-louisiana-abortion-bill-could-see-women-charged-murder-1704069> [<https://perma.cc/BE4H-MLMC>] (“Under the new proposed bill, called House Bill 813, abortion will be considered as homicide from fertilization and conception.”); Megan Messerly & Alice Miranda Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022, 4:30 AM), <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572> [<https://perma.cc/4XR3-F4Z6>] (“[I]n Texas, anyone who performs, induces or attempts an abortion where ‘an unborn child dies as a result of the offense’ is guilty of a first-degree felony — punishable by up to life in prison and up to a \$10,000 fine — under the state’s trigger ban.”); Lukas Mikelionis, *Death Penalty for Women Having Abortions? No, Candidate Clarifies*, FOX NEWS (Apr. 4, 2018, 1:09 AM), <https://www.foxnews.com/politics/death-penalty-for-women-having-abortions-no-candidate-clarifies> [<https://perma.cc/FJT6-Y63E>] (“‘There should be no abortion and anyone who has an abortion should pay,’ Nonini said and reportedly nodded in support of the death penalty as a means of punishing women.”).

²⁶³ See Yascha Mounk, *Why Freedom of Speech Is the Next Abortion Fight*, THE ATLANTIC (Aug. 22, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/freedom-speech-mississippi-abortion-rights/671202> [<https://perma.cc/ZPJ8-LU2V>]; Jeremy W. Peters, *First Amendment Confrontation May Loom in Post-Roe Fight*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/29/business/media/first-amendment-roe-abortion-rights.html> [<https://perma.cc/6USL-TJVK>]; Adam Liptak, *The Right to Travel in a Post-Roe World*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html> [<https://perma.cc/H84F-P8WP>]; Rachel Kranson, *History Shows that the First Amendment Should Protect Abortion*, WASH. POST (May 12, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/05/12/first-amendment-could-save-abortion-rights> [<https://perma.cc/372R-VUYE>]; Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi’s Mission to Find Out*, TIME (July 7, 2022, 6:51 PM), <https://time.com/6194804/abortion-religious-freedom-judaism-florida> [<https://perma.cc/UZ7X-9Z4L>].

²⁶⁴ Elizabeth Wolfe et al., *Man Indicted in Rape of a Child Who Traveled from Ohio to Indiana for an Abortion*, CNN (July 22, 2022, 12:32 AM), <https://www.cnn.com/2022/07/22/us/gerson-fuentes-child-rape-abortion-indictment/index.html> [<https://perma.cc/C9KG-TWPH>] (“[T]he indictment says she was 9 years old when the rapes took place, allegedly by Fuentes.”).

²⁶⁵ Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care> [<https://perma.cc/7EBB-F2P6>].

²⁶⁶ Minyvonne Burke, *Woman Carrying Fetus Without a Skull to Seek Abortion in Another State Following Louisiana Ban*, NBC NEWS (Aug. 26, 2022, 1:22 PM), <https://www.nbcnews.com/news/us-news/louisiana-woman-carrying-fetus-skull-seek-abortion-another-state-rcna45005> [<https://perma.cc/559T-LVX2>] (“‘Basically they said I had to carry my baby to bury my baby,’ said [Nancy] Davis.”).

pregnant.²⁶⁷ In that case, the parentless sixteen year old, who acknowledged that “she [wa]s not ready for the emotional, physical, or financial responsibility of raising a child,” may nonetheless be forced to carry the pregnancy to term.²⁶⁸ In Nebraska, a mother and daughter were both prosecuted in the aftermath of the daughter’s self-managed abortion.²⁶⁹ In Texas, “[a]fter receiving fetal diagnoses of spina bifida and trisomy 18, a 39-year-old woman was shocked that her physician would not even inform her about termination options.”²⁷⁰ After being denied care, she shared, “[w]hen you already have received news like that and can barely function, the thought of then having to do your own investigating to determine where to get this medical care and to arrange going out of state feels additionally overwhelming.”²⁷¹

Each day presents more glaring pregnancy-related medical crises for women and girls residing in antiabortion states.²⁷² In a study published in the *New England Journal of Medicine*, researchers conclude that the Texas abortion ban “has had a chilling effect on a broad range of health care professionals, adversely affecting patient care and endangering people’s lives.”²⁷³

Inevitably, at the heart of the surveillance demanded by various anti-abortion laws and lawmakers²⁷⁴ will be non-race-neutral policing. *Dobbs* will likely magnify and amplify — rather than curtail or upend — preexisting patterns of socioeconomic distress and racial discrimination that target women of color.²⁷⁵ In other words, antiabortion laws, which are a form of sex discrimination,²⁷⁶ also cause and exacerbate race

²⁶⁷ Brittany Shammass & Kim Bellware, *Florida Court Rules 16-Year-Old Is Not “Sufficiently Mature” for Abortion*, WASH. POST (Aug. 17, 2022, 4:57 PM), <https://www.washingtonpost.com/nation/2022/08/17/florida-teen-abortion-denied-mature> [<https://perma.cc/X63J-DDQ5>].

²⁶⁸ *Id.*

²⁶⁹ Shaila Dewan & Sheera Frenkel, *A Mother, A Daughter and an Unusual Abortion Prosecution in Nebraska*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/us/abortion-prosecution-nebraska.html> [<https://perma.cc/2665-WAUP>] (“[B]oth mother and daughter face criminal charges. Their Facebook messages, obtained by the police through a warrant, have become key evidence in a rare prosecution over abortion.”).

²⁷⁰ Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans — Texas Senate Bill 8*, 387 NEW ENG. J. MED. 388, 389 (2022).

²⁷¹ *Id.*

²⁷² See Neel Dhanesha, *A Pregnancy Turns Deadly in an Anti-abortion State. What Happens Next?*, VOX (July 4, 2022, 7:30 AM), <https://www.vox.com/science-and-health/23191865/abortion-ban-medical-emergency-ectopic-pregnancy> [<https://perma.cc/ZL6K-WTKA>]; see also Michelle Andrews, *\$80,000 and 5 ER Visits: An Ectopic Pregnancy Takes a Toll*, NPR (October 4, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/10/04/1126594608/ectopic-pregnancy-expensive-new-york> [<https://perma.cc/K55F-X29Y>].

²⁷³ Arey et al., *supra* note 270, at 388.

²⁷⁴ See Lily Hay Newman, *The Surveillance State Is Primed for Criminalized Abortion*, WIRED (May 24, 2022, 5:00 AM), <https://www.wired.com/story/surveillance-police-roe-v-wade-abortion> [<https://perma.cc/BTK7-CE9H>]; MICHELE GOODWIN, *POLICING THE WOMB* 28–45 (2020).

²⁷⁵ Bridges, *supra* note 29, at 1279 n.228.

²⁷⁶ See Ed Pilkington, *UN Experts Condemn Texas Abortion Law as Sex Discrimination “At Its Worst,”* THE GUARDIAN (Sept. 7, 2021, 2:00 AM), <https://www.theguardian.com/us-news/2021/sep/07/un-experts-condemn-texas-anti-abortion-law> [<https://perma.cc/B4WN-K4DB>].

discrimination and suffering. As a general matter, in the United States, a woman is fourteen times more likely to die in pregnancy or childbirth than during an abortion.²⁷⁷ However, nationally, Black women are roughly 3.5 times more likely to die due to maternal mortality than their white counterparts.²⁷⁸ That statistical gap multiplies depending on the city or county in which a Black woman resides.²⁷⁹

Why, then, did the Court fail to address racism and racial discrimination in *Dobbs* despite the alarmingly high racial disparities in rates of maternal deaths and morbidity in Mississippi?²⁸⁰ Despite a district court record replete with references to historical patterns of race discrimination and violence inflicted on Black women by the state, including coercive sterilizations,²⁸¹ why did the Court decline to address the negative impacts surely to be experienced by Black women? To what extent might complicit bias have influenced or been perceived as influencing the outcome in *Dobbs* or other cases this Term related to reproductive freedom, gun control, or free exercise?

CONCLUSION

What explains enduring legacies of racial inequality that materialize across the lifespan in reproductive rights, education, employment, housing, and fundamental areas related to civil liberties and civil rights? What accounts for the persistence of arcane race or sex biases and stereotypes festering in law and society despite available information to dislodge them? And can constitutional law serve to resolve these types of challenges? One reasonable answer resides in the argument made by Professor Neil Komesar in *Law's Limits* regarding the inherent

²⁷⁷ Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012), <http://www.ncbi.nlm.nih.gov/pubmed/22270271> [<https://perma.cc/HM24-HNRM>].

²⁷⁸ Sarika Chawla, *Black Women Are 3.5 Times More Likely to Die from Being Pregnant than White Women*, VICE (Sept. 13, 2017, 6:03 PM), <https://www.vice.com/en/article/mb7j4p/black-women-are-3-times-more-likely-to-die-from-being-pregnant> [<https://perma.cc/FN63-KF5Q>].

²⁷⁹ See LORRAINE C. BOYD ET AL., N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, PREGNANCY-ASSOCIATED MORTALITY, <https://www1.nyc.gov/assets/doh/downloads/pdf/ms/pregnancy-associated-mortality-report.pdf> [<https://perma.cc/XF77-YAHY>] (finding that from 2006 to 2010 in New York City, Black women were up to twelve times more likely to die due to complications in pregnancy and childbirth than their white counterparts); Sarah Oweremohle, *Why Louisiana's Maternal Mortality Rates Are So High*, POLITICO (May 19, 2022, 4:06 PM), <https://www.politico.com/news/2022/05/19/why-louisianas-maternal-mortality-rates-are-so-high-00033832> [<https://perma.cc/J8CY-8UE2>]; Ashton Pittman, *As Mississippi Debates Abortion, Maternal Mortality Remains High*, JACKSON FREE PRESS (May 23, 2019, 12:42 PM), <https://www.jacksonfreepress.com/news/2019/may/23/mississippi-debates-abortion-maternal-mortality-re> [<https://perma.cc/7ZKE-PYCW>] (“During the 2013 to 2016 time period studied, black women accounted for 80% of pregnancy-related cardiac deaths.”).

²⁸⁰ See, e.g., *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018), *aff'd sub nom. Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev'd*, 142 S. Ct. 2228 (2022); Pittman, *supra* note 279.

²⁸¹ *Jackson Women's Health Org.*, 349 F. Supp. 3d at 540 n.22.

weaknesses in law and legal processes. Komesar compares the legal process to a “tiny engine” confronted by “increasing strains on both its substantive abilities and physical capacity.”²⁸² Law can do only so much, and, ironically, the processes traditionally relied upon to settle legal disputes may actually be ill conceived and poorly structured to do so.²⁸³

Another argument, more specific to matters of civil rights and civil liberties and deployed by both segregationists and civil rights leaders during Jim Crow, is that law on its own — and constitutional law more specifically — may not be up to the task of changing hearts and minds. For the former, such arguments counseled against the enactment of civil rights legislation, and they urged courts against using their authority to strike down segregationist laws.²⁸⁴ In 1954, at the time of *Brown*, four states permitted racial segregation in schooling and seventeen states along with Washington, D.C., mandated racially segregated education.²⁸⁵ In fact, more states mandated racial segregation than forbade it.²⁸⁶ In such an atmosphere, changing laws presented less of a battle and fewer substantive obstacles than scrubbing from an American social consciousness centuries of bias and stereotype.

Thus, in *Brown*, when the Court explained, “[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,”²⁸⁷ whose hearts and minds concerned the Court? Or needed retooling? To answer the question, the Court stated, “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children.”²⁸⁸ According to the Court, “the policy of separating the races is usually interpreted as denoting the inferiority of

²⁸² NEIL K. KOMESAR, *LAW’S LIMITS* 35 (2001) (generally addressing the limits in law to resolve all legal disputes and speculating that some conflicts might better be resolved outside of traditional legal processes).

²⁸³ See *id.*

²⁸⁴ See *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (“On [the question of whether a state has any rational basis to forbid interracial marriage], the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.”); Transcript of Oral Argument at 32, *Loving* (No. 395) (“[F]or the Court to undertake to enter this controversy [regarding the legality of laws forbidding interracial marriage], the Court would find itself mired in a Sybarian bog of conflicting scientific opinions which . . . is sufficiently broad, sufficiently fluid, and sufficiently deep to swallow the entire Federal Judiciary.”).

²⁸⁵ See Richard H. King, *Race, Equality, and “Hearts and Minds,”* 70 J.S. HIST. 309, 309–10 (2004) (“A segregated America was not exactly the most compelling image to present to the newly emerging nations of the Third World (even though American foreign policy never placed decolonization at or near the top of its concerns).”).

²⁸⁶ See *id.* at 310 (“Sixteen states explicitly forbade school segregation, while the laws of eleven others made no mention of the matter.”).

²⁸⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

²⁸⁸ *Id.*

the negro group,” and because of this “sense of inferiority,” Black children’s motivation to learn was stunted along with their “educational and mental development.”²⁸⁹

Even as Bridges argues that the Court is willing to remedy anti-Black racism in pre-Civil Rights Era form, much remains contested about *Brown* and the Court’s unwillingness to recognize structural inequalities bounded in American law and white supremacy — including unequal housing, employment, and blatant racial discrimination in virtually all aspects of life — as that which harmed the psyche of Black children, not themselves.²⁹⁰ The much harder task before the Court was not speaking to the hearts and minds or attitudinal changes of Black children, but to those of white parents, lawmakers, school boards, and judges.

Nevertheless, even civil rights and civil liberties activists and movement leaders who relied on traditional constitutional arguments to dismantle unjust practices recognized the limits of constitutional law to reshape culture or change hearts and minds.²⁹¹ To understand *Brown* as the case whose time had come in light of the moral urgency to end a form of racial apartheid embedded in American law would be to misunderstand geopolitical realities and the fact that “the national commitment to racial equality was always intertwined with Cold War considerations and thus highly opportunistic.”²⁹²

Achieving legal victories to strike down unjust laws served an expedient purpose for civil rights leaders too, even if it meant the persistence of harmful and unjust racial biases in American culture furthered by the complicity of the Supreme Court in perpetuating stereotypes against Black children.

Perhaps one of the more troubling answers to the enduring phenomenon of race and sex bias in law and society and the relative inability of constitutional law to serve as the primary or sole force in law to address those problems emanates from the Court itself and its complicated, and arguably weak, history in defending the interests of the most vulnerable. In 1883, merely a stone’s throw away from the legalization of American slavery, the Court dismissed racial discrimination claims, explaining:

²⁸⁹ *Id.*

²⁹⁰ See generally, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

²⁹¹ See Wendy B. Scott, *Dr. King and the Battle for Hearts and Minds* 5 (Univ. of Md. Sch. of L. Legal Stud. Rsch. Paper No. 2009-2, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323329 [<https://perma.cc/6KZ5-7BRW>] (quoting Dr. King: “Desegregation will break down the legal barriers[,] . . . but something must touch the hearts and souls of men so that they will come together spiritually . . . True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.” (second omission in original)). See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944) (noting generally that the challenge for achieving racial equality in the United States is rooted in the struggle to change hearts and minds).

²⁹² See King, *supra* note 285, at 310. See also generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²⁹³

That is, despite the striking down of "separate but equal laws" and seventeen years of the Warren Court, according to Dean Erwin Chemerinsky, "[t]he Court, overall, has done much more harm than good with regard to race."²⁹⁴ The Court's nearly two decades of evaluating and striking down often bizarre, inane laws "cannot outweigh the horrendous ones in the century and a half before that or the troubling ones since."²⁹⁵

²⁹³ *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

²⁹⁴ CHEMERINSKY, *supra* note 196, at 52-53.

²⁹⁵ *Id.*