The "History And Tradition" of the Sanctification of Structural Violence: A Review of the Cyclical Corrosion of Constitutional Protections

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Abstract:

In recent decades, the American political and legal landscape has undergone a radical, though not necessarily unprecedented, transformation. Hard-fought progress in the area of civil rights has been eviscerated through sophisticated efforts to legitimize a political, economic, social, and legal system that devalues and exploits non-whites, women, the poor, and those who do not comport with heteronormative, gender-conforming standards. The corrosion of the rights of historically disenfranchised communities has been effectuated by courts and political leaders to sanction the dilution of constitutional protections through formal legal structures. Policy violence, a response by legal and political elites to the advancement of historically oppressed groups, has been the primary vehicle utilized to strip marginalized groups of civil rights, including fundamental constitutional protections.

The cyclical corrosion of constitutional protections and the demise of modern liberty-based rights has been made possible precisely because there is an established history and tradition of policy violence that permits such government actions. Structural violence targeted at those forced to the margins of society has long been employed as a tool of power and control. At its most foundational level, policy violence is enacted by federal, state, and local officials—elected and unelected—who use their authority to dispossess groups of political, personal, social, educational, economic, and legal rights. Notably, systemic violence is most pronounced when minoritized groups achieve any gains, no matter how modest. Any modicum of progress is perceived as a threat to the existing power structure, thereby necessitating a recalibration of the socio-political equilibrium that can be accomplished most efficiently through state-sanctioned policy violence.

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Although amplified to heightened levels, state-based policy violence is by no means a historical anomaly. Structural violence is instantiated in American political and legal culture. Despite the inspirational text and noble ideals of our country's founding document, the United States has been a racial, patriarchal dictatorship for the majority of its history. At the inception of the American republic and throughout much of the country's history, the majority of elected leaders and jurists who were responsible for writing and enforcing the nation's laws directly benefited from various forms of systemic violence.

In examining the role of the courts and legislators in pioneering and perpetrating structural violence, this Article considers the longstanding historical usage and modern expressions of state violence, specifically as applied to the erosion of unenumerated rights for people of color, women, and members of the LGBTQ+ community. This Article seeks to expound upon earlier works addressing state-based, policy violence directed at peripheral groups by examining how historical forms of structural violence may inform our current understanding of the loss of constitutional protections. Recent Supreme Court decisions and the proliferation of antidemocratic efforts to curtail civil rights progress require a renewed urgency in understanding and combatting the deployment of policy violence strategies.

This Article proceeds in several interrelated parts. Part one offers a historical overview of the protracted legacy of structural violence within the American socio-political system and its recurring appearance in response to civil rights gains. Part two presents a discussion of the origins, impetus, and instigators of systemic violence, providing a more focused description of the sources and actors of state-based harm. The third part aims to connect the historical and descriptive elements of the introductory parts to explain the contemporary indicators of structural violence as it uniquely affects communities of color, women, and the LGBTQ+ community. The final substantive part of the Article provides an analysis of how an incomplete articulation of the nation's "history and traditions" has resulted in modern forms of structural harm perpetrated by the Court. The Court's shifting substantive due process analysis has served as a basis to restrict, and in some cases revoke, legal rights for women, communities of color, and LGBTQ+ people. The misuse of history and tradition by the Court in determining unenumerated constitutional rights is itself a form of systemic violence that degrades the integrity of democratic institutions. The Article concludes by considering the governance implications for a socio-political system based on entrenched structural violence and suggests that redress will not be realized uniquely through judicial victories or the enactment of new legislation but

through the countervailing forces of community-based and individual resistance.

I. INTRODUCTION

"If liberty and equality, as thought by some, are chiefly to be found in democracy, they will be attained when all persons alike share in government to the utmost."

- Aristotle

On June 19, 1968, mere months after the assassination of her husband, Coretta Scott King addressed a crowd of over 50,000 anti-poverty and civil rights activists at the National Mall in Washington D.C.[1] Ms. King's Solidarity Day Address was in support of the Poor People's Campaign, Dr. Martin

[1] Coretta Scott King, Solidarity Day Speech at the Poor People's Campaign (June 19, 1968), https://timeline.thekingcenter.org/timeline/the-king-center/mrs-king-advances-the-poor-peoples-campaign [https://perma.cc/5CRC-9XTW]. The event had been on Juneteenth, recognized for its importance as the date when federal troops arrived in Texas, the last Confederate state to learn that the Civil War had ended and that enslaved people had been, officially, at least, emancipated. *See* Elizabeth Nix, *What is Juneteenth?*, HISTORY.COM (June 12, 2023), https://www.history.com/news/what-is-juneteenth [https://perma.cc/S4KW-NUYR]. Although Juneteenth is considered one of the longest established African American holidays, only recently was it recognized as a federal holiday in 2021. *Id.*

Luther King Jr.'s final and perhaps most ambitious dream to further equality through economic self-sufficiency.[2] Ms. King, in echoing the sentiments of the "I Have a Dream" speech that her late husband had delivered five years earlier at the Lincoln Memorial, spoke poignantly of what would be required to realize full equality for all Americans.[3] In reflecting upon the "broad dimensions of violence" regularly employed against people of color and the poor, Ms. King noted: "[S]tarving a child is violence. Suppressing a culture is violence. Neglecting school children is violence. Punishing a mother and her child is violence. Discrimination against the working man is violence. Ghetto housing is violence. Ignoring medical needs is violence. Contempt for poverty is violence."[4]

The state-based policy violence described by Coretta Scott King is an established facet of the American democratic experiment.[5] It has a historical basis in American society, having been facilitated by democratic institutions for the purpose of systematically limiting the civic, social, and economic participation of peripheral groups. Structural violence was present during the Constitutional Convention.[6] It thrived during slavery and was again rejuvenated in the aftermath of the Reconstruction era and during the Jim Crow period.[7] It became a powerful force to counter the Civil Rights, feminist, and gay liberation movements and, predictably, has found its resurgence in the period immediately following the election of the first Black president, the legal recognition of gay marriage, the browning of higher education, and the emergence of women as powerful economic forces in American society.[8] Policy violence, in its simplest terms, is an institutional response to legal gains by those who have never been allowed to be full

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[2] Scott King, *supra* note 1.

[3] *See id.*

[4] *Id.*

[5] *See id.*

[6] In agreeing to the Three-Fifths Compromise, the Founders left the institution of slavery undisturbed. Located in Article I, Section 2 of the Constitution, the Three-Fifths Clause declared that any person who was not free would be counted as three-fifths of a free individual for purposes of determining congressional representation. U.S. CONST. art. I, § 2. The Three-Fifths Clause thus increased the political power of slaveholding states and made no attempt to ensure that the legal interests of enslaved individuals would be represented in government. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 36–40 (6th ed. 2008).

[7] *See generally* HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW (2019) (discussing a history of white resistance efforts in response African American civil rights progress).

[8] *See* discussion *infra* Part IV.

participants in the American economic or political system. Systemic violence is simultaneously a feature of, and a threat to, democratic advancement.

Although intensified to heightened levels, state-based policy violence is by no means a historical irregularity. Violence perpetrated and legitimated through formal democratic structures against dispossessed groups is the basis on which our country was founded and has been a persistent feature of the American democratic system ever since. Notably, structural violence is most pronounced when minoritized groups achieve political, economic, or legal gains. Any modicum of progress is perceived as a threat to existing power structures, thereby necessitating a recalibration of the socio-political equilibrium that can best be accomplished through state-administered structural violence.

Most modern iterations of structural violence, as represented by reconstituted racist, misogynistic, and homophobic policies, have been largely achieved by undermining newly recognized rights through both legal and political processes. Though less overt than other forms of violence, such as sexual or physical violence, policy violence is no less pernicious or destructive to the communities it targets or to the overall health of democratic institutions.[9] State-based harm is the product of a system that communicates a consistent, forceful message of inferiority, indignity, and inhumanity toward those whom our laws and policies have systemically "othered" on account of their race, gender, and sexual orientation and identity.[10] American laws and policies have been constructed on, and have indeed fortified, these models of inferiority. Consequently, American socio-political structures have enabled the weaponization of democratic institutions to reify systems of violence and exclusion directed against peripheral communities.[11]

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[9] *See generally* MELVIN DELGADO, STATE-SANCTIONED VIOLENCE: ADVANCING A SOCIAL WORK SOCIAL JUSTICE AGENDA 42–71 (2020) (discussing the conceptual foundation for state-sanctioned policy violence).

[10] *See id.* at 72–78 (discussing the intersectionality of policy violence faced by different minoritized groups).

[11] Ran Hirschl coins the term "peripheral groups" to describe the marginalized populations perceived as threats by those who possess disproportionate access to legal and political authority. Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 91–92 (2000). As described by Hirschl, judicial empowerment is produced through a deliberate strategy of constitutional retrenchment with the purpose of limiting the growing influence of "peripheral" groups. *Id.*

A basic premise of this Article is that law and policy reflect broader socio-political values.[12] The United States is a democratic project that has gone to great lengths to reconcile the inherently irreconcilable tension between equality and socio-legal stratification.[13] American law and legal institutions have fostered an entrenched, multi-layered system of economic, racial, and gender inequality that has nurtured and legitimized political extremism and state-sanctioned violence.[14] This has resulted in the development of a governance apparatus that functions to divest humans of agency and reinforce the inhumanity of peripheral groups.[15] This particularly pernicious form of structural violence reproduces and magnifies the vulnerability of marginalized communities.[16] It has produced legislative bodies that are able to justify the codification of discrimination and a legal system that is reticent to recognize the constitutional personhood of women, people of color, and individuals with non-normative sexual identities and orientations.[17]

In examining the role of the Supreme Court and the political process in pioneering and perpetrating systemic violence, this Article analyzes the longstanding historical usages and modern expressions of policy violence, specifically as applied to the erosion of unenumerated fundamental rights for people of color, women, and members of the LGBTQ+ community. A central goal of this research is to examine the omnipresence of state-sanctioned violence from the country's founding to the present day in order to engage in a critical interrogation of questions integral to citizenship, personhood, autonomy, and democratic governance.

Accordingly, this Article aims to redefine the problem of legal inequality and the corrosion of constitutional protections with a renewed focus on the

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[12] *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051 ("Given a view that law serves largely to legitimize the existing social structure and, especially, class relationships within that structure, the ultimate constraints are outside the legal system.").

[13] *See, e.g.*, *id.* at 1050 ("[F]or as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.").

[14] *See id.*; *see also* Stephen M. Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (with an Emphasis on* Obergefell v. Hodges*)*, 24 WM. & MARY BILL RTS. J. 341, 348 (attributing the long-standing legitimization of racial and gender inequality to the Court's traditionalist interpretations of the Fifth and Fourteenth Amendments).

[15] *See* Feldman, *supra* note 14, at 341–48.

[16] *See id.*

[17] *See id*; *see also, e.g.*, *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (May 19, 2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights [https://perma.cc/MTZ3-U4PF] (tracking 489 anti-LGTBQ bills currently pending nationwide).

role and effects of structural violence. This work expounds upon earlier scholarship addressing state-based policy violence directed at marginalized and oppressed groups by examining how historical forms of policy violence may inform our current understanding of the systematic erosion of substantive due process rights. Recent Supreme Court decisions, in tandem with a proliferation of state and local initiatives to curtail fundamental rights, require renewed attention and urgency in addressing long-standing and persistent institutional harm.

Part one of this Article offers a historical overview of the protracted legacy of structural violence within the American socio-political system and its cyclical appearance in response to even the most constrained civil rights gains. The second part discusses the origins, impetus, and instigators of policy violence, providing a more focused description of the sources and actors of state-based harm. Part three aims to connect the historical and descriptive information contained in the introductory parts to explain the contemporary expressions of policy violence as it uniquely affects communities of color, women, and the LGBTQ+ population.[18]

The final substantive part of the Article offers an analysis of how an incomplete articulation of the nation's "history and tradition" has resulted in modern forms of structural harm effectuated by the Court. The Court's modern substantive due process analysis has served as a basis to restrict, and in some cases revoke, legal rights for women, communities of color, and LGBTQ+ people. The misuse of history and tradition by the Court in determining constitutional rights is itself a form of systemic violence that degrades the integrity of democratic institutions, including the Court. The Article concludes by considering the governance implications for a socio-political system based on entrenched structural violence and suggests that redress will not be realized solely through judicial victories or the enactment of new legislation but through the countervailing forces of community-based and individual resistance.

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[18] The limited case studies explored in this Article are not intended to represent an exhaustive description of the marginalized populations who are harmed through state-based policy violence.

II. THE ORIGINS, IMPETUS, AND INSTIGATORS OF STRUCTURAL VIOLENCE

"There is an enormous difference between seeing people as the victims of innate shortcomings and seeing them as the victims of structural violence. Indeed, it is likely that the struggle for rights is undermined whenever the history of unequal chances, and of oppression, is erased or distorted."

- Paul Farmer[19]

Structural violence lacks a singular, uniform definition but has generally been applied by sociologists, political economists, psychologists, philosophers, and anthropologists to explain the violence of injustice and inequity.[20] Structural violence broadly encompasses the violence of injustice that is "embedded in ubiquitous social structures [and] normalized by stable institutions and regular experience."[21] Structural violence comprises a constellation of political, cultural, social, economic, and legal structures that interact in a manner that engenders violence by marginalizing people and communities, constraining their capabilities, denying their dignity, and ultimately sustaining entrenched inequality.[22] Cultural and socio-political structures that include slavery, patriarchy, and colonialization have manifested in implicit and explicit forms of discrimination premised on race, ethnicity, gender, and sexual orientation.[23] The assemblage of these interdependent structures produces profound cumulative harm that, while

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[19] PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR 153 (2009).

[20] In 1969, Norwegian sociologist Johan Galtung first introduced the phrase "structural violence." Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 171 (1969). A founder of peace and conflict studies, Galtung developed the concept of "positive peace," which defined peace as more than the mere absence of physical violence. *Id.* at 183. In expressly linking structural violence to the unequal distribution of power, Galtung argued that "positive peace" requires the absence of indirect structural violence caused by exploitation, marginalization, and poverty. *Id.*; *see also* BANDY X. LEE, VIOLENCE: AN INTERDISCIPLINARY APPROACH TO CAUSES, CONSEQUENCES, AND CURES 4–6 (2019) (stating that scholars have yet to settle on a uniform definition of "structural violence"); *see also, e.g.*, Barbara Rylko-Bauer & Paul Farmer, *Structural Violence, Poverty, and Social Suffering*, *in* THE OXFORD HANDBOOK OF THE SOCIAL SCIENCE OF POVERTY 47, 47–74 (David Brady & Linda M. Burton eds., 2017) (refining the concept of structural violence through an anthropology lens).

[21] Rylko-Bauer & Farmer, *supra* note 20, at 47 (quoting Deborah DuNann Winter, & Dana C. Leighton, *Structural Violence, in* PEACE, CONFLICT, AND VIOLENCE: PEACE PSYCHOLOGY IN THE 21ST CENTURY 99 (2001)).

[22] *See generally* LEE, *supra* note 20, at 123–137 (providing global empirical data to establish structural violence as effectuating a multitude of social disparities).

[23] *See id.*

personally experienced, collectively targets select groups of people who are subjected to normalized forms of lived oppression and social suffering.

Structural violence, sometimes interchangeably referred to as "systemic injustice," "policy violence," "institutional violence," or "systemic violence," is often rendered invisible by bureaucratic structures that legitimate and insulate it from public accountability.[24] Accordingly, the social suffering caused by structural violence that would otherwise evoke public censure is often only recognized in retrospect in the form of a lax historical reckoning. Even then, when systemic injustice is named and acknowledged, it is frequently divorced from its contemporary vestiges and represented as a relic of the past with no modern relevancy.

Critically, chronic injustice is itself a form of systemic violence.[25] State-sanctioned policy violence is the dominant mechanism for the effectuation of structural violence and is applied in the maintenance of systems of injustice and subordination. Policy violence dehumanizes, devalues, and denies human dignity in a manner that redistributes harm, humiliation, and risk to subordinated social groups.[26] Because structural violence is routinized through rote, administrative processes that are broadly perceived as inherently legitimate, the injustice inflicted upon those targeted by policy violence is either unacknowledged or, worse yet, justified as socially desirable. Although structural violence is institutionalized, it is effectuated by individual actors (public officials and judges), who are conditioned to view their conduct as proper, even noble.

Moreover, the subtle, invisible nature of structural violence is precisely what allows it to function so efficiently as a silent but deadly killer.[27] Indeed, systemic violence has resulted in more death and human suffering than acts of individual or collective physical violence.[28] Research has indicated that the lethal consequences of systemic violence are ten times greater than that of

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[24] See Galtung, *supra* note 20, at 169–78, for a more comprehensive discussion of the invisibility of structural violence. There are some scholars who distinguish between these terms. However, for the purpose of this inquiry, these terms will be used interchangeably.

[25] FRANCISCO VALDES ET AL., CRITICAL JUSTICE: SYSTEMATIC ADVOCACY IN LAW AND SOCIETY 175 (2021).

[26] *See also* Tage S. Rai et al., *Dehumanization Increases Instrumental Violence, but Not Moral Violence*, 114 PNAS 8511, 8511 (2017) (hypothesizing that "dehumanization causes perpetrators to perceive victims as nonhuman and, therefore, not entitled to moral obligation or sympathy, thus enabling perpetrators to act out their violent impulses free of inhibition and without remorse").

[27] LEE, *supra* note 20, at 3.

[28] *See id.* at 128.

physical violence.[29] The chronic, intergenerational health effects of systemic racism, persistent poverty, and lethal patriarchy place subordinated groups at substantial risk of harm. Importantly, these state-sanctioned forms of extreme harm are policy-driven and, therefore, entirely avoidable.

From an epistemological perspective, the value of a structural violence framework in appreciating the role of democratic institutions in reproducing social suffering is that it rightfully places the analysis on the social machinery of exploitation and oppression.[30] Rather than relegating the causes of policy violence to a matter of individual "choice," a structural violence framing of injustice considers the covert institutional mechanisms, social structures, and forms of political oppression that are responsible for inflicting physical, emotional, economic, and psychological abuse upon members of peripheral groups. An analytical framework of systemic violence renders visible the interdependency of structural factors and their relationship with various forms of violence that are fortified through legal-political institutions.

Of additional importance is the centrality of survivors of systemic justice to the structural violence framework. Structural violence, as an analytical tool, reorients the perspective of discussions surrounding power and justice. By explicitly connecting structural violence to unequal power, the erasure of institutional responsibility for social suffering is lessened. In its place, broader socio-political determinates assume a new prominence in explaining the causes of exclusion and marginalization. These power relations structure and sustain the forms of oppression that create contexts of shame and stigma, and that deprive individuals of agency and essential legal protections.[31] These structurally created vulnerabilities, in turn, undermine life outcomes and inflict immense harm.[32] By defining structural violence from the perspective of those peripheral groups targeted by systemic injustice, this analytical paradigm justly reorients the onus of responsibility on institutional actors.

Structural violence targeted at those forced to live on the margins of society has long been employed as a tool of power and control. At its most foundational level, policy violence is enacted by federal, state, and local officials—elected and unelected—who use their authority to deprive groups of political, personal, educational, and economic rights. Policy violence is also

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[29] *Id.* at 126.

[30] PAUL FARMER, PARTNER TO THE POOR: A PAUL FARMER READER 354 (Haun Saussy ed., 2010).

[31] *See* LEE, *supra* note 20, at 54.

[32] *See, e.g.*, *id.* at 33 (linking the effects of structural violence to poor economic and mental health outcomes).

implemented through executive action.[33] It is further enabled through the judiciary, which sanctions legislative forms of policy violence by construing constitutional principles to apply to a select few.

Of particular significance, structural violence is historically rooted and culturally entrenched in American politics and society. At the inception of the American republic and throughout much of our history, the majority of elected leaders responsible for writing and enforcing the nation's laws directly benefitted from multiple forms of structural oppression.[34] The American Constitution, though patriotically celebrated as a document representing and realizing democratic ideals, conceptualized "We the People" as excluding the vast majority of modern citizens.[35] The politics of slavery, racism, colonization, patriarchy, and oppression that flowed from this document dominated American life and has influenced the development of constitutional law and democratic institutions.[36]

The origins of structural violence that undergirds American history and shaped its early Founders have informed every aspect of the evolution of law and society. Critically, every branch of government has been tainted by one of the most extreme forms of structural violence—slavery. Historical records demonstrate that more than 1,800 elected officials who served in Congress enslaved African Americans.[37] Congressional leaders who profited from the ownership of human beings were not limited to the American South but

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[33] *See, e.g.*, Exec. Order No. 13780(d), 82 Fed. Reg. 13209 (Mar. 9, 2017) (upheld in *Trump v. Hawaii*, 585 U.S. ___ (2018)).

[34] *See generally* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 106–41 (2022) (describing that at the time of the Constitution's ratification, colonial America was an agrarian society where right had been reserved for white property owners in explaining why an originalist interpretative method would lead to "abhorrent results").

[35] *See id.* For further commentary on the deficiencies of the Constitution as a founding document, the reflections of Justice Thurgood Marshall, the first non-white U.S. Supreme Court Justice, on the 200th anniversary of the Constitution are insightful. In reflecting upon the meaning and place of the Constitution in history and law, Justice Marshall noted, "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today." Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

[36] *See* CHEMERINSKY, *supra* note 34.

[37] Julie Zauzmer Weil et al., *More Than 1,800 Congressmen Once Enslaved Black People. This Is Who They Were, and How They Shaped the Nation.*, WASH. POST (Nov. 28, 2022), https://docdro.id/JBp8ujq [https://perma.cc/BH6V-BZDL].

represented a total of 40 states, including much of the West, Midwest, and nearly every state in New England.[38] Slaveholders continued to serve in Congress well into the 20th century.[39]

The institution of slavery equally affected the executive branch. The exploited labor and bodies of enslaved people built the White House.[40] The nation's first president, George Washington, became a slaveowner at the age of 11 and inherited an additional 300 slaves through marriage.[41] In fact, Washington went to great lengths to ensure the bondage of the people he enslaved, invoking the Fugitive Slave Clause to petition for the return of runaway slaves and rotating his slaves between Pennsylvania and Virginia to avoid complying with state laws that would have required that they be granted their freedom.[42]

Washington was no anomaly amongst his fellow Founding Fathers.[43] Thomas Jefferson, whose wealth depended on slavery, owned more than 600 human beings during his lifetime.[44] James Monroe, the last of the Founding Fathers to serve as president, owned 75 enslaved persons.[45] Twelve of the first 18 American presidents were slaveowners, eight of whom enslaved people during their time in office.[46] Overall, more than a quarter of U.S. presidents were enslavers.[47]

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[38] *Id.*

[39] *Id.*

[40] Evan Andrews, *How Many U.S. Presidents Owned Enslaved People*, HISTORY.COM (Sept. 3, 2019), https://www.history.com/news/how-many-u-s-presidents-owned-slaves [https://perma.cc/V2UK-PW2X].

[41] MARGARET KIMBERLEY, PREJUDENTIAL: BLACK AMERICA AND THE PRESIDENTS 7 (2020).

[42] *Id.* at 8–9.

[43] The term "Founding Father" itself affirms white supremacist and patriarchal ideals.

[44] KIMBERLEY, *supra* note 41, at 15. Jefferson raped the enslaved women he owned, including Sally Hemmings, whom he began to assault when she was 14 years old, and with whom he would ultimately father at least six children. *See* Britni Danielle, *Sally Hemings Wasn't Thomas Jefferson's Mistress. She Was His Property*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/outlook/sally-hemings-wasnt-thomas-jeffersons-mistress-she-was-his-property/2017/07/06/db5844d4-625d-11e7-8adc-fea80e32bf47_story.html [https://perma.cc/E9G8-XWSD]; *see also* ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY 109–11 (1997).

[45] KIMBERLEY, *supra* note 41, at 23. While in office, Monroe, like his predecessors, advanced colonization and oversaw the removal of Indigenous tribes in the Florida territory. *Id.*

[46] Andrews, *supra* note 40.

[47] *Id.*; Weil et al., *supra* note 37.

The federal judiciary, responsible for interpreting the law and determining the scope of constitutional liberties, also consisted of men who supported and were enriched from the country's slavocracy. Hailed as America's "Great Chief Justice," John Marshall bought and sold people during his 34 years on the Supreme Court.[48] During his tenure, Chief Justice Marshall never once held in favor of the government in a slave trading case.[49] Chief Justice Marshall's colleague, Justice Roger B. Taney, freed many of the enslaved people that he owned, but remained virulently opposed to Black rights, as perhaps best demonstrated by his opinion in the *Dred Scott* case, in which the Court concluded that formerly enslaved African Americans enjoyed no citizenship rights.[50] The pro-slavery Court that produced the notorious *Dred Scott* decision was comprised of seven justices who had been appointed by pro-slavery presidents, five of whom hailed from slave-owning families.[51] Ohio congressman and longtime Supreme Court Justice, John McLean, was one of only two justices who dissented in the decision, and yet census data indicated that he too was a slave owner earlier in his career while serving on the Ohio Supreme Court.[52]

It is these leaders whose monuments occupy our government buildings and whom schoolchildren are taught to revere.[53] Documenting and acknowledging that those who created and interpreted the law themselves denied basic legal protections to large swaths of people is necessary for appreciating the historical origins and contemporary consequences of state-sanctioned policy violence and contemporary antidemocratic efforts. And yet, it accomplishes little by way of recognizing the stories, experiences, and trauma of those victimized by this violence.

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[48] Paul Finkelman, *America's 'Great Chief Justice' Was an Unrepentant Slaveholder*, ATL. MONTHLY (June 15, 2021, 4:58 PM), https://www.theatlantic.com/ideas/archive/2021/06/chief-justice-john-marshall-slaves/619160 [https://perma.cc/N558-8SJM]; *see also* PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 4 (2018).

[49] *Teaching Hard History*: *Slavery in the Supreme Court - w/ Paul Finkelman*, LEARNING FOR JUST., at 13:49 (May 9, 2018), https://www.learningforjustice.org/podcasts/teaching-hard-history/american-slavery/slavery-in-the-supreme-court [https://perma.cc/6GYX-YCAL].

[50] FINKELMAN, *supra* note 48, at 7–8.

[51] *The Human Factor of History: Dred Scott and Roger B. Taney*, NAT. MUSEUM AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/explore/stories/human-factor-history-dred-scott-and-roger-b-taney [https://perma.cc/6ZEN-G935].

[52] Weil et al., *supra* note 37.

[53] A recent survey of U.S. Capitol statues and paintings determined that one-third of its artwork depicted enslavers and confederates. Gillian Brockell, *Art at Capitol Honors 141 Enslavers and 13 Confederates. Who Are They?*, WASH. POST, (Dec. 27, 2022, 7:00 AM), www.washingtonpost.com/history/interactive/2022/capitol-art-slaveholders-confederates [https://perma.cc/DDG2-B5ZD].

These stories are too countless to all be told, but that does not discount their importance or centrality in American history. Consider Margaret Garner, a woman who was enslaved by John Gaines, a Kentucky Congressman. Her story would come to inspire Toni Morrison's novel, *Beloved*.[54] Garner chose to kill her toddler rather than allow her child to endure a life of violence and enslavement.[55] Sojourner Truth, a formerly enslaved person who would become a prominent civil and women's rights advocate, offers another illustration of the bravery and resiliency of Black women in response to extreme violence.[56] In 1828, Truth became the first Black woman to successfully sue a white man for a family member's freedom.[57] Though ultimately successful in freeing her youngest son, Peter, from enslavement, he returned to her care severely beaten.[58]

The harrowing tale of Celia, a 19-year-old woman who killed the man who enslaved her after five years of sexual abuse that culminated in the birth of two children, is particularly emblematic of the systemic violence that permeated courts during the Slave Era.[59] Celia claimed self-defense at her 1855 trial, which Missouri law permitted for women who injured their attackers while resisting assault.[60] Nevertheless, the judge instructed the all-white male jury that the state laws protecting women who resist sexual assault did not apply to Celia as an enslaved person.[61] On December 21, 1855, the State of Missouri hanged Celia for her purported crimes.[62] The judge, himself an enslaver, was elected to Congress several years after the jury convicted Celia for "murder of her master."[63]

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[54] Weil et al., *supra* note 37.

[55] *Id.*

[56] *Sojourner Truth Fought to Free Her Son from Slavery, Rediscovered Documents Reveal*, BET (Feb. 28, 2022, 12:43 PM), https://www.bet.com/article/92kg5m/sojourner-truth-court-battle-freedom-child [https://perma.cc/9R8W-ZMML].

[57] Truth petitioned a New York Court for the freedom of her son, Peter, who had been illegally sold to a man in Alabama. *Id.*

[58] *Id.*; *see also* Giselle Rhoden, *New Documents Reveal Abolitionist's Court Case to Free Her Child from Slavery*, CNN (Feb. 27, 2022, 8:19 AM), https://www.cnn.com/2022/02/27/us/sojourner-truth-court-battle-ny-archives/index.html [https://perma.cc/94PB-BS6A].

[59] DeNeen L. Brown, Missouri v. Celia, *a Slave: She Killed the White Master Raping Her, Then Claimed Self-Defense*, WASH. POST (Oct. 17, 2017), https://docdro.id/CjJFBMv [https://perma.cc/75XF-558L].

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*; Weil et al., *supra* note 37.

Moreover, a genealogical examination of structural violence reveals that state-sanctioned forms of structural violence have assumed a predictable cadence throughout American history. State violence has generally intensified in the periods immediately preceding or following civil rights advances.[64] During the Reconstruction era, newly freed African Americans made enormous gains in virtually all sectors of society.[65] This era, though short-lived, was successful in rebutting the fundamental presumption on which the country had been founded that resources and formal legal rights should be based on a racial hierarchy.[66]

The Reconstruction era, however, was swiftly followed by the Redemption era, a period marked by virulent white supremacy that led to the violent erasure of any semblance of legal equality that had been attained by African Americans.[67] Domestic terrorism, a Supreme Court sympathetic to the maintenance of a racial caste system, and embittered Southern leaders determined to resurrect the pre-Civil War socio-political order coalesced to usher in a prolonged period of extreme violence.[68] Here too, the Court was complicit in the construction and maintenance of new systems of subordination.[69] By narrowly—and sometimes imaginatively—interpreting the Reconstruction Amendments to benefit corporations more so than African Americans,[70] the Court assumed a vital role in maintaining the structural violence that rendered formal legal and material equality little more than an illusion.

This cycle of resistance and retrenchment reappeared a century later in response to the Jim Crow policies that emerged in the wake of the Reconstruction period. Similar to the historical events that followed the Civil War, the hard-fought successes of the Civil Rights Movement had been rewarded with new forms of legalized injustices that emanated from the Court and political leaders. In the decades following the passage of the Civil Rights Acts, the Voting Rights Act, and the landmark civil rights decisions of

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[64] *See* GATES, *supra* note 7, at 12–13.

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See id.* at 61–63.

[69] *See id.*

[70] *See, e.g.*, Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886) (implying that the Fourteenth Amendment applied to corporations); *see also* Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. 64, 66–67 (2018) (tracking the history of judicially-created corporate rights); *see also* BELL, *supra* note 6, at 47 (describing the insufficient addressing of racial problems in the aftermath of the Reconstruction era).

the Warren Court, efforts by institutional actors to restore the status quo all but negated the gains of the period. The notable achievements of the Reconstruction and Civil Rights eras could ultimately neither dismantle nor overcome the entrenched racial hierarchy.[71] Rather, legal and socio-political norms only underwent superficial alterations to accommodate notions of equality under the law.

Racial retrenchment and racial resentment have been a persistent feature of American law and democracy. This pattern has been similarly replicated within the context of efforts to attain formal legal equality for women and LGBTQ+ persons.[72] Unlike racially minoritized groups, the Constitution does not explicitly deny women the right to equal protection of the law. Indeed, the text of the Constitution is relatively gender-neutral, generally referring to "persons," not "men," in the assignment of rights. This has not, however, prevented the Constitution from being interpreted in a manner that relegated women to second-class personhood.[73] Prior to the passage of the Reconstruction Amendments, the recognition of individual rights and the protection of the public welfare had been considered to exist within the exclusive purview of the states.[74] The Court's early application of the Bill of Rights as a strictly limiting power on the federal government enabled states to freely disenfranchise and discriminate against peripheral groups.[75] And states did precisely that.[76] Under this theory of constitutional interpretation, the Court's early constitutional jurisprudence involving the citizenship rights of women legitimized protective state labor laws, denied women the right to

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[71] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 65–66 (2nd ed. 1994).

[72] *See generally* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash* (Yale L. Sch. Pub. L., Working Paper No. 131, 2007) (describing the political and cultural backlash that generally follows progressive judicial victories) http://papers.ssrn.com/abstract=990968 [https://perma.cc/LY4D-F8C2].

[73] *E.g.*, Bradwell v. Illinois, 83 U.S. 130 (1872); Muller v. Oregon, 208 U.S. 412 (1908); Buck v. Bell, 274 U.S. 200 (1927); Hoyt v. Florida, 368 U.S. 57 (1961); *see also* JUDITH A. BAER, WOMEN IN AMERICAN LAW: THE STRUGGLE FOR EQUALITY FROM THE NEW DEAL TO THE PRESENT (3d ed. 2002) (describing the legal status of American women between 1940 and 2000).

[74] *See* CHEMERINSKY, *supra* note 34, at 206–07.

[75] *See id.* at 140–42.

[76] *E.g.*, Plessy v. Ferguson, 163 U.S. 537, 538 (1896).

vote, imposed legal disabilities on married women, and broadly considered women to be the property of their husbands.[77]

Early American feminists aligned with the abolitionist movement in recognizing that the deprivation of formal legal equality for women and African Americans necessitated a similarly robust response.[78] Feminist abolitionists, however, did not receive a warm welcome from their male peers. Lucretia Mott and Elizabeth Cady Stanton, who organized the Women's Rights Convention in Seneca Falls, New York in 1848, were prohibited from addressing the World Anti-Slavery Convention in London only a few years earlier.[79]

Long, difficult, and divisive, the women's suffrage movement was ultimately successful in securing women the right to vote.[80] However, even after the passage of the 19th Amendment, gender-based discrimination remained the norm in all facets of American life.[81] Comparable to the Reconstruction Amendments, amending the Constitution did not secure legal equality for women.[82] A generation after women formally attained the right to vote, renewed efforts were necessary to acquire a legal status that entitled women to the same rights as their male counterparts.[83] The emergence of the feminist movement in the 1960s coincided with the demands of civil rights

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[77] *See, e.g.*, *Muller*, 208 U.S. at 421 (upholding a state law limiting the hours that women could work in factories on the basis that women's "physical structure and the performance of maternal functions" necessitated the labor restrictions); Minor v. Happersett, 88 U.S. 162 (1874) (rejecting the claim that that women were United States citizens who were entitled to vote based on the privileges and immunities of national citizenship protected by the Fourteenth Amendment); Radice v. New York, 264 U.S. 292 (1924) (holding that a state statute prohibiting employment of women in restaurants in large cities between the hours of 10 p.m. and 6 a.m. was not an arbitrary and undue interference with the liberty of contract of the women and their employers, but rather was a justifiable health measure); *Bradwell*, 83 U.S. at 141 (relying on the importance of maintaining the "respective spheres and destinies of man and woman" in holding that the right to practice law in state court was not a right guaranteed to all citizens under the Fourteenth Amendment); Tinker v. Colwell, 193 U.S. 473, 473 (1904) (reifying the "personal and exclusive rights of a husband with regard to the person of his wife").

[78] LESLIE F. GOLDSTEIN ET AL., THE CONSTITUTIONAL AND LEGAL RIGHTS OF WOMEN 8 (4th ed. 2019).

[79] *Id.*

[80] Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948, 951 (2002) [hereinafter *She the People*].

[81] *See id.*

[82] *See id.* at 957–58.

[83] *See id.*

leaders.[84] During a brief period in the 1950s through the early 1970s that parallels the Reconstruction era, Congress and the Court were unusually receptive to demands by African Americans and women for true constitutional equality.[85] In the decades that followed, women's rights organizations were successful in advocating for the creation of new statutory rights that included protections from gender-based discrimination, the right to sue persons who inflict gender-motivated violence, and equal access to programs that receive federal funds.[86]

As these racial and patriarchal parallels demonstrate, structural violence can and should be viewed from the same lens that sustains racial and male supremacy. The role of the law in the endurance of a patriarchal, heteronormative, racial hierarchy is a foundational feature of our nation's history and tradition of policy violence and abuse. It has informed how our democratic systems have evolved. Each of the branches of American government has embedded this hierarchy as an enduring legacy of American democracy. Consequently, laws and democratic institutions are premised on assumptions of inferiority that are used to justify and normalize systemic violence. Validated through a veneer of democratic legitimacy, the law has long been used to entrench and regulate subordination. The weaponization of democratic institutions to maintain disenfranchisement and oppressive systems is not new, and yet a virulent new period of structural violence is currently underway.

In the proceeding parts, further attention will be devoted to examining how policy violence has targeted and harmed particular populations. These brief case studies seek to illustrate the predictable pattern of structural violence that arises as a standard response to advancements in formal legal and material equality. The cycle of structural violence that has dominated the nation's history and traditions has been punctuated by brief, fleeting moments of civil rights innovations, immediately countered by a hostile backlash aimed at quelling and ultimately reversing any structural changes that could substantively alter the socio-political order.[87] The prominence of

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[84] *See id.*

[85] *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'").

[86] GOLDSTEIN ET AL., *supra* note 78, at 1.

[87] *See generally* CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE (2016) (describing a history of relentless institutional backlashes as responses to African American civil rights gains) [hereinafter WHITE RAGE].

policy violence as an established trait in American democracy has had a corrosive effect on civic institutions and the broader health of our polity and people.

III. WHAT IS PAST IS PROLOGUE[88]

"History, in general, only informs us of what bad government is."

- Thomas Jefferson[89]

For some, the current socio-political and legal moment may feel unprecedented in the magnitude of its challenges. Although an unquestionable erosion of constitutional protections has occurred over the past generation, the recent acceleration of attacks on rights affecting people of color, women, and the LGBTQ+ community has spurred a disturbing regression and refashioning of hard-fought legal protections. The resurgence of policy violence in the form of emboldened efforts to disenfranchise Black and Brown voters, strip women of their bodily autonomy, and stigmatize the LGBTQ+ community is a tragically well-established political stratagem. The deprivation of dignity, self-agency, and opportunity is at the core of contemporary systems of policy violence and is only minimally different from the earlier forms adopted after nearly every previous period of civil rights advancements.

Only four years after the retirement of Justice Anthony Kennedy, who occupied the Court's ideological center for nearly three decades and was instrumental in establishing substantive due process protections,[90] the Court

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[88] Spoken by Shakespeare's character, Antonio, in *The Tempest*, this phrase has been invoked to represent that the past is determinative of the future. The full quote reads, "[w]hereof what's past is prologue, what to come, In yours and my discharge." WILLIAM SHAKESPEARE, THE TEMPEST act II, sc. 1, l. 253–54. The quote, in its entirety, suggests that despite the potency of the past, the future is ours to create.

[89] Letter from Thomas Jefferson, then-President, to John Norvell, then-U.S. Sen. (June 11, 1807), http://www.loc.gov/resource/mtj1.038_0592_0594 [https://perma.cc/AEK6-CCD5].

[90] Justice Kennedy authored several landmark majority decisions expanding legal protections for the LGBTQ+ community. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1995) (striking down a state constitution amendment which banned any government action protecting people based on their identities as lesbian, gay, or bisexual); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that criminal convictions for private, consensual, adult sexual conduct was unconstitutional); United States v. Windsor, 570 U.S. 744 (2013) (holding that an act defining marriage as between a man and a woman deprived same-sex couples married under state laws equal protection under federal law); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment requires states to grant marriage licenses to same sex couples and acknowledge licenses granted to same sex couples in other states).

eviscerated a half-century of legal precedents, eliminated the constitutional right to abortion, and suggested that a similar fate may await other unenumerated rights affecting historically marginalized groups.[91] The addition of two conservative justices in the wake of Justice Kennedy's retirement has produced a modern Court intent on moving the law "dramatically in a conservative direction."[92] Although legal scholars and jurists have long warned of the Roberts Court's disinclination to respect the doctrinal status quo,[93] the swiftness with which the Court has transformed legal precedent has surprised even those who predicted this eventual outcome.[94]

It is not hyperbole to describe the Supreme Court's most recent terms as historic.[95] The 2021–2022 Supreme Court term involved more 6–3 decisions than at any other point in the Court's history,[96] with the Court explicitly overturning or significantly altering legal precedent in the areas of equal protection,[97] religious freedom,[98] and gun rights.[99] The 2022–2023 Supreme Court term saw similarly sweeping changes to affirmative action law[100] and

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[91] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

[92] Erwin Chemerinsky, *Chemerinsky: This SCOTUS Term Moved the Law 'Dramatically in a Conservative Direction,'* A.B.A. J. (July 7, 2022, 8:46 AM), https://www.abajournal.com/columns/article/chemerinsky-october-term-2021 [https://perma.cc/4EFC-6VUH] [hereinafter *This SCOTUS Term*].

[93] *See* Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 851 (2008); *see also* Lawrence Hurley, *Kennedy's Departure Puts Abortion, Gay Rights in Play at High Court*, REUTERS (June 27, 2018, 5:47 PM), https://www.reuters.com/article/us-usa-court-kennedy-cases-idUSKBN1JN3AF [https://perma.cc/553J-X2K3] (speculating that Justice Kennedy's retirement would make the Supreme Court rule more conservatively on LGBTQ+ rights).

[94] Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html [https://perma.cc/QS7V-RC3Y].

[95] *See id.*; *see also This SCOTUS Term*, *supra* note 92.

[96] *See* Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/C8ER-SGW7].

[97] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022).

[98] Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427 (2022).

[99] N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2121 (2022).

[100] Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2150 (2023).

antidiscrimination protections for LGBTQ+ people.[101] Each of these jurisprudential earthquakes marked a dramatic movement of the law sharply to the right, based largely on an originalist methodology of constitutional interpretation that elevates a historical and legal foundation rooted in the early period of the country's formation.[102]

Long before the dramatic reconstitution of the Court with the addition of three Trump appointees, the Roberts Court had already revealed itself as loathed to acknowledge, let alone account for, the practical realities of its judicial decisions.[103] Whether in the realm of education,[104] employment discrimination,[105] or voting rights,[106] the Roberts Court has been strikingly adept at disassociating the real-world consequences of its rulings from the antiquated originalist framework in which it approached novel legal questions. Although the Supreme Court has been historically well-insulated from public opinion, the stark disconnect between the Court's increasing reliance on pre-Civil War history and social norms to determine modern civil rights standards threatens to undermine the Court's legitimacy, with 61% of Americans now expressing disapproval of the Court.[107]

Despite the recent unpopularity of the Court, it has long played a central role in legitimizing formal processes that have been used to facilitate structural violence. Perhaps the Court's most effective mechanism in the curtailment of constitutional protections has been through its application of an originalist approach to constitutional interpretation.[108] In the past several

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[101] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2336 (2023).

[102] *This SCOTUS Term*, *supra* note 92; *see also* Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken Over the Supreme Court*, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/2WCX-TTAY] (arguing that today's Supreme Court is the most originalist court in history); Wash. Univ. L., *The Supreme Court Database* (2022), http://scdb.wustl.edu [https://perma.cc/CQ9V-45NF]; Liptak, *supra* note 94.

[103] Andrew M. Siegel, *supra* note 93.

[104] *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[105] *E.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

[106] *E.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

[107] Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of the Supreme Court at New Lows, With Strong Partisan Differences Over Abortion and Gun Rights*, MARQ. UNIV. L. SCH. POLL (July 20, 2022), https://law.marquette.edu/poll/2022/07/20/mlspsc09-court-press-release [https://perma.cc/QMB5-BLFL]; *see also* Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1596 (2021) (positing that the Supreme Court can function effectively only if it has sociological legitimacy).

[108] *See* CHEMERINSKY, *supra* note 34.

decades, originalism has acquired prominence amongst the federal courts, particularly members of the Supreme Court, that has had a transformative effect on constitutional protections for peripheral groups.[109]

Originalism emerged as a relatively unknown legal theory in the 1970s as a response to strong purposivism.[110] Robert Bork, a conservative law professor whose appointment to the Supreme Court by President Ronald Reagan was famously rejected, is credited with devising the theory that would later emerge as originalism.[111] Bork argued for the need for a "principled" approach to the Constitution based on "neutrality."[112] Critical of what he considered to be an inappropriate degree of judicial discretion by the Warren and Burger Courts, Bork maintained that the judiciary had no role to play other than that of applying the law in a fair and impartial manner.[113]

The benefits of originalism, as touted by its proponents, rest on the dubious contention that the Constitution has a fixed meaning.[114] Though differing strands of originalism exist, the theory generally posits that judges bear an obligation to interpret and apply the Constitution's text as intended

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[109] *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1280, 1352 (2020); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 54 (2019).

[110] Grove, *Which Textualism?*, *supra* note 109, at 272; *see generally* Krishnakumar, *supra* note 109. Professor Krishnakumar refers to the term "purposivism" to describe an interpretative methodology that has historically been contrasted with textualism. *Id.* Although the precise definitions of each of these interpretative methods are themselves a source of disagreement, purposivism is primarily concerned with determining a statute or constitutional provision's underlying purpose or policy objectives. As such, purposivism has been construed as "directing courts to privilege the spirit over the letter of the statute." *Id.* at 1283. In contrast, textualists have traditionally emphasized the court's constitutional duty to give effect to the duly enacted text and, in doing so, have limited their interpretative inquiry to solely identifying the plain, objective meaning of the statute's official language using text-based interpretive tools. Whereas purposivists may prioritize purpose over text where there a conflict exists, textualists subscribe to the belief that it is inappropriate for the court to rely upon atextual aids such as legislative history, intent, and statutory purpose in determining the meaning of a statute or constitutional provision. *Id.* at 1282–83.

[111] *See* James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 337 (1989); Adam J. Di Vincenzo, *Robert Bork, Originalism, and Bounded Antitrust*, 79 ANTITRUST L.J. 821, 821 (2014).

[112] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971).

[113] *Id.* at 10.

[114] *See id.* at 5.

by its drafters.[115] Originalist crusaders, such as the late Justice Antonin Scalia and Justice Clarence Thomas, have argued that this interpretative method offers a rule-bound approach that is necessary to constrain judicial discretion.[116] According to this philosophy, where judicial precedents are inconsistent with the original meaning of the text, the Court is required to overturn the precedent.[117]

As a theory, originalism may appear well and good. Legal interpretation demands sensitivity to text and context. Judges are rightfully expected to interpret the law in an objective and unbiased manner. The legitimacy of the Court is premised on an assumption that members of the judiciary will render decisions that are untainted by their personal beliefs.[118] Neutrality is, of course, paramount to the fair administration of justice.[119]

But originalism does not hold a methodological monopoly on neutrality. In fact, originalism has been criticized for falsely purporting to provide an objective approach to constitutional interpretation.[120] Skeptics of originalism question the veracity of the claim that it is neutral and operates to limit the ideological proclivities of individual judges.[121] Rather, critics of originalism maintain that, as an interpretative method, originalism actually invites substantial judicial discretion under the guise that it is an objective historical and legal analysis.[122] Amongst the numerous compelling arguments to counter the dominance of an originalist theoretical approach is that the methodology allows for a selective interpretation and framing of constitutional history, oversimplifies the legislative process, lacks appropriate

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[115] The competing views of originalist methodology are beyond the scope of this Article, as a rich repository of scholarship already exists. *See, e.g.*, Grove, *Which Textualism?*, *supra* note 109, at 273; Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1478, 1478 (2009).

[116] Lee J. Strang, *The Most Faithful Originalist? Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 873 (2011).

[117] ANTONIN SCALIA, A MATTER OF INTERPRETATION 17–18 (1997).

[118] *Id.*

[119] *See* Bork, *supra* note 112.

[120] *See generally* CHEMERINSKY, *supra* note 34.

[121] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2013); Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 591 (2021).

[122] *See* Lemos, *supra* note 121.

deference to the fundamental principle of *stare decisis*, and serves as a methodological vehicle to promote conservative ideological aims.[123]

Furthermore, the modern Supreme Court has combined an originalist approach of constitutional interpretation with an aggressive states-rights philosophy that actively facilitates new forms of structural violence. The adoption of an uncompromising view of states' rights has coincided with a growing skepticism by the Court of the proper constitutional role of the federal government in remediating discrimination, as well as a growing emphasis on an originalist theory of constitutional interpretation that increasingly applies an ahistorical view of history to the Court's substantive due process analysis.[124] The coalescence of these conditions has uniquely situated the modern Court as one of the most effective instigators of structural violence.

The states' rights doctrine, which bars the federal government from interfering with powers reserved to the states under the Tenth Amendment, has been similarly used by the Court to shield state governments from constitutional accountability for their discriminatory conduct.[125] Though the appropriate balance of national and state power has long been a negotiated source of tension within the American federalist system, the invocation of state rights has been historically used as a basis to thwart civil rights advancements.[126] States' rights arguments have been employed to defend slavery, circumvent the Reconstruction Amendments through the enactment of state-level Jim Crow laws, foment resistance to the Civil Rights Movement (including the bellicose Southern response to the *Brown* decision), and counter efforts to expand equality under the law for women, non-whites, and LGBTQ+ persons.

In exercising its power of judicial review to limit the scope of federal constitutional protections and invalidate federal statutes, the Court has embraced a theory of constitutional law that increasingly elevates state authority under the Tenth Amendment and, in doing so, relegates the Supremacy Clause. The Supremacy Clause, considered the foundation of the U.S. political structure, delineates that federal law supersedes conflicting state laws.[127] By establishing that federal law is the "supreme Law of the Land,"

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[123] *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 7 (2016); Buchanan & Dorf, *supra* note 121.

[124] *See* discussion *infra* Part IV.

[125] *Id.*

[126] *E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

[127] U.S. CONST. art. VI; *see* THE FEDERALIST NO. 33 (Alexander Hamilton), NO. 44 (James Madison).

the Supremacy Clause functions as an arbitration provision when state and federal laws diverge, prohibiting states from interfering with the enforcement of federal laws.[128] The Court's acceptance of states' rights arguments in arriving at important judicial decisions that implicate federal constitutional protections has served to reallocate the authority to enforce or deny basic legal protections to states hostile to these foundational liberties for peripheral groups.

Although originalism, which has served for a half-century as the preeminent intellectual framework for conservative legal thought, continues to be the dominant theory of constitutional interpretation utilized by conservative jurists, it has evolved substantially in terms of how it co-exists with notions of judicial restraint and deference to legal precedent. "New originalism" or "piecemeal textualism," as it has been labeled by some scholars, has substituted a fidelity to judicial restraint with a hyper fixation on the original meaning of the Constitution as defined by the Founders (as interpreted by a majority of Justices).[129] As explained by Thomas Colby and Peter Smith, the growing prominence of libertarian economic values on conservative political politics has reshaped modern legal conservative thought and, in so doing, has further reified the states' rights doctrine.[130]

Interestingly, while the conservative supermajority of the Roberts Court has espoused a strict adherence to originalism, they have concomitantly shunned *stare decisis*.[131] The reliance on an originalist theory of constitutional interpretation to annihilate legal precedent seemingly poses no conflict to the Roberts Court. Ironically, the lack of deference to judicial restraint and

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[128] U.S. CONST. art. VI; *see* McCulloch v. Maryland, 17 U.S. 316 (1819) (clarifying and expanding federal authority by concluding that when a conflict exists between state and federal laws, the federal law takes priority).

[129] Thomas B. Colby & Peter J. Smith, *The Return of* Lochner*,* 100 CORNELL L. REV. 527, 532 (2015); Shalini Bhargava Ray, *The Demise of Rights-Protective Statutory Interpretation for Detained Immigrants and the Rise of "Piecemeal" Textualism*, SCOTUSBLOG (June 14, 2022, 9:58 PM), https://www.scotusblog.com/2022/06/the-demise-of-rights-protective-statutory-interpretation-for-detained-immigrants-and-the-rise-of-piecemeal-textualism [https://perma.cc/GX5F-ZMDQ].

[130] Colby & Smith, *supra* note 129. *Williamson v. Lee Optical* is a leading Supreme Court precedent on post–Lochner era substantive due process that provided extreme deference to state economic regulation. 348 U.S. 483 (1955).

[131] *Stare decisis*, Latin for "let the decision stand," is a legal doctrine that holds that courts should adhere to precedent when rendering a decision on a closely related matter. *But see, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning the right to abortion established in *Roe v. Wade*, 410 U.S. 113 (1973)); Kennedy v. Bremerton Sch. Dist. 142 S. Ct. 2407 (2022) (overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (relying on the 2008 case of *D.C. v. Heller*, 554 U.S. 570 (2008) to effectively overrule *United States. v. Miller*, 307 U.S. 174 (1939)).

precedent modeled by the modern Court echoes conservative criticisms of the Warren Court in response to the expansion of unenumerated, fundamental rights.[132] "New originalism," as evidenced by the Supreme Court's 2021–2022 and 2022–2023 terms, has been used to support the dismantling of legal precedents that proponents of piecemeal textualism identify as inconsistent with the original meaning of the Constitution.[133]

This interpretative approach to originalism, however, is patently incompatible with the foundational views of the framers.[134] Even a cursory reading of the Federalist Papers reveals that the framers understood the need and value of *stare decisis*.[135] Writing in the Federalist No. 78, Alexander Hamilton noted that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[136] James Madison similarly subscribed to the view that the Court should be generally bound by precedent:

> [I]t is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it.[137]

Although recognizing the exceptional circumstances in which *stare decisis* may not justify the maintenance of legal precedent, the early Court largely followed this approach to constitutional precedent as necessary to maintaining the legitimacy of the Court and providing predictability in the

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[132] Colby & Smith, *supra* note 129, at 569.

[133] *See id.*; *see also* Ray, *supra* note 129.

[134] Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, ATLANTIC (Sept. 6, 2002), https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334 [https://perma.cc/2WXR-VFN7] [hereinafter *Even the Founders*]; William M. Treanor, *Why This "Originalist" Supreme Court Would Disappoint the Founders*, SLATE (July 19, 2022, 5:34 PM), https://slate.com/news-and-politics/2022/07/originalist-supreme-court-would-disappoint-founders.html [https://perma.cc/52B9-ZP3K].

[135] *See* THE FEDERALIST NO. 33 (Alexander Hamilton), NO. 44 (James Madison).

[136] THE FEDERALIST NO. 78 (Alexander Hamilton).

[137] Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES, 183, 184 (1865).

rule of law.[138] During the 34 years of the Marshall Court, at no point did the Court overrule any of its constitutional precedents.[139]

Dubiously, originalists claim their methodological approach to constitutional jurisprudence is value-free and entirely independent of the personal values of those engaged in interpreting the law, thereby offering objective, "correct" answers to constitutional questions of social importance.[140] But even if this robotic approach to constitutional interpretation were plausible, scant evidence suggests that the framers would have endorsed such a view.[141] Notwithstanding the Court's "incoherence problem" in its originalist approach to constitutional interpretation,[142] the Court's embrace of this methodological approach to evaluating constitutional protections has been central to its endorsement of new forms of structural violence and has contributed to and sustained the nation's history and traditions of state-based harm. The proceeding parts will consider how this historical legacy has informed modern efforts to undermine constitutional protections for peripheral groups.

IV. INVIDIOUS FORMS OF TARGETED POLICY VIOLENCE

"A constitutional guarantee subject to future judges'

assessments of its usefulness is no constitutional guarantee at all."

- Justice Antonin Scalia[143]

This Part examines the effects of state-sanctioned policy violence with respect to three historically oppressed, peripheral populations: African Americans, women, and the LGBTQ+ community. This Part provides a brief historical overview to demonstrate the structural mechanisms employed to acclimatize the deprivation of constitutional protections for legally dispossessed groups. An underlying commonality in each of these case studies involves the predictable cycle of legal disenfranchisement and policy violence that has been accomplished and legitimized through constitutional politics and antidemocratic state action.

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[138] *See* Treanor, *supra* note 134.

[139] *Id.*

[140] *See* Bork, *supra* note 112, at 1–2.

[141] CHEMERINSKY, *supra* note 34, at 75–91.

[142] *Id.*; *Even the Founders*, *supra* note 134.

[143] D.C. v. Heller, 554 U.S. 570, 634 (2008).

A. Blackness as a Basis for Rights Deprivation

Contemporary forms of state violence perpetrated against communities of color, particularly African Americans, cannot be divorced from the brutal legacy of slavery, Black Codes, and Jim Crow laws that primed the current political and legal landscape for the denial of the most fundamental rights and protections for African Americans. Throughout the nation's history, racism has presented itself in both material and ideological terms and has flourished under socio-legal practices that have included slavery, colonialism, segregation, and discrimination.[144]

Despite the inspirational text and noble ideals of the nation's founding document, the United States has been a racial dictatorship for the majority of its history.[145] Ever since British colonialists established their presence on Indigenous lands in 1607, people of color have been brutalized and systematically excluded from civic life.[146] Under the pre-Reconstruction system, legal harm was a concept that was exclusively available on racial terms.[147] The law regarded enslaved African Americans as property, treating their harms as a "legal invisibility."[148] Indeed, with 80% of the nation's gross domestic product derived from the slave economy, legal actors had little incentive to disrupt a political economy whose wealth and power were ingrained in the subjugation of millions of enslaved people.[149] It would require no less than 250 years and a violent civil war for African Americans to be legally recognized as more than property.

In stark contrast, the law viewed the private property of enslavers as an unassailable foundation of personal freedom and democratic values.[150] Property law provided mechanisms for restitution for slaveowners to receive compensation for damaged or lost "property" in instances where enslaved

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[144] JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 6, 6–7 (4th ed. 2022); *see generally* WHITE RAGE, *supra* note 87, at 7–8.

[145] OMI & WINANT, *supra* note 71.

[146] *Id.*

[147] *See* discussion *infra* Part II.

[148] Alexis Hoag, Closing Remarks, *10th Annual Symposium: How the Law Underdeveloped Racial Minorities in the United States*, 11 COLUM. J. RACE L.F. 33, 37 (2021); *see also* Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 420 (1988).

[149] David Brion Davis, *The Rocky Road to Freedom, Foreward* to THE PROMISES OF LIBERTY xi, xiv (Alexander Tsesis ed., 2010).

[150] Staughton Lynd, *Slavery and the Founding Fathers*, *in* BLACK HISTORY: A REAPPRAISAL 117 (Melvin Drimmer ed., 1968).

persons were maimed or killed.[151] Constitutional protections for slavery further required the return of escaped enslaved African Americans to their owners, elevating the property rights of white slaveowners over the most essential liberty protections of African Americans.[152] Where a harm was alleged to have been perpetrated by an African American, no matter how minor the supposed infraction, the consequences were swift and often deadly.[153] Black lives had no intrinsic value apart from the profit they provided to enslavers and the nation's economic livelihood.

The Court's judicial predisposition toward legitimizing racial oppression existed prior to and extended long after the end of slavery. The Court's history and tradition of sanctioning state violence directed at African Americans is perhaps best illustrated in the *Dred Scott* case.[154] In writing for the majority, Chief Justice Roger Taney abolished the rights of all Black Americans—not just those who were enslaved—to seek redress in the nation's courts, concluding that the Constitution was never intended to include or acknowledge African Americans as citizens.[155] Relying on historical norms to justify the Court's decision, Chief Justice Taney declared that African Americans had "no rights which the white man was bound to respect."[156] In unequivocal terms, the Court established its constitutional view that African Americans were considered property for which they were granted no individual rights.[157]

The *Dred Scott* opinion made clear that the Court had no intention of adopting a constitutional construction that would result in the recognition of legal rights for African Americans.[158] The decision proved to be a significant contributor to the Civil War, which would result in the issuance of the

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[151] Rashawn Ray & Andre M. Perry, *Why We Need Reparations for Black Americans*, BROOKINGS (Apr. 15, 2020), https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans [https://perma.cc/6NAJ-PMKP].

[152] U.S. CONST. art. IV, § 2, cl. 2 (repealed 1864).

[153] Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 38–40 (Nov. 2019).

[154] *See* Scott v. Sandford, 60 U.S. 393 (1856).

[155] *Id.* at 407.

[156] *Id.*

[157] BELL, *supra* note 6, at 34–35.

[158] *Scott*, 60 U.S. at 407.

Emancipation Proclamation and the eventual abolition of slavery.[159] While credited for the freeing of enslaved African Americans, Abraham Lincoln was not a principled or consistent advocate for Black rights.[160] Though cited as one of the earliest federal actions in support of Black rights, the Emancipation Proclamation was primarily a strategic decision urged by Lincoln's military advisors to disrupt the Southern economy, encourage public support and military aid from foreign nations, and allow for the enlistment of thousands of desperately needed African Americans soldiers into a heavily depleted Union Army.[161] As has been hoped for by Union leaders, the Emancipation Proclamation allowed for the enlistment of African Americans.[162] By the war's end, more than 200,000 African Americans had served in the Union Army, 38,000 of whom lost their lives.[163]

At the conclusion of the four-year conflict, the country had lost 2% of its population and gained three new constitutional amendments.[164] The end of the Civil War led to the Reconstruction era,[165] which saw the passage of

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[159] Just. Stephen Breyer, Guardian of the Constitution: The Counter Example of *Dred Scott*, Lecture at Supreme Court Historical Society Annual Lecture (June 1, 2009), https://www.supremecourt.gov/publicinfo/speeches/sp_06-01-09.html [https://perma.cc/W6C5-A2QD].

[160] Early in his career, Abraham Lincoln stated, "I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races . . . that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race." Abraham Lincoln, Fourth Debate with Sen. Stephen A. Douglas (Sept. 18, 1858) (transcript on file with the National Park Service) https://www.nps.gov/liho/learn/historyculture/debate4.htm [https://perma.cc/WL55-QCTS]; *see also* BELL, *supra* note 6, at 21–23; *see generally* Vernon Burton, 91 S.C. HIST. MAG. 217, 220 (1990) (reviewing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988)) (arguing black suffrage policies were based on economic needs).

[161] BELL, *supra* note 6, at 22.

[162] *Id.* at 23.

[163] *Id.*

[164] Ken Burns, *Civil War Facts: Casualties*, PBS, https://www.pbs.org/kenburns/the-civil-war/civil-war-facts [https://perma.cc/WMG2-3KG5].

[165] The short-lived Reconstruction period led to unprecedented gains for African Americans in all areas of life. For the first time, African Americans could vote, participate in the political process, secure independent employment, access public accommodations, and acquire property. These gains, though modest relative to the persistent structural inequities, challenged the white-centric, patriotic narrative of meritocracy that had long undergirded the nation's history and tradition of racial subjugation. *See* GATES, JR., *supra* note 7, at 12–13.

the 13th,[166] 14th,[167] and 15th[168] Amendments. Shortly after the ratification of the 13th Amendment, Illinois Senator Lyman Trumbull introduced the Civil Rights Act of 1866, the nation's first federal civil rights bill, which would become a model for the 14th Amendment.[169] Trumbull felt strongly that the "'abstract truths and principles' of the [13th] Amendment meant nothing 'unless the persons who are to be affected . . . have some means of availing themselves of their benefits.'"[170] Therefore, the Act's purpose was to provide substance to the 13th Amendment by ensuring that states would not infringe upon citizenship rights.[171] The enactment of the Civil Rights Act of 1866 represented a significant step in redefining the legal status of formerly enslaved people and concurrently signified a revolutionary approach to American federalism.[172] In claiming to possess the constitutional authority under the 13th Amendment to supplant state law to the extent necessary to enforce the absolute rights of all Americans, Congress unequivocally asserted the power to provide remedies for the violation of constitutionally secured rights.[173]

In addition to the 13th Amendment, the Reconstruction Amendments also encompassed the 14th and 15th Amendments, intended to secure the franchise for African American men. Prior to the passage of the 14th Amendment, the Constitution was silent on the matter of who could become a citizen and contained no provisions pertaining to voting rights. States

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[166] U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude).

[167] U.S. CONST. amend. XIV (granting citizenship to formerly enslaved people and guaranteeing equal protection under the law).

[168] U.S. CONST. amend. XV (granting African American men the right to vote).

[169] Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (current version at 42 U.S.C. § 1988 (1999)).

[170] Allen C. Guelzo & Darrell A.H. Miller, *Civil Rights Act of 1866, "An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication,"* NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/civil-rights-act-of-1866-april-9-1866-an-act-to-protect-all-persons-in-the-united-states-in-their-civil-rights-and-furnish-the-means-of-their-vindication [https://perma.cc/35CR-VTXR] (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866) (statement of Sen. Trumbull)).

[171] CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866) (statement of Sen. Trumbull).

[172] Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (current version 42 U.S.C. § 1988 (1999)). The passage of the Civil Rights Act of 1866 was itself a historic accomplishment. President Andrew Johnson, openly hostile to any federal action to protect the newly acquired rights of African Americans, vetoed the bill. Congressional leaders, motivated as much for their disdain for Jackson as their support for legal equality for African Americans, rallied to override the presidential veto. *See* WHITE RAGE, *supra* note 87, at 24–31; *see also* KIMBERLEY, *supra* note 41, at 69–70.

[173] Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 565 (1989).

exploited the lack of specificity within the text of the Constitution with the support of the Court to legally deny the right to vote to African Americans, Native Americans, and women. The pre-Civil War Constitution predominantly limited national identity and citizenship rights to white, land-owning men.[174] The 14th Amendment extended U.S. citizenship to "all persons" born in the United States.[175] Two years later, in 1870, Congress ratified the 15th Amendment to protect the newly enlarged classification of citizens from infringement on voting rights on the basis of "race, color, or previous condition of servitude."[176]

However, federal support for the newly acquired rights of African Americans was exceedingly short-lived. Even before the passage of the Reconstruction Amendments, federal appetite to address refashioned forms of violence in the former Confederacy was tepid at best. Following Lincoln's assassination, Lincoln's successor, Andrew Johnson, granted amnesty to former Confederate leaders.[177] The pardoned Confederate leaders quickly returned to their former positions of power, which they used to oversee a genocidal campaign against newly emancipated African Americans.[178] Black boys and men were brutalized and murdered, their bodies left publicly strewn as a message for others who might dare to assert their legal rights.[179] African American women were mercilessly "scalped," had their ears removed, and

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[174] Dred Scott v. Sandford, 60 U.S. 393 (1856) (concluding that enslaved people were not U.S. citizens and could not expect any protection from the federal government or the courts). The Court continued this interpretation post-Civil War as well. *See, e.g.*, Ozawa v. United States, 260 U.S. 178, 199 (1922) (holding that a Japanese-born person who had lived the majority of his life in the United States was ineligible for citizenship because he was not considered racially "white"); United States v. Thind, 261 U.S. 204, 213–14 (1923) (the Court unanimously ruled that a person from India who served in the U.S. military during WWI was not sufficiently "white" to qualify for American citizenship).

[175] U.S. CONST. amend. XIV. Notably, the 14th Amendment, as interpreted by the Supreme Court, did not apply to Native Americans or women.

[176] U.S. CONST. amend. XV.

[177] *Proclamation Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion* (Dec. 25, 1868), LIBR. OF CONG., https://www.loc.gov/resource/rbpe.23602600 [https://perma.cc/8LNX-2BUD]; *see also* KEVIN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 1–3 (2015).

[178] WHITE RAGE, *supra* note 87, at 17–19.

[179] The Billie Holiday song, "Strange Fruit," recounts the horrors of the lynching of African Americans in the South during the post-Reconstruction period. BILLIE HOLIDAY, STRANGE FRUIT (Commodore Records 1939). Despite fierce resistance from radio stations throughout the South who refused to play the song and interminable harassment by the federal government until her untimely death to discourage her performance of the song, "Strange Fruit" became a powerful civil rights anthem. Liz Fields, *The Story Behind Billie Holiday's 'Strange Fruit*,*'* PBS (Apr. 12, 2021), https://www.pbs.org/wnet/americanmasters/the-story-behind-billie-holidays-strange-fruit/17738 [https://perma.cc/WSJ8-NZT8].

were drowned in rivers.[180] Decomposing Black bodies were left to rot in open ditches and were hung from the limbs of trees, leaving an excruciating odor of death.[181]

The well-documented horrors of this genocidal campaign had little influence on the Court's willingness to ensure that African Americans received meaningful legal protections. Tellingly, the Court consistently empowered states to serve as the enforcers of the rights of those persons whom they were responsible for brutalizing. In several cases that came before the Supreme Court in the 1870s, the Court rejected the theory of federal citizenship and congressionally enforceable rights and instead held that the authority to protect inalienable citizenship rights was enforceable exclusively by the states.[182] The Court further limited the efficacy of the Civil Rights Act of 1866 and the 14th Amendment by reducing Congress's plenary authority to enforce civil rights only to those instances in which states, not individuals, violated the provisions.[183] In direct contrast to the Court's earlier enforcement of slave owners' property rights under the Fugitive Slave Clause, the Court read restrictions into civil rights provisions that their framers had never even considered.[184] In hindsight, the Court's ahistorical interpretation of the 1866 Act and the Reconstruction Amendments would become a persistent feature of the Court's interpretative methodology and a potent source of structural violence.

In countless instances, the Court also legitimized violence against people of color, devising creative legal arguments to neuter constitutional protections for African Americans.[185] A particularly egregious, yet not atypical illustration of the Court's willingness to go to great lengths to deny

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[180] WHITE RAGE, *supra* note 87, at 17.

[181] *Id.*

[182] *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 53 (1872) (recognizing that while the Reconstruction Amendments "obliterated" the "confederate features of the government," the Court nonetheless interpreted the 14th Amendment in a manner that dramatically narrowed its application to the protection of federal citizenship rights); United States v. Cruikshank, 92 U.S. 542, 555 (1875) (concluding that the Constitution "has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the State." (citing Minor v. Happersett, 88 U.S. 162, 178 (1874))).

[183] *See* Kaczorowski, *supra* note 173, at 593–94; *see also* Virginia v. Rives, 100 U.S. 313, 333 (1879) (affirming that the 14th Amendment's prohibitions only apply to states and not individuals).

[184] *See* Kaczorowski, *supra* note 173, at 569.

[185] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 393 (1856); United States v. Reese, 92 U.S. 214, 214 (1875); The Civil Rights Cases, 109 U.S. 3, 3 (1883); Plessy v. Ferguson, 163 U.S. 537, 537 (1896); Williams v. Mississippi, 170 U.S. 213, 213 (1898); Korematsu v. United States, 323 U.S. 214, 214 (1944).

Black victims of violence legal redress is the 1872 case of *Blyew v. United States*.[186] The case involved the brutal murder of an entire Black family in Kentucky.[187] Two white men attacked three generations of one family, including the 97-year-old matriarch, in their home.[188] The surviving witnesses to the attack were all Black, and, under state law, could not testify in court.[189] Relying on the recently enacted Civil Rights Act of 1866,[190] the crime was prosecuted in federal court and convictions were secured against the attackers.[191] The Supreme Court required less than an hour to reverse the convictions.[192] According to the Court's limited interpretation of the Civil Rights Act of 1866, the statute did not grant federal courts jurisdiction to prosecute white defendants for crimes against Black victims in which the testimony of Black witnesses was inadmissible under state law.[193]

Seeing little resistance by either Congress or the federal judiciary to their extreme forms of structural violence, state legislatures in former Confederate states moved aggressively to reconstitute their former slavocracy into a new enterprise that would satisfy legal scrutiny.[194] The complicity of the Court, all too eager to maintain a socio-political structure premised on anti-Blackness, was reticent to invalidate state measures clearly designed to return formerly enslaved people to a life of bondage and domestic terror. Despite the documented need and constitutional authority of the Civil Rights Act of 1866, the Court adopted a narrow interpretation of congressional powers

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[186] *See generally* Blyew v. United States, 80 U.S. 581 (1871) (denying Black victims legal redress after an entire family was murdered in Kentucky).

[187] *Id.* at 584.

[188] *Id.* at 589.

[189] *Id.* at 583.

[190] The Civil Rights Act of 1866, passed two years prior to the family's slaying, was the first federal law to define citizenship and affirm that all citizens are equally protected by the law. Ch. 31, 14 Stat. 27–30 (1866) (current version at 42 U.S.C. § 1981). Section three of the Act provided jurisdiction to federal courts of "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be." *Id.* § 3.

[191] Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 483–89 (1989); *see also* Hoag, *supra* note 148.

[192] Univ. of Ky., *The Family of Jack and Sallie Foster [*Blyew v. United States*]*, NOTABLE KY. AFR. AMS. DATABASE (Sept. 8, 2022), https://nkaa.uky.edu/nkaa/items/show/2045 [https://perma.cc/K3TF-FQSA].

[193] Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 168 (1993).

[194] *See* WHITE RAGE, *supra* note 87, at 7–38.

while augmenting state rights' to heavily curtail the efficacy of the Act (as well as the Reconstruction era Amendments).[195]

The retreat of the federal government from the South inspired new state laws that directly attacked legal protections and voting rights by adopting anti-democratic measures intended to deny minoritized voters access to the ballot box.[196] Jim Crow-era voter suppression efforts—including the use of poll taxes, literacy tests, grandfather clauses, felony disenfranchisement laws, and white primaries[197]—pervaded the South until the enactment of the Voting Rights Act.[198] Legalized forms of state-sponsored voting disenfranchisement were buoyed by horrific acts of terror, exercised with complete impunity.[199]

The structural violence that pervaded the Redemption period largely was designed to eliminate any political power that could be exercised by African Americans. Beginning in the late 1880s, every former Confederate state revised its voting laws to introduce onerous requirements on newly enfranchised constituents.[200] The sole purpose of these anti-democratic

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[195] *See* Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 720 (Feb. 2009) ("Immediately after ratification of the Reconstruction Amendments, Supreme Court Justices deferred to newly enacted civil rights statutes. Shortly thereafter, however, the nation turned away from revolutionary reconstruction and toward national reconciliation. In keeping with this trend, the Court soon checked federal legislative power by nullifying laws meant to protect fundamental liberties and by closing off federal court jurisdiction to adjudicate cases arising from racial discrimination. Even today, the Court continues to rely on precedents whose conceptualization of federalism is incompatible with the Thirteenth and Fourteenth Amendments' constitutional incorporation of national civil rights norms.").

[196] *See* Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism: A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1397–1414 (2009); *see also* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 1–43 (2018) [hereinafter ONE PERSON, NO VOTE].

[197] Grovey v. Townsend, 295 U.S. 45, 54 (1935) (upholding primaries conducted by the Texas Democratic Party to voters only), *overruled by* Smith v. Allwright 321 U.S. 649 (1944).

[198] *See* ONE PERSON, NO VOTE, *supra* note 196.

[199] M. Isabel Medina, *The Missing and Misplaced History in* Shelby County, Alabama v. Holder—*Through the Lens of the Louisiana Experience with Jim Crow and Voting Rights in the 1890s*, 33 MISS. COLL. L. REV. 201, 207 (2014); *see generally* FONER, *supra* note 160, at 235 (discussing the changing political landscape in the Reconstruction era); COLEMAN, *supra* note 177, at 6–9.

[200] U.S. DEP'T OF JUST., *Before the Voting Rights Act* (Aug. 16, 2018), https://www.justice.gov/crt/introduction-federal-voting-rights-laws [https://perma.cc/P2SU-9TWL].

measures is well-established in historical and legislative records: to suppress the Black vote.[201]

Poll taxes, which had been largely eliminated prior to the Civil War to expand the franchise to white men, were resurrected following the ratification of the Reconstruction Amendments to dilute the efficacy of the 15th Amendment.[202] The economics of Jim Crow rendered "racially neutral" poll taxes particularly politically lethal to African Americans who continued to be denied educational and economic opportunities as a result of legal segregation and systemic racial discrimination.[203] African Americans in the South were confined to low-paying work, often surviving through sharecropping that required they subsist on credit until they could reap the meager profits of their harvest.[204] The average farming family in the Jim Crow South earned less than $100 a year and could not pay the poll taxes required to cast a ballot.[205] Moreover, because the poll tax was collected for every year an eligible voter could vote, the cumulative costs proved economically insurmountable for most Black voters.[206]

The collapse of the Black vote as a result of these measures was nearly instantaneous. In Alabama, the number of registered Black voters dropped from 180,000 to less than 3,000 in a three-year period.[207] Similar trends were replicated elsewhere throughout the South.[208] In Louisiana, a state with approximately 130,000 registered Black voters in 1896, that number had plummeted to 1,342 by 1904.[209] In North Carolina, Black voter participation declined from 98% to 10% during the 20-year period the poll tax was in effect. When the United States entered World War II in defense of

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[201] Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY.COM, https://www.history.com/news/jim-crow-laws-black-vote [https://perma.cc/55PB-2H4Z].

[202] Deborah N. Archer & Derek T. Muller, *Interpretation and Debate: The Twenty-Fourth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xxiv/interpretations/157 [https://perma.cc/MNZ9-KPCL].

[203] *Id.*

[204] ONE PERSON, NO VOTE, *supra* note 196, at 9.

[205] *Id.* (stating that the poll tax could easily consume 2% of a family's yearly income).

[206] *Id.*

[207] MICHAEL WALDMAN, THE FIGHT TO VOTE 86 (2016).

[208] J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION A ND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880–1910 76 (1974).

[209] WALDMAN, *supra* note 207, at 88.

democracy, only 3% of eligible African Americans were registered to vote in the South.[210]

The use of the poll tax, combined with the introduction of literacy tests, ensured the near-complete denial of the Black vote while, according to the Court, remaining within the legal bounds of the requirements of the 14th and 15th Amendments. The legal fallacy that these measures were constitutionally permissive was made possible courtesy of the Court's generous reading of the Reconstruction Amendments in favor of states hostile to voting rights.[211] With public education chronically underfunded in the South—and with most public funding used to almost exclusively fund white schools—the literacy rate for African Americans during the Jim Crow era was comparable to the period of enslavement.[212] By 1940, roughly half of all African Americans in Mississippi had received fewer than five years of formal schooling, with almost 12% failing to receive any education whatsoever.[213] The per-pupil education investment for white children in the South was typically at least four times that of their Black peers.[214] In most of the Jim Crow South, Black high schools were entirely unfunded, further exacerbating the gross educational disparities for African American children.[215] By employing democratic structures for undemocratic means, Southern states penalized minoritized communities by limiting their access to state resources and then exploiting that as a basis to deprive them of political participation in the very system that caused their harm.

Federal leaders in all branches of government had an opportunity to counter the terror that white Southerners unleashed in response to the Reconstruction era gains and Amendments. Pleas for a more robust federal presence in the South were handily rejected.[216] Without any meaningful federal oversight or intervention to prevent the resurgence of white supremacist violence, Southern states drafted new constitutions as if the Civil War had never been waged.[217] Black codes and Jim Crow laws emerged in defiance of the Reconstruction Amendments and, without national leaders

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[210] WALDMAN, *supra* note 207, at 142.

[211] *See* ONE PERSON, NO VOTE, *supra* note 196, at 9.

[212] *See generally id.*

[213] *Id.* at 5.

[214] *Id.*; WHITE RAGE, *supra* note 87, at 70, 89.

[215] WHITE RAGE, *supra* note 87, at 68–71.

[216] *Id.* at 17.

[217] COLEMAN, *supra* note 177, at 6–9.

interested in protecting the constitutional rights of African Americans, states simply proceeded as if there were no federal protections at all.[218]

After a brief flirtation with egalitarian principles, a new period of policy violence would extend for another century.[219] This was a moment in American history when the executive and legislative branches of the federal government demonstrated their utter unwillingness to intervene on behalf of newly emancipated African Americans. The Supreme Court could have disrupted this history and tradition of structural violence. Instead, as it had done so many times earlier in its history and since, the Court endorsed the multifaceted forms of violence employed by states to ensure that Black citizens were denied any rights or legal protections.

Perhaps the most incontrovertible evidence of the Court's complicity with the policy violence of southern states in response to the Reconstruction Amendments was the Court's landmark decision in *Plessy v. Ferguson*.[220] Despite the 14th Amendment's guarantees of equality, the Court concluded that racial segregation was well within constitutional bounds.[221] The Court's decision served as a vocal pronouncement to Southern states that it would not intervene to vindicate Black rights. Heeding the message, Southern states proceeded swiftly to enact Black Codes and Jim Crow laws designed to reconstitute slavery into a permanent racial caste system that denied African Americans political power, social equality, and basic dignity through both policy and physical violence.[222] Hospitals, restaurants, transportation, schools, phone booths, pools and beaches, libraries, and cemeteries were segregated to keep the races "separate but equal."[223] Where structural violence—exercised by the courts and state and local governments proved (or had been perceived as) insufficient—white citizens felt empowered to enforce the racial caste system through abject terrorism, well aware that their actions would be insulated from any legal or social consequences.

Though racial segregation is often associated with state-sanctioned violence towards communities of color in the South, it was by no means

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[218] *Id.* at 10.

[219] *See* GATES, JR., *supra* note 7, at 12–13.

[220] *See* 163 U.S. 537 (1896).

[221] *Id.* at 551–52 (concluding that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane").

[222] DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 11–13 (2004) [hereinafter BELL, SILENT COVENANTS].

[223] *Plessy*, 163 U.S. at 552.

limited in geographic scope.[224] Every state admitted to the Union after 1819 explicitly codified discrimination against African Americans in their state constitutions, and anti-miscegenation laws criminalizing interracial marriage were uniformly upheld by courts across the country.[225] In fact, the separation of races was a Northern concept.[226] "Separation," the term colloquially employed in the North to describe racial segregation, had no place in the South before the Civil War, where slavery required close contact and coercion to maintain racial domination.[227] Rather, it was in the North at the inception of the railroad age in the late 1830s that racial segregation became widely instituted.[228]

In the North, laws prevented African Americans from participating in skilled professions, excluded them from serving on juries or testifying in court, and frequently denied them the right to vote.[229] In multiple Northern states, blanket restrictions severely limited or outright banned the entry of Black citizens.[230] Though commonly associated with the Jim Crow South, anti-miscegenation laws criminalizing interracial marriage were nearly universal across the country, and uniformly upheld by courts.[231] Northern racism was also expressed through the forcible segregation of African Americans into slums where Black children attended chronically underfunded, racially segregated schools.[232]

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[224] *See generally* IMANI PERRY, SOUTH TO AMERICA: A JOURNEY BELOW THE MASON-DIXON TO UNDERSTAND THE SOUL OF A NATION (2022) (illustrating how segregation was not limited geographically to the South).

[225] WHITE RAGE, *supra* note 87, at 12.

[226] Steve Luxenberg, *The Forgotten Northern Origins of Jim Crow,* TIME (Feb. 12, 2019, 10:35 AM), https://time.com/5527029/jim-crow-plessy-history [https://perma.cc/Q4ME-NP6V].

[227] WHITE RAGE, *supra* note 87, at 12.

[228] *Id.*

[229] BELL, *supra* note 6, at 25–26.

[230] *Race-Based Legislation in the North*, PBS, https://www.pbs.org/wgbh/aia/part4/4p2957.html [https://perma.cc/Q5M8-HV48].

[231] *See* Pace v. Alabama, 106 U.S. 583 (1883) (affirming the constitutionality of Alabama's anti-miscegenation statute), *overruled by* Loving v. Virginia, 388 U.S. 1 (1967); *see generally* Robert A. Destro, *Law and the Politics of Marriage:* Loving v. Virginia *After 30 Years Introduction*, 47 CATH. UNIV. L. REV. 1207 (1998) (discussing the history of laws criminalizing interracial marriage in the United States).

[232] In Baltimore, a city ordinance made it illegal for Black residents from moving into a majority white neighborhood. Emily Badger, *Baltimore Shows How Historic Segregation Shapes Biased Policing Today*, WASH. POST (Aug. 10, 2016), https://docdro.id/MVkKT8C [https://perma.cc/9GCC-CA23].

Despite being violently denied the freedom and justice promised to all, African Americans have remained fervently committed to perfecting America's democratic ideals.[233] As articulated by historian Nikole Hannah-Jones:

> As the centennial of slavery's end neared, [B]lack people were still seeking the rights they had fought for and won after the Civil War: the right to be treated equally by public institutions, which was guaranteed in 1866 with the Civil Rights Act; the right to be treated as full citizens before the law, which was guaranteed in 1868 by the 14th Amendment; and the right to vote, which was guaranteed in 1870 by the 15th Amendment. In response to [B]lack demands for these rights, white Americans strung them from trees, beat them and dumped their bodies in muddy rivers, assassinated them in their front yards, firebombed them on buses, mauled them with dogs, peeled back their skin with fire hoses and murdered their children with explosives set off inside a church.
>
> For the most part, [B]lack Americans fought back alone. Yet we never fought only for ourselves. The bloody freedom struggles of the civil rights movement laid the foundation for every other modern rights struggle. This nation's white founders set up a decidedly undemocratic Constitution that excluded women, Native Americans and [B]lack people, and did not provide the vote or equality for most Americans. But the laws born out of [B]lack resistance guarantee the franchise for all and ban discrimination based not just on race but on gender, nationality, religion and ability.[234]

But African Americans' commitment to the American democratic experiment received no support from most state actors or members of the judiciary. Notwithstanding the long and documented history of disenfranchisement of people of color, the Court has contributed to the systemic denial of voting rights throughout much of its history, except during

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[233] *See generally* DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT (1991) (discussing the instrumental role that African Americans have played as change agents in advocating for a more democratic and equalitarian constitutional order).

[234] Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES (Mar. 11 2020), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html [https://perma.cc/3XBP-EVQ4].

a brief period in which it supported the Voting Rights Act.[235] Passed with overwhelming political support in 1965, the Voting Rights Act placed an affirmative responsibility on state and local governments to comply with constitutional voting requirements.[236] Cumbersome and costly litigation to address systemic disenfranchisement was no longer the only legal remedy for marginalized voters. Rather, the Voting Rights Act placed the federal government in a heightened supervisory role and obligated states that had documented policies and practices of voter suppression to obtain federal preclearance before enacting any changes to its voting laws.[237] Designed as a remedial legal measure prohibiting racial discrimination in laws regulating voting in order to enforce the 14th and 15th Amendments, the Voting Rights Act has been described as one of the most effective federal laws ever enacted.[238]

For roughly half a century, the Court appeared committed to the Voting Rights Act.[239] One year after the Voting Rights Act passed, South Carolina

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[235] *See generally* LAWRENCE GOLDSTONE, INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903 (2020) (discussing Supreme Court rulings on civil rights following the Civil War); *see also* WHITE RAGE, *supra* note 87.

[236] ONE PERSON, NO VOTE, *supra* note 196, at 22; *see also* WALDMAN, *supra* note 207, at 159.

[237] Sections four and five of the Voting Rights Act provide for federal oversight of the electoral process in states and political subdivisions where evidence existed of voting discrimination. COLEMAN, *supra* note 177, at 15–17. According to the coverage formula contained in section 4(b), federal intervention was proper in any jurisdiction that used any device as a condition for voter registration on November 1, 1964, where less than 50% of the voting age population either registered to vote on that date or voted in the presidential election that year. *Id.* at 15. For qualifying jurisdictions to be authorized, the Act required these jurisdictions to submit a preclearance process providing any proposed changes to their electoral process, subject to approval by the U.S. Department of Justice or the U.S. District Court for the District of Columbia. *Id.* at 15–17.

[238] The Voting Rights Act was renewed four times between 1970 and 2006, each time with overwhelming bipartisan support. *Id.* at 18–22; *see generally* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007) (discussing the political significance of the Voting Rights Reauthorization Act of 2006); *see also* ONE PERSON, NO VOTE, *supra* note 196, at 25.

[239] *See, e.g.*, S.C. v. Katzenbach, 383 U.S. 301, 337 (1966) ("We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live."); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) ("We therefore conclude that § 4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is reversed."); Allen v. State Bd. Of Elections, 393 U.S. 544, 570 (1969) ("[T]he balance of legislative history (including the statements of the Attorney General and congressional action expanding the language) indicates that § 5 applies to these cases."); Young v. Fordice, 520 U.S. 273,

challenged the constitutionality of the law.[240] In an 8-1 decision, the Supreme Court affirmed the constitutionality and need for the Act.[241] Having failed in their frontal attack on the Voting Rights Act, southern states hostile to voter enfranchisement adjusted their strategy in an attempt to limit the scope of electoral decisions subject to the Act's section five preclearance mandate.[242] Once again, the Warren Court outright rejected these efforts.[243] In *Allen v. State Board of Elections*, the Court concluded that Congress intended that "all changes [to the electoral process], no matter how small, be subjected to §5 scrutiny."[244]

The success of the Voting Rights Act, similar to the gains made during the Reconstruction period, produced an intense policy violence response.[245] Notwithstanding the bipartisan support the Act had long enjoyed, mobilization by Southern states subject to the Act's preclearance requirements gathered momentum in advance of the Act's scheduled 2007 expiration.[246] The debacle of the 2000 presidential election, combined with the overwhelming support of Black voters for Democratic Presidential candidate John Kerry in 2004,[247] persuaded some Republican politicians that preserving the Voting Rights Act was not in their political interest.[248]

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291 (1997) ("We hold that Mississippi has not precleared, and must preclear 'practices and procedures' that it sought to administer on and after February 10, 1995.").

[240] *Katzenbach*, 383 U.S. at 301.

[241] In *Katzenbach*, the Court upheld the constitutionality of the Voting Right Act in finding that, "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 328.

[242] ONE PERSON, NO VOTE, *supra* note 196, at 23.

[243] *Allen*, 393 U.S. at 544.

[244] *Id.* at 568.

[245] The Voting Rights Act is consistently referenced as one of the most effective pieces of federal legislation ever passed and is credited with significantly decreasing racial disparities in voter registration and participation. *See, e.g.*, Tucker, *supra* note 238, at 205.

[246] *Id.*

[247] *Id.* at 207; *see* RONALD W. WALTERS, FREEDOM IS NOT ENOUGH: BLACK VOTERS, BLACK CANDIDATES, AND AMERICAN PRESIDENTIAL POLITICS 157–88 (2005). John Kerry received 8% of all Black votes. By contrast, President George W. Bush received a lower percentage of the Black vote in 2004 than Presidents Nixon, Ford, candidate Dole, and President Reagan. *See* U.S. PRESIDENT NATIONAL EXIT POLL, CNN (2004), https://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html [https://perma.cc/BYD4-Q7BM].

[248] Tucker, *supra* note 238, at 207–10.

As explained by Professor Cheryl Harris, the replication of the Court's predictable pattern of disenfranchisement through the elevation of states' rights over the basic humanity of African Americans once again reemerged:

> For those who are committed to identifying and repairing deeply entrenched racial inequality the ground is exceptionally hard. Indeed, this moment parallels another troubling period in American history and jurisprudence—that following Reconstruction and culminating in *Plessy v. Ferguson*.
>
> In at least two respects, contemporary race jurisprudence approximates the jurisprudence of the *Plessy* era. First, the current Court seems to have adopted the specific forms of racial erasure prominent in the period of so-called Southern redemption. It has called upon and resuscitated interpretations of the Equal Protection Clause that assign the federal government a subordinate role relative to the states in protecting the right to be free from discrimination. In so doing, the Court has embraced as well the same states' rights logic that constituted the bedrock of the segregationist platform.
>
> Second, like the *Plessy* Court in 1896, the current Court insists that all racial identities are symmetrical and hold no social significance. Indeed, under a regime of colorblindness, this Court has naturalized and evacuated race as a matter of law. The result is that the Court now treats all race-conscious efforts to eradicate racial inequality as conceptually equivalent to acts designed to install racial hierarchy.[249]

These prescient observations pre-dated *Shelby County v. Holder*, the 2013 Supreme Court case that gutted key provisions of the Voting Rights Act.[250] As all signs indicated that Black voters were becoming increasingly influential in national and local elections, efforts coalesced after the election of the first African American President to erode the new political power of the Black vote.[251] Essentially adopting the earlier arguments of Southern states that had been previously rejected by the Supreme Court, Chief Justice John Roberts—

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[249] Cheryl Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2489–92 (2003) (reviewing LANI GUINIER & GERALD TORRES, THE MINER'S CANARY (2002)).

[250] 570 U.S. 529, 529 (2013).

[251] *See* ONE PERSON, NO VOTE, *supra* note 196, at 151.

writing for a divided Court—skillfully repackaged the discredited states' rights proclamations that had undergirded previous attacks on the Voting Rights Act.[252] In relying on a novel doctrine based on the equal sovereignty of the states, he concluded that the preclearance formula of the Act was not based on current conditions and that it unduly punished former Confederate states.[253]

The preclearance formula invalidated by the Court applied to nine states, as well as dozens of other counties in at least eight other states.[254] Of the states that had been previously subject to federal oversight by the Voting Rights Act, nearly all would ultimately enact restrictive voting laws within four years of the *Shelby County* decision.[255] Within hours of the Court's ruling, Alabama announced its intention to enforce a strict photo identification law that had been passed in 2011 but had been pending federal approval under the Voting Rights Act.[256] A similar voter identification law that had been passed in Mississippi in 2011 but had failed to satisfy the preclearance review went into effect in advance of the 2014 primaries.[257] Prior to the 2014 general election, Virginia implemented changes to its voting process that was

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[252] *Id.*; Shelby Cty. v. Holder, 570 U.S. 529, 550–51 (2013).

[253] The Chief Justice's characterization of the Voting Rights Act as punitive and without justification was reminiscent of the portrayal by South Carolina Senator Strom Thurmond. In 1970, Thurmond described the Voting Rights Act as "nothing more than a device created to inflict political punishment upon one section of the country." ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 83 (2015).

[254] The states covered by the Voting Rights Act at the time included Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. *Id.* 39–40. Counties in California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota were also subject to the preclearance requirement based on their documented history of racial discrimination in voting. *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/analysis/effects-shelby-county-v-holder [https://perma.cc/Y6ND-CCTB].

[255] *See generally* ONE PERSON, NO VOTE, *supra* note 196, at 44–71 (stating that states enacting restrictive voting laws post-*Shelby County* include Texas, Wisconsin, Iowa, Indiana, Pennsylvania, Florida, Missouri, Washington, Illinois, Ohio, Georgia, North Carolina, Alabama, Kansas, Tennessee.)

[256] Maggie Astor, *Alabama Offers Seven Examples of How to Limit the Right to Vote*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html [https://perma.cc/7B67-UQS4].

[257] Delbert Hosemann, *Not Our Grandfathers' Mississippi Anymore: Implementing Mississippi's Voter Identification Requirement*, 85 MISS. L.J. 1053, 1054–59 (2017); Ellen Brait, *Voting Restrictions in the US Since the 2010 Election: State by State*, GUARDIAN (July 13, 2015, 7:00 AM), https://www.theguardian.com/us-news/2015/jul/13/voting-restrictions-2010-election [https://perma.cc/LY9J-BD8W].

projected to disenfranchise one in twenty-five voters.[258] Arizona, too, moved to swiftly enact restrictive voting measures that would have been disallowed prior to *Shelby County*.[259] Leading up to the 2016 presidential election, Arizona closed over 200 polling stations, primarily in districts occupied by voters of color.[260]

The *Shelby County* Court adopted an ahistorical narrative of victimhood and innocence of Southern states to misrepresent a multi-century crusade to enslave and marginalize Black citizens that was effectuated through structural violence by state governments intent on suppressing their minoritized populations.[261] The success of these state disenfranchisement efforts could not have been achieved without the endorsement of the Court. The very same day the Court issued its opinion, Texas announced that it would enforce a strict Voter ID law and dubiously drawn redistricting maps that would have been subject to the Voting Rights Act preclearance requirement.[262] The combined effects of these state actions resulted in the disenfranchisement of hundreds of thousands of Texas voters who were predominantly Black and Brown.[263]

Following Texas's lead, North Carolina enacted a similarly antidemocratic voting law that reduced early voting, eliminated same-day voting registration, prevented the county board of elections from expanding polling hours, and instituted strict voter identification requirements.[264] The pre-*Shelby County* proposed bill, which would have also been subject to federal approval, was much more modest in its aims.[265] However, following the Court's decision in *Shelby County*, the North Carolina legislature significantly

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[258] VA. CODE ANN. § 24.2-643 (2013); *see* Brief of Appellant at 3–19, Lee v. Va. Bd. of Elections, 843 F.3d 592 (4th Cir. 2016) (No. 16–1605).

[259] Memorandum from the Az. Advisory Comm. to the U.S. Comm'n on C.R. 2 (July 2018), https://www.usccr.gov/files/pubs/2018/07-25-AZ-Voting-Rights.pdf [https://perma.cc/E8D7-G6TC].

[260] *Id.*; *see also* Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, NATION (Nov. 4, 2016), https://www.thenation.com/article/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted- the-voting-rights-act [https://perma.cc/R6PP-GLAA].

[261] *See generally* Shelby Cty. v. Holder, 570 U.S. 529 (2013) (reasoning that since racial discrimination is not the exact same as it was in 1965, then the continuance of the "stringent" conditions pressed on the states by the Voting Rights Act is not justified).

[262] Press Release, Greg Abbott, Tx. Att'y Gen., Statement by Texas Attorney General Greg Abbott (June 25, 2013), [https://perma.cc/SL53-AFSG].

[263] *The Effects of* Shelby County v. Holder, *supra* note 254.

[264] Voter Information Verification Act, Gen. Sess. Law 381 (N.C. 2013).

[265] *See id.*

expanded the law's reach, making it one of the most restrictive voting bills passed in the aftermath of the invalidation of the preclearance requirements of the Voting Rights Act.[266] The legality of these restrictions was challenged in court and, following years of litigation, ultimately found unconstitutional because they "target[ed] African Americans with almost surgical precision."[267]

Indeed, the structural violence represented by the Court's opinions during the Redemption period continues to manifest today in decisions like *Shelby County*.[268] By applying the practice of erasure in combination with an inaccurate retelling of America's racial history, the Court has exploited the success of the Voting Rights Act to essentially eviscerate it. According to the detached history and reality embraced by the Roberts Court, racial discrimination in the electoral process has been cured, not because of the vigorous federal interventions required by the Voting Rights Act, but because racism has apparently ceased to exist.[269]

This history and tradition of policy violence that has been committed by state legislatures and facilitated by the Court has not been limited to the area of political disenfranchisement. Legalized policy violence has further led to the establishment of an American carceral state with an incarceration rate that rivals countries with the world's most egregious human rights records, including North Korea, Iran, and China.[270] In the United States, which has long held itself out as a beacon and model of democratic idealism,[271] more than six million Americans are under some form of correctional supervision.[272] This staggering figure translates into one in every thirty-seven Americans being either incarcerated (after sentencing or on pending charges),

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[266] *See id.*

[267] N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

[268] *See* 570 U.S. 529 (2013).

[269] *See id.*

[270] *See* John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995 [https://perma.cc/A7C2-C37A].

[271] *See generally* ABRAM C. VAN ENGEN, CITY ON A HILL: A HISTORY OF AMERICAN EXCEPTIONALISM (2020) (discussing the historical development and modern influence of American national narratives).

[272] Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/reports/correctional control2018.html [https://perma.cc/K5FG-6U7N]; *see also* Jake Horowitz & Connie Utada, *Community Supervision Marked by Racial and Gender Disparities*, PEW RSCH. CTR. (Dec. 6, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/12/06/community-supervision-marked-by-racial-and-gender-disparities [https://perma.cc/ZH2B-FMAN].

on probation, or on parole.[273] If the population of persons under community control was to constitute its own state, it would represent the 16th largest state in the country and would be roughly equivalent to the size of Tennessee.[274]

Racial disparities are a defining characteristic of the American carceral system, with the use of state power and resources allocated for the imprisonment of people of color en masse.[275] The American prison system is yet another stark manifestation of race-based policy violence. The nation's first prison boom coincided with the emancipation of enslaved people, whereas the current mass incarceration crisis was a response to the successes of the Civil Rights movement.[276] Consequently, although African Americans comprise only 13% of the U.S. population, they account for 38% of the incarcerated population.[277] As with all forms of state-sanctioned structural violence, the construction of the American carceral state must be situated within the broader context of a system that ascribes human value, social resources, and legal protections based on an entrenched caste system with its origins in colonialization, enslavement, and patriarchy.

The collectivized disenfranchisement of individuals routed through the correctional system is itself another form of systemic violence. Voting rights is one of many areas in which the criminalization of Blackness has allowed for the wholesale, and oftentimes, permanent removal of African Americans from civic life. These Jim Crow era policies have resulted in 48 states with some form of felony disenfranchisement laws, resulting in 4.6 million Americans lacking the right to cast a ballot.[278] The policy violence that is intrinsic to felony disenfranchisement law is a vestige of the Redemption era and, consequently, is most pronounced in those states that have clung to a racial hierarchy. In Alabama, Mississippi, and Tennessee, nearly 10% of the adult population is denied the right to vote under the states' felony

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[273] Jones, *supra* note 272.

[274] *Id.*

[275] *Id.*

[276] *See* Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 555–69 (1983); Bruce Western, *The Prison Boom and the Decline of American Citizenship*, 44 SOC'Y. 30, 30–36 (2007).

[277] DANIELLE KAEBLE, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2016 24 (Apr. 2018), https://bjs.ojp.gov/content/pub/pdf/ppus16.pdf [https://perma.cc/9TKL-8DMS].

[278] CHRISTOPHER UGGEN ET AL., THE SENT'G PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS 2 (Oct. 25, 2022), https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights [https://perma.cc/4AQL-ELW7].

disenfranchisement laws.[279] Despite a 2018 ballot measure that received overwhelming approval from Florida voters to restore voting rights for non-violent felons, more than one million Floridians remain unable to vote.[280] Nationally, one in every nineteen African American adults of voting age is disenfranchised.[281]

In addition to the structural violence synergy of mass incarceration and felony disenfranchisement, the Court has also broadly imbued in its race-based jurisprudence a "color-blind" approach to constitutional interpretation.[282] Contemporary equality jurisprudence has heavily relied upon notions of "color-blindness" to justify a divorced historical understanding of the Reconstruction Amendments and to gradually erode anti-discrimination laws and constitutional protections alike.[283] Philosophically and in practice, color-blindness counterintuitively sustains the existing racial hierarchy by disguising and preserving an entrenched status quo that rewards and promotes whiteness.[284] As a form of public policy and judicial interpretation, the fallacy of color-blindness represents yet another pernicious form of structural violence.

The mythology that the Court has cultivated around color-blindness as a laudable judicial doctrine has operated as a cover for racial oppression. Aside from the false assumptions on which color-blindness is premised, this approach to the Court's race-based jurisprudence has fostered a means-oriented approach to equal protection that emphasizes the nature of law rather than the purpose or effects of the state action.[285] As explained by the late Alan David Freeman, the result of a means-oriented approach that is espoused under color-blindness is that it undermines attempts to promote equality by prohibiting race-conscious remedial measures, thereby

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[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] As a theoretical concept, "color-blindness" purports to remove race from the law by applying a "race-neutral" approach to policy-making and judicial interpretation. "Color-blindness" has been championed by originalist jurists, including those who are supportive of the application of history and tradition standard for determining unenumerated constitutional rights. *See, e.g.*, Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L. J. 983, 992–95 (1987) (advocating for a color-blind approach to constitutional interpretation).

[283] Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 164–65 (1994).

[284] *See* BELL, *supra* note 6, at 8–16 (discussing multi-raciality and racial identity); Freeman, *supra* note 12, at 1058–59 (discussing the Equal Protection Clause and how it relates to race).

[285] Freeman, *supra* note 12, at 1058–59.

maintaining the multiplex racial subordination apparatuses that remain entrenched in American law and society.[286]

Civil rights for communities of color have remained tenuous in large part because of the persistent policy violence perpetrated by courts and state officials that have been legitimized under a veneer of constitutionalism. Importantly, the Court's tolerance of constitutional abuses has been facilitated through its weak interpretation and application of the Reconstruction Amendments and antidiscrimination laws. The discriminatory ecology of mass incarceration, the purposeful disenfranchisement of voters of color, and the embrace of a color-blind approach to constitutional law can and should be understood as a continuation of the nation's history and tradition of systemic violence. The synergy of these phenomena speaks to a national narrative that conceives of racism as "an unhappy accident of history" that "immunizes the 'law' from antiracist critique" as opposed to a "broadly shared cultural condition."[287] This false, ahistorical telling of the nation's history has repeatedly been adopted by the Court to justify symbolic, rather than substantive, relief for minoritized groups. The racial retrenchment pattern that has typified the Court's judicial decisions has made all too clear that it lacks a meaningful, sustained commitment to a truly equal, democratic form of governance.[288] As with its jurisprudence impacting the rights of women and LGBTQ+ persons, the Court has an established history and tradition of enabling and directly perpetrating structural violence towards peripheral communities.

B. The Repudiation of Reproductive Rights, Bodily Autonomy, and Access to Fundamental Health Care as a Multi-Faceted Form of Policy Violence

The history of reproductive politics and constitutional protection for bodily autonomy, similar to the other rights-based movements discussed in this Article, provides a tragic illustration of the heightened policy violence that is often a direct response to civil rights gains. Structural violence has extended to women, having had especially devastating consequences on women of color.[289]

Lacking political, social, or economic agency for the better part of American history, women were restricted to domestic spheres where they

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[286] *Id.*

[287] BELL, SILENT COVENANTS, *supra* note 222, at 27.

[288] *See generally id.* (discussing the overturning of *Plessy v. Ferguson*).

[289] *See generally* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (2d ed. 2000) (describing the unique harm inflicted upon women of color in response to efforts to acquire equality under the law).

were rendered a legal appendage of their husbands.[290] The early adoption of the English common law doctrine of coverture provided that "husband and wife are one, and that one is the husband."[291] Indeed, prior to the ratification of the 14th Amendment, women had few cognizable constitutional rights. At the time of the Women's Rights Convention in Seneca Falls in 1848, state laws restricting the economic, political, and personhood rights of women were pervasive.[292] Legal liabilities were widely imposed on married women, limiting their ability to control their earnings, dispose of or inherit property, or independently enter into contracts.[293] Most states imposed additional limitations on property ownership by married women.[294] As property ownership was a condition to vote in most states, such restrictions functioned to deny women the franchise.[295] Protective labor laws further limited the economic self-sufficiency of women, making marriage an essential means of survival for most women and further instantiating their inferior legal status.[296]

However, the passage of the Reconstruction Amendments made it possible for women to assert new constitutional claims. The Reconstruction Amendments transformed the relationship between the federal government and the states, no longer permitting state governments to exercise unfettered power to enact legislation that explicitly limited legal rights exclusively to white, property-owning men.[297] Importantly, through a gradual incorporation process under the 14th Amendment, the Supreme Court would eventually determine that most of the Bill of Rights applied to the states, thereby permitting the power of the federal Constitution to shield the citizenship rights of individuals from state tyranny.

The Supreme Court, however, would come to adopt a narrow interpretation of the Reconstruction Amendments, including the 14th Amendment, that would hinder its viability as a legal mechanism to effectively combat state discrimination.[298] Women's rights litigation evolved in tandem with the Court's 14th Amendment jurisprudence. The Court decided *Bradwell v. State of Illinois*, one of the earliest women's rights cases, the

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[290] *See generally* GOLDSTEIN ET AL., *supra* note 78.

[291] *Id.* at 7–8.

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] GOLDSTEIN ET AL., *supra* note 78, at 7–8.

[297] *See supra* Part IV.A.

[298] *Id.*

day after it issued its first 14th Amendment ruling in the *Slaughterhouse Cases*.[299] In both cases, the Court demonstrated that it had little interest in applying the 14th Amendment as a meaningful constraint on state power.[300]

In *Bradwell*, the first 14th Amendment challenge to a sex-based classification, the Court concluded that a state was able to lawfully discriminate against women unencumbered by the Constitution.[301] The Court upheld an Illinois law that precluded women from the practice of law by relying on its newly established precedent in the *Slaughterhouse Cases*.[302] According to the Court's logic, the Privileges and Immunities Clause of the 14th Amendment offered Myra Bradwell no relief from the discriminatory state requirement that prevented her from practicing law because the ability to enter the legal profession did not fall within the "privileges or immunities" of national citizenship.[303] Curiously, the opinion was entirely silent as to whether the state's prohibition of the legal licensure of women was a violation of the Equal Protection Clause of the 14th Amendment.[304] In a concurrence authored by Justice Bradley and joined by two of his colleagues, the Court further elaborated that "[t]he natural and proper timidity and delicacy which belongs to the female sex" renders them "evidently unfit[] . . . for many of the occupations of civil life."[305] Citing the coverture principles of common law, Justice Joseph Bradley further noted that "the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things."[306]

Two years later, the Court again refused to invalidate a state law that confined voting exclusively to male citizens.[307] During the Reconstruction era, hundreds of women—both Black and white—defied state laws and cast

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[299] Bradwell v. Illinois, 83 U.S. 130, 130 (1873); Slaughterhouse Cases, 83 U.S. 36, 36 (1873).

[300] *See Bradwell*, 83 U.S. at 139 (1873) (holding the Privileges and Immunities Clause does not extend to rights not protected by federal citizenship); *Slaughterhouse Cases*, 83 U.S. at 73 (1873) (holding the Privileges and Immunities Clause does not extend to rights not protected by federal citizenship).

[301] 83 U.S. at 139.

[302] *Id.*

[303] *Id.* at 136.

[304] *See generally id.*

[305] *Id.* at 141 (Bradley, J., concurring).

[306] *Id.* at 141–42.

[307] Minor v. Happersett, 88 U.S. 162, 178 (1874).

ballots.[308] Referred to as the "New Departure" movement, suffragists were arrested and fined for their efforts.[309] Virginia Minor, along with over 100 women across ten states, went to the polls on national election day in 1872.[310] Only four women were permitted to cast ballots.[311]

In *Minor v. Happersett*, the Court concluded that the "privileges and immunities" of citizenship protected by the 14th Amendment did not encompass suffrage.[312] Though acknowledging that "[t]here is no doubt that women may be citizens," the Court cited the well-established and lengthy history of the exclusion of women from voting in nearly all states as evidence that the framers intended for states to have the exclusive power to determine suffrage.[313] Absent expressed language providing for such "radical a change" as granting the right to vote to women, the Court determined that it lacked the power to interpret the 14th Amendment as conferring universal suffrage.[314] Voting rights, according to the Court, were to be left to the exclusive purview of the states to decide.[315] Chief Justice Morrison Waite, in writing for a unanimous Court, held that:

> If the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. . . . Our province is to decide what the law is, not to declare what it should be.[316]

The Court would continue to interpret the 14th Amendment to curtail—rather than recognize— constitutional protections. In *Muller v. Oregon*, the Court invoked similar assumptions about the "physical structure" of women and the "performance of maternal functions" to reject a 14th Amendment challenge to a state law that limited the number of hours that a woman could work in certain industries.[317] In yet another unanimous decision, the Court readily embraced the position that the "physical well-being of woman

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[308] GOLDSTEIN ET AL., *supra* note 78, at 19.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] 88 U.S. at 179.

[313] *Id.* at 165.

[314] *Id.* at 176.

[315] *Id.* at 177.

[316] *Id.* at 177–78.

[317] 208 U.S. 412, 421 (1908).

[became] an object of public interest" that entitled the states to exercise their police powers to regulate the labor of women to preserve their health so that they may produce "vigorous offspring."[318] A nearly identical law applied to male bakers, whose physical well-being was evidently not an object of "public interest," had been struck down by the Court only three years prior.[319]

Forced to reckon with the Court's refusal to interpret and apply the 14th Amendment to ensure the equal protection of women under the law, suffragists shifted their strategy to more aggressively advocate for a constitutional amendment that would recognize women's right to vote.[320] Having been unsuccessful in petitioning for the expressed inclusion of protections for women within the 14th and 15th Amendments, suffragists again redirected their efforts to securing a standalone constitutional amendment that would unequivocally achieve universal suffrage for all women.[321] In 1878, Congress introduced the 19th Amendment.[322] It would require more than 40 years to be ratified.[323]

Though historically, politically, and symbolically significant, the passage of the 19th Amendment failed to usher in full legal equality for women and generated considerable debate concerning what would be required to achieve equality under the law.[324] The continued exclusion of women from the public sphere through state-level action necessitated further advocacy. However, it would be another four decades before the Court would begin to prove responsive to women's rights litigation under the 14th Amendment.[325] The sustained sanctioning by the Court of the imposition of legalized, gender-based discrimination remained a facet of 14th Amendment jurisprudence until the mid-20th century when it would, at last, attain a measure of constitutional significance under the Warren Court.

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[318] *Id.*

[319] *See* Lochner v. N.Y., 198 U.S. 45, 57 (1905).

[320] GOLDSTEIN ET AL., *supra* note 78, at 36.

[321] *Id.*

[322] *19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/19th-amendment [https://perma.cc/RK37-EBMA].

[323] GOLDSTEIN ET AL., *supra* note 78, at 43.

[324] *See generally She the People*, *supra* note 80, at 1006–49 (arguing that the 19th Amendment was the culmination of persistent efforts stemming from the struggles over the 14th Amendment to include women as equal members of the constitutional community); Mary Ziegler, *Contesting the Legacy of the Nineteenth Amendment: Abortion and Equality from* Roe *to the Present*, 92 UNIV. COLO. L. REV. 751, 778–84 (2021).

[325] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–93 (1937).

Over time, the Court gradually warmed to the recognition of unenumerated privacy rights determined to be implicit in the Constitution. Over a multi-decade period, the Court began to infer substantive due process liberties that encompassed the right to procreate,[326] the right to control the upbringing of one's children,[327] and the right to marry.[328] Through the Court's expansion of the due process clause of the 14th Amendment, it deemed non-textual, privacy-based rights as fundamental.[329]

Hence, when the feminist movement of the 1960s and 1970s demanded due recognition for the basic rights of women (including the ability to make decisions about their bodily autonomy and health), the Court had a constitutional basis on which to respond.[330] Though the Court had refused to address the matter on its merits only four years earlier in the case of *Poe v. Ullman*, the Court found a right of privacy in matters of marital intimacy in *Griswold v. Connecticut*.[331] Despite the Court's holding in *Griswold*, it did not reach a consensus as to the constitutional source of the implied right recognized.[332] Writing for the majority, Justice Douglas went to great lengths to avoid basing the right to use contraceptives in substantive due process, instead generally attributing the right to marital privacy to the "penumbras" of the Bill of Rights.[333]

Griswold was a significant precursor for *Roe v. Wade*, the landmark decision recognizing a woman's ability to terminate a pre-viability pregnancy.[334] Eight years following *Griswold*—and only one year after the

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[326] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[327] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

[328] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[329] Though the Court has declined to provide a precise definition for substantive due process or its criteria for inferring substantive due process rights, the applicable legal analysis has typically involved a determination by the Court as to whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Constitutional scholar, Erwin Chemerinsky, has written that, "[t]here is no concept in American law that is more elusive or more controversial than substantive due process." Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

[330] *See generally* GOLDSTEIN ET AL., *supra* note 78 (summarizing how the feminist movement was bolstered following the Supreme Court cases of the time, leading to more robust privacy with regard to women's bodily autonomy).

[331] Poe v. Ullman, 367 U.S. 497, 521 (1961); Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[332] 381 U.S. at 484.

[333] *Id.*

[334] Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2282, 2242 (2022).

expansion of the right to contraceptive use to unmarried individuals[335]—the Court would embrace the Due Process Clause of the 14th Amendment in finding an inherent constitutional right to privacy that includes the right to access abortion care.[336]

However, hardly a decade after the recognition of a constitutional right to reproductive agency in *Griswold* and *Roe*, the Court's commitment to the exercise of that right already appeared to be in decline. In a series of cases decided in 1977, the Supreme Court permitted state legislation that banned the use of public dollars or facilities for abortion services.[337] Shortly thereafter, the Court held in *Harris v. McRae* that federal legislation outlawing most Medicaid funding for abortion was also constitutional.[338]

By the close of the 1980s, the Court seemed on the verge of overruling *Roe* altogether. In *Webster v. Reproductive Health Services*, the Court upheld a multi-part state statute that, amongst numerous restrictions, imposed a duty on medical providers to make independent medical findings on fetal viability for pregnancies that had reached the 20th week of gestation.[339] A fractured Court ultimately left *Roe* intact but cast significant doubt as to its longevity.[340] In support of the state law in question, Chief Justice William Rehnquist expressed that *Roe* was "'unsound in principle and unworkable in practice.'"[341] Writing separately, Justice Antonin Scalia was more vocal in his opinion that *Roe* should be overruled entirely.[342]

The Court's rapid dilution of the right to abortion served as an invitation to states to intensify the scope and scale of their attack on reproductive rights. In the period immediately following *Webster*, 41 states introduced over 400 pieces of abortion-related legislation.[343] Four-fifths of the newly proposed legislation was designed to restrict abortion access.[344] By the summer of 1991,

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[335] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[336] *Roe*, 410 U.S. at 154.

[337] Maher v. Roe, 432 U.S. 464, 473 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977); Beal v. Doe, 432 U.S. 438, 445–46 (1977).

[338] Harris v. McRae, 448 U.S. 297, 325 (1980).

[339] 492 U.S. 490, 490 (1989).

[340] *Id.* at 509–10.

[341] *Id.* at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

[342] *See id.* at 532–37 (Scalia, J., concurring in part).

[343] Linda Feldmann, *States Stitching Patchwork Quilt of Abortion Laws*, CHRISTIAN SCI. MONITOR (Nov. 7, 1990), http://www.csmonitor.com/1990/1107/aweb.html [https://perma.cc/3R4H-9TW8].

[344] *Id.*

when Justice William Brennan and Justice Thurgood Marshall—reliable supporters of legal abortion—were preparing to retire, more than 550 pieces of anti-abortion legislation had been introduced in state legislatures.[345]

At this time, the Court agreed to hear *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a case that many at the time believed would be the death knell for *Roe*.[346] In *Casey*, the Court purported to reaffirm the central holding of *Roe* but significantly weakened the constitutional protections that had been afforded to women seeking abortion services.[347] Importantly, the Court abandoned the trimester framework that it had earlier adopted in *Roe* and replaced it with a less rigorous legal standard that was much more permissive of state abortion restrictions.[348]

Nearly half a century after the Court recognized a fundamental liberty interest in a woman's ability to make pregnancy determinations under the 14th Amendment, the Court eliminated that constitutional protection altogether in *Dobbs v. Jackson Women's Health Organization*.[349] The *Dobbs* Court largely based its decision on a spurious analysis premised on piecemeal textualism and an opportunistic approach to originalism that concluded that the right to abortion was neither "rooted in our Nation's history and tradition," "an essential component of . . . 'ordered liberty,'" or "part of a broader entrenched right that is supported by other precedents."[350] In describing at length the common law history that criminalized abortion between the 16th and 18th weeks of pregnancy, the Court relied on numerous

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[345] Linda Feldmann, *Division Over Abortion Continues to Deepen Since Webster Ruling*, CHRISTIAN SCI. MONITOR (July 3, 1991), https://www.csmonitor.com/1991/0703/03091.html [https://perma.cc/RAB6-3SWK].

[346] *See* 505 U.S. 833, 877–80 (1992) (plurality opinion).

[347] *Id.*

[348] Under the "undue burden" standard adopted by the Court in *Casey*, a law infringing upon the right to abortion would only be unconstitutional if it had "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877; *see* Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of* Casey, 45 HASTINGS L.J. 961, 966–67 (1994); Julie Schrager, *The Impact of* Casey, 1992 WIS. L. REV. 1331, 1331–32 (1992).

[349] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022).

[350] *Id.* at 2244 ("In deciding whether a right falls into [the first eight amendments or the fundamental rights not listed in the Constitution], the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Id.* at 2246.). Notably, the Court's "historical" interpretation of constitutional protections for women's privacy rights in *Dobbs* stands in stark contrast to its approach in *New York State Rifle & Pistol Ass'n. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). Both cases, which marked significant departures from existing constitutional law, had been decided during the Court's 2022 term.

male-dominated sources, including the 1732 edition of Gentlemen's Magazine and treatises, state laws, and judicial opinions from the 19th century.[351] All of the sources selected and relied upon by the Court were written, enacted, and issued at a time when women lacked the right to vote, participate in economic life, and were legally subjected to marital rape.[352] The fact that the historical sources relied upon by the Court to revoke a fundamental right that uniquely affects women were entirely devoid of any meaningful input from women suggests that the Court was either unaware or unconcerned that the "history" on which it based its determination had entirely excluded the very same class of individuals whose rights were being relegated to a non-existent status.

As a result of the synergistic harm of structural violence, the revocation of a long-standing constitutional fundamental right will disproportionately harm lower-income and minoritized women who already experience substantial systemic barriers to accessing health care and who suffer from higher rates of pregnancy complications, including maternal mortality.[353] Even Justices Samuel Alito and Clarence Thomas, who voted to overrule *Roe*, conceded as much. Justice Alito, writing for the majority in *Dobbs*, acknowledged that "it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black."[354] Justice Thomas has referred to abortion as a "tool of modern-day eugenics," disingenuously suggesting that limiting access to medical abortion access would benefit women of color.[355]

Most importantly, one should not overlook that compulsory, state-mandated pregnancy is a health and dignity harm bore almost exclusively by women.[356] The structural violence embodied by the *Dobbs* decision is

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[351] *E.g.*, *Dobbs*, 142 S. Ct. at 2249–50 (citing 2 GENTLEMAN'S MAGAZINE 931 (Aug. 1732)). Furthermore, the Court's ruling in *Dobbs* allows states to enact complete bans on abortion, with limited exceptions, imposing restrictions on women's ability to access abortion care more severe than was even acceptable in the 16th century. *See id.*

[352] *Id.*

[353] *See generally* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017) (exploring how poor mothers have been deprived of reproductive and family privacy rights); *see also* Anne Branigin & Samantha Chery, *Women of Color Will be Most Impacted by the End of* Roe, *Experts Say*, WASH. POST (June 24, 2022), https://docdro.id/PCRsg3c [https://perma.cc/EM9G-4URD].

[354] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2256 n.41 (2022).

[355] Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

[356] The Supreme Court applied similar logic in its earlier decisions involving pregnancy discrimination, which it reasoned was unrelated to sexual discrimination. *See*

indicative of a broader legal philosophy involving freedom from government interference that the Court has selectively applied to benefit legally favored groups. The assertion that unenumerated constitutional rights, including the right to essential abortion care, is an issue that should be "returned to the people and their elected representatives," neglects the restrictive political landscape created by a modern court that has been both hostile towards voting rights and increasingly tolerant of unfettered political spending by corporations.[357] Compounding the lack of meaningful democratic representation is the widespread use of extreme partisan gerrymandering, which has rendered elections so uncompetitive that securing the popular vote is no longer required to succeed in winning elected office.[358]

For example, in Texas where a trigger law banning most abortions was enacted in anticipation of *Roe* being overruled, the state's political maps have been deliberately drawn to dilute the voting influence of an increasingly non-white electorate.[359] According to the 2020 census, 39.3% of state residents are white.[360] Despite people of color comprising 95% of the state's population growth, white voters continue to exercise a disproportionate control over elections under the state's gerrymandered political maps.[361]

The Texas Heartbeat Act—the law that was enacted under these undemocratic conditions—permits civil actions to be brought against any individual who "aids" or "abets" an abortion after cardiac activity can be detected. As a result of the significant liability exposure and severe penalties imposed by this law, physicians have been particularly reticent to treat women

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Geduldig v. Aiello, 417 U.S. 484, 496 (1974); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134 (1976) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .").

[357] *Dobbs*, 142 S. Ct. at 2279; *see also, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529, 554 (2013); Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 446 (2010).

[358] Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, BRENNAN CTR. FOR JUST. (Aug. 11, 2022), https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [https://perma.cc/RAN5-TD6J].

[359] Ross Ramsey, *Analysis: Texas' Population Has Changed Much Faster Than Its Political Maps*, TEX. TRIB. (Dec. 8, 2021), https://www.texastribune.org/2021/12/08/texas-redistricting-demographics-elections [https://perma.cc/XT9N-DNW5].

[360] Alexa Ura et al., *People of Color Make Up 95% of Texas' Population Growth, and Cities and Suburbs are Booming, 2020 Census Shows*, TEX. TRIB. (Aug. 12, 2021), https://www.texastribune.org/2021/08/12/texas-2020-census [https://perma.cc/EH87-LVHJ].

[361] Although the white and Latinx population is roughly equal in size, whites are the majority in 65% of congressional districts. *See* Ramsey, *supra* note 359.

who experience early-term pregnancy loss.[362] Although the Act purports to be necessary for "protecting the health of the woman" and to allow the woman to make "an informed choice about whether to continue her pregnancy," any guidance or definition as to what constitutes a "medical emergency" that would allow a doctor to intervene to save a woman's life is notably absent from the statutory text.[363] The legal morass resulting from the lack of clarity in Texas's abortion ban has resulted in delays for women needing to access urgent, life-saving medical care.[364]

Likewise, in Georgia—another state where both aggressive voter restrictions and legislation to limit access to reproductive rights have flourished—state election maps similarly fail to accurately capture the composition of the electorate.[365] Redrawn congressional districts impacting predominantly Black voters in Georgia have been consistently subject to litigation due to persistent allegations that state legislators purposefully devised political maps with the aim of limiting the influence of voters of color.[366] Notably, had the preclearance requirements of the Voting Rights

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[362] TEX. HEALTH & SAFETY CODE ANN. § 171 (West) (2021).

[363] *Id.*

[364] Pam Belluck, *When Miscarriages Collide with Abortion Laws*, N.Y. TIMES, July 17, 2022, at A1, A14, https://docdro.id/7CWQuVs [https://perma.cc/QX6F-J9PD]; Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022), https://docdro.id/TCRuYAR [https://perma.cc/G3ML-PQPX]; Monica Hesse, *One Month In, Abortion Bans Are Hell on Earth*, WASH. POST (July 25, 2022), https://docdro.id/kRnQmes [https://perma.cc/Y2M9-Z58L]; Timothy Bella, *Woman Says She Carried Dead Fetus for 2 Weeks After Texas Abortion Ban*, WASH. POST (July 20, 2022), https://docdro.id/aFv9ECp [https://perma.cc/NM6Y-PAG5]; Carrie Feibel, *Because of Texas Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM), https://www.wuft.org/nation-world/2022/07/26/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare [https://perma.cc/Z3SZ-26R9]; Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NPR (May 10, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages [https://perma.cc/WSW6-TVMF]; Sarah Martinez, *Texas Woman Shares Story of Carrying Dead Fetus Due to Anti-Abortion Laws*, MY SAN ANTONIO (July 19, 2022), https://www.mysanantonio.com/news/local/article/Texas-woman-dead-fetus-anti-abortion-laws-17314394.php [https://perma.cc/8TCF-YLBA].

[365] Lacy Crawford, Jr., *Georgia's Racial Gerrymander Limits the Voting Rights of People of Color*, LAWS' COMM. FOR C.R. UNDER THE L. (Dec. 30, 2021), https://www.lawyerscommittee.org/georgias-racial-gerrymander-limits-the-voting-rights-of-people-of-color [https://perma.cc/N6UB-PQ5S].

[366] *Id.*; *see also* Jenny Jarvie, *District Mapping Is Diluting Minority Votes in This Georgia County, Civil Rights Groups Allege in Lawsuit*, L.A. TIMES, (Aug. 9, 2016, 3:00 AM),

Acts not been invalidated by the Court, Georgia's most recently contested legislative maps would have been subject to federal oversight because of their deleterious impact on racially minoritized voters.[367] Arguably, without the infusion of structural violence within the Court's broader jurisprudence, the deleterious effects of the Court's recent decision in *Dobbs* would not have been as injurious.

The repudiation of a belatedly acquired constitutional protection that has provided significant legal, economic, and personal empowerment to women—particularly women of color—will have far-reaching consequences for those who are denied this important right.[368] The majority of the nearly 22 states that have banned or proposed abortion restrictions in response to *Dobbs* are in the South where more than half of the Black population resides.[369] Women of color who reside in these states are more likely than their white counterparts to live in poverty, experience difficulties accessing medical care, and encounter structural barriers to voting.[370] These social determinants—all of which are intrinsically linked to structural racism and systemic violence—have significant consequences for the sexual and reproductive health outcomes of women of color.[371]

Despite overwhelming structural barriers, demographic data on abortion access makes clear that women of color have elected to take advantage of their liberty protections under *Roe* to make important family planning and

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https://www.latimes.com/nation/la-na-georgia-voting-rights-act-20160808-snap-story.html [https://perma.cc/P9SK-B29Q]; Annika Kim Constantino, *Gerrymandering Could Limit Minority Voters' Power Even Though Census Shows Population Gains*, CNBC, (Aug. 13, 2021, 8:21 PM), https://www.cnbc.com/2021/08/13/gerrymandering-could-limit-minority-voters-power-even-after-census-gains.html [https://perma.cc/VTY2-HGJV]; Common Cause Ga. v. Raffensperger, No. 1:18-cv-5102-AT, 2020 WL 12948010, at *1 (N.D. Ga. May 29, 2020).

[367] *See Georgia District Maps*, PRINCETON GERRYMANDERING PROJECT (Nov. 17, 2021), https://gerrymander.princeton.edu/redistricting-report-card?planId=recZwpVm5Uz1GESnV [https://perma.cc/6GC4-2KMY].

[368] *See* Katy Backes Kozhimannil et al., *Abortion Access as a Racial Justice Issue*, 387 N. ENGL. J. MED. 1537, 1537–39 (2022).

[369] Branigin & Chery, *supra* note 353. As of 2019, the largest concentration of the Black population was based in the South. CHRISTINE TAMIR, PEW RSCH. CTR., THE GROWING DIVERSITY OF BLACK AMERICA (Mar. 25, 2021), https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america [https://perma.cc/4YLR-UT84]. The states with the largest Black populations are Texas (3.9 million), Florida (3.8 million), and Georgia (3.6 million). *Id.* All are states in which reproductive and voting rights have been greatly curtailed. *See id.*

[370] *See* Cynthia Prather et al., *The Impact of Racism on the Sexual and Reproductive Health of African American Women*, 25 J. WOMEN'S HEALTH 664, 664–71 (2016).

[371] *See id.*

healthcare decisions.[372] According to state data from 2019, 38% of all women who had abortions were non-Hispanic Black, while 21% were Hispanic.[373] The higher documented rates of abortion access by women of color are explained by systemic factors, including structural barriers to accessing effective contraceptives and medical treatment, lower rates of insurance coverage, and racial disparities in health outcomes.[374]

Indigenous women, who have historically been limited in their ability to access abortion care, will also be adversely affected by the further curtailment of reproductive rights now permitted under *Dobbs*.[375] As noted by Indigenous abortion rights advocates, abortion access has long been a privilege and not a right for low-income women and women of color.[376] For many Indigenous women who lack the means to access private health insurance, they are reliant on the Indian Health Service (IHS).[377] The IHS serves as the main healthcare provider to about 2.5 million American Indians and Alaska Natives and, as a federal agency, is bound by the Hyde Amendment.[378] Passed shortly after the Court's decision in *Roe v. Wade*, the Hyde Amendment limits the use of federal Medicaid funding for abortion services except in narrow circumstances.[379] Because the Hyde Amendment disproportionately impacts low-income women who are unable to access quality care through private insurance and, therefore, disproportionately participate in Medicaid programs, Black and Indigenous women who have long faced structural barriers to accessing care have never fully enjoyed the benefits of the right to

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372 *See* KATHERINE KORTSMIT ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, ABORTION SURVEILLANCE—UNITED STATES, 2019 2 (2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm [https://perma.cc/BDT4-44D3].

373 *Id.* at 6.

374 *See* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 1, 4–5 (2008).

375 *See* Frances Nguyen, *Indigenous and Immigrant Communities Stand to Be Disproportionately Affected by Texas's Abortion Ban*, LILY (Sept. 14, 2021), https://www.thelily.com/indigenous-and-immigrant-communities-stand-to-be-disproportionately-affected-by-texass-abortion-ban [https://perma.cc/NSU8-5XGB].

376 *Id.*

377 *Id.*

378 *Id.*

379 The Hyde Amendment went into effect in 1977 and was upheld by the Supreme Court in Harris v. McRae, 448 U.S. 297, 325 (1980). It has remained an entrenched facet of American political life ever since.

abortion access.[380] In particular, the INS's status as a federal agency subject to the Hyde Amendment has largely deprived Indigenous women, who are reliant on the federal government for health care, the ability to equally access abortion services.[381] The denial of access to abortion care has been devasting for Indigenous women, nearly half of whom have experienced rape, physical violence, or stalking by an intimate partner and who are nearly three times as likely to die from pregnancy than white women.[382]

In very real terms, the denial of access to abortion services is a matter of life and death. The United States has the tragic distinction of being the most lethal place in the industrialized world for a pregnant woman.[383] Women are 14 times more likely to die by carrying a pregnancy to term than by having a legal abortion, a fact noted by Justice Stephen Breyer in *Whole Woman's Health v. Hellerstedt*.[384] This high maternal death rate is related to persistent systemic barriers to accessing care, with more than one-third of pregnant women in the United States forgoing necessary medical care due to financial

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[380] Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46, 49 (2016).

[381] As expressed by Charon Asetoyer, founder and executive director of the Native American Women's Health Education Resource Center on the Yankton Sioux reservation, "[w]e're the only race in the country that is denied access to abortion merely because of our race." Leslie Logan, *Abortion: Native Women Respond to Onslaught of Laws and Restrictions Across the Country*, INDIAN COUNTRY TODAY (June 3, 2019), https://indiancountrytoday.com/news/abortion-native-women-respond-to-onslaught-of-laws-and-restrictions-across-the-country [https://perma.cc/4KC9-X7DR].

[382] *Protecting Native American and Alaska Native American Women from Violence: November Is Native American Heritage Month*, U.S. DEP'T OF JUST. (Nov. 29, 2012), https://www.justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american [https://perma.cc/8KVE-NE8W]. The American Medical Association has acknowledged that "racism—in its systemic, cultural, interpersonal and other forms—as a serious threat to public health, to the advancement of health equity, and as a barrier to appropriate medical care." Andis Robeznieks, *Examining the Black U.S. Maternal Mortality Rate and How to Cut It,* AM. MED. ASS'N (May 24, 2021), https://www.ama-assn.org/delivering-care/population-care/examining-black-us-maternal-mortality-rate-and-how-cut-it [https://perma.cc/HQR2-V5F8].

[383] Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1238 (2020); EMILY E. PETERSON ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, RACIAL/ETHNIC DISPARITIES IN PREGNANCY-RELATED DEATHS—UNITED STATES 2007–2016 763 (Sept. 6, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6835a3.htm#:~:text=During%202007–2016%2C%20a%20total,12.7)%20(Table%201). [https://perma.cc/56PV-L4W2]; U.S. DEP'T OF HEALTH & HUM. SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO IMPROVE MATERNAL HEALTH 8 (2020), https://www.hhs.gov/sites/default/files/call-to-action-maternal-health.pdf [https://perma.cc/Y2XD-UNLN].

[384] 579 U.S. 582, 618 (2016); *see also,* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012).

limitations.[385] Moreover, women in the United States experience high rates of emotional distress, compounding physical health issues both during and after pregnancy.[386]

Accordingly, those who lack access to quality maternal health care are at appreciably higher risk of experiencing pregnancy-related complications.[387] The reproduction of racism in medical settings has dire consequences for women of color, and especially poor women of color.[388] A 2019 study conducted by the Center for Disease Control and Prevention (CDC) found that Black women are more than three times as likely to die from pregnancy-related complications than white women.[389] In Mississippi, where the *Dobbs* litigation originated, and which had but one abortion clinic remaining on the eve of the Court's ruling, Black women accounted for nearly 80% of pregnancy-related deaths in the state.[390]

Data remains limited regarding how precisely the rescission of this critical fundamental right and the accompanying restrictions on reproductive care will impact maternal health, but what is a virtual certainty is that the *Dobbs* decision will be lethal to American women. Even prior to the overruling of *Roe*, maternal mortality rates were 62% higher in states that had

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[385] Munira Z. Gunja et al., *What Is the Status of Women's Health and Health Care in the U.S. Compared to Ten Other Countries?*, COMMONWEALTH FUND (Dec. 19, 2018), https://www.commonwealthfund.org/publications/issue-briefs/2018/dec/womens-health-us-compared-ten-other-countries [https://perma.cc/K6MP-4LHL].

[386] *Id.*

[387] *See generally* KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011) (offering a detailed ethnographical study of the process of race formation as it occurs in the pregnancy process by exploring the maternal health care received by pregnant Black mothers at the Women's Health Clinic at New York City's Alpha Hospital).

[388] *See generally* Prather et al., *supra* note 370, at 664–71. Although poverty is a contributing factor to the rate of maternal mortality for women of color, maternal mortality persists amongst education and income levels for upper and middle-class Black women, who continue to die of pregnancy-related complications at rates that are significantly higher than their white counterparts. *See also* Neel Shah, *A Soaring Maternal Mortality Rate: What Does It Mean for You?*, HARV. HEALTH PUBL'G (Oct. 16, 2018), https://www.health.harvard.edu/blog/a-soaring-maternal-mortality-rate-what-does-it-mean-for-you-2018101614914 [https://perma.cc/B6JY-4WRL].

[389] EMILY E. PETERSEN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL SIGNS: PREGNANCY-RELATED DEATHS, UNITED STATES, 2011–2015, AND STRATEGIES FOR PREVENTION, 13 STATES, 2013–2017 423 (MAY 10, 2019).

[390] CHARLENE COLLIER ET AL., MISS. STATE DEP'T OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT 2013–2016 16 (2019), *see also* Branigin & Chery, *supra* note 353.

adopted restrictive abortion laws.[391] Between 2018 and 2020, the maternal death rate increased twice as fast in states that enacted abortion restrictions.[392] States with legislation limiting abortion access had fewer maternal care providers and resources, significantly higher perinatal mortality rates, and worse overall health outcomes.[393] Moreover, for every racial-ethnic group surveyed, maternal mortality rates were appreciatively higher in states with restrictive abortion policies as compared to states that provided abortion access.[394]

In 2021, the maternal mortality rate in the United States rose 40%, marking its highest historical level and resulting in a maternal mortality rate ten times higher than that of most high-income nations.[395] As abortion restrictions take hold in large swaths of the country, the pregnancy and birthing process will become decidedly more dangerous, having especially lethal consequences for women of color, poor women, and the more than half of American women who now live in states without constitutionally protected reproductive rights.[396]

Most pregnancy-related deaths are preventable, and yet, the United States remains an outlier in that it is one of only 13 countries in the past quarter-century that has been unsuccessful at reducing its maternal mortality rate.[397]

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[391] Eugene Declercq et al., *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes [https://perma.cc/M65H-A5UQ].

[392] *Id.*

[393] *Id.*

[394] Maternal mortality rates in states with abortion restrictions were found to be 20% higher among non-Hispanic Black people, 33% higher among non-Hispanic white people, and 31% higher among Hispanic people. *Id.*

[395] Selena Simmons-Duffin & Carmel Wroth, *Maternal Deaths in the U.S. Spiked in 2021, CDC Reports*, NPR (Mar. 16, 2023, 12:02 AM), https://www.npr.org/sections/health-shots/2023/03/16/1163786037/maternal-deaths-in-the-u-s-spiked-in-2021-cdc-reports [https://perma.cc/XV5N-MPJM]; DONNA L. HOYERT, CTRS. FOR DISEASE CONTROL & PREVENTION, MATERNAL MORTALITY RATES IN THE UNITED STATES, 2021 1 (2020).

[396] *See generally* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017) (discussing the Court's disregard of the interests of poor women in accessing abortion care).

[397] The other countries in this category include the Bahamas, Georgia, Guyana, Jamaica, North Korea, St. Lucia, Serbia, South Africa, Suriname, Tonga, Venezuela, and Zimbabwe. *See* John A. Ozimek & Sarah J. Kilpatrick, *Maternal Mortality in the Twenty-First Century*, 45 OBSTETRICS & GYNECOLOGY CLINICS N. AM. 175, 176 (2018). The CDC concluded that 84.2% of maternal

Both legal and health scholars have noted that maternal mortality is largely a social problem exacerbated by a persistent lack of political will to properly care for the lives and well-being of pregnant mothers.[398] The fact that the maternal mortality rate has continued to worsen in recent generations should be inferred as a function of the low social status that women continue to occupy in society and the enormity of structural violence inflicted upon this population.[399]

Within this context, the Court and political leaders have elected to further limit women's ability to access life-saving medical care. The effects of *Dobbs* have been swift and severe. Within a month of the Court's decision eliminating the constitutional protection to abortion services, seven states—Alabama, Arkansas, Mississippi, Missouri, Oklahoma, South Dakota, and Texas—had enacted near total abortion bans.[400] Cumulatively, these states accounted for 80,500 abortions during the prior year.[401] By the one-year anniversary of the *Dobbs* decision, nearly half of all states had enacted legislation either banning or significantly restricting access to abortion care.[402]

In states such as Texas, Missouri, and Louisiana, where the ability to access abortion-health services evaporated overnight, countless stories have emerged of women being required to continue to carry nonviable fetuses at great risk to their own health due to legal confusion as to what may qualify

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deaths in the United States were preventable. SUSANNA TROST ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREGNANCY-RELATED DEATHS: DATA FROM MATERNAL MORTALITY REVIEW COMMITTEES IN 36 US STATES, 2017–2019 4 (2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html [https://perma.cc/9KDQ-6ARK].

398 Alicia Ely Yamin, *Toward Transformative Accountability: Applying a Rights-Based Approach to Fulfill Maternal Health Obligations*, 7 SUR INT'L J. ON HUM. RTS. 95, 112 (2010); *see also* CTR. FOR REPROD. RTS., BLACK MAMAS MATTER: ADVANCING THE HUMAN RIGHT TO SAFE AND RESPECTFUL MATERNAL HEALTH CARE 8–17 (2018).

399 Laura Katzive, *Maternal Mortality and Human Rights*, 104 AM. SOC'Y INT'L L. PROC. 383, 383 (2010).

400 Marielle Kirstein et al., *One Month Post-Roe: At Least 43 Abortion Clinics Across 11 States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (July 28, 2022), https://www.guttmacher.org/article/2022/07/one-month-post-roe-least-43-abortion-clinics-across-11-states-have-stopped-offering# [https://perma.cc/3C34-DKTN].

401 *Id.*

402 Allison McCann et al., *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Sept. 19, 2023, 4:30 PM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/KMV4-WP3H].

as a medical emergency under the new state laws.[403] Because the treatment for a miscarriage and abortion are often identical, hastily enacted post-*Dobbs* abortion bans have restricted access to drugs recommended by the American College of Obstetricians and Gynecologists for treating early pregnancy loss and have widely limited the ability of doctors to provide medically appropriate care to women who suffer a miscarriage.[404]

Notably, the very same states that have enacted restrictive abortion laws based on a self-proclaimed desire to protect maternal and fetal health have consistently refused to adopt policies that would provide tangible, meaningful support to mothers and children. Even prior to the *Dobbs* decision, the states with the most severe abortion restrictions had the distinction of having the worst maternal and child health outcomes, the highest child poverty rates, and the poorest performing schools in the country.[405] These states have likewise limited pregnancy-related Medicaid eligibility and have declined to extend Medicaid coverage under the Affordable Care Act, leaving poor mothers and children who are most affected by an inability to access abortion care with a lack of quality healthcare.[406] The disinvestment in healthcare, education, and social

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[403] *See* Prather *supra* note 370. See generally All Things Considered, *An OB/GYN in Texas Reflects How the End of Roe Will Affect Her Work*, NPR (June 26, 2022, 5:02 PM), https://www.npr.org/2022/06/26/1107713211/an-ob-gyn-in-texas-reflects-how-the-end-of-roe-will-affect-her-work [https://perma.cc/Y4CG-TFER], for a more in-depth discussion of the effects of restrictive abortion legislation in Texas.

[404] An estimated 10%–15% of pregnancies result in a miscarriage prior to 20 weeks of pregnancy. *See* Sudeshna Mukherjee et al., *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271, 1271 (2013). The risk of early pregnancy loss is even greater for Black women than their white counterparts. *See also* Huff, *supra* note 364.

[405] *See generally* Brief for Am. Pub. Health Assoc., Guttmacher Inst. & Ctr. for U.S. Pol'y as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2288 (2022) (No. 19-1392) (discussing, among other things, the connection between these statistics and abortion restrictions); *see also Percentage of Babies Born Low Birthweight By State*, CDC (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/lbw_births/lbw.htm [https://perma.cc/5ZFL-TN8V] (listing rates of a particular poor child outcome by state); *Infant Mortality Rates by State*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 30, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm [https://perma.cc/BM4E-XWX5] (listing rates of another poor child outcome by state); *Poverty in the United States: Explore the Map*, CAP (2021), https://www.americanprogress.org/data-view/poverty-data/poverty-data-map-tool [https://perma.cc/55M5-T78D] (displaying the percentage of people who fell below the poverty line by state).

[406] Sara Rosenbaum, *A Public Health Paradox: States with Strictest Abortion Laws Have Weakest Maternal and Child Health Outcomes*, COMMONWEALTH FUND (Mar. 8, 2022), https://www.commonwealthfund.org/blog/2022/public-health-paradox-states-abortion-

infrastructure to support families is revealing of the disingenuous nature of the argument that abortion restrictions are aimed at safeguarding mothers and children. Abortion restrictions are embedded within a wider policy regime of structural violence that devalues women and children, economically disempowers marginalized groups, and broadly asserts control over the bodily integrity of women.

Even in states where reasonable access to abortion care remains available, abortion clinics are strained, and doctors remain uncertain as to how to navigate the new post-*Dobbs* legal landscape. Abortion clinics located in states bordering those with recently enacted abortion bans have been overwhelmed by interstate traffic, significantly increasing the wait time for services from several days to several weeks.[407] The resulting delay in accessing care has significant health and economic consequences, with abortions becoming more medically complicated and expensive later in a pregnancy.[408] These augmented burdens will be most severely felt by lower income women.[409]

As state leaders in regions hostile to abortion rights rapidly rally to enact new state laws, and in some cases amend their state constitution to restrict abortion-related medical care, parallel efforts are being pursued at the federal level.[410] Within hours of the issuance of the *Dobbs* opinion, Republican members of Congress had announced a proposal that would provide for a

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laws-maternal-child-health-outcomes [https://perma.cc/RLL6-B7J7]; Lomi Kriel, *Texas Says It Cares About Mothers, but Its Medicaid Postpartum Coverage Lags Behind Most Other States*, PROPUBLICA (July 20, 2022, 5:00 AM), https://www.propublica.org/article/texas-abortion-medicaid-postpartum-benefits [https://perma.cc/4PGW-Q4K7].

[407] *See* Jason M. Lindo et al., *How Far Is Too Far? New Evidence on Abortion Clinic Closures, Access, and Abortions* 10–11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23366, 2017).

[408] Badger et al., *Ragged Safety Net Is Weaker in States that Ban Abortion*, N.Y. TIMES., July 30, 2022, at A11, https://docdro.id/aDD2kGT [https://perma.cc/3J7D-FUGG].

[409] Elizabeth B. Harned & Liza Fuentes, *Abortion Out of Reach: The Exacerbation of Wealth Disparities After* Dobbs v. Jackson Women's Health Organization, A.B.A. (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/abortion-out-of-reach [https://perma.cc/6UGK-56CC]; Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides,* GUTTMACHER INST. (Jan. 17, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides [https://perma.cc/Z2TX-FK6F].

[410] *See* Michael Scherer & Josh Dawsey, *Antiabortion Groups Push 2024 GOP Candidates to Embrace National Ban*, WASH. POST (May 18, 2023, 10:05 AM), https://docdro.id/JBduBCO [https://perma.cc/4SAY-5K45].

federal abortion ban.[411] The same Republican leaders who had long professed that abortion is an issue best addressed by states suddenly felt compelled to impose strict abortion restrictions on states supportive of reproductive rights.[412] Research suggests if these national efforts were successful, pregnancy-related deaths overall would increase by 21%, with a 33% increase among Black women, as compared to rates in 2017.[413]

The threat of abortion criminalization is another area of concern that is emerging as a viable form of policy violence that could be legitimized in the aftermath of *Dobbs*.[414] Although the criminalization of pregnancy through fetal abuse laws pre-dates *Dobbs*,[415] the Supreme Court's expansive endorsement of state-level regulation of pregnancy and maternal conduct will embolden states to more aggressively punish conduct under existing child abuse statutes or through new fetal personhood laws.[416] Under such laws,

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[411] Melanie Zanona & Manu Raju, *House Republicans Eye 15-Week Abortion Ban After* Roe *Ruling*, CNN (June 24, 2022, 4:27 PM), https://www.cnn.com/2022/06/24/politics/republican-reaction-abortion-congress/index.html [https://perma.cc/WC54-FQ3P].

[412] Glenn Kessler, *These Republicans Cheered Abortion Policy Going to States. They Are Also Sponsoring a Federal Ban*, WASH. POST (Sept. 7, 2022, 3:00 AM), https://docdro.id/4lU5Kpq [https://perma.cc/T8AY-NFWQ].

[413] The data only includes the estimated increase deaths due to pregnancy complications resulting from an inability to access abortion services and does not include increased maternal death rates that would result from an increase in unsafe abortions. Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2023 (2021).

[414] *See generally* All Things Considered, *Criminal Defense Lawyers Sound the Alarm About Mass Incarceration in a Post-Roe U.S.*, NPR (June 14, 2022), https://www.npr.org/2022/06/14/1105025433/criminal-defense-lawyers-sound-the-alarm-about-mass-incarceration-in-a-post-roe- [https://perma.cc/U23M-XHC3] (discussing efforts of criminal defense attorneys who are planning for an increase in the amount of criminal cases surrounding abortions in the case of a *Roe* reversal).

[415] *See generally* Sandhya Dirks, *Criminalization of Pregnancy Has Already Been Happening to the Poor and Women of Color*, NPR (Aug. 3, 2022, 10:30 AM), https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of [https://perma.cc/MC2D-FMSA] (highlighting how the potential criminalization of abortions in a post-*Roe* world has already been happening in the form of systematic and targeted arrests of women of color who had "suspicious" details surrounding their pregnancies); MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 4 (2020); *see also* Cary Aspinwall et al., *They Lost Pregnancies for Unclear Reasons. Then They Were Prosecuted*, WASH. POST (Sept. 1, 2022, 6:22 PM), https://docdro.id/tgWKLki [https://perma.cc/XF6U-UBR2].

[416] At least nine states currently have fetal personhood laws on the books, with several other actively pursuing similar legislation. Caroline Kitchener et al., *States Where Abortion is Legal, Banned or Under Threat*, WASH. POST (May 23, 2023, 7:43 PM), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-

prenatal conduct deemed by prosecutors as contributing to the termination of a pregnancy, miscarriage, or stillbirth could result in criminal charges ranging from child endangerment to homicide.[417] According to the National Association of Criminal Defense Lawyers (NACDL), an excess of 4450 crimes exist in the federal criminal code and tens of thousands in state criminal provisions that could be used as a basis to impose lengthy prison sentences on pregnant women, prosecute abortion care providers, and target individuals who provide support to loved ones attempting to exercise agency over their bodily autonomy.[418]

The structural violence imposed on the post-*Dobbs* generation of women cannot be overlooked and will be undoubtedly magnified over generations to come. Women who choose to terminate a pregnancy do so for a number of legitimate reasons, including to be able to adequately and safely provide for their other children.[419] According to a study conducted by the University of California San Francisco, women who were unable to access an abortion experienced higher rates of poverty and unemployment and were less likely to be able to cover basic living expenses for *years* after their unwanted pregnancy.[420] The long-term economic hardships experienced by women denied abortion access include increased debt and evictions, making it more likely that their children will live in poverty.[421]

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criminalization-roe [https://perma.cc/DYZ3-U7MT]; *see also* Blake Ellis & Melanie Hicken, *These Male Politicians Are Pushing for Women Who Receive Abortions to be Punished with Prison Time*, CNN (Sept. 21, 2022), https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html [https://perma.cc/9HMT-2YSR].

417 *See generally* Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016) (discussing a series of laws selectively targeted at pregnant women); Robert Baldwin III, All Things Considered, *Losing a Pregnancy Could Land You in Jail in Post-*Roe *America*, NPR (July 3, 2022, 5:27 AM), https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss [https://perma.cc/FQ53-47BQ] (equating recent anti-abortion legislation to traditional murder laws); Dirks, *supra* note 415.

418 NAT'L ASS'N OF CRIM. DEF. LAWS., ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS 3 (Aug. 18, 2021) (outlining current legal statutes that criminalize abortion and the impact overturning *Roe* would have on laws to prosecute and incarcerate those providing, receiving, or assisting with abortions).

419 *See* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH, 2013, at 5; *see also* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 112–25 (2005). More than half of women who chose to terminate their pregnancy are existing parents. *See* JENNA JERMAN ET AL., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008 5 (MAY 2016).

420 UNIV. OF CAL S.F., THE HARMS OF DENYING A WOMAN A WANTED ABORTION FINDINGS FROM THE TURNAWAY STUDY 1 (Apr. 16, 2020).

421 *Id.*

Furthermore, the overruling of *Roe* should cause alarm in that it may be a prelude to the systemic dismantling of other unenumerated privacy rights that women have come to rely upon as fundamental to their reproductive health and autonomy. For example, three states—Idaho,[422] Missouri,[423] and Arizona[424]—have attempted, and in some cases succeeded, in banning access to emergency contraceptives by falsely equating it with abortion. Although there is no scientific basis to conclude that contraceptives, including emergency contraceptives, induces abortion, politicians and members of the Supreme Court have expressed an openness—if not an outright zealousness—to restricting access to contraceptives on that basis.[425] In a concurrence authored by Justice Clarence Thomas, he invites the Court to revisit several of its prior decisions, including *Griswold v. Connecticut* (establishing a right to access contraceptives),[426] *Obergefell v. Hodges* (right to same-sex marriage),[427] and *Lawrence* (establishing the right to engage in consensual, same-sex intimacy in one's home).[428] Justice Thomas refers to these substantive due process opinions as "demonstrably erroneous" and asserts that the Court has a "duty to 'correct the error' established in those precedents."[429]

We, therefore, arrive at a familiar historical and legal moment. Policy violence, orchestrated by state legislators in tandem with the Court, has weakened constitutional protections for peripheral communities while

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[422] Rachel Cohen, *Idaho Lawmakers Could Restrict Emergency Contraceptives if* Roe *Overturns*, BOISE STATE PUB. RADIO (May 11, 2022, 12:04 PM), https://www.boisestatepublicradio.org/news/2022-05-11/abortion-idaho-ban-contrception [https://perma.cc/UJY8-W48C].

[423] Rudi Keller, *Abortion Amendment Puts Bill to Finance Missouri Medicaid Program in Limbo*, THE MO. INDEP. (Mar. 24, 2021, 7:05 PM), https://missouriindependent.com/2021/03/24/abortion-amendment-puts-bill-to-finance-missouri-medicaid-program-in-limbo [https://perma.cc/RVM6-YXYB].

[424] Gabriella Smith, *Bill Erroneously Equates Emergency Contraception with Abortion*, ARIZ. CAP. TIMES (Feb. 25, 2021), https://azcapitoltimes.com/news/2021/02/25/bill-erroneously-equates-emergency-contraception-with-abortion [https://perma.cc/ZY6A-HK4H].

[425] Brief for Physicians for Reproductive Health et al. as Amici Curiae in Support of Government, at 11–15, Sebelius v. Hobby Lobby Stores, Inc., 571 U.S. 1067 (2013), (No. 13-354) (explaining the distinction between contraceptives and abortifacients); *see* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2300–17 (Thomas, J., concurring). Monthly birth control, IUDS, and emergency contraception (such as the morning after pill) prevent either ovulation or fertilization. These common forms of contraceptives are not capable of terminating a pregnancy, which does not begin until after a fertilized egg implants in the uterus.

[426] 381 U.S. 479, 485–86 (1965).

[427] 576 U.S. 644, 663 (2015).

[428] 539 U.S. 558, 567 (2003).

[429] *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring)

simultaneously and disingenuously maintaining that those rights are accessible through a political process that has systematically excluded those very same groups. In doing so, the Court and state officials have narrowed the political and legal rights of historically and presently marginalized constituents under the pretense that such a denial is a justifiable democratic outcome. This, at its core, is the perverse functioning of state-perpetrated policy violence.

C. The Denial of Queer Identity and the Dispossession of Constitutional Protections

The policy violence strategies employed against communities of color and women have been similarly leveraged to target LGBTQ+ rights. The late recognized liberty and privacy protections of LGBTQ+ persons, and the predictable systemic violence response that it engendered, further demonstrate the pattern and permanency of state-sanctioned harm that is employed as a mechanism for unraveling hard-fought legal rights. In anticipation of and following the Court's revocation of the right to access safe and legal abortions, state legislatures across the country hurriedly moved to enact legislation that would dismantle previously protected constitutional rights for not only women but the LGBTQ+ community as well.

Justice Thomas's concurring opinion in *Dobbs*, calling for the Court to revisit the entirety of its "substantive due process precedents," suggests that the logic that undergirds the *Dobbs* decision could be equally applied to justifying the annulment of personhood protections for LGBTQ+ persons.[430] In fact, Justice Thomas, referring to "the 'legal fiction' of substantive due process" as "particularly dangerous" and "lack[ing] any basis in the Constitution," specifically targeted the landmark cases that decriminalized private, consensual same-sex activity amongst adults and that recognized gay marriage for future judicial scrutiny.[431]

Although the Court claimed to have limited the *Dobbs* ruling to the issue of abortion care, at least some of Justice Thomas's colleagues on the Court may heed his call.[432] Justice Alito, in particular, has repeatedly vocalized his desire to overturn gay rights precedents, including the *Obergefell* decision.[433]

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[430] *Id.*

[431] *Id.* at 2301–02 (citing *Griswold*, 381 U.S. at 479; *Lawrence*, 539 U.S. at 558; *Obergefell*, 576 U.S. at 722).

[432] *See id.* at 2284.

[433] *See* Nina Totenberg, *Justices Thomas, Alito Blast Supreme Court Decision on Same-Sex Marriage Rights*, NPR, (Oct. 5, 2020, 4:13 PM), https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights [https://perma.cc/DTH8-FN8D].

Two years prior to authoring the *Dobbs* decision, Justice Alito addressed the Federalist Society and bemoaned that marriage was no longer an institution "between one man and one woman."[434]

As states have responded to the *Dobbs* decision by swiftly passing restrictive abortion laws, so too have state legislators summarily sought to remove legal protections for LGBTQ+ and gender non-confirming individuals by seeking to render them legally invisible.[435] Unsurprisingly, the same states with an institutionalized history of governing through systemic violence through Jim Crow laws, legalized misogyny, and the criminalization of same-sex relationships are pioneering the revitalization of modern forms of policy abuse.[436] The number of recent anti-LGBTQ+ bills proposed in state legislatures has exploded from 41 to 238 in the four years prior to the issuance of the *Dobbs* opinion.[437] During the first quarter of 2023, state legislators introduced more than 450 bills that target access to medically necessary health care, preempt nondiscrimination protections, and limit the ability of transgender people to update gender information on government-issued records.[438]

Moreover, it is not simply the quantity of discriminatory LGTBQ+ legislation that has been proposed and passed that is of concern. The barbarity of the restrictions and the broad swath of conduct that these measures seek to regulate—or outright ban—is reminiscent of the extreme anti-sodomy laws of the 1970s and 1980s. These laws impact every aspect of private and public life, regulating curriculum in public schools by censoring discussions about gender identity and sexual orientation,[439] preventing

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[434] Joan Biskupic, *Samuel Alito's Viral Speech Signals Where Conservative Supreme Court Is Headed*, CNN (Nov. 13, 2020, 12:56 PM), https://www.cnn.com/2020/11/13/politics/samuel-alito-supreme-court-federalist-society-speech-analysis/index.html#:~:text=%E2%80%9CYou%20can't%20say%20that,%2C%20%E2%80%9Cit's%20considered%20bigotry.%E2%80%9D [https://perma.cc/GSD8-QWUC].

[435] Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been Introduced This Year*, CNN (Apr. 6, 2023, 6:00 AM), https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/M4WW-YZTD].

[436] *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, *supra* note 17.

[437] Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022, 5:00 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418 [https://perma.cc/LN2T-VBZ8].

[438] *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, *supra* note 17.

[439] *E.g.*, FLA. STAT. § 1001.42 (2022); *see generally* ABBIE E. GOLDBERG, IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA, WILLIAMS INST. (Jan. 2023), https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents

transgender people from using public facilities that correspond with their gender identity,[440] banning drag performances,[441] preventing transgender youth from participating in school sports and recreational activities,[442] and limiting access to gender transition-related medical care for minors.[443]

While each of these laws represents a contemporary form of structural violence enabled by the Court and effectuated by state legislators, legal prohibitions on health care for transgender youth are a particularly cruel expression of modern policy violence. Though gender-affirming care has been endorsed as safe and effective by leading health organizations, the majority of anti-LBTQ+ laws introduced during the 2023 legislative session have sought to restrict access to medically necessary health care for transgender youth by imposing criminal penalties against health professionals and parents who provide or enable access to such care.[444] Since 2020, 36 states have sought to restrict gender-affirming health care.[445] As a result of recently passed and pending legislation in more than a dozen states, approximately 146,300 transgender youth in 30 states have lost access to care or are at risk of losing access to essential health care.[446]

[https://perma.cc/SZ9U-L6LR] (examining the "concerns and perspectives of LGBTQ+ parents regarding" the Don't Say Gay Bill in Florida).

[440] *E.g.*, IDAHO CODE § 33-6603 (2023); *see also* Sydney Kashiwagi, *Idaho Governor Signs Bill That Restricts Transgender Students' Bathroom Use in Schools*, CNN (Mar. 25, 2023 5:10 PM), https://www.cnn.com/2023/03/25/politics/idaho-bathroom-bill-brad-little-transgender-youth/index.html [https://perma.cc/4FZS-96ZK].

[441] *E.g.*, TENN. CODE ANN. § 7-51-1401–07 (2023); *see also* Shawna Mizelle & Dave Alsup, *Tennessee Becomes First State in 2023 to Restrict Drag Performances*, CNN (Mar. 3, 2023, 6:01 PM), https://www.cnn.com/2023/03/02/politics/tennessee-ban-drag-show-performances-governor/index.html [https://perma.cc/2MPP-B97K].

[442] FLA. STAT. § 1006.205; *see also* The Associated Press, *On the First Day of Pride Month, Florida Signed a Transgender Athlete Bill into Law*, NPR (June 2, 2021, 7:54 AM), https://www.npr.org/2021/06/02/1002405412/on-the-first-day-of-pride-month-florida-signed-a-transgender-athlete-bill-into-l [https://perma.cc/SP6M-USAV].

[443] *See* ELANA REDFIELD ET AL., THE WILLIAMS INST., PROHIBITING GENDER AFFIRMING MEDICAL CARE FOR YOUTH 7–9 (2023) (summarizing nine anti-gender-affirming state laws enacted between January and March 2023).

[444] Gender-affirming care encompasses a range of social, psychological, behavioral, and medical interventions that support and affirm an individual's gender identity when it conflicts with the gender they were assigned at birth. The American Medical Association, the American Academy of Pediatrics, and the Endocrine Society all support gender-affirming health care for transgender minors. *See* Patrick Boyle, *What is Gender-Affirming Care? Your Questions Answered*, ASS'N OF AM. MED. COLLS. (Apr. 12, 2022), https://www.aamc.org/news-insights/what-gender-affirming-care-your-questions-answered [https://perma.cc/6WJK-G8MZ].

[445] REDFIELD ET AL., *supra* note 443, at 17.

[446] *Id.* at 2.

The enactment of health care bans targeting transgender youth is part of a broader strategy of policy violence that seeks to reverse fundamental rights involving bodily autonomy using parental involvement laws as an entry point to curtailing protections for the wider affected population.[447] With the success of early anti-trans and anti-LGBTQ+ legislation aimed at minors under the guise of supporting parental autonomy, state legislators have expanded their policy aims to include LGBTQ+ adults more generally.[448] Texas, which previously relied on executive action to define gender-affirming medical care as a form of "child abuse,"[449] has subsequently proposed a sweeping ban that would bar the use of any state funds to pay for gender reassignment procedures.[450] Tennessee, also an early adopter of policy violence targeting transgender youth and which already prohibits Medicaid reimbursement for gender-affirming care, has proposed legislation that would limit coverage for gender-affirming care under private managed care plans for adults and youths.[451] In Florida, where educators are already prohibited from discussing topics related to sexual identity under the state's "Don't Say Gay" bill,[452] and where a ban on gender-affirming health care for minors is currently in effect,[453] efforts are underway to further expand existing restrictions.[454]

The overruling of *Roe*, in tandem with the historic number of anti-LGBTQ+ bills that have passed in the wake of the *Dobbs* decision, will further limit the ability of LGBTQ+ people to access life-saving health care.

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[447] A similar strategy was employed pre-*Dobbs* to erect barriers to minors seeking abortion care. *See generally* Alisha Kramer et al., *The Impact of Parental Involvement Laws on Minors Seeking Abortion Services*: *A Systematic Review*, HEALTH AFFS. SCHOLAR (forthcoming 2023).

[448] *E.g.*, S.B. 1029, 88th Leg., Reg. Sess. (Tex. 2023) (passed by the Senate Apr. 26, 2023).

[449] *See* Letter from Ken Paxton, Att'y Gen. of Tex., to Matt Krause, Tex. State Rep. (Feb. 18, 2022), https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf [https://perma.cc/7H5G-GX5V]; Letter from Greg Abbott, Gov. of Tex., to Jaime Masters, Comm'r, Tex. Dep't of Fam. & Prot. Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/362B-VA29].

[450] S.B. 1029, 2023 Leg., 88th Sess. (Tex. 2023) (passed by the Senate Apr. 26, 2023).

[451] H.B. 1215, 113th Gen. Assemb. Reg. Sess. (Tenn. 2023).

[452] FLA. STAT. § 1001.42 (2022); *see also* Anthony Izaguirre, *DeSantis to Expand 'Don't Say Gay' Law to All Grades*, ASSOCIATED PRESS (Mar. 22, 2023), https://apnews.com/article/dont-say-gay-desantis-florida-gender-d3a9c91f4b5383a5bf6df6f7d8ff65b6 [https://perma.cc/UU8L-Y6RL].

[453] 49 Fla. Admin. Reg. No. 40 (Feb. 28, 2023); *see also* Romy Ellenbogen et al., *Florida to Ban Care for Transgender Youth – Even in Clinical Trials*, TAMPA BAY TIMES (Feb. 10, 2023), https://www.tampabay.com/news/health/2023/02/10/transgender-youth-gender-affirming-care-banned-florida-clinical-trials/ [https://perma.cc/NUR3-KTHC].

[454] S.B. 254, 59th Leg., Reg. Sess. (Fla. 2023) (enacted).

Though largely overlooked, the revocation of constitutionally enshrined reproductive rights will have enormous consequences for the LGBTQ+ community as well. Even prior to *Dobbs*, LGBTQ+ persons faced significant structural barriers in accessing health care, including reproductive health services.[455] Discrimination, violence, and stigma, along with other social determinants of health, significantly affect the physical, mental, and behavioral health of LGBTQ+ people.[456] According to CDC data, lesbian, bisexual, and queer women are more likely to need abortion care and are more likely to have pregnancies that are the result of violence than cisgender or heterosexual women.[457] For transgender people especially, discriminatory treatment in reproductive health care, the marginalization and denial of patient priorities, and countless structural barriers were persistent long before the *Dobbs* decision erected even more hurdles in accessing healthcare.[458]

Furthermore, the state-sanctioned harm that is represented by, and that has resulted from, the Court's deconstruction of the 14th Amendment may further threaten other LBGTQ+ rights. Given the modern Court's disinclination to adhere to its own established precedent and its general disregard for basic civil rights for minoritized groups, there are justifiable concerns that other constitutional protections may also be at risk. If the Court, for example, were to determine that same-sex marriage—similar to abortion—has no basis in the Constitution and is an issue that should be returned to the states, the 29 same-sex marriage bans[459] that were invalidated by the *Obergefell* decision but that have remained codified in state statutes

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[455] *See* Wingo et al., *Reproductive Health Care Priorities and Barriers to Effective Care for LGBTQ People Assigned Female at Birth: A Qualitative Study*, 28 WOMEN'S HEALTH ISSUES 350, 350 (2018); Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. (SPECIAL ISSUE) 73, 74 (2013).

[456] *See* CHRISTY MALLORY ET AL., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN TEXAS 25–53 (2017).

[457] Press Release, Laurel Powell, Hum. Rts. Campaign, Human Rights Campaign Fact Sheet: Lesbian, Bisexual, Queer Women Who Have Been Pregnant Are More Likely to Need Abortion Services; Demonstrates Impact *Roe* Reversal Would Have on LGBTQ+ People (June 2, 2022), https://www.hrc.org/press-releases/human-rights-campaign-fact-sheet-lesbian-bisexual-queer-women-who-have-been-pregnant-are-more-likely-to-need-abortion-services-demonstrates-impact-roe-reversal-would-have-on-lgbtq-people [https://perma.cc/9TGL-FYUS].

[458] *See generally* Wingo et al., *supra* note 455 (detailing the experience of individuals assigned female at birth who identify as LGBTQ+ on reproductive healthcare needs).

[459] Julie Moreau, *States Across U.S. Still Cling to Outdated Gay Marriage Bans*, NBC NEWS (Feb. 18, 2020, 9:44 AM), https://www.nbcnews.com/feature/nbc-out/states-across-u-s-still-cling-outdated-gay-marriage-bans-n1137936 [https://perma.cc/QT5J-MGW7].

would once again be legal.[460] The fact that over half of states have refused to remove same-sex marriage prohibitions from their statutes and constitutions eight years after the Court found such bans unconstitutional indicates that this is an issue, much like abortion, that could be resurrected.

The state-sanctioned harm normalized by the Roberts Court and state legislatures across the nation is now being methodically applied to dilute, and ultimately dismantle, fundamental rights necessary for the preservation of the liberty, privacy, civic participation, and personhood of members of the *very* same groups who have historically been targeted by these multifaceted forms of policy violence. If legal precedent and the doctrine of *stare decisis* no longer hold value in the Court's constitutional jurisprudence, the forces of structural violence embedded in American institutions will spread like a contagion. The deconstruction of long-established substantive due process jurisprudence in the *Dobbs* decision will have a far greater effect than beckoning states hostile to civil liberties to engage in further acts of structural harm. The reliance on systemic violence as a means of governance is entirely incompatible with the notion of a modern, liberal, multicultural democracy. The failure to recognize and rectify this new and punishing wave of policy violence will result in tremendous personal pain, in addition to corrupting the core of our democratic institutions.

V. AN AHISTORICAL APPLICATION OF "HISTORY AND TRADITION" AS A JUDICIALLY-ORCHESTRATED FORM OF STRUCTURAL VIOLENCE

"It must be remembered that the oppressed and the oppressor are bound together within the same society; they accept the same criteria, they share the same beliefs, they both alike depend on the same reality."

- James Baldwin[461]

Many of the fundamental rights that are most cherished find their constitutional source in the 14th Amendment.[462] Unenumerated constitutional rights have been gradually recognized by the Court as inherent

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[460] Unlike the right to abortion recognized in *Roe*, the Court based its decision in *Obergefell* (extending the fundamental right to marry to same-sex couples) on both the Due Process and Equal Protection Clauses of the 14th Amendment. This may offer some added protections to the survival of *Obergefell* should the Court elect to revisit it at a future date. *Compare* Roe v. Wade, 410 U.S. 113, 152 (1973) *with* Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

[461] JAMES BALDWIN, NOTES OF A NATIVE SON 21 (1955).

[462] The Fourteenth Amendment provides that, "No State shall . . . *deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

to the guarantees of liberty embedded in the 14th Amendment.[463] During a brief period during the Warren and Burger eras, the Court expanded constitutional protections for historically marginalized communities by recognizing unenumerated fundamental rights not explicitly referenced in America's founding document to be implicit in the due process clause of the 14th Amendment.[464]

The expansion of constitutional protections to include civil liberties essential to the personhood, autonomy, and dignity of women, people of color, and the LGBTQ+ population provoked a predictable, anti-democratic response similar to the cycles of state-based violence that proceeded prior eras of American history where gains were made in progressing towards a truly representative and equitable democracy. Much as the Court had earlier in its history narrowly interpreted the Reconstruction Amendments for the benefit of corporations over the rights of formerly enslaved persons, the modern Court has once again adopted an ahistorical approach to the 14th Amendment to retract newly recognized constitutional rights.

Admittedly, the Court's approach to the recognition of unenumerated fundamental rights has been philosophically fraught. Substantive due process was initially a basis for the zealous protection of economic liberties during

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[463] Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the "liberty" guarantee of the 14th Amendment includes the right "to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating bans on interracial unions and holding that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men"); Roe v. Wade, 410 U.S. 113, 163–64 (1973) (finding that the guarantee of "liberty" in the 14th Amendment, which protects individual privacy, includes the right to abortion prior to fetal viability); Moore v. East Cleveland, 431 U.S. 494, 500 (1977) (concluding that a zoning ordinance that prohibited members of an extended family from living together in the same residence violated the liberty protection of the due process clause of the 14th Amendment); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 284 (1990) (recognizing that competent adults have the right under the liberty protections of the due process clause of the 14th Amendment to discontinue life-saving medical care); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (holding that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (affirming that the right to marry is a fundamental right inherent in the liberty of the due process clause of the 14th Amendment that may not be denied to same-sex couples).

[464] *See* Chemerinsky, *Substantive Due Process*, *supra* note 329, at 1510.

the Lochner Era.[465] For a period spanning the early 1900s through 1937, the Court relied on substantive due process to invalidate over 200 economic and labor laws based on the theory that freedom of contract was a fundamental right protected under the liberty of the due process clause.[466] In the aftermath of the Great Depression, economic substantive due process was all but disavowed, and has rarely been invoked since.

The abrogation of economic substantive due process understandably caused some consternation when the Court sought to apply the same legal theory to the protection of civil liberties in the mid-20th century.[467] In fact, in his majority opinion in *Griswold v. Connecticut*, Justice William Douglas went to great lengths to assuage any concerns that the Court's holding was attributable to substantive due process.[468] Expressly rejecting that the right to contraception implicit in marital privacy was based in substantive due process, Justice Douglas instead found the right rooted in the "penumbras" of the Bill of Rights.[469]

Despite Justice Douglas's reservations in anchoring reproductive rights in substantive due process, the Court would do precisely that less than a decade later in *Roe v. Wade*.[470] Building on the earlier legal foundation of *Griswold*, the Court found that the right to abortion was a fundamental right implicit in the liberty prong of the Due Process Clause of the 14th Amendment.[471] *Roe* would prove controversial not only because of the legal principle it represented but, moreover, because of the Court's acceptance of substantive due process in reaching its decision.

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[465] This period is named after the 1905 case of *Lochner v. New York*, which became a symbol of this economic substantive due process. 198 U.S. 45, 54. When the Court eventually repudiated its allegiance to substantive due process in the 1937 case of *West Coast Hotel Co. v. Parrish*, it adopted a much more cautious approach to substantive due process. 300 U.S. 379, 392–93.

[466] Chemerinsky, *Substantive Due Process*, *supra* note 329, at 1503.

[467] *See* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV., 1902, 1960 (2021) (arguing that judicial interventions for purposes of expanding modern substantive due process has been "democracy-promoting").

[468] 381 U.S. 479, 481–82 (1965).

[469] *Id.* at 484. Notably, several concurrences debated the appropriate constitutional source for the recognized privacy right. *Id.* at 486–508. As noted by Chemerinsky, despite the eloquent avoidance embraced by Justice Douglas to distance the *Griswold* opinion from being tainted by *Lochner*, Douglas was indeed relying on substantive due process even while denying he was doing so. *See* Chemerinsky, *Substantive Due Process*, *supra* note 329, at 1506 (describing Justice Douglas' majority opinion in *Griswold* as "[t]he best illustration of the avoidance of substantive due process").

[470] 410 U.S. 113, 153 (1973).

[471] *Id.*

Conservative jurists, who would lay the foundation for originalism, have long been hostile to the Court's reliance on substantive due process to recognize unenumerated constitutional rights that empowered historically minoritized and marginalized populations.[472] In response to the new-found prominence of substantive due process as a mechanism for the defense of fundamental rights for women, people of color, and members of the LGBTQ+ community, the conservative legal establishment voiced their view that the recognition of non-textual constitutional rights was an inappropriate exercise of judicial discretion.[473]

Justice Antonin Scalia, an ardent and early supporter of originalism, expressed that the Court should only recognize unenumerated rights under substantive due process in the limited circumstances where a history and tradition existed of protecting those rights.[474] During the 1980s, Justice Scalia advocated for an approach to constitutional interpretation and rights dictated by the visions and values at the time of the country's nascency.[475] By the 1990s, originalism had principally become synonymous with the conservative legal movement.[476]

Notably, this circular logic of originalism functions to eliminate the possibility that the Court may exercise its proper powers of judicial review to interpret the 14th Amendment in a manner consistent with its purpose and history. In a 1985 speech, Justice William Brennan acknowledged as much, stating that originalism "in effect establishes a presumption of resolving

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[472] *See, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (criticizing the majority opinion in *Lawrence* as contemptuous of the Constitution and Court); Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 277 (2016) (comparing the rise in textual criticisms of substantive due process with a surge in originalism); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–77 (1980) (contrasting the Court's responsibility to interpret the Constitution to its duty to "keep the machinery of democratic government running" and protect the rights of minorities).

[473] *See* Bork, *supra* note 112 (discussing the inherent controversy surrounding the Court's ability to invalidate the acts of "another branch of government"); City of Chi. v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation.").

[474] Michael H. v. Gerald D., 491 U.S. 110, 125–127 (1989).

[475] *See generally* Bethany A. Cook & Lisa C. Kahn, *Justice Scalia's Due Process Model: A History Lesson in Constitutional Interpretation*, 6 ST. JOHN'S J. LEGAL COMMENT. 263 (evaluating Justice Scalia's traditional approach to constitutional interpretation).

[476] Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 869 (2015).

textual ambiguities against the claim of constitutional right."[477] Practically, a right with a history and tradition of legal protection does not need to come before the Court.[478] The very fact that a right requires protection from the Court demonstrates that it has no established tradition of protection.[479] Consequently, under an originalist theory, the Court has a non-existent role in the recognition of non-textual privacy and liberty-based constitutional protections. Those rights, many of which comprise the most basic aspects of citizenship and personhood, are instead delegated to the elected leaders who bear the greatest responsibility for inflicting policy violence against the communities for whom constitutional protections are being denied.

The eventual embrace of the "history and tradition" threshold for recognizing substantive due process rights is illuminated in *Washington v. Glucksberg*.[480] Writing for the majority, Chief Justice William Rehnquist expressed that liberty protections under the Due Process Clause of the 14th Amendment should be limited only to those rights explicitly included in the text of the Constitution, intended by the Framers to be protected, or if a clear tradition of safeguarding that right exists.[481] The history and tradition test articulated by the Court in *Glucksberg* would all but ensure that historically subjugated groups will find no constitutional relief in the protections afforded through the due process clause of the 14th Amendment.

As the composition of the Court has shifted to the right, the Court steadily embraced a substantive due process standard that has come to almost exclusively rely upon the history and tradition test articulated in *Glucksberg*. The Court had, for a limited period of time, acknowledged that an appropriate substantive due process analysis should begin—but not end—with historical considerations.[482] Within this more expansive approach to integrating historical foundations into constitutional analysis, the Court recognized that the Founders envisioned the notion of liberty embodied in the Constitution as an evolving concept.[483] Indeed, ample evidence suggests

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[477] Justice William J. Brennan, Jr., Speech at the Georgetown University To the Text and Teaching Symposium: The Great Debate (Oct. 12, 1985), https://fedsoc.org/commentary/publications/the-great-debate-justice-william-j-brennan-jr-october-12-1985 [https://perma.cc/85FZ-87N9].

[478] Chemerinsky, *Substantive Due Process*, *supra* note 329, at 1513–14.

[479] *Id.*

[480] 521 U.S. 702, 723–35 (1997) (declining to extend substantive due process to the right to physician-assisted suicide).

[481] *Id.* at 719–22.

[482] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[483] *Id.* at 585.

that many of the Founders themselves understood that the Constitution could not survive as a governing document if bound to an antiquated past that failed to meet the evolving needs of a modern democracy.[484]

In the two decades following *Glucksberg*, the Court only cited the history and tradition standard twice, both times in dissents.[485] In several historic decisions expanding privacy rights to apply to same-sex intimacy and marriage, the Court explicitly limited the application of the *Glucksberg* test.[486] Justice Anthony Kennedy, in the majority opinion in *Obergefell v. Hodges*, stated, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[487] Adding that "rights come not from ancient sources alone," Justice Kennedy stressed that rights "rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[488]

The *Glucksberg* test, much like originalism, remained largely at the margins of constitutional legitimacy until three Supreme Court justices were appointed during the single-term Trump Administration.[489] Joining senior originalists Justices Clarence Thomas and Samuel Alito, the addition of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett transformed the Court.[490] The controversial presidency and judicial nomination process that resulted in the creation of a conservative super-majority elevated an originalist methodology of constitutional interpretation

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[484] *See generally* THE FEDERALIST NO. 14 (James Madison); *see also* CHEMERINSKY, *supra* note 34, at 75–91.

[485] Justice Scalia cited the *Glucksberg* standard in his dissent to the 2003 case of *Lawrence v. Texas*, which recognized a right to same-sex intimacy. 539 U.S. 558, 588. The *Glucksberg* test was additionally invoked by Chief Justice Roberts and Justice Alito in their dissents in *Obergefell v. Hodges*, which further expanded protections for same-sex couples under the 14th Amendment. 576 U.S. 644, 686–720 (2015).

[486] *See Lawrence*, 539 U.S. at 572; *Obergefell*, 576 U.S. at 671.

[487] 576 U.S. at 671.

[488] *Id.* at 671–72.

[489] The Trump Presidency resulted in the appointment of more Supreme Court Justices than at any point since the Reagan Presidency and the most by any one-term President since Herbert Hoover. 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/WQG4-BZBH].

[490] The effect of the Trump Administration on the federal judiciary is by no means limited to the composition of the Supreme Court. Approximately one-quarter of all federal judges are Trump appointees. *Id.*

and, consequently, ushered a hyper-fixation and questionable application of history and tradition in deciding the contours of constitutional rights.

The Court's modern approach to the 14th Amendment is entirely consistent with the divorced understanding of history that it has traditionally applied to the Reconstruction Amendments to limit its efficacy in curing systemic discrimination and violence.[491] Though the product of a bloody civil war predicated on the need to recognize the humanity and legal rights of African Americans, the Court has consistently—with only narrow exceptions—interpreted the Reconstruction Amendments in a manner that entirely neglects the basis for these necessary constitutional revisions.[492] The Court's disingenuous framing of the Reconstruction Amendments has done more than simply dismiss the true intentions of these transformative constitutional amendments. The Court has actively detached context from history to revise the original purpose of the Reconstruction Amendments altogether.

Significantly, the Court's recent adoption and rigid application of the history and tradition standard to the recognition of unenumerated constitutional rights necessarily begs the critical question of whose history should govern constitutional norms.[493] Limiting the protections of the Due Process Clause of the 14th Amendment to how it was conceptualized by a narrow, unrepresentative sector of the American populace—as the modern Court has elected to do—predestines the 14th Amendment to replicating the inequities it was so clearly intended to alleviate. The historical analysis that the Court has relied upon to reshape key constitutional rights presents the views and values of the Founders as the only legitimate narrators of American history. This flawed approach to constitutional interpretation does more than simply bind current and future generations to an inherited history of structural violence. It promotes a historically truncated, intellectually insincere, and legally unsound theory of constitutional law that minimizes our national history of systemic violence in order to maintain it.

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[491] *See* Franita Tolson, *"In Whom is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. ONLINE 211, 216 (2021), https://scholarship.law.upenn.edu/penn_law_review_online/vol169/iss1/11 [https://perma.cc/3W85-V9X9].

[492] Slaughter-House Cases, 83 U.S. 36, 53 (1872); Plessy v. Ferguson, 163 U.S. 537, 537 (1896); Cumming v. Richmond Cnty. Bd. of Ed., 175 U.S. 528, 528 (1899); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 701 (2007); Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll. 143 S. Ct. 2141, 2141 (2023).

[493] *See generally* Feldman, *supra* note 14 (discussing the *Obergefell* and *Glucksberg* decisions as illustrating how the Court's polar conceptualizations of "tradition" inform the relationship between voice and democracy).

The dilution of the 14th Amendment through the Court's narrow application of the history and tradition standard represents the effects and propagation of rampant systemic policy violence. As the influence of originalist jurists has increased on the Court, so has the virulency of the history and tradition analysis as a weapon for extinguishing unenumerated fundamental rights. The long-term danger of the Court's history and tradition analysis to 14th Amendment protections to deconstruct modern constitutional rights is alarmingly evident in the Court's recent *Dobbs* decision.[494] The *Dobbs* decision demonstrates that the Court has fully and unapologetically embraced its myopic view of history and tradition in a manner that remains deeply gendered and racialized. In the *Dobbs* decision, the Court elevated the authority of documents exclusively authored by white men to produce a suspect historic account that wholly negates—as the dissent notes[495]—the evidence that both the common law and American legal traditions did not criminalize abortion prior to "quickening."[496] Moreover, the embedded structural violence of the contemporary history and tradition standard as applied in the *Dobbs* decision determines the force of basic constitutional protections as applied to individuals who, for the better part of our nation's history, lacked citizenship rights as determined by those who concluded those very same groups should not be entitled to due process under the law or rights generally.

The current Supreme Court has additionally employed an ahistorical approach to its application of history and tradition for purposes of constitutional interpretation to justify a "color-blind" reading of the Reconstruction Amendments that has no basis in either history or tradition (or law).[497] The origins of the theory of color-blind constitutionalism emerged prior to the Civil War and gained prominence after the ratification of the Reconstruction Amendments, reaching its full maturity after the Court's landmark civil rights decision in *Brown v. Board of Education*.[498] As explained by Neil Gotanda, color-blind constitutionalism functions to

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[494] *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1169–83 (2023) (discussing how several justices warned that any substantive due process right could be held unconstitutional).

[495] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2323–36 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

[496] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129–130 (7th ed. 1775); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1644); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900 3–4 (1978).

[497] *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 26 (1991).

[498] *Id.* at 39–40.

legitimate, and thereby promote, white racial domination and supremacy.[499] Under this distorted form of reality that exists only for those who are socially, racially, and politically privileged, "subordination is ubiquitous, yet disregarded—unless it takes the form of individual, intended, and irrational prejudice."[500]

Nevertheless, even this warped standard of systemic violence, when unabashedly demonstrated out in the open, seems insufficient to warrant any legal remedy by the Court. The effects of the structural violence embedded in an ideology of color-blind constitutionalism have been made frighteningly clear in considering the consequences of the Court's modern approach to voting rights. Outside of the Warren and Burger period, the Court has a long-established history and tradition of disassociating race from political power.[501] The Court's evisceration of the Voting Rights Act in *Shelby County* invited a deluge of restrictive voting laws aimed at suppressing the Black vote. These antidemocratic measures have largely been sanctioned by the Court, fostering the erosion of constitutional protections by emboldening states eager to disenfranchise their Black citizens to push the bounds of legalized discrimination further and further.[502]

Furthermore, the Court's application of the history and tradition analysis to determining the scope of substantive due process is consistent with its adoption of the perpetrator perspective of discrimination. As described by the late Alan David Freeman, discrimination may be viewed from the perspective of either the victim or the perpetrator.[503] According to this theory of antidiscrimination law, the perpetrator perspective narrowly conceives discrimination as caused by individual actors divorced from systemic conditions.[504] The effects of discrimination on peripheral communities are almost entirely relegated in the analysis, with the focus limited to determining

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[499] *Id.*

[500] *Id.* at 46.

[501] *Id.*

[502] During the 2022 term, the Supreme Court granted cert in *Allen v. Milligan* to consider yet another Voting Rights Act challenge brought by the state of Alabama. 599 U.S. 1 (2023), *cert. granted,* 142 S. Ct. 1105 (2022). The case, if it were successful, would have threatened section two of the Voting Rights Act, the last remaining substantive provision of the law that prohibits states from engaging in racial gerrymandering and purposefully discriminating by race. *Id.*

[503] Although Freeman's conception of the "victim/perpetrator" perspective is analyzed within the context of racial discrimination, it is equally applicable to discrimination based on ethnicity, gender, sexuality orientation, immigration status, and intersectional identities. Freeman, *supra* note 12, at 1052–57.

[504] *Id.*

if a legal standard was breached and, if so, neutralizing it.[505] The perpetrator perspective, which has become dominant in the modern Court, adopts a callous indifference to the condition of the affected individuals and groups.[506] Importantly, in applying a structural violence framework to a critique of the perpetrator perspective, this legal approach incorrectly assumes that "discrimination is not . . . a social phenomenon but merely . . .the misguided conduct of particular actors."[507]

As further explained by Freeman, related notions of "fault" and "causation" are imbued in the perpetrator's perspective.[508] The centrality of the mutually reinforcing concepts falsely depicts discrimination as separate from systems of oppression, representing discrimination as a structural anomaly limited to a few bad actors.[509] This flawed approach to understanding systemic discrimination creates a broader social complacency that "creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations."[510]

The process by which the Court has methodically unraveled substantive due process rights under the 14th Amendment is itself a potent contributor to institutional harm. The Court has sought to render the 14th Amendment legally null through the interrelated concepts of color-blindness and the perpetrator perspective, both of which have been integrated into a morphed, modernized form of originalism that espouses a fundamentally incomplete telling of the nation's history and traditions. The simultaneous rise of these harmful concepts has resulted in what Freeman has referred to as "The Era of Rationalization," whereby the Court has pronounced that discrimination had been miraculously cured, as if such a decree could make it so.[511]

If, as it so clearly appears, the Roberts Court in operating under a color-blind, perpetrator-oriented perspective, originalist theory of constitutional interpretation is intent on defining fundamental liberties based on the history and tradition of our country, then it has an institutional, moral, and legal obligation to do so in a manner that appropriately places structural violence

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[505] *Id.*

[506] *Id.* at 1053–54.

[507] *Id.* at 1054.

[508] *Id.* at 1054–55.

[509] Freeman, *supra* note 12, at 1055.

[510] *Id.*

[511] *Id.* at 1102.

within that national narrative. The Court's adoption of a constitutional analysis premised on the nation's history and traditions does not preclude it from considering—let alone telling—that history from the perspective of those who had been denied full civic participation and legal equality in American society.

Yet, the Court has shown no inclination to consider the nation's history and traditions from the perspective of those peripheral groups who have been most harmed. Instead, the Court has adopted a history and tradition analysis for purposes of constitutional interpretation that embraces false founding myths based on noble ideals of freedom, rather than on our country's actual collective history of genocide, slavery, institutionalized racism, misogyny, and homophobia. Consequently, our national history and tradition of systemic violence continues to order our society, politics, economy, and legal system.

The Court's incomplete understanding and telling of our nation's history represents in the starkest of terms the frightening and formidable dangers of judicial and political myth-making. It all but ensures that our national history and tradition of cyclical policy violence will continue unabated. Adopting and applying a view of our history and traditions that is premised on myth more so than fact robs minoritized groups of constitutional protections to which they are legally entitled and deprives us, as a society, and the Court as an institution, of valuable insight and much-needed accountability. If the Court is intent on examining constitutional law from a vantage point that emphasizes history and tradition, then the history and tradition of employing structural violence to systematically disempower and subordinate marginalized communities cannot be extracted from its analysis.

VI. CONCLUSION

"In our world, divide and conquer must become define and empower."

- Audre Lorde[512]

This Article advances the fundamental thesis that state actors—primarily represented by members of the Court and state officials—are more than simply untrustworthy partners in the ever-present need to obtain legal equality for peripheral groups.[513] Historically and continuing to the present

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[512] AUDRE LORDE, THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE 3 (2018).

[513] *See, e.g.*, Carliss Chatman, *We Shouldn't Need* Roe, 29 UCLA J. GENDER & L. 81, 81 (2022); *see also* KK Ottesen, *Current Supreme Court Is Damaging to the Country, Law Scholar Warns*, WASH.

day, state actors have operated under a veneer of democratic legitimacy to limit the definition of citizenship and humanity to a privileged few. Structural violence is a prominent part of our national identity that is concomitantly unacknowledged and exploited by modern state actors of structural violence.

Reliance on the Court and state legislators for the recognition and enforcement of basic rights has rarely been an effective strategy. Legal historians and activists have long questioned the wisdom of a rights-centered approach, characterizing limited judicial victories as evidence of a broader preoccupation with legalism and the fragile nature of constitutional protections.[514] Whereas some constitutional and social movement scholars have maintained that the utility of a right-centered strategy is context-dependent,[515] others have cautioned that the advancement of civil rights through judicial action can be fleeting and even counterproductive.[516] Critical theorists have been especially vocal in noting the deficiencies of formal legal equality and antidiscrimination law, which have proven inadequate in recognizing and redressing the institutional harms that affect marginalized groups.[517] At its worst, legal equality strategies may not only fail to address institutional harm but may function to legitimize and expand oppressive and violent institutions.[518]

POST MAG. (Aug. 16, 2022), https://docdro.id/1LOzRjG [https://perma.cc/D8RL-5M4C] (interviewing Professor Laurence Tribe, describing the Supreme Court as erecting persisting barriers to advancing gender and racial equality for most of its history).

[514] *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 369 (2012); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29, 41 (1969); Ralph J. Bunche, *A Critical Analysis of the Tactics and Programs of Minority Groups*, 4 J. NEGRO EDUC. 308, 317 (July 1935); JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS xi (1964) (arguing that law should be viewed as part of an all-inclusive social continuum, rather than as a rigid system); MURRAY JACOB EDELMAN, THE SYMBOLIC USES OF POLITICS 2 (1964); BELL, SILENT COVENANTS, *supra* note 222, at 2 (illustrating that despite the Court's ruling in *Brown*, racial bigotry is still prevalent and education for most black children is still not equal).

[515] *See* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 890–95 (2013).

[516] *See generally* Dean Spade, *Intersectional Resistance and Law Reform*, 38 J. WOMEN CULTURE & SOC'Y 1031, 1032 (2013); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 465 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 415–19 (2d ed. 2008); WHITE RAGE, *supra* note 87, at 5 (describing a history of relentless institutional backlashes as responses to African American civil rights gains).

[517] *See generally* Freeman, *supra* note 279; BELL, SILENT COVENANTS, *supra* note 222 (arguing that the quest for racial justice requires more than judicial proclamations).

[518] *See* Spade, *supra* note 516.

The contributions of critical scholars to the discourse surrounding the limitations of rights-based advocacy are instructive in understanding both the reoccurring nature and devasting consequences of systemic violence towards politically vulnerable communities. The deficiencies of legal equality strategies and the efficacy of policy violence are equally influenced by the critically important fact that both rely on a rights-based system in which access to rights is limited to an exceedingly limited class of individuals.[519] Arguments that seek to advance legal equality—and the structural violence that those arguments commonly elicit—are constrained by legal and political systems that are founded upon and sustained by gendered racialization.[520] Constitutional protections that are proclaimed to be universal and accessible to all are dependent on socially dictated norms that reward whiteness, heteropatriarchy, and wealth. The artificially constructed, zero-sum framing of civil rights functions to expand harmful systems by reinforcing structures of domination, reproducing a false hierarchy of deservingness of rights, and fracturing constituencies with shared rights aims.[521] It is this very system that dooms the efficacy of rights-based advocacy that concurrently enables the virulency of structural violence.

More American than apple pie, policy violence and social suffering are deeply entrenched in American political and legal culture and traditions. In fact, systemic violence is perhaps one of the most prominent and persistent facets of our nation's history and tradition. Despite this historical fact, the Court's conceptualization of history and tradition for purposes of constitutional interpretation has tended to focus narrowly on the intentions of the Founders at the expense of adopting a historical lens that accounts for the influence and effects of the structural violence that informed the creation of the nation's constitutional order. In only considering the history and tradition of wealthy, white, male enslavers who were responsible for early constitutional history, the Court has adopted an approach to constitutional law that remains firmly rooted in the pre-Civil War patriarchal slavocracy.

Federal congressional intervention is needed to counter the structural violence that has become heartily embraced by the Court and the states. Yet, this is neither likely nor will it be sufficient to repair our damaged democracy. Law and freedom will not come solely from institutional action. Redress will not be realized through judicial victories or the enactment of new laws alone. We should not look to the law or government institutions as providing a panacea for the social ills that it is responsible for having created. Local

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[519] *Id.*

[520] *Id.*

[521] *Id.*

action, individual resistance, and community activism is the most powerful countervailing force to state violence.

Critically, our future need not be as bleak as our past. We can cease to operate on myths and reject those fables as a basis for constitutional interpretation. We can invite a purposeful reckoning of our history and tradition of systemic violence. We can reclaim and reconstitute our history and traditions with integrity and accuracy. We can embrace a full and truthful accounting of our collective past so that it may serve as a guide and a cautionary tale, rather than enabling the continuation of an incomplete national narrative that propagates policy violence. We can combat the erasure of minoritized people contemplated by structural violence by elevating their voices and experiences in the telling of that reclaimed history. We can center our national history and traditions on those who have resisted systems of exclusion and oppression as opposed to those responsible for the creation of those systems of exclusion and oppression. We can—and must—replace our violence-based governance structure with a humanity-oriented, truly democratic system. Structural violence is a part of our history and tradition, but it need not govern our future.