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### The Antiracist Constitution

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## THE ANTIRACIST CONSTITUTION

BRANDON HASBROUCK\*

### ABSTRACT

*Our Constitution, as it is and as it has been interpreted by our courts, serves white supremacy. The twin projects of abolition and reconstruction remain incomplete, derailed first by openly hostile institutions, then by the subtler lie that a colorblind Constitution would bring about the end of racism. Yet, in its debut in Supreme Court jurisprudence, colorblind constitutionalism promised that facially discriminatory laws were unnecessary for the perpetuation of white supremacy. That promise has been fulfilled across nearly every field of law as modern white supremacists adopt insidious, facially neutral laws to ensure the oppression of Black people and other vulnerable populations. However, it need not be this way. The Reconstruction Congress gave us the tools in the Thirteenth, Fourteenth, and Fifteenth Amendments to apply color-conscious remedies to historic inequities and build an abolition democracy.*

*Previous scholarship has typically focused on the failure to achieve this goal within specific fields of law—criminal justice, education, employment discrimination, and more. Rather than simply analyze the symptoms of racist legal structures, this Article will demonstrate that the patterns across various fields of law reveal the presence of the underlying disease of white supremacy. Even those scholars willing to look to these patterns of oppression have tended to take the pessimistic view that the Constitution is hopelessly infested with white supremacist interpretations.*

*This Article will instead argue that Congress and the courts can, and should, apply the Constitution as it was written and intended—to promote an antiracist vision of America—and will explore what an antiracist Constitution would look like in practice. The resulting framework demonstrates the doctrinal puissance of abolition constitutionalism. Where progressive constitutionalism often*

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*struggles to justify the rights-affirming results of the Warren Court and Roe v. Wade while excluding the possibility of a return to the Lochner era, abolition constitutionalism provides a robust basis to support civil rights, including reproductive rights, while rejecting the primacy of freedom of contract.*

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*The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.*

—Justice John Marshall Harlan<sup>1</sup>

*You need to believe in things that aren't true. How else can they become?*

—Terry Pratchett<sup>2</sup>

#### INTRODUCTION

If we want to shape a better America—a country that lives up to its purported ideals, rather than twisting them to cover for white supremacy—we must first understand what America has been. HBO's *Watchmen* explored both the horrors that comfortable white Americans would rather believe are confined to the past and what a world where government power served antiracist ends could look like.<sup>3</sup> In the show, the most powerful being in the universe, Doctor Manhattan, chooses to experience life without all that power—becoming, in contrast, a Black man in America.<sup>4</sup> The character's own history is explored in the original comics through a series of vignettes, which illustrate his unusual ability to perceive all of time without ordinary human limitations.<sup>5</sup> America has a long history of white supremacy: political compromises that sold out Black rights, slavery, white backlash, suppressing advocates for justice by force of law, twisting the interpretation of the Constitution and laws to excuse systemic racism, and allowing the bigotry of years past to continue through ostensibly neutral laws.<sup>6</sup> The story is too big to take in all at once. So, let us instead imagine

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<sup>1</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>2</sup> TERRY PRATCHETT, *HOGFATHER* 337 (1996).

<sup>3</sup> See generally *Watchmen: It's Summer and We're Running Out of Ice* (HBO television broadcast Oct. 20, 2019) (depicting alternate reality in which Tulsa Race Massacre occurs and one of modern-day police force's highest priorities is to root out and defeat white supremacist movement).

<sup>4</sup> See generally *Watchmen: An Almost Religious Awe* (HBO television broadcast Dec. 1, 2019) (revealing Cal Abar as Doctor Manhattan's assumed, human identity).

<sup>5</sup> See generally 4 ALAN MOORE & DAVE GIBBONS, *WATCHMEN* (Len Wein ed., 1986) (depicting Doctor Manhattan's simultaneous perception of each moment of his life).

<sup>6</sup> See generally, e.g., Mary Elliott & Jazmine Hughes, *Four Hundred Years After Enslaved Africans Were First Brought to Virginia, Most Americans Still Don't Know the Full Story of Slavery.*, N.Y. TIMES MAG. (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html?mtrref=www.nytimes.com&assetType> (exploring history and legacy of

how that history would appear if, like Doctor Manhattan, we might see all of time at once.

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It is June 28, 1776. The Continental Congress orders that Thomas Jefferson's draft of the Declaration of Independence "lie on the table."<sup>7</sup> The document will be edited heavily, removing—to appease Georgia and South Carolina<sup>8</sup>—the accusation that King George III forced slavery upon the colonies.<sup>9</sup> Jefferson, who enslaves hundreds of people,<sup>10</sup> nonetheless includes an assertion that "all men are created equal."<sup>11</sup>

It is July 16, 1787. The Constitutional Convention has been debating how to determine a state's population when apportioning members of the House of Representatives.<sup>12</sup> After delegates from Southern states propose that their states be allowed to include enslaved persons when calculating their population,<sup>13</sup> the Convention adopts a previously rejected proposal that enslaved persons should count as three-fifths of a person.<sup>14</sup> The Three-Fifths Compromise will entrench disproportionate power for slaveholding states in Congress and in presidential elections.

It is March 3, 1820. The Senate approves the admission of Maine as a free state while simultaneously allowing the admission of Missouri as a slave state.<sup>15</sup> The Missouri Compromise forbids slavery within western territories "north of the thirty-six degrees and thirty minutes north latitude"<sup>16</sup> while simultaneously cementing the notion that the balance between states permitting and forbidding slavery must be maintained to preserve the political power of slaveholding states in the Senate.<sup>17</sup> The territorial restriction feeds the anxiety of the enslavers,

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slavery in United States).

<sup>7</sup> Thomas Jefferson, *Autobiography* (Jan. 6, 1821), in 1 THE WORKS OF THOMAS JEFFERSON 3, 28 (Paul Leicester Ford ed., 1904).

<sup>8</sup> *See id.* at 33.

<sup>9</sup> *See id.* at 39-40.

<sup>10</sup> *The Practice of Slavery at Monticello*, MONTICELLO, <https://www.monticello.org/thomas-jefferson/jefferson-slavery/the-practice-of-slavery-at-monticello/> [<https://perma.cc/PGC2-XHK5>] (last visited Jan. 17, 2022).

<sup>11</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>12</sup> *See* MICHAEL F. CONLIN, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR* 88-89 (2019).

<sup>13</sup> *Id.* at 88.

<sup>14</sup> *Id.* at 88-89; *see also* U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

<sup>15</sup> Senate Hist. Off., *Missouri Compromise Ushers In New Era for the Senate*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Missouri\\_Compromise.htm](https://www.senate.gov/artandhistory/history/minute/Missouri_Compromise.htm) [<https://perma.cc/RPR2-FRS4>] (last visited Jan. 17, 2022).

<sup>16</sup> Missouri Compromise, ch. 22, § 8, 3 Stat. 545, 548 (1820) (repealed 1854).

<sup>17</sup> *See* Senate Hist. Off., *supra* note 15.

inevitably driving their hunger for foreign territory and willingness to resort to violence to uphold their system of oppression.

It is September 18, 1850. Congress passes the Fugitive Slave Act<sup>18</sup> as part of the Compromise of 1850 to settle a series of debates on California statehood and the borders of Texas.<sup>19</sup> The new law requires government officials to assist in capturing persons accused of escaping slavery on nothing more than an affidavit,<sup>20</sup> allowing free Black people to be enslaved without any right to defend themselves in court.

It is March 2, 1877. A divided Congress fiercely contests which electoral certificates to count in the presidential election.<sup>21</sup> After hours of gridlock, a backroom deal allows Rutherford B. Hayes to be declared the winner in exchange for removing federal troops from Southern states, effectively ending Reconstruction.<sup>22</sup> Openly white supremacist state governments will dominate the region under one-party rule for nearly a century.<sup>23</sup>

It is March 3, 1913. The National American Woman Suffrage Association is marching in Washington, D.C., to demand universal suffrage.<sup>24</sup> To ensure the participation of Southern women, Black marchers are instructed to form a separate contingent at the back of the parade rather than march with their state delegations.<sup>25</sup> Ida B. Wells refuses to comply and joins the Illinois delegation as it passes the crowd of spectators.<sup>26</sup> Women will gain the right to vote through the ratification of the Nineteenth Amendment in 1920,<sup>27</sup> but Black women will largely remain disenfranchised until the Voting Rights Act of 1965 (“VRA”) effectively ends segregation at the ballot box.<sup>28</sup>

It is 1508. Juan Ponce de León has established a Spanish settlement in Borikén—later known as Puerto Rico—where native Taíno people are enslaved.<sup>29</sup> As the Taíno dwindle in population from the ravages of colonialism,

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<sup>18</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 465 (repealed 1864).

<sup>19</sup> See Ken Drexler, *Compromise of 1850: Primary Documents in American History*, LIBR. OF CONG.: RSCH. GUIDES (Apr. 11, 2019), <https://guides.loc.gov/compromise-1850> [<https://perma.cc/QF5J-9KFZ>].

<sup>20</sup> Fugitive Slave Act of 1850, § 9, 9 Stat. at 465.

<sup>21</sup> See JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 329 (2018); ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, at 327 (paperback ed. 2004).

<sup>22</sup> See LEPORE, *supra* note 21, at 329-30.

<sup>23</sup> See *id.* at 330.

<sup>24</sup> See Paula J. Giddings, *A Noble Endeavor: Ida B. Wells-Barnett and Suffrage*, NAT'L PARK SERV. (Apr. 1, 2020), <https://www.nps.gov/articles/000/a-noble-endeavor-ida-b-wells-barnett-and-suffrage.htm> [<https://perma.cc/3EPA-JUHW>].

<sup>25</sup> See *id.*

<sup>26</sup> *Id.*

<sup>27</sup> U.S. CONST. amend. XIX.

<sup>28</sup> See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

<sup>29</sup> Russell Schimmer, *Puerto Rico*, YALE UNIV. GENOCIDE STUD. PROGRAM,

the Spanish will begin to replace them with enslaved people kidnapped from Africa.<sup>30</sup>

It is August 1619. British privateers have seized a Portuguese slave ship and captured the enslaved people on board.<sup>31</sup> They are brought to Virginia, where they and other African people and their descendants will be subjugated in a racial caste system.<sup>32</sup>

It is June 19, 1865. Major General Gordon Granger issues General Order No. 3 in Galveston, Texas, to enforce the emancipation of all enslaved people in Texas.<sup>33</sup> The order, believed to have been read aloud to the public,<sup>34</sup> proclaims “absolute equality of personal rights and rights of property between former masters and slaves.”<sup>35</sup> The formal end of slavery throughout the United States will occur in six months when the Thirteenth Amendment is ratified.<sup>36</sup>

It is 1832. John Chavis, the first college-educated Black man in the United States<sup>37</sup> and a veteran of the Revolution,<sup>38</sup> is forced out of his work as a teacher and preacher.<sup>39</sup> New laws have been passed to forbid these activities among Black people, whether free or enslaved, in response to Nat Turner’s Rebellion.<sup>40</sup>

It is November 10, 1898. Following an openly white supremacist election campaign to oust a biracial alliance that governed Wilmington, North Carolina, a mob organized by prominent citizens attacks Black businesses and homes.<sup>41</sup>

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<https://gsp.yale.edu/case-studies/colonial-genocides-project/puerto-rico>  
[<https://perma.cc/98TY-66Y8>] (last visited Jan. 17, 2022).

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

<sup>31</sup> See Nikole Hannah-Jones, *Our Founding Ideals of Liberty and Equality Were False When They Were Written. Black Americans Fought to Make Them True. Without This Struggle, America Would Have No Democracy at All.*, N.Y. TIMES MAG., Aug. 18, 2019, at 14, 16.

<sup>32</sup> See *id.*

<sup>33</sup> NCC Staff, *Juneteenth: Understanding Its Origins*, NAT’L CONST. CTR.: CONST. DAILY (June 19, 2021), <https://constitutioncenter.org/blog/juneteenth-understanding-its-origins> [<https://perma.cc/2459-24EB>].

<sup>34</sup> *Id.*

<sup>35</sup> General Order No. 3, June 19, 1865, *reprinted in General Orders, No. 3*, HOUS. TRI-WKLY. TEL., July 14, 1865, at 3, <https://texashistory.unt.edu/ark:/67531/metaph232756/> [<https://perma.cc/2HEG-QF79>].

<sup>36</sup> U.S. CONST. amend. XIII.

<sup>37</sup> Working Grp. on Afr.-Am. Hist., *African Americans at Washington and Lee: A Timeline*, WASH. & LEE UNIV., <https://my.wlu.edu/working-group-on-african-american-history/timeline-of-african-americans-at-wandl> [<https://perma.cc/U4YY-BBEG>] (last visited Jan. 17, 2022).

<sup>38</sup> See HELEN CHAVIS OTHOW, JOHN CHAVIS: AFRICAN AMERICAN PATRIOT, PREACHER, TEACHER, AND MENTOR (1763-1838) 63 (2001).

<sup>39</sup> See *id.* at 65-66, 68.

<sup>40</sup> See *id.* at 66, 68.

<sup>41</sup> See Timothy B. Tyson & David S. Cecelski, *Introduction to DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY* 3, 4-5 (David S. Cecelski & Timothy B. Tyson eds., 1998) [hereinafter DEMOCRACY BETRAYED].



The mob begins by burning a prominent Black-owned newspaper.<sup>42</sup> The mob's leaders force the mayor, board of aldermen, and police chief to resign at gunpoint and then install a new city council, which elects the mob's leader as mayor.<sup>43</sup> The instigators of the coup include several future governors, senators, and a Secretary of the Navy.<sup>44</sup>

It is June 1, 1921. In the early hours of the morning, a white mob sets fire to Black-owned businesses in Tulsa, Oklahoma's Greenwood neighborhood.<sup>45</sup> Greenwood—known as the “Black Wall Street”—is one of the wealthiest Black neighborhoods in the country.<sup>46</sup> As dawn breaks, the white mob will rush Greenwood en masse, looting, shooting indiscriminately, and pulling Black residents from their homes to round them up in detention centers.<sup>47</sup> The sheer size of the mob will overwhelm the Black residents defending their neighborhood, many of whom will be forced to flee the city.<sup>48</sup> As the morning drags on, white attackers will destroy over one million dollars of property,<sup>49</sup> and their actions will leave eight to ten thousand people homeless.<sup>50</sup>

It is May 13, 1985. Philadelphia police resolve to bomb a rowhouse where members of MOVE, an anarcho-primitivist Black separatist group, are engaged in a shootout with police.<sup>51</sup> A Philadelphia police lieutenant drops a satchel bomb on the rowhouse,<sup>52</sup> starting a fire that Police Commissioner Gregore J. Sambore and Fire Commissioner William Richmond determine “should . . . burn until it neutralize[s] the bunker.”<sup>53</sup> The fire kills six adults and five children inside before spreading and destroying dozens of nearby homes

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<sup>42</sup> See H. Leon Prather Sr., *We Have Taken a City: A Centennial Essay*, in DEMOCRACY BETRAYED, *supra* note 41, at 15, 32.

<sup>43</sup> See *id.* at 36-37.

<sup>44</sup> *Id.* at 20-22; John Haley, *Race, Rhetoric, and Revolution*, in DEMOCRACY BETRAYED, *supra* note 41, at 207, 220.

<sup>45</sup> Scott Ellsworth, *The Tulsa Race Riot*, in OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT 37, 71-86 (2001).

<sup>46</sup> Yuliya Parshina-Kottas, Anjali Singhvi, Audra D.S. Burch, Guilbert Gates, Troy Griggs, Mika Gröndahl, Lingdong Huang, Eleanor Lutz, Tim Wallace, Jeremy White & Josh Williams, *What Was Lost in the Tulsa Race Massacre*, N.Y. TIMES, May 30, 2021, at 21, <https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html>.

<sup>47</sup> Ellsworth, *supra* note 45, at 74.

<sup>48</sup> *Id.* at 77.

<sup>49</sup> Parshina-Kottas et al., *supra* note 46, at 21.

<sup>50</sup> *Id.* at 24. Adjusted for inflation, the property loss amounts to twenty-seven million dollars. *Id.* at 21.

<sup>51</sup> Lindsey Norward, *The Day Philadelphia Bombed Its Own People*, VOX (Aug. 15, 2019, 9:03 AM), <https://www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move>; see Bobbi Booker, *Thirty Years Later, MOVE Still Hurts*, PHILA. MAG. (May 13, 2015, 12:46 PM), <https://www.phillymag.com/news/2015/05/13/thirty-years-move-still-hurts/>.

<sup>52</sup> Norward, *supra* note 51.

<sup>53</sup> *Africa v. City of Philadelphia*, 158 F.3d 711, 715 (3d Cir. 1998).

and leaving more than two hundred people homeless.<sup>54</sup> No city officials will face criminal charges for the attack.<sup>55</sup>

It is May 29, 2020. Omar Jimenez and his CNN news crew report on the racial justice protests following George Floyd's murder in Minneapolis.<sup>56</sup> While Jimenez's crew broadcasts live, police order them to move.<sup>57</sup> Jimenez and his crew agree to move and ask where they should go.<sup>58</sup> Rather than answer, the police officers arrest Jimenez and his crew live on national television.<sup>59</sup> In the course of violently suppressing protests during the following month, police around the country will routinely attack journalists.<sup>60</sup>

It is December 1859. Alfred Iverson, a Senator from Georgia, is denouncing his congressional opponents for their refusal to condemn a book, *The Impending Crisis of the South: How to Meet It*.<sup>61</sup> The book lays out the economic case against slavery as an institution detrimental to both enslaved persons and white farmers and laborers outside of the aristocracy.<sup>62</sup> Senator Iverson calls for all those who support or endorse the book to be hanged as accessories to John Brown's raid.<sup>63</sup> In Southern states, abolitionists are prosecuted for merely circulating a copy of the book.<sup>64</sup>

It is November 1964. Martin Luther King, Jr., is sent an anonymous letter threatening to reveal his sexual affairs to the public if he does not commit suicide before being awarded the Nobel Peace Prize.<sup>65</sup> Dr. King correctly believes that

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<sup>54</sup> Norward, *supra* note 51.

<sup>55</sup> *Id.*

<sup>56</sup> Jason Hanna & Amir Vera, *CNN Crew Released from Police Custody After They Were Arrested Live On Air in Minneapolis*, CNN (May 29, 2020, 8:19 PM), <https://www.cnn.com/2020/05/29/us/minneapolis-cnn-crew-arrested/index.html> [<https://perma.cc/NW5K-9AP8>].

<sup>57</sup> *Id.*

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See* Courtney Douglas, *Amid Black Lives Matter Protests, a Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/> [<https://perma.cc/Y9Y6-CKAA>].

<sup>61</sup> *See* Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book*, *The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1144-45 (1993).

<sup>62</sup> *See id.* at 1141-42 (citing HINTON ROWAN HELPER, *THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT passim* (George M. Fredrickson ed., Harvard Univ. Press 1968) (1857)).

<sup>63</sup> *Id.* at 1145 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 30 (1859) (statement of Sen. Alfred Iverson)).

<sup>64</sup> *See, e.g., id.* at 1159-67 (describing Reverend Daniel Worth's prosecution in North Carolina for circulating Helper's book).

<sup>65</sup> *See* Beverly Gage, *I Have a [Redacted]*, N.Y. TIMES MAG., Nov. 16, 2014, at 15, 15-16; *see also* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTEL. ACTIVITIES, FINAL REPORT, S. REP. NO. 94-755, bk. 3, at 158-61 (1976) [hereinafter CHURCH

the FBI sent him the letter.<sup>66</sup> The FBI will conduct additional “COINTELPRO” surveillance of civil rights activists for several years<sup>67</sup> before these efforts are exposed to the public.<sup>68</sup>

It is 1994. Dan Baum interviews John Ehrlichman, White House Counsel under President Richard Nixon, who bluntly describes the impetus behind the “War on Drugs.”<sup>69</sup> Ehrlichman says that the public association of drugs with “the antiwar left and [B]lack people,” followed by the heavy criminalization of those drugs, was engineered to target leaders and break up communities that President Nixon saw as his enemies.<sup>70</sup> The War on Drugs is ruthlessly effective at driving the mass incarceration of Black people.<sup>71</sup>

It is July 28, 1868. Secretary of State William Seward certifies that enough states have ratified the Fourteenth Amendment for it to become law.<sup>72</sup> The Amendment’s drafters believe it to settle the question of whether the rights enumerated in the Constitution apply against the states through its Privileges or Immunities Clause.<sup>73</sup> In only five years, the Supreme Court will effectively write this Clause out of the Constitution in the *Slaughter-House Cases*.<sup>74</sup>

It is May 30, 1942. Fred Korematsu is arrested in San Leandro for remaining there rather than reporting to an assembly center for removal to an internment camp.<sup>75</sup> He will challenge his conviction, arguing in part that it violates the

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COMMITTEE REPORT]; KENNETH O’REILLY, “RACIAL MATTERS”: THE FBI’S SECRET FILE ON BLACK AMERICA, 1960-1972, at 142-47 (1989).

<sup>66</sup> See CHURCH COMMITTEE REPORT, *supra* note 65, at 158-59. See generally *id.* at 79-184 (providing case study of FBI’s systematic efforts to undermine Dr. King).

<sup>67</sup> See *id.* at 179-80 (detailing FBI’s initiation of “Black Nationalist-Hate Groups COINTELPRO” in late 1960s); O’REILLY, *supra* note 65, at 276-92, 300-24 (recounting COINTELPRO operations targeting Black leaders); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 53 (10th anniversary ed. 2020) (describing “COINTELPRO,” FBI counterintelligence program).

<sup>68</sup> See Betty Medsger & Ken W. Clawson, *Stolen Documents Describe FBI Surveillance Activities*, WASH. POST, Mar. 24, 1971, at A1.

<sup>69</sup> Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S MAG., Apr. 2016, at 22, 22.

<sup>70</sup> *Id.*

<sup>71</sup> See ALEXANDER, *supra* note 67, at 224-25, 233-36.

<sup>72</sup> *14th Amendment Adopted*, HISTORY.COM (July 27, 2020), <https://www.history.com/this-day-in-history/14th-amendment-adopted> [<https://perma.cc/GA7S-5GC5>].

<sup>73</sup> See Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1146-47 (2000) (arguing that ordinary contemporaneous understanding of “privileges or immunities” encompassed protections included in Bill of Rights).

<sup>74</sup> 83 U.S. (16 Wall.) 36, 75 (1873) (“If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter . . . are not embraced by this paragraph of the amendment.”).

<sup>75</sup> *Korematsu v. United States*, 323 U.S. 214, 220-22 (1944).

implicit equality component of the Fifth Amendment's Due Process Clause.<sup>76</sup> In upholding *Korematsu's* conviction, the Court will articulate an exacting standard for evaluating restrictions on the civil rights of a specific racial group while maintaining that the exclusion of persons of Japanese descent satisfies it.<sup>77</sup>

It is September 24, 1957. President Dwight Eisenhower sends the Army's 101st Airborne Division to enforce the desegregation of Little Rock Central High,<sup>78</sup> invoking the Insurrection Act of 1807.<sup>79</sup> The Supreme Court's rejection of the principle of "separate but equal"<sup>80</sup> and its command that desegregation of the nation's public schools proceeds with "all deliberate speed"<sup>81</sup> has seen widespread resistance across the South.<sup>82</sup> Arkansas Governor Orval Faubus's plan to deploy the State's National Guard to prevent enforcement of court-ordered desegregation at the school is foiled when President Eisenhower federalizes the entire Arkansas National Guard.<sup>83</sup> Massive resistance campaigns against school desegregation will continue for another decade.<sup>84</sup>

It is May 1988. Black homeowners in Atlanta have less access to mortgage credit than their lower-paid, white counterparts.<sup>85</sup> This systemic lack of faith in Black borrowers' ability to repay their loans traces back decades, to the Federal Home Owners' Loan Corporation ("HOLC") and Federal Housing Administration's New Deal-era lending and underwriting practices.<sup>86</sup> HOLC's practice of designating whole neighborhoods as good or poor credit risks based

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<sup>76</sup> Brief for Appellant at 48, *Korematsu*, 323 U.S. 214 (No. 22). The Court would not recognize an equality principle in the Fifth Amendment for another decade. See *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954) (applying equal protection principle to federal government action through Fifth Amendment Due Process Clause).

<sup>77</sup> *Korematsu*, 323 U.S. at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . .").

<sup>78</sup> Anthony Lewis, *Eisenhower On Air: Says School Defiance Has Gravely Harmed Prestige of U.S.*, N.Y. TIMES, Sept. 25, 1957, at A1.

<sup>79</sup> Exec. Order No. 10730, 3 C.F.R. 389-90 (1954-1958) (citing 10 U.S.C. §§ 332-334 (current version at 10 U.S.C. §§ 252-254)). See generally JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 34-42 (2018) (providing historical overview of President's authority under Insurrection Acts).

<sup>80</sup> *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

<sup>81</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

<sup>82</sup> See EQUAL JUST. INITIATIVE, SEGREGATION IN AMERICA 20-39 (2018) (describing Southern "massive resistance" campaign in response to desegregation decisions).

<sup>83</sup> See *id.* at 76.

<sup>84</sup> See *id.* at 39.

<sup>85</sup> See Bill Dedman, *Atlanta Blacks Losing in Home Loans Scramble* (pt. 1), ATLANTA J.-CONST., May 1, 1988, at 1.

<sup>86</sup> See RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63-65 (2017).

on their racial composition has become known as “redlining.”<sup>87</sup> The prevalence of redlining hinders Black homeownership, while homeownership becomes the predominant means for white families to accumulate wealth.<sup>88</sup>

It is November 22, 1977. Justice Lewis F. Powell, Jr., circulates a draft opinion to his colleagues concluding that affirmative action programs for college admissions must be subjected to the strict scrutiny applied to racially discriminatory laws.<sup>89</sup> He will ultimately cobble together opposing majorities for his views, ruling that such a standard applies, and strike down race-based quotas<sup>90</sup> while enshrining the state’s interest in a diverse student body as sufficient to meet the standard with less-restrictive methods.<sup>91</sup> Allan Bakke, a white applicant who was initially denied admission to U.C. Davis School of Medicine,<sup>92</sup> will force the school to admit him as a student.<sup>93</sup>

It is December 31, 2019. Judge Loretta Biggs issues an opinion blocking North Carolina’s voter identification law as racially discriminatory.<sup>94</sup> The ruling is a rare victory for voting rights advocates, who have seen a host of such laws passed and upheld around the country—but especially in the South.<sup>95</sup> The wave

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<sup>87</sup> See *id.* at 64 (describing HOLC’s color-coded maps in which neighborhoods were colored green to illustrate they were “safest” and neighborhoods with Black residents were colored red to illustrate “riskiness” of Black borrowers regardless of income level); see also Dedman, *supra* note 85, at 2 (describing practice of redlining).

<sup>88</sup> See ROTHSTEIN, *supra* note 86, at 64; see also, e.g., ANA PATRICIA MUÑOZ, MARLENE KIM, MARIKO CHANG, REGINE O. JACKSON, DARRICK HAMILTON & WILLIAM A. DARITY JR., FED. RSRV. BANK OF BOS. WITH DUKE UNIV. & THE NEW SCH., *THE COLOR OF WEALTH IN BOSTON* 20 (2015) (“Racial differences in asset ownership, particularly homeownership, contribute to vast racial disparities in net worth.”); *id.* at 20 tbl.9 (documenting median net worth of \$247,500 for white households and \$8 for Black households in Boston area).

<sup>89</sup> See Memorandum from Lewis F. Powell, Jr., J., Sup. Ct. of the U.S., to Warren E. Burger, William J. Brennan, Jr., Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, William H. Rehnquist & John Paul Stevens, JJ., Sup. Ct. of the U.S. 3-5 (Nov. 22, 1977), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?filename=32&article=1113&context=casefiles&type=additional>; see also BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 80-85 (1988).

<sup>90</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (opinion of Powell, J.).

<sup>91</sup> *Id.* at 320 (plurality opinion) (“[T]he courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”).

<sup>92</sup> *Id.* at 276-77.

<sup>93</sup> See *id.* at 320 (opinion of Powell, J.).

<sup>94</sup> *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 23-24, 43, 53-54 (M.D.N.C. 2019) (“[The law’s] ID and ballot-challenge provisions have been enjoined, and . . . no voter ID will be required in the upcoming election cycle . . .”).

<sup>95</sup> See, e.g., Max Garland, Alex Amico, Ali Schmitz, Phillip Jackson & Pam Ortega, *New Voting Laws in the South Could Affect Millions of African Americans*, NBC NEWS (Aug. 29, 2016, 3:34 PM), <https://www.nbcnews.com/news/nbcblk/new-voting-laws-south-could-affect-millions-african-americans-n639511> [<https://perma.cc/S3B4-P4JV>] (detailing Southern “wave” of efforts to restrict voting).

of facially neutral voting restrictions burst through the floodgates opened by *Shelby County v. Holder*,<sup>96</sup> in which the Supreme Court severely limited Congress's remedial power under the Fifteenth Amendment by declaring that the systemic inequalities the VRA sought to remedy were confined to the distant past.<sup>97</sup>

It is 1981. Alexander Lamis interviews Lee Atwater,<sup>98</sup> a Reagan Administration official who will go on to run George H.W. Bush's 1988 presidential campaign.<sup>99</sup> Atwater lays bare his strategy of using ever more abstract dog-whistles to reach racist white voters.<sup>100</sup> By shifting from openly attacking Black people to opposing actions taken for their benefit to promoting policies that—in the aggregate—will disproportionately harm them, a politician can appeal to racist white voters while maintaining a patina of respectability.

It is June 27, 2019. Chief Justice John Roberts issues an opinion ruling that partisan gerrymandering is a nonjusticiable political question.<sup>101</sup> While racial gerrymanders may still be struck down under the VRA—ensuring districts in which minority voters can elect the candidate of their choice—there is no constitutional protection for the political parties those candidates align with.<sup>102</sup> In this way, white supremacist legislatures are given free rein to draw favorable districts for white supremacist political parties, so long as Black and Brown voters have proportional electoral power.

It is July 1, 2021. Justice Samuel Alito issues an opinion ruling that a facially neutral restriction on the time, place, or manner of voting that has a disparate impact on the voting rights of minority voters—even when the impact is twice what it is for white voters<sup>103</sup>—cannot be challenged under the VRA if the overall burden is small and in line with traditional burdens of voting.<sup>104</sup> Justice Alito

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<sup>96</sup> 570 U.S. 529 (2013); see Garland et al., *supra* note 95 (describing impact of *Shelby County*).

<sup>97</sup> See *Shelby County*, 570 U.S. at 554 (“Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”).

<sup>98</sup> Rick Perlstein, *Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, NATION (Nov. 13, 2012), <https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/>.

<sup>99</sup> Michael Oreskes, *Lee Atwater, Master of Tactics for Bush and G.O.P., Dies at 40*, N.Y. TIMES, Mar. 30, 1991, at 1.

<sup>100</sup> See Perlstein, *supra* note 98.

<sup>101</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501, 2506-07 (2019) (finding partisan gerrymandering nonjusticiable because “the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly”).

<sup>102</sup> See Sara Tofighbakhsh, Note, *Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party*, 120 COLUM. L. REV. 1885, 1886, 1911 (2020).

<sup>103</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2368 (2021) (Kagan, J., dissenting).

<sup>104</sup> See *id.* at 2348 (majority opinion) (“As with the out-of-precinct policy, the modest evidence of racially disparate burdens caused by HB 2023, in light of the State’s justifications,

defends a strong state interest in combating the nearly nonexistent threat of voter fraud.<sup>105</sup> With the VRA's preclearance and intent prongs previously neutralized,<sup>106</sup> little remains of one of the premier laws for protecting civil rights.

It is October 31, 1963. John Terry, Richard Chilton, and Carl Katz are stopped on a Cleveland street by a police officer who finds their patterns of walking and talking together suspicious.<sup>107</sup> Terry and Chilton are Black, Katz is white—a fact that Detective McFadden (also a white man<sup>108</sup>) will note in his testimony during the initial suppression hearing but that the Supreme Court will pass by silently.<sup>109</sup> Terry's challenge to his arrest for a handgun that Detective McFadden finds in his pocket will lead to the birth of a doctrine granting officers a broad exception from the requirement that searches require probable cause.<sup>110</sup> This, in turn, will become a favorite tool of police to harass Black men on the street.<sup>111</sup>

It is August 2014. Shaniz West returns to her Idaho home to find it surrounded by police looking for her ex-boyfriend.<sup>112</sup> Rather than use the key that West provides them to get into the house, the police summon a SWAT team, which breaks the home's windows and ruins West's belongings with tear gas grenades.<sup>113</sup> The officers will all be granted qualified immunity when the Ninth Circuit determines that West's right not to have her home and belongings rendered unusable was insubstantial after she consented to a search of the house.<sup>114</sup>

It is March 19, 2002. Brian Bartholomew, who became a police informant after being charged with drug possession, enters Afton Callahan's home to purchase methamphetamine.<sup>115</sup> On Bartholomew's signal, police enter without

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leads us to the conclusion that the law does not violate § 2 of the VRA.”).

<sup>105</sup> See *id.* at 2339-40.

<sup>106</sup> See *id.* at 2354-58 (Kagan, J., dissenting).

<sup>107</sup> See *Terry v. Ohio*, 392 U.S. 1, 5-7 (1968).

<sup>108</sup> Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 964 (1999).

<sup>109</sup> *Id.* at 967.

<sup>110</sup> See *Terry*, 392 U.S. at 27 (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1516 (2017).

<sup>111</sup> See Carbado, *supra* note 110, at 1537; Thompson, *supra* note 108, at 957-59.

<sup>112</sup> *West v. City of Caldwell*, 931 F.3d 978, 980-81 (9th Cir. 2019).

<sup>113</sup> See *id.* at 981-82.

<sup>114</sup> See *id.* at 987-88 (“Defendants are entitled to qualified immunity because, assuming that their actions violated Plaintiff's Fourth Amendment rights, those rights were not clearly established, at the appropriate level of specificity, in August 2014.”).

<sup>115</sup> *Callahan v. Millard County*, 494 F.3d 891, 893 (10th Cir. 2007), *rev'd sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

a warrant, arresting Callahan and searching the home.<sup>116</sup> Callahan will attempt to sue the officers for the warrantless search,<sup>117</sup> which the county will argue was justified by his previous consent to allow the police's informant into the home.<sup>118</sup> A unanimous Supreme Court will use the case to remove the procedural requirement that courts first evaluate whether a constitutional right was violated before determining whether that right was clearly established at the time of the violation.<sup>119</sup>

It is March 6, 1857. Chief Justice Roger Taney rules that Dred Scott can have no recourse to seek his freedom in federal court.<sup>120</sup> The ruling turns on the idea that Scott cannot satisfy the diversity of citizenship required to have a state law claim heard in federal court because, as a Black man, he cannot be a citizen of the United States.<sup>121</sup> Chief Justice Taney cherry-picks his sources to conclude that state laws at the time the Constitution was adopted did not treat Black people as citizens.<sup>122</sup> He carries the argument even further, though, and concludes that the states lack any power to make a Black person a U.S. citizen.<sup>123</sup> This line of reasoning will be invalidated by the passage of the Thirteenth<sup>124</sup> and Fourteenth Amendments.<sup>125</sup>

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The Supreme Court has in its time produced something of a multidisc boxed set of racist decision hits. Many of them feature in basic constitutional law and criminal procedure casebooks—including, in addition to those I referenced above, the *Civil Rights Cases*,<sup>126</sup> *McCleskey v. Kemp*,<sup>127</sup> *Village of Arlington*

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<sup>116</sup> *Pearson*, 555 U.S. at 228.

<sup>117</sup> *See id.* at 227.

<sup>118</sup> *See id.* at 229.

<sup>119</sup> *See id.* at 236, 242 (abandoning procedural requirement and opining that lower “courts should have the discretion to decide whether th[e] procedure is worthwhile in particular cases”).

<sup>120</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393, 427 (1857) (enslaved party) (“Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts . . .”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

<sup>121</sup> *Id.* at 426-27. Chief Justice Taney also contended that even if Black persons were legally capable of citizenship, enslaved persons were not. *Id.* at 427.

<sup>122</sup> *See id.* at 407-21.

<sup>123</sup> *Id.* at 405-06 (“Each State may still confer [rights and privileges] upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States.”).

<sup>124</sup> U.S. CONST. amend. XIII.

<sup>125</sup> U.S. CONST. amend. XIV.

<sup>126</sup> 109 U.S. 3 (1883).

<sup>127</sup> 481 U.S. 279 (1987).



*Heights v. Metropolitan Housing Development Corp.*,<sup>128</sup> *Milliken v. Bradley*,<sup>129</sup> *City of Richmond v. J.A. Croson Co.*,<sup>130</sup> *Gratz v. Bollinger*,<sup>131</sup> *United States v. Armstrong*,<sup>132</sup> *Whren v. United States*,<sup>133</sup> *California v. Hodari D.*,<sup>134</sup> and many more.<sup>135</sup> Many of these decisions date to the past century—and the ones featured

<sup>128</sup> 429 U.S. 252 (1977).

<sup>129</sup> 433 U.S. 267 (1977).

<sup>130</sup> 488 U.S. 469 (1989).

<sup>131</sup> 539 U.S. 244 (2003).

<sup>132</sup> 517 U.S. 456 (1996).

<sup>133</sup> 517 U.S. 806 (1996).

<sup>134</sup> 499 U.S. 621 (1991).

<sup>135</sup> See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 381-84 (2010) (concluding that silence during police interrogation does not constitute invocation of *Miranda* rights and that uncoerced, post-*Miranda*-warning statements constitute implied waiver of those rights); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 204 (2008) (plurality opinion) (applying “balancing” test to uphold state voter identification law against equal protection claim); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007) (applying strict scrutiny to invalidate city’s attempt to prevent de facto segregation in schools and implying that racial diversity is not compelling state interest outside of higher education context); *Minnesota v. Carter*, 525 U.S. 83, 89-91 (1998) (denying Fourth Amendment protection to non-overnight visitors in homes); *Lewis v. Casey*, 518 U.S. 343, 349-51 (1996) (narrowing prisoners’ right to meaningful access to courts); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (concluding that desegregation orders may be dissolved when district has “complied in good faith” for sufficient time period and “the vestiges of past [de jure] discrimination ha[ve] been eliminated to the extent practicable” (emphasis added)); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (declaring that Fourth Amendment’s exclusionary rule does not apply where police “reasonably (though erroneously) believe that the person who consented to their entry is a resident of the premises”); *Teague v. Lane*, 489 U.S. 288, 292-96 (1989) (reiterating limited retroactivity of *Batson v. Kentucky*, 476 U.S. 79 (1986), and rejecting Black defendant’s challenge to prosecutor’s use of all ten peremptory challenges to ensure all-white jury); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (concluding that due process only requires states to preserve evidence in “cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant”); *Patterson v. Illinois*, 487 U.S. 285, 290-91, 296-97 (1988) (narrowing Sixth Amendment right to counsel protections by requiring postindictment defendants to affirmatively invoke right and lowering standard for waiver); *United States v. Leon*, 468 U.S. 897, 922 (1984) (creating “good faith” exception to Fourth Amendment’s exclusionary rule); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (creating “public safety” exception to compulsory self-incrimination protections required under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Strickland v. Washington*, 466 U.S. 668, 687, 689 (1984) (adopting “highly deferential” scrutiny of counsel’s performance in ineffective assistance of counsel claims); *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (requiring showing of discriminatory intent to prevail on both Fifteenth Amendment and Fourteenth Amendment claims); *Ambach v. Norwick*, 441 U.S. 68, 80 (1979) (upholding New York’s citizenship requirement for eligible public school teachers under *Foley v. Connelie*, 435 U.S. 291 (1978)); *Foley*, 435 U.S. at 295-97 (announcing that citizen classifications related to self-government need only satisfy rational basis review rather than strict scrutiny); *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971) (rejecting equal protection claim, despite evidence of racist intent, where city equally impacted all residents by closing municipal pool

in casebooks certainly follow this trend, as most students have more of a need to learn what the law *is* than what it once was.

In recent years, some of the most egregiously racist cases have involved the Court resting on constitutional colorblindness to establish why it will not attempt to deal in reasoning or remedies focused on race.<sup>136</sup> To advocates of this sort of colorblindness, an ideal society would make no distinction whatsoever on the basis of race, and we should endeavor to reach such a state.<sup>137</sup> At their most extreme, such advocates seek to eliminate racism in society by eliminating racial distinctions in law immediately and entirely.<sup>138</sup> Or perhaps I should say that they claim to seek this—my thesis is less charitable as to their goals.

While some form of colorblindness in American discourse predates Reconstruction,<sup>139</sup> the rhetorical weaponization of colorblindness against remedial consideration of race arose as a theme in the late twentieth century.<sup>140</sup> This modern use of colorblind constitutionalism is not so much a corruption of its legacy in the Supreme Court but a reclamation. As Randall Kennedy observed, Justice Harlan’s initial introduction of the concept to Supreme Court jurisprudence affirms white supremacy and squares with the historical Justice Harlan: “After all, he was a former slave owner, initially opposed the Thirteenth Amendment, and tolerated various forms of segregation, notwithstanding his *Plessy* dissent.”<sup>141</sup> Despite colorblindness’s association with antiracist movements,<sup>142</sup> its life as a constitutional doctrine is inextricably bound up with its white supremacist introduction to Supreme Court jurisprudence.<sup>143</sup>

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rather than desegregating it); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (establishing fruit-of-the-poisonous tree doctrine but determining that days-long gap between illegal search and suspect’s voluntary confession dissipates taint of illegality).

<sup>136</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (“Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”); see also Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIA. L. REV. 191, 219 (1997) (“In essence, colorblindness is held together by a conglomeration of baseless contradictions which are illuminated with increasing intensity the more we try to ignore race.”).

<sup>137</sup> See Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 2 (2013).

<sup>138</sup> See *id.*; see also *Parents Involved*, 551 U.S. at 748 (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>139</sup> See Kennedy, *supra* note 137, at 3 (discussing colorblindness’s role in nineteenth-century Massachusetts politics).

<sup>140</sup> See *id.* at 5-6 (discussing constitutional colorblindness’s application against affirmative action and business set-aside programs in Supreme Court opinions).

<sup>141</sup> *Id.* at 5.

<sup>142</sup> See *id.* at 6-7.

<sup>143</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”).

Plenty of attention has been focused on the constitutional failings of jurisprudence in various fields of law. Angela Onwuachi-Willig admirably tackles the gap that *Brown v. Board of Education*<sup>144</sup> left by failing to discuss the reasons schools were segregated in the first place, as well as how white supremacist reasoning has charged into that gap to challenge affirmative action in education.<sup>145</sup> Devon Carbado delves into how ostensibly neutral criminal procedure decisions allow police violence to escalate unaccountably.<sup>146</sup> Henry Chambers examines the history of racial disenfranchisement and the ineffectiveness of current constitutional protections to prevent it.<sup>147</sup> Alison Brown and Angus Erskine have laid bare courts' hesitancy to consider circumstantial evidence of employment discrimination.<sup>148</sup> Law reviews around the country are full of such analyses highlighting instances of racism in our courts.

And yet, the possibility that these disparate fields of law converge on anti-Black jurisprudence because the Court itself is anti-Black often evades scholarly review. An ancient parable from the Indian subcontinent tells the story of a group of blind men seeking to understand what an elephant is by feeling it.<sup>149</sup> Each touches a part of the elephant—its trunk, its ear, its leg—and compares the elephant to some other object.<sup>150</sup> The blind men disagree as to the nature of an elephant because all of them lack the context to observe the whole creature.<sup>151</sup> The parable is meant to counsel against claiming a monopoly on

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<sup>144</sup> 347 U.S. 483 (1954).

<sup>145</sup> See Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 363 (2019) (“Sixty-five years later, our legal discourse has still not caught up with the reality of race that was excluded in *Brown*. Nowhere is this gap in our lives and doctrine clearer than in the affirmative action cases . . .”).

<sup>146</sup> See Carbado, *supra* note 110, at 1514 fig.1 (demonstrating how over-policing of Black and Brown communities escalates into cycle of violence through easy justification of police encounters and unaccountability for use of force).

<sup>147</sup> See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1466 (2002) (“From the earliest days of this country until the recent past, racial minorities in general and [B]lack Americans in particular have often been excluded from choosing their representatives at all levels of government both explicitly through restrictions on voting and implicitly through voting structures erected to minimize their voting impact. That is, their votes have been non-existent, ignored, or diluted.” (footnote omitted)).

<sup>148</sup> See Alison Brown & Angus Erskine, *A Qualitative Study of Judgments in Race Discrimination Employment Cases*, 31 LAW & POL’Y 142, 142 (2009) (“Courts tend to be skeptical of claims of race plaintiffs, and are hesitant to draw inferences of racial discrimination based on circumstantial evidence, even though courts have long recognized that race discrimination is generally subtle in form.”).

<sup>149</sup> E.g., UDĀNA: EXCLAMATIONS 95-97 (Thānissaro Bhikkhu trans., 2012); JALĀL AL-DĪN RŪMĪ, THE MASNAVI bk. III, at verses 1260-1362 (Jawid Mojaddedi trans., Oxford Univ. Press 2013) (c. 1262); see also ED YOUNG, SEVEN BLIND MICE (1992) (substituting blind mice for blind men).

<sup>150</sup> See RŪMĪ, *supra* note 149, at verses 1263-66.

<sup>151</sup> *Id.* at verses 1267-68.

truth, instead teaching to remain open to other perspectives so as to gain a more complete understanding.

In the context of legal academia, we all too often specialize; I have had the pleasure of meeting and learning from experts in a variety of specialties.<sup>152</sup> All of them challenge unjust legal institutions and doctrines in their scholarship, and each of these challenges is important and necessary. I do not think for a moment that any of them believes that the law is fundamentally just, with only a handful of problems in need of redress.

This Article will take a different approach.<sup>153</sup> Rather than focusing on the details of a single issue, I aim to explore their connections through their common patterns. The law once tolerated overt racial discrimination but later rejected the

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<sup>152</sup> For a sample of such experts and their important works, see SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (Tenth-anniversary ed. 2018); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652 (2021); Paul Butler, *Mississippi Goddamn: Flowers v Mississippi's Cheap Racial Justice*, 2019 SUP. CT. REV. 73; Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621; D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008); Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65 (2020); Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55 (2020); Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973 (2019); Onwuachi-Willig, *supra* note 145; Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093 (2018); I. India Thusi, *On Beauty and Policing*, 114 NW. U. L. REV. 1335 (2020).

<sup>153</sup> I am not the only scholar whose work has proceeded in this direction. In a forthcoming piece, Ruth Colker argues that white supremacy has become so entrenched in the Constitution as to turn it to antidemocratic ends to ensure white supremacy's perpetuation. *See* Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. (forthcoming 2022) (manuscript at 5) ("The U.S. has never been willing to allow democracy to flourish because democracy might be a tool to challenge some aspects of white supremacy."). Colker calls for the revival of the debate between William Lloyd Garrison and Frederick Douglass over whether the Constitution is capable of serving as a vehicle for reform. *See id.* (manuscript at 6). Colker essentially takes the side of Garrison: even after the ratification of the Reconstruction Amendments, the Constitution is fundamentally a pro-slavery document. *See id.* (manuscript at 13). While she leaves a caveat for the potential for a radical reinterpretation along the lines of Justice Thurgood Marshall's jurisprudence and calls for the elevation of Black voices, *see id.* (manuscript at 57), she does not explore what such a jurisprudence would entail and does little to highlight the very voices she says must be elevated. I have great respect for Colker's analysis of the white supremacy running through constitutional jurisprudence, but I must take up Douglass's cause in this debate. To that end, this Article will attempt to elevate Black voices and provide a radical vision of the Constitution as an exploration of its abolitionist potential.

appearances of bigotry.<sup>154</sup> In their place, (slightly) subtler systems emerged, relying on facial neutrality and procedural barriers to enforce white supremacy instead.<sup>155</sup> As Justice Harlan said, white supremacy need do little more than rely on established constitutional principles to perpetuate itself.<sup>156</sup> Justice Harlan's vision of white supremacy—that white people could retain their position of privilege, wealth, and authority indefinitely without the intervention of law<sup>157</sup>—is not the white supremacy of the snarling, tiki-torch fascist.<sup>158</sup> Instead, it relies on claims of colorblindness and meritocracy, hoping to avoid scrutiny of the question of just who determines what constitutes merit.<sup>159</sup> White people's cultural dominance, established by centuries of physical and economic violence, ensures that they retain the power to define what abilities and traits are considered meritorious.<sup>160</sup> So long as that remains true, purportedly neutral, colorblind constitutional principles will ensure white people's continued success.

Our constitutional history need not be our fate. While *established* principles sufficiently maintain the status quo, they are not the only principles possible. Many of the drafters of the Reconstruction Amendments believed that the new order they created must necessarily account for race.<sup>161</sup> Black public understandings of the new amendments were inclined to see them as an effort to

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<sup>154</sup> See *infra* Part I (explaining Court's shift from promoting explicit anti-Blackness to implicitly accepting it under guise of colorblindness).

<sup>155</sup> See *infra* Section II.B (explaining procedural mechanisms of oppression in "colorblind" system).

<sup>156</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>157</sup> See *id.*

<sup>158</sup> See Stefan Becket, *Torch-Wielding White Nationalists March Through University of Virginia Campus*, CBS NEWS (Aug. 12, 2017, 11:05 AM), <https://www.cbsnews.com/news/torch-carrying-white-nationalists-march-through-university-of-virginia-ahead-of-rally/> [<https://perma.cc/U9DD-XRR6>].

<sup>159</sup> See Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 529 (2019) ("[D]ecades of research on implicit bias and stereotype threat reveals that common measures of merit, although facially neutral, fail to produce racially neutral results." (footnote omitted)); see also Daphne Martschenko, *The IQ Test Wars: Why Screening for Intelligence Is Still So Controversial*, CONVERSATION (Feb. 1, 2018, 9:32 AM), <https://theconversation.com/the-iq-test-wars-why-screening-for-intelligence-is-still-so-controversial-81428> [<https://perma.cc/NX3B-57E5>] ("According to some researchers, the 'cultural specificity' of intelligence makes IQ tests biased towards the environments in which they were developed – namely white, Western society.").

<sup>160</sup> For example, the concentration of wealth in white families is remarkably persistent, even without government-sanctioned discrimination. See ANGELA HANKS, DANYELLE SOLOMON & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, SYSTEMIC INEQUALITY: HOW AMERICA'S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP 29 (2018) ("Maintaining the status quo translates into another 200 years before African Americans have the same level of wealth as their white counterparts."); MUÑOZ ET AL., *supra* note 88, at 20 (highlighting dramatic wealth disparities between racial groups in Boston area).

<sup>161</sup> See *infra* Section III.A.2 (exploring legislative history of Reconstruction Amendments).

remake the American social order as an antiracist one.<sup>162</sup> The only thing stopping the Supreme Court from adopting such an understanding is the Court's own engrained white supremacy. Our Constitution contains tools sufficient to accomplish a sweeping, antiracist reimagining of the law but requires a Court that believes in that possibility.

Part I will address the Court's history of anti-Black jurisprudence. I will begin with an examination of the Court's openly anti-Black decisions, with a focus on the nineteenth century. This basal layer of anti-Black decisions can inform our understanding of what follows. Beginning with *Plessy v. Ferguson*,<sup>163</sup> I will then explore the Court's use of constitutional colorblindness, particularly in its modern incarnation, as a bludgeon against remedial measures. In this, at least, the Court's modern advocates for a colorblind Constitution are fitting inheritors of Justice Harlan's legacy. In constructing a Constitution that is purportedly colorblind, the Court has essentially rendered the Constitution an anti-Black document.

Next, Part II will examine the consequences of an anti-Black interpretation of the Constitution. As Justice Harlan predicted, simply by purporting to remove race as a factor in constitutional decision-making, white supremacy can be perpetuated where it already exists.<sup>164</sup> The myriad consequences are often the result of the Court's fondness for erecting procedural barriers to the success of any challenge to systemic racism.<sup>165</sup> Blackness, by essentially colonial mechanisms, is criminalized; police become an occupying force.<sup>166</sup> Public discrimination is allowed to persist through the adoption of ostensibly neutral standards that lack regard for the history of oppression that created racial disparities along the lines of those same criteria.<sup>167</sup> Private discrimination is tolerated so long as it can be done without outward displays of bigotry.<sup>168</sup> Purposefully antiracist legislation is limited in its scope, often through the very

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<sup>162</sup> See *infra* Section III.A.3 (describing original public meaning of Reconstruction Amendments from perspective of Black Americans).

<sup>163</sup> 163 U.S. 537 (1896).

<sup>164</sup> See *id.* at 559 (Harlan, J., dissenting) (predicting that white supremacy will flourish even without Constitution's endorsement).

<sup>165</sup> See sources cited *supra* notes 126-35.

<sup>166</sup> See Robert Staples, *White Racism, Black Crime, and American Justice: An Application of the Colonial Model to Explain Crime and Race*, 36 *PHYLON* 14, 17 (1975) ("It is not only that the police force is composed mostly of members of the colonizers' group, but they also represent the more authoritarian and racist members of that sector.").

<sup>167</sup> See, e.g., Kennedy, *supra* note 137, at 6-7 (discussing use of "colorblind" standard to invalidate state actions designed to protect minorities); Laura Reiley, *Judge Halts Debt-Relief Plan for Black Farmers*, *WASH. POST*, June 25, 2021, at A19 (describing injunction against Biden Administration's efforts to direct certain federal aid to farmers of color to address past discrimination).

<sup>168</sup> Cf. Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 *SUP. CT. REV.* 1, 15 ("So long as the state maintains [a] formally neutral posture, the substantive inequalities imposed by private discrimination are, from the Constitution's standpoint, not the state's responsibility.").

constitutional tools meant to authorize it.<sup>169</sup> The long years of slavery and Jim Crow laws ensured that—without remedial measures to reshape society—Black people would continue to face an uneven playing field in this country. To achieve any measure of success, we would have to be twice as good as our white counterparts. Constitutional colorblindness ignores this history and modern social realities with catastrophically anti-Black consequences.

Finally, Part III will present the alternative: the antiracist potential of a color-conscious Constitution. While the benefits of an antiracist society should be obvious, the Constitution's potential as a tool for achieving that goal has invited some skepticism.<sup>170</sup> To that end, Part III will begin with a Section addressing historical antiracist understandings of the Constitution. I will primarily compare the legislative histories of the Reconstruction Amendments and their radical heritage to contemporaneous Black reactions to the Amendments and early legislation under them. These understandings form a critical—and too often disregarded—component of the Amendments' original public meaning.

The other two Sections of Part III will deal with the potential scope of the Reconstruction Amendments' application. This Article advances a novel structural understanding of the Reconstruction Amendments, illuminating their abolitionist potential as a system unto themselves.<sup>171</sup> First, I will explore the unrealized potential of the Thirteenth Amendment for further liberation from the badges and incidents of slavery. While I have previously explored the Amendment's potential use as a tool of police abolition,<sup>172</sup> the conceivable scope of the Amendment is substantially broader. Our entire carceral system has been bent to replicate many of the abuses of slavery, despite the supposed end of convict leasing during the New Deal era.<sup>173</sup> Modern legislation to restrict reproductive choices—which disproportionately impacts Black women<sup>174</sup>—recalls the use of forced reproduction at the hands of enslavers.<sup>175</sup> If we were to

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<sup>169</sup> See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013) (invalidating VRA coverage formula enacted under Congress's Fifteenth Amendment enforcement powers).

<sup>170</sup> See Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 91-92 (2014) (listing various left-leaning scholars' constitutional skepticism).

<sup>171</sup> But see generally ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994) (exploring parts of this system by interrogating content of Fourteenth Amendment's Equal Protection and Due Process Clauses). West's work is an important precursor to this project but is incomplete in its exploration of the Reconstruction Amendments.

<sup>172</sup> Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108 (2020).

<sup>173</sup> See Stian Rice, *How Anti-immigration Policies Are Leading Prisons to Lease Convicts as Field Laborers*, PAC. STANDARD (June 7, 2019), <https://psmag.com/social-justice/anti-immigrant-policies-are-returning-prisoners-to-the-fields> [<https://perma.cc/X3GW-NBVZ>].

<sup>174</sup> See IF/WHEN/HOW, *WOMEN OF COLOR AND THE STRUGGLE FOR REPRODUCTIVE JUSTICE* 3 (2016).

<sup>175</sup> See generally MARIE JENKINS SCHWARTZ, *BIRTHING A SLAVE: MOTHERHOOD AND MEDICINE IN THE ANTEBELLUM SOUTH* (2006) (exploring enslavers' coordination with doctors

finish the work of abolition, we would do well to remember the Thirteenth Amendment's potential as a foundation for that work.

The final Section of Part III will address the various tools of the Fourteenth and Fifteenth Amendments for building an abolition democracy. While most of these tools have seen at least limited use from Congress or the Court to support race-conscious remedies, their potential is much greater. I will explore each of these tools as a possible vehicle for such remedies. The Constitution, interpreted to truly entitle Black people to the equal protection of the law, due process, the privileges and immunities of citizenship, and equal voting rights, would be radically different than it is today—all without changing a word. This radical interpretation, though, is wholly consistent with contemporaneous understandings of the Reconstruction Amendments. The Court—its role in systemic racism shielded by its fundamentally antidemocratic nature—has chosen a different interpretation so far. But if we want to live to see the last stains of white supremacy scrubbed from our constitutional system, we must first envision a better framework.

#### I. FROM OVERT ANTI-BLACKNESS TO COLORBLINDNESS

*Both the Fourteenth and Fifteenth Amendments were thus made innocuous so far as the Negro was concerned, and the Fourteenth Amendment in particular became the chief refuge and bulwark of corporations. It was thus that finance and the power of wealth accomplished through the Supreme Court what it had not been able to do successfully through Congress.*

—W.E.B. Du Bois<sup>176</sup>

The Supreme Court has a long history of anti-Black decisions in its interpretation of the Constitution. The antebellum Court upheld the Fugitive Slave Act<sup>177</sup> and denied the possibility that a Black person could ever be a citizen entitled to bring suits in federal courts.<sup>178</sup> Even when the Reconstruction Amendments directly contradicted the Court's prior decisions, the Court

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to assume control over enslaved women's reproductive choices). Women of color's reproductive freedom has often been targeted in unique ways not strongly emphasized by middle-class white women at the face of the movement. See ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 202-21 (Vintage Books 1983) (1981); Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, ACLU (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans/> [<https://perma.cc/6GQU-26YC>].

<sup>176</sup> W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 618 (Routledge 2017) (1935).

<sup>177</sup> See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842).

<sup>178</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 427 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.



adopted a series of interpretations to drastically reduce their power.<sup>179</sup> These decisions, culminating in the adoption of the principle of “separate but equal” in *Plessy v. Ferguson*,<sup>180</sup> were openly anti-Black.

In his dissent to *Plessy*, Justice Harlan introduced a theory of colorblind constitutionalism to the Court’s jurisprudence.<sup>181</sup> Justice Harlan made no pretense of hiding his white supremacy but acknowledged the unconstitutionality of de jure discrimination—and its utter superfluosity for the maintenance of white supremacy.<sup>182</sup> Justice Harlan’s dissent went virtually unnoticed for the better part of a century, only making a strong resurgence when the Court’s conservative wing sought authority for its efforts to turn the Equal Protection Clause against race-conscious remedies.<sup>183</sup> This Part will briefly explore this history, not as an anomaly, but as a through line of Supreme Court jurisprudence.

#### A. *The Court’s Overtly Anti-Black Jurisprudence*

The Court’s early anti-Black decisions focused on the issue of slavery itself, forcing the presumptions and procedures of the law in slave states upon states that had abolished the institution.<sup>184</sup> Even after the adoption of the Reconstruction Amendments, the Court responded with anti-Black decisions limiting the application of those Amendments.

While some cases, such as *United States v. The Amistad*,<sup>185</sup> resulted in anti-slavery decisions,<sup>186</sup> they seldom did so with anti-slavery reasoning. Justice Story’s opinion may have returned the kidnapped Africans to their homes, but he made it clear that he would have been entirely willing to return them to Cuba

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<sup>179</sup> See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78-80 (1873) (interpreting Privileges or Immunities Clause to protect only limited “privileges or immunities of citizens of the United States”); *The Civil Rights Cases*, 109 U.S. 3, 24-25 (1883) (concluding that Congress lacks power to prohibit private discrimination because “[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make”).

<sup>180</sup> See 163 U.S. 537, 551-52 (1896).

<sup>181</sup> See *id.* at 559 (Harlan, J., dissenting).

<sup>182</sup> See *id.*

<sup>183</sup> See Kennedy, *supra* note 137, at 5 (“The Harlan declaration becomes an oft-used rhetorical weapon only later, when it was deployed against affirmative action policies. Justice Potter Stewart inaugurated the practice in 1980, when he began a dissent to the Court’s validation of a federal minority business set-aside program by quoting Harlan.”).

<sup>184</sup> See Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 544 (2009) (“Surely if a master had a right to a slave without a judicial hearing, as Story claimed, then the amount of violence or force used to exercise this right should not matter, and this rationale, McLean knew, meant that the majority opinion would bring the law of slavery into the North.”).

<sup>185</sup> 40 U.S. (15 Pet.) 518 (1841).

<sup>186</sup> See *id.* at 596.

had they not been illegally taken from Africa.<sup>187</sup> In a more typical case, *Prigg v. Pennsylvania*,<sup>188</sup> the Court addressed the conflict between Pennsylvania's 1826 Personal Liberty Law and the Fugitive Slave Act of 1793.<sup>189</sup> Justice Story, now able to use pro-slavery reasoning to reach a pro-slavery result, determined that the right of an enslaver to self-help in returning an escaped enslaved person to captivity was constitutionally protected.<sup>190</sup> Justice Story's invention of a constitutional right to self-help for enslavers essentially nullified what little due process the Fugitive Slave Act required.<sup>191</sup>

Where *Prigg* effectively eliminated due process for Black people claimed as property by enslavers, *Dred Scott v. Sandford*<sup>192</sup> cut off even their theoretical right of access to the courts. Rather than simply affirm the lower court's decision that Scott was not free because the court was bound by the common law of Missouri,<sup>193</sup> Chief Justice Taney issued a sweeping decision limiting congressional authority and denying that Black people could ever be citizens.<sup>194</sup>

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<sup>187</sup> See *id.* at 593 ("If these negroes were, at the time, lawfully held as slaves under the laws of Spain, and recognised by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants: for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation.").

<sup>188</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>189</sup> See *id.* at 609-10.

<sup>190</sup> See *id.* at 613 ("We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or regulation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any which is not expressed, and cannot be fairly implied; especially are we estopped from so doing, when the clause puts the right to the service or labour upon the same ground and to the same extent in every other state as in the state from which the slave escaped, and in which he was held to the service or labour. If this be so, then all the incidents to that right attach also; the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding states.").

<sup>191</sup> See *id.* at 667 (McLean, J., dissenting) ("Both the Constitution and the act of 1793, require the fugitive from labour to be delivered up on claim being made, by the party or his agent, to whom the service is due. Not that a suit should be regularly instituted. The proceeding authorized by the law is summary and informal. The fugitive is seized by the claimant, and taken before a judge or magistrate within the state, and on proof, parol or written, that he owes labour to the claimant, it is made the duty of the judge or magistrate to give the certificate, which authorizes the removal of the fugitive to the state from whence he absconded.").

<sup>192</sup> 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

<sup>193</sup> See DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 279 (1978).

<sup>194</sup> See Stephen J. Safranek, *Race and the Law, or How the Courts and the Law Have Been Warped by Racial Injustice*, 48 WAYNE L. REV. 1025, 1035 n.55 (2002) ("The basic holding of *Dred Scott* was: '[F]irst, that no Negro could be a United States citizen or even a state citizen "within the meaning of the Constitution[']; and second, that Congress had no power

Chief Justice Taney attempted to frame his opinion as capturing the true and original meaning of the Constitution, all while ignoring significant evidence to the contrary.<sup>195</sup> The opinion represents the nadir of the legal status of Black people under the Constitution.

Following the adoption of the Reconstruction Amendments, the Court was quick to beat back any signs of progress for Black Americans. First, in the *Slaughter-House Cases*, the Court significantly narrowed the range of possible interpretations of the Fourteenth Amendment.<sup>196</sup> While Justice Miller's dicta left open the possibility that the Privileges or Immunities Clause incorporated the Bill of Rights against the states,<sup>197</sup> the Court has declined to hold this.<sup>198</sup> The Court then proceeded to further restrict what was left of the Fourteenth Amendment in the *Civil Rights Cases* by ruling that the Amendment could apply only to state action.<sup>199</sup> The decision struck down the Civil Rights Act of 1875, which had attempted to require the protection of Black travelers' right of access to public accommodations<sup>200</sup>—a protection that would be perversely

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to exclude slavery from the federal territories, and that accordingly the Missouri Compromise, together with all other legislation embodying such exclusion, was unconstitutional." (first alteration in original) (quoting FEHRENBACHER, *supra* note 193, at 2)).

<sup>195</sup> See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 23 n.51 (2009) (noting that many scholars believe Chief Justice Taney "plainly overreached in asserting that free [B]lacks had not been recognized as citizens in any states at any time").

<sup>196</sup> See 83 U.S. (16 Wall.) 36, 74 (1873); David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 341 (2003) (discussing Justice Miller's opinion that Fourteenth Amendment did not contain clear statement of intent to change relationship between state and federal governments, and therefore could not have meant to protect all fundamental rights of state citizens against state governments through Privileges or Immunities Clause).

<sup>197</sup> See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78-79 ("[W]e may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.").

<sup>198</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) ("[I]t comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because . . . the *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address the historical underpinnings or its place in our constitutional jurisprudence. . . . Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.").

<sup>199</sup> See 109 U.S. 3, 13 (1883) ("[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.").

<sup>200</sup> See *id.* at 10.

accomplished through the Commerce Clause nearly a century later.<sup>201</sup> The anti-Black jurisprudence of the early cases on the Fourteenth Amendment dealt the Reconstruction project a mighty blow.

But it was not until *Plessy v. Ferguson* that the Court restored the bulk of the Constitution's antebellum white supremacy. The decision permitting segregated cars on railways constitutionalized the principle of "separate but equal"—a phrase only appearing in the dissent.<sup>202</sup> The case has descended into the "anticanon" of Supreme Court jurisprudence and is rightly criticized for the Court's willful ignorance of the discriminatory intent of the Louisiana statute.<sup>203</sup> The Court found—and not for the first time<sup>204</sup>—room within the Fourteenth Amendment to allow enforced distinctions and separation between people of different races.<sup>205</sup>

#### B. *The White Supremacy at the Core of Constitutional Colorblindness*

It is little surprise that the *Plessy* Court, faced with a constitutional provision diametrically opposed to racial discrimination, could find a way to subvert the provision's abolitionist roots and apply it in the service of white supremacy. Rather, the surprise is that the dissent is in large part a disagreement with the majority over how best to put white supremacy into practice.<sup>206</sup> Justice Harlan's observation that white supremacy, if left alone, would persist and his adoption of colorblindness are of a piece with the Court's later decisions weaponizing colorblind constitutionalism against race-conscious remedies.<sup>207</sup>

Prior to his declaration that the Constitution is colorblind, Justice Harlan engaged in a review of the history of the Reconstruction Amendments and their

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<sup>201</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964) (noting that under Civil Rights Act of 1964, hotels and inns affect interstate commerce per se).

<sup>202</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, 'by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a *partition* so as to secure separate accommodations.'" (quoting Act of July 10, 1890, No. 111, § 1, 1890 La. Acts 152, 153 (emphasis added))). The statute at issue required "equal but separate accommodations." Act of July 10, 1890, § 1, 1890 La. Acts at 153.

<sup>203</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 414 (2011) ("The third common critique of *Plessy*, then, follows Justice Harlan's lead: the majority's error was willfully remaining blind to the social meaning of segregation, that [B]lacks are and should remain a permanent underclass.").

<sup>204</sup> See *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding criminal statute prescribing greater penalty for crime of fornication when parties were of different races because penalty was same for each offender).

<sup>205</sup> See *Plessy*, 163 U.S. at 550-51.

<sup>206</sup> See *id.* at 552-64 (Harlan, J., dissenting).

<sup>207</sup> See *id.* at 559; *cf.* *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting challenge to Georgia's capital punishment system because of failure to show discriminatory purpose behind significant racial disparities).

application against discriminatory laws.<sup>208</sup> He then rejected the argument that a law prohibiting members of *either* race from occupying a railroad car occupied by the other has equal application.<sup>209</sup> The Louisiana legislature's intent was clearly to exclude Black passengers from cars occupied by white passengers, and the corresponding prohibition was merely incidental to this goal.<sup>210</sup> In this reasoning, Justice Harlan's dissent is largely consistent with modern Equal Protection Clause jurisprudence.<sup>211</sup>

But Justice Harlan, despite this sound reasoning, was no antiracist. As stated above, he "was a former slave owner, initially opposed the Thirteenth Amendment, and tolerated various forms of segregation."<sup>212</sup> Justice Harlan's declaration of the superiority of the white race, given this background, is entirely unsurprising. The proclamation of the colorblind Constitution reads as less an acknowledgment of the Constitution's abolitionist roots and potential and more a statement of disappointment that white legislators thought so little of their own superiority as to believe it needed the explicit oppression of Black people for its perpetuation.<sup>213</sup> Justice Harlan goes on to claim that granting legal sanction to race hatred would be to the detriment of both races.<sup>214</sup> And yet, Justice Harlan's dissent abruptly pauses to put his own racial animosity on full display: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."<sup>215</sup>

Justice Harlan's dissent includes a fair measure of valuable legal reasoning regarding the Reconstruction Amendments and their role in rejecting laws passed with racist intent. His proclamation of constitutional colorblindness, by contrast, is inextricably linked to his musings on white superiority and his personal history as an enslaver and opponent of abolition. Its use by later jurists

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<sup>208</sup> See *Plessy*, 163 U.S. at 555-56 (Harlan, J., dissenting).

<sup>209</sup> See *id.* at 556-59.

<sup>210</sup> See *id.* at 557.

<sup>211</sup> See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in [a legislative or administrative] decision, . . . judicial deference is no longer justified. Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available." (footnote omitted)).

<sup>212</sup> Kennedy, *supra* note 137, at 5.

<sup>213</sup> See *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) ("Sixty millions of whites are in no danger from the presence here of eight millions of [B]lacks."); Kennedy, *supra* note 137, at 5 ("What Harlan seems to be saying is that to remain ascendant, the dominant race need not resort to ruses like equal but separate, precisely because it is dominant and will continue to be for all time, if it observes the principles of constitutional liberty.").

<sup>214</sup> See *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

<sup>215</sup> *Id.* at 561.

as a weapon against racially conscious remedies is a fitting continuation of this legacy.

The dissent was little used in Supreme Court jurisprudence until opponents of affirmative action latched onto it as a bludgeon against race-conscious remedies.<sup>216</sup> Beginning in dissents and concurrences, conservative justices signaled their allegiance to colorblind constitutionalism as a means of protecting the access of mediocre white candidates to schools and jobs.<sup>217</sup> In *Gratz v. Bollinger*, the Court applied strict scrutiny to the University of Michigan's consideration of race in its admissions—a virtual guarantee that the program would be struck down.<sup>218</sup> In *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*,<sup>219</sup> the Court determined that the Equal Protection Clause sanctioned state mandates of colorblindness in school admissions.<sup>220</sup> The Court's adoption of colorblind constitutionalism effectively undermines state and congressional efforts to redress racial inequities while enabling systems that preserve white supremacy by inertia.

Justice Harlan's prediction that the white race would remain dominant without explicit de jure discrimination continues to hold true.<sup>221</sup> The combination of centuries of slavery and segregation ensures that, today and for the foreseeable future. The Supreme Court's colorblind constitutionalism is merely another incarnation of the anti-Blackness it previously realized through its protection of the slave power and separate but equal regimes.

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<sup>216</sup> See Kennedy, *supra* note 137, at 5.

<sup>217</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 414-18 (1978) (Stevens, J., concurring in judgment) (interpreting Civil Rights Act of 1964 to require entirely colorblind administration of school admissions programs); *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting) (quoting Justice Harlan's dissent from *Plessy* in opposition to minority business set-aside program); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment) ("The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.").

<sup>218</sup> See 539 U.S. 244, 275 (2003) ("We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.").

<sup>219</sup> 572 U.S. 291 (2014).

<sup>220</sup> See *id.* at 311 (finding that Michigan constitutional amendment banning affirmative action in university admissions was "basic exercise of [voters'] democratic power" that did not violate Fourteenth Amendment). The mandatory colorblindness also applies to public employment and public contracting, but the *Schuette* Court did not address these aspects of the amendment. See *id.* at 299.

<sup>221</sup> See, e.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 1-4 (6th ed. 2021) (recounting how racial inequality, perpetuated by colorblind racism, continues to pervade "virtually every area of social life" in America).

## II. THE CONSEQUENCES OF AN ANTI-BLACK CONSTITUTION

*If you stick a knife in my back nine inches and pull it out six inches, there's no progress. If you pull it all the way out, that's not progress.*

—Malcolm X<sup>222</sup>

The Supreme Court's anti-Blackness has very real consequences for litigants alleging racial discrimination. Without a veritable smoking gun demonstrating discriminatory intent, claims of discrimination are routinely rejected.<sup>223</sup> The Court has adopted increasingly obtuse means of ignoring obvious racism, but its commitment to colorblind jurisprudence has usually required it to couch these denials in procedural mechanisms. While the individual mechanisms have often been decried for their role in perpetuating white supremacy, the pattern of their adoption and application reveals a much larger problem: the Court is decidedly anti-Black. This Part explores that anti-Blackness through the procedural barriers the Court has erected for both criminal and civil litigants.

A. *The Criminalization of Blackness*

In the wake of emancipation, Southern state legislatures frantically grasped for new means to compel the labor of newly freed Black Americans.<sup>224</sup> The Black Codes<sup>225</sup>—their most obvious efforts to criminalize Blackness and thereby fit within the exception granted by the Thirteenth Amendment—were roundly rejected during Reconstruction.<sup>226</sup> Yet other facially neutral statutes were allowed to stand, including laws criminalizing vagrancy and trespassing—both of which were racially motivated in passage and application.<sup>227</sup> With the

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<sup>222</sup> Finifinito, *MALCOLM X – If You Stick a Knife in My Back*, YOUTUBE, at 00:10 (Nov. 5, 2011), <https://youtu.be/XiSiHRNQIQo>.

<sup>223</sup> See generally Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1265-84 (2018) (cataloging Court's "erratic and uneven response to various kinds of evidence" of discriminatory intent).

<sup>224</sup> See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 933 (2019).

<sup>225</sup> See *id.* at 935-41 ("The Black Codes were exhaustive, covering all manner of freedoms associated with housing, family, sex, farming, associations, possessing paperwork to farm and sell goods, and more.").

<sup>226</sup> See Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685, 1688 (2021) ("The Southern states' deliberate circumvention of Black people's emancipation prompted the later Radical Reconstruction period that resulted in the United States' adopting the Fourteenth Amendment—extending due process and equal protection rights—and the Fifteenth Amendment—protecting against race-based disenfranchisement.").

<sup>227</sup> See Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW & HIST. REV. 351, 361 (2015) (noting that several Southern state legislatures enacted vagrancy and trespassing statutes in response to emancipation); see also Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 879 (2020) ("In tandem with the racialized crime of 'vagrancy,' criminal trespass was the

rise of the Jim Crow regime, the combined effects of restricted movement, daily indignities, and racist policing were sufficient to ensure cheap access to Black labor.<sup>228</sup>

With the end of Jim Crow, new tactics were necessary for the maintenance of white control over Black labor. The War on Drugs provided an ideal means to drive mass incarceration.<sup>229</sup> While the War on Drugs itself has racist roots, its implementation has also involved large shifts in the authority of police and prosecutors.<sup>230</sup> The Supreme Court has constitutionalized this authority<sup>231</sup> while erecting significant barriers to litigants who seek to mount challenges to its racist application.

Consider, for instance, the Court's rejection of statistical evidence of the racist application of the death penalty in *McCleskey v. Kemp*.<sup>232</sup> The Court had already required a criminal defendant to bear the burden of proving not just purposeful discrimination but also "a discriminatory effect."<sup>233</sup> The *McCleskey* Court insisted that the individualized nature of capital sentencing eliminated the probative value of statistical evidence regarding disparities in death penalty application.<sup>234</sup> Yet *McCleskey* had produced evidence that demonstrated it was "more likely than not" that the race of the victim determined the application of the death penalty.<sup>235</sup> Despite an apparently conclusive demonstration of the role

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predicate for the arrest and imprisonment of thousands of young people across the South during Freedom Summer [in 1964]." (footnotes omitted)).

<sup>228</sup> See Goodwin, *supra* note 224, at 933-50 (recounting decades of efforts to control Black labor after ratification of Thirteenth Amendment); see also James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1511-13 (2019) ("The Thirteenth Amendment had transformed [B]lack slaves into free trespassers on the real property of their former owners. Homeless and without means of production, they were forced to choose between accepting whatever terms were offered by white employers or committing one or more of the many crimes that were shaped and selectively enforced to target their behaviors.").

<sup>229</sup> See ALEXANDER, *supra* note 67, at 224-25, 233-36 (analyzing how policies and practices of War on Drugs have driven mass incarceration crisis).

<sup>230</sup> See Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 600-01 (2016) (explaining that War on Drugs "transformed justice systems" by incentivizing drug arrests and prosecutions and limiting judicial discretion in sentencing drug offenders); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2184-91 (2016) (discussing "metastasizing of police and prosecutorial power" as result of War on Drugs).

<sup>231</sup> See Ian F. Haney López, *Is the "Post" in Post-racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 815 (2011) (arguing that Supreme Court's colorblind approach shields law enforcement).

<sup>232</sup> 481 U.S. 279, 297 (1987).

<sup>233</sup> *Wayte v. United States*, 470 U.S. 598, 608 (1985).

<sup>234</sup> See *McCleskey*, 481 U.S. at 294 ("Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.").

<sup>235</sup> See *id.* at 321 (Brennan, J., dissenting) ("[F]rankness would compel the disclosure that it was more likely than not that the race of *McCleskey's* victim would determine whether he



of race in capital sentencing, the Court erected a procedural barrier in its requirement that McCleskey prove individualized discrimination.<sup>236</sup>

A similar difficulty arises in challenges to pretextual stops and selective prosecutions. “Given that only direct proof of an individual officer’s racist animus can serve as the basis for constitutional relief, the evidentiary burden on a plaintiff is high.”<sup>237</sup> Here, a plaintiff faces an insurmountable Catch-22: if the plaintiff wishes to compel the government to produce the sort of evidence that could prove racial discrimination in an executive officer’s discretionary actions, the plaintiff must first demonstrate the differential treatment of similarly situated persons of other races.<sup>238</sup> In *United States v. Armstrong*, the barrier was set so high as to remove the matter of examining racial disparities in the choice to prosecute under federal law—with its punitive mandatory-minimum sentences—or state law from the trial judge’s discretion altogether if the evidentiary burden was not met.<sup>239</sup> Defendants faced with such discriminatory abuses of discretion have virtually no recourse short of police and prosecutors admitting their discriminatory intent.

Even when the Court considers the evidence sufficient to discern racial discrimination, it often does so in narrow decisions of limited consequence. Paul Butler described the Court’s decision in *Flowers v. Mississippi*<sup>240</sup> as “so limited, even on its own terms, that it will not help other victims of discrimination.”<sup>241</sup> Like many of the Court’s decisions on racial discrimination, *Flowers* reads like less of a condemnation of the practice than a guide to not getting caught engaging in it.<sup>242</sup> Indeed, the Court has approved peremptory challenges that

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received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been [B]lack, while, among defendants with aggravating and mitigating factors comparable to McCleskey’s, 20 of every 34 would not have been sentenced to die if their victims had been [B]lack.” (citations omitted)).

<sup>236</sup> See *id.* at 292-93 (majority opinion) (“[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.”).

<sup>237</sup> Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1600 (2019).

<sup>238</sup> See *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (concluding that plaintiffs pursuing race-based selective prosecution claim must “show that the Government declined to prosecute similarly situated suspects of other races” to access discovery).

<sup>239</sup> See *id.* at 480 (Stevens, J., dissenting) (noting, in contrast to majority’s conclusion, that inquiry into racial disparities in choice of prosecutorial forum was well within trial judge’s discretion).

<sup>240</sup> 139 S. Ct. 2228 (2019).

<sup>241</sup> Butler, *supra* note 152, at 83.

<sup>242</sup> See *id.* at 88 (“The lesson of *Strauder* [v. *West Virginia*, 100 U.S. 303 (1880)], like the lessons of *Batson* [v. *Kentucky*, 476 U.S. 79 (1986)] and *Flowers*, was that discrimination against African American jurors should not be blatant. If bias can be disguised as a nonracial ‘qualification’ or ‘race neutral’ explanation it is permissible.”); see also *Flowers*, 139 S. Ct.

only narrowly provide any justification at all beyond race.<sup>243</sup> The bar is set low, and the prosecution is playing with house money.

The difficulties of obtaining relief from racially biased prosecutions are mirrored in the Court's qualified immunity decisions.<sup>244</sup> A qualified immunity defense requires a plaintiff to show that the defendant violated the plaintiff's constitutional right and that the right was clearly established at the time of the violation.<sup>245</sup> The doctrine presents two interrelated challenges. First, the details of a plaintiff's alleged violation must be sufficiently close to those already deemed a violation of the law to survive a qualified immunity defense.<sup>246</sup> Second, and perhaps more perniciously, the Court, since *Pearson v. Callahan*,<sup>247</sup> has allowed lower courts to review the elements of the defense in either order,<sup>248</sup> effectively allowing them to frustrate any exploration of whether the conduct alleged does, in fact, violate the law.<sup>249</sup> With a cooperative judiciary, police can freely violate the rights of Black and Brown people so long as these violations do not fall within established prohibitions.

Michelle Alexander summed up the results of the procedural protection of racism in the criminal justice system:

The fact that more than half of the young [B]lack men in many large American cities are currently under the control of the criminal justice system (or saddled with criminal records) is not—as many argue—just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work.<sup>250</sup>

The Supreme Court cannot be counted on to protect Black and Brown Americans against racially motivated searches, seizures, arrests, prosecutions,

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at 2235 (reversing conviction after Mississippi prosecutor's actions during jury selection were egregiously racist).

<sup>243</sup> See, e.g., *Hernandez v. New York*, 500 U.S. 352, 363-64 (1991) (explaining that prosecutor's exclusion of jurors "related to their ability to speak and understand Spanish" was not necessarily an exclusion because of their race).

<sup>244</sup> This trend has continued in the Court's recent per curiam opinions granting officers qualified immunity largely on the "clearly established law" prong of the test. See *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11-12 (2021) (per curiam).

<sup>245</sup> See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 11 (2015).

<sup>246</sup> See Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 620 (1998) ("It is not enough, in other words, that the broadly defined right to be free from unreasonable searches or cruel and unusual punishment is clear; the right allegedly violated must be described at a particularized level in factually analogous case law that would have provided more concrete guidance for the official's conduct.").

<sup>247</sup> 555 U.S. 223 (2009).

<sup>248</sup> See *id.* at 236.

<sup>249</sup> See Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. PUB. INT. L.J. 243, 247 (2013).

<sup>250</sup> ALEXANDER, *supra* note 67, at 19.

or sentences. Even if Congress chooses to do so, the Court may limit their remedies to “race-neutral” rules, greatly increasing the difficulty of enacting significant changes.<sup>251</sup> Until the Court’s approach or the Constitution changes—or state and local governments take up the abolitionist project—the criminalization of Blackness will persist.

B. *The Procedural Protection of “Race-Neutral” Discrimination*

The Court’s procedural barriers for challenging purportedly colorblind government action have a significant impact on nearly every aspect of American civil and political life. No American can vote, attend school, travel, buy property, or even breathe without feeling the effects of laws that disparately impact people of color. The Court’s anti-Blackness subverts democratic ideals both directly and indirectly, typically by erecting procedural barriers.

The Court’s voting rights jurisprudence is particularly pernicious. Two decisions in the past decade have sapped the VRA’s power to prevent discriminatory voting regimes. In *Shelby County v. Holder*, the Court struck down the VRA’s coverage formula, which subjected covered jurisdictions to the Act’s preclearance requirement.<sup>252</sup> The Court relied on the pretense that the covered jurisdictions lacked a current record of voter suppression sufficient to justify a disparate burden upon them.<sup>253</sup> Unsurprisingly, the states no longer bound by the VRA’s preclearance requirement rushed a wave of voter suppression laws into effect.<sup>254</sup> Despite these new, more sophisticated voter suppression tactics, the Court determined in *Brnovich v. Democratic National Committee*<sup>255</sup> that evidence of statistically significant disparities would not be sufficient to show a VRA violation.<sup>256</sup> Without an outright admission of discriminatory intent, such as in *North Carolina State Conference of the NAACP*

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<sup>251</sup> See Feingold, *supra* note 159, at 518 (“[C]ontemporary equal protection doctrine has rendered the Fourteenth Amendment more hostile to race-conscious remedies designed to promote integration and racial equality than to facially neutral state action that perpetuates the United States’ legacy of segregation and racial inequality.”).

<sup>252</sup> 570 U.S. 529, 556-57 (2013) (declaring VRA coverage formula unconstitutional).

<sup>253</sup> See *id.* at 554 (“[A] more fundamental problem remains: Congress did not use the [current] record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”).

<sup>254</sup> See Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 317 n.349 (2020) (providing examples of cases striking down such laws or actions in Arizona, North Carolina, and California, in part under section 2 of VRA).

<sup>255</sup> 141 S. Ct. 2321 (2021).

<sup>256</sup> See *id.* at 2343 (dismissing dissent’s argument that “any ‘statistically significant’ disparity—wherever *that* is in the statute—may be enough to take down even facially neutral voting rules with long pedigrees that reasonably pursue important state interests” (quoting *id.* at 2358 n.4, 2360-61, 2367-68 (Kagan, J., dissenting))); *id.* at 2368 (Kagan, J., dissenting) (pointing out that statistical evidence majority dismissed demonstrated that ballots cast by Black, Latinx, and Indigenous voters were twice as likely to be discarded as those cast by white voters).

v. *McCrary*,<sup>257</sup> the Court's farcical equal protection jurisprudence—and its close cousins, equal openness and equal opportunity inquiries under the VRA<sup>258</sup>—erect insurmountable procedural barriers for voting rights plaintiffs.

While the Court's anti-Black decisions on affirmative action in education are explored above,<sup>259</sup> the need for such programs is predicated on a web of other procedural barriers to equality in education. Students are assigned to schools based on the geography of school districts whose boundaries often follow the racial divides of communities.<sup>260</sup> School funding is typically based in part on property taxes, which are driven by property values—which also follow the racial divides of communities.<sup>261</sup> Even once a student reaches school, student discipline—increasingly at the hands of uniformed police officers<sup>262</sup>—falls

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<sup>257</sup> See 831 F.3d 204, 214 (4th Cir. 2016) (“[O]n the day after the Supreme Court issued *Shelby County v. Holder*, eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an ‘omnibus’ election law. Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.” (citation omitted)); *id.* at 226 (“As ‘evidence of justifications’ for the changes to early voting, the State offered purported inconsistencies in voting hours across counties, including the fact that only some counties had decided to offer Sunday voting. The State then elaborated on its justification, explaining that ‘[c]ounties with Sunday voting in 2014 were disproportionately [B]lack’ and ‘disproportionately Democratic.’ In response, [the legislation] did away with one of the two days of Sunday voting. Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges *explicitly* on race—specifically, its concerns that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.” (first alteration in original) (citations omitted)).

<sup>258</sup> See *Brnovich*, 141 S. Ct. at 2337-38, 2343 n.17.

<sup>259</sup> See *supra* notes 216-20 and accompanying text (discussing Court’s harmful application of colorblindness to affirmative action programs).

<sup>260</sup> See Laura Meckler & Kate Rabinowitz, *School District Boundaries Get In the Way*, WASH. POST, Dec. 17, 2019, at A1 (“Boundaries between districts enabled white flight from the cities to the suburbs after courts began enforcing desegregation orders.”).

<sup>261</sup> See Wilbur C. Rich, *Putting Black Kids into a Trick Bag: Anatomizing the Inner-City Public School Reform*, 8 MICH. J. RACE & L. 159, 184 (2002) (“We know that the much-maligned property tax, the major source revenue for schools, has had a disparate impact on poor school districts.”); see also Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html> (reporting that predominantly nonwhite school districts receive less funding because “poorer districts are unable to generate the same revenue” from property taxes as wealthier districts).

<sup>262</sup> Benjamin W. Fisher & Emily A. Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-Analysis*, 1 ADOLESCENT RSCH. REV. 217, 218 (2016) (“Although [school resource officers] were implemented to address physical threats to school safety, they have become increasingly involved in matters internal to the school, particularly adolescent problem behaviors.”).

disproportionately on Black students.<sup>263</sup> And if a student can run this gauntlet and wishes to pursue higher education, college admissions depend upon standardized tests with known racial disparities.<sup>264</sup> Challenges to parts of this system are stunted by the typical procedural barriers of challenges to racist practices with disparate impacts: the plaintiff must prove discriminatory intent, and statistical evidence will be disregarded if it is not overwhelming.<sup>265</sup>

While the Civil Rights Act of 1964 formally ended segregation in interstate travel,<sup>266</sup> people of color still find themselves subjected to unequal indignities in travel. Various systems for excluding travelers from airline flights in the years since the 9/11 terrorist attacks, such as the No Fly List, have consistently had a disparate impact on people of color.<sup>267</sup> Some federal courts have only recently recognized their own authority to hear challenges to a person's inclusion on the

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<sup>263</sup> Brence D. Pernel, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL'Y REV. 420, 426-27 (2021) ("Because of this racially warped approach to school discipline, Black American students are significantly more likely to become entrapped in what has been dubbed the 'school-to-prison pipeline,' whereby discipline policies funnel students from schools to the criminal justice system." (footnote omitted)).

<sup>264</sup> See William C. Kidder & Jay Rosner, *How the SAT Creates "Built-in-Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 133 (2002) ("Although this process may appear facially-neutral and non-discriminatory, the SAT unfairly exacerbates the test's already significant disparate impact on African Americans and Chicano test-takers.").

<sup>265</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 54-55 (1973) (declining to find that education is fundamental right and consequently declining to apply heightened scrutiny to disparate impacts of property tax-based funding regime for public schools); see also Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 69 (2020) ("Given the great difficulty of proving intentional discrimination and the decrease in overt discrimination, a claim for disparate impact discrimination provides the only potential avenue for those injured by discrimination to find relief from an array of harmful educational practices . . . . However, the Court held in *Alexander v. Sandoval*[, 532 U.S. 275 (2001)] that only federal agencies can enforce regulations [that prohibit direct impact as] promulgated under section 602.").

<sup>266</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

<sup>267</sup> See Ben Norton, *Victory over Racial Profiling: Federal Court Rules Americans Can Challenge No Fly List*, SALON (Oct. 26, 2015, 7:42 PM), [https://www.salon.com/2015/10/26/victory\\_over\\_racial\\_profiling\\_federal\\_court\\_rules\\_americans\\_can\\_challenge\\_no\\_fly\\_list/](https://www.salon.com/2015/10/26/victory_over_racial_profiling_federal_court_rules_americans_can_challenge_no_fly_list/) [<https://perma.cc/532G-D4FF>] ("The people on the list are disproportionately Arab and from Muslim-majority countries, leading critics to describe it as a state-sanctioned policy of racial profiling and religious discrimination."); Press Release, Barry Steinhardt, Dir., Tech. & Liberty Program, ACLU, Problems with No-Fly List Show Problems with CAPPS II Airline Profiling System, <https://www.aclu.org/other/problems-no-fly-list-show-problems-capps-ii-airline-profiling-system> [<https://perma.cc/CPR7-MAJ7>] (last visited Jan. 17, 2022) ("The no-fly list and [TSA's computer-assisted passenger prescreening system] both impose sanctions (interference with [passengers'] constitutional right to travel) without any meaningful due process, making abuses - whether through discrimination or pure sloppiness - inevitable.").

No Fly List.<sup>268</sup> The Trump Administration carried this a full step further with its “Muslim ban.”<sup>269</sup> While the first two iterations of the ban were struck down for their obvious discriminatory intent,<sup>270</sup> the Supreme Court rejected a constitutional challenge to the third iteration due to the Executive Branch’s broad authority on national security matters.<sup>271</sup> The procedural sleight of hand the Court perfected in permitting discrimination against Black Americans has proven well suited to allowing discrimination against Muslims too.

Discrimination—both past and present—continues to harm people of color in the institution at the root of most American wealth: real property ownership.<sup>272</sup> “Unfortunately, [discriminatory housing and lending] practices remain with us and are continued not only through intentional acts of discrimination, but through non-intentional institutional practices which reflect our learned history. The discriminatory practices are particularly problematic for African Americans.”<sup>273</sup> While the Fair Housing Act and Equal Credit Opportunity Act prohibit discrimination in housing and mortgage lending, the evidentiary burdens of proving discriminatory practices fall on plaintiffs.<sup>274</sup> Federal law prohibits discriminatory advertising, but real estate agents persist in racially coding the subtext of their listings.<sup>275</sup> Brokers and real estate agents typically

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<sup>268</sup> See *Mokdad v. Lynch*, 804 F.3d 807, 815 (6th Cir. 2015) (reversing district court’s judgment that it lacked subject-matter jurisdiction to hear plaintiff’s challenge to inclusion on No Fly List).

<sup>269</sup> See Adam Liptak & Michael D. Shear, *Justices Back Travel Ban, Yielding to Trump*, N.Y. TIMES, June 27, 2018, at A1 (“In a 5-to-4 vote, the court’s conservatives said that the president’s power to secure the country’s borders, delegated by Congress over decades of immigration lawmaking, was not undermined by Mr. Trump’s history of incendiary statements about the dangers he said Muslims pose to the United States.”); *id.* (“[But] Chief Justice Roberts acknowledged that Mr. Trump had made many statements concerning his desire to impose a ‘Muslim ban.’”).

<sup>270</sup> See *id.*

<sup>271</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2420-22 (2018) (rejecting plaintiffs’ Establishment Clause claims because policy was “facially legitimate and bona fide” and because, applying rational basis review, Court should not substitute its judgment for Executive Branch’s on complex national security matters). The Court also rejected plaintiffs’ argument that the President exceeded the authority delegated to him under several provisions of the Immigration and Nationality Act. See *id.* at 2414-15.

<sup>272</sup> See Allyson E. Gold, *Redlining: When Redlining Goes Online*, 62 WM. & MARY L. REV. 1841, 1844 (2021) (“In 2016, the average [w]hite family’s wealth was more than ten times that of the average Black family. This racial wealth gap is explained in part by access to capital in the form of real property.” (footnote omitted)).

<sup>273</sup> Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACK LETTER L.J. 45, 46 (1998).

<sup>274</sup> See *id.* at 66-68 (“In essence, the Act requires a very sophisticated consumer to assess the actions of the mortgage provider and to determine discrimination on a prohibited basis. Even if the consumer suspects discrimination, the burden of proof poses a significant challenge.”).

<sup>275</sup> See Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25

present people of color seeking housing with fewer options than their white counterparts.<sup>276</sup> And when they lose their property in a forced sale, people of color may suffer not only the discounted price of the forced sale but an additional market discount due to their race.<sup>277</sup> Of course, many issues of property are matters of state law resolved in state courts. The high procedural barriers at play in cases alleging discrimination likely keep many potential litigants from ever even considering filing in federal court. Even when Congress seeks to remedy centuries of discrimination in real property, the Court's anti-Black jurisprudence perversely applies constitutional colorblindness as a barrier.<sup>278</sup>

The consequences of the Constitution's anti-Black interpretation reach as far as Black people's physical environment itself. Despite a Clinton-era executive order directing federal agencies to "make achieving environmental justice part of [their] mission[s]"<sup>279</sup> and an accompanying memorandum emphasizing that agencies' initial National Environmental Policy Act review of projects should include consideration of "effects on minority communities and low-income communities,"<sup>280</sup> permits for pollution-generating industries tend to cluster near communities of color.<sup>281</sup> For instance, a recent study of the location of oil and

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CAP. U. L. REV. 101, 113-14 (1996) ("Today . . . many real estate advertisers have begun to use graphic art, pictorial, or surreal images in order to sell or rent their housing stock. These images rely exclusively on the ad's emotional impact, and with the image's emotional impact, the targeted market potentially gets many subtextual messages, one of which suggests to whites that they will be *comfortable* and one of which suggests to African Americans that they will be *unwanted*." (footnotes omitted)).

<sup>276</sup> See Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 650-51 (2010) (summarizing three studies published between 1979 and 2002 in American real estate markets using white, Black, and later Latinx, Asian, and Indigenous buyers).

<sup>277</sup> See *id.* at 658 ("[W]e raise the possibility for the first time that racial price discrimination may exist in the context of forced sales of real property. If minorities are either more at risk of having their property sold at a forced sale as a result of owning property under more unstable conditions than white property owners or if minorities suffer a 'double discount' when their property is sold at a forced sale, then it would be necessary to address these issues as part of a comprehensive and concerted campaign to close the racial wealth gap.").

<sup>278</sup> See, e.g., Reiley, *supra* note 167, at A19 (describing injunction blocking—as discriminatory—measure meant to redress inequitable distribution of previous COVID-19 debt relief to farmers and decades of discrimination by earmarking some federal aid for farmers of color).

<sup>279</sup> Exec. Order No. 12898, 3 C.F.R. 859 (1995).

<sup>280</sup> Memorandum on Environmental Justice, 1 PUB. PAPERS 241, 242 (Feb. 11, 1994).

<sup>281</sup> See, e.g., LESLEY FLEISCHMAN, CLEAN AIR TASK FORCE; MARCUS FRANKLIN, NAACP, FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES 6 (2017) ("It is not a coincidence that so many African Americans live near oil gas development. Historically, polluting facilities have often been sited in or near African American communities. Companies take advantage of communities that have low levels of political power. In these communities, companies may face lower transaction costs associated with getting needed permits, and they have more of an

gas pipeline infrastructure found that the concentration of this infrastructure was significantly greater for the most vulnerable communities.<sup>282</sup> People of color are routinely exposed to more polluted air.<sup>283</sup> Their water is more likely to be unsafe.<sup>284</sup> Those affected can file citizen suits under the various federal environmental statutes,<sup>285</sup> but without evidence of discriminatory intent, they need to overcome a comparable procedural barrier: challenges to agency rulemaking typically need to demonstrate that the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>286</sup>

Justice Harlan was likely correct that, absent any legal intervention, colorblind constitutionalism serves to perpetuate white supremacy. White people in the late nineteenth century enjoyed considerable advantages in social, economic, and political power, all of which largely persist into the present.<sup>287</sup> The doctrine of “separate but equal” segregation likely contributed to that but was hardly essential to either establishing or maintaining white dominance in American society. And yet, white supremacy is plagued by feelings of

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ability to influence local government in their favor.” (footnotes omitted)); *see also* Amy Patronella & Saharra Griffin, *Communities of Color Bear the Brunt of Trump’s Anti-Environmental Agenda*, CTR. FOR AM. PROGRESS (Feb. 27, 2020), <https://www.americanprogress.org/issues/green/news/2020/02/27/480820/communities-color-bear-brunt-trumps-anti-environmental-agenda/> [<https://perma.cc/4NZF-W8J7>] (“Due to a history of systemic racism and segregation, low-income communities and people of color have been burdened with higher levels of pollution in their backyards.” (citations omitted)).

<sup>282</sup> *See* Ryan E. Emanuel, Martina A. Caretta, Louie Rivers III & Pavithra Vasudevan, *Natural Gas Gathering and Transmission Pipelines and Social Vulnerability in the United States*, GEOHEALTH, May 2021, at 3-5 (finding density of natural gas gathering and transmission pipelines “significantly greater” in “counties with the most vulnerable populations”).

<sup>283</sup> *See* Hiroko Tabuchi & Nadja Popovich, *A Stark Inequality More Harmful with Each Breath*, N.Y. TIMES, Apr. 29, 2021, at A12 (“Black Americans are exposed to more [air] pollution from every type of source, including industry, agriculture, all manner of vehicles, construction, residential sources and even emissions from restaurants.”).

<sup>284</sup> *See* KRISTI PULLEN FEDNICK, NAT. RES. DEF. COUNCIL; STEVE TAYLOR, COMING CLEAN; MICHELE ROBERTS, ENV’T JUST. HEALTH ALL., WATERED DOWN JUSTICE 18 (2019) (“[W]e found that the rate of drinking water violations was greater in counties with greater percentages of their populations with high racial, ethnic, and language vulnerability; crowded housing and limited transportation access; and low economic status. Racial, ethnic, and language vulnerability, and housing and transportation quality, had the strongest relationships. Our analysis also revealed that of all the sociodemographic characteristics analyzed, racial, ethnic, and language vulnerability had the strongest relationship to slow and inadequate enforcement.” (emphasis omitted) (footnotes omitted) (citation omitted)).

<sup>285</sup> *See* Clay F. Kulesza, Note, *The Devil in NEPA’s Details: Amending NEPA to Prevent State Interference with Environmental Reviews*, 62 WM. & MARY L. REV. 1041, 1060-62 (2021) (discussing provisions of Clean Air and Clean Water Acts that enable citizen suits against violators).

<sup>286</sup> 5 U.S.C. § 706(2)(D).

<sup>287</sup> *See generally*, e.g., Gold, *supra* note 272 (discussing historical policies and practices that created racial wealth gap and highlighting Airbnb and similar platforms as modern-day perpetrators of these practices).



vulnerability.<sup>288</sup> The electoral strategy of exploiting these feelings benefits from maintaining and erecting barriers against people of color and pointing out any resulting struggle for justice as an existential threat to the America white people know.<sup>289</sup> In its time, “separate but equal” served this role well; its institution provided a security blanket, and its fall precipitated a flurry of white political violence.<sup>290</sup> The procedural barriers, too, are likely unnecessary to the perpetuation of white supremacy, absent an abolitionist intervention, but provide a security blanket. The wave of protests in response to the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery drew fresh attention to the procedural tools of white supremacy but also served as the catalyst for more of its backlash.<sup>291</sup> The cycle will likely repeat itself absent an abolitionist constitutional movement sufficient to complete the work of Reconstruction. As we work toward that, we must not forget that white supremacy’s “race-neutral” procedural barriers constitute an oppressive pattern in the public lives of people of color.

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<sup>288</sup> See Jonathan M. Metzler, *The Politics of White Anxiety*, BOS. REV. (Oct. 23, 2020), <http://bostonreview.net/race/jonathan-m-metzler-politics-white-anxiety> [<https://perma.cc/7BDN-QP95>] (describing white anxiety as “an internal, ego-dystonic sense of unease. A weltenschmerz. A disjunct between the manifest world and the world as one wishes it were. Psychic pain on the inside, which renders helping other people ever more difficult on the outside”).

<sup>289</sup> See *id.*

<sup>290</sup> See Lawrence Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 22, 2020, 10:41 AM), <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/> (“These individual backlashes are all instances of a reactionary tradition, one that is deeply woven into American political culture and that extends back to the era of Reconstruction, at least.”).

<sup>291</sup> See, e.g., Emily Cureton, *In Rural Oregon, Threats and Backlash Follow Racial Justice Protests*, NPR (Sept. 3, 2020, 5:01 AM), <https://www.npr.org/2020/09/03/906809148/in-rural-oregon-threats-and-backlash-follow-racial-justice-protests> [<https://perma.cc/8KMA-8RD6>] (describing counterprotests and online harassment stemming from racial justice demonstrations in one Oregon community). Even those white persons who initially supported calls for racial justice have not generally remained engaged. See Joseph P. Williams, *A Year After George Floyd’s Killing, White Allyship Fades*, U.S. NEWS & WORLD REP. (May 25, 2021, 12:13 PM), <https://www.usnews.com/news/national-news/articles/2021-05-25/a-year-after-george-floyds-killing-white-support-for-black-lives-matter-fades>.

## III. THE ANTIRACIST CONSTITUTION

*While good laws will always be found where good practice prevails, the reverse does not always hold true. Far from it. The very opposite is often the case. What then? Shall we condemn the righteous law because wicked men twist it to the support of wickedness? Is that the way to deal with good and evil? Shall we blot out all distinction between them, and hand over to slavery all that slavery may claim on the score of long practice?*

—Frederick Douglass<sup>292</sup>

Our Constitution begins with the democracy-affirming notion that it is “We the People” who established the federal government for the purposes of promoting freedom, peace, justice, and the common good.<sup>293</sup> The operative text of the Constitution undercuts this notion,<sup>294</sup> but structurally, the government authorized under the Constitution draws much of its authority from the states.<sup>295</sup> The ultimate source of that power becomes apparent when one looks to the state constitutions: all but New York maintain that their authority derives, ultimately, from the people.<sup>296</sup> While the Constitution arguably excluded a great many people—especially Black people—from its concept of “the People” in 1789, the Reconstruction Amendments inarguably changed who “the People” were for both the Federal and State Constitutions.<sup>297</sup>

Governments, meanwhile, were still composed of men. In a great many places across time, those men have not had any intention of recognizing the new constitutional order.<sup>298</sup> We would do ourselves a disservice, though, if we

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<sup>292</sup> Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), <https://www.blackpast.org/global-african-history/1860-frederick-douglass-constitution-united-states-it-pro-slavery-or-anti-slavery/> [https://perma.cc/LP7Z-JW9Z].

<sup>293</sup> See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

<sup>294</sup> See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 895 (2021) (interpreting Constitution as “wary of unmediated popular sovereignty, majority rule, and political equality”).

<sup>295</sup> See Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 285 (1997) (“The political authority of the general government under the Constitution was derived from both the states and the people, unlike the political authority of the general government under the Articles, which was derived from the states alone.”).

<sup>296</sup> See Bulman-Pozen & Seifter, *supra* note 294, at 869.

<sup>297</sup> See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

<sup>298</sup> See, e.g., Goodwin, *supra* note 224, at 936 (“Black Codes provided an urgent legal solution to the demand for low- or no-wage labor after the ratification of the Thirteenth Amendment. Rather than individual planters illegally exerting control over their former slaves by forcing them to labor for no compensation in violation of the Thirteenth Amendment’s

surrendered to those men the very interpretation of the Constitution. To pursue the completion of abolition, we must claim—as Frederick Douglass did—the Constitution as an instrument of abolition.<sup>299</sup> Furthermore, the Reconstruction Amendments explicitly worked to transform the Constitution into an abolitionist document.<sup>300</sup> In a very real sense, the culmination of the abolitionist project in the Reconstruction Amendments after decades of publicizing their meanings through litigation and organizing is the original playbook for movement law. Several passages of the Amendments hardwired fundamental protections against racial discrimination and oppression into the Constitution, and while the Supreme Court has all too often looked to its own past interpretations of those provisions rather than their own text and origins,<sup>301</sup> this trend can and should be interrupted.

Doing so requires acknowledging and affirming the Constitution’s potential to support color-conscious remedies. The language and tactics of white supremacy have shifted since Reconstruction, but the textual opposition of the Reconstruction Amendments to white supremacy has not. The Reconstruction Congress’s members differed in their understanding of how broad a grant of power the Thirteenth Amendment gave them but generally understood it to support sweeping civil rights legislation.<sup>302</sup> To quell any fears that Congress had

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abolition clause, a legislative solution could provide the mechanism to acquire noncompensated laborers through exercise of the Punishment Clause.”); *see also* EQUAL JUST. INITIATIVE, *supra* note 82, at 20-39 (recounting “massive resistance” campaigns in Southern states in response to desegregation decisions); Elie Mystal, *Bigots Have Finally Accomplished Their Goal of Gutting the Voting Rights Act*, NATION (July 2, 2021), <https://www.thenation.com/article/politics/voting-rights-arizona-court/> (“Yesterday, in a Supreme Court case called *Brnovich v. Democratic National Committee*, Justice Samuel Alito told conservatives how to defeat the Voting Rights Act, once and for all. White supremacists don’t have to storm the Capitol to hoard political power anymore. They just have to follow Alito’s instructions.”).

<sup>299</sup> *See* Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 59 (2019).

<sup>300</sup> *See id.* at 63 (“The language of the Fourteenth Amendment can be traced to specific speeches and writings of leading antislavery advocates who developed an abolition constitutionalism in the preceding decades.”).

<sup>301</sup> *See supra* Part I (examining Supreme Court’s cabining of Reconstruction Amendments).

<sup>302</sup> *See* Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 821-25 (1998) (noting that both supporters and opponents of Thirteenth Amendment in Reconstruction Congress recognized it to “grant former slaves ‘equality before the law, protection in life and person, opportunity to live, work and move about’” (quoting Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 176 (1951))); *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1821 (2010) (“Thus, the Civil Rights Act of 1866 was both within Congress’s power to enforce the Thirteenth Amendment and its power to enforce the Citizenship Clause of the Fourteenth Amendment.”). *But see* Kurt T. Lash, *Enforcing the*

exceeded its authority, the Fourteenth Amendment contained expansive and explicit language drawn from the language of antebellum abolitionism.<sup>303</sup> The Reconstruction Congress did not simply assume that future generations would respect its abolitionist goals; it doubled down on embedding abolitionist principles in the Constitution itself.<sup>304</sup> By refusing to disclaim the power of these principles, modern abolition and liberation movements can reshape the landscape of constitutional interpretation.

The Reconstruction Amendments were—apart from the Fifteenth Amendment—intended as broad solutions to broad problems. Even the Fifteenth Amendment’s flaws were largely addressed later through the Nineteenth,<sup>305</sup> Twenty-Fourth,<sup>306</sup> and Twenty-Sixth Amendments.<sup>307</sup> A historically accurate understanding of the Reconstruction Amendments is both color-conscious and broad enough to account for more than just racial discrimination. The Reconstruction Amendments can (and should) form the backbone of the ongoing abolitionist project and are potent remedies in the struggle to dismantle racism, sexism, ableism, xenophobia, homophobia, and more. Movement lawyers today should follow the example of nineteenth-century abolitionists, applying pressure both through constitutional challenges and political organizing until their constitutional vision prevails.

This Part will proceed in its first Section to review the oft-ignored original public meanings of the Reconstruction Amendments. These meanings can be gleaned from the antebellum arguments of abolitionists, the congressional remarks of the Amendments’ supporters, and the writings of contemporaneous Black Americans. All these sources contain support for the radical abolitionist interpretation of the Reconstruction Amendments. With these original public meanings in mind, the second Section of this Part will specifically examine the Thirteenth Amendment’s potential for redressing badges and incidents of slavery, from the abuses of the carceral state to the restriction of reproductive choice. This Part’s final Section will explore the various tools of the Fourteenth and Fifteenth Amendments for building an abolition democracy. These Amendments provide several clauses to affirm democracy and liberty that must be core parts of any abolitionist understanding of the Constitution.

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*Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1406 (2018) (“Most of all, opponents [of Freedmen’s Bureau Bill] denied that the Thirteenth Amendment authorized enforcement of the civil rights covered by either the Freedmen’s Bill or the Civil Rights Act.”).

<sup>303</sup> See Roberts, *supra* note 299, at 54 (“The abolition struggle profoundly shaped not only the specific language of the Reconstruction Amendments but also the very meaning of those constitutional principles.”).

<sup>304</sup> See *id.*

<sup>305</sup> U.S. CONST. amend. XIX (addressing sex-based voting discrimination).

<sup>306</sup> *Id.* amend. XXIV (addressing wealth-based voting discrimination).

<sup>307</sup> *Id.* amend. XXVI (addressing age-based voting discrimination).

A. *Original Public Meanings of the Reconstruction Amendments*

In exploring what a constitutional provision meant to the public that ratified it, we will almost invariably encounter a range of constructions its contemporaries gave it.<sup>308</sup> The Reconstruction Amendments are no different from any other provisions in this regard. We can be certain of the broad topics that they covered—the end of chattel slavery,<sup>309</sup> the meaning of citizenship for formerly enslaved Black citizens,<sup>310</sup> the exclusion of Confederates from positions of power,<sup>311</sup> and the guarantee of voting rights to Black citizens.<sup>312</sup> We can be reasonably certain of the semantic content of their text. But the range of public meanings—in the sense of legal consequences attributed to the Reconstruction Amendments—cannot be so neatly summed up. Still, there is value in exploring how various contemporaneous interpretations—especially those of the Amendments’ drafters and intended beneficiaries—dealt with the potential effects of the new constitutional text. In particular, this Section will examine the constitutional understandings of the abolitionist movement, the Radical contingent of the Reconstruction Congress, and Black Americans.

1. The Origins of the Reconstruction Amendments in Abolitionist Advocacy

First, we should consider the language and values of the antebellum movement to abolish slavery. The Citizenship Clause’s conceptual underpinnings descend directly from abolitionist legal arguments regarding laws restricting the status of free Black persons, particularly in Northern states.<sup>313</sup> And—as the profoundly influential Lysander Spooner argued—if a state could make Black people citizens merely by abolishing slavery, they must already have been citizens of the United States, for the power to grant that citizenship could not reasonably vest in the states.<sup>314</sup> These citizenship arguments were central to many of the abolitionists’ other contentions.

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<sup>308</sup> See Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 93 (2016) (“[B]y scaling down our ambitions, we can have far greater hope that history will converge on a relatively small range of original public meanings. If we ask for more, by contrast, we are far more likely to encounter divergence and disagreement. These issues are best left to constitutional construction.”).

<sup>309</sup> See U.S. CONST. amend. XIII, § 1.

<sup>310</sup> See *id.* amend. XIV, § 1.

<sup>311</sup> See *id.* amend. XIV, § 3.

<sup>312</sup> See *id.* amend. XV, § 1.

<sup>313</sup> See Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 174-76 (2011) (discussing Ohio Anti-Slavery Convention’s argument that Ohio Constitution’s guarantee of inalienable rights to *all* combined with Federal Privileges and Immunities Clause to render Ohio statutes discriminating against free Black emigrants from other states unconstitutional).

<sup>314</sup> See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 93 (Boston, Bela Marsh, enlarged ed. 1860); Barnett, *supra* note 313, at 207-08 (describing Spooner’s argument).

Principal among these was the argument that the Constitution's Privileges and Immunities Clause applied to Black Americans because they were citizens.<sup>315</sup> While the typical thrust of these arguments was that states could not restrict the privileges and immunities of citizens of *other* states, some, notably Joel Tiffany, argued that the Clause was strong enough to prevent states from restricting the rights of their own citizens.<sup>316</sup> Benjamin Shaw took a similar line of argument, relying on the Privileges and Immunities Clause to support his contention that Southern states' imprisoning Black travelers and punishing abolitionists for their speech violated the Constitution.<sup>317</sup> To the abolitionists, the concept of the privileges and immunities of citizenship was capacious enough to support national standards of fundamental rights under the Constitution.

On the other hand, due process of law was a particularly contentious topic among abolitionists. Some, such as Salmon P. Chase, took the stance that because the enslavement of human beings was contrary to natural rights, it required positive legislation, but that Congress could not constitutionally authorize slavery<sup>318</sup> because it amounted to "the government depriving each person enslaved of all liberty and all property, and all that life makes dear, without imputation of crime or any legal process whatsoever" in violation of the Due Process Clause.<sup>319</sup> While this looks somewhat similar to the concept of substantive due process by which fundamental rights are protected, it has an element of legislative jurisdiction, too.<sup>320</sup> If a person cannot be deprived of life,

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<sup>315</sup> See Barnett, *supra* note 313, at 224-25.

<sup>316</sup> See *id.* at 225 (contrasting Tiffany's position with that of most other abolitionists, who instead "offered a conventional reading of Article IV as protecting the fundamental rights of free citizens of one state when traveling into another"); see also JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 95-97 (Cleveland, J. Calyer c. 1849) ("A state law, therefore, which would conflict with the rights of citizenship, is necessarily unconstitutional and void. If making a man a slave, withholds from him citizenship, or is inconsistent with his privileges, and immunities as a citizen, then it is unlawful to make a man a slave, in the United States. But if the slave is a citizen (and that he is we have no doubt) then he is entitled to all the privileges and immunities of citizenship, which are guaranteed in the Federal Constitution for personal security, personal liberty, and private property.").

<sup>317</sup> See BENJAMIN SHAW, ILLEGALITY OF SLAVERY 9 (n.p. c. 1846), <https://archive.org/details/illegalityofslav00shaw/page/12/mode/2up> (arguing that Congress could "compel each State to grant to the citizens of each State, all the privileges and immunities of the citizens in the several States" and that "[t]his principle of the constitution is [u]nheded in the South"); see also Barnett, *supra* note 313, at 219 (describing Shaw's argument).

<sup>318</sup> See Salmon P. Chase, The Address of the Southern and Western Liberty Convention, Held at Cincinnati, June 11 and 12, 1845, to the People of the United States (June 1845), in ANTI-SLAVERY ADDRESSES OF 1844 AND 1845, at 75, 101 (Charles Dexter Cleveland ed., London, Sampson Low, Son & Marston; Philadelphia, J.A. Bancroft & Co. 1867); see also Barnett, *supra* note 313, at 215 (describing Chase's argument).

<sup>319</sup> See Chase, *supra* note 318, at 87 (describing government as "real enslaver").

<sup>320</sup> See Barnett, *supra* note 313, at 177 (arguing that one conception of due process encompasses inquiry into "whether the substance of a statute was within the *jurisdiction* or *power* of the legislature to enact").

liberty, or property without due process of law, then a process—such as slavery—that lacked the fundamental power of law could not be due process of law.<sup>321</sup> Others argued that slavery, as a deprivation of liberty, required the full due process of an indictment, trial, and judgment entered upon the verdict of a jury.<sup>322</sup> Even without going this far, abolitionists frequently looked to the Due Process Clause as a tool for Congress to eliminate slavery throughout the entire country, particularly in response to *Prigg v. Pennsylvania*.<sup>323</sup> Thus, abolitionists believed that due process included procedural rights, substantive rights, and limits on legislative authority, while also contending that Congress already possessed the authority to enforce those procedural and substantive rights.

The concept of equal protection, meanwhile, arose from the notion that the duty of loyalty that citizens owed their country conferred upon the government a corresponding duty to protect the life, liberty, and property of those citizens.<sup>324</sup> Theodore Dwight Weld advanced this idea, emphasizing how this right was “first and foremost, about rendering *protection*.”<sup>325</sup> Spooner, too, focused on protection, emphasizing an equal entitlement in all citizens to the protection of the laws.<sup>326</sup> James Birney considered this protection to be fundamental to the government’s exercise of authority over individuals; those it refused to protect, it could not punish.<sup>327</sup> To the abolitionists, then, equal protection meant not just that the government had a duty to apply the law equally, but that the law *must* protect those subject to it.

These abolitionist notions of how the Constitution provided and ought to provide protection to Black Americans informed the understanding of the Reconstruction Congress when it drafted the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>328</sup> The need for enforcement clauses, beginning with

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<sup>321</sup> See *id.* at 184.

<sup>322</sup> See *id.* at 185, 197.

<sup>323</sup> See *id.* at 188, 214-15.

<sup>324</sup> See *id.* at 255 (“[T]he idea that there exists a fundamental duty of government to extend its protection to all from whom obedience is expected, and a corresponding right to that protection, was repeatedly asserted. This duty of protection included protecting the equal natural rights to life, liberty, and property of every person, an equality of rights that was inconsistent with the recognition of any ‘caste, such as white, or [B]lack, male or female[ . . . ]’” (quoting CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. John Bingham))).

<sup>325</sup> *Id.* at 182; see Theodore Dwight Weld, *The Power of Congress over the District of Columbia*, N.Y. EVENING POST, reprinted in THEODORE DWIGHT WELD, *THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA* 43-44 (New York, John F. Trow 1838).

<sup>326</sup> See SPOONER, *supra* note 314, at 247; see also Barnett, *supra* note 313, at 209.

<sup>327</sup> See James G. Birney, *Can Congress, Under the Constitution Abolish Slavery in the States?*, ALBANY PATRIOT, May 1847, reprinted in JACOBUS TENBROEK, *EQUAL UNDER LAW* app. c at 317-19 (Collier Books rev. ed. 1969) (1951); see also Barnett, *supra* note 313, at 220-21 (“[A]llegiance and protection are inseparable.” (quoting Birney, *supra*, at 317 (emphasis omitted))).

<sup>328</sup> See Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 397-98, 410 (2012) (discussing abolition constitutionalism’s influence on

section 2 of the Thirteenth Amendment, grew from the desire to realize the ideology of the Revolution as expressed in the Declaration of Independence and the Constitution's Preamble.<sup>329</sup> The language of the guarantees embedded in the Reconstruction Amendments borrows heavily from the antebellum arguments of abolitionists, many of whom served in Congress in the 1860s.<sup>330</sup> The abolitionist understanding of the Constitution would no longer be merely theoretical; its precepts were explicitly inserted into the Constitution's text, and Congress would have the authority to enforce them.

## 2. Congressional Understandings of the Reconstruction Amendments

To open the final arguments in favor of the Thirteenth Amendment's passage, Representative James Ashley predicted that in addition to abolishing slavery, the Amendment would guarantee a "system of free labor" as well as a "Government [that would] protect the rights of all, and secure the liberty and equality of its people."<sup>331</sup> Senator Henry Wilson, arguing for the Amendment's passage, declared that it would "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it."<sup>332</sup> Full equality of civil rights would see statutory implementation under the Thirteenth Amendment in the Civil Rights Act of 1866.<sup>333</sup> Thus, the Reconstruction Congress initially construed its authority under the Thirteenth Amendment in broad abolitionist terms. Modern interpretations of the Amendment as narrowly abolishing slavery simply do not comport with the intent or context of its passage and ratification.

Even moderates in Congress understood abolition to entail more than simply the end of chattel slavery itself.<sup>334</sup> Congress reacted fiercely to attempts to take

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James Ashley, John Bingham, and Lyman Trumbull in Reconstruction Congress).

<sup>329</sup> See Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1804 (2006) ("The Declaration could only provide an inspirational token for abolitionists and Reconstructionists since it did not end slavery and the Constitution lacked any clear recognition of its principles. The Thirteenth Amendment's Enforcement Clause became the constitutional vehicle for ending any vestiges of slavery and involuntary servitude." (footnote omitted)).

<sup>330</sup> See SENATE HIST. OFF., U.S. SENATE, THE SENATE'S CIVIL WAR, S. PUB. 112-7, at 17, 27, 29 (2011) (recounting work of Radical Republicans in Senate in early 1860s).

<sup>331</sup> CONG. GLOBE, 38th Cong., 2d Sess. 141 (1865) (statement of Rep. James Ashley); see Zietlow, *supra* note 328, at 409.

<sup>332</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Henry Wilson); see *id.* at 1199, 1319, 1321 (statements of Sen. Henry Wilson).

<sup>333</sup> See Zietlow, *supra* note 328, at 410 (recounting Representative Ashley's failure to achieve this end in Reconstruction bill, only to see it ultimately passed as part of Civil Rights Act of 1866).

<sup>334</sup> See C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 76-77 (updated 3d ed. 2008) ("Debates over the question in the Senate... and in the House of Representatives... contain evidence that the framers aimed at equality as well as emancipation. Both objectives were assumed by the opponents as well as the sponsors of the



advantage of the Amendment's exception allowing forced labor as a criminal punishment to force large numbers of Black Americans back into servitude.<sup>335</sup> The notion that the Thirteenth Amendment also abolished what the Court would later refer to as the "badges and incidents of slavery"<sup>336</sup> was widely held—though a comprehensive list of these markers of caste was not provided.<sup>337</sup> For Senator James Harlan, the list included—in addition to compelled labor—restraints on marriage, family relations, speech, property, education, and status within the legal system.<sup>338</sup> Senator Trumbull used the term generally to refer to laws denying people civil rights on the basis of race.<sup>339</sup> While there is some reason to doubt that Congress generally meant to provide itself with the ability not just to remedy the commonly understood badges and incidents but to name new ones, it clearly did exert some sort of discretion in choosing which to target with the Civil Rights Act of 1866.<sup>340</sup> The Thirteenth Amendment's supporters in Congress meant for its scope to be greater than the simple decree of abolition.<sup>341</sup>

The Reconstruction Congress understood the enforcement clauses of all three Reconstruction Amendments to grant Congress power subject to the relatively lax test of *McCulloch v. Maryland*.<sup>342</sup> The test would allow appropriate legislation to achieve legitimate ends, so long as the means were plainly adapted to the ends and otherwise consistent with the limits of the Constitution.<sup>343</sup> The

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amendment during the debate.”).

<sup>335</sup> See Pope, *supra* note 228, at 1510 (“Republican members of Congress also held that the Amendment prohibited the infliction of servitude as punishment for offenses so minor as to make it improbable that servitude had actually been imposed to punish the particular ‘crime whereof the party shall have been duly convicted.’” (quoting U.S. CONST. amend. XIII)).

<sup>336</sup> See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Though the Court used this term to describe Congress's Thirteenth Amendment powers, *id.*, “[t]he concepts of a ‘badge of slavery’ and ‘incident of slavery’ both predate the Thirteenth Amendment.” Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 570 (2012); see *id.* at 570-82.

<sup>337</sup> See Pope, *supra* note 228, at 1472.

<sup>338</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan) (listing “[s]ome of the incidents of slavery”).

<sup>339</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull).

<sup>340</sup> See Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 136 (2010).

<sup>341</sup> See *id.* at 103-06.

<sup>342</sup> See 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”); Balkin, *supra* note 302, at 1810 (“The framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply to Congress's new Reconstruction Powers, and the use of the term ‘appropriate’ in the text of all three enforcement clauses reflects this assumption.”).

<sup>343</sup> See *McCulloch*, 17 U.S. (4 Wheat.) at 420-21; Balkin, *supra* note 302, at 1810.

three enforcement clauses use parallel language and should be presumed to be subject to parallel interpretations.<sup>344</sup>

The question of the limits of Congress's enforcement powers under the Thirteenth Amendment provided part of the impetus for the passage of the Fourteenth Amendment.<sup>345</sup> While Congress understood the scope of its Thirteenth Amendment powers broadly, the Fourteenth Amendment textualized many of the rights Congress sought to guarantee.<sup>346</sup> Chief among the legislation whose constitutionality was assumed under the Thirteenth Amendment, but explicit under the Fourteenth, were the Civil Rights Act of 1866 and the Second Freedmen's Bureau Bill.<sup>347</sup> This latter bill reveals an even greater scope of congressional power: while the Civil Rights Act concerned itself with continuing access to societal benefits free from discrimination,<sup>348</sup> the Second Freedmen's Bureau Bill was remedial, focusing on creating the material conditions necessary to aid in the transition from slavery to citizenship.<sup>349</sup> While the provision of such goods and services could be justified as legislation necessary and proper to redress the badges and incidents of slavery, it also recalls the abolitionist concept of equal protection: that the law has a duty to ensure the

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<sup>344</sup> See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-23 (1999).

<sup>345</sup> See Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1528 (2012) ("The Fourteenth Amendment was ratified in large part because of political and legal developments that were inhibiting congressional implementation of the Thirteenth Amendment."); Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TUL. L. REV. 281, 327 (2021) ("[S]ome members of Congress believed that the Thirteenth Amendment not only abolished slavery but also guaranteed that the freed people were now the equals of white citizens under the law in all respects. To be sure, this view was not universally shared, and the constitutionality of the Civil Rights Act of 1866 was contested by some, one of the reasons for the adoption of the Fourteenth Amendment." (footnote omitted)).

<sup>346</sup> See Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 205 (2005) ("[T]he framers of the Fourteenth Amendment asserted that the Thirteenth Amendment determined that the status of all Americans, not only that of the former slaves, is that of freemen, which they equated with the status of United States citizenship. The framers of that Amendment also asserted that the Amendment delegated to Congress the power to protect the rights to which Americans are entitled as freemen, that is, the power to define and enforce the rights of United States citizenship." (footnote omitted)).

<sup>347</sup> See Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1362 (2016) ("Both measures were central to the Reconstruction effort. Both implemented the Thirteenth Amendment. Both were vigorously objected to by Democrats on constitutional grounds. The power to pass both was confirmed by the Fourteenth Amendment.").

<sup>348</sup> *Id.*

<sup>349</sup> See *id.* at 1363 ("Legislation was necessary to provide former slaves with various goods and services, the precise provision of which depended on local circumstances and changing conditions. Given the need for a high degree of nimbleness in the managing of that transition, Congress, rather than the judiciary, had to play the lead role in removing all badges and incidents of slavery in American constitutional life.").

protection of citizens.<sup>350</sup> This concept was broad enough to support the closest effort Congress has made in the direction of reparations for slavery.<sup>351</sup>

The Citizenship Clause had a similarly broad meaning to the Reconstruction Congress and the public.<sup>352</sup> “The idea that American citizenship necessarily implied equal citizenship was commonplace in American political and legal writing of the late eighteenth and early nineteenth centuries.”<sup>353</sup> Yet Southern states had refused to treat newly freed Black Americans as equal citizens—or even citizens at all.<sup>354</sup> In enacting the Fourteenth Amendment, Congress resolved any potential counterarguments to the abolitionist concept of birthright citizenship under the Constitution. Meanwhile, the Privileges or Immunities Clause gave effect to what that citizenship would mean. The Clause used contemporary language understood to reference a set of rights that included those found in the Bill of Rights.<sup>355</sup> It is textually the broadest of the Fourteenth Amendment’s protective clauses, consistent with a clause meant to protect the rights of citizens rather than those of all persons.<sup>356</sup> While Congress was often vague on the distinctions between the scope of the Fourteenth Amendment’s

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<sup>350</sup> See *id.* at 1385-86 (“During the debate over [certain provisions of the bill,] Republicans placed special emphasis on how government assistance would increase the capacity of former slaves to escape enforced dependency and develop the capacities necessary to exercise the rights of full and equal citizens.”); WEST, *supra* note 171, at 25-26 (discussing consensus among historians and legal theorists that chief evil to be redressed by Equal Protection Clause was private violence and violation).

<sup>351</sup> See Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 686 (1999) (discussing broad scope of Second Freedmen’s Bureau Bill but noting that “[s]ince the Freedmen’s Bureau Acts, there has been no consistent measure of reparations for African Americans”). But see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1030 (2002) (“Congress established an anemic Freedmen’s Bureau and made no provisions for reparations. An exploitative sharecropping system and arrangements of outright peonage arose as a matter of course.” (footnote omitted)).

<sup>352</sup> See Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 408 (2020) (“[T]he [Fourteenth] Amendment’s text, given its public meaning at the time of enactment, directed a relatively broad scope for constitutional birthright citizenship as to both places and persons. At the time of enactment, places subject to permanent U.S. sovereign authority were considered ‘in’ the United States without regard to whether they were territorially contiguous or culturally integrated into the U.S. political system.”).

<sup>353</sup> Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 504 (2013).

<sup>354</sup> See *id.* at 528 (describing Southern states’ efforts to undermine national concept of citizenship through enactment of Black Codes after ratification of Thirteenth Amendment).

<sup>355</sup> See Curtis, *supra* note 73, at 1089 (“[I]n the thirty-five years or so before the 1868 ratification of the Fourteenth Amendment, common usage often referred to Bill of Rights liberties as ‘privileges,’ ‘immunities,’ or ‘rights’ of Americans or of citizens of the United States.”).

<sup>356</sup> See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 968 (1998) (“Only the Privileges or Immunities Clause, which places a limitation on the states’ power to ‘make . . . law,’ reads textually as a limitation on legislation.” (alteration in original) (quoting U.S. CONST. amend. XIV, § 1)).

protective clauses, the text of the Amendment itself and the prevailing abolitionist discourse indicate that the Privileges or Immunities Clause was meant to be the strongest tool in the constitutional kit for protecting the rights and liberties of newly freed Black Americans.

That is not to say that only the Privileges or Immunities Clause was meant to be broad. At least some of the framers of the Fourteenth Amendment clearly intended it to include both procedural and substantive due process rights.<sup>357</sup> Teasing out precisely which trial rights the Reconstruction Congress intended to include in the Fourteenth Amendment's Due Process Clause is complicated by the inconsistent language used in debates around its implementation.<sup>358</sup> The Due Process Clause could certainly extend to the guarantees of the Bill of Rights, even if the Reconstruction Congress's understanding of those guarantees and their relationship to the Amendment is debatable.<sup>359</sup> The case is strongest, however, for choosing to give well-understood rights their contemporaneous judicial constructions, as these were the interpretations of those rights with which the Reconstruction Congress was most familiar.<sup>360</sup> While the exact details of those rights are beyond the scope of this Article, the method of assessing due process rights through examining judicial precedents available in 1868 should reveal Congress's understanding of the meaning of the Due Process Clause.

Congress also intended for the Equal Protection Clause to be broad in its application. Its framers meant the Clause not just to guarantee that whatever protection state and federal governments offered be applied equally but also to impose a positive duty on them to protect all people within their borders.<sup>361</sup>

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<sup>357</sup> See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 477-80 (2010) (“[T]he orthodox view of due process rights [when the Civil Rights Act of 1866 was being debated] in 1866, as evidenced by judicial decisions at both the state and federal level, would almost certainly have included at least the vested rights version of substantive due process and most likely the general law reading as well.”).

<sup>358</sup> See *id.* at 481-82; see also, e.g., Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1171-76 (2011) (offering contrasting historical evidence to respond to modern scholars' arguments that jury nullification is constitutionally protected).

<sup>359</sup> See Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 527 (2017) (advancing—against trend of traditional originalists—claim that Fourteenth Amendment framers clearly intended it to protect both rights explicitly guaranteed in first eight amendments and those natural law rights guaranteed by Article IV's Privileges and Immunities Clause).

<sup>360</sup> See David Skeels, *Judicial Review and the Fourteenth Amendment: The Forgotten History*, 51 U. TOL. L. REV. 281, 306 (2020) (arguing that because Reconstruction Congress's debates were public, “[t]he public knew that by using the expression ‘appropriate’ with all of the new amendments, Congress thought it was giving itself discretionary power to enforce these amendments, and it knew that expressions like ‘due process of law,’ which were already in the Constitution, were meant to have their previous judicial interpretation”).

<sup>361</sup> See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) (“The debates in the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866 confirm that the

“States could not turn a blind eye to criminal acts or private violations of rights committed against people of color or other disfavored groups.”<sup>362</sup> Congress rejected proposed language that would have simply forbidden laws that were racially discriminatory on their face.<sup>363</sup> Instead, the focus remained on the central abolitionist concept of *protection*: While that protection was most obviously needed in that historical moment to remedy laws discriminating on the basis of race, color, or previous condition of servitude, the rejection of language directly addressing those characteristics indicates that Congress was significantly more concerned with constitutionalizing the fundamental duty of protection.<sup>364</sup>

The Fifteenth Amendment does not deal in abolitionist terms of art and broad grants of rights. Rather, it narrowly focuses on ensuring voting rights as a means of promoting Black freedom and political participation.<sup>365</sup> The meaning of the Fifteenth Amendment is clarified in the debates around provisions that were specifically excluded from its final form. Breaking from the broad, universal sweep of the Thirteenth and Fourteenth Amendments, the framers of the Fifteenth Amendment rejected proposals for universal suffrage.<sup>366</sup> The Reconstruction Congress declined to take advantage of the mood for constitutional change to enact women’s suffrage despite the prominent role of women in the abolitionist movement.<sup>367</sup> Conversely, the exclusion of an explicit right to hold office was meant to affirm that right.<sup>368</sup> The right to vote implied a

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constitutional right to protection was understood to include protection against private violence.” (footnote omitted)).

<sup>362</sup> David H. Gans, “*We Do Not Want to Be Hunted*”: *The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 292 (2021).

<sup>363</sup> See Kennedy, *supra* note 137, at 3-4 (describing abolitionist Wendell Phillips’s failed proposal for Fourteenth Amendment to prohibit states from enacting racially discriminatory statutes).

<sup>364</sup> Cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (“In my view the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of [B]lack slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”).

<sup>365</sup> See U.S. CONST. amend. XV; see also Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 227 (1995) (describing Fifteenth Amendment as protecting political rights to complement Fourteenth Amendment’s protection of civil rights).

<sup>366</sup> See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 969-70 n.59 (2002) (discussing rejected proposals of Senators Fowler and Pomeroy to include universal franchise in text of Fifteenth Amendment).

<sup>367</sup> See *id.* at 968-70. See generally DAVIS, *supra* note 175, at 30-45 (providing overview of women’s early involvement in anti-slavery movement).

<sup>368</sup> See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 1426 (1869) (statement of Rep. Benjamin Butler) (“I had supposed if there was anything which was inherent as a principle in the American system and theory of government, of equality of all men before the law, and the right of all men to a share in the Government, it was this: that the right to elect to office carries

right to be voted for—a fact that even opponents of the Fifteenth Amendment acknowledged.<sup>369</sup> By contrast to the implication that the Fifteenth Amendment guaranteed a right to be elected, neither its supporters nor its opponents argued that it would create universal suffrage. Still, the acknowledgment of Black citizens' right to hold office reveals that the Fifteenth Amendment was understood to expand Black political participation in meaningful ways rather than as a mere formality.

### 3. Contemporaneous Black Understandings of the Reconstruction Amendments

Perhaps the most overlooked understanding of the Constitution's abolitionist meaning is that of Black Americans themselves.<sup>370</sup> Frederick Douglass, while initially a Garrisonian skeptical of the Constitution's value to the cause of abolition, came to argue for a novel, abolitionist interpretation by 1851.<sup>371</sup> Douglass presented the choice as one between slavery and democracy—America could not have both.<sup>372</sup> Douglass's understanding of the tension between the two institutions presaged the agenda of Black Reconstruction: the replacement of the fallen slave power with a democratic society.

The public meaning of the Reconstruction Amendments within contemporary Black communities must be understood in the context of how they understood

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with it the inalienable and indissoluble and indefeasible right to be elected to office. Therefore, I am myself almost persuaded not to vote for the [Fifteenth A]mendment. As [the Amendment] comes to us from the Senate it provides that no man, on account of race, color, or previous condition of servitude, shall be deprived of the right to hold office. That seems to give color to the conclusion that there are other classes which may be deprived of the right to hold office . . . .”). *But see id.* at 1641 (statement of Sen. Joseph S. Fowler) (“I simply wish to say before the vote is taken that my understanding of the proposition as it now stands is that it decides by an amendment to the Constitution that the Constitution does not guaranty to all citizens of the United States the right to hold office.”).

<sup>369</sup> *See id.* at 1630 (statement of Sen. Garrett Davis) (“[T]he power to vote in my judgment implies the power to hold office; that is to say, it does not necessarily do so under the provision of this amendment, but a class of people who are entitled to vote and to whom by principles of right and good policy the right to vote ought to be conceded ought to have at the same time the concession of the right to hold office. If it was my principle that the negro was a proper depository of the right of suffrage I would unhesitatingly vote in favor of extending the proposition and giving him the right to hold office, which I deem to be a right of less force and efficiency than the right to vote. But . . . I deny that the negro has the proper capacity to exercise this right . . . .”); *see also* Amar, *supra* note 365, at 229, 234 (discussing acknowledgments during ratification debates in Georgia and California that Fifteenth Amendment would grant rights to vote and hold office).

<sup>370</sup> *See* Roberts, *supra* note 299, at 57 (“Even more neglected in constitutional history than these white abolitionists are [B]lack Americans who theorized and defended claims to equal citizenship.”).

<sup>371</sup> *See id.* at 58-59 (chronicling evolution of Douglass's abolition constitutionalism as radical departure from accepted interpretations).

<sup>372</sup> *See id.* at 60-61.

Reconstruction itself. Jeffery M. Brown described the Black vision of Reconstruction as both an economic and societal project:

Reconstruction both envisioned a more pluralistic economic order than had ever existed in the post-war South and saw [B]lacks as autonomous free agents in this larger milieu.

Such developments suggested a profound reordering of the prevailing economic order, not just in the South, but nationally as well. In this historical context, then, [B]lack rehabilitation could be thought of as echoing not only notions of redistributive justice, but also larger southern, and even national, economic and social developmental considerations. By the same token, the concept of “[B]lack rehabilitation” or reparations at this time embraced the idea of an American polity defined by political and economic pluralism for [B]lacks and poor whites (i.e., non-land owning whites). Indeed, Black Reconstruction saw [B]lack rehabilitation as a necessary component of continued southern and also national economic and political progress.<sup>373</sup>

The Reconstruction Amendments were crucial to this vision, providing the constitutional foundation upon which such a radically new order could be built. “The goal was not just to reunite the states, but to recreate the polity so that citizenship would, first, be universal, and second, encompass the liberties that slavery had denied.”<sup>374</sup> Both the membership and the concept of citizenship were to be expanded.

This expansion was accomplished in part through the direct action of Black people. The Union’s victory in the Civil War was accelerated by the refusal of Black people to remain enslaved and their abandonment of the plantations for work in service of the Union army.<sup>375</sup> Dorothy Roberts explores the ways Black people set about creating new lives for themselves in the war’s aftermath:

After 1867, four million formerly enslaved people grabbed the opportunity Emancipation afforded them to create their own economic, social, and political lives independent of white domination. They gathered their family members, established farms and businesses, and ran for public office. Black Americans elected to southern legislatures helped to install egalitarian state constitutions, enact civil rights legislation, and establish

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<sup>373</sup> Jeffery M. Brown, *Deconstructing Babel: Toward a Theory of Structural Reparations*, 56 RUTGERS L. REV. 463, 479 (2004) (footnotes omitted).

<sup>374</sup> Peggy Cooper Davis, *Neglected Stories and Civic Space*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 45, 48 (2001).

<sup>375</sup> See Tim Schermerhorn, *Review: “Lincoln” Somehow Missed the General Strike*, LAB. NOTES (Mar. 14, 2013), <https://www.labornotes.org/blogs/2013/03/review-%E2%80%9Clincoln%E2%80%9D-somehow-missed-general-strike> [<https://perma.cc/QZY4-WYUU>] (“The general strike accelerated the South’s defeat in the Civil War and compelled Northern forces—Democrat and Republican—to even have the discussion about ending slavery. The 13th Amendment represented the first legal battle of a new democratic movement that would push for much more.”).

public education. . . . Thus, by resisting white domination and acting like citizens, [B]lack people have secured greater freedom apart from official recognition of their rights, thereby changing the Constitution's meaning to encompass their freedom.<sup>376</sup>

To Black Americans, the Reconstruction Amendments guaranteed their right to establish and protect this new society.<sup>377</sup> A proper understanding of the Reconstruction Amendments' original public meaning must be consistent with that project.

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To summarize: these various sources of original public meaning combine to form a coherent vision of the new constitutional order of the Reconstruction Amendments. The Thirteenth Amendment not only ended chattel slavery but forbade its essential badges and incidents. The Citizenship Clause eliminated the ability of state governments to mount challenges to the citizenship of Black Americans by creating a broad system of birthright citizenship. The Privileges or Immunities Clause applied the Bill of Rights and the traditional understanding of citizenship against the states. The Due Process Clause ensured that—both procedurally and substantively—the actions of legislatures, executive officials, and judges would not violate those rights through either facially or subtly discriminatory means. The Equal Protection Clause extended a duty to governments to extend the force of their protection to all their citizens. The Fifteenth Amendment ensured the ability of Black Americans to participate in representative government to aid in the protection of their own freedom. And all these goals were entrusted to congressional application through their enforcement clauses, armed with language clarifying the permissive standard of review to be applied under them. The remainder of this Article is devoted to an exploration of the consequences of this historical understanding, which reach so far as to provide a fresh and complete justification for the corpus of progressive constitutional case law through abolition constitutionalism.<sup>378</sup>

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<sup>376</sup> Roberts, *supra* note 299, at 64 (footnotes omitted).

<sup>377</sup> *See id.*

<sup>378</sup> *See, e.g.,* William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1257-70 (2011) (exploring objections to progressive constitutional decision-making in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Reynolds v. Sims*, 377 U.S. 533 (1964)). The remainder of the text will more fully analyze the power of abolition constitutionalism, but briefly, the cases Marshall highlights as examples of progressive constitutionalism can be justified under abolition constitutionalism as follows: *Barnette* would rest on the Equal Protection Clause's requirement that the law protect the rights of individuals against compelled speech contrary to their conscience. *Cf. id.* at 1261 (justifying *Barnette* as protecting religious minorities and recognizing evolving free speech principles based on societal developments). *Brown* would rest on the Thirteenth Amendment's protection against the badges and incidents of slavery. *Cf. id.* at 1263-64



B. *Redressing the Badges and Incidents of Slavery*

As there was disagreement within the Reconstruction Congress as to just what constituted badges and incidents of slavery, I will take a somewhat moderate route in this Section, addressing only practices that were essential to the preservation of slavery or would be necessary to its resumption. My exploration will reach the modern consequences of these practices and the potential application of the Thirteenth Amendment to them. Several of these were explicitly addressed in the congressional debates over the Thirteenth Amendment and the Civil Rights Act of 1866.

1. Police Abolition

I have previously addressed the potential of the Thirteenth Amendment for eliminating racist police practices through congressional action.<sup>379</sup> While Congress—by analyzing the history of policing in this country and including its findings in support of an appropriate bill—would be well within its Thirteenth Amendment powers in that field, the courts would be too. If we look to the test of a practice’s historical use to perpetuate slavery and its potential future use to resume the system of chattel slavery, policing certainly fits the mold.

Policing originated in this country as a means of enforcing slavery.<sup>380</sup> Even when it was adopted in places that had abolished slavery, the practice still lent itself to maintaining a racial caste system, including allowing its co-option by the slave power to forcibly return persons who managed to escape to their enslavers.<sup>381</sup> The same police agencies that had served as slave patrols were tasked with enforcing Black Codes and Jim Crow following abolition.<sup>382</sup> Police today routinely target Black and Brown neighborhoods as “high-crime areas”—a self-fulfilling prophecy.<sup>383</sup> Policing is a driving force of the disproportionate impact of mass incarceration—a system rife with compelled labor but narrowly exempted from the Thirteenth Amendment’s prohibition<sup>384</sup>—on Black

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(justifying *Brown* as protecting racial minorities and exemplifying evolving constitutional meanings). *Gideon* would also rest on the Equal Protection Clause. *Cf. id.* at 1265-66 (justifying *Gideon* as protecting a discrete and insular minority and demonstrating evolving notions of fairness). *Reynolds* would rest on the Fifteenth Amendment and the Equal Protection Clause. *Cf. id.* at 1268-69 (justifying *Reynolds* as addressing majoritarian entrenchment and need for expanded understanding of voting equality).

<sup>379</sup> See generally Hasbrouck, *supra* note 172 (calling for Congress to abolish policing through its Thirteenth Amendment power to eliminate badges and incidents of slavery).

<sup>380</sup> See *id.* at 1114-18.

<sup>381</sup> See *id.* at 1116-17.

<sup>382</sup> See Aya Gruber, Commentary, *Policing and “Bluelining,”* 58 Hous. L. Rev. 867, 876 (2021) (“[V]agrancy laws [contained in Black Codes] were facially neutral—indeed, some lawmakers characterized them as intended to protect the emancipated—but when enforced by the newly formed Southern police, they were indistinguishable from the prewar slave patrol regime.”).

<sup>383</sup> See Carbado, *supra* note 110, at 1543-44.

<sup>384</sup> See U.S. CONST. amend. XIII (abolishing slavery “except as a punishment for crime”).

people.<sup>385</sup> Policing was an essential tool during chattel slavery and has been a key factor in its approximate returns through convict leasing and mass incarceration.<sup>386</sup> It is nearly a textbook example of the badges and incidents of slavery.

Therefore, in light of a proper understanding of what the Thirteenth Amendment itself proscribes,<sup>387</sup> the courts would be within their inherent powers to eliminate or curtail any policing practice that they found fits these patterns. While some of these practices could survive under current standards of review,<sup>388</sup> they would not pass muster under a standard calculated to eliminate the badges and incidents of slavery. Such a color-conscious standard would account for the understanding that the Reconstruction Congress meant to reach further than simply the text of laws to achieve a radical adoption of racial equality in American society.<sup>389</sup> Any system or practice prone to the sort of discretion involved in policing would need to be closely scrutinized to ensure that its application did not in fact become infested with racism the way policing has.<sup>390</sup>

Policing's susceptibility to systemic racism stems in part from its emphasis on enforcing order and protecting property rather than promoting public safety. The recent prominence of the "Karen" meme highlights this effectively.<sup>391</sup> White people feel comfortable invoking the power of the police—and the state violence they bring with them—at the slightest sign that a person of color is not behaving in a sufficiently subservient manner.<sup>392</sup> When the police arrive, any

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<sup>385</sup> See generally ALEXANDER, *supra* note 67 (providing comprehensive account of how law enforcement and drug policy result in mass incarceration of Black men).

<sup>386</sup> See Hasbrouck, *supra* note 172, at 1114-21 (chronicling progression of police practices under slavery, Jim Crow, and mass incarceration regimes).

<sup>387</sup> See *supra* text accompanying notes 331-41 (describing Reconstruction Congress's broad view of practices directly prohibited by Thirteenth Amendment).

<sup>388</sup> See *supra* Section II.B (analyzing anti-Black consequences of Court's emphasis on neutrality).

<sup>389</sup> See *supra* text accompanying notes 331-41 (recounting original interpretations of Thirteenth Amendment's meaning).

<sup>390</sup> Cf. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) ("McCleskey challenges decisions at the heart of the State's criminal justice system. . . . Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").

<sup>391</sup> See Cady Lang, *How the 'Karen Meme' Confronts the Violent History of White Womanhood*, TIME (July 6, 2020, 4:11 PM), <https://time.com/5857023/karen-meme-history-meaning/>.

<sup>392</sup> See Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 337-41 (2019) ("The summer of 2018 saw a legion of [w]hite persons calling the police on Black persons engaged in mundane

perceived failure by the person of color to comport with the police's desired level of subservience can turn the encounter fatal.<sup>393</sup> This modern trend simply removes steps from the old pattern where a Black man would be accused of raping a white woman as justification for lynching him<sup>394</sup>—often with the participation or condonation of police.<sup>395</sup> When police exist to enforce social order, and that order itself is racist, policing will inherently remain a tool of the racial caste system.

A judicial standard aimed at eliminating the badges and incidents of slavery would be capable of piecing together these trends. Given the difficulty of locating racist trends in the facts of single encounters or the text of any statute or regulation, such a standard would necessarily be capable of considering statistical evidence. Current jurisprudence, of course, obscures systemic patterns through evidentiary bars to the admission of statistical evidence.<sup>396</sup> Considering the treasure trove of criminal justice data that prosecutors have been forced to release under North Carolina's Racial Justice Act,<sup>397</sup> it stands to reason that a standard open to challenging police practices using statistical evidence could yield similar tools for pursuing substantive justice. With adequate data on the

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activities. Black people had the authorities summoned for sitting in Starbucks; playing golf; eating at Waffle House; sleeping in university common rooms; eating in university class rooms; making purchases; returning purchases; smoking cigarettes; moving into apartments; leaving apartments; going for walks; doing their jobs; eating in restaurants; barbecuing; going to the gym; attending funerals; using too many or the wrong coupons; swimming in pools; playing basketball; canvassing for political reelection; doing community service; mowing the lawn; sheltering from the rain; getting into their cars; sitting in their cars; not listening to a neighbor's problems; walking their dogs; wearing costumes; wearing a bandana; and selling bottled water on a hot summer's day." (footnotes omitted)).

<sup>393</sup> See German Lopez, *Black Parents Describe "The Talk" They Give to Their Children About Police*, VOX (Aug. 8, 2016, 11:40 AM), <https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk> ("For [B]lack parents, that means a typical police stop turning into a violent encounter is a very real, terrifying possibility."); see also McNamara, *supra* note 392, at 343-44 (describing violent arrest of Black father simply picking up daughter from friend's house in white neighborhood).

<sup>394</sup> See Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 276 (2003) ("While historical reports suggest that most lynchings were motivated by white mob anger against [B]lack men accused (often falsely) of raping or assaulting a white woman, lynchings were in fact a tool used to regulate and restrict all aspects of [B]lack advancement, independence, and citizenship. Most lynchings were not related to the familiar interracial sex taboo." (footnote omitted)).

<sup>395</sup> See *id.* at 300 ("[I]n far too many instances, officers offered token resistance, or did not interfere with lynchings. . . . Other police officers actively assisted lynchings or were part of the mob. Local law enforcement routinely failed to participate in efforts to identify and try lynchings for their crimes." (footnotes omitted)).

<sup>396</sup> See *supra* text accompanying notes 232-49 (describing Court's resistance to statistical evidence of racial discrimination).

<sup>397</sup> See Laura Leslie, *Judge Orders State to Provide Decades of Data on Death Penalty Trials in NC to Attorneys Seeking to Overturn Sentences*, WRAL.COM (May 20, 2021, 7:45 PM), <https://www.wral.com/judge-orders-state-to-provide-decades-of-data-on-death-penalty-trials-in-nc-to-attorneys-seeking-to-overturn-sentences/19688573/>.

racist application of policing and a Thirteenth Amendment standard with sufficient scope to reach the badges and incidents of slavery, courts could realize a society where existing in public while Black would be safe.

## 2. Carceral Abolition

Just as policing's role in mass incarceration subjects it to scrutiny as a badge or incident of slavery, so too does our carceral system itself merit scrutiny. Mass incarceration is a direct replacement for the system of vagrancy laws and excessive punishments implemented in the wake of Reconstruction.<sup>398</sup> The Thirteenth Amendment can certainly reach slavery itself, whichever name it goes by. The Punishment Clause, however, would seem to exempt prison sentences from Thirteenth Amendment scrutiny.<sup>399</sup> While the Punishment Clause undoubtedly allows for the imposition of compelled labor as punishment for a crime, it still does not permit the badges and incidents of slavery.<sup>400</sup> Requiring persons convicted of crimes to labor for the state or its licensees may not be prohibited, but the brutality inherent in our prison system is.

Furthermore, the collateral consequences of a conviction would also fall outside the scope of the Punishment Clause's exception. As William M. Carter argues, the "racialized policies giving rise to mass incarceration result in a permanent caste distinction of such magnitude and impermeability as to arguably amount to a badge or incident of slavery."<sup>401</sup> While some collateral consequences likely fall beyond scrutiny, the network of potential consequences is now so vast as to essentially reinstitute the old punishment of civil death.<sup>402</sup> These persistent restrictions strip the convicted person of fundamental privileges and immunities of citizenship, including restrictions on speech, family relations,

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<sup>398</sup> See Pope, *supra* note 228, at 1528-29 ("No sooner had the Supreme Court at long last struck down traditional vagrancy laws, than they were replaced with a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage." (footnote omitted)).

<sup>399</sup> See U.S. CONST. amend. XIII, § 1 (prohibiting slavery "except as a punishment for crime").

<sup>400</sup> See Pope, *supra* note 228, at 1551-52, 1552 n.476 (noting that prison system dehumanizes incarcerated persons and subjects them to officially tolerated rape and assault).

<sup>401</sup> William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 825 (2016).

<sup>402</sup> See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) ("[Civil death] no longer exists under that name, but effectively a new civil death is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences. A person convicted of a crime, whether misdemeanor or felony, may be subject to disenfranchisement (or deportation if a noncitizen), criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location. Some are not allowed to live outside of civil confinement at all. In addition, the person may be subject to occupational debarment or ineligibility to establish or maintain family relations." (footnotes omitted)).

and legal status—all of which are textbook examples of badges and incidents of slavery.<sup>403</sup>

The conditions and collateral effects of carceral punishment certainly merit Thirteenth Amendment scrutiny, but what of incarceration itself? While compelled labor as punishment for a crime was permissible under the Punishment Clause, the resumption of chattel slavery by other means was not. The Reconstruction Congress considered even race-neutral convict leasing to fall within the Thirteenth Amendment's prohibition when it was used to effectively re-enslave Black Americans.<sup>404</sup> Our current system of mass incarceration does just that. One in three Black men in America will spend time in prison, with one in twelve Black men in their thirties incarcerated at any given time; only one in seventeen white men will experience incarceration in their lives.<sup>405</sup> Black and Latinx Americans account for fifty-six percent of the incarcerated population, despite representing only thirty-two percent of the U.S. population.<sup>406</sup> The increase in prison populations spurred under mass incarceration is comparable to that under the Black Codes.<sup>407</sup> Mass incarceration quacks like the proverbial duck.

It is somewhat unclear whether the Reconstruction Congress intended to empower the courts to deal directly with a system of slavery by another name. Congress certainly considered itself to have this authority, as it applied its power first against facially discriminatory vagrancy laws and later worked toward doing so with the facially neutral ones.<sup>408</sup> The courts during Reconstruction could not be relied upon to enforce a self-enforcing prohibition in the Constitution along abolitionist lines—it was the Chase Court that decided the

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<sup>403</sup> See *supra* text accompanying notes 331-41 (describing original, broad views of what Thirteenth Amendment's ban on slavery encompassed); see also Carter, *supra* note 401, at 825-27 (concluding that mass incarceration "create[s] a large, racialized, near-permanent underclass unable to overcome its alienation from civil society," which is tantamount to badge or incident of slavery).

<sup>404</sup> See Pope, *supra* note 228, at 1485-89. Legislation targeting race-neutral convict leasing stalled in the Senate after passing the House of Representatives. *Id.* at 1488-89 (describing contents of bill criminalizing convict leasing and its passage in House).

<sup>405</sup> *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/6J95-XKS6>] (last visited Jan. 17, 2022) (estimating lifetime incarceration rates for Americans born in 2001).

<sup>406</sup> *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/TU6J-TEWS>] (last visited Jan. 17, 2022).

<sup>407</sup> Compare *Criminal Justice Facts*, *supra* note 405 ("There are 2 million people in the nation's prisons and jails—a 500% increase over the last 40 years."), with *Mississippi History Timeline: 1876*, MISS. DEP'T OF ARCHIVES & HIST., <https://www.mdah.ms.gov/timeline/zone/1876/> [<https://perma.cc/V34B-A4A9>] (last visited Jan. 3, 2022) ("[In 1876, t]he law defining the theft of any property over \$10 as grand larceny quadrupled the prison population.").

<sup>408</sup> See Pope, *supra* note 228, at 1485-89.

*Slaughter-House Cases*.<sup>409</sup> Given the belt-and-suspenders structure of the Reconstruction Amendments, it would likely be fair to say that Congress did not reserve *exclusive* authority to enforce the prohibition against slavery and find that modern practices such as mass incarceration violate its spirit. As with policing, either Congress or the courts has the power to defend abolition against such an obvious attempt to reinstitute slavery.

The dehumanization at the core of slavery was also so great as to excuse the private killing of an enslaved person for some transgressions.<sup>410</sup> Enslaved persons were subject to execution for offenses specific to their condition.<sup>411</sup> This level of control was essential to the maintenance of the institution of slavery. Modern capital punishment is little changed—Black defendants make up a disproportionate share of executions,<sup>412</sup> with the race of the victim providing an even stronger predictor of who will be executed.<sup>413</sup> In opposing passage of the Racial Justice Act in North Carolina, legislators essentially admitted that capital punishment would be all but eliminated if racial disparities could be used to vacate a death sentence.<sup>414</sup> There are significant reasons to doubt that courts—even with abolitionist judges—would find these statistical arguments compelling enough to determine that capital punishment is one of the badges and incidents of slavery. The racist application of capital punishment arises out of the individual interactions of prosecutors, defendants, judges, and juries, with blame hard to lay at any one party’s feet. However, Congress would be well within its powers under the Thirteenth Amendment to take notice of the use of

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<sup>409</sup> See Williams, *supra* note 353, at 560-65, 564 n.349 (recounting Justices’ positions in *Slaughter-House Cases*).

<sup>410</sup> See Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment*, 94 N.C. L. REV. 817, 835-40 (2016) (describing state statutes that penalized “cruelly” killing enslaved persons but expressly permitted killing in certain circumstances, as “punishment ‘for running away or other offence[s]’”).

<sup>411</sup> See, e.g., *id.* at 835-38; Judith Kelleher Schafer, “*Under the Present Mode of Trial, Improper Verdicts Are Very Often Given*”: *Criminal Procedure in the Trials of Slaves in Antebellum Louisiana*, 18 CARDOZO L. REV. 635, 646-47 (1996) (describing Louisiana capital offense, specific to enslaved persons, of striking white person with authority over them).

<sup>412</sup> See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 4-5 (2007) (“[T]hose who end up on death row tend to be poor, [B]lack, and the recipients of woefully inadequate legal representation.” (footnotes omitted)); see also NGOZI NDULUE, DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 28 (Robert Dunham ed., 2020) (“The small number of counties that account for the majority of recent death sentences have shown increasing racial concentration of death sentencing.”).

<sup>413</sup> See NDULUE, *supra* note 412, at 30-32 (summarizing modern empirical evidence of salience of victim’s race in capital sentencing); Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 587 (2020) (demonstrating that defendants convicted of killing white persons are seventeen times more likely to actually be executed than defendants convicted of killing Black persons).

<sup>414</sup> See Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2124 n.403 (2010).

capital punishment as a tool of racial oppression and outlaw it as a badge or incident of slavery. The Amendment contains the authority for Congress and the courts to transform criminal justice as we know it.

### 3. Reproductive Rights

The Thirteenth Amendment also can be understood as a guarantee of reproductive autonomy. Recall that when explicit lists of the badges and incidents of slavery were given in Congress, Senator Harlan included a lack of control over a person's marriage and family.<sup>415</sup> This lack of control included forced reproduction, which allowed enslavers to ensure the birth of a new generation of people to subject to slavery.<sup>416</sup> Even without its inclusion in specific lists, the necessity of controlling the reproduction of enslaved people should be considered one of the badges and incidents of slavery because of its necessity to the perpetuation of chattel slavery.

If abolition eliminated not just slavery itself but also the structures that had perpetuated it and would be necessary to enable its return, it must include the recognition that free people inherently need control over their own reproductive decisions. A ban on reasonable methods of maintaining control over one's own reproductive decisions removes autonomy, pushing toward the risk of slavery's return—whether in its old form or a new one.<sup>417</sup>

Critics have suggested that there is no support for *Roe v. Wade*<sup>418</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>419</sup> in the Constitution's text.<sup>420</sup> But when the Thirteenth Amendment's scope is considered to include the badges and incidents of slavery, a person's choice not to have a child must be protected. Bodily autonomy, including reproductive autonomy, is essential in the life of a free person, and its denial is essential to the institution of slavery. The Reconstruction Amendments, read in their original abolitionist context,

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<sup>415</sup> See *supra* note 338 and accompanying text (describing Senator Harlan's position that control over marriage and family constituted incident of slavery).

<sup>416</sup> See William Spivey, *The Truth About American Slave Breeding Farms*, MEDIUM (June 9, 2019), <https://medium.com/the-aambc-journal/the-truth-about-american-slave-breeding-farms-ee631e863e2c> ("While owners of the breeding farms and plantations in general fornicated at will with their property, they also utilized selective breeding.").

<sup>417</sup> See also Laurie Penny, *The Criminalization of Women's Bodies Is All About Conservative Male Power*, NEW REPUBLIC (May 17, 2019), <https://newrepublic.com/article/153942/criminalization-womens-bodies-conservative-male-power> ("These laws are not about whether a fetus is a person. They are about enshrining maximalist control over the sexual autonomy of women as a foundational principle of conservative rule. They are about owning women. They are about women as things.").

<sup>418</sup> 410 U.S. 113 (1973).

<sup>419</sup> 505 U.S. 833 (1992).

<sup>420</sup> See generally Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) (attacking *Casey* and *Roe* as incompetent, unfounded interpretations of the Constitution begetting even more far-reaching errors).

necessarily apply to protect a person's right to bodily autonomy, including abortion.

In a limited sense, the critics are correct that the Due Process Clause is not the source of the right to abortion, for that Clause, properly understood, is only one part of the legal structure supporting the right to abortion.<sup>421</sup> The right originates in the Thirteenth Amendment's abolition of slavery's badges and incidents. A person's right to make that choice regarding their own body is a matter of natural rights, and thus is further protected as one of the privileges or immunities of citizenship.<sup>422</sup> The government's obligation to defend that right against state regulation resides in the Equal Protection Clause's requirement that the law *protect* people.<sup>423</sup> Under the abolitionist scheme, only the privacy of that decision between a person and their doctor remains for substantive due process. There is considerable overlap between the protections granted by the various clauses, of course. That is by design, as the Reconstruction Congress had already seen Southern states attempt to legislate in the perceived gaps of the Thirteenth Amendment when they drafted the Fourteenth.<sup>424</sup>

A similar attempt is underway now, seeking to legislate against reproductive freedom in the perceived gaps of current jurisprudence.<sup>425</sup> In an especially brazen challenge to federal law, Texas has enacted an abortion ban at six weeks, using private citizen suits as its enforcement mechanism in an effort to avoid review of the law as state action.<sup>426</sup> Meanwhile, Mississippi has adopted a

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<sup>421</sup> See *id.* at 1007.

<sup>422</sup> See D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas's Effort to Resurrect the Privileges or Immunities Clause*, 46 IND. L. REV. 341, 384 (2013) (noting that although Privileges or Immunities Clause is silent on "fundamental rights issues [including] abortion," Reconstruction Congress "did not shy away from arguing that rights were deserving of being considered fundamental to the extent that they coincided with natural rights").

<sup>423</sup> See U.S. CONST. amend. XIV, § 1; *supra* text accompanying notes 324-27 (highlighting abolitionist understanding of government's affirmative duty of protection).

<sup>424</sup> See Roberts, *supra* note 299, at 62 ("Slavery's defeat was met immediately by a terrorist effort to return newly freed [B]lacks to servitude and reinstate white rule.").

<sup>425</sup> See Caitlin E. Borgmann, *Roe v. Wade's 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL'Y REV. 245, 246 (2013) ("The mainstream anti-abortion-rights movement, encouraged by *Casey*, has pursued legislation calculated to appeal to a public that generally favors abortion rights, albeit with some restrictions. In advocating for these incremental measures, the anti-abortion-rights movement has not always been forthright about its ultimate goal to ban all abortions."); Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 81-85 (2015) (discussing incremental legislative attacks on reproductive rights, including targeting abortion providers with additional regulations, imposing additional requirements on medication-induced abortions, and applying requirements of ambulatory surgical centers to abortion clinics).

<sup>426</sup> See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Alito, J., in chambers) (Roberts, C.J., dissenting) ("The statutory scheme before the Court is not only unusual; it is unprecedented. The legislature has imposed a prohibition on abortions after roughly six weeks, and then essentially delegated enforcement of that prohibition to the populace at large. The desired consequence appears to be to insulate the State from



strategy of directly asking the Supreme Court to overrule *Roe v. Wade*.<sup>427</sup> This litigation strategy is possible in part because of the narrow reasoning underpinning *Roe*, whereas a robust, abolitionist interpretation of the Constitution would be more protective of reproductive rights.

#### 4. Property Reparations

The impairment of property rights was another of the chief badges and incidents of slavery recognized by the Reconstruction Congress.<sup>428</sup> Following emancipation, many Black Americans lacked property and faced tremendous disadvantages in adapting to their new status as citizens.<sup>429</sup> Several remedies were proposed, and some saw limited implementation, often through the Freedmen's Bureau.<sup>430</sup> Yet Black Americans struggled to obtain real property and faced numerous discriminatory and bureaucratic regimes that stymied their attempts to build generational wealth.<sup>431</sup>

The Thirteenth Amendment was meant to eradicate slavery and prevent its return. Yet the lack of generational wealth has left Black Americans in a constantly precarious position, susceptible to repeated attempts to reintroduce slavery by any other name—for example, peonage,<sup>432</sup> convict leasing,<sup>433</sup>

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responsibility for implementing and enforcing the regulatory regime.”); Press Release, Am. Coll. of Obstetricians & Gynecologists, Statement on Texas SB8 (Sept. 1, 2021), <https://www.acog.org/news/news-releases/2021/09/statement-on-texas-sb8> [<https://perma.cc/3AC8-LLXH>] (“By allowing third-party lawsuits against clinicians, by virtually banning all abortions, and by curtailing the sharing of information and support related to access to vital women’s health care, Texas’s new law creates a coercive environment for patients and clinicians . . .”).

<sup>427</sup> See Adam Liptak, *Justices Indicate They Will Uphold Curb on Abortion*, N.Y. TIMES, Dec. 2, 2021, Late Edition, at A1 (“In the state’s petition . . . officials told the justices that ‘the questions presented in this petition do not require the court to overturn [*Roe*] or [*Casey*]’ . . . . Once the court agreed to hear the case, the state shifted its emphasis and began a sustained assault on those precedents.” (quoting Petition for a Writ of Certiorari at 5, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 15, 2020))).

<sup>428</sup> See *supra* note 338 and accompanying text (describing Senator Harlan’s position that property restraints constituted incidents of slavery).

<sup>429</sup> See Pope, *supra* note 228, at 1511-13.

<sup>430</sup> See W.E. Burghardt Du Bois, *The Freedmen’s Bureau*, ATLANTIC, Mar. 1901, <https://www.theatlantic.com/magazine/archive/1901/03/the-freedmens-bureau/308772/> (recounting history, accomplishments, and limitations of Freedmen’s Bureau).

<sup>431</sup> See *supra* notes 272-78 and accompanying text (describing systems that shut Black people out of property ownership). See generally Sawers, *supra* note 227 (highlighting evolution of postbellum property law and its role in controlling newly freed Black Americans).

<sup>432</sup> See Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1626-28 (2015) (describing modern form of coerced labor for debt and parallels to post-Civil War peonage system).

<sup>433</sup> See *id.* at 1598-1601 (describing Georgia program “leasing out convicted men to work on [a] plantation” and similar instances of convict leasing across state).

sharecropping,<sup>434</sup> and mass incarceration.<sup>435</sup> So long as Black people are treated as a lower caste of Americans, this cycle will persist. If we wish to abolish not only slavery but “slavery lite” in all its forms, we must remedy the conditions that keep Black Americans vulnerable—especially their lack of property and the decades of legal maneuvers to maintain that status quo. That will require reparations.

This isn’t to claim that the Thirteenth Amendment creates a self-enacting right to reparations. Nothing that the Reconstruction Congress did indicated that its members believed that, nor does the main body of abolitionist literature indicate that the ideas were inherently linked within the movement. To be sure, some politicians had advocated that enslaved persons would have a right to the land that they worked following emancipation,<sup>436</sup> an idea that had reached the ears of its intended beneficiaries.<sup>437</sup> General Sherman and other military leaders ordered the redistribution of some land, but this practice was not widespread, because the general policy of Reconstruction favored wage labor to land ownership.<sup>438</sup>

However, the inclusion of some land reforms in the Freedmen’s Bureau Bills indicates that the Reconstruction Congress believed that such reparations were potentially a necessary and proper method to enforce emancipation. The Reconstruction Congress meant for its enforcement powers to be evaluated by the *McCulloch* test:<sup>439</sup> if the legislation was appropriate to achieve legitimate ends by means that were plainly adapted to the ends and otherwise consistent with the limits of the Constitution, the legislation would be constitutional.<sup>440</sup> Therefore, reparations under the Thirteenth Amendment should be evaluated by this standard.

First, a court would need to evaluate whether the ends are “legitimate.”<sup>441</sup> Reparations are—at their core—a remedy, and a remedy must be aimed at redressing a particular harm.<sup>442</sup> Black Americans have been maintained as a

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<sup>434</sup> See *id.* at 1615-16 (“Former slaves were typically paid half in currency, with the other half to be paid only when the crop was harvested.”).

<sup>435</sup> See *id.* at 1629-35 (“[J]ail time is not prohibited for such noncommercial debts as those stemming from criminal court involvement and those stemming from failure to pay child support or alimony, and it is not prohibited for contractual debts stemming from civil contempt orders.” (footnote omitted)).

<sup>436</sup> See Tsesis, *supra* note 329, at 1812 n.206.

<sup>437</sup> See Sarah McCammon, *The Story Behind ‘40 Acres and a Mule,’* NPR: CODE SWITCH (Jan. 12, 2015, 6:02 PM), <https://www.npr.org/sections/codeswitch/2015/01/12/376781165/the-story-behind-40-acres-and-a-mule> [<https://perma.cc/9UV9-UY4Y>].

<sup>438</sup> See Du Bois, *supra* note 430 (noting that Freedmen’s Bureau “set going a system of free labor” but failed to make Black persons “landholders in any considerable numbers”).

<sup>439</sup> See Balkin, *supra* note 302, at 1810.

<sup>440</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>441</sup> See *id.*

<sup>442</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

racially disfavored caste since their forcible introduction to the continent.<sup>443</sup> Since the time of emancipation, this has relied in part on their lack of access to real property. Various legal means have been deployed to relieve Black Americans of their property and prevent them from obtaining more.<sup>444</sup> That constitutes a very real and ongoing harm, one that reparations could redress, at least in part. Therefore, redressing the harm of land deprivation would be a legitimate end within the scope of the Thirteenth Amendment.

Next, the means must be “appropriate” and “plainly adapted” to the legitimate ends.<sup>445</sup> If the end is a remedy for the harm of land deprivation, the means allow for the acquisition of land. Either large-scale land reforms placing ownership in the hands of Black Americans or a grant of the financial means to acquire such lands would clearly accomplish the goal of aiding Black Americans in the acquisition of land. Such methods would be appropriate means plainly adapted to the end of remedying land deprivation.

Finally, the means must otherwise “consist with” the Constitution.<sup>446</sup> Congress has vast authority with respect to property of the United States<sup>447</sup> and expenditures from its treasury.<sup>448</sup> Either a grant of federal lands or funds would clearly be within Congress’s authority. Redistribution of privately held lands might be more questionable, but the Takings Clause has been interpreted to contemplate a wide range of public purposes.<sup>449</sup> The federal government’s condemnation power is not in doubt. The question, then, would be whether any of these methods of making land available to Black Americans as reparations would run afoul of some other constitutional provision.

The most obvious candidate, based on the Court’s modern jurisprudence, would be the Equal Protection Clause. Given the frequent rejection of programs tailored to provide funds to members of a disadvantaged race,<sup>450</sup> the Court’s current understanding of the Equal Protection Clause would forbid reparations. But this colorblindness does not comport with the Reconstruction Congress’s vision of the Fourteenth Amendment. The Reconstruction Amendments were intended to be color-conscious remedies capable of supporting appropriate legislation to redress slavery and discriminatory state action. Equal protection instead imposed a duty on governments to affirmatively protect people within their jurisdictions and to preserve equality generally. The doctrine should not be

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<sup>443</sup> See generally, e.g., Elliott & Hughes, *supra* note 6 (exploring history and legacy of slavery in United States).

<sup>444</sup> See *supra* notes 272-78 and accompanying text (describing discriminatory practices that continue to deprive people of color of access to real property).

<sup>445</sup> See *McCulloch*, 17 U.S. (14 Wheat.) at 421.

<sup>446</sup> See *id.*

<sup>447</sup> See U.S. CONST. art. IV, § 3.

<sup>448</sup> See *id.* art. I, § 8.

<sup>449</sup> See *Kelo v. City of New London*, 545 U.S. 469, 484-85 (2005) (listing precedents upholding takings and allowing takings for respondent city’s economic benefit).

<sup>450</sup> See *Kennedy*, *supra* note 137, at 5-6; *Reiley*, *supra* note 167, at A19.

conceived to require a blind application of the law without regard to the needs and interests of individuals. Therefore, there is no basis under the Constitution—properly understood—to find a conflict with reparations to enable land ownership. The Thirteenth Amendment, under the *McCulloch* test, can support reparations.<sup>451</sup>

C. *Ensuring Equality Under Law—and Its Protection*

The Reconstruction Congress saw that state governments were all too willing to attempt to circumvent the abolitionist project on any technicality they could imagine.<sup>452</sup> To prevent that, the Fourteenth and Fifteenth Amendments protected a broad range of civil and political rights through sweeping language and expansive enforcement powers.<sup>453</sup> This Section will explore the scope of these protections through an abolitionist lens and imagine their potential modern applications.

1. The Citizenship Clause

Of all the protections granted by the Reconstruction Amendments, the Citizenship Clause’s guarantee of birthright citizenship is the one modern application that gets the closest to its abolitionist intent. The main distinction between the Clause’s promise and current enforcement has to do with birthright citizenship in U.S. territories. Michael Ramsey accurately described the Citizenship Clause’s full meaning:

[A]t the time of its enactment the Citizenship Clause’s phrase “born . . . in the United States” most likely referred to birth in territory under permanent U.S. sovereignty. The distinction between incorporated and unincorporated territory was a subsequent policy-driven judicial invention that lacked foundation in original materials. Rather, the key distinction at the time of the Amendment’s enactment was . . . formal cession or annexation, as opposed to temporary occupation.

. . . [T]he original meaning would apply the Citizenship Clause to persons born in Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands—all of which are under permanent U.S. sovereignty pursuant to formal acquisitions and thus are “in the United States” under the original meaning of the Fourteenth Amendment.<sup>454</sup>

In other words, the Fourteenth Amendment’s intended effect is to extend birthright citizenship to the entire United States. That would require only a minor

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<sup>451</sup> By implication, it could also support more narrowly tailored remedies to redress the symptomatic harms that hinder Black landownership. *See supra* text accompanying notes 272-78 (highlighting several discriminatory practices that continue to impede Black property ownership).

<sup>452</sup> *See Roberts, supra* note 299, at 62.

<sup>453</sup> *See Amar, supra* note 365, at 226-27.

<sup>454</sup> Ramsey, *supra* note 352, at 435-36 (second alteration in original).

change in enforcement to cover the territories not currently treated as within the Citizenship Clause's meaning.

## 2. The Privileges or Immunities Clause

By contrast, the Privileges or Immunities Clause is furthest from its intended, abolitionist meaning. Its champion on the Supreme Court, Justice Clarence Thomas, is unlikely to acknowledge its full original meaning,<sup>455</sup> while other Justices seem content to leave it dormant.<sup>456</sup> The Reconstruction Congress clearly intended for the Privileges or Immunities Clause to encompass both the Bill of Rights and the sorts of natural law rights understood to fall within the scope of the Comity Clause.<sup>457</sup>

To begin, let us consider what Justice Thomas gets right: “the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights.”<sup>458</sup> Shortly before the Fourteenth Amendment's ratification, President Johnson cemented in the public consciousness the connection of the phrase “privileges or immunities” to the Bill of Rights when he proclaimed amnesty for former Confederates.<sup>459</sup> Justice Thomas is absolutely correct when he asserts that “[e]vidence from the political branches in the years leading to the

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<sup>455</sup> See Broyles, *supra* note 422, at 364-65 (noting that while Justice Thomas advocates for use of Privileges or Immunities Clause to incorporate Bill of Rights against states, he “does not address the numerous references by Bingham and others to the centrality of natural rights as a critical component of their understanding of privileges and immunities”).

<sup>456</sup> See Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City of Chicago's Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights*, 115 PENN ST. L. REV. 561, 576 (2011) (noting that in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), four Justices explicitly rejected using Privileges or Immunities Clause in general, another rejected it in instant case, and three others made no comment on it, while Justice Thomas favored it for incorporation).

<sup>457</sup> See *supra* notes 352-56 and accompanying text (comparing scopes of Privileges or Immunities Clause and Citizenship Clause).

<sup>458</sup> *McDonald*, 561 U.S. at 837 (Thomas, J., concurring in part and concurring in judgment).

<sup>459</sup> See Emily Jennings, Note, *Let's All Agree to Disagree, and Move On: Analyzing Slaughter-House and the Fourteenth Amendment's Privileges or Immunities Clause Under "Sunk Cost" Principles*, 54 B.C. L. REV. 1803, 1811 (2013) (“This pardon and amnesty, not surprisingly, headlined every newspaper, and introduced ‘privileges and immunities’ to the American voters as a term of art. As Johnson’s pardon was undeniably the most publicized event in its day, the American voter would likely have viewed this new term of art as inextricably linked to those rights under the Constitution, as Johnson had done.” (footnote omitted)); see also Proclamation (Dec. 25, 1868), reprinted in *AMNESTY: Important Proclamation by the President—Pardon and Amnesty Granted to All the Late Rebels*, N.Y. TIMES, Dec. 25, 1868, at 3 (granting “restoration of rights, privileges and immunities under the Constitution and the laws which have been made in pursuance thereof”). See generally Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010) (explaining usage of “privileges,” “immunities,” and “privileges and immunities” in antebellum and Reconstruction eras).

Fourteenth Amendment's adoption demonstrates broad public understanding that the privileges and immunities of United States citizenship included rights set forth in the Constitution, just as Webster and his allies had argued.<sup>460</sup> Any historically accurate understanding of the Privileges or Immunities Clause must include the incorporation of the entire Bill of Rights against the states.

But Justice Thomas breaks with the framers of the Fourteenth Amendment regarding natural law rights. He would constrain the Privileges or Immunities Clause to protect only such rights as could be considered *fundamental*.<sup>461</sup> The distinction, typically, is that whichever rights Justice Thomas wants to recognize will fit within that framework, and those he thinks should not be protected will not.<sup>462</sup> Justice Thomas's objection to reproductive rights is especially illustrative of this point.<sup>463</sup> Bodily autonomy and the right to be free of interference with one's family structure are both protected under the Thirteenth Amendment's abolition of slavery and its badges and incidents, regardless of what other provisions might support them.<sup>464</sup> The notion that the right to bear arms is fundamental, while the right not to be enslaved—along with its attendant rights to liberty—is not, is patently absurd. The framers of the Fourteenth Amendment were savvy to the ability of state governments to discover new means of oppressing Black Americans—it was the impetus for the Amendment's adoption.<sup>465</sup> The ratifying public also understood that the Amendment was a response to such oppression to ensure that the government would remain agile enough to counteract it. The Fourteenth Amendment was the “find-out” Amendment in response to the South's transgressions; the Privileges or Immunities Clause was intended to be its strongest tool.<sup>466</sup> The Privileges or Immunities Clause must necessarily be understood to allow for the protection of not just rights that people in 1868 already understood to be fundamental but those that would later come to be understood as fundamental.

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<sup>460</sup> *McDonald*, 561 U.S. at 826-27 (Thomas, J., concurring in part and concurring in judgment).

<sup>461</sup> See Broyles, *supra* note 422, at 365 (“As Justice Thomas points out, the Framers intended the Privileges and Immunities Clause of Article IV primarily to be a comity provision that would guarantee citizens of each state the fundamental rights of citizens of other states should they travel to those other states.”).

<sup>462</sup> See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in judgment) (discussing approvingly Court's treatment of right to bear arms as fundamental while decrying its protection of right of same-sex partners to marry and right to reproductive privacy).

<sup>463</sup> See *id.*

<sup>464</sup> See *supra* Section III.B.3 (discussing reproductive autonomy's centrality to free personhood).

<sup>465</sup> See Graber, *supra* note 345, at 1528.

<sup>466</sup> See *supra* text accompanying notes 352-56 (arguing that text and history of Privileges or Immunities Clause indicate it should be understood as strongest tool in Reconstruction Amendments).

All the liberty interests and protections against government interference in our lives that we take for granted today as constitutionally protected fall within the scope of the Privileges or Immunities Clause. In its full abolitionist glory, the Privileges or Immunities Clause gives all citizens a powerful tool against government interference with their fundamental rights—be they speech, privacy, travel, or bearing arms. The restoration of this Clause to its intended strength would be a revolution in individual rights.

### 3. The Due Process Clause

The modern understanding of the Due Process Clause does much of the work intended for the Privileges or Immunities Clause—but only a portion of its own.<sup>467</sup> The Due Process Clause can and should protect those procedural rights guaranteed by the Bill of Rights, as well as traditional understandings of fairness in the application of notice and an opportunity to be heard.<sup>468</sup> However, its substantive components would also provide protection against misconduct by legislatures, executive officers, and courts. If the Clause met its abolitionist potential, it would provide powerful recourse for the vindication of rights against improper government action.

Just as the Administrative Procedure Act provides a means to vacate the actions of an executive agency taken by some improper procedure,<sup>469</sup> the Due Process Clause, properly conceived, would supply a guarantee that legislatures conduct their affairs in good faith. Acts of legislatures taken in contravention of their own rules or state constitutions could be challenged as violating substantive due process. Self-dealing in legislative redistricting to guarantee a representative's own seat or a party's victory could likewise be challenged.<sup>470</sup> The original framers of the Constitution assumed the good faith of elected officials, but the framers of the Fourteenth Amendment, hardened by a war brought on by the founders' moral failings, had no such delusions.

An abolitionist reading of the due process guarantee of the Fourteenth Amendment could also spell the end of the "good faith" exception to the Fourth Amendment's exclusionary rule.<sup>471</sup> Rather than haphazardly balancing the needs

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<sup>467</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment) ("[T]he Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights."); *supra* text accompanying notes 357-60 (discussing confusion as to Due Process Clause's scope).

<sup>468</sup> See Williams, *supra* note 357, at 420-22 (providing overview of procedural due process).

<sup>469</sup> See 5 U.S.C. § 706(2)(D).

<sup>470</sup> For a similar discussion regarding the power to redress violations of the states' assurances that power derives from the people through *state* constitutions, see Bulman-Pozen & Seifter, *supra* note 294, at 913.

<sup>471</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 907-08 (1984) ("The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. . . . Particularly when law enforcement officers have acted in

of the state against the rights of individuals, courts could ask a simpler question: were the defendant's rights violated to their detriment? If the answer is yes, the fact that the government blundered rather than sought to oppress would be immaterial to the availability of procedural remedies.

At its core, substantive due process would require that any government decision that could deprive a person of life, liberty, or property be conducted fairly, within established norms, and without illicit motive. The abolitionist understanding of due process is a strong limit upon government action and is significantly broader in scope than the present interpretation of the Due Process Clause.<sup>472</sup>

Abolition constitutionalism also requires a reexamination of our concept of liberty. The abolitionist view is more consistent with a vision of liberty that embraces positive liberties rather than merely the negative liberties our modern concept of ordered liberty does.<sup>473</sup> “What the post-Civil War reconstruction amendments were about fundamentally . . . was securing the positive liberties of citizenship, self-governance, autonomy, and the end of bondage . . . .”<sup>474</sup> While such positive liberties could be construed as protected under the Privileges or Immunities Clause, the Due Process Clause provides an additional means of protection.

#### 4. The Equal Protection Clause

By comparison to the rather positive abolitionist concept of protection, modern Equal Protection Clause jurisprudence merely analyzes whether the law has been applied equally—even to dissimilarly situated persons.<sup>475</sup> Any deviation from this colorblind doctrine is subjected to strict scrutiny.<sup>476</sup> Yet the original, abolitionist doctrine of protection asked instead: Does the law protect all those subject to it? The right to equal protection was not so much a right of equal protection against the government, but a duty of the government to provide protection—including against private action—to the people as equals.<sup>477</sup>

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objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on . . . guilty defendants offends basic concepts of the criminal justice system.”).

<sup>472</sup> See Williams, *supra* note 357, at 476.

<sup>473</sup> See WEST, *supra* note 171, at 125 (“The two limitations that define the modern conception of ordered liberty and render the Constitution’s promise so empty . . . are flatly unjustified, given the breadth of political vision that inspired . . . the Fourteenth Amendment, including its guarantee of liberty.”).

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

<sup>475</sup> See Kennedy, *supra* note 137, at 4; WEST, *supra* note 171, at 26-27 (arguing that colorblind constitutionalism is flawed because it creates possibility that in absence of Thirteenth Amendment, Equal Protection Clause would permit colorblind slavery).

<sup>476</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314-15 (2013) (remanding case with instructions to apply strict scrutiny to college admissions affirmative action programs to ensure equal protection of white students).

<sup>477</sup> See *supra* notes 361-64 and accompanying text (discussing equal protection as including affirmative obligation for government to provide protection).



As with the Privileges or Immunities Clause, restoring the abolitionist meaning of the Equal Protection Clause would work a significant change in its application. The Reconstruction Congress understood the Fourteenth Amendment to not just permit but to support race-conscious remedies.<sup>478</sup> So long as Black people remain disadvantaged in American society, such remedies would remain appropriate legislation for the legitimate end of remedying the lingering effects of slavery and its aftermath. The Equal Protection Clause, therefore, would not provide *protection* to white people against race-conscious remedies—the notion is contrary to the entire project of Reconstruction.

Instead, the Equal Protection Clause would be applicable to answer questions such as: Did the police have a duty to enforce Jessica Gonzales’s restraining order against her estranged husband?<sup>479</sup> Does the EPA have a duty to prevent carbon dioxide emissions from threatening coastal communities through rising sea levels?<sup>480</sup> Did state and federal governments have a duty to protect prisoners from COVID-19?<sup>481</sup> Did Michigan have a duty to protect the people of Flint from contaminated drinking water?<sup>482</sup> Yes—in all of these instances, the government has a duty to protect people subject to its laws.<sup>483</sup>

Under the abolitionists’ Equal Protection Clause, government officials have the duty to protect people from the environmental ravages of corporate greed and official neglect. Police have the duty to protect people from known threats. Courts have a duty to protect people from abusive police. Prisons, psychiatric treatment centers, and public hospitals have a duty to protect people in their care. Regulators have a duty to protect employees from hostile work environments and unsafe conditions. State and federal governments have a duty to protect

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<sup>478</sup> See Roberts, *supra* note 299, at 63.

<sup>479</sup> See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751-54 (2005) (detailing Gonzales’s attempts to enforce restraining order to protect her daughters, who her estranged husband murdered sometime during hours she spent pleading for police help).

<sup>480</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 515 (2007) (describing projection that rising sea levels would lead to loss of coastal property in Massachusetts if EPA did not curb greenhouse gas emissions).

<sup>481</sup> See *A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT (July 1, 2021, 1:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/38JH-D9S6>] (examining nearly 400,000 cases and 2,715 deaths from COVID-19 in U.S. prisons through June 2021).

<sup>482</sup> See *Flint Water Crisis*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/flint> [<https://perma.cc/ME96-9CD6>] (last visited Jan. 17, 2022) (describing water contamination in Flint, Michigan, as involving “lead levels well above the ‘action level’ for lead set by the U.S. Environmental Protection Agency”).

<sup>483</sup> See Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1, 10 (1999) (“This abolitionist reading [of the Fourteenth Amendment] has the added virtue . . . of harmonizing the Equal Protection and Due Process Clauses, and it does so in a way which is both logical and historically sensible. The point of the Due Process Clause is to guarantee the positive liberty that is the antithesis of slavery, and the point of the Equal Protection Clause, on this approach, is not *equality* at all (equal is in the clause as a modifier, not a noun) but *protection*.”).

voters against campaigns of suppression and disenfranchisement. These duties cannot be neglected, especially not to the detriment of a subset of the population.

By contrast, the government does not have a duty to protect mediocre people in a position of privilege from remedies to address systemic racism, sexism, ableism, or other systemic harms. Like the Privileges or Immunities Clause, the Equal Protection Clause is agile. If, in some distant future, white people somehow become a socially, economically, and politically disadvantaged class, the Equal Protection Clause would be there to protect them against discrimination. But if that future sounds far-fetched, it's even more so in light of the abolitionist interpretation of the Equal Protection Clause; the abolitionist concept of equal protection is designed so that new groups in need of special protections do not emerge. The very concept of a disadvantaged class is alien to a fully realized abolition democracy.

##### 5. The Right to Vote

The Fifteenth Amendment is not as radical and far-reaching as the other Reconstruction Amendments.<sup>484</sup> The critical change that a color-conscious application of the Fifteenth Amendment would enable is the analysis of voting laws based on their actual benefit or harm to communities of color.<sup>485</sup> The Equal Protection Clause and Privileges or Immunities Clause would likely serve as stronger tools to combat voter suppression. Nevertheless, an abolitionist understanding of the Fifteenth Amendment would still allow the analysis of voting restrictions to determine their practical effects and realistically assess the intention behind them.<sup>486</sup>

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<sup>484</sup> See *supra* text accompanying notes 366-68 (discussing narrower scope of Fifteenth Amendment as compared to Thirteenth and Fourteenth Amendments).

<sup>485</sup> Cf. Patricia Okonta, Note, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 255 (2018) (“While civil rights advocates have relied on non-race-neutral redistricting schemes to enable disenfranchised minorities to elect their preferred candidates, other schemes have been utilized for the opposite effect. Such schemes include, for example, the use of racial gerrymandering in contexts where racially polarized voting does not enhance minorities’ ability to elect their candidate of choice.”).

<sup>486</sup> Cf. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2341 (2021) (applying modern voting rights jurisprudence and referring to evaluation of voter suppression by its disparate impacts “a radical project”).

The waves of gerrymandering,<sup>487</sup> polling place closures,<sup>488</sup> voter identification requirements,<sup>489</sup> restrictions on ballot submissions,<sup>490</sup> and even bans on aiding people stuck in lengthy voting lines<sup>491</sup> would all be subjected to rigorous analysis of their practical effects and likely intent. No one paying attention seriously believes that these laws are passed for legitimate, race-neutral reasons.<sup>492</sup> They have a purpose—suppressing the votes of Black and Brown people—and are effective at doing that within the limits of what the Court has shown itself to be willing to tolerate.

The Reconstruction Congress realized that voter suppression was a serious threat to an abolition democracy. Treating the Fifteenth Amendment as a call to

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<sup>487</sup> See Alex Tausanovitch & Danielle Root, *How Partisan Gerrymandering Limits Voting Rights*, CTR. FOR AM. PROGRESS (July 8, 2020), <https://www.americanprogress.org/issues/democracy/reports/2020/07/08/487426/partisan-gerrymandering-limits-voting-rights/> [<https://perma.cc/Y82G-2Z6K>] (“In recent years, gerrymandered legislatures have pioneered other tools to stay in power, including making it harder for voters who oppose them to cast a ballot. It is a power grab on top of a power grab.”).

<sup>488</sup> See Matt Vasilogambros, Carrie Levine & Pratheek Rejala, *National Data Release Sheds Light on Past Polling Place Changes*, PEW CHARITABLE TRS.: STATELINE (Sept. 29, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/29/national-data-release-sheds-light-on-past-polling-place-changes> [<https://perma.cc/7NTX-4B92>] (“Polling place reductions and changes can lower turnout by creating confusion and barriers for voters, potentially disenfranchising them. There is no national public database of polling place locations and addresses for past federal elections.” (citation omitted)).

<sup>489</sup> See KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUST., *THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1* (2012) (“The 11 percent of eligible voters who lack the required photo ID must travel to a designated government office to obtain one. Yet many citizens will have trouble making this trip.” (footnote omitted)).

<sup>490</sup> See Janelle Bouie, Opinion, *If It's Not Jim Crow, What Is It?*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/opinion/georgia-voting-law.html> (“The new law requires each county to provide drop boxes for absentee ballots, but limits their location and the hours when they are available, as well as the number the most populous counties can have. This increases access for largely Republican-voting rural counties and decreases it for the state’s Democratic urban centers.”).

<sup>491</sup> See Tim Carman, *Aid Groups Alarmed by Ga. Voting Restrictions*, WASH. POST, Apr. 12, 2021, at C1 (“Among the provisions in Georgia’s new elections law is one that prohibits ‘any person’ — not just politicians, campaign volunteers or political nonprofits that might try to influence votes — from passing out food or drink to residents awaiting their turn to vote.”).

<sup>492</sup> Yet, the Court has repeatedly found restrictions on the right to vote legitimate and race neutral. See, e.g., *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2347 (2021) (“Even if the plaintiffs had shown a disparate burden caused by [the Arizona statute placing restrictions on vote by mail ballots], the State’s justifications would suffice to avoid [VRA] liability.”); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life.”); *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (“Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

make a serious inquiry into the effects of and motivations behind racially discriminatory (but colorblind) voting restrictions would be a powerful tool for the Court to become a positive force in promoting American democracy. But even more than that, an abolitionist reading of the Fifteenth Amendment's enabling clause could allow Congress to ban felon disenfranchisement and enact reparations through voting reforms to redress the legacy of mass racial disenfranchisement.<sup>493</sup> An abolitionist reading of even the least powerful of the Reconstruction Amendments is still a powerful tool toward the creation of an abolition democracy.

#### 6. Congress's Enforcement Powers

The common thread running through the provisions discussed so far is the reach of Congress's enforcement powers under the enabling clauses of the Reconstruction Amendments. If we look to the original understanding of the Reconstruction Amendments, Congress's enforcement powers are considerably broader than the narrow scope announced by the Supreme Court in *City of Boerne v. Flores*.<sup>494</sup> Congress drafted the enabling clauses with a deliberate eye to the *McCulloch* standard—the lax standard applied to such powers as Congress's ability to levy taxes and spend for the general welfare.<sup>495</sup>

In so many cases, the standard of review is determinative.<sup>496</sup> Applying the abolitionist understanding of the enabling clauses would treat them as sweeping powers to be reviewed for the legitimacy of their ends and the appropriateness of their means to meet those ends. Congress would have a free hand to enact legislation to address abolitionist goals—a power that would only be as good as the Congress itself. And yet, a Congress able to advance the cause of abolition democracy even gradually would likely increase the odds of a future Congress being composed of members better suited to further advancing that cause.

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<sup>493</sup> See Brandon Hasbrouck, *Double-Count All Black Votes*, NATION, Dec. 28, 2020-Jan. 4, 2021, at 12, 12 (proposing vote reparations in form of counting votes of Black Americans twice). Other potential reforms could include minority set-aside seats in legislatures, proportional representation, and altering the order of state election days in presidential primaries to reduce the influence of unusually white states.

<sup>494</sup> 521 U.S. 507, 518-20 (1997) (announcing “congruence and proportionality” test for review of Congress's exercise of Fourteenth Amendment enforcement powers); see Balkin, *supra* note 302, at 1812-15 (arguing that standard Court applied in *Boerne* to invalidate Religious Freedom Restoration Act's application to states is unjustified).

<sup>495</sup> See David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 582 (2017) (“The enumerationism that has come down to us via the post-New Deal constitutional settlement and the post-1995 ‘federalism revival’ of the Rehnquist and Roberts Courts has been revised to embrace *McCulloch*'s understanding of the Necessary and Proper Clause and a much-broadened understanding of the commerce, taxing, and spending powers.”).

<sup>496</sup> See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391 (1995) (“Appellate courts have to decide what the ‘standard of review’ is, and that standard more often than not determines the outcome.”).

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Such a Congress would be empowered to enact sweeping legislation to undermine the choke hold white supremacy has on this country. It could abolish policing as we know it, mass incarceration, and the death penalty. It could protect reproductive rights and pay reparations for slavery. It could end discriminatory state practices without having to wade through a quagmire of procedural barriers. It could protect the wide range of rights Americans enjoy without being limited by centuries-old notions of fundamentality. It could respond to the emergence of new prejudices to protect Americans whose interests and vulnerabilities might not have even been imagined a generation ago. It could meaningfully guarantee that everyone would be able to enjoy clean air and water; vote on an even playing field with their neighbors; and live, work, and learn without fear of discrimination. The power to build an abolition democracy would be truly transformative for this country.

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Understanding the depths of the evil the members of the Reconstruction Congress sought to remedy clarifies their intent and the breadth of the Reconstruction Amendments. W.E.B. Du Bois summarized it:

Slaves were not considered men. They had no right of petition. They were “devisable like any other chattel.” They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry and constitute families; they could not control their children; they could not appeal from their master; they could be punished at will. They could not testify in court; they could be imprisoned by their owners, and the criminal offense of assault and battery could not be committed on the person of a slave. The “willful, malicious and deliberate murder” of a slave was punishable by death, but such a crime was practically impossible of proof. The slave owned [sic] to his master and all his family a respect “without bounds, and an absolute obedience.” This authority could be transmitted to others. A slave could not sue his master; had no right of redemption; no right to education or religion; a promise made to a slave by his master had no force nor validity. Children followed the condition of the slave mother. The slave could have no access to the judiciary. A slave might be condemned to death for striking any white person.<sup>497</sup>

Congress sought to tear down a system that legally rendered human beings nonpersons and replace it with a democracy dedicated to a radical vision of freedom and equality.<sup>498</sup> That vision required not just that the government refrain

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<sup>497</sup> DU BOIS, *supra* note 176, at 7-8.

<sup>498</sup> See WOODWARD, *supra* note 334, at 74 (“The ‘concomitant’ of the second war aim of freedom was a third—equality. No sooner was the Union officially committed to the second war aim than the drive was on for commitment to the third.”); see also President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), <https://www.loc.gov/exhibits/gettysburg-address/ext/trans-nicolay-inscribed.html> (“It is rather for us to be here dedicated to the great

from interfering in the details of citizens' lives but that it affirmatively protect them—from mob violence, discrimination, and individually insurmountable economic and political obstacles.

To enact this radical vision, the Reconstruction Congress provided a new, systematic approach to freedom and equality in the Constitution. First, slavery and the legal enforcement of the racial caste undergirding it were removed. Next, Congress made citizenship a birthright—including all of its accompanying rights and privileges, like those to state protection and procedural fairness as well as decidedly positive rights and liberties. Finally, these guarantees were supported by the political enfranchisement of all American men, irrespective of race. Congress intended itself to be the arbiter of these new guarantees' meaning and empowered itself to enforce them.

A constitutionalism grounded in the Reconstruction Congress's vision supports the Supreme Court's most rights-affirming decisions and demands that we go further while rejecting the Court's flirtations with oppression by government and private actors.<sup>499</sup> It empowers us to redress the lingering evils of slavery and demands that we do so. It establishes a broad vision of citizenship and its accompanying rights. It protects even those who lack some of those rights and guarantees that they be treated with fundamental fairness. It is systematic and recognizes the necessity of the political franchise for protecting such a system. It is an antiracist, abolition constitutionalism.

#### CONCLUSION

*[W]e have to remember that what we observe is not nature in itself but nature exposed to our method of questioning.*

—Werner Heisenberg<sup>500</sup>

Nine wise, blind elephants, after arguing for a while about what men are like, decided to settle the matter by observing one directly. The first wise, blind elephant felt the man and declared, "men are flat." The other eight wise, blind elephants felt the man and agreed.<sup>501</sup>

Colorblind jurisprudence was developed by men who had never experienced racism. They applied the standard, observed that the law no longer discriminated

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task remaining before us . . . that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth.").

<sup>499</sup> Cf. Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 555 (2015) ("The Court's decision in *Roe* substantially complicated the task of liberal scholars who were 'struggling to rationalize the Warren Court while guarding against conservative judicial activism.'" (quoting LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 7 (1996))).

<sup>500</sup> WERNER HEISENBERG, *PHYSICS AND PHILOSOPHY* 58 (1st Harper Torchbook ed. 1962) (1958).

<sup>501</sup> See, e.g., GEOFF TIBBALLS, *THE MAMMOTH BOOK OF JOKES* 2 loc. 875 (2012) (ebook). I have been unable to locate the exact origin of this joke but have repurposed it for this analogy.

against people on the basis of race, and agreed with each other that this was so. But in the process, they very much crushed people. For some, this was surely as knowing as Justice Harlan's vision of white supremacy; for others, it may well have been a well-meaning error. Regardless of the motives of individual Justices, the Constitution will continue to protect white supremacy so long as it is deprived of the means to see the problem of racial injustice. The Supreme Court has the power either to act as the custodian of our democracy against the steady creep of oligarchy or to match antidemocratic ends to its antidemocratic structure. And when the Court seeks to understand the shape of our society, it will inevitably be a society already exposed to its methods of questioning.

The constitutional principles that the Court applies today will never be sufficient to achieve a state of racial justice in America. We could pessimistically assume that these principles will persist as a necessary consequence of American history.<sup>502</sup> Or, we could take a lesson from the arts, specifically from the traditions of fantasy and science fiction. Despite its typical setting in the future, science fiction is about the present.<sup>503</sup> Despite its typical setting in imaginary times and places, fantasy is about the real world.<sup>504</sup> Those genres are often derided as escapist or power fantasies. But the whole point of power fantasies—and especially superhero power fantasies—is imagining how great it would be to have the power to help other people.<sup>505</sup>

When I was imagining what it would be like to see the world as Doctor Manhattan does, I also speculated as to what I would do with all that power. Who would I help? How? What would I do to improve the world? It got me going, and the proposals in this piece are all part of the better world I would want to shape.

But I'm not powerless; I'm a lawyer. The law, in its way, is a kind of magic. Not the kind with wands and spells, of course, but (along with art and computer programming) it's one of the ways we, as humans, can use language to change the world. We're limited by rules, like those contained in the Constitution, and

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<sup>502</sup> See, e.g., Colker, *supra* note 153 (manuscript at 55-56) (portraying Constitution as sure impediment to remedial legislation).

<sup>503</sup> See Lisa Allardice, *Margaret Atwood: 'I Am Not a Prophet. Science Fiction Is Really About Now.'* GUARDIAN (Jan. 20, 2018, 6:00 AM), <https://www.theguardian.com/books/2018/jan/20/margaret-atwood-i-am-not-a-prophet-science-fiction-is-about-now> [<https://perma.cc/4636-XM2Q>] (“Prophecies are really about now. In science fiction it’s always about now. What else could it be about?”).

<sup>504</sup> See Anna Bradley, *How Fantasy Can Inspire Us to Live in the Real World*, GUARDIAN (Feb. 28, 2016, 4:00 AM), <https://www.theguardian.com/childrens-books-site/2016/feb/28/how-fantasy-can-inspire-us-to-live-in-the-real-world> [<https://perma.cc/3BNG-UFGC>] (“But fantasy books can [teach us about our everyday lives or warn us about our possible future] too, even if it’s in a slightly different way [than dystopian books].”).

<sup>505</sup> See Deidre Delpino Dykes, *Protagonist as Power Fantasy*, MEDIUM (Aug. 15, 2019), <https://medium.com/write-away/protagonist-as-power-fantasy-a6ce3b2165b5> (“[M]ost of all, Red[, a superhero protagonist,] has the power to help people, which I[, the author,] feel I do not. That’s right, my true power fantasy is the ability to help others.”).

some practical considerations, of course, but also by our own imaginations. So, I invite you—all of you—to exercise your imaginations as to what this world and this time can become. Envision a better world, because if we do not begin there, we will never succeed in making it a reality.

The Constitution has been wielded for centuries as a tool of white supremacy, but it also contains the tools of abolition democracy. We can reclaim them, through decades of advocacy and organizing, and change the way our laws are understood. But first, we must believe.