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THE WHITE SUPREMACIST CONSTITUTION

Ruth Colker*

Abstract

The United States Constitution is a document that, during every era, has helped further white supremacy. White supremacy constitutes a “political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”¹ Rather than understand the Constitution as a force for progressive structural change, we should understand it as a barrier to change.

From its inception, the Constitution enshrined slavery and the degradation of Black people by considering them to be property rather than equal members of the community. The Civil War Amendments did not truly abolish slavery and only prohibited a limited band of state action. Radical Reconstruction was short-lived as white supremacy quickly eviscerated any political gains that Black voters had achieved.

The Supreme Court has interpreted the Civil War Amendments consistently with their white supremacist roots. Rather than serve as an effective instrument to help eradicate the badges, incidents, and vestiges of slavery, the Constitution has become a tool both to ban voluntary race-affirmative measures at the federal, state, and local government level, and also to preclude Congress from enacting strong abolitionist measures. The Court has enshrined the views of Andrew Johnson, a fierce proponent of white supremacy, into its basic structure.

This Article challenges us to imagine how resistance lawyers might seek to use the Constitution to help eliminate white supremacy while also generally recognizing the limitations of the use of the judicial system, including the specific limitations of the U.S. Constitution, for that purpose. Only then might we achieve a truly radical reconstruction.

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¹ Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

INTRODUCTION

The United States Constitution is a document that, during every era, has helped further white supremacy. Rather than understand the document as a force for progressive structural change, we should understand it as a barrier to change. Put differently, the U.S. Constitution has been a resounding success at preserving white supremacy. For example, U.S. citizens in the District of Columbia, who are disproportionately racial minorities, are provided no power in the U.S. Senate,² while the former slave-holding states of Alabama and Mississippi have as much Senatorial power as California and New York.³ Further, the Constitution makes it especially difficult to divide existing states into more than one state so that more populous and diverse states, such as California and New York, could have greater power in the Senate to influence judicial nominations.⁴ These are only some of the many deliberate design features that structure our so-called democracy in which Black lives are intended not to matter.⁵

One might respond that certain substantive features of the U.S. Constitution, found in the Bill of Rights⁶ and the Civil War Amendments,⁷ could yet make the

² Cf. Ian Millhiser, *How an Anti-democratic Constitution Gave America Amy Coney Barrett*, VOX (Oct. 26, 2020, 8:09 PM), <https://www.vox.com/2020/10/26/21534358/supreme-court-amy-coney-barrett-constitution-anti-democratic-electoral-college-senate> [<https://perma.cc/G7DX-ZXMY>] (stating that the Republican Senators who voted to confirm Amy Coney Barrett represented 13.5 million fewer Americans than the Democratic Senators who opposed her).

³ Cf. Geoffrey Skelley, *Can Democrats Win the Senate by Adding States? It's Been Done Before*, FIVETHIRTYEIGHT (June 5, 2019, 7:00 AM), <https://fivethirtyeight.com/features/can-democrats-win-the-senate-by-adding-states-its-been-done-before/> [<https://perma.cc/4474-X5R3>]; see also Eric W. Orts, *The Path to Give California 12 Senators, and Vermont Just One*, THE ATLANTIC (Jan. 2, 2019) <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/> [<https://perma.cc/KV72-UE9R>] (explaining how California, New York, and other states could receive more Senate seats which would likely increase the voting representation of racial minorities in the United States Senate).

⁴ See U.S. CONST. art. IV, § 3 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

⁵ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. (forthcoming 2021) (providing a wide ranging discussion of how the Supreme Court fails to reflect democratic principles).

⁶ See *The Bill of Rights: What Does It Say?*, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say> [<https://perma.cc/GW62-RS24>] (last visited Aug. 8, 2021) (explaining that the Bill of Rights includes the first ten amendments to the Constitution).

⁷ See *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmend>

Constitution a tool to help overcome white supremacy. While, in theory, that argument may be plausible, this Article will demonstrate the stark failure of the Constitution to live up to that possibility.

Nonetheless, as resistance lawyers,⁸ this Article challenges us to find the fragmentary strands of abolitionism within certain minority or dissenting judicial opinions that can be used to help make the Constitution a tool for abolitionism. In particular, this Article asks whether we can re-imagine the Civil War Amendments so that they are a force for abolitionism, rather than a barrier to it.

What are the features of white supremacy? In a 1989 article, Frances Lee Ansley described “white supremacy” as a “political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”⁹ Ansley observed that there is both a class and a race model for understanding white supremacy. “The ‘class model’ of white supremacy portrays white supremacy as primarily a means to justify and enhance class dominance and thus to strengthen existing relations of economic power.”¹⁰ The “race model” of white supremacy “characterizes white supremacy as an evil standing on its own base. . . . [T]here is no reason to look beyond the system

ments.htm [https://perma.cc/8JXP-4PS8] (last visited Aug. 8, 2021) (explaining that the Civil War Amendments include the Thirteenth, Fourteenth, and Fifteenth Amendments and were ratified by the states on December 6, 1865; July 9, 1868; and February 3, 1870 respectively). The Civil War Amendments are not the only provisions of the U.S. Constitution that could, in theory, be an instrument for progressive change. A similar article could be written about the potential in theory and the failure in actuality of many of the provisions of the Bill of Rights. *See, e.g.*, Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL’Y REV. 539 (2019) (examining how the Supreme Court’s voting, speech, and religion decisions in the 2017–18 term denied systemic equality).

⁸ *See generally* Daniel Farbman, *Resistance Lawyering*, 107 CAL. L. REV. 1877, 1881 (2019) (“A resistance lawyer engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate.”).

⁹ Ansley, *supra* note 1, at 1024 n.129 (1989). Ta-Nehisi Coates notes that:

To Trump, whiteness is neither notional nor symbolic but is the very core of his power. . . . The repercussions are striking: Trump is the first president to have served in no public capacity before ascending to his perch. But more telling, Trump is also the first president to have publicly affirmed that his daughter is a ‘piece of ass.’ . . . [T]hat is the point of white supremacy—to ensure that that which all others achieve with maximal effort, white people (particularly white men) achieve with minimal qualification.

Ta-Nehisi Coates, *The First White President: The Foundation of Donald Trump’s Presidency Is the Negation of Barack Obama’s Legacy*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> [https://perma.cc/NXF3-PC4W].

¹⁰ Ansley, *supra* note 1, at 1025.

of racial hierarchy itself to understand its well-springs and strength.”¹¹ But Ansley also notes that pure models of white supremacy do not exist in the real world. “The themes of race and class refuse to keep their bounds. They constantly interpenetrate, converge, and reflect on each other.”¹² The system is maintained through politics, economics, and culture. I would add the Constitution to her list of systems that help maintain White Supremacy.

Ansley’s work continues to be important today as we wrestle with calls for an abolitionist society in which we “transform our built environment and our relationships with one another and the earth.”¹³ Today’s abolitionist activists “embody a combined concern with democracy and the economy, the ends and processes of grassroots power: to fight criminalization and privatization as we organize for collective self-determination.”¹⁴ In other words, today’s abolitionists have accepted Ansley’s call to consider both seeds of capitalism and racism to create a more just and democratic society.

In a breathtaking article published in 2020, Michael Klarman describes how U.S. democracy is at risk because the privileged few control our so-called democratic instruments.

To entrench democracy, Democrats would need to overcome simultaneously the disadvantages of partisan gerrymandering and geographic clustering in state legislatures and the House of Representatives, extreme malapportionment in the Senate, the vagaries and malapportionment of the Electoral College, and the flood of unregulated political spending that the Court has unleashed.¹⁵

In an afterthought, though, he quickly notes: “Even then, Republican Justices might invalidate democracy-entrenching measures.”¹⁶

While recognizing that “[w]e are trapped in a downward spiral in which growing economic inequality erodes democracy, leading to the enactment of more policies that further exacerbate economic inequality, which then further erodes democracy,”¹⁷ he argues that “democratic reform logically must come first.”¹⁸ But, as Amna Akbar aptly notes: “Electoral reform is unlikely to mobilize a public where only twenty to sixty-five percent of eligible voters cast their ballots in various elections and only twenty percent trust the federal government.”¹⁹ And Akbar does

¹¹ *Id.* at 1035.

¹² *Id.* at 1050.

¹³ Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 90 (2020).

¹⁴ *Id.* at 98.

¹⁵ Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 10 (2020).

¹⁶ *Id.*

¹⁷ *Id.* at 254.

¹⁸ *Id.*

¹⁹ Akbar, *supra* note 13, at 96.

not ask the more frightening question of whether a democratic electorate, if the franchise were exercised universally, would seek to end white supremacy. Would we still need a constitution to protect Black people and others who have been subordinated since our Nation's founding? Other countries have used their constitutions expressly to protect those, such as Native people, who have had their lands stolen from them to build and maintain a privileged ruling class.²⁰

Putting aside the question of what kinds of reforms must come first to overturn white supremacy, one might wonder how it could be true that the U.S. Constitution could be used as a tool to *invalidate* democracy-entrenching measures. The answer to that question is complex (and Klarman devotes 264 pages to discussing many of those impediments),²¹ but this Article proposes an explanation that Klarman barely explores. 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. To be clear, the creation of genuine democracy will not suddenly end white supremacy. White supremacy preceded the creation of the Constitution and would certainly endure its demise.²² It is nonetheless important to recognize that the U.S. Constitution is an impediment to the kinds of structural reforms that are needed to lessen the strength of white supremacy.

Dorothy Roberts, while a brilliant scholar, was wrong to suggest that the seeds of what she calls “abolition constitutionalism”²³ can be found in the U.S. Constitution. The lesson to be learned from the Black Lives Matter (“BLM”) movement is that change can only occur through political, social action, not through the courts and, especially, not through the Constitution. Monuments that glorify white supremacy, both literally and figuratively, did not come down as a result of legal action. They came down through protests on the streets.²⁴ The courts will stand

²⁰ See, e.g., CANADA ACT, 1982, c 11 § 35(1) (“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”); see also *id.* at § 15(2) (validating explicitly that affirmative action by providing that the Equal Protection Clause “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

²¹ See Klarman, *supra* note 15.

²² See Ibram X. Kendi, *Racial Progress Is Real. But So Is Racist Progress*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/opinion/sunday/racial-progress-is-real-but-so-is-racist-progress.html> [<https://perma.cc/6F3M-ZAK8>] (commenting on the transition from Obama to Trump as President of the United States as reflecting a “dual and dueling history of racial progress and the simultaneous progression of racism”).

²³ Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3 (2019).

²⁴ See Christine Emba, *A Monumental Shift: Memorials to White Supremacy Are Falling. What Will Replace Them?*, WASH. POST (June 17, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/confederate-statues-monuments/> [<https://perma.cc/JW2V-8CP>] (highlighting the different statues that have been removed as a result of mass protests).

in the way rather than facilitate the attainment of many of BLM's list of demands. This Article will recount how the U.S. Constitution has been a barrier to, rather than instrument for, justice.

Part I recounts the historical debate about the role of the Constitution in structural reform among anti-slavery advocates. By the late 1830s, William Lloyd Garrison had taken the position that the Constitution was so profoundly pro-slavery that the only solution was for the free states to secede from the Union.²⁵ While Frederick Douglass initially agreed with Garrison that the Constitution was inextricably pro-slavery, Douglass eventually abandoned that position and argued that the Constitution could be used as a vehicle for reform.²⁶ We are in a moment where the Garrison/Douglass debate should be rekindled. Despite the ratification of the Thirteenth, Fourteenth, and Fifteenth amendments, is the Constitution still a profoundly pro-slavery document? Or can it be used as an abolitionist tool?

Part II recounts how the Constitution was written and interpreted to preserve both slavery and white supremacy. Even the Thirteenth Amendment did not completely abolish slavery.²⁷ The state action doctrine immediately eviscerated the heart of the Fourteenth Amendment by precluding individuals from seeking legal redress against private actors.²⁸ Qualified immunity protects state actors, like police officers, from responsibility.²⁹ The public murder of Black people has occurred throughout our nation's history,³⁰ with capital punishment being the latest state-sanctioned tool to that end.³¹ Black people remained incarcerated even as COVID-

²⁵ IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 164 (2016).

²⁶ Roberts, *supra*, note 23, at 59.

²⁷ U.S. CONST. amend. XIII, § 1 (ratified in December 1865 the Thirteenth Amendment abolished slavery or involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted").

²⁸ See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that section 5 of the Fourteenth Amendment could not be used to justify Congress regulating private actors).

²⁹ The doctrine of qualified immunity was first developed in *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (providing qualified immunity to police officers who arrested and jailed a group of Black people who attempted to eat at a coffee shop in a bus terminal in violation of Mississippi law); see also Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62 (2016) (offering an excellent critique of the expansion of qualified immunity doctrine to protect public officials from any accountability).

³⁰ See, e.g., KENDI, *supra*, note 25, at 259 ("Someone was lynched, on average, every four days from 1889 to 1929. . . . White men, women, and children gathered to watch the torture, killing, and dismemberment of human beings – all the while calling the victims savages.").

³¹ John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2006), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [<https://perma.cc/Z8TE-Z9Q3>] ("In 2018, black Americans represented 33% of the sentenced prison population, nearly triple their 12% share of the U.S. adult population.").

19 ravaged the prison system.³² When Black activists sought to end racially inferior schools, the courts balked at creating effective remedies.³³ In a completely ahistorical interpretation of the Fourteenth Amendment, the Equal Protection Clause soon became a tool to overturn affirmative action out of fear of hurting “innocent whites”³⁴ whose century of wealth had been built on the back of Black labor.³⁵ While one might hope that the electoral system could fill in the gaps created by the Constitution through the election of leaders who seek to use their power to overcome the legacy of slavery, the reality is that the Constitution has impeded that possibility. The Constitution, itself, rewards southern states with disproportionate political power to perpetuate white supremacy.³⁶ When Congress finds the political will to create some statutory protections for Black people, the Supreme Court finds ways to significantly limit those statutes.³⁷ One must ask: what has the Constitution ever done for Black people? It has precluded all hope of structural reform and allowed

³² See Jordan Wilkie, *Prisons Contribute to Racial Imbalance in COVID-19 Impact in NC*, CAROLINA PUB. PRESS (Feb. 11, 2021), <https://carolinapublicpress.org/42342/prisons-contribute-to-racial-imbalance-in-covid-19-impact-in-nc/> [<https://perma.cc/VG8K-K2TR>] (explaining how previous criminal justice reform, which has disproportionately affected the black population, has extended prison sentences and thus put black workers and prisoners at greater harm from COVID-19); Len Engel, Joanna Abaroa-Ellison, Erin Jemison & Khalil Cumberbatch, *Racial Disparities and COVID-19*, NAT’L COMM’N ON COVID-19 AND CRIMINAL JUSTICE (Nov. 2020), https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/Racial_Disparities_and_COVID.pdf [<https://perma.cc/7KBA-W74C>] (explaining that people of color in the United States, especially poor people of color, are disproportionately affected by crime, the criminal justice system, and COVID-19); Eddie Burkhalter, Izzy Colón, Brendon Derr, Lazaro Gamio, Rebecca Griesbach, Ann Hinga Klein, Danya Issawi, K.B. Mensah, Derek M. Norman & Savannah Redl et. al., *Incarcerated and Infected: How the Virus Tore Through U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html?action=click&module=Spotlight&pgtype=Homepage> [<https://perma.cc/S7BJ-9DNY>] (“America’s prisons, jails and detention centers have been among the nation’s most dangerous places when it comes to infections from the coronavirus.”).

³³ See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 753 (1974) (overturning mandatory busing order).

³⁴ See, e.g., *Dotson v. City of Indianola, Miss.*, 739 F.2d 1022, 1025 (5th Cir. 1981) (“In fashioning a remedial plan, the balancing process may include consideration of not only the interests of the minority, but also the interests of innocent whites.”); *Hammon v. Barry*, 606 F. Supp. 1082 (D.C. Cir. 1985) (“[T]he fact of past discrimination alone is not enough to deprive innocent whites of their legitimate expectation of advancement.”).

³⁵ See, e.g., Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 84 (2018) (“Perhaps not surprisingly, the Southern states did not go quietly into the night—rather, nearly all of them quickly began passing laws (‘black codes’) designed, ultimately, to ensure the availability of African-Americans as a cheap labor force . . . [The black codes’] ‘primary purpose was to restrict blacks’ labor and activity.’”) (quoting *Black Codes*, HISTORY, <http://www.history.com/topics/black-history/black-codes>).

³⁶ See Skelley, *supra* note 3.

³⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (overturning minority owned business program of the Small Business Administration).

Black people to gather the scraps of the remedies still available under the Civil Rights Act of 1964.³⁸ Part II argues that we should understand the Constitution to be an impediment to racial equality rather than a tool to dismantle white supremacy. Even *Brown v. Board of Education* has come to further white supremacy.³⁹

Part III asks how we should teach the basic course on Constitutional law given the Constitution's role in promoting and preserving white supremacy. This Article argues that we should teach Constitutional law from a critical lens that does not venerate the document. We should use the course to help our students understand how the Constitution is rarely an affirmative tool to dismantle white supremacy; instead, it is often an impediment to the radical reform that seeks to end the legacy of slavery.

Although this Article focuses on the white supremacist ideology that permeates the Constitution, the same claim could be made on behalf of every other disadvantaged group in the United States. The document is also sexist,⁴⁰ ableist,⁴¹ xenophobic,⁴² colonialist,⁴³ and homophobic.⁴⁴ It is time to stop venerating the Constitution. It is usually just another barrier to change.

But this Article does not end on a nihilistic note. While the dominant story of Constitutional law has been the support for, rather than dismantling of, white supremacy, there have been noted jurists over the centuries who have found seeds of abolitionism within the Constitution. Because Justice Thurgood Marshall offers the most powerful abolitionist voice among jurists, this Article seeks to elevate Marshall's voice to be the controlling understanding of the Constitution. Only then can the U.S. Constitution be one tool, among many, to attain a radical reconstruction.

³⁸ The Civil Rights Act of 1964 prohibits discrimination in places of public accommodation, public facilities, public education, federally assisted programs, and employment. See 42 U.S.C. §§ 2000a–2000a-6 (public accommodations), 2000b–2000b-3 (public education), 2000c–2000c-9 (federally assisted programs) & 2000e–2000e-17 (employment).

³⁹ See *infra* Section II.C.

⁴⁰ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948 (2002) (arguing that reconsideration of the Nineteenth Amendment's historical purpose could strengthen gender equality claims).

⁴¹ See generally Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014) (arguing for heightened constitutional review in disability cases).

⁴² See Karla McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 95, 99 (2020) (describing the Supreme Court's history of deference to the executive branch in the context of xenophobia).

⁴³ See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793 (2019) (arguing the importance of not using a racial binary paradigm to understand U.S. public law).

⁴⁴ See generally Darren Lenard Hutchinson, "Closet Case": *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81 (2001) (arguing that the Court's First Amendment jurisprudence has silenced gay, lesbian, bisexual, and transgender individuals).

I. THE CONSTITUTION'S WHITE SUPREMACIST UNDERPINNINGS

This Part discusses the strong current of white supremacy that has dominated American politics in every era. Part II shows how the courts have faithfully interpreted the Constitution to achieve this end.

The British kidnapped the first group of African people in 1619 and “dragged [them] to this county in chains to be sold into slavery.”⁴⁵ By the time of the American Revolution, the British had forcibly transported around three million African people to the American colonies to work as enslaved people.⁴⁶ Slavery formed the core of the Southern colonies’ agricultural economy.⁴⁷ “[T]he slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime.”⁴⁸

As thoroughly documented by Manisha Sinha, enslaved people always sought the abolition of slavery in the United States.⁴⁹ During the revolutionary era, they “accepted abolitionism in word and deed as an article of faith.”⁵⁰ They petitioned the government for the immediate abolition of slavery; they sought both compensation and redress.⁵¹ In comparison to the complaints of the white colonists against Great Britain, enslaved people thought their own sufferings were far more profound.⁵² Despite this resistance, slavery was deeply entrenched in the American colonies.⁵³ “Forgotten antislavery voices and actions of Quaker and African pioneers, slave rebels and runaways, radical, dissenting Christianity, English antislavery lawyers and judges, and early black writers all played a part in laying the foundation of revolutionary abolitionism.”⁵⁴ Abolition’s origins in the United States were interracial, even if not embraced by the propertied white men who wrote the Constitution.

Thomas Jefferson’s original draft of the Declaration of Independence contained some anti-slavery language, but it was “removed at the behest of lower south slaveholders from South Carolina and Georgia.”⁵⁵ Like Thomas Jefferson, both John

⁴⁵ *Regents Univ. Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting); see also *Congress Abolishes the African Slave Trade*, HISTORY (Feb. 9, 2010), <https://www.history.com/this-day-in-history/congress-abolishes-the-african-slave-trade> [<https://perma.cc/3D2L-AMNV>] (“The first shipload of African captives to the British colonies in North America arrived . . . in August 1619.”).

⁴⁶ *Congress Abolishes the African Slave Trade*, *supra* note 45.

⁴⁷ *Id.*

⁴⁸ *Bakke*, 438 U.S. at 388.

⁴⁹ See generally MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* (2016).

⁵⁰ *Id.* at 41.

⁵¹ *Id.*

⁵² *Id.* at 43 (“The petitioners condemned racism that prevented colonists from including Africans in conceptions of American liberty.”).

⁵³ *Id.* at 44.

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at 40.

Jay and Benjamin Franklin were slaveholders.⁵⁶ “Antislavery sentiment among the founding fathers may have been widespread, but committed abolitionists were few and far between.”⁵⁷ Despite his long-term sexual relationship⁵⁸ with Sally Hemings, with whom he fathered six Black children, Jefferson believed that Black people were “inferior in the faculties of reason and imagination” and that racial “mixing” should not take place after slaves were freed.⁵⁹ Jefferson’s racist views were used by influential Virginia residents, like St. George Tucker, to justify the inappropriateness of allowing free Black people to join Virginia’s privileged society.⁶⁰

The language of the U.S. Constitution, as it was adopted in 1787, makes it clear that the slaveholders controlled the narrative. The fact that the document did not use the words “slave” or “slavery” should not be misunderstood as any kind of vindication for abolitionists. Article One, Section Nine provided that the “migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”⁶¹ Such “persons,” of course, were African slaves. Their continued, forcible kidnapping from Africa to be held as slaves was permitted to continue until 1808. The Three-Fifths Clause⁶² refused to recognize slaves as persons entitled to hold citizenship and vote and also allowed the Southern colonies to dominate the national government. As David Waldstreicher has argued, we should consider the Constitution to be “Slavery’s Constitution.”⁶³

In 1808, the United States Congress abolished the importation of slaves, a year after Britain had outlawed the British Atlantic slave trade.⁶⁴ Thereafter, enslaved people already held in the United States, and their offspring, were rarely made free.⁶⁵

⁵⁶ *Id.* at 40–41.

⁵⁷ *Id.* at 41.

⁵⁸ By using the word “relationship,” I do not mean to suggest that it was a consensual relationship.

⁵⁹ SINHA, *supra* note 49, at 88.

⁶⁰ *Id.* at 90–91.

⁶¹ U.S. CONST., art. 1, § 9, cl. 1.

⁶² *The U.S. Constitution, Article 1. Section 2. The “Three-Fifths Clause,”* THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/legal/docs2.html> [<https://perma.cc/GP5K-99Q5>] (last visited Aug. 20, 2021) (“[A]ny person who was not free would be counted as three-fifths of a free individual for the purposes of determining congressional representation.”); *see, e.g.*, U.S. CONST., art 1, § 2.

⁶³ *See generally* DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009).

⁶⁴ *See* Reuters Staff, *Chronology – Who Banned Slavery When?*, REUTERS (Mar. 22, 2007, 12:18 AM), <https://www.reuters.com/article/uk-slavery/chronology-who-banned-slavery-when-idUSL1561464920070322> [<https://perma.cc/WFH5-E7FN>].

⁶⁵ *See Congress Abolishes the African Slave Trade, supra* note 45 (explaining that during the late 1700s and early 1800s, in the southern states “children of enslaved people automatically became enslaved themselves”).

White owners of enslaved people still traded enslaved people and their children. With a population of four million enslaved people, slavery could thrive without the assistance of an African trade to bring newly enslaved people to the United States.⁶⁶

Seeds of anti-slavery sentiment always existed, and they gained more weight in the nineteenth century. In fact, the emerging anti-slavery view in the early eighteenth century, especially among white politicians and activists, was arguably consistent with white supremacy because it did not seek to free or empower Black people. In the 1820s, the predominant anti-slavery position was that of colonization—freed Black people would be forcefully relocated back to Africa.⁶⁷ Thomas Jefferson, who was well known as the chief architect of the Declaration of Independence, favored the colonization position. While a draft of the Declaration of Independence had included the charge that the King has waged a “cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them in slavery in another hemisphere, or to incur miserable death in their transportation thither,” that language was not included in the final document.⁶⁸ In his *Autobiography*, Jefferson took the position that “the two races, equally free, cannot live in the same government.”⁶⁹

K-Sue Park, in a brilliant piece on U.S. historical self-deportation policy, argues that anti-slavery proponents in the late eighteenth and early nineteenth centuries could not imagine integrating Black people into U.S. life as a consequence of ending slavery.⁷⁰ “White northerners wished to ensure that blacks would stay in the South, and white southerners would not contemplate civic equality. These factors, together with the daunting expense and logistics of a mass expulsion, long stymied efforts during the early Republic to imagine a concrete end to slavery.”⁷¹ The mass deportation of free Black people was a central point of deliberation along a broad political spectrum. “Indeed, Frederick Douglass remarked that ‘almost every respectable man’ in the north was in favor of black colonization. By the 1840s . . . eleven northern state legislatures had formally endorsed black colonization.”⁷²

While Sinha’s work⁷³ suggests that most free Black people opposed colonization, John Russwurm, one of the two Black editors of *Freedom’s Journal*,

⁶⁶ *Id.* (explaining how the southern congressmen joined northern congressmen to ban the slave trade in 1808 since the south already had “a self-sustaining population” of enslaved people).

⁶⁷ KENDI, *supra* note 25, at 152–53 (“[Thomas Jefferson] promoted the colonization idea, that freed Blacks be hauled away to Africa in the same manner that enslaved Blacks had been hauled to America.”).

⁶⁸ *Regents Univ. Cal. v. Bakke*, 438 U.S. 256, at 388 (Marshall, J., dissenting).

⁶⁹ *Id.* at 392.

⁷⁰ K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1904 (2019).

⁷¹ *Id.* at 1904–05.

⁷² *Id.* at 1905–06.

⁷³ See SINHA, *supra* note 49.

avored colonization.⁷⁴ Further, Russwurm's publication often expressed the view "that lower-income Blacks had an inferior work ethic, inferior intelligence, and inferior morality compared to White people and Black elites like him."⁷⁵

Some anti-slavery advocates, however, began to oppose colonization. William Lloyd Garrison, a white man raised in New England in poverty, initially championed colonization,⁷⁶ but, by 1828, he began to support "a gradual abolition of slavery" rather than colonization.⁷⁷ He first thought that immediate emancipation was a "wild vision" but then moved to the position of supporting immediate emancipation.⁷⁸

Antislavery activist David Walker, who was a member of Boston's Black community, agreed with Garrison that immediate emancipation was necessary. In fact, in his pamphlets, Walker urged Black people to mobilize for a revolutionary war.⁷⁹ Nonetheless, like Russwurm, Walker thought that slavery had made Black people inferior.⁸⁰ They were "the most degraded, wretched, and abject set of beings that ever lived since the world began."⁸¹ Walker also drew on the Declaration of Independence, "imploring Americans to 'See your Declaration!'"⁸² as part of his call for Black people to attain their freedom. Many Southern states tried to suppress his pamphlet because of its subversive appeal.⁸³

Although Nat Turner's 1832 rebellion famously used force to free Black people from slavery, abolitionists, such as Garrison, criticized those efforts arguing that the "fury against revolters" would cause the public to forget the horrors of slavery.⁸⁴ The dominant message from anti-slavery activists was the importance of uplift suasion.⁸⁵ The newly formed American Anti-Slavery Society, for example, instructed their agents in 1833 to instill in free Black people "the importance of domestic order, and the performance of relative duties in families; of correct habits; command of temper and courteous manners."⁸⁶

In a well-known and important historical disagreement, William Lloyd Garrison and Frederick Douglass debated whether the United States Constitution could be understood to be a proslavery document. Garrison called the Constitution's failure to abolish slavery a "covenant with death and an agreement with hell."⁸⁷ Both

⁷⁴ KENDI, *supra*, note 25, at 155 ("Russwurm decided to endorse the American Colonization Society in 1829, dooming his newspaper in anti-colonialist Black America.").

⁷⁵ *Id.*

⁷⁶ *Id.* at 162.

⁷⁷ *Id.* at 164.

⁷⁸ *Id.*

⁷⁹ *Id.* at 165.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 166.

⁸³ *Id.* at 167.

⁸⁴ *Id.* at 173.

⁸⁵ *Id.* at 505 ("Historically, Black people have by and large figured the smartest thing we could do for ourselves is to partake in uplift suasion. . .").

⁸⁶ *Id.* at 176.

⁸⁷ Roberts, *supra* note 23, at 55.

white and Black abolitionists disagreed with this interpretation of the Constitution, insisting that it could be used to challenge slavery even before the Reconstruction Amendments were ratified.⁸⁸ While initially agreeing with Garrison that the Constitution was inherently a “pro-slavery instrument” that abolitionists should not support, Douglass converted “to the antislavery side after years of careful consideration and abolitionist activism including publishing his paper, lecturing against slavery, and concealing fugitive slaves.”⁸⁹ As he described in his autobiography, he came to this conclusion after a:

course of thought and reading . . . that the Constitution of the United States—inaugurated to ‘form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty’—could not have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery.⁹⁰

It is wrong, however, to understand Douglass as underestimating the work required for genuine abolitionism irrespective of how the Constitution was interpreted. Douglass argued that the Civil War would ultimately decide “which of the two, Freedom or Slavery, shall give law to this republic.”⁹¹ But, as Jennifer McAward has noted, Douglass also wrote an article in the Rochester *North Star* in 1849 in which he expressed concern “that even after emancipation, there would be ‘long and dark . . . years through which the freed bondman will have to pass’ to cleanse himself of the badge of slavery.”⁹²

Unfortunately, history has shown that the U.S. Constitution has helped perpetuate the badges and incidents of slavery,⁹³ even after the ratification of the Civil War Amendments. Andrew Johnson reflected the white supremacy values of his time when he ascended to the Presidency following Lincoln’s assassination on April 14, 1865. In his December 1867 message to Congress, after the Thirteenth Amendment had been ratified, Johnson proclaimed that Black people possessed less “capacity for government than any other race of people. No independent government of any form has even been successful in their hands. On the contrary, wherever they have been left to their own devices they have shown a constant tendency to relapse

⁸⁸ *Id.* at 55–58.

⁸⁹ *Id.* at 59.

⁹⁰ *Id.*

⁹¹ *Id.* at 61.

⁹² Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 577 n.71 (2012).

⁹³ *See id.* at 577–78 (providing a historical analysis of the meaning of the badges, incidents, and vestiges of slavery).

into barbarism.”⁹⁴ Historian Eric Foner characterizes this statement as “probably the most blatantly racist pronouncement ever to appear in an official state paper of an American President.”⁹⁵

Not surprisingly, President Johnson used his veto authority to stall even modest improvements in the lives of newly freed people. He vetoed the Freedman’s Bureau Bill of 1866, repudiating the very idea of Congress constituting a Freedman’s Bureau. He argued that the limited economic assistance contemplated under the Act would produce “immense patronage” and criticized the notion that Congress would be “called upon to provide economic relief, establish schools, or purchase land for ‘our own people’; such aid, moreover, would injure the ‘character’ and ‘prospects’ of the freedmen by implying that they did not have to work for a living.”⁹⁶ Further, Johnson insisted that “clothing blacks with the privileges of citizenship discriminated against whites – ‘the distinction of race and color is by the bill made to operate in favor of the colored and against the white race.’”⁹⁷ In a telling interplay, when Johnson asked during a rally, “What does the veto mean?” A voice from the crowd shouted, “It is keeping the n--- down.”⁹⁸ As Foner observes, “Johnson voiced themes that to this day have sustained opposition to federal intervention on behalf of blacks.”⁹⁹ Congress was not able to override his veto.¹⁰⁰

It is helpful to pause and consider Johnson’s views in comparison to modern views about race discrimination. Notice how Johnson equated discrimination against white people as being as bad (or worse) than discrimination against Black people. He tied a concern about discrimination against white people with an attempt to keep “the n--- down.” Today, by comparison, it is elementary that discrimination against white people is considered as constitutionally suspect as discrimination against Black people.¹⁰¹ The courts have abandoned an anti-subordination perspective¹⁰² under which they could understand the Constitution as a tool to help Black people overcome the legacy of slavery. Thus, it is no surprise that, as Asad Rahim’s careful historical work demonstrates, Justice Powell’s diversity rationale in *Bakke* was *not* rooted in “his longstanding commitment to integration and racial equality.”¹⁰³ Before joining the Court, Powell “spent nearly two decades resisting compulsory integration . . . [and] traveled the country telling audiences that African Americans

⁹⁴ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, 180 (1988).

⁹⁵ *Id.*

⁹⁶ *Id.* at 247.

⁹⁷ *Id.* at 250.

⁹⁸ *Id.* at 251.

⁹⁹ *Id.* at 248.

¹⁰⁰ *Id.* at 249.

¹⁰¹ For an excellent discussion of the evolution of this view in the *Bakke* decision, see Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423 (2020).

¹⁰² See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1066 (1986).

¹⁰³ Rahim, *supra* note 101, at 1431.

were owed nothing for injustices of the past.”¹⁰⁴ While it would not be correct to equate Johnson’s overt racism with Powell’s opposition to compulsory racial integration, both provide helpful illustration of the early roots of the formal equality perspective that contends that society needs to protect white people from race discrimination. Historically, it is important to document the consistency of that formal equality view from the late nineteenth century to the present time.

In the nineteenth century, Johnson’s opposition to reconstruction placed him at odds with the Republican majority in Congress. Johnson favored “almost total amnesty to ex-Confederates, a program of rapid restoration of U.S.-state status for the seceded states, and the approval of new, local Southern governments, which were able to legislate ‘Black Codes’ that preserved the system of slavery in all but its name.”¹⁰⁵

Ironically, Johnson’s resistance to racial equality may have helped spur the ratification of the Fourteenth Amendment.¹⁰⁶ Congress may have concluded that the ratification of the Fourteenth Amendment was more urgently needed because, without such an amendment, they would lack the authority to invalidate the Black Codes and enact civil rights legislation.¹⁰⁷ But the Fourteenth Amendment was, in many ways, a modest document. It did not guarantee suffrage to the people who were newly freed. It did invalidate the Black Codes and give power to Congress to enact a Civil Rights Act pursuant to its Section 5 powers.¹⁰⁸ Yet, as Foner argues, the Fourteenth Amendment did not reflect a break with the principles of federalism. “Most Republicans assumed the states would retain the largest authority over local affairs.”¹⁰⁹ The Civil Rights Act placed enormous power in the hands of the judiciary to enforce civil rights.¹¹⁰ That mechanism “appeared preferable to maintaining indefinitely a standing army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction.”¹¹¹ The judiciary, however, as we have seen in more recent times, can reflect Johnson’s attitude that providing civil rights to Black people constitutes discrimination against whites.¹¹²

¹⁰⁴ *Id.* at 1431.

¹⁰⁵ *This Day in History, February 24, 1868: President Andrew Johnson Impeached*, HISTORY (Feb. 23, 2021), <https://www.history.com/this-day-in-history/president-andrew-johnson-impeached> [<https://perma.cc/9BZ8-LDSC>].

¹⁰⁶ *See generally Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/14thAmendment.htm> [<https://perma.cc/T2NB-LJGK>] (last visited Aug. 21, 2021) (explaining that the Fourteenth Amendment passed the Senate on June 8, 1866 and was ratified by the states on July 9, 1868).

¹⁰⁷ FONER, *supra* note 94, at 257 (“Republicans proposed to abrogate the Black Codes and eliminate any doubts as to the constitutionality of the Civil Rights Act.”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 259.

¹¹⁰ *Id.* at 258 (“Now, discriminatory state laws could be overturned by the federal courts regardless of which party dominated Congress.”).

¹¹¹ *Id.*

¹¹² *See infra* Part II.

In 1869, Congress finally ratified the Fifteenth Amendment, providing the right to vote to Black men.¹¹³ But “the Amendment said nothing about the right to hold office and failed to make voting requirements ‘uniform throughout the land,’ as many Radicals desired . . . [It] did not forbid literacy, property, and educational tests that, while nonracial, might effectively exclude the majority of [B]lacks from the polls.”¹¹⁴ The limitations of the reach of the Fifteenth Amendment are still with us today, as states are free to use various voting suppression tactics to disenfranchise large swaths of the Black electorate.¹¹⁵

Thus, the challenge for abolitionists, since the settling of the American colonies, is a power elite who castigated Black people if they were poor and also if they were well-educated and more affluent. During the colonial era, the power elite took the view that emancipation would lead to a large vagrant poor who would be the source of social disorder.¹¹⁶ In response, white abolitionists pushed for “model Black behavior” to deflect such concerns through the development of Black churches and schools.¹¹⁷ Such efforts, however, provoked rather than deflected racism. “Many whites took umbrage at African Americans who supposedly stepped out of their place by displaying economic independence, political assertiveness, and social skills.”¹¹⁸ These views were not regional; they were found in the South as well as in New England.¹¹⁹

In fact, as Kendi has persuasively documented,¹²⁰ white supremacist ideology has been a major force in United States life since European settlers descended on and occupied Native American soil. Passage of various laws, election of various representatives, and ratification of various constitutional amendments did not magically cause that ideology to end. In fact, these events may have spurred additional energy to undermine any anti-racist advances. President Andrew Johnson based much of his presidency on undermining the anti-slavery efforts of President

¹¹³ FONER, *supra* note 94, at 446 (“In February 1869, Congress approved the Fifteenth Amendment, prohibiting the federal and state governments from depriving any citizen of the vote on racial grounds.”).

¹¹⁴ *Id.*

¹¹⁵ President Biden, for example, has described Georgia’s new voting law as “Jim Crow on steroids.” Derek Thompson, *The Truth About Georgia’s Voter Law*, ATLANTIC (Apr. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/georgia-voting-rights-fiasco/618537/> [<https://perma.cc/NR57-N72Q>]; see also Edward Lempinen, *Stacking the Deck: How the GOP Works to Suppress Minority Voting*, BERKELEY NEWS (Sept. 20, 2020), <https://news.berkeley.edu/2020/09/29/stacking-the-deck-how-the-gop-works-to-suppress-minority-voting/> [<https://perma.cc/PF34-CTZG>] (“While vote suppression targeting people of color is a grim tradition in U.S. elections, this year [2020] the election process itself has become a central campaign issue.”).

¹¹⁶ See SINHA, *supra* note 49, at 115.

¹¹⁷ *Id.* at 115.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Kendi, *supra* note 22 (explaining that the election of Donald Trump signals a change away from racial progress and towards racist progress and that there is “a progression of racism that historically has come after racial progress”).

Abraham Lincoln,¹²¹ while President Donald Trump devoted much of his presidency to undermining the modest anti-racist reforms achieved under President Barack Obama.¹²² Racism and anti-racism have always co-existed in American life and politics. Gains by abolitionists have never dismantled white supremacy; at most, they have attained incremental reforms while simultaneously inflaming the seeds of white supremacy.

II. THE CONSTITUTION’S ROLE IN PERPETUATING RACIAL INEQUALITY

A. *Slavery Not Ever Abolished*

When drafted, the Constitution facilitated the continued existence of slavery. Slaves were defined as three-fifths of a person for purposes of political representation for white people.¹²³ This provision helped ensure that Black people in the South would remain enslaved while white southerners benefitted politically from their status and unpaid labor. The drafters of the Constitution were well aware of the purpose behind the Three-Fifths Clause. Gouverneur Morris unsuccessfully moved to require inhabitants to be “free” to be counted for the purposes of political representation, making the moral argument that:

[t]he admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages, shall have more votes in a Govt. instituted for the protection of the rights of mankind, than the Citizens of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice.¹²⁴

Morris argued that the continuation of slavery was the “curse of heaven.”¹²⁵

The Constitution also prevented any legislative interference with the slave trade until 1808¹²⁶ and made the Northern colonies complicit in the perpetuation of slavery by requiring the return of escaped slaves to their masters.¹²⁷ The United States

¹²¹ FONER, *supra* note 94, at 247–51 (documenting what Foner calls Johnson’s “blatant racism”).

¹²² It is impossible to summarize all the Trump-era policy changes that rolled back the Obama administration’s efforts to address racial bias, but this article discusses a few. See Katy O’Donnell, *Trump Rolling Back Obama Efforts on Racial Bias*, POLITICO (May 8, 2019, 9:32 PM), <https://www.politico.com/story/2018/05/08/trump-obama-racial-bias-522940> [<https://perma.cc/DL8U-B5MR>].

¹²³ U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

¹²⁴ *Madison Debates: August 8, 1787*, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_808.asp [<https://perma.cc/E5GB-2YNN>] (last visited Aug. 22, 2021).

¹²⁵ *Id.*

¹²⁶ U.S. CONST. art. I, § 9, cl. 1.

¹²⁷ U.S. CONST. art. IV, §2, cl. 3.

Congress codified that rule in 1793 with the passage of the Fugitive Slave Act.¹²⁸ The Act “allowed for the capture and return of runaway enslaved people within the territory of the United States . . . [It] authorized local governments to seize and return escapees to their owners and imposed penalties on anyone who aided in their flight.”¹²⁹

Although the Fugitive Slave Act was enacted by the Second United States Congress, some Northern states, such as Pennsylvania, sought to defy the Act by passing their own laws that made it illegal for anyone to attempt to use force or violence to kidnap a “negro or mulatto” to take them out of state.¹³⁰

The Supreme Court interpreted the Constitution to preclude such efforts.¹³¹ Edward Prigg, upon the request of Margaret Ashmore, a slave owner, had gone to Pennsylvania to kidnap Margaret Morgan, an enslaved person and return her to the slave-holding state of Maryland. Prigg was indicted for violating Pennsylvania law.¹³² The United States Supreme Court, in an opinion authored by Justice Joseph Story (an anti-slavery northerner from Massachusetts), ruled that the Pennsylvania law was unconstitutional and could not be used to indict Prigg, because:

The act of the legislature of Pennsylvania upon which the indictment against Edward Prigg is founded, is unconstitutional and void; it purports to punish as a public offence against the state, the very act of seizing and removing a slave by his master, which the constitution of the United States was designed to justify and uphold.¹³³

The Court emphasized that the Fugitive Slave Clause was an essential aspect of the Constitutional design. Before the Constitution was ratified, some Northern states openly resisted the return of fugitive slaves.¹³⁴ According to the United States Supreme Court, the South relied on the expectation that regulation of fugitive slaves could only happen by Congress. “The history of the times proves, that the [S]outh regarded and relied upon it, as an ample security to the owners of slave property.”¹³⁵

By striking down the Pennsylvania legislation as unconstitutional, the Court made it clear that the Constitution did not merely preserve slavery in the South, but it precluded the northern states from taking any steps to assist people who were fugitive slaves. The North was required to allow the Fugitive Slave Act to operate

¹²⁸ Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (enacted by the 2nd United States Congress, repealed 1864).

¹²⁹ *Fugitive Slave Acts*, HISTORY (Feb. 11, 2020), <https://www.history.com/topics/black-history/fugitive-slave-acts> [<https://perma.cc/F2GN-3QA2>].

¹³⁰ *See* Prigg v. Pennsylvania, 41 U.S. 539, 551 (1842).

¹³¹ *Id.* at 625–26.

¹³² *Id.* at 561.

¹³³ *Id.*

¹³⁴ *Id.* at 564.

¹³⁵ *Id.*

within its borders to further the ends of the white supremacist constitution. And despite some Northern resistance, the Fugitive Slave Act was updated in 1850, decades after the Constitution permitted Congress to abolish slavery.¹³⁶

Some state courts tried to resist the use of the Constitution to perpetuate slavery, but those attempts were overturned by the Supreme Court. For example, the Wisconsin Supreme Court granted a writ of habeas corpus to an abolitionist who was arrested under the Fugitive Slave Act on the grounds that the Act was unconstitutional, holding that the Magna Carta was a proper source for defining the due process rights of the person arrested for seeking to assist fugitive slaves.¹³⁷ Those arguments were unsuccessful; the United States Supreme Court continued to conclude in 1859 that Congress's power to enact a fugitive slave law and have exclusive jurisdiction over those people who tried to assist fugitive slaves was essential to the constitutional design.¹³⁸

Nonetheless, it is important not to overstate the limited success achieved in some state courts. To the extent that the Wisconsin Supreme Court could imagine a violation of due process rights, its exclusive focus was on the rights of the person seeking to assist the fugitive slave. Whether slaves were actually "persons" who were entitled to be "free" when they entered the state of Wisconsin was beyond the scope of the Wisconsin court's consideration.¹³⁹ Thus, as of 1850, both anti-slavery Justice Joseph Story and the comparatively liberal Wisconsin Supreme Court declined to take any steps that would have directly freed slaves that escaped to the north. They did not question the Constitutional design that permitted and protected slavery while never mentioning the word itself.

In a little-told story, the lawyers who represented fugitive slaves in the 1850s understood the futility of their legal arguments.¹⁴⁰ They saw fugitive slave cases "as a venue for a vigorous rhetorical proxy battle against slavery."¹⁴¹ The lawyers "used the procedural tools within that system both to achieve the best possible outcomes

¹³⁶ *Fugitive Slave Acts*, *supra* note 129.

¹³⁷ See *In re Booth*, 3 Wis. 1, 66 (Wis. 1854).

¹³⁸ See *Ableman v. Booth*, 62 U.S. 506, 526 (1859).

¹³⁹ The Court in *In re Booth* emphasized that:

We are aware that it has been said that slaves are not persons in the sense in which that term is used in the amendment to the constitution above referred to. But this, admitting it to be true, does not affect the question under consideration, as persons who are free are liable to be arrested and deprived of their liberty by virtue of this act, without having had a trial by a jury of their peers. We do not propose to discuss the question whether a slave escaping from the state where he is held to service or labor, into a state where slavery does not exist, thereby becomes free by virtue of the local law, subject only to be delivered up to be returned again to servitude, as it is a question not necessarily involved in the consideration of the subject before us.

In re Booth, 3 Wis. at 66–67.

¹⁴⁰ See Farbman, *supra* note 8.

¹⁴¹ *Id.* at 1882.

for their clients, *and* to obstruct and dismantle the system itself.”¹⁴² They understood the premise of this Article that the white supremacist constitution was not a likely source of legal relief, but nonetheless, they concluded that making arguments against the barbarity of these laws could be a step in an important political struggle to end slavery.¹⁴³

The Supreme Court’s insistence that the Fugitive Slave Act (as a federal statute) was presumptively supreme was in stark contrast to the Court’s infamous decision (two years earlier) in *Dred Scott v. Sandford*.¹⁴⁴ In *Dred Scott*, the Court, in a 7-2 decision, ruled that a federal statute, the Missouri Compromise of 1820, was unconstitutional.¹⁴⁵ That conclusion invalidated Dred Scott’s claim to state citizenship.¹⁴⁶ Pursuant to the Missouri Compromise of 1820, Dred Scott became a free man when his owner took him to Illinois (a state where slavery was forbidden by its state constitution) and to Fort Snelling (where slavery was forbidden by the Missouri Compromise).¹⁴⁷ Arguing that he was a citizen of Illinois, Dred Scott sought to sue for his freedom under the federal court’s diversity jurisdiction.¹⁴⁸

For the first time since *Marbury v. Madison*¹⁴⁹, the Supreme Court in *Dred Scott* invalidated a federal statute. Further, the Court expansively interpreted the Fifth Amendment’s Due Process Clause to conclude that the federal government was seeking to deprive citizens (i.e., slave owners) of their property (i.e., slaves) without just compensation and due process of law.¹⁵⁰

For our purposes, the most important part of the *Dred Scott* decision was its originalist methodology. The Court concluded that free Black people could not be citizens because they “were at [the time the Constitution was drafted] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . [having] no rights or privileges but such as those who held the power and the Government might choose to grant them.”¹⁵¹ This was considered to be the “fixed and universal” view of the ratifiers of the Constitution.¹⁵²

The *Dred Scott* decision is probably glossed over in many constitutional law courses as a politically disastrous decision that was a key factor in leading the United States to a civil war. While that description may, in hindsight, be accurate, the more important point is that the decision *was structured in originalist methodology that was consistent with the longstanding understanding of the Constitution’s original intent regarding slavery and the rights of all Black people*. Black people were

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIII.p.

¹⁴⁵ *Id.* at 452.

¹⁴⁶ *Id.* at 453.

¹⁴⁷ *Id.* at 431–32.

¹⁴⁸ *Id.* at 406.

¹⁴⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁵⁰ *Scott*, 60 U.S. at 450–51.

¹⁵¹ *Id.* at 404–05.

¹⁵² *Id.* at 407.

considered a “subordinate” and “inferior” class of beings, even by many who described themselves as abolitionists.¹⁵³ To argue, as did some anti-slavery advocates,¹⁵⁴ that slavery should end because it was immoral was not necessarily to argue that Black people were equal to white people. The Constitution was founded on the premise that Black people were inferior to white people.

B. *The Civil War Amendments’ Evisceration*

Following the end of the Civil War, a sea change arguably occurred in U.S. history. The Thirteenth, Fourteenth, and Fifteenth amendments were ratified during a contentious struggle in which Democratic President Andrew Johnson, who became President upon the assassination of Republican President Abraham Lincoln, opposed the ratification of the Fourteenth Amendment.¹⁵⁵

In theory, one could construe the language of these amendments as furthering an abolitionist understanding of the Constitution.¹⁵⁶ The Thirteenth Amendment seemingly abolished slavery and involuntary servitude, furthering the argument that no one had the legal or moral authority to own another person.¹⁵⁷ Section 1 of the Fourteenth Amendment overturned *Dred Scott* by providing that persons born in the United States are U.S. citizens as well as citizens of the states in which they reside.¹⁵⁸ It also prohibited states from violating a citizen’s privileges or immunities and a person’s right to due process and equal protection.¹⁵⁹ The Fifteenth Amendment prohibited the denial of the right to vote on the basis of race.¹⁶⁰

¹⁵³ See KENDI, *supra* note 25, at 165, 178.

¹⁵⁴ See *supra* Part I.

¹⁵⁵ See Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1279 (2013) (arguing that originalist accounts of the Fourteenth Amendment have “completely missed President Johnson’s important role as leader of the Anti-Amendment Party in the drama of the Fourteenth Amendment. As the de facto national head of the Democratic Party, Johnson took the lead in crafting arguments against the Amendment”).

¹⁵⁶ See JACOBUS TEN BROEK, *EQUAL UNDER LAW* (1965); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AND THE BILL OF RIGHTS* (1986); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993) (arguing that the Reconstruction Amendments should be understood as supporting an abolitionist perspective).

¹⁵⁷ U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.”).

¹⁵⁸ 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.”).

¹⁵⁹ U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person . . . the equal protection of the laws.”).

¹⁶⁰ U.S. CONST. amend. XV.

With the ratification of the Thirteenth Amendment presided over by a deeply racist Andrew Johnson in the White House, the Thirteenth Amendment's exception for involuntary servitude "as a punishment for crime" helped slavery persist in all but name. With the support of President Johnson, who had granted broad amnesty for former Confederates, the South "barred Blacks from voting, elected Confederates as politicians, and instituted a series of discriminatory Black codes at their constitutional conventions to reformulate their state in the summer and fall of 1865. With the Thirteenth Amendment barring slavery 'except as a punishment for crime,' the law replaced the master."¹⁶¹ In more recent years, the Thirteenth Amendment has not been able to serve as a bar to convict labor.¹⁶²

The Supreme Court initially interpreted the Fourteenth Amendment consistently with an abolitionist agenda.¹⁶³ As the nation retreated from offering protections to newly freed people, and instead imposed a reign of terror upon them, the Supreme Court likewise retreated from using the Fourteenth Amendment as an instrument to dismantle white supremacy. Two important aspects of the Fourteenth Amendment were construed in a way that precluded an abolitionist agenda—the Equal Protection Clause in Section One and the Congressional Power Clause in Section Five. I will tell this story chronologically.

Despite the Fourteenth Amendment's seemingly broad language, the Supreme Court began an immediate and long-term process of interpreting those provisions narrowly. In the *Slaughter-House Cases*, the Supreme Court held that the Privileges and Immunities Clause did not preclude the states from implementing a local monopoly.¹⁶⁴ While that opinion did not relate directly to race discrimination, its underlying logic reflects the many ways that the Fourteenth Amendment has been narrowly interpreted. The Court emphasized that ratification of the Fourteenth Amendment did not subject states to the control of Congress nor change "the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."¹⁶⁵ In other words, the Fourteenth Amendment's broad prohibitions against state action did not undermine the system of federalism that empowers state's rights. Similarly, the Privileges and Immunities Clause was interpreted narrowly so that states could deny women the right to

¹⁶¹ KENDI, *supra* note 25, at 235. For further discussion of the Punishment Clause of the Thirteenth Amendment, see Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607 (2008).

¹⁶² See generally Michael Scimone, *More to Lose Than Your Chains: Realizing the Ideals of the Thirteenth Amendment*, 12 N.Y. CITY L. REV. 175 (2008); Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213 (2009); Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117 (2013).

¹⁶³ See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (striking down state law excluding any but "white persons" from juries); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down state law that effectively barred Chinese people from running laundries).

¹⁶⁴ *Slaughter-House Cases*, 83 U.S. 36 (1873).

¹⁶⁵ *Id.* at 78.

practice law and the right to vote.¹⁶⁶ In other words, the term “privileges and immunities” was given a narrow interpretation that has largely precluded it from being a source for progressive reform despite calls from progressives to reconsider its meaning.¹⁶⁷

Similarly, the Court quickly narrowed the meaning of Section Five of the Fourteenth Amendment. That provision ambitiously gave Congress the authority “to enforce, by appropriate legislation, the provisions of this article.”¹⁶⁸ Consistent with an abolitionist agenda, Congress used that authority to enact laws in 1870 and 1871 to protect Black people from the terror of the Ku Klux Klan. The Enforcement Act of 1870 prohibited groups of people from banding together “or [to] go in disguise upon the public highways, or upon the premises of another” with the intention of violating people’s constitutional rights.¹⁶⁹ The Second Force Act, which became law in 1871, placed administration of national elections under the control of the federal government and empowered federal judges and United States marshals to supervise local polling places.¹⁷⁰ The Third Force Act, which became law in 1871, empowered the President to use the armed forces to combat those who conspired to deny equal protection of the laws and to suspend habeas corpus, if necessary, to enforce the Act.¹⁷¹ These poorly funded Enforcement Acts caused the Klan to nominally dissolve by 1871, “but the train of terror still rushed down the tracks under new names”¹⁷² because of the lack of funding for a strong federal presence in the South.¹⁷³

¹⁶⁶ See *Bradwell v. State*, 83 U.S. 130 (1873) (holding that states could deny women the right to practice law); *Minor v. Happersett*, 88 U.S. 162 (1875) (holding that states could deny women the right to vote).

¹⁶⁷ Kevin Christopher Newsom noted that:

Novice students of constitutional law, upon encountering the Privileges or Immunities Clause for the first time, are told by their professors (pausing ever so briefly in the headlong rush toward the real meat of the Fourteenth Amendment, the Due Process and Equal Protection Clauses): ‘Privileges or Immunities? Don’t worry about it. Justice Miller and the *Slaughter-House* Court decimated that provision way back in 1873.

See, e.g., Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 646 (2000).

¹⁶⁸ U.S. CONST. amend. XIV, § 5.

¹⁶⁹ Enforcement Act of 1870, 41st Cong. Sess. 1 Ch. 114 (1870), https://www.cop.senate.gov/artandhistory/history/common/image/EnforcementAct_1870_Page_1.htm [<https://perma.cc/P792-KYX9>].

¹⁷⁰ Enforcement Act of February 1871, 41st Cong. Sess. 3 Ch. 99 (1871), https://www.cop.senate.gov/artandhistory/history/common/image/EnforcementAct_Feb1871_Page_1.htm [<https://perma.cc/P3AE-GMET>].

¹⁷¹ Enforcement Act of April 1871, 42nd Cong. Sess. 1 Ch. 22 (1871), https://www.cop.senate.gov/artandhistory/history/common/image/EnforcementAct_Apr1871_Page_1.htm [<https://perma.cc/EQX2-7BSS>].

¹⁷² KENDI, *supra* note 25, at 249.

¹⁷³ *Id.*

Congress documented the continuing violence against Black people in the South in 1872 but then also explained that the violence was in response to the “bad legislation, official incompetency, and corruption” of Black politicians.¹⁷⁴ Meanwhile, white Southerners “made it known to Black people . . . that ‘to vote against the wishes of their white employers and neighbors was to risk death.’”¹⁷⁵

While the Enforcement Acts required a strong federal presence to achieve their ends, the Civil Rights Act of 1875 was more promising. In the final Reconstruction Bill enacted by Congress, it gave Black people the ability to use the federal courts to challenge race discrimination in jury selection, transportation, and accommodations.¹⁷⁶ But the Supreme Court virtually wiped out the Civil Rights Act of 1875 in its 1883 decision in *The Civil Rights Cases*.¹⁷⁷ Although Section Five of the Fourteenth Amendment gave Congress the power to “enforce” the Fourteenth Amendment, the Supreme Court in 1883 concluded that that power did not extend to banning race discrimination by private actors.¹⁷⁸ The decision began the creation of a rigid “state action” doctrine that makes it very difficult to use the Fourteenth Amendment to reach discriminatory conduct by private actors or even state-supported private actors. In the words of Justice Bradley:

civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals . . . The wrongful act of an individual, unsupported by any such [State] authority, is simply a private wrong, or a crime of that individual. . . . [I]t is not individual offenses, but abrogation and denial of rights, which it denounces, and for which [Section Five] clothes the Congress with power to provide a remedy.¹⁷⁹

In a vigorous and lone dissent, Justice Harlan argued that Congress’s power should not be limited by that narrow interpretation of the state action doctrine. In an argument that foreshadowed the perpetuation of white supremacy in the United States through actions of private actors, Harlan said:

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents of the State, because they are charged with duties to the public, and are amenable, in respect of their public duties and functions, to governmental regulation. It seems to me that . . . a denial, by these instrumentalities of the State to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State within the meaning of the Fourteenth Amendment.

¹⁷⁴ *Id.* at 252.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 256.

¹⁷⁷ See generally *United States v. Stanley*, 109 U.S. 3 (1883).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 17–18.

If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States.¹⁸⁰

Congress eventually found a way to regulate what Harlan calls “places of public amusement” through its Commerce Clause powers,¹⁸¹ but the Court has never revisited this narrow understanding of Congress’s enforcement authority under the Fourteenth Amendment. The Court’s 8-1 vote, however, left little reason to expect the majority’s reasoning to be reconsidered or abandoned.

As Charles Black forcefully argued in 1967, “the ‘state action’ problem is the most important problem in American law.”¹⁸² Further, he contended that “the most important single task to which American law must address itself is the task of eradicating racism.”¹⁸³ Finally, Black insisted that:

amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action ‘doctrine,’ and of the ways of thinking to which it is linked. It is not too much to have said that the state action problem is the most important problem in American law.¹⁸⁴

Black argued that the continued presence of racism in American life is all the evidence we need of state *inaction*, to which the Constitution should offer redress.¹⁸⁵ He insisted that both Congress and the courts should be given the widest latitude to use the Equal Protection Clause and Section Five as tools to eradicate such denials of equality.¹⁸⁶

¹⁸⁰ *Id.* at 58–59 (Harlan, J., dissenting).

¹⁸¹ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the public accommodations provision of the Civil Rights Act of 1964).

¹⁸² Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 69 (1967); see also Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 779 (2004) (extending Black’s argument to the field of welfare rights).

¹⁸³ *Id.* at 69.

¹⁸⁴ *Id.* at 70.

¹⁸⁵ *Id.* at 107.

¹⁸⁶ Charles L. Black, Jr. explains that:

Racism, including that formally “private” racism that blots so much of public life, is not only a national problem but *the* national problem. The racism problem, in law, is now principally the “state action” problem; to be slow to recognize state action, to complicate the concept with unwarranted limiting technicalities, is to confirm racism *pro tanto*. “State action” questions, however stated, are therefore national questions, questions for the Court and Congress, both of them acting in keen consciousness of their being engaged in work of

In 1896, the infamous decision in *Plessy v. Ferguson*¹⁸⁷ made it difficult to use Section One of the Fourteenth Amendment to end even state-sanctioned apartheid. The Supreme Court first quoted from the *Civil Rights Cases* to observe that “the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury.”¹⁸⁸ Further, the Court went on to declare that:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.¹⁸⁹

In response to the argument that the state’s laws imposed a badge of inferiority on Black people, the Court responded: “If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”¹⁹⁰ While *Plessy* was eventually overturned, its limited view of state action remains with us today—that the Constitution cannot be used as a tool to force states to remedy the legacy of slavery.¹⁹¹

Justice John Marshall Harlan is often remembered as a powerful dissenter in both *Plessy* and *The Civil Rights Cases*, but he also authored the Supreme Court’s 1899 opinion that upheld the segregation of Richmond County public schools in *Cumming v. Board of Education of Richmond County*.¹⁹² In *Cumming*, Justice Harlan concluded that it did not violate the Fourteenth Amendment for Richmond County, Georgia to use taxpayer dollars to provide for a public high school for white children but no public high school for Black children.¹⁹³ In addition to concluding that the expenditure of state funds in that way was permissible under the Fourteenth Amendment, the Court also questioned whether it should even be involved in questions about public education. Speaking for a unanimous Court, Justice Harlan said:

We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any

exploratory interpretation that goes to the life of that one of our constitutional guarantees most evidently rooted in justice.

Id. at 107.

¹⁸⁷ 163 U.S. 537 (1896).

¹⁸⁸ *Id.* at 542–43.

¹⁸⁹ *Id.* at 543.

¹⁹⁰ *Id.* at 551.

¹⁹¹ See Black, *supra* note 182, at 107.

¹⁹² 175 U.S. 528 (1899).

¹⁹³ *Id.*

class on account of their race, the education of people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.¹⁹⁴

In other words, the reach of the Fourteenth Amendment's Equal Protection Clause was quite narrow; even one of the Court's most progressive jurists did not conclude that the Equal Protection Clause disturbed basic principles of federalism by requiring the states to mandate equal education on the basis of race.

The Supreme Court wrestled with the meaning of the Fourteenth Amendment, while Radical Reconstruction was making some headway in the South. The Reconstruction Acts of 1867 had forced Southern States to adopt new constitutions that did not deny the right to vote on the basis of race or color.¹⁹⁵ According to historian Eric Foner, "[w]hen not deterred by violence, blacks eagerly attended political gatherings, and voted in extraordinary numbers; their turnout in many elections approached 90 percent."¹⁹⁶ And Black people attained elective office in significant numbers, with some state legislatures becoming majority Black.¹⁹⁷ "Throughout the Republican South, the number of black officials rose significantly in the early 1870s. Black representation in Congress grew from five to seven in 1873 and reached a Reconstruction peak of eight (representing six different states) in 1875."¹⁹⁸

But the withdrawal of federal troops as part of the Compromise of 1877¹⁹⁹ heralded the end of Reconstruction and Black voting power in the southern United States. From 1890 to 1908, every Confederate state produced new constitutions or suffrage-restricting constitutional amendments.²⁰⁰ "The avowed purpose of these new constitutions was to restore white supremacy . . ."²⁰¹ And the results were devastating. In Alabama, which was the subject of an important lawsuit by Jackson

¹⁹⁴ *Id.* at 545.

¹⁹⁵ See FONER, *supra* note 94, at 276–80, 452–53; see also KENDI, *supra* note 25, at 244 (describing effects of Reconstruction Acts).

¹⁹⁶ *Id.* at 291.

¹⁹⁷ See *The First South Carolina Legislature After the 1867 Reconstruction Acts*, FACING HISTORY & OURSELVES, <https://www.facinghistory.org/reconstruction-era/first-south-carolina-legislature> [<https://perma.cc/5HHE-HFLA>] (last visited Apr. 27, 2021).

¹⁹⁸ FONER, *supra* note 94, at 537–38.

¹⁹⁹ See History.com Editors, *Compromise of 1877*, HISTORY CHANNEL (Nov. 27, 2019), <https://www.history.com/topics/us-presidents/compromise-of-1877> [<https://perma.cc/6WB9-4UDW>].

²⁰⁰ See Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295, 301 (2000).

²⁰¹ *Id.* at 301–02.

Giles,²⁰² the number of eligible black voters declined from 181,471 to 3,000 when the new rules went into effect in 1900.²⁰³

Despite the glaring evidence that the Democrats were using these newly amended Constitutions to disenfranchise Black people, the Supreme Court refused to intervene. In 1903, in an opinion authored by Justice Oliver Wendell Holmes, with another Harlan dissent, the Supreme Court failed to overturn the refusal of Alabama voting officials to register more than 5,000 qualified Black voters.²⁰⁴ As persuasively demonstrated by Richard Pildes, the Court did not intervene because it was inconceivable that it would enter an order that required a court to supervise voting. “No doubt Holmes, in particular, viewed the complaint as an invitation for courts, in essence, to re-initiate Reconstruction, or perhaps even the Civil War.”²⁰⁵ One had to wonder if the Fourteenth and Fifteenth Amendments had been repealed while former slaves struggled under conditions of dire poverty and grave injustice.

The idea that the Constitution could be used as a tool to help disadvantaged members of society was suggested in the famous footnote four from *Carolene Products*²⁰⁶ in 1938. While upholding the authority of Congress to regulate the interstate shipment of milk under a relaxed standard of judicial review, the Court suggested that a more “searching” judicial review should take place when a statute is directed at particular religious, national, or racial minorities where there is likely to be “prejudice against discrete and insular minorities” and a limited political process that cannot be “relied upon to protect minorities.”²⁰⁷ The *Carolene Products* footnote was sometimes used to strike down state action,²⁰⁸ but it did not prevent the imposition of internment camps on Japanese Americans during the Second World War.²⁰⁹

While the Roberts Court has explicitly repudiated *Korematsu*²¹⁰ (despite upholding restrictions on Muslims seeking to enter the United States),²¹¹ the

²⁰² *Giles v. Harris*, 189 U.S. 475 (1903).

²⁰³ Pildes, *supra* note 200, at 303–04.

²⁰⁴ *Giles*, 189 U.S. at 488.

²⁰⁵ Pildes, *supra* note 200, at 306.

²⁰⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

²⁰⁷ *Id.* at 152 n.4.

²⁰⁸ *See* *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624 (1943) (prohibiting religious minorities from being required to recite the Pledge of Allegiance); *see also* *Shelley v. Kraemer*, 334 U.S. 1 (1948) (applying Fourteenth Amendment to racially restrictive covenants).

²⁰⁹ *See* *Hirabayashi v. United States*, 320 U.S. 81 (1943); *see also* *Korematsu v. United States*, 323 U.S. 214 (1944).

²¹⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“The dissent’s reference to *Korematsu*, however affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – ‘has no place in law under the Constitution.’” (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

²¹¹ *Id.* (upholding Presidential Proclamation 9645 despite statements by President Trump and administration officials that the proclamation was motivated by anti-Muslim animus).

important historical lesson is that the Court never interprets the Fourteenth Amendment progressively to remedy racial injustice at the time in which the consequences of that racial injustice are the starkest. *Cummings* did not invalidate racial segregation after Radical Reconstruction ended; *Korematsu* did not release Japanese-American people from internment camps during the Second World War; even *Brown* itself offered no immediate relief to the plaintiffs; the Court insisted on hearing re-argument on the issue of remedy.²¹² As Jordan Steiker has noted, “[t]hat there was a ‘Brown II’ did not portend well for the plaintiffs, because the background assumption in constitutional law—which required no additional briefing or argument—was that the plaintiffs’ demonstration of a constitutional violation entitled them to immediate, personal relief and an injunction against future constitutional misconduct.”²¹³ Further, the court issued its decision in *Brown* after the school district at issue had already voluntarily ended its practice of racial segregation; and public schools remain as segregated as ever under segregated housing patterns and white flight from public schools.²¹⁴ The Constitution has routinely failed to be a contemporary tool to overcome white supremacy.

To be clear, Southern constitutions were amended in the late nineteenth and early twentieth century to re-establish white supremacy after the end of Radical Reconstruction.²¹⁵ The Supreme Court decisions invalidating those measures have occurred in the late twentieth or early twenty-first centuries, nearly a century after the measures were enacted. For example, in 1967, nine years after the Lovings were convicted under the Virginia anti-miscegenation statute and forced to live in another state, the Supreme Court invalidated that statute in *Loving v. Virginia*.²¹⁶ The statute had survived judicial attack for more than a half-century despite its title “An Act to Preserve Racial Integrity.”²¹⁷ In *Hunter v. Underwood*,²¹⁸ in 1985, the Supreme Court invalidated a long list of 1901 measures designed to disenfranchise Black voters and maintain white supremacy. In 2020, the Supreme Court invalidated a nonunanimous jury requirement in Louisiana, which had been adopted by constitutional convention in 1898 to help maintain a steady pool of Black convicts

²¹² See *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955).

²¹³ Jordan M. Steiker, *Brown’s Descendants*, 52 HOWARD L.J. 583, 608 (2009).

²¹⁴ See Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 16–20 (2004) (detailing the continuing prevalence of racial segregation in public schools and American society).

²¹⁵ This era is usually referred to by the name “Jim Crow.” See *Jim Crow Laws*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> [<https://perma.cc/X8VG-BL3Q>] (last visited Aug. 3, 2021).

²¹⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

²¹⁷ *Id.* at 11 n.11.

²¹⁸ *Hunter v. Underwood*, 471 U.S. 222 (1985).

to be used within the convict leasing system.²¹⁹ One committee chairman described the purpose of this and other provisions as to “establish the supremacy of the white race.”²²⁰

Although much attention in recent years has been placed on the concept of implicit bias,²²¹ the attempts to maintain white supremacy have scarcely been subtle. As the Supreme Court recounted in its 1985 decision in *Hunter*, the delegates to the all-white Alabama constitutional convention in 1901 could not have been clearer that their purpose was to turn back Radical Reconstruction and re-establish a system of white supremacy.²²² Convention President John B. Knox proclaimed: “And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.”²²³ The Constitution has never been designed or interpreted to end white supremacy.

C. *Turning Brown on Its Head*

One might argue that there was a brief window in U.S. history, sometimes called the Second Reconstruction,²²⁴ when the Constitution was used to dismantle white supremacy. Beginning with *Brown v. Board of Education*²²⁵ and *Bolling v. Sharpe*,²²⁶ the Supreme Court was arguably willing to seek ways to dismantle racial apartheid in the United States by requiring local school districts to integrate their public schools. These abolitionist steps, however, ended in the 1970s as the Supreme Court balked at instituting effective remedies that would truly integrate the public

²¹⁹ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394, 1408 (2020); see also Jessica Rosgaard & Wallis Watkins, *The History of Louisiana’s Non-Unanimous Jury Rule*, WWNO (Oct. 22, 2018, 5:16 PM), <https://www.wwno.org/politics/2018-10-22/the-history-of-louisianas-non-unanimous-jury-rule> [<https://perma.cc/P3RQ-JH7K>] (describing the history of the provision as furthering white supremacy).

²²⁰ *Ramos*, 140 S. Ct. at 1394.

²²¹ See Frank Harty & Haley Hermanson, *Implicit Bias Evidence: A Compendium of Cases and Admissibility Model*, 68 DRAKE L. REV. 1, 2, 5 (2020); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 194–96 (2018).

²²² *Hunter*, 471 U.S. at 229.

²²³ *Id.*

²²⁴ See U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, THE CIVIL RIGHTS MOVEMENT AND THE SECOND RECONSTRUCTION, 1945–1968, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> [<https://perma.cc/BZC9-YDUR>].

²²⁵ 349 U.S. 294 (1955) (declaring state-mandated school segregation unconstitutional under Fourteenth Amendment).

²²⁶ *Bolling v. Sharpe*, 347 U.S. 497 (1954) (declaring that segregation of D.C. public schools violates the Fifth Amendment’s Due Process Clause).

schools²²⁷ and refused to dismantle the system of property-tax funded education that maintained the superiority of suburban white schools.²²⁸

The Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*²²⁹ is often not given enough attention in understanding the Court's movement away from racial justice. The *San Antonio* case was brought by Mexican-American parents who challenged the funding of public schools by property taxes in a lawsuit that was filed in 1968.²³⁰ Drawing on court decisions striking down poll taxes and on cases that emphasized the importance of public education, the parents argued that the school-funding scheme violated the Equal Protection Clause.²³¹ A 3-judge district court panel entered a *per curiam* opinion concluding that "the current method of state financing for public elementary and secondary education deprives their class of equal protection of the laws under the Fourteenth Amendment."²³² The *per curiam* panel found that strict scrutiny applied because lines "drawn on the basis of wealth or property" should be immediately suspect, especially in the context of public education.²³³ Concluding that the state could not meet the compelling interest standard, the court ruled that the current system of funding education was unconstitutional and gave the state two years to devise a system that would comply with its holding.²³⁴

In an opinion authored by Justice Powell, the Supreme Court reversed.²³⁵ The Court found that wealth classifications did not have the indicia of suspectness that would warrant strict scrutiny. Leaning on footnote four from *Carolene Products*, the Court found that strict scrutiny should be limited to a class that is "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."²³⁶ Poor, Mexican-American families whose children received a substandard quality of public education, as compared with white children who lived in more affluent neighborhoods, qualified for no more than low-level rational basis review.

²²⁷ See *Milliken v. Bradley*, 418 U.S. 717, 753 (1974) (overturning the lower court order that would have required busing school children between inner city Detroit into the Detroit suburbs); see also *Freeman v. Pitts*, 503 U.S. 467 (1992) (reversing the court of appeals which had ordered aggressive remedies to dismantle racial segregation in public schools in DeKalb, Georgia); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (overturning the trial court's order requiring the state to fund inner-city schools to attract white students from the suburbs).

²²⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting the claim that Texas' system of funding education unconstitutionally discriminated against poor people and Mexican Americans).

²²⁹ *Id.*

²³⁰ *Id.* at 4–6.

²³¹ *Id.* at 17–19.

²³² *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1.

²³³ *Id.* at 283.

²³⁴ *Id.* at 286.

²³⁵ *Rodriguez*, 411 U.S. 1.

²³⁶ *Id.* at 28.

Justice Marshall's eloquent dissent disagreed with what he called the majority's "rigidified approach to equal protection analysis."²³⁷ Marshall argued that:

A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.²³⁸

By contrast, the majority concluded that the combination of poverty, race, and education were not sufficient indicators to warrant any kind of heightened scrutiny, erasing the significance of the national origin of the plaintiffs.²³⁹

The most charitable reading of *Rodriguez* is that the Court was limiting its use of strict scrutiny to cases involving individuals, like Black people, who have suffered a history of purposeful discrimination. But that reading was soon erased in the Supreme Court's decision in *Bakke*. The *Bakke* decision turned the Equal Protection Clause into a tool to *eradicate* state and local governments' attempts to remedy a legacy of racism. In *Regents of the University of California v. Bakke*,²⁴⁰ the Supreme Court invalidated the University of California's racial preferential admissions program for 16 of the 100 places in its medical school class.²⁴¹ Whether one interpreted the Court's opinion as limiting what a university could do pursuant to Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment of the United States Constitution, the message was clear: White men could use the legacy of *Brown* to argue that they were suffering from race discrimination.²⁴² The language from *Carolene Products* suggesting that close judicial scrutiny was reserved for those who constituted a "discrete and insular minority"²⁴³ was dead.

The often-heralded opinion by Justice Powell in *Bakke* was an important step toward erasing what I have called an anti-subordination understanding²⁴⁴ of the Equal Protection Clause. As Ian Haney López has perceptively observed, Justice

²³⁷ *Id.* at 98 (Marshall, J., dissenting).

²³⁸ *Id.* at 98–99 (Marshall, J., dissenting).

²³⁹ *Id.* at 18.

²⁴⁰ *Regents Univ. Cal. v. Bakke*, 438 U.S. 265, 387–88 (1978).

²⁴¹ *Id.* at 279.

²⁴² For further discussion, see Rahim, *supra* note 101.

²⁴³ *United States v. Carolene Prods Co.*, 304 U.S. 144, 152 n.4 (1938) ("Nor need we inquire whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.")

²⁴⁴ See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1038 (1986).

Powell abandoned his *Carolene Products* approach in *Bakke* when he “contended that this inquiry was superfluous in race cases”²⁴⁵ Thus, Alan Bakke, a white man seeking admission to medical school, could take advantage of strict scrutiny while the poor, Mexican-American parents seeking more equitable K-12 public school funding could not take advantage of strict scrutiny.

Justice Marshall’s dissent provides a history lesson in why the invocation of formal equality, to allow Bakke to take advantage of strict scrutiny, makes no sense. First, Marshall reminds us that 350 years ago:

[T]he Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime.²⁴⁶

Further, Marshall reminds us that the Thirteenth Amendment may have “free[d] the Negro from slavery,” but it “did not bring him citizenship or equality in any meaningful way The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.”²⁴⁷ Marshall also argued: “The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”²⁴⁸ Marshall ended his opinion by comparing the Court’s decision to that of *Civil Rights Cases* and *Plessy*, saying that he “fear[ed] that we have come full circle . . . [with] this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.”²⁴⁹ Although the majority may have thought it was permitting some continued use of affirmative action, Justice Marshall’s understanding of the meaning of *Bakke* rings true today.

Beginning with the *Bakke* decision, it is hard to find cases in which Black people successfully argue that they were victims of unconstitutional race discrimination. In *City of Richmond v. J.A. Croson Co.*,²⁵⁰ the Supreme Court dismantled the Minority Business Enterprise program that was created in Richmond, Virginia to remedy the history of Black contractors obtaining only 0.67% of the

²⁴⁵ Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1034 (2007). According to Haney López, Powell replaced a racial analysis with an ethnic analysis. “Powell deployed ethnicity to locate all groups in the same position, that of temporary minorities similarly engaged in pluralist politics and facing the same levels of societal hostility—and all deserving an identical level of judicial protection.” *Id.* at 1037.

²⁴⁶ *Regents Univ. Cal. v. Bakke*, 438 U.S. 265, 387–88 (1978) (Marshall, J., dissenting).

²⁴⁷ *Id.* at 390.

²⁴⁸ *Id.* at 395.

²⁴⁹ *Id.* at 402.

²⁵⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

city's prime construction contracts despite constituting 50% of the city's population.²⁵¹ In a 6-3 decision, the all-white majority substituted its opinion regarding the effect of racial affirmative measures for that of the majority-Black city council. The Supreme Court concluded that the city council misunderstood the ways that this program would further racial prejudice or stereotypes against Black people. The Court found that such programs "promote notions of racial inferiority and lead to a politics of racial hostility."²⁵² In a scathing dissent, Justice Marshall, the only Black member of the Court, argued that interpreting the Civil War Amendments to proscribe such state remedial measures "turns the Amendments on their heads" in light of the historical evidence that the purpose of such laws was to respond to "racial violence or discrimination against newly freed slaves."²⁵³ Thus, the five Black members of the city council and the only Black member of the Supreme Court thought such programs were essential to eliminating the badges, incidents, and vestiges of slavery, but the all-white majority of the Supreme Court found otherwise.

Bakke and *Crosby* opened a floodgate of litigation to challenge state and local government remedial attempts to respond to dire racial inequality. While the holistic review of student applications at Michigan Law School, where race was one of many diversity factors, was upheld as constitutional with a suggested sunset in 2028 in *Grutter v. Bollinger*,²⁵⁴ the University of Michigan's awarding of 20 points on the 150-point scale to any underrepresented minority applicant who applied for admission to the undergraduate program was struck down as unconstitutional in *Gratz v. Bollinger*.²⁵⁵ The *Gratz* majority decision found it unconstitutional to use race in such a mechanical way. It interpreted the admissions program as treating race as the *only* plus factor.²⁵⁶ As noted by the dissent, however, applicants could also receive an additional "20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion."²⁵⁷ Even with the operation of this affirmative program, students from underrepresented minority groups were still a distinct minority at the university.²⁵⁸ In Justice Ginsburg's dissent, she points out that white applicants had ample opportunities to gain admission notwithstanding this affirmative program and that it was better for a university to be transparent about its

²⁵¹ *Id.* at 480.

²⁵² *Id.* at 493.

²⁵³ *Id.* at 469 (Marshall, J., dissenting).

²⁵⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁵⁵ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²⁵⁶ *Id.* at 271–72 ("[T]he LSA's automatic distribution of 20 points has the effect of making the 'factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant" thereby not acting consistently with Justice Powell's *Bakke* opinion (quoting *Regents Univ. Cal. v. Bakke*, 438 U.S. 265, 317 (1978))).

²⁵⁷ *Id.* at 294–95 (Souter, J., dissenting).

²⁵⁸ In 2003, Black students comprised 410 of the 5,550 students (7.4%) in the first-year class. See UNIVERSITY OF MICHIGAN – ANN ARBOR, COMMON DATA SET, 2003–2004, https://obp.umich.edu/wp-content/uploads/pubdata/cds/cds_2003-2004_umaa.pdf [<https://perma.cc/C7NR-JYJF>].

admissions policy rather than try to achieve the same results through “winks, nods, and disguises.”²⁵⁹ The majority decision granted an injunction to prevent the University of Michigan from continuing its program of considering race as one of many factors for which a candidate could earn 20 points.²⁶⁰ The overwhelmingly white legacy admission candidates could still request the Provost to intervene to benefit their privileged offspring.²⁶¹

In Michigan itself, the *Grutter* decision was short-lived as the state’s voters passed an initiative to eliminate affirmative action at state universities.²⁶² While the state had a very limited path available to even enact race-based affirmative action in admissions, this anti-racial-equality measure by the voters was found to be constitutionally permissible.²⁶³ In a lengthy dissent, Justice Sotomayor (joined by Justice Ginsburg) explained why a proper understanding of the Civil Rights Amendments would prohibit the state voters from using the initiative process to stymie the rights of racial minorities to participate in the political process.²⁶⁴ Sotomayor said:

Race matters. Race matters in part because of the long history of racial minorities’ being denied access to the political process . . . Race also matters because of persistent racial inequality in society — inequality that cannot be ignored and that has produced stark socioeconomic disparities And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away.²⁶⁵

She sharply disagreed with the conclusion of the majority that this initiative by voters in Michigan did not constitute “invidious” discrimination.²⁶⁶ In looking at the Court’s evolution of its understanding of the meaning of the Civil War Amendments, it is important to recognize that only *one* member of the Court joined Justice Sotomayor’s opinion. Justice Kagan took no part in the consideration of the case, but Justice Breyer concurred with the plurality’s decision in favor of the initiative.²⁶⁷ Thus, a Supreme Court majority both constrained the very limited form of affirmative action that the university could choose and then allowed the voters, in a

²⁵⁹ *Gratz*, 529 U.S. at 305 (Ginsburg, J., dissenting).

²⁶⁰ *Id.* at 282 (Stevens, J., dissenting).

²⁶¹ See The Michigan Daily Staff, *From the Daily: Legacy Admissions*, THE MICH. DAILY, (June 5, 2013), <https://www.michigandaily.com/opinion/daily-legacy-a> [<https://perma.cc/BP45-NQZ9>].

²⁶² See *Schuetz v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 314–15 (2014) (holding that Court had no authority to set aside an amendment to the Michigan Constitution prohibiting affirmative action in public education, employment, and contracting).

²⁶³ *Id.*

²⁶⁴ *Id.* at 338–39 (Sotomayor, J., dissenting).

²⁶⁵ *Id.* at 380–81.

²⁶⁶ *Id.* at 358.

²⁶⁷ *Id.* at 332 (Breyer, J., concurring).

race-conscious way, to erase even that minor use of affirmative action. While the University was supposedly offending the underlying meaning of the Fourteenth Amendment in engaging in race-conscious practices, the voters were free to use race-conscious practices to curtail that limited form of racial redress.²⁶⁸ The Fourteenth Amendment became unhinged from its historical roots as a means to help people who were recently freed from slavery, and instead became a tool of white supremacy.

It was not enough for the Supreme Court to curtail all but the most limited use of affirmative action in university admissions. The Court also tied the hands of local government officials who were trying to integrate the public-school system. In *Parents Involved in Community Schools v. Seattle School District*,²⁶⁹ the Supreme Court invalidated such efforts in Seattle, Washington and Jefferson County, Kentucky. As in *Gratz*, what is remarkable about these decisions is the skimpy remedial affirmative action that was at issue.

Jefferson County had been under a court-ordered decree until 2000 to remedy its historical system of *de jure* segregation.²⁷⁰ When the judicially ordered decree ended, the school district wanted to take voluntary measures to maintain an integrated school district.²⁷¹ The overall statistics in the district were 66% white and 34% Black.²⁷² Rather than try to adhere strictly to that ratio, the school district decided to use race as a factor in admissions if enrollment would fall outside a guideline of 15% to 50% Black.²⁷³ These guidelines only applied to students in kindergarten or first grade, or students who were new to the school district.²⁷⁴ Further, after assignments were made, students could transfer between nonmagnet schools in the district.²⁷⁵ Very few students were assigned based on race, given the broad range of these criteria.²⁷⁶

The Seattle program had a similar minimal effect on students' school assignment. When determining which students would fill slots at oversubscribed schools, the school district used a racial tiebreaker if the school was not within the ten percentage points of the district's overall white/nonwhite racial balance.²⁷⁷ The tiebreaker rule did not affect large numbers of students, and its impact appears to

²⁶⁸ See Conor Friedersdorf, *Ideas: Why California Rejected Racial Preferences, Again*, THE ATLANTIC (Nov. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049/> [https://perma.cc/A6P3-MBTG] (explaining that, like Michigan, California has also banned the use of affirmative action and California voters voted against repealing that ban as recently as November 2020).

²⁶⁹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

²⁷⁰ *Id.* at 715–716.

²⁷¹ *Id.* at 716.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 716–17.

²⁷⁶ See *id.* at 734 (estimating that only 3% of assignments were affected by racial guidelines).

²⁷⁷ *Id.* at 712.

have affected both white and nonwhite students. More nonwhite students were selected for one school; more white students were selected for another school; and one school did not need to use a racial tiebreaker at all to stay within the required range.²⁷⁸ The district argued that “only 52 students who were ultimately adversely affected by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.”²⁷⁹ The school district limited application of the tiebreaker to students entering the ninth grade and did not use it for students in the higher grades.²⁸⁰ For all students, the tiebreaker only affected their school choice for one year because they could transfer to another school after one year.²⁸¹ The school district had previously experimented with a mandatory busing plan to achieve more racial diversity but abandoned it due to parental complaints.²⁸² Although Seattle had voluntarily stopped using its racial tiebreaker by the time the case reached the Supreme Court, the Court nonetheless insisted on deciding the case against them.²⁸³

Given the language from prior opinions that focused on the importance of race being used as little as possible as a decision-making factor, one might have expected the minimal impact of these plans to have been a point in their favor. Not to Chief Justice Roberts, who said: “While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”²⁸⁴ In case Chief Justice Roberts’ position was unclear, he boldly proclaimed in the last sentence of his opinion: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁸⁵ The problem was not that Seattle or Louisville used race too much or too little. The problem was that they used race at all.

But, at that moment, Chief Justice Roberts did not have five votes for the claim that all affirmative action plans were *per se* unconstitutional. Justice Kennedy concurred separately to suggest that schools were free to devise “race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systemic, individual typing by race.”²⁸⁶ And, shortly before retiring from the Court, Kennedy found one such program—at the University of Texas (not a K-12 school)—which met that criteria and had also

²⁷⁸ *Id.* at 713.

²⁷⁹ *Id.* at 733–34.

²⁸⁰ *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1239 (W.D. Wash. 2001).

²⁸¹ *Parents Involved*, 551 U.S. at 813 (Breyer, J., dissenting) (“[A]ll students were free subsequently to transfer . . . to a different school of their choice without regard to race. Thus, at worst, a student would have to spend one year at a high school he did not pick as a first or second choice.”).

²⁸² *Parents Involved*, 137 F. Supp. 2d at 1225.

²⁸³ *Parents Involved*, 551 U.S. at 719.

²⁸⁴ *Id.* at 734.

²⁸⁵ *Id.* at 748.

²⁸⁶ *Id.* at 788–89 (Kennedy, J., concurring).

faithfully followed his vaunted top ten percent plan, under which the top ten percent from every public high school was automatically admitted to a state university.²⁸⁷ But Kennedy's decision in *Fisher* offered little guidance to a school district that wanted to use race as a factor to integrate its kindergarten or first-grade classrooms where students do not yet have talents and differing abilities to consider.

Although Justice Kennedy says in *Parents Involved* that schools, as a last resort, may engage in a "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component,"²⁸⁸ he fails to indicate how a school district could develop such a "nuanced" program that uses race as a component for the enrollment of five- and six-year-olds. He ignores the record in the Seattle case where the city abandoned mandatory busing in favor of the racial tiebreaker in response to parental complaints.²⁸⁹ The two lead plaintiffs' primary complaint in the Seattle case was the length of their bus ride, not the race of who sat beside them on the bus or in the classroom.²⁹⁰

Like Chief Justice Roberts, Justice Kennedy counsels as a *negative factor* for the school districts that "the number of students whose assignment depends on express racial classifications is limited."²⁹¹ In other words, it is unconstitutional to use race too much, as in *Gratz*, but also too little, as in *Parents Involved*. The Court was systematically dismantling attempts to create integrated public schools irrespective of the limited role that race played in such plans.

Let us be clear about the impossible legal standard developed in *Parents Involved*. School districts are instructed to use race as little as possible, but they must also demonstrate that the use of race was necessary to achieve significant educational improvement for racial minorities. Not surprisingly, the empirical literature on education suggests that aggressive use of race for school assignment, starting in the early grades, is the best way to improve educational performance for minority children.²⁹² To the extent that Seattle or Jefferson County could not demonstrate to the Court's satisfaction that their programs were educationally effective, it is likely because they used race *too little* as a factor in school assignments. Their token use of race was not likely as a result of their conclusion

²⁸⁷ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2205 (2016).

²⁸⁸ *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring).

²⁸⁹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp.2d 1224, 1225 (W.D. Wash. 2001).

²⁹⁰ The whole long bus ride story was also likely manufactured to generate standing. The plaintiffs alleged they would have a four-hour bus ride as a result of the application of the tie breaker rule and opted for private school rather than a long bus ride. The purported long bus ride, however, occurred because they refused to list the names of any local schools on their school choice form. Had the school district returned to its race-neutral mandatory busing program, their bus ride might have been even longer. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 156 n.4 (Wash. 2003).

²⁹¹ *Parents Involved*, 551 U.S. at 790.

²⁹² See Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 OHIO STATE L. J. 1089, 1106–1112 (2008) (examining empirical literature on effective racial desegregation programs).

that a very minimal use of race to allocate school assignments was the best way to improve educational performance for minority children; their token use of race was likely the result of instructions from their lawyers that the Supreme Court was unlikely to tolerate more than token use of race. But that legal advice proved to be wrong in the hands of a Court that was determined to strike down any use of race to improve the educational performance of minority children.

While joining the majority in *Parents Involved*, Justice Kennedy was seemingly aware of the effect that the decision would have on integration efforts at the school board level. He says: “To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”²⁹³ Notice his choice of word; he asks whether the Constitution *mandates* acceptance of the segregated status quo. He interprets Chief Justice Roberts’s plurality opinion as taking that position.

But even if Justice Kennedy’s position remained the view of the Court, what does that mean for affirmative action? Kennedy never found a K-12 plan that met his stringent criteria. As for higher education, the one program that passed muster was from the University of Texas. After two trips to the Supreme Court, Justice Kennedy managed to author a 5-4 majority opinion in *Fisher v. University of Texas*²⁹⁴ that upheld the University’s incredibly narrow use of race as a plus factor for about 25% of the applicant pool.²⁹⁵

Fisher is an extraordinarily narrow victory for race-affirmative admissions. Close examination of the facts can help underscore the ways in which the Texas race-affirmative admissions process could not be replicated elsewhere. In 1996, the Fifth Circuit in *Hopwood v. Texas*²⁹⁶ had invalidated the admissions process at the University of Texas, holding that any consideration of race violated the Equal Protection Clause of the Fourteenth Amendment. In response, the Texas legislature adopted the “Top Ten Percent Law” in 1998.²⁹⁷ Under that law, the university would first admit the top ten percent of students graduating from public Texas high schools and then admit the rest of the class through various race-neutral methods.²⁹⁸ In the last year that the university admitted students under this program, without an additional race-affirmative measure, it admitted an incoming class that was 4.5% African-American, 17.9% Asian-American, and 16.9% Latino-American.²⁹⁹

Then, in 2003, the Supreme Court rendered a decision that was inconsistent with *Hopwood*. In *Grutter v. Bollinger*,³⁰⁰ the Supreme Court ruled that race could

²⁹³ *Parents Involved*, 551 U.S. at 788.

²⁹⁴ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2205 (2016).

²⁹⁵ *Id.* at 2206.

²⁹⁶ *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir. 1996).

²⁹⁷ *Fisher*, 136 S. Ct. at 2205.

²⁹⁸ *Id.* at 2205.

²⁹⁹ *Id.* at 2218 (Alito, J., dissenting).

³⁰⁰ 539 U.S. 306 (2003).

be a factor under a system of holistic review of an application.³⁰¹ But, the Court also made it clear in the companion case of *Gratz v. Bollinger*³⁰² that a university could not award predetermined points to the applications of minority students.³⁰³

The *Grutter* opinion offered Texas an opportunity to continue to take steps to diversify its admissions process while also seeking to admit the most highly qualified candidates. The Top Ten Percent Plan had succeeded in maintaining some racial diversity during the admissions process. Further expansion of that plan to, let's say, the top fifteen percent, would likely have increased diversity even more. But the problem with using class rank as the exclusive criteria for admissions is that it disadvantages students who attend highly competitive high schools. While a top fifteen percent plan might increase diversity, it might not result in offers of admission to the most highly qualified racial minorities (or white students). Those students might be attending rigorous academic programs where they fall outside the top ten or fifteen percent by class rank.

In fact, the university concluded that it wanted to cap the number of students admitted under the Top Ten Percent Plan to 75% of the student body so that it could use the other seats for students with possibly higher academic credentials than those selected under the Top Ten Percent Plan.³⁰⁴ In other words, it decided to admit *fewer* than the top ten percent of each high school class in order to try to strengthen the quality of the admitted class.

The dilemma for the university was: how could it use merit to select the remaining 25% of the class without undoing the diversity work that was attained through the Top Ten Percent Plan? With Latino students, for example, sitting at 16.9% of the admitted students under the Ten Percent Plan, that number could plummet to 12 or 13% if the remaining seats were filled nearly exclusively with white applicants.³⁰⁵ So, closely following *Grutter*, the university designed a complicated system where race would be a factor of a factor in determining a student's ability to be admitted.³⁰⁶ The university never documented the impact that

³⁰¹ *Id.* at 337 (describing law school as engaging in a “holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment”).

³⁰² 539 U.S. 244 (2003).

³⁰³ *Id.* at 279 (O’Connor, J., concurring) (“But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.”).

³⁰⁴ *Fisher*, 136 S. Ct. at 2206.

³⁰⁵ If the university were to primarily rely on test scores to select the remaining candidates, that kind of impact is plausible. See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving ‘Elite’ College Students*, 89 CAL. L. REV. 1055, 1062–66 (2001) (discussing adverse impact of standardized testing); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 762 (2000).

³⁰⁶ See *Fisher*, 136 S. Ct. at 2206.

race had in this process for a mere 25% of the applicant pool,³⁰⁷ but it could not have been very significant. Nonetheless, it did allow the university to admit qualified minorities who barely missed admission under the Top Ten Percent Plan.

The University of Texas could achieve some racial diversity through the combination of the Top Ten Percent Plan and the modest use of racial affirmative action, because Texas public schools are so highly segregated, and Texas principally draws from its own state's population in admitting students.³⁰⁸ The *Fisher* case has little precedential value, because few other states are willing to devote a substantial number of seats in their entering class to students based purely on high school class rank. Universities arguably prefer Michigan's approach under which they get to consider all candidates so they can admit the most highly qualified candidates from all racial groups. The Texas plan may create perverse incentives for students to stay enrolled in less academically rigorous public schools where they think they might excel, rather than seeking opportunities at the most academically competitive public schools. The fact that few states have chosen an admission policy akin to the Texas plan suggests that it just isn't a great way to select an entering class. The pretense of racial neutrality (while importing the consequences of housing racial segregation) overwhelms the desire to admit the most highly qualified students. The important point is that the so-called victory for affirmative action in *Fisher* was not much of a victory at all. It allowed a state to continue to use a much-criticized Top Ten Percent Plan,³⁰⁹ which achieved diversity by building on the consequences of housing discrimination along with a very modest race-conscious step for 25% of the applicant pool. The winner was not affirmative action. The winner was a creative, largely race-neutral work-around written for a Court that was otherwise determined to end all race-conscious affirmative action.

The departures of Justices Kennedy and Ginsburg from the Court results in little doubt that universities and school districts, which could previously try to thread an extremely small needle to use race as a factor, no longer have any available needle at all. They can take advantage of housing segregation to achieve an integrated

³⁰⁷ Allyson Waller, *Federal Judge Tosses Lawsuit that Sought to End UT-Austin's Affirmative Action Policy*, TEX. TRIB. (Jul. 27, 2021, 11:00 AM) <https://www.texastribune.org/2021/07/27/ut-austin-affirmative-action/> [<https://perma.cc/UED4-R9Y8>] (explaining that the University of Texas admits 25% "of it of its students through a holistic review in which race is considered a factor, which has been university practice since 2003").

³⁰⁸ See Jennifer Mason McAward, *Good Faith and Narrow Tailoring in Fisher v. University of Texas*, 59 LOY. L. REV. 77, 86 (2013) ("Texas's Top Ten Percent law has been relatively successful in creating racial diversity because Texas's public high schools are severely segregated by race.").

³⁰⁹ See Lindsay Daugherty, Isaac McFarlin & Paco Martorell, *The Texas Ten Percent Plan's Impact on College Enrollment*, 14 EDUC. NEXT (Apr. 22, 2014), <https://www.educationnext.org/texas-ten-percent-plans-impact-college-enrollment/> [<https://perma.cc/GY28-YCCX>] ("Some critics allege that they force the most-selective public colleges to admit underprepared students from low-performing schools and to deny admission to better prepared students; others complain that they don't do enough to promote diversity.").

classroom by admitting the top ten percent of each public high school class to their flagship university. But no such mechanism is likely to exist to integrate their K-12 classrooms. Further, property taxes will be able to continue to ensure that the rich have access to better funded schools that are also likely to attain better educational outcomes for students.³¹⁰ *Brown*'s aspiration to integrate U.S. schools has been squelched. The Fourteenth Amendment is merely a tool to curtail meaningful attempts at racial integration. White supremacy has won.

D. The Dismantling of Democracy

Conservatives often promote judicial restraint as the proper role of the Court.³¹¹ Under that view, one might applaud the Warren Court's narrow remedial path in enforcing *Brown*. One might argue that the Court did all it could in announcing that school desegregation was unconstitutional, and it was up to legislatures and school boards to implement the remedies necessary to achieve those results.

But, if one takes the restraintist position, then it is hard to explain why the Supreme Court has been so involved in second-guessing decisions by state and local government to dismantle racial segregation in K-12 and higher education. A genuine conservative restraintist should have said that Jefferson County, Seattle, and the states of Michigan and Texas were in the best positions to determine how to end racial inequality in education. Thus, it is important to recognize that the cases discussed in Section II.B resulted in attempts by state and local government to take race-positive steps to help overcome a legacy of white supremacy.

In response, restraintists might say that they could not permit those state and local branches of government to institute race-conscious programs because such action goes against what they understand to be the very core of the Fourteenth Amendment's Equal Protection Clause—the rejection of any kind of racial distinctions. Although they may favor restraintism as a theoretical matter, they could not apply it to cases contesting state action in violation of the Equal Protection Clause under the Fourteenth Amendment. In James Bradley Thayer's words, a court "can only disregard the Act, when those who have the right to make laws have not merely made a mistake, but have made a very clear one, -- so clear that it is not open

³¹⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding that use of property taxes to fund public schools did not require the use of strict scrutiny by the courts; the system was found to be constitutional under rational basis scrutiny). Empirical studies have concluded that student achievement depends significantly on teacher achievement, teacher experience, and class size. See Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. L. ON LEGIS. 465, 488 (1991); see also Opinion of the Justices, 624 So. 2d 107, 140 (Ala. 1993) (stating that the Alabama Supreme Court relied on Ferguson's work to conclude that there is a positive correlation between student achievement levels and certain types of expenditures).

³¹¹ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 76–78 (1962).

to rational question.”³¹² If, like Justice Thomas, one believes that the Equal Protection Clause mandates a strict no-racial distinction construction,³¹³ then one might feel justified in second-guessing the state and local government judgments for how best to move towards racial equity in education.

But that view of the core meaning of the first section of the Fourteenth Amendment declaring “No state shall . . .” does not apply to Congress. Section Five of the Fourteenth Amendment *increases* the scope of Congress’ power by giving it the power to “enforce” the Fourteenth Amendment.³¹⁴ If one views Congress as a co-equal branch of government with the federal courts, then one would imagine that a restraintist jurist would be unlikely to dismantle any statutes that Congress enacted pursuant to its Section Five authority. And a similar argument would be made concerning legislation to enforce the Thirteenth³¹⁵ and Fifteenth Amendments³¹⁶ because they also provide Congress with enforcement authority. In fact, one could even argue that these enforcement powers are the clearest indication of an abolitionist perspective in the Constitution—the ratifiers of these Civil War Amendments empowered Congress to end racial apartheid. And the Reconstructionist Congress initially took up that mantle by enacting the Civil Rights Act of 1870, 1871, and 1875.³¹⁷ These laws broadly tried to end racial apartheid in both the public and private sector by enforcing the Civil Rights Amendments, especially against state recalcitrance.

Initially, the Supreme Court broadly interpreted Congress’s enforcement authority. In 1879, the Supreme Court was asked to consider whether the Civil Rights Act of 1875 could be constitutionally construed to permit a prosecution of a state court judge for keeping Black people off of juries.³¹⁸ J.D. Coles, a state court judge, was arrested under the 1875 Act for keeping certain citizens of “African race and black color” off of juries.³¹⁹ Coles sought a writ of habeas corpus to be released from custody. The state of Virginia joined him in this request.³²⁰

In some ways, Coles’ case was an easy one. The Supreme Court had held in an earlier case the same term that a statute that excluded any but “white persons” from

³¹² James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

³¹³ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring) (explaining the personal belief “that there is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . In each instance, it is racial discrimination, plain and simple” (internal quotation marks omitted)).

³¹⁴ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

³¹⁵ U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

³¹⁶ U.S. CONST. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

³¹⁷ See Act of Mar. 1, 1875, ch. 114, 1875.

³¹⁸ *Ex parte Va.*, 100 U.S. 339 (1879).

³¹⁹ *Id.* at 340.

³²⁰ *Id.* at 340–41.

juries violated the Fourteenth Amendment.³²¹ Thus, it was easy to conclude that Congress could ban state action that also served to exclude Black people from juries through its Section Five enforcement power under the Fourteenth Amendment.

Nonetheless, in upholding Congress's power to enact the 1875 law, the Supreme Court articulated a broad understanding of Congress's Section Five authority. In abolitionist language, it said:

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress . . . Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.³²²

That understanding of the breadth of Congress's powers, however, was short-lived. In 1883, with a strong dissent by Justice Harlan, the Court invalidated much of the Civil Rights Act of 1875 as exceeding Congress's Section Five authority.³²³ Section 1 of the Civil Rights Act of 1875 provided:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.³²⁴

The Supreme Court overturned this provision as failing to comply with the Fourteenth Amendment's state action requirement.³²⁵ In a vigorous dissent, Justice Harlan argued that the statute should be understood as coming within Congress's Section Two authority under the Thirteenth Amendment.³²⁶ After first reciting case law instructing the Supreme Court to have a restraintist understanding of Congress's

³²¹ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

³²² *Ex parte Va.*, 100 U.S. at 344–45.

³²³ *See* *The Civil Rights Cases*, 109 U.S. 3, 32 (1883) (“[N]o countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested. . .”).

³²⁴ *Id.* at 9 (quoting Civil Rights Act of 1875).

³²⁵ *Id.* at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

³²⁶ *Id.* at 35 (Harlan, J., dissenting).

authority, Harlan said that one should understand the Thirteenth Amendment as giving Congress authority to:

remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens³²⁷

With respect to the state action argument favored by the majority opinion, Harlan responded: “Such legislation must act upon persons, not upon the abstract thing denominated a state, but upon the persons who are the agents of the State, in the denial of the rights which were intended to be secured.”³²⁸

Although Justice Harlan’s dissent in *Plessy v. Ferguson* later served as the foundation to the majority opinion in *Brown v. Board of Education*, no such dynamic has occurred with respect to Harlan’s interpretation of Congressional action under the Thirteenth and Fourteenth Amendments.³²⁹ The state action doctrine is alive and well, and Congress’s enforcement power under the Civil War Amendments has been subjected to repeated constrictions over the years. It should be no surprise that an institution that was willing to render the *Dred Scott* decision³³⁰ a few decades earlier would also use every available tool to undermine Congress’s enforcement powers under the Civil War Amendments. Amending the Constitution does not necessarily curtail or even lessen the power of white supremacy.

The 1997 case that severely curtailed Congress’s power to use the Civil War Amendments to enforce the Equal Protection Clause was a seemingly unrelated case in which the Court concluded that Congress exceeded its authority when it adopted the Religious Freedom Restoration Act in *City of Boerne v. Flores*.³³¹

At first glance, *City of Boerne* is an unlikely case to constrict Congress’s power to enforce the Fourteenth Amendment. Justice Kennedy’s opinion for the Court was joined by Justices Stevens, Thomas, and Ginsburg. Justice Scalia concurred separately. The dissenting Justices—O’Connor, Souter, and Breyer—disagreed about the majority’s interpretation of the First Amendment but did not fundamentally disagree with the majority’s analysis of Congress’s authority, under Section Five of the Fourteenth Amendment, to enact enabling legislation.

The *City of Boerne* case concerned a request for a building permit from the Catholic Archbishop of San Antonio. The request was subject to special rules that

³²⁷ *Id.*

³²⁸ *Id.* at 58.

³²⁹ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (stating that the Court’s decision gave a glimmer of hope that the Thirteenth Amendment’s Enabling Clause would empower Congress to invalidate private discrimination—but that decision has not been used subsequently as a justification for Congressional power).

³³⁰ *Scott v. Sandford*, 60 U.S. 393 (1857).

³³¹ 521 U.S. 507 (1997).

applied to historic districts.³³² The city’s Historic Landmark Commission denied the request.³³³ Relying on the Religious Freedom Restoration Act (“RFRA”), the Archbishop argued that he should not be subjected to the rules governing historic districts. He argued that the permit denial impacted the ability of the church to hold services for its parishioners; about 40 to 60 parishioners could not be accommodated at Sunday masses due to the small size of the church.³³⁴ Under RFRA, the government would have to remove this burden to the exercise of religion unless it could demonstrate it had a compelling state interest in applying the historic district rules to the church.³³⁵

The issue in *City of Boerne* was the constitutionality of RFRA. Could Congress use its Section 5 authority to impose the compelling state interest test on local government when private parties argued that the neutral law interfered with their ability to engage in the free exercise of religion? In 1990, in *Employment Division v. Smith*,³³⁶ the Supreme Court had ruled that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”³³⁷ Nonetheless, purporting to use its Section Five authority, Congress enacted RFRA to prohibit government from substantially burdening a person’s exercise of religion through neutral, generally applicable laws unless the government can demonstrate that the burden “is in furtherance of a compelling governmental interest.”³³⁸ In other words, Congress sought to use its Section Five authority to overturn *Smith*. Under *Marbury v. Madison*,³³⁹ it is axiomatic that Congress cannot use its powers to alter the meaning of the Constitution.³⁴⁰

But *City of Boerne* was actually a more difficult case than one in which Congress brazenly and unconstitutionally tried to overturn an unpopular Supreme Court decision. The challenge for the Court’s majority was to reconcile the holding in *City of Boerne* with some prior decisions about Congress’s power to use Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment to ban racial discrimination by state actors.

The hardest case to reconcile with the opinion in *City of Boerne* was the 1966 decision in *Katzenbach v. Morgan*.³⁴¹ The issue in *Katzenbach* was the constitutionality of section 4(e) of the Voting Rights Act of 1965, which provided that no person who had successfully completed sixth grade in Puerto Rico could be denied the right to vote because of an inability to read or write English.³⁴² That provision arguably sought to overturn the Supreme Court’s decision in *Lassiter v.*

³³² *Id.* at 512.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* at 515–16.

³³⁶ 494 U.S. 872 (1990).

³³⁷ 521 U.S. at 514.

³³⁸ *Id.* at 515 (quoting 42 U.S.C. § 2000bb-1).

³³⁹ 5 U.S. 137, 180 (1803).

³⁴⁰ 521 U.S. at 529.

³⁴¹ 384 U.S. 641 (1966).

³⁴² *Id.* at 646–47.

Northampton County Board of Elections,³⁴³ in which the Court upheld the facial constitutionality of a North Carolina literacy test under the Fourteenth Amendment.³⁴⁴ Despite the decision in *Lassiter*, the Supreme Court upheld Section 4(e) in *Morgan* because it was consistent with the “letter and spirit of the constitution.”³⁴⁵

The dissenters in *Morgan* argued that the decision was dangerous because it could allow Congress to dilute the meaning of the Fourteenth Amendment by, for example, using its Section Five enforcement authority to establish a racially segregated system of education.³⁴⁶ The majority responded with a one-way ratchet understanding of Congress’ Section Five enforcement authority: Congress may expand the range of conduct prohibited by the Fourteenth Amendment but may not “restrict, abrogate, or dilute these guarantees.”³⁴⁷ That language in *Morgan* could be interpreted to give Congress expansive authority to enforce the Fourteenth Amendment.

Justice Kennedy’s majority opinion in *City of Boerne* took a sledgehammer to an expansive reading of Congress’s Section Five authority as articulated in *Morgan*. While noting that there was language in *Morgan* that could be interpreted “as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment,” the Court concluded that that is “not a necessary interpretation, however, or even the best one.”³⁴⁸ In the Court’s opinion, that kind of power would be counter to *Marbury v. Madison*.³⁴⁹

City of Boerne is a difficult decision to understand because the decision was a product of both liberal and conservative understandings of Congress’s powers. On the one hand, the Court wanted to appease the Court’s liberals by upholding prior decisions like *Morgan* that affirmed Congress’s power to enact legislation to protect racial minorities from discrimination. On the other hand, the Court wanted to prevent Congress from using its legislative powers to overturn constitutional law decisions with which it disagreed; the conservatives wanted to end Congress’s broad authority under *Morgan*’s one-way ratchet theory. To reach this position, the Court created a congruence and proportionality test. “While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.”³⁵⁰ In other words, when Congress seeks to use its Section Five enforcement authority, it is not confined to merely listing that conduct which the courts have already construed as unconstitutional. Congress may also, as the Court permitted in *Morgan*, adopt remedial measures that seek to *prevent* possible unconstitutional conduct in the future. Thus, we should understand *Morgan* as standing for the principle that it is alright for Congress to ban a particular type of

³⁴³ 360 U.S. 45 (1959).

³⁴⁴ *Id.* at 53–54.

³⁴⁵ 384 U.S. at 651 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

³⁴⁶ *Id.* at 667–68 (Harlan, J., dissenting).

³⁴⁷ *Id.* at 651 n.10.

³⁴⁸ *City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997).

³⁴⁹ *Id.* at 529.

³⁵⁰ *Id.* at 530.

voting qualification that has a long history as a “notorious means to deny and abridge voting rights on racial grounds”³⁵¹ even if there is no direct evidence of such nefarious conduct in New York, where the rule was directed. By contrast, the Court concluded that Congress did not have evidence of that kind of notorious conduct when it enacted the RFRA.³⁵²

Because the *City of Boerne* Court went out of its way to reaffirm various cases concerning the scope of Congress’s authority to enforce the Civil Rights Act of 1965, it was not clear how this new congruence and proportionality test would apply. Was the Court’s holding that Congress had exceeded its authority confined to RFRA or might it extend to other civil rights laws?

The immediate impact of *City of Boerne* was for the Court to strike down civil rights laws that applied *outside* the area of race discrimination. In *Kimel v. Florida Board of Regents*,³⁵³ the Court held in 2000 that Congress could not use its Section Five authority to protect state employees under the Age Discrimination in Employment Act.³⁵⁴ Congress also could not use its Section Five authority to protect women under the Violence Against Women Act.³⁵⁵ Then, a year later, the Court held that Congress could not use its Section Five authority to protect state employees from employment discrimination under the Americans with Disabilities Act.³⁵⁶ Finally, in a confusing duo of decisions, the Court upheld the family leave provisions under the Family and Medical Leave Act, as being within Congress’s prophylactic authority to prevent gender-based discrimination,³⁵⁷ but overturned the provision that allowed employees to take leave when they became seriously ill, even though those provisions were important to women who faced pregnancy-related illnesses.³⁵⁸

These cases suggested that the Court was willing to be activist to conclude that Congress had exceeded its Section Five authority but was hesitant to overturn key elements of the Civil Rights Acts. But that understanding of *City of Boerne* is beginning to unravel. In *Shelby County v. Holder*,³⁵⁹ a case in which the Court mysteriously never mentioned Congress’s Section Five authority, the Court was willing to invalidate the preclearance requirements of the Voting Rights Act of 1965.³⁶⁰ Reminiscent of the Court chastising Congress in *Boerne* for only considering examples of religious discrimination that were more than forty years old when it enacted RFRA, the Court chastised Congress for using a preclearance

³⁵¹ *Id.* at 533 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 355 (1966) (Black, J., concurring and dissenting)).

³⁵² *Id.* at 530 (“The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.”).

³⁵³ 528 U.S. 62 (2000).

³⁵⁴ *Id.* at 92.

³⁵⁵ *United States v. Morrison*, 529 U.S. 598 (2000).

³⁵⁶ *Bd. Trs. Univ. Ala. v. Garrett*, 531 U.S. 356 (2001).

³⁵⁷ *Nev. Dep’t Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

³⁵⁸ *Coleman v. Ct. App. Md.*, 566 U.S. 30 (2012).

³⁵⁹ 570 U.S. 529 (2013).

³⁶⁰ *Id.* at 557.

formula that was based on forty-year-old facts.³⁶¹ That language was also similar to Justice O'Connor's *Grutter* opinion in which she suggested that affirmative action should be able to end in 25 years.³⁶² Rather than understand white supremacy to be an imbedded feature of American society, the Court repeatedly considers it to be a soon-to-be bygone era in American history.

The Court has so far considered key aspects of the Civil Rights Acts to be sacred cows, but the modern Court's narrow understanding of Congressional power makes it virtually impossible to broaden those laws in response to renewed concerns about racial civil rights in the post-George Floyd moment. In fact, the Court's race jurisprudence is increasingly irreconcilable with its general constriction of Congressional power. We should just hold our breath until the Court recognizes that fact. "I can't breathe" should be the metaphor while we wait for the Court to further constrain Congress's authority to combat the legacy of white supremacy.

E. Proof of Race Discrimination Made Nearly Impossible for Black Plaintiffs

While the Supreme Court has bent over backwards to hear cases from white plaintiffs complaining that they were victims of race discrimination when they could not be admitted to a particular grade school or college because of the subtle way race was a factor in a small part of the admissions process, the Court has essentially thrown Black plaintiffs out of Court when they have tried to contest the ways in which race discrimination operates in their lives under state sanction. It did not have to be that way.

Soon after the Fourteenth Amendment was ratified, the Supreme Court understood that race or national origin discrimination could occur without direct *de jure* acts of discrimination. In *Yick Wo v. Hopkins*,³⁶³ the Court held that the city of San Francisco had violated the Equal Protection Clause when it adversely enforced against Chinese-American people an ordinance governing the operation of laundries. The Court stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.³⁶⁴

Yick Wo was followed by other cases in which courts suggested that evil motives could be enough to overturn state action under the Fourteenth Amendment

³⁶¹ *Id.* at 554.

³⁶² *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

³⁶³ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

³⁶⁴ *Id.* at 373–34.

without direct evidence of racial discrimination. In 1960, in *Gomillion v. Lightfoot*,³⁶⁵ the Court invalidated a local ordinance that altered the shape of Tuskegee “from a square to an uncouth twenty-eight-sided figure,”³⁶⁶ which had the effect of removing all but four or five of the city’s 400 Black residents from its jurisdiction. Similarly, in 1964, the Court held that a county’s closing of the public schools while contributing to the support of the private segregated white schools denied Black children the equal protection of the law.³⁶⁷

But the tide soon turned against challenges to state actions that had a disparate impact against Black residents. In 1971, the Supreme Court in *Palmer v. Thompson*³⁶⁸ upheld the decision by Jackson, Mississippi to close its five public swimming pools in order to avoid racial integration. While recognizing that “there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality,”³⁶⁹ the Court held that that language could not be used to invalidate a governmental action that applied to both its white and Black residents. Further, continuing a narrow interpretation of the Thirteenth Amendment, the Court said it did not have authority to construe the state action as perpetuating an unconstitutional “badge or incident of slavery.”³⁷⁰ Not anticipating the Court’s subsequent decision in *City of Boerne*, the *Palmer* Court threw a bone to the Thirteenth Amendment’s Enforcement Clause when it noted that Congress could act to overturn such state action.³⁷¹

This language from *Palmer* can only seem quaint today as a plausible understanding of Congress’s authority to enforce the Civil Rights Amendments:

[A]lthough the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred H. Mayer Co.* could empower Congress to outlaw “badges of slavery.” . . . But Congress has passed no law under this power to regulate a city’s opening or closing of swimming pools or other recreational facilities.³⁷²

In other words, when the Supreme Court narrowed its understanding of its authority to invalidate state action under the Civil Rights Amendments, it clearly did *not* intend to limit Congress’s power to enforce those amendments. It did *not* intend to limit Congress’s authority to outlaw “badges of slavery.”

³⁶⁵ 364 U.S. 339 (1960).

³⁶⁶ *Id.* at 340.

³⁶⁷ *Griffin v. Cnty. Sch. Bd. Prince Edward Cnty.*, 377 U.S. 218 (1964).

³⁶⁸ 403 U.S. 217 (1971).

³⁶⁹ *Id.* at 225.

³⁷⁰ *Id.* at 226.

³⁷¹ *Id.* at 227.

³⁷² *Id.*

In 1976, the Supreme Court continued to narrow its authority to overturn state action that adversely impacted Black plaintiffs. In *Washington v. Davis*,³⁷³ it held that a plaintiff could not succeed on an equal protection claim solely with evidence of disparate impact; the plaintiff also needed evidence of discriminatory purpose.³⁷⁴ Because *Yick Wo* was arguably a case in which plaintiffs succeeded through proof of discriminatory impact alone, the Court had to contend with whether it was overruling *Yick Wo*. The answer was no. It reconceptualized *Yick Wo* as a case where the evidence of discriminatory purpose could be gleaned from the overwhelming disparate impact. The Court said: “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”³⁷⁵ In *Davis*, disproportionate impact was not sufficient evidence of an unconstitutional purpose because of evidence that the city had taken other steps to integrate its police force.³⁷⁶

Two subsequent cases, however, made it clear that *Yick Wo* stands by itself as a case where disproportionate impact alone can trigger a finding of an equal protection violation. In *Arlington Heights v. Metropolitan Housing Development Corp.*³⁷⁷ and *Personnel Administrator v. Feeney*,³⁷⁸ the Court again walked back when, if ever, disproportionate impact alone could invoke an equal protection violation.

Arlington Heights was an important lawsuit from the perspective of ending the legacy of white supremacy. The Metropolitan Housing Development Corporation, a nonprofit developer, had sought to purchase a tract of land to build racially integrated low- and moderate-income housing.³⁷⁹ Because housing patterns are tied to school assignments, integrated housing is an important tool to attain school desegregation. To build this integrated housing, the developer needed the Village of Arlington Heights to rule favorably on its rezoning request. When this request was denied, the developer challenged the denial as an equal protection violation.³⁸⁰ Their disproportionate impact theory, which was accepted by the Seventh Circuit, was that 40% of Chicago area residents would be eligible to become tenants of this new development, although those potential tenants composed a far lower percentage of the total area population.³⁸¹ Further, the plaintiffs offered evidence that the Village applied a buffer policy more harshly in this instance than in previous instances, suggesting an improper racial motive for their conduct.³⁸² Finally, the plaintiffs proceeded in this case without the benefit of the Court’s decision in *Davis*. Based on cases like *Yick Wo* and *Gomillion*, the plaintiffs thought that the Village’s refusal to

³⁷³ 426 U.S. 229 (1976).

³⁷⁴ *Id.* at 252.

³⁷⁵ *Id.* at 242.

³⁷⁶ *Id.* at 246.

³⁷⁷ 429 U.S. 252 (1977).

³⁷⁸ *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271–81 (1979).

³⁷⁹ 429 U.S. at 254.

³⁸⁰ *Id.* at 254.

³⁸¹ *Id.* at 259.

³⁸² *Id.* at 261, 269.

rezone, with its racially discriminatory effect, was sufficient to demonstrate unconstitutionality.³⁸³

The Supreme Court not only tightened the rules under *Davis*, but also did not allow the plaintiffs in *Arlington Heights* to re-argue that case in the lower courts with the benefit of these new rules. Again, the Court narrowed the disproportionate impact route that seemed to be permissible under *Yick Wo* when it said:

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.³⁸⁴

In dissent, Justice White criticized the Court for announcing a new standard, that neither the plaintiff nor court of appeals was aware of, and then failing to remand the case back to the court of appeals for consideration in light of its decision.³⁸⁵ The Court, however, was eager to shut the doors of disproportionate impact claims and found no reason to remand for further factual development of the record.

If one wondered whether the *Yick Wo* disproportionate impact theory was dead, the Court answered that question in *Feeney*.³⁸⁶ While a sex discrimination case, the Court followed the *Davis* line of cases in determining whether plaintiff established an Equal Protection violation through an argument about disproportionate impact. In this case, the effect of the state's veterans preference statute was to negatively impact women in the state's labor force, of whom only 1.8% could benefit from the veterans preference. These statistics were arguably as stark as those in *Yick Wo* and *Gomillion*. Yet, the Court insisted that the "legitimate noninvidious purpose"³⁸⁷ of the law could not be missed—preferring veterans over nonveterans. It rejected the plaintiff's argument that an entity should be responsible for the natural and foreseeable consequences of its actions.³⁸⁸ Although the state's veterans preference harmed women's employment opportunities "as inevitable as the proposition that if tails is up, heads must be down,"³⁸⁹ it was not unconstitutional. Discriminatory purpose, we are told, "implies more than intent as volition or intent as awareness of consequences."³⁹⁰

The fact that the Court's discriminatory intent jurisprudence does not take into account modern understandings of the way implicit bias works to further racial

³⁸³ *Id.* at 268.

³⁸⁴ *Id.* at 266.

³⁸⁵ *Id.* at 272 (White, J., dissenting).

³⁸⁶ *See* *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271–81 (1979) (considering the constitutionality of the Massachusetts veterans' preference statute).

³⁸⁷ *Id.* at 275.

³⁸⁸ *Id.* at 278.

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 279.

stereotyping is well-accepted in most progressive quarters.³⁹¹ There is no need for me to repeat those arguments. I would like to make a different point—that we should look at the parallel, aggressive development of case law on behalf of white plaintiffs who challenge affirmative action along with the aggressive curtailment of equal protection arguments for Black plaintiffs. These two developments take place simultaneously in the service of white supremacy under the U.S. Constitution.

Let's put these two case developments side by side. The Supreme Court went out of its way to hear a complaint by Allan Bakke, a white man, that he was not admitted to medical school because of affirmative treatment that was provided to various racial minorities. But Bakke was rejected from twelve medical schools, and his age, not his race, was likely the factor that caused him to be rejected from these schools.³⁹² Further, his score of 468 of 500 points was below the threshold for automatic admission at U.C. Davis medical school.³⁹³ But Bakke, at least, did eventually attend U.C. Davis Medical School, so his case was about a genuine desire to attend that school and become a doctor. By contrast, Abigail Fisher, a white woman, was the plaintiff for more than a decade in the Texas affirmative action case. Texas university official, Greg Vincent, noted that 168 African-American or Latino students, with higher grades than Fisher, were denied admission.³⁹⁴ To allow Fisher to continue her case, after having already completed college, the Court had to construe her injury as one involving a right to be considered for all admission spots, even if such consideration would lead to a denial of admissions.

More fundamentally, a Court that has been hostile to affirmative action hides behind its ignorance of the myriad of ways that white privilege advantages white applicants to these various universities. Abigail Fisher was able to get in touch with Edward Blum, the lawyer who would handle her case, the day she received her rejection letter.³⁹⁵ Blum was reportedly a friend of her father.³⁹⁶ After attending Louisiana State University, Fisher obtained a job in finance.³⁹⁷ It is easy to imagine that white privilege likely assisted her in subtle and overt ways throughout her life.

³⁹¹ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356–58 (1987) (drawing on cognitive psychology to argue that the Court's requirement to find conscious or intentional motivation disregards the effect that the history of racism has had on the individual and collective unconscious); Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1198–99 (2008) (updating Lawrence's theory to reflect social cognition theory).

³⁹² Cf. Kekaplan, *Allan Bakke: The Applicant and Plaintiff*, THE CIV. RTS. MOVEMENT (Feb. 18, 2015), <https://civilrightsmovement.blogs.wm.edu/2015/02/18/allan-bakke-the-applicant/> [<https://perma.cc/U6YE-QSJ8>].

³⁹³ *Id.*

³⁹⁴ See Giles Edwards, *Abigail Fisher: Affirmative Action Plaintiff 'Proud' of Academic Record*, BBC NEWS (July 29, 2016), <https://www.bbc.com/news/world-us-canada-36928990> [<https://perma.cc/TK4J-69N2>].

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

Yet, she was entitled to challenge the subtle use of race by the University of Texas in an admissions process aimed at helping the University to admit the most qualified class that was also somewhat racially diverse.

By contrast, when Black applicants who applied to the police force, or a nonprofit committed to building integrated housing went before the Court, they met staunch skepticism. It was unthinkable to the Court that unconscious racism or implicit bias could skew the D.C. police department's choice of test or that the Village of Arlington's zoning authority could be influenced by negative stereotypes about integrated housing.

F. *The Puzzle Pieces*

Putting the puzzle pieces together, this is what has occurred:

- *Brown*'s legacy is that state and local government may not engage in race-based affirmative action other than in the narrowest of circumstances.
- If a state does choose to engage in limited race-based affirmative action, voters may overturn that decision through the initiative process.
- If Congress tries to create additional race-based remedies, so that plaintiffs no longer need to rely on constitutional law to dismantle white supremacy, those efforts are likely to be found unconstitutional.
- If a Black plaintiff wants to sue directly under the Fourteenth Amendment, they are unlikely to have a viable case unless they can provide direct evidence of *de jure* discrimination.

I can imagine a reader responding that this critique is unfair. One might argue that these results can be understood as supporting a federalist vision for society or promoting democracy. My reply is "hogwash." If the vision is federalism, then states should have the ability to enact affirmative action measures. If the vision is democracy, then Congress should be able to strengthen federal law in the name of racial equality. But if the vision is white supremacy, then we have seen total vindication.

III. WHITE POWER

In this last section of the Article, I am going to switch from the impersonal third person to a more personal perspective.

As a privileged white person, I have grown increasingly uncomfortable teaching the required law school class on the U.S. Constitution. I suspect that many students enter my classroom expecting me to expound on the beauty and wisdom of this foundational document. I have to worry that I contribute to white supremacy by furthering that premise. In the language of my colleague Amna Akbar,³⁹⁸ how can I

³⁹⁸ Amna Akbar details three criteria that we can use to assess whether a reform is what she calls a "non-reform reform" – a truly transformative reform that is likely to be sustained during the onslaught of racist ideology. *See* Akbar, *supra* note 13. Non-reform reforms meet

teach constitutional law in a way that encourages my students to think broadly and creatively about non-reform reforms?

This Article reflects how I have come to re-understand my role in the classroom when I teach constitutional law. I understand the Constitution as having two critical roles related to the current abolitionist struggle. First, the Constitution is unlikely to be a positive, affirmative tool to dismantle white supremacy. But, as Daniel Farberman has effectively argued, we can still understand today’s civil rights lawyers as part of what he calls “resistance lawyering.”³⁹⁹ These lawyers can use their losses under the Voting Rights Act,⁴⁰⁰ for example, as evidence of the need for deep-seeded structural changes in our system of voting.⁴⁰¹ One could argue that such losses helped mobilize the effective grass-roots voting rights work that Stacey Abrams has led in Georgia⁴⁰² while also emboldening the political right to pass highly restrictive voting rights laws in Georgia.⁴⁰³ Civil rights lawyers may unsuccessfully seek to overturn Georgia’s new voting rights law, but their efforts may heighten the public critique (which has even been joined by some of corporate America)⁴⁰⁴ of Georgia’s effort to suppress Black voters.⁴⁰⁵ It is remarkable and a sign of changing public sentiment that President Biden was willing to describe the new Georgia law as “‘outrageous,’ ‘un-American’ and ‘Jim Crow in the 21st Century’” and say we have a “‘moral and

three criteria: (1) They “advance a radical critique and radical imagination. Reform is not the end goal; transformation is.” *Id.* at 103. (2) They “draw from and create pathways for building ever-growing organized popular power. They aim to shift power away from elites and toward the masses of people.” *Id.* at 105. (3) They “are about the dialectic between radical ideation and power building. . . . They aim to create ‘a vast extension of democratic participation in all areas of civic life—amounting to a very considerable transformation of the character of the state and of existing bourgeois democratic forms.’” *Id.* at 106.

³⁹⁹ See Farberman, *supra* note 8.

⁴⁰⁰ See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (holding that the Voting Rights Act provision setting forth coverage formula was unconstitutional).

⁴⁰¹ See Ed Kilgore, *The John Lewis Voting Rights Act Picks Up Steam*, INTELLIGENCER (Apr. 22, 2021), <https://nymag.com/intelligencer/2021/04/the-john-lewis-voting-rights-act-picks-up-steam.html> [<https://perma.cc/G5PN-GP6H>] (discussing H.R. 1/S. 1, the For the People Act and the John Lewis Voting Rights Act).

⁴⁰² For a general discussion of Stacey Abrams’ work, see Reid J. Epstein & Astead W. Herndon, *The 10-year Stacey Abrams Project to Flip Georgia Has Come to Fruition*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/05/us/politics/stacey-abrams-georgia.html> [<https://perma.cc/7WSA-9AZ2>].

⁴⁰³ See Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [<https://perma.cc/DK4C-RG77>].

⁴⁰⁴ See *id.*

⁴⁰⁵ Stephen Fowler, *DOJ Says Georgia’s New Voting Law Restricts The Black Vote*, NPR (June 26, 2021 5:11 PM), <https://www.npr.org/2021/06/26/1010606306/doj-says-georgias-new-voting-law-restricts-the-black-vote> [<https://perma.cc/7EJA-YF3J>] (“The DOJ says the discriminatory effect of Georgia’s law, particularly on Black voters, was known to Republican lawmakers who nonetheless pushed for its passage.”).

constitutional obligation to act.”⁴⁰⁶ Change rarely moves in a straight line; the story of Constitutional law can be a story of change, resistance to change, backlash, and continued struggle. Even if the courts will not use their authority to overturn the Georgia law, the public discourse about what a constitution can mean is influenced by this kind of public discussion.

Secondly, and possibly even more unfortunately, the U.S. Constitution should be understood as an impediment to non-reform reforms, be they small or large. Let me first offer one small example. President-elect Biden announced that he would prioritize Covid financial relief to minority-owned businesses.⁴⁰⁷ Putting aside the logistical hurdle of whether he could get such a relief package through a Congress which is weighted towards representation of the deep south, the proposed relief faced immediate criticism as a kind of discrimination forbidden by the Constitution. Brit Hume described Biden’s plans as “racial discrimination, plain and simple.”⁴⁰⁸ Kimberly Klacik declared: “This is actual discrimination. The opposite of what my hero, Dr. Martin Luther King, Jr., fought & died for in America.”⁴⁰⁹ Jeremy Frankel said: “This seems like a blatant violation of the civil rights act, if not the fourteenth amendment.”⁴¹⁰

And, unfortunately, as far as constitutionality is concerned, these critics were right. As discussed in Part II, Congress does not have the authority to target relief at minority communities, because that would be considered a violation of the Constitution’s rigid formal equality principles.

The Constitution is also likely to serve as an impediment to broader, more meaningful reform. For example, the House of Representatives boldly introduced the “For the People Act” or H.R. 1 on January 3, 2021.⁴¹¹ The bill requires states to re-enfranchise all people convicted of felonies who are not currently serving time in a correctional institution, creates a public financing program for congressional candidates, bans challenges to voters’ eligibility by non-elected officials, mandates a federal voting holiday, prohibits deceptive practices and voter intimidation, combats voter purging, creates new ethics rules for the Supreme Court, and requires candidates for president and vice president to publicly disclose their tax returns.⁴¹²

⁴⁰⁶ See Jane C. Timm, ‘Outrageous’: Biden Condemns New Georgia Law as a ‘Blatant Attack’ on Voting Rights, NBC NEWS (Mar. 26, 2021), <https://www.nbcnews.com/politics/elections/democrats-excoriate-new-voting-restrictions-georgia-make-it-illegal-give-n1262181> [<https://perma.cc/2J54-2JZ5>].

⁴⁰⁷ Ellie Bufkin, *Biden Faces Backlash over Vow to Prioritize Minority-Owned Businesses*, ABC: 7 ON YOUR SIDE (Jan. 12, 2021), <https://katv.com/news/nation-world/biden-faces-backlash-over-vow-to-prioritize-minority-owned-businesses> [<https://perma.cc/5SND-W5Y9>].

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ See For the People Act of 2021, H.R. 1, 117th Cong. (1st Sess. 2021) https://democracyreform-sarbanes.house.gov/sites/democracyreform.house.gov/files/BILL-TEXT_H.R.-1-Introduction_FINAL.pdf [<https://perma.cc/F3V6-2UTB>].

⁴¹² *Id.*

Even if such a bill can muster the required 60 votes in the Senate to overcome a filibuster, it is likely to face constitutional challenge by conservatives who think states should have unlimited power to set qualifications for voters.

It is important for students of constitutional law to realize how likely it is that the most progressive legislation will be ruled unconstitutional by the courts. But the more important question is what do we learn from that fact?

Some, like voting rights scholar Richard Hasen, argue that progressives should favor a narrower voting rights law that is likely to withstand constitutional scrutiny.⁴¹³ The key elements of such a bill are restoring “the preclearance provision” of the 1965 Voting Rights Act, “requir[ing] that states offer ample registration and voting opportunities to voters,” “requir[ing] states to assure election security,” and “end[ing] partisan gerrymandering of congressional districts by requiring states to use bipartisan or nonpartisan commissions to draw the lines.”⁴¹⁴

But others, like the Leadership Conference on Civil and Human Rights,⁴¹⁵ joined by 200 national organizations, continue to push for the passage of H.R. 1. Taking a page from the history of resistance lawyering, they are not limiting their vision for change to what is readily possible or even constitutional. They recognize the importance of pushing for non-reform reforms even as the political calculation will, at most, permit incremental reform. Notice, for example, that Hasen’s list of passable reforms includes increased “election security”—a concession to conservatives who have falsely pushed claims of election fraud.⁴¹⁶ Of course, that concession is understandable in a political atmosphere in which white supremacy amasses great power. What is politically possible is unlikely to be a non-reform reform, even if the courts were not a roadblock to implementation of bold measures to overturn white supremacy.

The important point, I would argue, is that we provide our students with as many tools as possible. They should learn how current constitutional doctrine makes it difficult to use the courts to challenge state action that subordinates and discriminates against Black people. They should also learn how progressive reforms, if they can be passed at the local, state, or national level, are likely to be overturned by the courts. They can then decide if they want to work on narrow reforms, like those proposed by Hasen, which might pass constitutional muster, or whether they want to work on broader reforms like H.R. 1, which face an uncertain political and constitutional future.

⁴¹³ See Richard L. Hasen, *H.R. 1 Can’t Pass the Senate. But Here Are Some Voting Reforms That Could*, N.Y. TIMES (Mar. 16, 2021), <https://www.washingtonpost.com/outlook/2021/03/16/hr-1-voting-reforms/> [<https://perma.cc/73B4-FX5Y>].

⁴¹⁴ *Id.*

⁴¹⁵ See Letter from The Leadership Conf. on Civ. & Hum. Rts., *Support H.R. 1, the For the People Act* (Mar. 1, 2019), <https://civilrights.org/resource/support-h-r-1-the-for-the-people-act/> [<https://perma.cc/7T4L-UJ23>].

⁴¹⁶ See Max Feldman, *10 Voter Fraud Lies Debunked*, BRENNAN CTR. FOR JUST. (May 27, 2020), <https://www.brennancenter.org/our-work/research-reports/10-voter-fraud-lies-debunked> [<https://perma.cc/77KY-4CAC>].

Finally, I hope that we seek to elevate the voices of Black scholars and jurists, along with others who are seeking to challenge white supremacy. The most frequently cited or discussed jurist should be Thurgood Marshall. His many dissents,⁴¹⁷ which I have emphasized in this Article, should be studied closely so that we can learn more about the history of white supremacy while also considering how his dissenting opinions might be elevated to controlling authority. Taking a page from Thurgood Marshall's own work as a lawyer and jurist, students should also learn that civil rights lawyers have often sought recourse in the courts not "out of a philosophical belief regarding the optimal role for courts in a democracy"⁴¹⁸ but because, like Marshall, they considered the third branch to be their "last hope."⁴¹⁹ That recognition should help our students better understand how to be resistance lawyers.

Much work needs to be done at the grassroots level to change our understanding of what it means to live in an equitable society where Black lives matter. We cannot expect the Supreme Court to take the lead in dismantling white supremacy, but the Supreme Court should also not be left off the hook as irrelevant. Its jurisprudence helps empower and further white supremacy. This Article has sought to tell that story.

⁴¹⁷ Others have written about his outstanding dissents. See, e.g., Susan Low Bloch, *Celebrating Thurgood Marshall: The Prophetic Dissenter*, 52 HOW. L.J. 617 (2009); Mark Tushnet, *The Principled Dissenter*, 72 A.B.A. J. 29 (1986); William J. Daniels, *Thurgood Marshall and the Administration of Criminal Justice: An Analysis of Dissenting Opinions*, 6 BLACK L.J. 43 (1978); John T. Hand, *Thurgood Marshall's Dissents in Defense of the Poor*, 13 PACE L. REV. 305 (1993).

⁴¹⁸ Rebecca Brown, *Deep and Wide: Justice Marshall's Contributions to Constitutional Law*, 52 HOW. L.J. 637, 637 (2009).

⁴¹⁹ *Id.*