DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION: THE U.S. SUPREME COURT'S ABYSMAL TRACK RECORD ON RACIAL JUSTICE AND EQUITY

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ABSTRACT

Of the three branches of government, the United States Supreme Court has shown itself to be the truest defender of white supremacy. To establish this point, this article offers an unprecedented historical account of the Supreme Court's race-related jurisprudence from 1795 to 1945. From Native American colonization and chattel slavery to Old Jim Crow and Japanese detention during World War II, the Court has time again affirmed white superiority. Such affirmance cannot be explained by stare decisis or faithful adherence to rules of statutory and constitutional interpretation; the Court has willingly violated both in the name of furthering racial hierarchy. The Court's precedents during this time were not just destructive during that period; the Court's historical record leaves a lasting legacy that continues to maintain white supremacy and makes racial justice and equity impossible to realize in America. With African Americans in particular, the Court lives in the spirit of Dred Scott.

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Of all our studies, history is best qualified to reward our research. – Malcolm X[1]

Much has been written recently about the Supreme Court under the leadership of John Roberts. Academics and pundits have criticized the court for being deeply partisan, promoting right-wing politics and beliefs to such an extreme as to call into question the court's legitimacy.[2] Many writers have also lamented the

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1. Malcolm X, *Message to the* Grassroots, TEACHING AMERICAN HISTORY (Nov. 10, 1963), https://teachingamericanhistory.org/document/message-to-grassroots/.

2. *See, e.g.*, Michael S. Greve, *Is the Roberts Court Legitimate?*, NATIONAL AFFAIRS (2020), https://www.nationalaffairs.com/publications/detail/is-the-roberts-court-legitimate; Kelsey Reichmann, *With* Roe *on the Rocks, the Roberts Court Exists in Name Only*, COURTHOUSE NEWS SERVICE (May 10, 2022), https://www.courthousenews.com/with-roe-on-the-rocks-the-roberts-court-exists-in-name-only/; *America's Supreme Court Faces a Crisis of Legitimacy*, THE ECONOMIST (May 7, 2022), https://www.eco

relationship between the Supreme Court's Republican appointees and the Federalist Society, a conservative legal machine that has been instrumental in shifting legal practice and doctrine to the political right.[3] One veteran federal court judge even resigned from the Supreme Court bar and excoriated Roberts and his right-wing co-justices in a scathing letter.[4] Authors of law review notes and op-ed pieces have opined on ways to save the court.[5]

Some scholars have commented on or written about the Roberts Court's treatment of issues of race.[6] Professor Tom I. Romero, II, for example, wrote about the Roberts Court's false retelling of America's racial history in its precedents; he focused particularly on one of the Court's most renowned and infamous decisions, *Shelby County v. Holder*.[7] Professor Khiara M. Bridges wrote a lengthy piece demonstrating how the Roberts Court has limited its recognition of racism to incidents and actions reminiscent of American racism before 1960.[8] Professor Daniel Harawa examined some of the Court's more recent criminal law precedents and found them to be superficially positive but ultimately lacking and in line with the Roberts Court's woefully inadequate (as far as race is concerned) criminal law jurisprudence.[9] The Roberts Court's racial jurisprudence, like its precedents on other

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nomist.com/briefing/2022/05/07/americas-supreme-court-faces-a-crisis-of-legitimacy ; *see also* Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF L. REV. 1519, 1534 (2020).

3. *See, e.g.*, Emma Green, *How the Federalist Society Won*, THE NEW YORKER (Jul. 24, 2022), https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won; David Montgomery, *Conquerors of the Courts*, THE WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/.

4. Dahlia Lithwick, *Former Judge Resigns from the Supreme Court Bar*, SLATE (Mar. 13, 2020, 3:22 PM), https://slate.com/news-and-politics/2020/03/judge-james-dannenberg-supreme-court-bar-roberts-letter.html.

5. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

6. *See, e.g.*, Tom I. Romero, II, *The Keys to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415 (2015); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681 (2022).

7. Romero, *supra* note 6, at 418; *see* Shelby County v. Holder, 570 U.S. 529 (2013).

8. Bridges, *supra* note 6.

9. Harawa, *supra* note 6.

issues, has moved or remained to the right, and its rightward shift has been cited to bolster the argument that the high court has lost its legitimacy under Chief Justice John Roberts.[10]

It is true that under the Roberts Court, Supreme Court jurisprudence has moved more significantly to the right on a number of issues.[11] The Court has overruled longstanding precedents, twisted the factual narratives to support its conclusions, decided questions that were not presented in the cases before them, and refashioned the law along clear ideological lines.[12] However, on matters regarding race and racism, the Court's illegitimacy goes far beyond Chief Justice John Roberts and the present ensemble. When it comes to racial justice and equity, the Court's track record has consistently been abysmal throughout its 234-year existence.[13] Landmark decisions such as *Dred Scott* and *Plessy* were not one-offs; they were predictable decisions given the High Court's precedents both preceding and following those decisions.[14] The tenure of the Warren Court, the one period of the Supreme Court most scholars hold up as a triumph for racial justice and equity advocates, was truly an anomalous era.[15] While the Court should be commended for its jurisprudence during the so-called "Second Reconstruction," it failed to both fully acknowledge the impact of white supremacy on America as a whole and undo destructive First Reconstruction precedents that hinder contemporary efforts to promote racial justice.

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10. *America's Supreme Court Faces a Crisis of Legitimacy*, THE ECONOMIST (May 7, 2022), https://www.economist.com/briefing/2022/05/07/americas-supreme-court-faces-a-crisis-of-legitimacy.

11. Michael Waldman, *A Regressive Supreme Court Turns Activist*, BRENNAN CENTER FOR JUSTICE (May 22, 2023), https://www.brennancenter.org/our-work/research-reports/regressive-supreme-court-turns-activist.

12. *See* Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 192 (2011).

13. *See generally*, William H. Freivogel, *The Supreme Court is Losing Legitimacy,* GATEWAY JOURNALISM REVIEW (Jan. 26, 2023), https://gatewayjr.org/the-supreme-court-is-losing-legitimacy/.

14. *See generally*, Robert A. Sedler, *The Civil Rights Struggle in Retrospect*, 40 J. LEGAL EDUC. 541, 550 (1990).

15. *See* Ronald J. Krotoszynski Jr., *A Remembrance of Things Past: Reflections on the Warren Court and the Struggle for Civil Rights Symposium: The Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1055, 1056 (2002).

The Supreme Court has consistently emphasized the importance of history in deciding constitutional matters.[16] This article turns the history lens on the Supreme Court and offers an unprecedented examination of its race-related decisions from 1795-1945. The year 1795 makes sense: the Court came into existence with the ratification of the Constitution six years prior, and there are no opinions between 1789 and 1795 that decide matters appertaining to Native Americans or Black people.[17] The year 1945 is an ideal endpoint; it is the year after the last overtly racist event the Court sanctioned: the Japanese prison camps during World War II.[18] This article will examine the Court's precedents over a span of 150 years. The doctrines the Court developed and the racist frameworks it generated during this period have had a lasting impact on the Court's precedents after 1945.

The Court's decisions between 1795 and 1945 justified Native American colonization and cast indigenous peoples as savages in need of being civilized.[19] The Court judicially upheld chattel slavery and relegated African Americans to the bottom of society.[20] The Court put several nails in the First Reconstruction Era's coffin with treacherous opinions, the impact of which reverberates to the present.[21] The Court foreshadowed the implementation of widespread racial segregation and steadfastly maintained Jim Crow.[22] The Court endorsed white supremacy as the gold standard in the immigration context.[23] Finally, the Court created a national security exception to the Fourteenth Amendment's prohibition against overt racial discrimination during World War II.[24] This history will firmly establish the Supreme Court as the truest defender of white supremacy among the three branches of government. It will also provide key insights into the role the Court's precedents from this period play in exacerbating racial issues today. Whether doctrinally or

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16. *See, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2111, 2130 (2022).

17. *See generally*, David P. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 820 (1981).

18. *See* Korematsu v. United States, 323 U.S. 214 (1944).

19. *See* Beecher v. Wetherby, 95 U.S. 517, 526 (1877).

20. *See* Dred Scott v. Sandford, 60 U.S. 393 (19 How.) (1857).

21. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875).

22. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

23. *See* Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L. REV. 1455, 1455 (2020).

24. *See* Korematsu v. United States, 323 U.S. 214 (1944).

otherwise, the Court has continued to uphold structures of white supremacy and has remained in the spirit of *Dred Scott*.

Compiling this history is important for three reasons. First, it will provide racial justice activists and advocates for Supreme Court reform the knowledge necessary to pursue adequate solutions. Knowing history is vitally important: one cannot plan for the future without understanding the present, and one cannot possibly understand the present without knowing the past. A significant reason why America has failed to make much racial progress is because large portions of the populace are ignorant of history.[25] It is that lack of history that allows some to believe that the Roberts Court is an outlier in what is otherwise a fair and just institution. Learning history will show that the Court's current approach to race and racism is not new. Much of what makes achieving racial justice impossible in the twenty-first century is the product of Supreme Court decisions going back over a century and attitudes that have lingered for decades.[26]

Second, this history will provide law school professors with the information necessary to give a well-rounded legal education. Legal education tends to promote the study of law in a vacuum; it baselessly assumes law to be objective and grossly fails to account for the ways that other factors, especially race, play a role in shaping judicial doctrine.[27] Legal education centered around Supreme Court doctrine is even worse, given how law schools and the constitutional law professoriate, in particular,

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25. *See generally*, *What is Modern Racism? How and why Racism has Mutated*, PEARN KANDOLA (June 4, 2019), https://pearnkandola.com/insights/what-is-modern-racism-how-and-why-racism-has-mutated/.

26. *See generally*, Linda S. Greene, *Race in the 21st Century: Equality Through Law?* 64 TUL. L. REV. 1515, 1517 (1990).

27. Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 24 (2013) (noting that "traditionally, much of the first-year law school curriculum is teaching students to 'think like lawyers.' This includes learning, at least as a baseline principle, that the law is objective and is generally applied equally to all people. The underlying assumption is that the law includes all cultural perspectives, and therefore should be unaffected by the discourse on race and gender. While law students are commonly taught to analyze and dissect case law and legal doctrine, they are less frequently taught to question the fundamental and unstated assumptions on which legal doctrine depends. Without the requisite training or critical perspectives, students who assume neutrality and objectivity accept a flawed analytic structure.").

revere the High Court.[28] The fact that law students generally tend to be ignorant of progressive history compounds this problem.[29] The false myth that law is objective renders future lawyers and jurists ignorant of the racial dynamics at play in judicial systems, and it further leaves them unprepared to grapple with racial dynamics constructively.[30] Further, the myth that American law is objective has the adverse effects of objectifying and alienating law students of color in a myriad of ways.[31] Only through an honest examination of the Supreme Court's precedents can future professionals have a better understanding of the interplay between law and existing systems of oppression. If the legal profession is to promote racial justice and equality, it is imperative to have this better understanding.

Finally, a history of the Supreme Court's racism will refute ignorant counternarratives such as post-racialism and colorblindness. At a time when there is a growing right-wing movement to ban educators from teaching about America's racial past,[32] such a history could not be more timely. An examination of the Court's precedents spanning nearly 150 years, coupled with clear examples of how the Court's precedents apply to contemporary times and impact the present, offers a logical answer to those who deny the current presence of racism in America. It will further rebut arguments that the Court's decisions were only racist because it was bound by its own precedents and by rules of constitutional and statutory interpretation. The history will show that the most consistency in the Court's precedents is its adherence to whatever advances white supremacy.

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28. *See, e.g.*, Aziz Z. Huq & Jon D. Michaels, *Law Schools Have a Supreme Court Problem*, THE CHRONICLE OF HIGHER EDUCATION (Jul. 18, 2022), https://www.chronicle.com/article/law-schools-supreme-court-sycophancy?bc_nonce=sdm754jinx8hhgj6165ks&cid=reg_wall_signup.

29. Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 162-63 (2020).

30. *See generally*, John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 201 (1995).

31. *See* Kimberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994); *see also*, Anastasia M. Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 232-35 (2017).

32. Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory*, BROOKINGS INSTITUTE (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/; Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023, 7:00 AM), https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors.

This article will proceed in three parts. Part I will set forth premises regarding race and racism on which the foregoing argument will be based. Part II will explore the Court's race-related jurisprudence from Native American colonization to Japanese detention camps during World War II. Part III will examine present-day ramifications of the Court's prior decisions and draw comparisons between the Court's precedents before World War II and its decisions after World War II. The comprehensive history set forth in this article will be the first of its kind and will go beyond the landmark decisions most scholars are familiar with to examine how lesser-known cases also helped to fashion a racist America. In addition to the purposes explained above, it is the author's hope that this article will serve as a resource for other scholars working on matters regarding racism and the High Court.

I. AMERICAN RACISM: BASELINE PREMISES

This Part will define race and racism before diving into the history for a couple reasons. First, having a definition will help the reader to follow the argument. Second, and more important, this argument requires distinguishing historical racism from the current Supreme Court's warped definition of racism. In the current world of the Supreme Court, colorblindness is antiracism, and race-conscious remedies to past and present racial discrimination are themselves acts of racial discrimination.[33] In reality, colorblindness is the antithesis of anti-racism; it is, in the words of Professor Lopez, "geared to preserving a status quo of continued white dominance."[34] Adherents to colorblindness divorce race from America's history of violent subjugation of people of color and falsely equate the problem with the remedy.[35]

The author is aware of the abundance of literature and scholarship defining race and racism. For sake of space, this Part will not delve heavily into this

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33. *See, e.g.,* Lawrence Hurley*, 'Colorblind Constitution': Supreme Court wrangles over the Future of Race in the Law*, NBCNEWS (July 1, 2023, 5:00 AM CDT) https://www.nbcnews.com/politics/supreme-court/colorblind-constitution-supreme-court-wrangles-future-race-law-rcna90661.

34. Ian F. Haney Lopez, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 828 (2011).

35. *See, e.g.*, Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1304-06 (2021) (Prof. Stanchi references Professor Sumi Cho's discussion of "moral equivalences" of racial discrimination with racial remedies. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1603, 1615 (2009)).

scholarship; it simply seeks to provide a workable definition of terms that recognizes America's history of subjugation and can be applied to the Supreme Court's jurisprudence during the period in question. This Part will define race, differentiate between racism and racial prejudice, and contrast racial equality to racial justice and equity.

A. *What Is Race?*

Race is a social construct in which human beings are defined by observable physical characteristics, with skin color as the chief determinant of race. There are no biological, genetic, or otherwise scientific differences between human beings based upon race.[36] Nor are there any behaviors or personality traits inherent in any race.[37] Defining race in biological terms not only is contrary to science, but it also continues to promote racial hierarchy and harm racial minorities in a myriad of ways.[38] One clear example is racism in the medical establishment: racist notions that Black people feel less pain than their white counterparts have led to misdiagnoses, maltreatment, and even death.[39]

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36. *See, e.g.*, JAMES KING, THE BIOLOGY OF RACE at 118 (1981) ("Race is a concept of society that insists there is a genetic significance behind human variations in skin color that transcends outward appearance. However, race has no significant merit outside of sociological classifications. There are no significant genetic variations to within the human species to justify the division of 'races.'"); Professor Ian F. Haney Lopez has also written extensively on race as a social construction. *See, e.g.*, Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L.L. REV. 1, 10-16 (1994).

37. Anthropological studies of man done by researchers such as Carl Von Linnaeus and Johann Friedrich Blumenbach fixed behavior characteristics upon persons classified by race. Dr. Joy DeGruy, *Dr. Joy DeGruy Leary: Post Traumatic Slave Syndrome*, YOUTUBE.COM, https://www.youtube.com/watch?v=BGjSday7f_8, at 25:47-33:39.

38. *See e.g.*, Wolfgang Umek & Barbara Fischer, *We Should Abandon "Race" as a Biological Category in Biomedical Research*, 26(12) FEMALE PELVIC MED. & RECONSTRUCTIVE SURGERY 719 (2020).

39. Linda Villarosa, *Myths about Physical Racial Differences were used to Justify Slavery – And are still Believed by Doctors Today*, N.Y. TIMES (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/racial-differences-doctors.html; Nina Martin & Renee Montagne, *Nothing Protects Black Women from Dying in Pregnancy and Childbirth*, PROPUBLICA & NPR NEWS (Dec. 7, 2017, 8:00 AM), https://www.propublica.org/article/nothing-protects-black-women-from-dying-in-pregnancy-and-childbirth.

However, it would be a mistake to treat race as a completely fictional concept merely because there is no scientific basis for it.[40] Professor Ian Haney Lopez defines race as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry."[41] This definition is consistent with America's racial history; different groups have had divergent experiences and histories based on socially constructed identities.[42] The federal Constitution, as well as federal actions that all three branches of government have taken, has played a central role in ensuring divergent experiences and histories based on race.[43]

B. *Racism Versus Racial Prejudice*

Racism is a system that confers benefits and detriments on the basis of race. While individual experiences may certainly be indicative of racism's existence, racism is a group dynamic and goes beyond the individual.[44] Chattel slavery, Old Jim Crow, and the New Jim Crow were not the product of individual biases and behaviors; they were systemic in nature.[45] As will be demonstrated below, the federal Constitution and Supreme Court jurisprudence legitimized and approved of chattel slavery and Old Jim Crow.[46] State and local laws and judicial opinions also

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40. Lopez, *supra* note 36, at 19-20 (Lopez touches on the dangers of a "races do not exist" paradigm, noting that such a position implies that there should be an "abandonment of calls for racial amelioration by disallowing reference to race.").

41. *Id.* at 7.

42. *See e.g.*, TAMMERA STOKES RICE, COMMUNICATIONS 256: INTERCULTURAL COMMUNICATION 17, 20 (2023).

43. *See e.g.*, Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651.

44. Definitions of racism that are simply limited to individual beliefs ignore both the origins and the history of racism in America and other western nations. Native American policies, chattel slavery, immigration policy, and both Old and New Jim Crows were systemic in nature, justified by "science" and academia and legitimated by law. For a visual explanation of what racism is, *see* Dr. Joy DeGruy, *Post Traumatic Slave Syndrome P.1,* YOUTUBE.COM, https://www.youtube.com/watch?v=wZ2mnoHINyE, at 11:09-14:47.

45. *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 EDT), https://time.com/5851855/systemic-racism-america/.

46. *See Infra* Part II, Sections B & D.

legitimated chattel slavery and Old Jim Crow.[47] A collaboration of governments at the state and federal levels made the New Jim Crow possible.[48] America's history demonstrates that white people are the group on which benefits on the basis of race have been collectively conferred, while groups of color, especially African Americans, have collectively been conferred detriments on the basis of race.[49]

Given this definition of racism, reverse racism requires an alternative *system* that confers benefits and detriments on the basis of race.[50] As applied to America, because racism has benefitted white people collectively and disadvantaged people of color collectively, reverse racism would be a system that collectively advantages any or all groups of color and collectively injures whites. No such contrary system exists.[51] Reverse racism proponents often cite affirmative action,

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47. *See, e.g.,* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 379-87 (2022).

48. *Id.* at 396-97 ("Persons of color are disproportionately policed; arrested, subjected to pretrial detention, which enhances likelihood of conviction; and sentenced to incarceration. Furthermore, persons of color receive less-favorable plea offers from prosecutors and longer prison sentences than similarly situated whites. People of color are vastly overrepresented in U.S. prison populations, and they suffer substantially higher economic detriment from incarceration than whites. Former offenders of color have far greater difficulty obtaining jobs than White offenders, which means that incarceration exacerbates preexisting racial inequality."); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

49. Hutchinson, *supra* note 47, at 396-97.

50. *See* Mario Peuker, *What is 'Reverse Racism' – And what's Wrong with the Term?,* THE CONVERSATION (July 11, 2023, 4:05 EDT) https://theconversation.com/what-is-reverse-racism-and-whats-wrong-with-the-term-208009.

51. For books on the subject, *see, e.g.*, FRED L. PINCUS, REVERSE RACISM: DISMANTLING THE MYTH (2003). For opinion pieces, *see, e.g.*, Nichole Shaw, *Reverse Racism is a Myth*, THE GAZETTE (Oct. 27, 2022, 2:42 PM), https://www.thegazette.com/staff-columnists/reverse-racism-is-a-myth/; Vann R. Newkirk II, *The Myth of Reverse Discrimination*, THE ATLANTIC (Aug. 5, 2017), https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/; Nicole Kief, *MLK and the Myth of Reverse Racism*, ACLU NEWS & COMMENTARY (Aug. 27, 2010), https://www.aclu.org/news/smart-justice/mlk-and-myth-reverse-racism. For a demonstrative exercise of the myth of reverse racism, *see, e.g.*, David I. Backer, *The Game Metaphor: How to Teach Racists that There is No Such Thing as Reverse Racism*, HAMPTON THINK (June 22, 2016), https://www.hamptonthink.org/read/the-game-metaphor-how-to-teach-racists-that-there-is-no-such-thing-as-

which refers to practices designed to increase racial diversity and remedy past and present effects of discrimination, as an example of anti-white discrimination, but affirmative action does not disadvantage white people collectively.[52] Despite scattered societal attempts at modest remedial measures, white Americans still enjoy overwhelming economic, political, and social advantages compared to African Americans and other racial groups.[53] Further, it is absurd to aver that affirmative action is comparable to American racism and the violent subjugation that came with it.[54] While many whites perceive themselves as victims of racism, such perceptions are not grounded in reality.[55]

Racism should not be confused with *racial prejudice*. Racial prejudice is the act of prejudging (usually negatively) a person on the basis of race.[56] Unlike

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racism?rq=backer%20game%20metaphor. For a comedic explanation of reverse racism, see, e.g., Aamer Rahman *(Fear of a Brown Planet) – Reverse Racism,* YOUTUBE.COM, https://www.youtube.com/watch?v=dw_mRaIHb-M.

52. Newkirk, *supra* note 51 ("Fears of reverse racism fly in the face of data. White students still make up almost three-quarters of all private external scholarship recipients in four-year bachelor's programs, almost two-thirds of all institutional grants and scholarship recipients, and over three-quarters of all merit-based grants and scholarships, although white people only make up about 62 percent of the college-student population and about half of all people under 19. White students are more likely than black, Latino and Asian students to receive scholarships."). Additionally, white women have statistically benefitted more from affirmative action programs than any other demographic. *See, e.g.*, Victoria M. Massie, *White Women Benefit most from Affirmative Action – And are among its Fiercest Opponents*, VOX (June 23, 2016, 12:00 PM), https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action.

53. *See generally* Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS (February 20, 2020) https://www.brookings.edu/articles/examining-the-black-white-wealth-gap/; *see also* ALEXANDER, *supra* note 48.

54. Arguments that affirmative action programs and diversity initiatives constitute "reverse racism" are meritless. Such endeavors are attempts to level a playing field that has been historically and grossly unequal along racial lines. As Ian F. Haney Lopez writes in Dog Whistle Politics: "Is affirmative action the same as Jim Crow segregation? Or the internment of Japanese Americans during World War II? Or Native American genocide? Of course not. Racism's harm lies in racial distinctions made in order to repair racism's painful legacies. The "different treatment" produced by affirmative action lies a chasm apart from the racial violence of segregation, internment, or genocide." IAN F. HANEY LOPEZ, DOG WHISTLE POLITICS 91 (2014).

55. *See* Brett Hammon, *Playing the Race Card: White Americans' Sense of Victimization in Response to Affirmative Action*, 19 TEX. HISP. J.L. & POL'Y 95, 97 (2013).

56. *See generally* Peuker, *supra* note 50.

racism, all persons in a society where race is recognized are capable of being racially prejudiced.[57] In America, African Americans (and other groups of color) can be racially prejudiced just like white Americans. The key difference between racism and racial prejudice is a matter of collective power; to be racist, a group must have power *over another group* and be able to impact that group based on its prejudice.[58]

C. *Racial Equality Versus Racial Justice and Equity*

Racial equality is where all persons are treated equally regardless of race. Racial equality does not take into account the effects of past discrimination.[59] By contrast, racial justice, or racial equity, is a state where racial hierarchies have been eliminated, the effects of past racial wrongs have been reversed, and existing racial oppression is rooted out and destroyed.[60] Racial justice and equity advocates seek to ensure fair treatment of people of all races.[61] Racial justice in America is not about retaliation or discriminating against white people; it is about leveling a historically uneven playing field and guaranteeing true fairness in opportunity and access.[62]

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57. *See* Hammon, *supra* note 55.

58. *See generally* Peuker, *supra* note 50.

59. *See, e.g.*, Holly Martinez, *What is Racial Equity? Racial Equity Definition*, UNITED WAY OF THE NATIONAL CAPITAL AREA (Jan. 7, 2022), https://unitedwaynca.org/blog/what-is-racial-equity-definition/.

60. *Id.*

61. *Id.*

62. My perusal of a few organizations that do diversity work show some interchangeable uses of "racial justice" and "racial equity." For example, the National Education Association defines racial justice as follows: "The systematic fair treatment of people of all races, resulting in equitable opportunities and outcomes for all. Racial justice — or racial equity — goes beyond "anti-racism." It is not just the absence of discrimination and inequities, but also the presence of deliberate systems and supports to achieve and sustain racial equity through proactive and preventative measures." NEA Center for Social Justice, *Racial Justice in Education: Key Terms and Definitions*, NATIONAL EDUCATION ASSOCIATION (Jan. 2021), https://www.nea.org/professional-excellence/student-engagement/tools-tips/racial-justice-education-key-terms-and. Meanwhile, the Baltimore Racial Justice Action defines "equity" as follows: "The condition and the process together that would be achieved if the identities assigned to historically oppressed groups no longer acted as the most powerful predictor of how one fares. The root causes of inequities, not just their manifestations, would be eliminated. This includes elimination of policies, practices, attitudes, and

II. THE SUPREME COURT AND RACISM: FROM NATIVE AMERICAN COLONIZATION TO JAPANESE INTERNMENT CAMPS DURING WORLD WAR II

From 1795 to 1945, the Supreme Court has been the truest defender of white supremacy among the three branches of government.[63] The first section of this part will examine the Court's jurisprudence during chattel slavery, which set the tone for a racial hierarchy that has endured in America for centuries. The second section will cover the Court's chattel slavery precedents. The third section will explore the Court's Reconstruction-Era jurisprudence, which was arguably the most damaging period of race-related judicial action. The fourth section will discuss the Court's precedents during Old Jim Crow, which preserved the most narrowly defined constitutional protections while enabling private discrimination and subtle state-sanctioned racism. The fifth and final section will examine the Court's xenophobic and racist immigration decisions.

A. *The Supreme Court as a Justifier of Native American Colonization*

Almost three centuries before the U.S. Supreme Court existed, Christopher Columbus sailed the Atlantic Ocean seeking India (maybe) and landing instead in the Caribbean.[64] Columbus's journeys set a blueprint for other European explorers, and they led to England, Portugal, Spain, and other European nations sending people to the Western Hemisphere in search of wealth and prosperity.[65] Centuries of genocide against Native Americans living in North America, South America, and the Caribbean followed.[66] English colonists "settled" in the eastern portion of

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cultural messages that reinforce or fail to eliminate disproportional outcomes (economic, educational, health, criminal justice, etc.) by group identity." *Our Definitions*, BALTIMORE RACIAL JUSTICE ACTION (2016), https://bmoreantiracist.org/resources/our-definitions.

63. For a brief explanation of the Supreme Court's ties to white supremacy, *see* Claudia Garcia-Rojas, *The Supreme Court Won't Save Us — It Was Founded to Defend White Supremacy,* TRUTHOUT (Sept. 12, 2022), https://truthout.org/articles/the-supreme-court-wont-save-us-it-was-founded-to-defend-white-supremacy/.

64. *See* JAMES LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 48-49 (2d ed. 2007).

65. KEHINDE ANDREWS, THE NEW AGE OF EMPIRE 27-34 (2021).

66. *Id.*

modern-day America and pushed out the Native Americans living there.[67] English statutory and common law bestowed the right to land upon amongst European nations and reduced the Native Americans to mere occupants.[68] After the ratification of the Federal Constitution in 1789, Americans purported to normalize relations with the remaining Native American tribes, but through treaties, conquest, and other judicially affirmed government actions, the federal government dispossessed indigenous peoples of millions of acres of land and rendered them wards of the state.[69] Thus, America's relationship with Native Americans is one of continuing conquest with past and present Supreme Court legitimation.

In the first few decades of the Republic, despite the plethora of wars between pre-colonial America and Native Americans,[70] the federal government sought to treat Native American tribes with a modicum of respect, mainly for political and economic reasons. In 1787, the pre-Constitution American government issued the Northwest Ordinance, which required that "utmost good faith . . . always be observed towards the Indians."[71] It further declared that "their lands and property shall never be taken from them without their consent" and that "in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress."[72] The commerce clause of the Federal Constitution placed Native American sovereignty on equal footing (on paper) with that of foreign nations and of individual states.[73] Congress enacted the Trade and Intercourse Act of 1790, which gave Congress the power to make treaties and gave the federal government sole control of all matters regarding Native American and non-Native

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67. *See* ROBERT S. GRUMET, HISTORIC CONTACT: INDIAN PEOPLE AND COLONISTS IN TODAY'S NORTHEASTERN UNITED STATES IN THE SIXTEENTH THROUGH EIGHTEENTH CENTURIES 56-57, 198-99, 329-30 (1995).

68. *See, e.g.*, *Proclamation of 1763, 1763,* THE GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/spotlight-primary-source/proclamation-1763-1763 (last visited Nov. 1, 2023).

69. *See Indian Removal Timeline*, DIGITAL HISTORY (2021), https://www.digitalhistory.uh.edu/active_learning/explorations/indian_removal/removal_timeline.cfm.

70. *See* LOEWEN, *supra* note 64, at 114-22 (2007).

71. Ordinance of 1787: The Northwest Territorial Government, reprinted in 1 U.S.C. at LV (2006) [hereinafter Northwest Ordinance].

72. *Id.* at Art. 3.

73. U.S. CONST. art. I, § 8, cl. 3.

American interactions.[74] This act was passed for the purpose of protecting indigenous tribes from the aggressive actions of individual states, but it was also enacted out of a belief that Native Americans were "too incompetent to trade with white people."[75] Nonetheless, the federal government's initial attitude was one of little respect for indigenous sovereignty.

After the War of 1812, that attitude began to change. America and Britain reached a compromise in 1815 that involved the U.S. abandoning any plans to annex Canadian territory in exchange for Britain giving up alliances with Native American tribes.[76] Additionally, slaveholding states had always seen Native American civilizations as a threat because enslaved Africans could win freedom by escaping to them.[77] As such, the national attitude towards indigenous people shifted from somewhat friendly to acrimonious and antipathetic.[78] The Native American image was thoroughly assassinated, and their marginalization was invoked to justify westward expansion and the federal government's conquest of Native American lands.[79]

The Supreme Court promoted colonialism and emphasized white superiority in its Native American jurisprudence from the late eighteenth century to the mid-twentieth century. The Court first set the groundwork for validating the taking of Native American land in 1799.[80] The decision resulted from a land dispute between two white people, in which the ultimate loser in the case alternatively argued that the land in question belonged to Native Americans.[81] The Court rejected that argument and recognized conquest as a legitimate manner of land acquisition.[82] In 1810, the Court doubled down on the doctrine of conquest in another legal land dispute.[83] The Court wrote that white people "found the territory in possession of a

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74. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 2 Stat. 137 (1790).

75. Adam Crepelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 189, 210 (2021).

76. *See* LOEWEN, *supra* note 64, at 123 (2007).

77. *Id.* at 108.

78. *Id.* at 123-24.

79. *Id.*

80. *See generally* Sims' Lessee v. Irvine, 3 U.S. 425 (1799).

81. *Id.* at 452.

82. *Id.*

83. Fletcher v. Peck, 10 U.S. 87 (1810).

rude and uncivilized people" who had "no idea of property in the soil but a right of occupation."[84] The Court emphasized the validity of European conquest and provided some self-serving revisionist history; they noted that Europeans had "always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, [sic] and took to themselves what was not wanted by the natives."[85]

In an 1823 decision that Professor Seth Davis designated as "a foundation of U.S. property rights and claims to territorial sovereignty,"[86] the Court expanded on the discovery doctrine as a legal mechanism for property possession, affirming the Eurocentric idea that white people had superior authority to land that indigenous peoples had occupied for centuries prior.[87] Now, discovery could be either by purchase or by conquest.[88] The Court venerated the "superior genius of Europe" and depicted Native Americans as "fierce savages" and "heathens."[89] Eight years later, in a decision holding that the Cherokee tribe was not a foreign nation and therefore had no right to challenge Georgia's attempt to eject them from the state,[90] the Court praised Europe's superiority and America's benevolence before dubbing the tribe a "domestic dependent nation" and describing the relationship between Native American tribes and the white federal government as "that of a ward to his guardian."[91]

The Court further endorsed white superiority in 1832 when Georgia's removal endeavors were again challenged: the Court decided the merits because the plaintiffs this time were not Native Americans but white missionaries.[92] While it barred Georgia from regulating or imposing anything upon the Cherokee tribe without either tribal approval or federal authorization,[93] the Court again exalted

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84. *Id.* at 122.

85. *Id.*

86. Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1767 (2017).

87. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

88. *Id.* at 587.

89. *Id.* at 573, 576-77, 590.

90. Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831).

91. *Id.* at 15, 17.

92. Crepelle, *supra* note 75, at 200.

93. Worcester v. Georgia, 31 U.S. 515, 561-63 (1832).

white people as "adventurous sons" who were "guided by nautical science" and disparaged indigenous people as primitives "whose general employment was war, hunting, and fishing."[94] The concurrence was even worse: Justice McLean rhetorically remarked: "[I]s no distinction to be made between a [c]ivilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties?"[95] In his mind and the mind of the Court, white people embody civilization while Native Americans are "uncivilized" persons who, by way of the righteous guidance of whites, have naturally grown attached to America.[96]

In 1846, the Court rejected a white petitioner's argument that he was Native American because he had moved into Cherokee territory and had a family with a Cherokee woman around the time he allegedly murdered another white man who had done the same.[97] The opinion was littered with express racism regarding Native Americans who were described as an "unfortunate race" in need of salvation from themselves.[98] Indeed, the Court claimed that the white federal government regulated Native Americans "in the spirit of humanity and justice, and has [endeavored] by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices."[99] Like prior decisions, this opinion exalted white people as benevolent saviors of natural miscreants of color.

In 1883, the Supreme Court reversed the federal prosecution of a Native American who murdered a fellow Native American on indigenous land; they found that indigenous persons lacked "the white man's morality" to such a degree that prosecuting them under American law seemed unfair.[100] It was this decision that led Congress to enact the Major Crimes Act of 1885.[101] In 1886, the Court upheld the Major Crimes Act in a decision that conceded Congress's lack of constitutional basis

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94. *Id.* at 543.

95. *Id.* at 582.

96. *Id.* at 582, 588.

97. United States v. Rogers, 45 U.S. 567, 573-74 (1846).

98. *Id.* at 572; see Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 548-49 (2021).

99. *Rogers,* 45 U.S. at 572.

100. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883).

101. Crepelle, *supra* note 98, at 551.

for it.[102] Once again, the Court referred to indigenous persons as "wards of the nation" that were "*dependent* on the United States."[103] As far as the Court was concerned, the need for white salvation trumped the absence of constitutional authority. In 1892, in another property law decision adverse to indigenous persons, the Court plainly stated,

> Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation . . .. Congress, too, has recognized their dependent condition, and their hopeless inability to withstand the wiles or cope with the power of the *superior* race . . . .[104]

In 1903, in a decision academics have termed the *Dred Scott* of Native American law, the Court upheld the Dawes Act of 1887, a statute that authorized the government to break up tribal lands and redistribute them to families instead.[105] The Dawes Act was designed to open up indigenous land to white settlement.[106] Tragically, the Court further concluded that there were no constitutional limits on Congress's authority to take land away from indigenous people.[107] The government cited a desire to assimilate Native Americans into American society, but the Dawes Act was mainly designed to open Native American land for white people to settle.[108] Indeed, the law effectively destroyed the Native American tribal system of land ownership and cost Native Americans roughly 60 million acres of land.[109] After the

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102. United States v. Kagama, 118 U.S. 375, 378-85 (1886).

103. *Id.* at 383-84.

104. Felix v. Patrick, 145 U.S. 317, 330 (1892) (emphasis added).

105. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 334-337).

106. *Dawes General Allotment Act*, BRITANNICA, (Dec. 4, 2019), https://www.britannica.com/topic/Dawes-General-Allotment-Act; *The Dawes Act*, NATIONAL PARK SERVICE, (Jul. 9, 2021) https://www.nps.gov/articles/000/dawes-act.htm.

107. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); *see, e.g.*, Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 38-39 (2017).

108. *Lone Wolf,* 187 U.S. at 560-562.

109. *Land Tenure Issues*, INDIAN LAND TENURE FOUNDATION, https://iltf.org/landissues/issues/#:~:text=Land%20Loss,As%20a%20result%20of%20the%20General%20Allotment%20Act%20of%201887,or%20transferred%20to%20non%2DIndians (last visited Nov. 4, 2023).

decision, Congress and the Office of Indian Affairs "attempted to regulate nearly every aspect of life on Indian reservations in a continuing attempt to Christianize and civilized."[110]

On at least one occasion prior to the end of World War II, the Supreme Court contradicted its own precedent to further white supremacy. In 1877, the Court found that the Pueblos, indigenous tribes that inhabited land in the southwestern portion of what would eventually be the United States, were not "Indian" under the Non-Intercourse Act of 1834.[111] Unlike most Native American tribes, according to the Court, the Pueblos were a "peaceable, industrious, intelligent, honest, and virtuous people."[112] They were "Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and equal of the most civilized thereof."[113] Yet thirty-six years later, the Pueblos transmogrified into "Indians in race, customs and domestic government . . . adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors."[114] In 1926 the Court reaffirmed the Pueblos' "Indian-ness" and again exalted white supremacy, describing indigenous peoples in the nineteenth century as "a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races."[115] Therefore, while Congress lacked plenary power over the Pueblos in 1877, they magically had plenary power in 1913, thanks to the Supreme Court.

The Supreme Court's jurisprudential history regarding Native Americans is a story of continuing conquest and the exaltation of white supremacy. It manufactured out of whole cloth a legal rationale for taking Native American land that endured well into the twentieth century. The Court professed itself responsible for interpreting the federal Constitution, yet it granted Congress the authority to regulate indigenous tribes on a theory that has no support in the federal Constitution.

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110. Taylor Ledford, *Foundations of Sand: Justice Thomas' Critique of the Indian Plenary Power Doctrine*, 43 AM. INDIAN L. REV. 167, 186 (2018).

111. United States v. Joseph, 94 U.S. 614 (1877).

112. *Id.* at 616-17.

113. *Id.*

114. Crepelle, *supra* note 98, at 555 (citing and quoting United States v. Sandoval, 231 U.S. 28, 39 (1913)).

115. United States v. Candelaria, 271 U.S. 432, 441-42 (1926). By logical implication, given the status of African Americans in the nineteenth century, it was white intelligence that the high court deemed Native Americans "ill-prepared to cope with."

The Court exalted white supremacy and explicitly cast Native Americans as subhuman and uncivilized.

B. *The Supreme Court as a Vanguard of Slavery*

American chattel slavery predated the founding of the republic.[116] Columbus's voyages to the western hemisphere launched the transatlantic slave trade, which brought millions of people of African ancestry to North America, South America, and parts of the Caribbean.[117] In 1619 English colonists began enslaving people of African descent in Jamestown, Virginia.[118] Both Blacks and poor whites were subject to indentured servitude, but Black people were often forced to continue laboring after their contracts expired.[119] Then, the formation of judicial opinions and slave codes in the mid-seventeenth century slowly transformed Black people into permanent slaves.[120] Slavery existed throughout the thirteen colonies for decades; it was not until the year after the Declaration of Independence was issued that Vermont became the first state to abolish slavery.[121] In 1789, when the Constitution of the

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116. James J. Wood, *The Illegal Beginning of American Negro Slavery*, 56 AM. BAR ASSOC. J. 45, 45 (1970).

117. LOEWEN, *supra* note 64, at 53.

118. *See* Wood, supra note 116, at 46.

119. *Id.* at 48.

120. *See, e.g.*, Slave Act of 1664, 1664 Md. Laws 533-34 (repealed 1681); Negro Womens Children to Serve According to the Condition of the Mother, *in* 2 The Statutes at Large; Being a Collection of All the Laws of Virginia 170, 170 (enacted 1662) (William Waller Hening ed. 1823). ; *See General Court Responds to Runaway Servants and Slaves (1640)*, ENCYCLOPEDIA VIRGINIA, https://encyclopediavirginia.org/entries/general-court-responds-to-runaway-servants-and-slaves-1640/ (last visited Nov. 1, 2023) (citing H. R. McIlwane, ed., *Minutes of the Council and General Court of Colonial Virginia 1622–1632, 1670–1676* (Richmond: Library of Virginia, 1924), 466–467 (describing sentencing John Punch, a Black man, to slavery for the remainder of his natural life in Virginia in 1640)); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 25 (2010).

121. *July 2, 1777: Vermont Officially Abolished Slavery*, ZINN EDUCATION PROJECT, https://www.zinnedproject.org/news/tdih/vermont-abolished-slavery/ (last visited Nov. 1, 2023).

United States was ratified, slavery was a major institution throughout the South and parts of the North, and it had an invaluable impact on American life and affairs.[122]

As such, the Supreme Court's role as a protector of chattel slavery was not solely of its own doing. The Federal Constitution itself was the product of a compromise between northern states striving to form a country and southern states determined to maintain and protect chattel slavery.[123] Thus, as noted historian Paul Finkelman averred, the Constitution of the United States was a document designed to protect the institution of chattel slavery.[124] Although the word "slave" appears nowhere in the original document (i.e., before the ratification of the Thirteenth Amendment), the extensive record of debates at the Constitutional Convention in Philadelphia demonstrated the impact that slavery had on the drafting of the Constitution.[125] Direct pro-slavery provisions include the three-fifths clause,[126] the prohibition against banning the slave trade before 1808,[127] and the fugitive slave clause.[128] Other constitutional provisions, like the Second Amendment,[129] were either promoted or agreed upon with chattel slavery in mind.[130] The three-fifths clause in particular "gave the South and its northern doughface allies a lock on the House of Representatives, the Electoral College, and on the presidency."[131]

Both the legislative and executive branches of the government were generally pro-slavery. Congress passed legislation deeming only whites to be

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122. *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 80 (1971) (discussing the entrenchment of slavery during this time period).

123. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 6-12 (2d ed. 2001).

124. Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 423-25 (1999).

125. *Id.* at 433-70.

126. U.S. CONST. art. I, § 2, cl. 3.

127. U.S. CONST. art. I, § 9, cl. 1.

128. U.S. CONST. art. IV, § 2, cl. 3.

129. For a history on the relationship between the Second Amendment and slavery, *see* CAROL ANDERSON, THE SECOND 23-39 (2021).

130. Finkelman, *supra* note 124, at 429-31.

131. Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's The Classical Liberal Constitution*, 8 N.Y.U.J.L. & LIBERTY 839, 843 (2014).

citizens;[132] limiting militia service to white people;[133] regulating enslaved and free Black persons in Washington, D.C.;[134] and requiring the return of escaped slaves to the places where they were held in bondage.[135] Discussion regarding slavery was largely absent from Congress until the mid-1830's,[136] and when the abolition movement found its way into Congress through John Quincy Adams and others, Congress instituted the "gag rule," which required tabling any discussions and debates about ending slavery.[137] As for the executive branch, thirteen of the fifteen presidents elected before Abraham Lincoln were supporters of chattel slavery, and ten of those thirteen were slaveowners.[138] Included in that ten were James Madison, who was the architect of the three-fifths compromise;[139] Thomas Jefferson, who owned over 600 enslaved persons throughout his lifetime despite his public pronouncements against slavery[140] and declared that Black people were "inferior to

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132. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795); *see, e.g.,* Naturalization Act of 1795, ch. 20, 1 Stat. 414 (repealed 1802); Naturalization Act of 1798, ch. 54, 2 Stat. 566; Naturalization Act of 1802, ch. 28, 2 Stat. 153.

133. Militia Act of 1792, ch. 33, 1 Stat. 271 (1792); *see* ANDERSON, *supra* note 129, at 33-35 for a discussion regarding the militias suppressing slave rebellions far more effectively than defending against foreign invaders or enemies.

134. Act of May 4, 1812, ch. 75, 2 Stat. 721, 725.

135. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of Sep. 18, 1850, ch. 60, 9 Stat. 462.

136. Roberta Alexander, *Dred Scott: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 646-47 (2007).

137. *The House 'Gag Rule'*, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1800-1850/House-Gag-Rule/ (Last visited Nov. 1, 2023).

138. Calabresi, *supra* note 131, at 843.

139. *The Impact of the Three-fifths Clause on Representation in U.S. House of Representatives, 1793*, CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION (Feb. 12, 2021), https://csac.history.wisc.edu/2021/02/12/the-impact-of-the-three-fifths-clause-on-representation-in-u-s-house-of-representatives-1793/#:~:text=James%20Madison%20recommended%20the%20ratio,of%20the%20states%20in%20Congress.

140. Henry Wiencek, *The Dark Side of Thomas Jefferson*, SMITHSONIAN MAGAZINE (Oct. 2012), https://www.smithsonianmag.com/history/the-dark-side-of-thomas-jefferson-35976004/.

the whites, in the endowments of body and mind";[141] and James Polk, who oversaw the charge to silence anti-slavery advocacy on the floor of the House of Representatives with the infamous gag rule.[142]

Having pro-slavery presidents helped make the Supreme Court a pro-slavery institution. Under Article II, Section 2 of the Constitution, presidents nominate U.S. Supreme Court justices.[143] Because the three-fifths clause gave the South a lock on the electoral college, the south also had a lock on the Supreme Court.[144] Between the ratification of the Constitution and Abraham Lincoln's election in 1861, thirty-six jurists were appointed to sit on the Supreme Court; the thirteen pro-slavery presidents selected thirty-two of them.[145] Put another way, supporters of chattel slavery selected ninety percent of all justices to serve on the nation's highest Court. It should come as no surprise, therefore, that the Court's jurisprudence generally favored slaveholders' interests.

1. The Infamous *Dred Scott* Decision

The Supreme Court's opinion in *Dred Scott v. Sanford*[146] is widely recognized as the high court's most notorious antebellum decision.[147] The plaintiff in the case, Dred Scott, sued for his freedom after his enslavers removed him from the slave state of Missouri to the free state of Illinois before moving back to Missouri.[148] In one of the earliest examples of constitutional originalism, the Court held in a 7-2 decision that it was never the framers' intent to endow African Americans with the constitutional rights of citizenship.[149] The Court invalidated the

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141. *Jefferson's Notes on the State of Virginia*, PBS, https://www.pbs.org/wgbh/aia/part3/3h490t.html (Last visited Nov. 1, 2023).

142. *John Quincy Adams: Old Man Eloquent*, MASSACHUSETTS HISTORICAL SOCIETY: JOHN QUINCY ADAMS DIGITAL DIARY, https://www.masshist.org/publications/jqadiaries/index.php/headnotes/old-man-eloquent (Last visited Nov. 1, 2023).

143. U.S. CONST. art. II, § 2.

144. Calabresi, *supra* note 131, at 843.

145. *Id.*

146. 60 U.S. 393 (1857).

147. Melvin I. Urofsky, *Dred Scott decision*, BRITANNICA, https://www.britannica.com/event/Dred-Scott-decision (Last updated Sept. 18, 2023).

148. *Dred Scott*, 60 U.S. at 397-98.

149. *Id.* at 406, 411-12, 420-21.

Missouri Compromise and thereby voided a federal statute for the second time in its history.[150] The Court further ruled that Mr. Scott had no access to sue in U.S. federal courts because he was not a citizen.[151] In short, Black people like Mr. Scott "had no rights which the white man was bound to respect."[152]

The *Dred Scott* case, which Chief Justice Roger Taney authored, was a potentially frightening decision for opponents of chattel slavery. By striking down the Missouri Compromise and classifying bans on slavery as a constitutional taking, the opinion called into question how much power northern states had to restrict or prohibit slavery within their own borders.[153] It empowered pro-slavery advocates and states to push back on the abolitionists' efforts and demand that the "peculiar institution" be respected and recognized throughout the country.[154] Taney hoped that the decision would permanently put abolitionist ambitions to rest.[155]

Unfortunately, for Taney, the decision also rallied abolitionists across the North. The Republican Party, the party opposed to slavery, strongly decried the decision.[156] Leaders within the party, including eventual president Abraham Lincoln, questioned the legitimacy of the decision and of the high court.[157] Famed abolitionist Frederick Douglass called the decision a "vile and shocking abomination" and refused to accept its command, declaring, "[y]ou may close your Supreme Court against the black man's cry for justice, but you cannot, thank God, close against him the ear of a sympathizing world, nor shut up the Court of

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150. Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 275 (2000).

151. *Id.* at 265.

152. *Dred Scott*, 60 U.S. at 407.

153. William Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34, 55 (1978).

154. *Id.* at 55-57.

155. *Id.*

156. Roberta Alexander, Dred Scott*: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 650-51 (2007).

157. *Id.* at 650-52.

Heaven."[158] Courts in northern states rebelled against *Dred Scott*; one clear example was the New York Court of Appeals' decision in *Lemmon v. People*.[159]

2. Other Slavery Decisions

The *Dred Scott* decision was roundly criticized in the years leading up to the Civil War and remains a symbol of terrible Supreme Court jurisprudence.[160] However, as Professor William Wiecek noted, *Dred Scott* does "not appear exceptional or anomalous; rather, it emerges as a natural result of judge-made doctrines and tendencies that had been developing for two decades."[161] Before *Dred Scott*, the Supreme Court rejected various petitions for freedom.[162] In one such case, the Court eradicated a hearsay exception that allowed enslaved persons to prove their freedom without a manumission deed.[163] In another case, the Court creatively interpreted a Virginia statute to deny a petition for freedom where it would have been granted had the statute been interpreted based on plain language.[164] Until 1817, the Court ruled consistently in favor of slave traders who illegally smuggled people of African ancestry into the United States for purposes of bondage *despite* the fact

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158. Frederick Douglass, *Speech on the* Dred Scott *Decision* (May 14, 1857), https://teachingamericanhistory.org/document/speech-on-the-dred-scott-decision-2/.

159. 20 N.Y. 562 (1860) (The Court's holding that an enslaved Black person brought to New York by his "master" is free upon reaching New York conflicts with *Dred Scott's* instruction that such a rule constitutes an unconstitutional taking.); *see* Wiecek, *supra*, note 153, at 56-57.

160. *See, e.g.*, John T. Valauri, Dred Scott, *Lincoln, and the Constitution: A Reply to Professor Graber*, 34 N. KY. L. REV. 619 (2007) ("*Dred Scott v. Sandford,* the case in which Chief Justice Taney declared that an African-American could not be a citizen of the United States and that Congress could not prohibit slavery in the territories, is perhaps the most reviled Supreme Court decision in American history, both for its judgment and for its reasoning.").

161. Wiecek, *supra* note 153, at 35.

162. *See*, *e.g.*, Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813); Wood v. Davis, 11 U.S. (7 Cranch) 271 (1812); Scott v. Ben, 10 U.S. (6 Cranch) 3 (1810); Scott v. London, 7 U.S. (3 Cranch) 324 (1806).

163. *Hepburn*, 11 U.S. at 295.

164. *Scott*, 7 U.S. at 330-31.

that the slave trade was restricted in 1794 and banned in 1807.[165] The Court reversed course on slave trade rulings after 1817[166] but continued to uphold the institution of slavery.

In 1825, the Court ruled that enslaved persons "belonging" to another country that wound up in America could be returned to that foreign country, even though the slave trade contravened both American and British law.[167] In 1827, the Court again subverted the plain language of the Virginia statute in *Scott v. Negro London*[168] (now a Washington D.C. statute) requiring that slaves be freed after a year if new residents failed to take an oath within sixty days of moving into the area.[169] Despite a complete lack of evidence that the slaveowner in question took such an oath, the Court read a presumption into the statute and reversed the release of Black persons who had been enslaved for over two decades.[170] In 1837, the Court held that enslaved persons who were taken out of the country and then brought back in were not "imported" under the meaning of the Slave Trade Act,[171] thereby rendering their re-enslavement in America permissible.[172] In 1842, the Court struck down a Pennsylvania statute prohibiting the return of enslaved Black people who escaped their conditions in the South.[173] The Court split on the issue of whether states could enact legislation that supported federal law, with five justices answering in the negative and three justices, including Taney, answering in the affirmative.[174] The dissenting view became law a decade later, when the Court upheld an Illinois statute barring the harboring of runaway enslaved persons.[175]

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165. *See, e.g.*, The Brigantine Amiable Lucy v. United States, 10 U.S. (6 Cranch) 330 (1810); U.S. v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1805); Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805); *see also* Leslie Friedman Goldstein, *Slavery and the Marshall Court: Preventing "Oppressions of the Minor Party?,"* 67 MD. L. REV. 166, 183-99 (2007).

166. Goldstein, *supra* note 165, at 198.

167. The Antelope, 23 U.S. (10 Wheat.) 66 (1825).

168. *Scott*, 7 U.S. at 330-31.

169. Mason v. Matilda, 25 U.S. 590 (12 Wheat.) (1827).

170. *Id.*

171. Act Prohibiting Importation of Slaves, ch. 22, 2 Stat. 426 (1807).

172. The Garonne, 36 U.S. (11 Pet.) 73 (1837).

173. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

174. *Id.*

175. Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).

In 1847, the Court rejected a constitutional challenge to the Fugitive Slave Act of 1793 and opined that "Southern participation in the union imposed a promise on the Constitution protecting the institution of slavery" and that "this court has no alternative, while they exist, but to stand by the constitution and the laws with fidelity to their duties and their oaths."[176] The attorney for the enslaved persons, Salmon Chase, argued that the law violated the Fourth, Fifth and Tenth Amendments; the Court ignored those arguments.[177] After the decision, Chase declared that the Court "cannot be trusted at all" as far as slavery was concerned.[178] In 1851, in a dispute over whether enslaved persons sent from Kentucky to Ohio and Indiana for work were freedmen and thus not fugitives, the Court upheld the Kentucky courts' judgment and ruled that the status of the enslaved persons in question (and enslaved persons generally) is the exclusive province of state courts.[179] Roger Taney, the eventual author of *Dred Scott*, included unnecessary pro-slavery dicta in the decision.[180] Professor Wiecek wrote that Taney's opinion "implied that Congress could not constitutionally impose an enforceable condition on the admission of a new state that it abolish slavery."[181]

Even on matters seemingly unrelated to chattel slavery, the Supreme Court made decisions with the peculiar institution in mind, and, more often than not, those decisions advanced the interests of slavery's defenders. For example, chattel slavery shaped the Court's antebellum commerce clause jurisprudence.[182] In the 1820s, there was longstanding debate over whether the regulation of interstate commerce was solely the province of the federal government or the responsibility of both the federal government and the states.[183] In 1837, however, the Supreme Court recognized a state "police power" for the first time and validated a New York statute requiring shipmasters entering the state to provide a list of the names of all passengers on their ships.[184] As Finkelman noted, the fear that a contrary ruling would hinder Southern states' ability to regulate both enslaved and free Black

176. Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229, 231 (1847).

177. Wiecek, *supra* note 153, at 48-49.

178. *Id.* at 49.

179. Strader v. Graham, 51 U.S. (10 How.) 82 (1851).

180. *Id.*

181. Wiecek, *supra* note 153, at 54.

182. Finkelman, *supra* note 150, at 263.

183. Wiecek, *supra* note 153, at 50.

184. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

persons within their borders inspired the Court's decision.[185] The Court issued two additional commerce clause decisions that year that upheld state authority to regulate matters of commerce within their borders.[186] In 1841, the Court decided *Groves v. Slaughter*,[187] a case that emphasized the justices' differing opinions on the interplay between state police power and federal commerce clause power.[188] The end result, however, was judicial validation of a sale of slaves made in apparent violation of Mississippi's state constitution.[189]

The Supreme Court's pre-Civil War decisions tended to favor slaveholders' interests. Finkelman noted only two exceptions to this general trend.[190] One case was *The Amistad*,[191] in which a Portuguese slave trader brought Sierra Leone nationals to Cuba illegally (under Spanish law) and sold them to Spanish slaveholders in 1839.[192] The slaveowners tried to ship them to plantations they had in the Caribbean, but the African nationals rebelled, took over the ship, and demanded that their "purchasers" sail back to their homeland.[193] The Spanish men began sailing toward Africa but turned the boat around at nightfall and sailed into U.S. waters, where they were ultimately captured near New York and brought to Connecticut.[194] There was much court action the following two years, including bogus murder indictments against the Sierra Leone nationals; an admiralty action that the commander of the survey brig that captured the *Amistad* brought, in which the Cuban slaveholders intervened and claimed ownership of the Africans, and the Africans argued that they were legally free; and abolitionists had the slaveholders

185. Finkelman, *supra* note 150, at 266, 275-76.

186. David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE. L. J. 471, 473-74, 477-82 (1983); *see* Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

187. Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841).

188. Wiecek, *supra*, note 153, at 49-51.

189. *Groves*, 40 U.S. 449.

190. Finkelman, *supra*, note 123, at 426 n. 14.

191. The Amistad, 40 U.S. (15 Pet.) 518 (1841).

192. Wiecek, *supra* note 153, at 40.

193. *Id.*

194. *Id.*

arrested and charged with false imprisonment in New York.[195] The Supreme Court's decision in the Africans' favor came as a surprise to everyone,[196] and while it was a win for anti-slavery advocates, it certainly was not an anti-slavery opinion in its rationale. As Professor Brandon Hasbrouck pointed out, the *Amistad* decision would have likely gone the other way were the Sierra Leone nationals *legally* enslaved under Spanish law.[197]

The second case, *Norris v. Crocker*,[198] was more of a technical win than a substantive one. The plaintiff, Kentucky native John Norris, went to Michigan in 1849 with eight of his fellow statesmen to recapture a family of enslaved persons who ran away from his plantation.[199] He seized four of them and started back to Kentucky.[200] While travelling through Indiana, an armed posse that included the local sheriff stopped Norris and his crew and served him with a writ of habeas corpus.[201] After proceedings at the local court, the judge released the enslaved family members, who returned to Michigan and continued on to Canada.[202] Norris later filed a lawsuit in the federal court of Indiana against everyone allegedly involved in helping the enslaved family escape, including the sheriff and the attorneys for the formerly enslaved persons.[203] He filed a separate action under the Fugitive Slave Act of 1793 to recover $500 for each formerly enslaved person from each of the approximately forty-six named defendants.[204] However, his lawsuit came after the Fugitive Slave Act of 1850, which did not include such a provision.[205] Thus, the Supreme Court ruled that Norris's failure to sue prior to the enactment of the

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195. *Id.* at 40-42.

196. *Id.* at 43.

197. Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 110-11 (2022) (citing The Amistad, 40 U.S. at 593).

198. 54 U.S 429 (1851).

199. Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of "Justice Delayed,"* 78 IOWA L. REV. 89, 93 (1992).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 94.

204. *Id.* at 94-95.

205. Norris, 54 U.S. at 439 (1851).

Fugitive Slave Act of 1850 cost him the right to sue under the Fugitive Slave Act of 1793.[206] This "victory" for the abolition cause was more technical than substantive.

Aside from those two cases, Supreme Court antebellum jurisprudence had a consistent pro-slavery slant.[207] Chief Justice Taney, who remained on the bench until his death in 1864, stood ready to promote and protect chattel slavery during the Civil War.[208] He drafted a supplement to his *Dred Scott* decision in response to northern courts' rejection of that decision.[209] He also wrote "anticipatory opinions" to strike down several pieces of Civil-War legislation and to require the return of confederate "property."[210] His efforts to preserve chattel slavery ultimately failed. The 1863 Emancipation Proclamation,[211] the end of the Civil War in April 1865, and the ratification of the Thirteenth Amendment in December 1865 brought about the formal end of chattel slavery in America.[212] Thus, the ultimate abolition of slavery was a product of legislative and executive actions. By contrast, America's federal judicial branch played no affirmative role in ending chattel slavery in America.

One may be inclined to discount the Court's pro-slavery stance as a relevant stain on the Court today. After all, chattel slavery no longer exists. The Thirteenth Amendment overruled *Dred Scott*, and the Court's slavery-related precedents are generally dead letter law. However, while chattel slavery may have ended, the Court's position on African Americans' place in the racial hierarchy certainly did not. Far from seeing Black people as "equal citizens" with whites, the Court's Anti-Black attitudes that were plainly evident in its slavery precedents persisted into the Reconstruction Era, a period in which the Court inflicted lasting damage on both state and federal efforts to bring about racial justice and equity.

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206. *Id.* at 440.

207. *See* Goldstein, *supra* note 165, at 183-99; Wiecek, *supra* note 153.

208. Wiecek, *supra* note 153, at 57-58.

209. *Id.* at 58.

210. *Id.*

211. Proclamation No. 17 (Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863).

212. Nicholas J. Dilley, *Constitutional Amendments – Amendment 13 – "The Abolition of Slavery,"* RONALD REAGAN PRESIDENTIAL LIBR. AND MUSEUM, https://www.reaganlibrary.gov/constitutional-amendments-amendment-13-abolition-slavery#:~:text=Amendment%20Thirteen%20to%20the%20Constitution,except%20as%20a%20criminal%20punishment (Last visited Nov. 1, 2023).

C. *The Supreme Court as a Killer of Reconstruction*

Following the end of the Civil War, war-torn America entered the Reconstruction Era. the Radical Republicans, a group of the most left-wing members of the Republican Party, controlled Congress.[213] The Radical Republicans envisioned a new social order in the South in which African Americans enjoyed all the rights and privileges of citizenship.[214] However, the South—via state government officials as well as private actors—violently resisted any attempts to place Black people on equal footing with whites. Thus unfolded the saga of America's first racial equality experiment: a half-hearted movement towards racial equality that produced meaningful gains but ultimately ended in failure. A host of factors contributed to the fall of Reconstruction. The United States Supreme Court played one of the biggest roles in decimating Reconstruction.

Of the three branches of government, the legislative branch was the most supportive of Reconstruction. Congress passed the Thirteenth Amendment in January 1865, prior to the end of the Civil War.[215] In February 1866, a couple months after the Thirteenth Amendment was ratified, Congress passed the Civil Rights Act of 1866, which mandated civil equality under the law and protected federal officials from meritless state persecution for trying to enforce federal law.[216] When President Andrew Johnson vetoed the bill, Congress overrode his veto in April 1866.[217] Congress then passed the Fourteenth Amendment in June 1866.[218] Its eventual ratification in July 1868 made equal protection the law of the land in the realm of civil rights.[219] Congress passed the Fifteenth Amendment in February 1869,

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213. *Radical Republican*, BRITANNICA, https://www.britannica.com/topic/Radical-Republican (Last visited Nov. 1, 2023).

214. *Id.*

215. U.S. CONST. amend. XIII.

216. *Civil Rights Act of 1866*, BALLOTPEDIA, https://ballotpedia.org/Civil_Rights_Act_of_1866#:~:text=The%20Civil%20Rights%20Act%20of,39th%20United%20States%20Congress%20and (last visited Nov. 1, 2023).

217. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

218. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment (last visited Nov. 1, 2023).

219. *Id.*; U.S. CONST. amend. XIV. *See* Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 198-99 (1998); Raoul Berger,

which prohibited race-based voting discrimination; three-quarters of states ratified it in February 1870.[220] Congress enacted three enforcement acts between May 1870 and April 1871 to give the Reconstruction Amendments true force, and they empowered the executive branch and the federal courts to crack down on racialized gang violence and Southern disenfranchisement.[221] Finally, before Democrats took office after thoroughly defeating the Republicans in the 1874 midterm elections, Congress hurriedly passed the Civil Rights Act of 1875, which barred racial discrimination in places of public accommodations and in the context of grand and petit jury service.[222]

Tellingly, Congress recognized the danger the Supreme Court posed to Reconstruction. After passing the Civil Rights Act of 1866, the Radical Republicans feared that the federal courts would invalidate the law.[223] For that reason, they sought to enshrine some of the law's major components into constitutional amendments to place them out of the High Court's reach.[224] The Court had already frustrated congressional efforts to use military tribunals as a vehicle for trying and punishing disloyal Americans during the war.[225] When a white news editor charged with sedition filed a lawsuit challenging the First Reconstruction Act, an 1867 law authorizing the division of the former confederacy into five military zones supervised by army generals, Congress responded with an amendment stripping the Court of jurisdiction to hear any appeals arising from the act.[226] After another Supreme Court decision "implicitly undermining the authority of the military commissions" set up in the South,[227] Congress considered proposals extinguishing

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The "Original Intent"—As Perceived by Michael McConnell, 91 NW. U. L. REV. 242, 253-55, 257-59 (1996).

220. U.S. CONST. amend. XV.

221. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870); Enforcement Act of 1871, ch. 99, 16 Stat. 433 (1871); Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871).

222. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

223. Calabresi, *supra* note 131, at 895-96.

224. *Id.*

225. *Ex parte* Milligan, 71 U.S. 2 (1866).

226. *Ex Parte McCardle*, BRITANNICA, https://www.britannica.com/event/Ex-Parte-Mc Cardle (last visited Nov. 1, 2023); *see Ex parte* McCardle, 74 U.S. 506 (1869).

227. Thomas John Carey, *Ex Parte Yerger*, MISSISSIPPI ENCYCLOPEDIA (last updated Apr. 14, 2018), https://mississippiencyclopedia.org/entries/ex-parte-verger/; *see Ex parte* Yerger, 75 U.S. 85 (1869).

altogether the Court's authority to hear habeas corpus petitions.[228] The Court's 1870s jurisprudence vindicated the Radical Republicans' concerns.

Executive branch support for Reconstruction was far more mixed. With the assassination of Abraham Lincoln in April 1865, Andrew Johnson was essentially the first Reconstruction Era president. Johnson, however, was no supporter of Reconstruction.[229] He encouraged southern states to ratify the Thirteenth Amendment, but only because he wanted to showcase ratification as proof that all was well and that northern regulation of southern affairs was unnecessary.[230] Johnson unconditionally pardoned almost every former confederate official, paving the way for their return to political office in the union.[231] He ignored the widespread violence against Black people in the South and fought every effort outside of the Thirteenth Amendment to bring about racial equality.[232] His veto of the Civil Rights Act of 1866 was one of fifteen of his vetoes that Congress overrode, the most of any president in U.S. history.[233] Johnson was so obstructionist that the Radical Republicans impeached him and came within one vote of removing him from office.[234] He failed to capture the Democratic Party nomination for president in 1868; instead, the party settled on New York governor Horatio Seymour.[235]

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228. Stanley I. Kutler, *Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 J. AM. HIST. 835, 849-50 (1967).

229. CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 14-31 (2016).

230. *Andrew Johnson and the Civil War Amendments*, BILL OF RIGHTS INSTITUTE, 1 (2009), https://billofrightsinstitute.org/activities/handout-a-andrew-johnson-and-the-civil-war-amendments.

231. ANDERSON, *supra* note 229, at 15.

232. *Id.* at 17-18, 22-31.

233. *Vetoes, 1789 to Present*, UNITED STATES SENATE, https://www.senate.gov/legislative/vetoes/vetoCounts.htm (last visited Nov. 1, 2023).

234. *Historical Highlights: The Impeachment of President Andrew Johnson*, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1851-1900/The-impeachment-of-President-Andrew-Johnson/ (last visited Nov. 1, 2023).

235. Elizabeth R. Varon, *Andrew Johnson: Campaigns and Elections*, UNIVERSITY OF VIRGINIA MILLER CENTER, https://millercenter.org/president/johnson/campaigns-and-elections (Last visited Nov. 1, 2023).

Republican nominee Ulysses Grant ultimately won the White House in the 1868 election.[236] Grant, a former union general, was far more supportive of Reconstruction during his first term than Johnson ever was. To be clear, Grant was not necessarily bothered by the South's resurrection of slavery via the enactment of black codes.[237] However, Grant was troubled by both the widespread violence and Southern governments' intimidation of federal officials. Before becoming president, Grant sought to protect federal officials from Southern state wrath with "General Order No. 3, which barred the prosecution of federal officials in state courts, as well [as] the prosecution of [U]nion loyalists and the unequal prosecution of persons of color."[238] The substance of this order was federally codified in the Civil Rights Act of 1866, and the Fourteenth Amendment made the equal protection portion an official constitutional commandment.[239]

As president, Grant signed the Fifteenth Amendment and the three Enforcement Acts into law.[240] In the third Enforcement Act, Grant expressly tasked Congress with devising a solution to address the ubiquitous carnage in the South.[241] Congress answered the call with the Ku Klux Klan Act of 1871.[242] With these laws, and the support of the newly established Department of Justice,[243] the Executive Branch cracked down on the Klan and other white supremacist gangs, and African

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236. *Presidential Election of 1868: A Resource Guide*, LIBR. OF CONG., https://guides.loc.gov/presidential-election-1868 (last visited Nov. 1, 2023).

237. ANDERSON, *supra* note 229, at 20.

238. Zamir Ben-Dan & Rigodis Appling, *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, 73 RUTGERS U. L. REV. 1373, 1390 (2021).

239. Hurd v. Hodge, 334 U.S. 24, 32 (1948).

240. Ron Chernow, *What a Simple Pen Reminds Us About Ulysses S. Grant's Vision for a Post-Civil War America*, SMITHSONIAN MAGAZINE (Nov. 2017), https://www.smithsonianmag.com/history/president-grant-pen-vision-civil-war-america-180965218/#:~:text=The%2015th%20Amendment%20prevented%20states,fought%20for%20during%20the%20war.; Kianna Wright, *The Enforcement Act of 1870 (1870-1871)*, BLACK PAST (Dec. 11, 2019), https://www.blackpast.org/african-american-history/the-enforcement-act-of-1870-1870-1871/.

241. Cong. Globe, 42nd Cong. 1st. Sess. 217, 72 (1871).

242. *The Enforcement Acts of 1870 and 1871*, U.S. SENATE (Aug. 8, 2023), https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.

243. *History of the Dep't of Justice*, THE U.S. DEP'T OF JUSTICE, https://www.justice.gov/history (last updated May 13, 2023).

Americans began to experience some semblance of freedom.[244] By 1872, the Klan was on the verge of collapse.[245]

However, the successes of Reconstruction during Grant's first term became a political liability for the Republican Party. Democratic politicians successfully painted the government as being overly sympathetic to Black people at the expense of poor whites.[246] The economic collapse in 1873, which wiped out scores of small white farmers throughout the South, further complicated matters.[247] Growing Northern opposition to the Justice Department's vigorous prosecutions of Klan leaders also helped to turn the political tide.[248] Consequently, Grant began making political maneuvers to increase his chances of re-election in 1872.[249] He promised Southern politicians via his Attorney General George H. Williams that he would lessen the vigor of federal prosecutions if they could prove that "the danger from Ku Klux violence has ceased and that such unlawful associations have been abandoned . . . ."[250] The Klan responded by ensuring that the 1872 presidential election "was the most violence-free election during the entire period of Reconstruction."[251] The Grant administration followed through by winding down and ultimately abandoning civil rights enforcement by the summer of 1873.[252]

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244. RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 26-28 (2003); P*rotecting Life and Property: Passing the Ku Klux Klan Act*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/000/protecting-life-and-property-passing-the-ku-klux-klan-act.htm (last visited Nov. 1, 2023).

245. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 at 76-77 (2005).

246. WORMSER, *supra* note 244, at 28-29; Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice Versa*, 112 COLUM. L. REV. 1585, 1588 (2012) ("[D]uring the 1870s the efforts of the federal government to uplift and protect former slaves came to be seen by many white Americans as a form of favoritism, which in effect discriminated against the white population.").

247. WORMSER, *supra* note 244, at 28-29.

248. KACZOROWSKI, *supra* note 245, at 44-45, 75-76, 78.

249. *Id.* at 80.

250. *Id.* at 87-88.

251. *Id.*

252. *Id.* at 88-89.

The Democratic Party mobilized the Southern electorate and began "redeeming" the legislatures and governorships from Republican rule.[253] In 1873, Democrats captured the governments in four states, and in 1874 they "redeemed" two more states, gained a majority in the U.S. House of Representatives, and narrowed the Republican lead in the U.S. Senate.[254] From 1872 forward, the Grant administration and the Republican Party lost interest in promoting civil rights in the hopes of remaining politically competitive.[255] When violence resurged with a vengeance throughout the South, the Grant administration refused to intervene to address it.[256] The next president, Republican Rutherford Birchard Hayes, received the White House on the condition that he officially end Reconstruction.[257] Hayes, who openly opposed Reconstruction during his campaign,[258] followed through on that condition in April 1877.[259] Thus, executive branch support for Reconstruction was nonexistent during the first few years, then peaked between 1869 and 1873, only to then taper off and die out by 1877.

The judicial branch was the only branch of government that never supported Reconstruction. As noted earlier, the Court weakened the power of military tribunals with an 1866 decision where it held that military trials of citizens were unconstitutional where civil courts existed.[260] This decision threatened the essence of Reconstruction, given the role the military played in its implementation and given how purposely useless Southern courts were in providing any semblance of justice for Black people. Also, in 1866, the Court thwarted Congress's attempt to keep former Confederate officials from practicing in the federal courts. The Court ruled that the 1865 law barring former rebels from federal law practice was a bill of attainder and an ex post facto law, so the Court granted a green light to former traitors of the Union to rejoin both the federal practice of law and positions in the federal judiciary.[261] In 1872, the Court dulled the third section of the Civil Rights

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253. *See, e.g.*, Matthew Hild, *Redemption*, NEW GEORGIA ENCYCLOPEDIA (Jul. 21, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/redemption/.

254. WORMSER, *supra* note 244, at 29.

255. KACZOROWSKI, *supra* note 245, at 91-92.

256. WORMSER, *supra* note 244, at 29-30.

257. *Id*. at 32.

258. *Id.* at 30.

259. *Id.* at 32.

260. *Ex parte* Milligan, 71 U.S. 2. (1866).

261. *Ex parte* Garland, 71 U.S. 333, 277-81 (1866).

Act of 1866. That section permitted litigants to remove from state to federal court cases that "affect[ed] persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."[262] Yet the Court found that this section did not allow for removal of an axe murder case from Kentucky courts where a victim's dying declaration would be excluded based on state law barring Black people's testimony.[263]

The Court's jurisprudence in the mid-1870s was especially damaging and had far-reaching impacts beyond Reconstruction. In 1873, in two cases unrelated to race, the Supreme Court began its assault on the Fourteenth Amendment by narrowing its reach to the "privileges and immunities" accompanying U.S. citizenship.[264] In March of 1876, the Court handed down two horrific decisions. In one of them, the Court invalidated sections of the Enforcement Act of 1871 on the principle that neither of the last two Reconstruction Amendments actually gave citizens the right to vote.[265] Because the Fifteenth Amendment allegedly prohibited only "infringement" on the right to vote, the Court held that the two sections in dispute went beyond the amendment's command.[266]

In the other decision, the Court delivered a knock-out blow to federal Reconstruction efforts in a case stemming from one of the bloodiest massacres of the period.[267] The case arose out of an attempt to prosecute three of the ninety-seven white people responsible for the infamous Colfax Massacre in Colfax, Louisiana, in April 1873.[268] The Court invalidated a major section of the Enforcement Act of 1870 and held that the Constitution did not allow the federal government to punish private parties.[269] The Court required affirmative state action as a prerequisite to any

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262. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat 27 (1866).

263. Blyew v. United States, 80 U.S. 581, 591-92 (1872).

264. The Slaughter-House Cases, 83 U.S. 36, 74-75 (1873); Bradwell v. Illinois, 83 U.S. 130, 138-39 (1873).

265. United States v. Reese, 92 U.S. 214, 221 (1876).

266. *Id.* at 218-21.

267. United States v. Cruikshank, 92 U.S. 542 (1876).

268. Deborah Menkart, *April 13, 1873: Colfax Massacre*, ZINN EDUCATION PROJECT (last modified August 9, 2023), https://www.zinnedproject.org/news/tdih/colfax-massacre/; *see also* Bernice Bouie Donald, *When the Rule of Law Breaks Down: Implications of the 1866 Memphis Massacre for the Passage of the Fourteenth Amendment*, 98 B.U. L. REV. 1607, 1660 (2018).

269. *Cruikshank*, 92 U.S. at 554-55.

Fourteenth Amendment violation and disqualified state inaction from satisfying that mandate, despite congressional intent to the contrary.[270] Frederick Douglass criticized the state action doctrine in a speech years later, remarking that while states "shall not abridge the privileges or immunities of citizens of the United States," the Court "commits the seeming absurdity of allowing the people of a State to do what it prohibits the State itself from doing."[271] With that decision, the Court did not just strip the Fourteenth Amendment of its original purpose (so much for originalism); it left African Americans in the South to the mercy of state governments that everyone knew had no intention of protecting them from mob violence.

This reality became more pronounced as the Supreme Court continued its assault on Reconstruction legislation after the Reconstruction period ended in 1877. In January 1883, the Court invalidated the second section of the Ku Klux Klan Act of 1871 and found that the federal government had no authority under the Fourteenth Amendment to criminalize assault and murder in most circumstances.[272] This ruling set free a mob of twenty white people, including a sheriff, who had broken into a jail, kidnapped four Black men, killed one of them, and severely beaten the other three.[273] In October 1883, the Court decided *The Civil Rights Cases*, in which it struck down the Civil Rights Act of 1875 based on the rationale that Congress could

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270. *Id.*; *see* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 99-101 (1993); Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1074-76 (2009). *See also* Cong. Globe, 42nd Cong. 1st. Sess. 217, 459 (1871) (the congressional debates for the Ku Klux Klan Act of 1871, in which congressmen in support of the act expressly articulated that state inaction in the face of indiscriminate violence constituted a denial of equal protection. For example, Representative John Coburn of Indiana stated: "The failure to afford protection equally to all is a denial of it. Affirmative action or legislation is not the only method of a denial of equal protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or ask for redress of wrongs in court . . . and many other things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen . . . .").

271. Frederick Douglass, *The Civil Rights Mass Meeting Speech* (Oct. 22, 1883), TEACHING AMERICAN HISTORY (last modified July 28, 2023), https://teachingamericanhistory.org/document/the-civil-rights-case/.

272. United States v. Harris, 106 U.S. 629 (1883).

273. *Supreme Court Ruling Allows Racial Terror Violence to Continue*, EQUAL JUSTICE INSTITUTE, https://calendar.eji.org/racial-injustice/jan/22 (last visited Nov. 1, 2023).

not punish private conduct.[274] The decision applied to the states, but the Court left open the question of the statute's applicability to Washington, D.C. and other federal territories.[275] Rather facetiously, the Court remarked,

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[276]

Of course, the Court offered no acknowledgement of the significant role it played in gutting the beneficent legislation it spoke of. Nor did the Court explain how Black people could have possibly "shaken off the inseparable concomitants" of chattel slavery in the face of violently hostile state governments, a recently disinterested federal legislature, and a Supreme Court that empowered the Klan and other racial terrorists.

The reaction from Black people in America to *The Civil Rights Cases* was swift and righteous anger.[277] Bishop Henry McNeal Turner of the African Methodist Episcopal (A.M.E.) Church called the decision "barbarous"[278] and accurately predicted the violence that befell Black people in the ensuing decades: "Mark my word, there will be bloodshed enough over that decision."[279] He averred that the decision "absolves the allegiance of the negro to the United States" and that if the "decision is correct, The United States Constitution is a dirty rag" that should be "spit upon by every negro in the land."[280] Turner called for Black people to either

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274. *The Civil Rights Cases,* 109 U.S. 3, 24-25 (1883).

275. *Id.* at 19.

276. *Id.* at 25.

277. *See* Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 346 (2015).

278. LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 392 (1998) (quoting HENRY MCNEAL TURNER, RESPECT BLACK: THE WRITINGS AND SPEECHES OF HENRY MCNEAL TURNER 62-63 (1971)).

279. *Id.*

280. *See* ANDRE E. JOHNSON, THE FORGOTTEN PROPHET: BISHOP HENRY MCNEAL TURNER AND THE AFRICAN AMERICAN PROPHETIC TRADITION 73 (2014).

"prepare to return to Africa or get ready for extermination."[281] Many other Black people, who had "beg[un] to embrace the Constitution and the Declaration of Independence as symbols of their own freedom and equality," became disillusioned and ultimately shared his sentiments.[282]

Black people unaligned with the calls for emigration from America nonetheless spoke out against the Court's decision. Days after the opinion was issued, John Mercer Langston, an attorney and future congressman, delivered a speech in which he averred that the Court "would seem desirous of remanding us back to that old passed condition."[283] George B. Vashon, a Black attorney, criticized both the decision and the High Court for becoming "the voluntary exponents of a most degraded prejudice."[284] Blanche Kelso Bruce, the first Black person to serve a full term as U.S. senator, lamented that the decision constituted "the revival of [pro-slavery senator John C.] Calhoun's theory of State rights."[285] Black newspapers and editorials almost universally condemned the Court's decision, endorsed the dissent, and highlighted critics' statements.[286] Frederick Douglass offered a glum comparison between judicial enthusiasm to protect chattel slavery versus the Court's attitude towards the freedom of Black people:

> [W]hile slavery was the base line [sic] of American society, while it ruled the church and the state, while it was the interpreter of our law and the exponent of our religion, it admitted no quibbling, no narrow rules of legal or scriptural interpretations of Bible or Constitution. It sternly demanded its pound of flesh, no matter how much blood was shed in the taking of it. It was enough for it to be able to show the *intention* to get all it asked in the Courts or out of the Courts . . . Liberty has supplanted slavery, but I fear it has not

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281. *Id.* at 74.

282. *See* Rana, *supra* note 277, at 346-48.

283. Marianne L. Engelman Lado, *A Question of a Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1131-34 (1995) (quoting *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. GLOBE, Oct. 27, 1883, at 2).

284. *Id.* at 1146-47 (quoting George B. Vashon, *Another View of the Decision: Further Legislation Declared Necessary*, N.Y. GLOBE, Nov. 3, 1883, at 1 (letter to the editor from George B. Vashon)).

285. *Id.* at 1147 (quoting *Civil Rights Decision: Views of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2).

286. *Id.* at 1148-72.

> supplanted the spirit or power of slavery. Where slavery was strong, liberty is now weak.
>
> O for a Supreme Court of the United States which shall be as true to the claims of humanity, as the Supreme Court formerly was to the demands of slavery! When that day comes . . . . a Civil Rights Bill will not be declared unconstitutional and void, in utter and flagrant disregard of the objects and *intentions* of the National legislature by which it was enacted, and of the rights plainly secured by the Constitution.[287]

Douglass likened *The Civil Rights Cases* to other horrific events in history, including the *Dred Scott* decision and the Fugitive Slave Law of 1850.[288] He pointed out the contradiction between the Court's legal interpretation standards before and after the Civil War: while the Court emphasized history and the framers' intent in upholding slavery, it "utterly ignored and rejected the force and application of object and intention as a rule of interpretation."[289] That disregard was deliberate; the Court was determined to "construe[] the Constitution in defiant regard of what was the object and intention of the adoption of the Fourteenth Amendment."[290] The Court chose to reverse course on rules of constitutional interpretation: the originalist lens that the Court deployed with *Dred Scott* evaporated when interpreting the Fourteenth Amendment.

The Court also reversed course on its antebellum commerce clause jurisprudence, to the African Americans' detriment. As explained above, the Court constricted federal commerce clause power during the days of chattel slavery and recognized a state police power to regulate conduct and persons within its borders.[291] However, the Court switched gears in 1877 and invoked the commerce clause to strike down a Louisiana statute banning race-based discrimination in transportation.[292] That the plaintiff in the case, an African American woman, was travelling from one destination in Louisiana to another made no difference to the

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287. Frederick Douglass, *The Civil Rights Mass Meeting Speech* (Oct. 22, 1883), TEACHING AMERICAN HISTORY, https://teachingamericanhistory.org/document/the-civil-rights-case/.

288. *Id.*

289. *Id.*

290. *Id.*

291. *See supra* Part II.B.

292. Hall v. Decuir, 95 U.S. 485 (1877).

Court.[293] The high court dubiously proclaimed that laws like the one at issue "must come from Congress and not from the States."[294] Of course, Congress *did* pass a law prohibiting discrimination in transportation, but it was a statute the Court also overruled a few years later: the Civil Rights Act of 1875.[295] In any event, this decision paved the way for legalized segregation, which the Court sanctioned nineteen years later. Indeed, the Court justified its decision by noting the "burden" a carrier would have in going from one jurisdiction that banned racial segregation into another jurisdiction that required it.[296] However, as Professor Joseph William Singer pointed out, no state had a law that mandated racial segregation in common carriers in 1877.[297] In the absence of such a state law anywhere in the country, the Supreme Court "was already anticipating the legality, not only of the 'separate but equal' doctrine, but also of the Jim Crow doctrine of forced segregation."[298]

The Court's Reconstruction Era jurisprudence serves to rebut arguments that the Court was simply following prior precedents and normal rules of constitutional and statutory interpretation. There were no prior precedents to follow: slavery had been abolished, the Thirteenth Amendment rendered *Dred Scott* and the Court's slavery jurisprudence moot, and the Fourteenth and Fifteenth Amendments were both new. Additionally, the congressional history of the amendments and related legislation called for expansive readings of the amendments.[299] Yet the Court, bound by no prior precedents and faced with legislative guidance to interpret the protections of the amendments broadly, chose to give the amendments as narrow an interpretation as possible.[300] As Frederick Douglass rightfully noted, the Court applied rules of statutory construction liberally when it came to enforcing chattel slavery but strictly when it came to enforcing liberty and equality for Black people.[301]

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293. DeCuir v. Benson, 27 La. Ann. 1, 2 (1875).

294. *Hall*, 95 U.S. at 490.

295. *Id.*

296. *Id.* at 489.

297. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1396 (1996).

298. *Id.* at 1397.

299. *Id.*

300. *Id.* at 1396-97.

301. *See generally,* Douglass, *supra* note 287.

Of the three branches of government, the judicial branch did the most damage to America's first experiment in racial equality. It shredded the tools Congress assembled to combat racial violence, weakened the three newly ratified amendments to the constitution, and reversed course on its commerce clause precedents to the Black people's detriment. While activists may question the executive and legislative branches' sincerity in bringing about racial justice and equality,[302] the Supreme Court indisputably opposed anything resembling racial justice. Its jurisprudence signaled to the South—and to white supremacists all over the country—that the federal government would tolerate violence against Black people with impunity. That reality played out in the decades to come when thousands of Black people were lynched and subjugated throughout America.

D. *The Supreme Court as an Agent of Old Jim Crow*

Two realities defined Black-white relations in the decades after Reconstruction: stringent and thorough racial segregation and indiscriminate violence. As to the former, the North had already instituted apartheid before the Civil War.[303] Jim Crow laws sprang up throughout the South starting in 1875.[304] In the twentieth century, federal, state, and local governments collaborated with banks and private entities to segregate Black people across the country.[305] Government-sanctioned segregation created and continued to maintain drastic inequalities between Blacks and whites in terms of wealth, education, adequate housing, and health statistics.[306] Segregation was justified by emphasizing the "savage" nature of African Americans and other groups of color, an image reinforced by minstrel shows, human zoo exhibits, and a national eugenics campaign.[307]

As to the latter, extrajudicial killings became commonplace across the country, particularly in the South. Between 1889 and 1929, a Black person was

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302. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105-07 (2019).

303. Steve Luxenberg, *The Forgotten Northern Origins of Jim Crow*, TIME MAGAZINE (Feb. 12, 2019, 10:35 AM), https://time.com/5527029/jim-crow-plessy-history/.

304. Stanley J. Folmsbee, *The Origin of the First Jim Crow Law*, 15 J.S. HIST. 235 (1949).

305. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

306. *See Id.*

307. LOEWEN, *supra* note 64, at 163-64.

lynched, on average, once every four days.[308] Many lynchings were marked by extreme levels of sadism, with body parts collected as souvenirs.[309] Lynchings often were announced in advance, widely attended by hundreds to thousands of white people, and captured in photographs that participants willingly took without fear of reprisal.[310] The late 18th and early 19th centuries were also rocked by racial massacres in places like Atlanta, Georgia, in 1906; Tulsa, Oklahoma, in 1921; and Rosewood, Florida, in 1923.[311] The only successful coup in American history took place in Wilmington, North Carolina, in 1898, when the Republican government was overthrown and African Americans were either killed or chased out of town.[312] Many towns in America today remain almost exclusively (or exclusively) white because all the people of color were chased out of those neighborhoods.[313] Sexual violence against Black women was commonplace during Jim Crow, and a majority of the 70,000-plus women forcibly sterilized in America were Black and Brown.[314] The Klan was a powerful entity throughout the country and peaked at four million members in forty-eight states in the early 1900s.[315] With race war talks and calls for genocide against African Americans, America entered a dark period that historians refer to as the "nadir" of race relations.[316] The collective weight of racial oppression led to disproportionate social problems in the Black community, or the "tangle of pathology."[317]

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308. ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 39 (2010).

309. JAMES ALLEN ET AL., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 13-14 (2000).

310. *Id.* at 8-11, 17-18; LOEWEN, *supra* note 64, at 167.

311. LOEWEN, *supra* note 64, at 165-66.

312. *Nov. 10, 1898: Wilmington Massacre*, ZINN EDUCATION PROJECT, https://www.zinnedproject.org/news/tdih/wilmington-massacre-2/ (last visited Nov. 1, 2023). (For a fuller treatment of the coup, *see*. Sandra L. Rierson & Melanie H. Schwimmer, *The Wilmington Massacre and Coup of 1898 and the Search for Restorative Justice*, 14 ELON L. REV. 117 (2022)).

313. LOEWEN, *supra* note 64, at 166.

314. Abdallah Fayyad, *America's Shameful History of Sterilizing Women*, BOSTON GLOBE (Sept. 18, 2020, 5:25 AM), https://www.bostonglobe.com/2020/09/17/opinion/americas-shameful-ongoing-history-sterilizing-women/.

315. LOEWEN, *supra* note 64, at 165.

316. *Id.* at 167-70.

317. *Id.* at 167.

The legislative branch contributed to the anti-Black environment both through affirmative legislation and through inaction. In 1894, Congress repealed much of the three enforcement acts passed during Reconstruction.[318] During the Great Depression, Congress passed New Deal legislation designed to protect workers and rebuild the country from economic collapse.[319] While such laws appeared to be race-neutral, they were written with intent to exclude African Americans. This careful and deceptive drafting was the product of Congress taking cues from the Supreme Court's equal protection jurisprudence developed during the Old Jim Crow Era, as further discussed below.[320] After the Civil Rights Act of 1875, Congress passed no civil rights legislation for eighty-two years.[321] Every anti-lynching bill proposed during the Old Jim Crow Era failed to pass.[322] In fact, it took until March 2022 for Congress to pass its first anti-lynching bill—long after lynchings dried up in America.[323]

The executive branch also contributed to the anti-Black environment with several presidents who were either openly racist or deeply indifferent to African Americans' plight. Openly racist presidents included Grover Cleveland, Woodrow Wilson, and Herbert Hoover. Grover Cleveland sympathized with the former confederacy, attacked Republicans in his 1892 presidential campaign for promoting civil rights for Black people, and signed the repeal of the enforcement acts into

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318. Civil Rights Repeal Act, ch, 25, 28 Stat. 36 (1894); *see also, Civil Rights Repeal Act 28 Stat. 36 (1894)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/civil-rights-repeal-act-28-stat-36-1894#:~:text=In%20the%20Repeal%20Act%20of,been%20undermined%20by%20the%20Court (last visited Nov. 3, 2023).

319. Jim Powell, *Why Did FDR's New Deal Harm Blacks?*, CATO INSTITUTE (Dec. 3, 2003), https://www.cato.org/commentary/why-did-fdrs-new-deal-harm-blacks.

320. *Id.*

321. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957).

322. Amanda Shendruk, *The US Has Failed to Pass Anti-Lynching Laws 240 Times. This is all of them*, QUARTZ (Jul. 10, 2018), https://qz.com/1322702/the-us-has-tried-to-pass-anti-lynching-laws-240-times-and-failed-every-single-time.

323. Jeffery A. Jenkins & Justin Peck, *Congress Finally Passed a Federal Anti-lynching Bill – After 120 Years of Failure*, WASH. POST (Mar. 9, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/03/09/congress-finally-passed-federal-anti-lynching-law-after-120-years-failure/.

law.[324] Woodrow Wilson was an outspoken white supremacist who racially segregated the executive branch and the navy; surveilled Black newspapers, organizations, and union leaders; and proposed a legislative program to curtail Black people's civil rights that Congress ultimately rejected.[325] African American contemporaries saw Herbert Hoover as a racist, as he promoted a "southern strategy" in which he openly expelled Black people from positions within the Republican Party in an attempt to appeal to white voters long before Richard Nixon did the same.[326] Other presidents, such as Franklin Delano Roosevelt, did not openly espouse racist views but nonetheless showed relative indifference to anti-Black racism.[327] A few presidents, like Warren Harding and Calvin Coolidge, spoke out against lynchings and in favor of racial equality.[328] Such speeches, however, never translated into effective government action.

The Supreme Court played its part in blessing anti-Black violence during Reconstruction by preventing the federal government from intervening where the perpetrators were private individuals.[329] With respect to segregation, the Court tacitly hinted its approval of racial segregation in the 1877 common carrier case, *Hall v. DeCuir*.[330] In 1883, the Court upheld Alabama's anti-miscegenation statute and paved the way for states to (continue to) criminalize interracial relationships.[331] Anti-miscegenation statutes, which were common during chattel slavery, played an integral part in ensuring racial segregation, so much so that the Warren Court's

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324. Henry F. Graff, *Grover Cleveland: Domestic Affairs*, UNIVERSITY OF VIRGINIA MILLER CENTER, https://millercenter.org/president/cleveland/domestic-affairs; LOEWEN, *supra*, note 64, at 165.

325. LOEWEN, *supra* note 64, at 19-20.

326. Georgia F. Garcia, *Herbert Hoover and the Issue of Race*, 44 ANNALS OF IOWA, NO. 7, 507, 507-08 (1979).

327. *Confront the Issue: Roosevelt and Race*, FDR VIRTUAL LIBRARY TOUR, http://www.fdrlibraryvirtualtour.org/graphics/05-20/5-20-NewDeal_confront_pdf.pdf (last visited Nov. 4, 2023).

328. *See generally, President Harding Publicly Condemns Lynching*, HISTORY (Nov. 16, 2009), https://www.history.com/this-day-in-history/harding-publicly-condemns-lynching; Maceo Crenshaw Dailey, *Calvin Coolidge's Afro-American Connection*, 8 CONTRIBUTIONS IN BLACK STUDIES 77 (1986).

329. *See supra* Part II.C.

330. *Hall*, 95 U.S. at 490 (1877).

331. Pace v. Alabama, 106 U.S. 583 (1883).

eventual repudiation of Jim Crow brought about massive white fears of eventual interracial relationships and marriages.[332]

Thirteen years after *DeCuir*, the High Court was confronted with a very similar case, except that Mississippi law *required* segregation instead of prohibiting it.[333] Although *DeCuir* should have militated in favor of invalidating the statute, the Court upheld the law and based its seemingly contradictory decision on the state supreme court's claim that the law only regulated intrastate commerce.[334] That the train in question operated from Memphis, Tennessee, to New Orleans, Louisiana, (i.e., across state lines) made no difference.[335] These two decisions paved the way for the notorious *Plessy v. Ferguson* decision,[336] which the Court decided years after the first Old Jim Crow law in the nation was introduced in Tennessee.[337] Racial segregation, the high court ruled, was constitutional as long as the separate accommodations were equal.[338] *Plessy*, like *Dred Scott*, was not an anomaly; it was the natural culmination of the jurisprudence of the times.

In a set of three decisions in 1880, the Court tacitly gave states guidance on how to permissibly discriminate against Black people. In the first case, *Strauder v. West Virginia*, the Court reversed a criminal conviction where a Black defendant had an all-white jury by express operation of a state statute.[339] In the second case, *Virginia v. Rives*, the Court upheld a conviction under circumstances identical to *Strauder* but without any allegation that the state was directly responsible for the jury being all-white.[340] As historian Leon F. Litwack noted, "[t]he mere absence of [B]lacks on juries, no matter how complete and systematic, the Court held, did not prove conclusively 'that any Civil Right was denied'".[341] In the third case, *Ex parte Virginia*, the Court held that an individual acting on a state's behalf is a state actor

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332. *See* Rebecca Schoff, *Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis*, 95 VA. L. REV. 627, 632-40 (2009).

333. Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587 (1890).

334. *Id.* at 590-91.

335. *Id.* at 592-93 (Harlan, J., dissenting).

336. Singer, *supra* note 297, at 1400-01.

337. Folmsbee, *supra* note 304.

338. Plessy v. Ferguson, 163 U.S. 537, 543 (1896).

339. 100 U.S. 303 (1880).

340. 100 U.S. 313 (1880).

341. LITWACK, *supra* note 278, at 255.

for purposes of the Fourteenth Amendment.[342] With these cases, the Court shaped equal protection law for more than a century.[343] The takeaway from these three cases is that overt governmental discrimination violated the Fourteenth Amendment, but the mere presence of racially disparate impact without express governmental intent to discriminate does not offend the Constitution. Thus, all a state had to do to legally discriminate was deny a racially malicious purpose behind its actions and make said actions appear race neutral.[344]

Three cases illustrate this principle. Two of these cases concerned challenges to voting laws enacted after each respective state drafted new constitutions with the intent of excluding African Americans. In the first case, *Williams v. Mississippi*, a Black man indicted and convicted for murder challenged the jury selection in his case on the grounds that Mississippi law unconstitutionally excluded Black people from jury service.[345] In 1890, Mississippi adopted a new constitution that instituted a poll tax and literacy tests as conditions of, or prerequisites to, voting.[346] Mississippi law then required that persons be eligible to vote to qualify for jury service, and it entrusted state officials with discretion to determine who was eligible to vote and who was not.[347] In arguing that the jury selection was unconstitutional, the defendant, Henry Williams, pointed out that the constitutional convention had almost no Black representation and argued that the state constitution was drafted and hurriedly adopted without a vote for the purpose of excluding Black people.[348] Despite an admission from the Mississippi Supreme

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342. 100 U.S. 339 (1880).

343. Many scholars cite to Washington v. Davis, 426 U.S. 229 (1976) as the case that set forth an intent requirement for unconstitutional discrimination. However, Rives impliedly (if not expressly) found that racially disparate impact, without proof of discriminatory state action, does not establish an equal protection violation. Hence, the Court essentially required prove of intent to discriminate from the 1880's. Later cases in the late 19th and early 20th century further demonstrate this.

344. *See, e.g.*, Neal v. Delaware, 103 U.S. 370 (1881). Neal was very similar to Rives, but the Court in Neal reached a different result because the state conceded that Black people were being excluded on account of race. *See also* Bush v. Kentucky, 107 U.S. 110 (1883), as well as the related discussion by Professor Brando Simeo Starkey in *Criminal Procedure, Jury Discrimination & the Pre-Davis Intent Doctrine: The Seeds of a Weak Equal Protection Clause*, 38 AM. J. CRIM. L. 1, 13-16 (2010).

345. 170 U.S. 213 (1898).

346. *Id.* at 213-14.

347. *Id.* at 213-15.

348. *Id.*

Court corroborating Williams' argument,[349] the U.S. Supreme Court unanimously denied the equal protection challenge.[350] The Court found that neither the Mississippi constitution nor the subsequent statutes were discriminatory on their face, and the Court declined to find unconstitutional action in the absence of specific allegations that specific state officials were being overtly discriminatory.[351]

The second voting case, *Giles v. Harris*, featured a legal challenge to Alabama's constitutional provisions regarding voting.[352] Like Mississippi, Alabama also convened state officials to draft a constitution that excluded Black people from the ballot box.[353] Alabama's new constitution was ultimately adopted in 1901.[354] Jackson W. Giles, president of the Colored Man's Suffrage Association of Alabama (CMSAA),[355] filed the lawsuit on behalf of himself and five thousand other African Americans; he alleged that the state constitution and accompanying statutes were enacted with a discriminatory purpose and that state officials who administered the law fulfilled that purpose.[356] The framers of the new constitution succeeded: despite there being 181,471 eligible Black voters in Alabama in 1900, only 3,000 Black

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349. *Id.* at 222. The U.S. Supreme Court quoted the Mississippi Supreme Court as follows: "By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory within narrow limits, without forethought, and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone."

350. *Id.* at 225.

351. *Id.* ("It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi; nor is there any sufficient allegation of an evil and discriminating administration of them.").

352. 189 U.S. 475 (1903).

353. *Id.* at 482-83.

354. Sarah A, Warren, *Alabama Constitution of 1901*, ENCYCLOPEDIA OF ALABAMA (March 27, 2023), http://encyclopediaofalabama.org/article/h-3030.

355. Brian Lyman, *The Journey of Jackson Giles*, MONTGOMERY ADVERTISER (Feb. 7, 2022, 6:31 PM), https://www.montgomeryadvertiser.com/in-depth/news/2022/01/27/jim-crow-alabama-jackson-giles-supreme-court/7995760002/.

356. *Giles*, 189 U.S. at 482.

people were actually registered.[357] Nonetheless, the Court looked at the face of the statute, saw no language explicitly sanctioning racial discrimination, and rejected the challenge.[358] The Court went one step further and declared that it lacked jurisdiction to review the state officials' enforcement actions for constitutional noncompliance.[359] The Court rejected Giles's request for relief and suggested that the only remedy available to Giles was monetary damages.[360] Such a suggestion, however, was cruel irony; in Giles' suit for monetary damages the very next year, the Court stated that it did not have jurisdiction and denied his monetary damages claim.[361]

In the non-voting case, *Cumming v. County Board of Education of Richmond County*, the Richmond Board of Education voted to close the only Black high school in the county to open four elementary schools.[362] The decision left Black families without a public, non-sectarian high school to attend but did not deprive white students of the same.[363] Black parents sued the local board; they asserted that the decision violated the Equal Protection Clause of the Fourteenth Amendment.[364] Justice John Marshall Harlan, who dissented in *Plessy* and *The Civil Rights Cases*, wrote the unanimous decision dismissing the challenge.[365] The Court's rationale can be summed up as follows: "We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored school children of the county on account of their race."[366] Put another way, the board gave an economic excuse for its actions, the Court accepted the reason, and the Court found no unconstitutional discrimination.

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357. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT 295, 303-04 (2000).

358. *Giles*, 189 U.S. at 487.

359. *Id.* at 487-88.

360. *Id.* at 488.

361. Giles v. Teasley, 193 U.S. 146, 167 (1904).

362. Cumming v. Cty. Bd. of Educ., 175 U.S. 528, 533 (1899).

363. *Id.* at 533-35.

364. *Id.* at 529.

365. *Id.* at 541-42.

366. *Id.* at 544.

For the next few decades, the Court adhered to this narrow understanding of the Equal Protection Clause and invalidated governmental actions that were palpably discriminatory while sanctioning both private discrimination and less overt state discrimination.[367] The Court's jurisprudence regarding housing and real estate provides a fascinating example. In 1917, the Court invalidated a Kentucky statute that prohibited Black people from moving into white neighborhoods (and vice versa).[368] Interestingly, the Court largely avoided the Equal Protection Clause and grounded its decision instead in the Due Process Clause.[369] The Court voided similar laws in Louisiana and Virginia on similar grounds.[370] However, in 1926, the Court upheld the constitutionality of racially restrictive covenants because such covenants were private contracts.[371] In a 1926 case unrelated to race, the Court upheld the constitutionality of zoning ordinances.[372] Both zoning ordinances and racially

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367. *See, e.g.*, Marbles v. Creecy, 215 U.S. 63 (1909) (defendant's contention regarding an inability to receive an unfair trial in Mississippi given its racial prejudice is unsupported and thus insufficient to prevent extradition based on equal protection grounds); Thomas v. Texas, 212 U.S. 278 (1909) (no racial discrimination where defendant could not prove intentional discrimination); Martin v. Texas, 200 U.S. 316 (1906) (no racial discrimination where the petitioner only established the lack of Black people in either the grand jury that indicted him or the jury that convicted him); Brownfield v. South Carolina, 189 U.S. 426 (1903) (no Fourteenth Amendment violation where defendant failed to prove the jury commissioners' intent to discriminate); Tarrance v. Florida, 188 U.S. 519 (1902) (no racial discrimination where defendants could not prove intentional discrimination); Smith v. Mississippi, 162 U.S. 592 (1896) (no racial discrimination in jury selection where evidence of intent to discriminate lacking); *cf.* Roger v. Alabama, 192 U.S. 226 (1904) (reversal required where state law barred the introduction of evidence to support defendant's contention of jury discrimination).

368. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

369. *Id.* at 78, 82. The Court posed the issue this way: "[C]an a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?" The Court later concluded, "[w]e think this attempt to prevent the alienation of the property in question to a person of color . . . is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand."

370. *See* Harmon v. Tyler, 273 U.S. 668 (1927); City of Richmond v. Deans, 281 U.S. 704 (1930).

371. *See* Corrigan v. Buckley, 271 U.S. 323 (1926).

372. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

restrictive covenants played major roles in segregating America, and both tools had the Court's blessing.

One equal protection case outside of the Black-white paradigm, *Yick Wo v. Hopkins*,[373] has generally been viewed favorably as a decision that guaranteed equal protection for citizens and noncitizens alike.[374] This decision marked the first time that the Supreme Court found an equal protection violation from the discriminatory application of a facially neutral statute.[375] However, *Yick Wo* was an extreme outlier. The result was a product of extreme racial disparities—San Francisco city officials granted a waiver of the prohibition against laundry operations in wooden buildings to seventy-nine out of eighty white persons who sought a permit but denied the waiver to all 200 Chinese applicants[376]—coupled with the fact that officials failed to give a race-neutral explanation as to why they granted and denied said permits accordingly.[377] In 1885, the year before *Yick Wo*, the Supreme Court rejected a challenge to that very San Francisco ordinance despite the history of anti-Chinese discrimination that likely motivated the statute's enactment.[378] Because the law was worded in a race-neutral manner, the Court found no constitutional infirmity.[379] Therefore, *Yick Wo* was consistent with the Court's narrow definition of equal protection and its "racist intent" requirements.

The other tragic aspect of *Yick Wo* was how inconsequential it proved to be for African Americans. For example, *Yick Wo* could have made a difference in some of the voter disenfranchisement cases, but the Court declined to apply the decision to the facts in *Williams v. Mississippi* and omitted it entirely from its rationale in *Giles v. Harris*.[380] Indeed, the Court in *Williams* distinguished *Yick Wo* by claiming

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373. 118 U.S. 356 (1886).

374. *See, e.g.*, *May 10, 1886: Lee Yick Wins Equal Protection Under the Law Case*, ZINN EDUCATION PROJECT, https://www.zinnedproject.org/news/tdih/lee-yick-wins-equal-protection-case/ (last visited Nov. 1, 2023).

375. *Yick Wo v. Hopkins: Neutral Law and the Equal Protection Clause*, CONSTITUTIONAL LAW REPORTER, https://constitutionallawreporter.com/2016/03/15/yick-wo-v-hopkins-neutral-law-and-the-equal-protection-clause/.

376. *Yick Wo*, 118 U.S. at 373-74.

377. *Id.*

378. Soon Hing v. Crowley, 113 U.S. 703, 711 (1885).

379. *Id.* at 704-05, 710-11.

380. *See* Williams v. Mississippi, 170 U.S. 213, 223 (1898); Giles v. Harris, 189 U.S. 475 (1903).

that the ordinance in question was unconstitutional on its face,[381] an obviously false claim given the Court's holding in *Soon Hing v. Crowley*.[382] The Court further asserted that unlike the defendant in *Williams*, the petitioner in *Yick Wo* submitted actual proof of discriminatory enforcement instead of mere future possibility.[383] However, given the Court's express acknowledgement of discriminatory intent as articulated by the Mississippi Supreme Court, the absence of Black people from the jury pools was more than just mere possibility; it was the reality of the time.[384] As for *Giles*, the Court did not even bother to review the enforcement actions for constitutional compliance; the Court had no way of knowing whether *Yick Wo* applied to the facts in *Giles* and clearly had no interest in finding out.

The Court's Thirteenth Amendment jurisprudence during this period was largely negative. On one hand, the Court recognized that the amendment was not limited to state action and, in fact, prohibited private conduct.[385] The Court further invalidated statutes that obviously violated the amendment's proscription against involuntary servitude.[386] On the other hand, the Court generally interpreted the Thirteenth Amendment quite narrowly; as Professor William M. Carter noted, "the Court limited its reading of the Amendment to situations involving actual, forced labor."[387] In 1883, the Court declared that discrimination in public accommodations was not a "badge of slavery" that the Thirteenth Amendment prohibited.[388] The Court summarily dismissed a Thirteenth Amendment challenge in *Plessy*, again adhering to the narrow interpretation.[389] Then, in 1906, the Court shrank Congress's

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381. *Williams*, 170 U.S. at 223-24.

382. *Crowley*, 113 U.S. at 703.

383. *Williams*, 170 U.S. at 224-25.

384. *Id.* at 222.

385. Clyatt v. United States, 197 U.S. 207 (1905).

386. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219 (1911) (law that criminalized entering into a labor contract with fraudulent intent to violate it was unconstitutional where a presumption of fraudulent intent was created from the fact of breach); United States. v. Reynolds, 235 U.S. 133 (1914) (law that permitted private parties to pay the fines and court costs of a person convicted of a minor crime in exchange for the offending party's physical labor to pay off said costs violate the Thirteenth Amendment).

387. William M. Carter, *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1325 (2007).

388. *The Civil Rights Cases*, 109 U.S. at 20-32.

389. *Plessy*, 163 U.S. at 542-543.

enforcement power under the amendment.[390] Using the same rationale, the Court threw out convictions of "whitecapping"[391] farmers for using violence and threats thereof to force Black people to abandon their labor contracts.[392] The Court also denied a Thirteenth Amendment challenge to racially restrictive covenants on similar logic.[393] Outside of literal enslavement, the Thirteenth Amendment was neither useful nor effective during the late 18th and early-to-mid-19th centuries.

Other Supreme Court decisions either upheld its tortured interpretations of the Reconstruction Amendments or invalidated the actions in question where the constitutional violation was obvious. In 1908, the Court upheld a criminal conviction of a Kentucky college that educated Black and white students in the same classroom in violation of state laws mandating segregation.[394] In 1910, the Court upheld *Plessy* in a case where a Black railway passenger in Kentucky was forced to move from the first-class car for whites to a substantially lower quality car for Blacks.[395] In 1913, the Court put the final nail in the coffin of the Civil Rights Act of 1875 and held that it could not be applied to the District of Columbia nor to other federal territories because it was inapplicable to the states.[396] In 1914, the Court dismissed a challenge to an Oklahoma segregation statute on procedural grounds but opined in dicta that the failure to provide a luxury railway car for Blacks when such a car existed for whites violated equal protection.[397] In 1915, the Court

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390. *See generally*, Hodges v. United States, 203 U.S. 1 (1906).

391. "Whitecapping" was a practice among white farmers in the late 19th and early 20th centuries that used violence and the threat thereof to scare Black people; they usually did it to get African Americans to abandon land, breach labor contracts, and leave certain areas so whites could be more economically competitive. For further exploration, *see, e.g.*, William F. Holmes, *Whitecapping in Georgia: Carroll and Houston Counties, 1893*, 64 GA. HIST. Q. 388 (1980).

392. *Hodges*, 203 U.S. at 16 ("The meaning of this [amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation.").

393. *Corrigan*, 271 U.S. at 330.

394. Berea College v. Kentucky, 211 U.S. 45, 58 (1908).

395. Chiles v. Chesapeake & Ohio Ry., 218 U.S. 71, 77 (1910).

396. Butts v. Merch. & Miners Transp. Co., 230 U.S. 126, 138 (1913).

397. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151,160-64 (1914).

outlawed grandfather clauses as violative of the Fifteenth Amendment,[398] but Southern legislators, academics, and the media already doubted the constitutionality of such devices.[399]

In 1927 and 1932, the Court struck down two Texas statutes barring Black people from voting in Democratic party primaries; it was obvious government discrimination.[400] However, the third time was the charm: in 1935, the Court upheld the bar on Black people voting in a primary held by the Democratic party's state convention and concluded that the party's annually held state convention was not a state actor.[401] In 1937, the Court once again approved of poll taxes as permissible under the Fourteenth Amendment.[402] In 1938, the Court struck down a Missouri statute that offered funding for Black prospective law students to attend a law school out of state in lieu of allowing them to attend the state's only law school; the Court required that Missouri either integrate the sole law school in the state or build a separate and equal one for students of color.[403] In 1944, the Court finally found sufficient state action and shut down all-white primaries in Texas for good.[404] Given this history, the period from 1880 to 1945 was marked by relatively strict adherence to the state action requirement, legalized segregation, and the prohibition of both involuntary servitude and obvious racial discrimination.

The Court's Commerce Clause jurisprudence during Old Jim Crow also disfavored African Americans. As demonstrated above, the Court interpreted the Commerce Clause after Reconstruction in a manner that permitted segregation to thrive, even when its precedents contradicted each other.[405] In 1900, the Court upheld state legislation imposing exorbitant taxes on labor agents who sought to recruit Black workers to leave one state for another state with more favorable work

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398. Guinn v. United States, 238 U.S. 347, 364-68 (1915); Myers v. Anderson, 238 U.S. 368, 376 (1915).

399. *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUITY 69-70 (2004).

400. *See generally,* Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932).

401. Grovey v. Townsend, 295 U.S. 45, 55 (1935).

402. Breedlove v. Suttles, 302 U.S. 277, 283 (1937).

403. Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 339-54 (1938).

404. Smith v. Allwright, 321 U.S. 649, 664-65 (1944).

405. *Contrast Hall*, 95 U.S. 485 (1877)*, with Louisville, N.O. & T. Ry. Co.*, 133 U.S. 587 (1890).

conditions.[406] The Court found that such so-called "emigrant-agent laws" did not impose an impermissible burden on commerce.[407] In 1920, the Court rejected a challenge from a railway company that operated a railroad from Kentucky to Ohio.[408] The railroad was indicted for violating Kentucky's segregation statute and argued that a Kentucky law mandating segregation and an Ohio law prohibiting the same imposed conflicting obligations upon it and thereby violated the Commerce Clause.[409] This decision conflicted with another opinion five years prior in which the Court found that conflicting regulations unrelated to racial segregation *did* impose an unconstitutional burden on this very railroad.[410] In the name of maintaining racial hierarchy, the Supreme Court narrowed federal commerce clause power during slavery, widened it during Reconstruction, and contracted it again during Old Jim Crow.

One slight improvement in the Supreme Court's Old-Jim-Crow-Era jurisprudence was its criminal procedure precedents of the early twentieth century. Prior to the 1920s, the Court refused to disturb state criminal convictions on Fourteenth Amendment grounds except in cases where state-sanctioned racial discrimination infected jury selections.[411] However, the criminal justice landscape in the South was so abominable that criminal trials resembled legal lynchings instead of constitutional proceedings meant to honestly determine guilt or innocence.[412] With a growing national antipathy in the 1900s to both lynchings and the farce that was Southern justice, a few egregious cases presented opportunities for the high court to set a minimum floor regarding criminal defendants' rights.[413]

Hence, modern criminal procedure was birthed in the 1920s with the reversal of a few convictions of Black defendants condemned to die. In 1923, the Court reversed the convictions of six Black men in Arkansas whose trials were

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406. Williams v. Fears, 179 U.S. 270, 376 (1900).

407. *Id.* at 278.

408. South Covington & Cincinnati Street Ry. Co. v. Kentucky (*Covington II*), 252 U.S. 399, 400 (1920).

409. *Id.* at 400, 402-404.

410. South Covington & Cincinnati Street Ry. Co. v. City of Covington (*Covington I*), 235 U.S. 537 (1915).

411. Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 52-53 (2000).

412. *Id.* at 53-54.

413. *Id.* at 53-55.

dominated and controlled by white mobs determined to see six convictions.[414] The Court in separate cases reversed the rape convictions of two of the nine "Scottsboro Boys" and decided in 1932 that being provided an attorney on the morning of trial was unconstitutional.[415] The Court then held in 1935 that African Americans had been purposely kept off both the grand and petit juries in violation of federal law.[416] In 1936, the Court reversed the death sentences of three Black sharecroppers who were beaten severely and forced to confess to the crime.[417] In 1940, the Court reversed another conviction where the Black defendant was made to confess via torture.[418] In four of the five cases, the Supreme Court found that the Due Process Clause of the Fourteenth Amendment mandated some semblance of legitimacy, which all of the reversed cases lacked.[419] While the impact of these decisions is questionable,[420] they were at least a symbolic step in the right direction, given the continuous overrepresentation of Black people in the criminal judicial system since the end of chattel slavery.

Nonetheless, the Supreme Court largely remained committed to promoting white supremacy during the Old Jim Crow Era. Its Reconstruction-Era narrowing of the three post-Civil War amendments remained intact through Old Jim Crow.[421] Worse, the Court endorsed racist narratives about Reconstruction and regarded the period as a time of unexampled corruption (especially among newly emancipated African Americans), unwarranted congressional vindictiveness toward the South, and illegitimate constitutionalism.[422] Such accounts originated in academia, with "scholars" such as Columbia University professor William Archibald Dunning leading the way.[423] Despite the fact that racist narratives regarding Reconstruction

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414. Moore v. Dempsey, 261 U.S. 86, 92 (1923).

415. Powell v. Alabama, 287 U.S. 45, 64 (1932).

416. Norris v. Alabama, 294 U.S. 587, 588 (1935).

417. Brown v. Mississippi, 297 U.S. 278, 281-87 (1936).

418. Chambers v. Florida, 309 U.S. 227, 228 (1940).

419. *Id.* at 228-29, 236-41; Klarman, *supra* note 411, at 50.

420. KLARMAN, *supra* note 399, at 152-158.

421. *See* Foner, *supra* note 246, at 1600.

422. *Id.* at 1589-90.

423. J. VINCENT LOWERY ET AL., THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 77-78, 81-95 (2013).

were debunked in the 1930s and 1940s,[424] they found their way into U.S. Supreme Court decisions until the 1950s.[425] It was not until the tenure of the Warren Court that more accurate historical accounts replaced these narratives in Supreme Court opinions, and the narratives persisted beyond the 1950s in lower federal courts.[426]

Further, the Court's Old Jim Crow precedents only upheld the most narrowly interpreted constitutional rights for African Americans. Judicial decisions in favor of Black people affirmed the bare minimum; opposite rulings would have rendered the Reconstruction Amendments meaningless to a degree too obvious to go unnoticed. Take, for example, *Bailey v. Alabama*, which prohibited the criminalization of ordinary labor contract breaches.[427] The outcome was obvious; there was "virtual unanimity among lower courts" that such laws violated the Thirteenth Amendment.[428] Additionally, as noted earlier, the Court issued opinions in *Guinn* and *Myers* at a time when the constitutionality of grandfather clauses was in serious doubt. The criminal procedure cases of the 1920s and 1930s provided basic minimums for due process. As such, the High Court's decisions in cases like *Bailey* and *Guinn* "involve[d] fairly minimalist constitutional interpretations."[429]

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424. *Id.* at 96-99.

425. Examples of Supreme Court approval of racist Reconstruction narratives include a) the majority opinion in Collins v. Hardyman, 341 U.S. 651, 657 (1951), which cites to popular racist work *The Tragic Era* for the following quote: "The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction." and b) the plurality decision in U.S. v. Williams, 341 U.S. 70, 74-75 (1951), in which the plurality claimed "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate. While the discussion of the bill as a whole fills about 100 pages of the Congressional Globe, only two or three related to s 6, and these are in good part a record of complaint that the section was inadequately considered or understood."

426. Foner, *supra* note 246, at 1595-96.

427. *See Bailey*, 219 U.S. 219.

428. KLARMAN, *supra* note 399, at 73.

429. *Id.*

For the Supreme Court to have ruled any differently "would have essentially acquiesced in southern nullification of the Constitution."[430]

The Court's Old Jim Crow jurisprudence is palpably inconsistent with notions of racial justice. The three Reconstruction Amendments, which held real promise for racial justice and equality despite their flaws, were watered down to irrelevance. The Fourteenth Amendment doctrines of separate-but-equal and the discriminatory intent rule specifically demonstrated the Supreme Court's utter disinterest in enforcing Black people's federal rights as long as no state actor admitted to acting in a racially biased manner.

E. *The Supreme Court as a Purveyor of Xenophobia*

As with every other aspect of American life, race colored immigration policy. In the 19th and 20th centuries, people of different races emigrated from countries in Europe and Asia to the United States.[431] Additionally, the federal government promised citizenship to Mexicans who were living in territories that Mexico ceded to America after the Mexican-American War[432] In the late 1800s, the country began cracking down on immigration generally, but immigrants of color were treated worse that white immigrants.[433] While white immigration was restricted, immigration from countries predominantly populated by people of color was shut down by 1924.[434] Within the country, non-Black people of color were discriminated against at the state and local levels, and they were subject to violence

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430. *Id.*

431. History.com Editors, *Asian American Milestones: Timeline*, HISTORY (last updated Apr. 28, 2023), https://www.history.com/topics/immigration/asian-american-timeline; *Immigrants in the Progressive Era*, LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/immigrants-in-progressiveera/#:~:text=Between%201900%20and%201915%2C%20more,the%20previous%2040%20years%20combined (last visited Nov. 1, 2023).

432. Treaty of Peace, Friendship, Limits and Settlement art. 8, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922, 929 [hereinafter Treaty of Guadalupe Hidalgo].

433. MONICA MUNOZ MARTINEZ, THE INJUSTICE NEVER LEAVES YOU 151-66 (2018).

434. Maddalena Marinari, *The 1921 and 1924 Immigration Acts a Century Later: Roots and Long Shadows,* 109 J. AM. HIST. 271, 273 (2022).

and deportation irrespective of legal citizenship rights.[435] All three branches of government were actively involved in promoting white supremacy and racism against Asian Americans.

To stem the tide of Asian immigration, the Supreme Court affirmed congressional efforts to keep America white. The Court upheld the Chinese Exclusion Act of 1882[436] and the Scott Act[437] in a decision that trumpeted racial stereotypes about Chinese people.[438] The Supreme Court credited the California constitutional convention's negative assessment of Chinese Americans and averred that "the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals"; that Chinese immigration resembled "an Oriental invasion"; and that they were "a menace to our civilization."[439] The Court accused Chinese Americans of being "strangers in the land, residing apart by themselves" and being unable to "assimilate with *our* people."[440] The Court scorned Chinese people for "[n]ot being accompanied by families, except in rare instances,"[441] seemingly forgetting that the Page Act of 1875 essentially banned Chinese women from immigrating to America.[442] At the same time, the Court justified white anti-Chinese attitudes and the violence that accompanied them;[443] in its view, whites clearly must have been of high moral character and sought to protect their righteous civilization from immoral people. To sum up the Court's view of Chinese Americans: "Those laborers are not citizens of the United States; they are aliens."[444]

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435. *See* Nicole Grant, *White Supremacy and the Alien Land Laws of Washington State,* UNIV. OF WASH. SEATTLE CIVIL RTS. & LABOR HIST. PROJECT (2008), https://depts.washington.edu/civilr/alien_land_laws.htm; *see also* GABRIEL J. CHIN & ANNA RATNER, THE END OF CALIFORNIA'S ANTI-ASIAN ALIEN LAND LAW: A CASE STUDY IN REPARATION AND TRANSITIONAL JUSTICE 31 (2022).

436. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943).

437. Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888).

438. *See generally*, Chae Chan Ping v. United States, 130 U.S. 581 (1889).

439. *Id.* at 595.

440. *Id.* (Emphasis added).

441. *Id.*

442. Page Act of 1875, ch. 141, 18 Stat. 477 (1875).

443. *Chae Chan Ping,* 130 U.S. at 595.

444. *Id.* at 603.

In 1893, the Court upheld the Geary Act, a law that deemed that any Chinese person who did not have a valid certificate was unlawfully present in the United States unless "at least one credible white witness" could attest to their lawful entry and continued presence in the country.[445] Speaking to the law's "credible white witness" requirement embodied in Section 6 of the Act, the Court first commented favorably on Congress's election to grant Chinese people a chance to prove their legal residency instead of deporting them immediately.[446] The Court then justified the requirement by alluding to Congress's "experience" that Chinese persons were inherently untrustworthy and dishonest.[447] In doing so, the Court gave force to the white supremacist idea that Caucasian people are naturally truthful while persons of color are not.

The Court affirmed whiteness as a mark of Americanism in two landmark citizenship cases. In 1922, the Court rejected a Japanese national's naturalization application on the grounds that he was not white within the meaning of the law.[448] The High Court deemed the favorable comments in various amici briefs regarding "the culture and enlightenment of the Japanese people" irrelevant; race was the sole determining factor, and because of that factor, the Japanese petitioner did not qualify.[449] In 1923, the Court rejected an upper-caste Hindu's citizenship petition based on the same grounds.[450] The Court rejected the argument that Indians such as the petitioner descended from the so-called Aryan race; they claimed that the Aryan-origin contention has been "discredited by most, if not all, modern writers on the subject of ethnology."[451] In both cases, the Court justified its opinion by relying on prior precedents as well as "scientific authorities."[452] Of course, the prevailing "science" in the late nineteenth and early twentieth centuries exalted whiteness to the exclusion of other races, so the Court's reliance on said "science" was an endorsement of its racist tenets.[453]

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445. Geary Act of 1892, ch. 60, § 6 27 Stat. 25 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

446. *Fong Yue Ting*, 149 U.S. at 727-28.

447. *Id.* at 729-30.

448. Takao Ozawa v. United States, 260 U.S. 178, 198 (1922).

449. *Id.* at 198.

450. United States v. Bhagat Singh Thind, 261 U.S. 204, 215 (1923).

451. *Id.* at 210.

452. *Id.*; *Ozawa*, 260 U.S. at 198.

453. *See* KEHINDE ANDREWS, THE NEW AGE OF EMPIRE 7-11 (2021).

In one important respect, the Court went further than Congress and the president in discriminating against Asians in America. California passed an "alien land law" in 1913 that forbade Japanese Americans from owning farmland, and several other states (mainly in the West) followed suit.[454] In 1923, the Court upheld Washington's alien land law as a valid exercise of state police power.[455] Within a week, the Court sustained three other alien land laws on similar grounds.[456] On one hand, the Court discounted the Fourteenth Amendment's application because all non-citizens who could not naturalize were barred from land ownership.[457] On the other hand, the Court expressly sanctioned anti-Japanese discrimination in at least one case.[458] In 1948, the Court invalidated the *application* of California's land law in the petitioner's case, but it did not strike down the law itself.[459] The states themselves eventually repealed the alien land laws without Supreme Court intervention.[460]

Yick Wo, as discussed in the prior section, was a decision involving anti-Chinese discrimination, and as noted earlier, it marked the first time that the Court found an equal protection violation based on how a facially race-neutral statute was applied.[461] Unfortunately, *Yick Wo* was of little use in other anti-Asian bias cases. The Court handed down *Plessy* a decade after *Yick Wo*, and the Supreme Court extended *Plessy* beyond Black people to justify segregation of other persons of color. Across the Southwest and Western portions of the country, states segregated Mexican Americans and Asian Americans from whites.[462] In 1927, the Court

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454. Hardeep Dhillon, *The Making of Modern US Citizenship and Alienage: The History of Asian Immigration, Racial Capital, and US Law*, 41 L. & HIST. REV. 1, 23 (2023).

455. Terrace v. Thompson, 263 U.S. 197, 224 (1923).

456. *See* Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1926); Frick v. Webb, 263 U.S. 326 (1923).

457. *Terrace*, 263 U.S., at 218.

458. *Porterfield*, 263 U.S. 225. The Court in *Frick* noted in that both acts in *Porterfield* prohibited leasing land to or making agricultural contracts with Japanese "aliens" and nonetheless upheld the statute.

459. Oyama v. California, 332 U.S. 633, 647 (1948).

460. *See* Grant, *supra* note 435; *see also,* Chin & Ratner, *supra* note 435.

461. *Yick Wo v. Hopkins: Neutral Law and the Equal Protection Clause,* CONSTITUTIONAL LAW REPORTER, https://constitutionallawreporter.com/2016/03/15/yick-wo-v-hopkins-neutral-law-and-the-equal-protection-clause/ (last visited Nov. 5, 2023).

462. Juan F Perea, *Buscando America: Why Intergration and Equal Protection Fail to Protect Latinos*, 117 HARV L. REV. 1420, 1440-41 (2004).

permitted Mississippi to bar a Chinese child from attending an all-white school; the unanimous decision was a straightforward application of *Plessy*.[463]

The Supreme Court also legitimized the government singling out Japanese people during World War II. In the first of two landmark cases, the high court sustained a constitutional challenge to a conviction for violating a military-imposed curfew.[464] The Court excused the curfew as an understandable encroachment on Japanese Americans' liberty during wartime.[465] One year later, in 1944, the Court went further and condoned the entire detention program under similar rationale.[466] Incredibly, the High Court used the fact that thousands of Japanese detainees "refused to swear unqualified allegiance to the United States" and "requested repatriation to Japan" as justification for profiling them.[467] The Court did not consider that a group of mostly American citizens who were ripped from their homes, forced into prison camps, and subjected to indignities and abuse may reasonably not desire to support the very entity responsible for their conditions. With these two decisions, the Court, for the first time since the ratification of the Fourteenth Amendment, *permitted overt racial discrimination* if the government had a good excuse; in this case, the compelling interest was national security.[468] As some consolation, the Court announced another decision that very day that barred the continued detention of persons that the federal government admitted were loyal to the United States.[469]

Of course, not all the High Court's precedents were entirely negative. The Court did, for example, rule in 1898 that all persons born in the United States were citizens regardless of race or their parents' status.[470] The Court also established a baseline for due process in the immigration context. In 1896, on the same day it decided *Plessy*, the Court held that non-citizens who faced criminal charges were entitled to Fifth and Sixth Amendment rights and could not be imprisoned without a jury trial.[471] In 1903, the Court upheld the deportation of a sixteen-year-old

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463. Gong Lum v. Rice, 275 U.S. 78, 86-87 (1927).

464. Hirabayashi v. United States, 320 U.S. 81, 101 (1943).

465. *Id.* at 93-96.

466. Korematsu v. United States, 323 U.S. 214, 222-24 (1944).

467. *Id.* at 219.

468. *Id.* at 215-16.

469. *Ex parte* Endo, 323 U.S. 283, 302 (1944).

470. United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898).

471. Wong Wing v. United States, 163 U.S. 228, 233-37 (1896).

Japanese girl, but it did hold that a hearing of some sorts was required prior to removal.[472] As such, the Court made it possible to appeal violations of procedural due process in the immigration context. The government's bar was very low; the Court sanctioned the "investigation" the government conducted even though the petitioner had no counsel, did not understand what was happening in the proceedings due to a language barrier and legal jargon, and did have the opportunity to disprove the "pauper" label the government gave her.[473] However, it was a step up from the Court's decision a decade prior when it refused to even consider the appellant's claim and made no such pronouncements regarding due process.[474]

Nonetheless, the Court's treatment of Asian Americans remained consistent with its treatment of Native Americans and African Americans between 1795 and 1945. During this time, the Court as an institution was more committed to maintaining white supremacy than the other two branches of government.

III. THE PRESENT-DAY IMPACT OF THE SUPREME COURT'S RACISM

Part II of this article examined the Supreme Court's race-related jurisprudence over a span of 150 years. In 1795, the United States had already dispossessed Native Americans of land, and chattel slavery had been in full swing for over a century throughout the South and in parts of the North. From that point, Native American colonization intensified; chattel slavery lasted another six decades before finally coming to a bloody end; an attempt to reconstruct a multiracial democracy during Reconstruction failed miserably; Old Jim Crow and racial segregation became the law of the land; Black people were lynched in staggering numbers, sometimes as frequently as thrice a week; and increased immigration of Asians to America led to xenophobic violence and prohibitive legislation to keep people of color out of America. This 150-year span covers a period of profound racial inequality and injustice. Far more often than not, the Supreme Court's precedents advanced and maintained this racial inequality and injustice.

This Part will examine the impact of the Court's jurisprudential history on the present. The first section will discuss its doctrinal impact because some of the Court's cases remain good law. The second section will explore the deeper societal impact of the Court's race-related decisions because the law does not exist in a

472. Yamataya v. Fisher, 189 U.S. 86, 96-97 (1903).

473. *Id.* at 94.

474. *See* Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

vacuum. What happens in society helps to shape the law, and the Supreme Court's pronouncements and racial attitudes are of great practical importance.

A. *Doctrinal Impact of the Court's Race-Related Precedents from 1795-1945*

From a purely doctrinal standpoint, the Court's race-related jurisprudence has a limited, but significant, influence on the present. Some of the Court's decisions were plainly racist; other decisions announced rules that seemed neutral on their face but are nonetheless destructive to goals of racial justice and equity. This section will examine each in turn.

1. Doctrinal Impact – More Obvious Racism

In certain respects, the Court remained—and remains—as doctrinally racist as it was before 1945. Native American jurisprudence provides a clear example of this: Supreme Court jurisprudence continued to explicitly treat Native Americans as less-than, as people in need of paternalistic government supervision. For example, in 1955, the Court ruled that Native American land not recognized by U.S. statute or treaty fails to qualify as "property" under the takings clause of the Fifth Amendment and can therefore be taken without compensation.[475] The Court reasoned that the forcible taking of land was necessary for the development of civilization and that the federal government subsequently recompensed Native Americans "as a matter of grace, not because of legal liability."[476] Most shamefully, as Professor Crepelle points out, this holding directly contradicted a 1946 decision.[477]

The Court continued to promote colonization even after the other two branches of government attempted to shift gears on Native American policy. Beginning in the 1960s, Congress adopted a policy of promoting Native American self-determination by passing laws such as the Indian Self-Determination and Education Assistance Act of 1975.[478] The executive branch moved away from the assimilationism and colonialism of the late nineteenth and early twentieth century,

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475. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955).

476. *Id.* at 281-82.

477. Crepelle, *supra* note 98, at 556 (citing and quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946)).

478. Indian Self-Determination and Education Assistance Act of 1975, Pub.L. No. 93-638 (1975).

with presidents from John F. Kennedy to Ronald Reagan taking public steps and making public pronouncements favoring indigenous self-determination and opposing Native American colonization.[479] Both democratic branches of government have largely adhered to policies that support Native American self-determination.

Yet despite the other two branches' official change in federal Native American policy in the 1970's, the Supreme Court has undermined indigenous self-determination and whittled away at tribal jurisdiction. In 1978, for example, the Court held that tribes lack jurisdiction to prosecute non-Native Americans without congressional authorization and dismissed criminal charges against a white person for assaulting a tribal officer on indigenous land.[480] That decision, asserted Professor Crepelle, contained reasoning that "at times was deceptive, relied on inaccuracies, and introduced a new point of view" regarding the interpretation of federal Indian law that is plainly racist.[481] While that decision was purportedly superseded by statute,[482] the Court extended the logic of that decision three years later in a civil case where they held that Native American tribes lacked authority to regulate the activities on reservation land owned by non-indigenous persons unless either those persons "enter consensual relationships with the tribe" or those persons' behavior "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[483] Since 1886, the Court has "repeatedly affirmed Congress's plenary power over [Native Americans];" and its efforts over the last few decades to ground congressional authority in the commerce clause palpably lacks veracity.[484]

The Supreme Court further validated federal government failure to protect Native American property rights. The Court has consistently excused government mismanagement of Native American land and resources and has hamstrung Native American efforts to hold the government accountable.[485] As an additional example

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479. Elizabeth A. Pearce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L. REV., 361, 370 (1991).

480. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978).

481. Crepelle, *supra* note 98, at 558-67.

482. The Supreme Court apparently recognized that *Oliphant* and other cases were superseded by statute. *See* Lara v. United States, 541 U.S. 193 (2004).

483. Montana v. United States, 450 U.S. 544, 565-566 (1981).

484. Crepelle, *supra* note 98, at 553.

485. *Id.* at 590.

of inconsistent precedents Professor Crepelle wrote about, the Court ruled in 1985 that the state of New York unlawfully took land away from Native American tribes in New York in the late 1700s and early 1800s.[486] The Court further held that the Oneida tribe was free to sue for their property rights in court.[487] Yet in a volte-face two decades later, the Court held that the Oneida tribe could *not* vindicate their property rights because they waited too long to file: the taking happened in 1795, and the tribe did not file until 1970.[488] This decision flew in the face of basic property law principles regarding improper conveyance of title.[489] It is also an ironic conclusion considering that, as early as 1831, the Supreme Court barred a Native American tribe from vindicating its property rights in the "courts of the conqueror."[490] Additionally, as Professor Joseph William Singer pointed out, Eleventh Amendment sovereign immunity could bar such a lawsuit.[491] Despite the absurdity of the Court's opinion, the case remains good law, and the Oneida tribe remains deprived of their land without due compensation.[492]

Professor Crepelle described perhaps the biggest tragedy of the Supreme Court's Native American jurisprudence: racist ideology remains a central part of modern Native American case law and litigation.[493] Bigoted opinions from the 1800s and early-to-mid 1900s largely remain good law and are routinely cited in court opinions and litigation in contemporary times.[494] The Court—with liberal justice Ruth Bader Ginsburg writing the majority opinion—expressly approved of the discovery doctrine in the twenty-first century.[495] Such cases remain current despite government officials' admissions that they were misguided.[496] Thus, while the legislative and executive branches of government have moved away from the

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486. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985).

487. *Id.*

488. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005).

489. Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 610 (2006).

490. *See Cherokee Nation*, 30 U.S. 1; Johnson v. M'Intosh, 21 U.S. at 588.

491. Singer, *supra* note 107, at 42.

492. *Id.* at 46-47.

493. *See generally,* Crepelle, *supra* note 75.

494. Crepelle, *supra* note 98, at 553-54.

495. *See City of Sherrill*, 544 U.S. at 203 n.1.

496. Crepelle, *supra* note 98 at 556.

racist tropes and paternalism of the past, the Supreme Court has effectively infused it into federal law.

2. Doctrinal Impact – Less Obvious Racism

In other respects, the Court has shied away from some of its more racist opinions. Obviously, the Court's chattel slavery precedents are no longer in effect; chattel slavery ceased to be constitutionally sanctioned after the federal constitution was amended during Reconstruction. The Court made racially restrictive covenants, vital tools for ensuring residential segregation, unenforceable in 1948.[497] The Supreme Court rendered de jure segregation illegal in the United States when it overruled *Plessy v. Ferguson* in 1954.[498] Congress repealed its xenophobic immigration laws in the 1950s and 1960s, and "citizenship" ceased to be defined with racial qualifications.[499] The Court struck down state bans on interracial relationships first in 1964 and most famously in 1967.[500] The Court finally overruled *Korematsu v. United States* in 2018, although, ironically, it did so in an opinion that upheld President Donald Trump's xenophobic "Muslim Ban."[501] In certain respects, the Court has moved away from some its well-known racist precedents and no longer overtly espouses racism like it did before 1945.

That said, certain doctrines from the applicable period continue to promote racial injustice and inequality in the present. The state action requirement from Reconstruction is one example.[502] Created in 1876, the doctrine places private racial discrimination outside the ambit of the Fourteenth Amendment.[503] It has been used several times to invalidate antiracist government actions and to uphold mechanisms of private discrimination.[504] In fact, the framers of the Civil Rights Act of 1964,

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497. Shelley v. Kraemer, 334 U.S. 4, 40 (1948).

498. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

499. Immigration and Nationality Act of 1952, Pub. L. No. 82-414 (1952); Immigration and Nationality Act of 1965, Pub. L. No. 89-236 (1965).

500. Loving v. Virginia, 388 U.S. 1, 12 (1967).

501. Trump v. Hawaii, 138 S.Ct. 2392, 2423 (2018).

502. *See* Foner, *supra* note 245, at 1600, 1602-04.

503. *Id.*

504. Cases in which Fourteenth and Fifteenth Amendment claims were rejected on state action grounds include *The Civil Rights Cases*, 109 U.S. 3; *Hodges*, 203 U.S. 1; and *Corrigan, 271* U.S. 323.

which is touted as the most comprehensive civil rights legislation still in effect, were forced to turn to the commerce clause as the avenue to prohibit private discrimination in Titles II and VII.[505] As Professor Charles Lund Black observed in 1967, the state action doctrine

> immunizes racist practices from constitutional control. Those who desire to practice racism are therefore motivated, even driven, to test it through total possibility . . . The commitment of the Court to a single and exclusive theory of state action . . . would fail to correspond to the endless variations not only of reality as presently given, but of reality as it may be manipulated and formed in the hands of people ruled by what seems to be one of the most tenacious motives in American life. Such an arbitrary commitment would serve only to instruct racism in the essentials of evasory [sic] tactics; it would make the law, classically, "Their perch and not their terror."[506]

Five years later, the Court reversed course on state action and made the doctrine the perch of racists.[507] The Court has continuously declined to find state action with private entities.[508]

The Court's discriminatory intent rule is another example of an old doctrine that causes modern problems. The Court expanded the doctrine, which was created in 1880, in 1976 to cover claims under Title VII of the Civil Rights Act of 1964.[509] Four years later, the Court required proof of racist intent to prove discrimination under the Voting Rights Act of 1965.[510] In 1985, the Court expanded the rule to racially selective prosecution claims.[511] In 1987, the Court applied the rule to sentencing and concluded that the findings of racial bias revealed in the most exhaustive study ever assembled did "not demonstrate a constitutionally significant risk of racial bias," which effectively closed the courthouse doors to racial discrimination challenges.[512] Decisions like these make the discriminatory intent rule one of the most frustrating constitutional doctrines to deal with because it

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505. Singer, *supra* note 297, at 1401.

506. Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 90-91 (1967).

507. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

508. *See, e.g.*, Manhattan Community Access v. Halleck, 139 S.Ct. 1921 (2019); Blum v. Yaretsky, 457 U.S. 991 (1982).

509. Washington v. Davis, 426 U.S. 229, 238-240 (1976).

510. Thornburg v. Gingles, 478 U.S. 30, 80 (1986).

511. Batson v. Kentucky, 476 U.S. 79, 99-100 (1986).

512. McCleskey v. Kemp, 481 U.S. 279, 313 (1987).

renders the task of proving invidious racial discrimination virtually impossible unless the state is foolish enough to admit racist intent.[513]

The Court's precedents between 1795 and 1945 have had a limited doctrinal impact on the present, but the Court's jurisprudence has been far more damaging on a societal level.

B. *Deeper Societal Impact of the Court's Race-Related Precedents from 1795-1945*

Law, like any other discipline, does not exist in a vacuum; it influences and is influenced by the happenings of the surrounding society. The Court's decisions between 1795 and 1945 shaped laws, policies, and attitudes towards people of color, and societal racism similarly shaped the Court's views. The same was true after 1945, and the same is true today. America remains a racist country, and the Supreme Court is a product of America's racism and is significantly responsible for why America remains so. Regardless of what one thinks of it, the pronouncements of America's highest court carry a lot of weight, and its ideas are widely influential.

This section will set forth three main observations of the Court's race-related jurisprudential history that apply to the present. First, the Court has religiously prioritized protecting and advancing the interests of white people above the interests of all others. Second, the Court has consistently ignored and denied the idea that racism is widespread and systemic. Third, the Court has lived in the spirit of *Dred Scott v. Sanford* and deemed the rights of Black people unworthy of white people's respect.

1. The Supreme Court Has Religiously Prioritized Protecting and Advancing the Interests of White People Above the Interests of All Others.

American racism established a hierarchy of whites over nonwhites, with African Americans at the bottom. During the period examined in this article, the Supreme Court reaffirmed this hierarchy time and time again between 1795 and

513. Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1191-92 (2004) ("Doctrines such as standing, colorblindness, and the discriminatory intent rule limited access to the Court by subordinate groups, curtailed the availability of judicial remedies to plaintiffs properly before the Court, and made it extraordinarily difficult for states and Congress to address questions of racial inequality.").

1945. In its Native American precedents, it glorified European civilization and barbarized indigenous persons.[514] In *Dred Scott v. Sanford*, the Court opined that Black people's inferiority was well established from the time of the nation's founding.[515] In another case/other cases, the Court contrasted Asians to whites and casted Asians as immoral people and as "aliens."[516] In the 1920s, the Court was clear that citizenship was for white people; Asians could not work their way into citizenship.[517] The Court's precedents were clear: white people were civilized, moral, intelligent, and superior to Native Americans, African Americans, and Asian Americans.

The Court's endorsement of white superiority remains the most obvious with respect to Native Americans; the Court never entered a progressive period in Native American law like Congress and the White House. While the Court admittedly became more progressive as far as other groups of color (particularly African Americans) were concerned, it promoted racial equality on rationales that reaffirmed white superiority. The Court's landmark *Brown v. Board of Education* decision exemplifies this very well. The Court concluded that segregating Black children from whites "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be ever undone."[518] However, with no acknowledgement of systemic racism or white supremacy,[519] the Court's holding is essentially reduced to the proposition that Black children were unconstitutionally disadvantaged because they were not learning alongside "superior" white children. Dr. Kenneth Clark, the lesser architect of the famous doll test, concluded in a report that school segregation was bad for white children as well;[520] while his report was mentioned in a footnote in *Brown*,[521]

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514. *See, e.g.,* Johnson v. M'Intosh, 21 U.S. 543 (1823); Lone Wolf v. Hitchcock, 187 U.S. 533 (1903).

515. Scott v. Sandford, 60 U.S. 393, 416 (1857).

516. United States v. Bhagat Singh Thind, 261 U.S. 204, 207 (1923).

517. Takao Ozawa v. United States, 260 U.S. 178, 198 (1922).

518. *Brown*, 347 U.S. at 494.

519. *See infra* Part III.B.2.

520. *A Revealing Experiment: Brown v. Board of Education and "The Doll Test,"* LEGAL DEFENSE FUND, https://www.naacpldf.org/brown-vs-board/significance-doll-test/ (last visited Nov. 1, 2023).

521. *Brown*, 347 U.S. at 494 n.11.

that conclusion did not appear in the decision. Thus, while *Brown* is rightly lauded, its reasoning recertifies white superiority.

The Court's affirmative action precedents provide another example. In 1978, the Court invalidated an anti-racist remedial measure on Fourteenth Amendment grounds, thereby beginning the perverse inversion of the Equal Protection Clause as a means of promoting racial equality.[522] The petitioners in *Regents of California v. Bakke* advanced four rationales for implementing its affirmative action program.[523] Of the four reasons, Justice Lewis Powell—a segregationist who thought civil disobedience was "heresy" and Martin Luther King was an evil man for encouraging it[524]—embraced the only reason that benefited white people: the educational benefit of diversity in higher education.[525] Otherwise, as far the Court was concerned, all other reasons amounted to anti-white discrimination.[526]

Thus, in *Bakke* and other affirmative action cases, the Court saw white plaintiffs as "innocent parties . . . denied social benefits that they might otherwise have received."[527] The Court placed affirmative action on par with racial subjugation that included wholesale school segregation and Japanese detention.[528] One justice even compared affirmative action to chattel slavery and Old Jim Crow.[529] In the rare instances when affirmative action programs were found constitutional, it was only because the educational institutions amply demonstrated that white students would not be disadvantaged.[530] The Court's view of whites as innocent victims of affirmative action

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522. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978).

523. *Id.* at 305-06.

524. Lewis Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell Jr. Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229, 1230-32 (2015).

525. *Bakke*, 438 U.S. at 311-15.

526. *Id.* at 307-11.

527. Fran Lisa Buntman, *Race, Reputation, and the Supreme Court: Valuing Blackness and Whiteness*, 56 U. MIAMI L. REV. 1, 17-18 (2001) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) & Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)).

528. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-17, 223-26 (1995).

529. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 328-30 (2013) (Thomas, J., concurring).

530. *See, e.g.*, Fisher v. Univ. of Tex. at Austin II, 579 U.S. 365 (2016); Grutter v. Bollinger, 539 U.S. 306 (2003).

> is particularly disturbing given the pairings of guilt and innocence as linked binaries in the broader language and culture, and perhaps especially in the legal arena. If whites, who are no longer privileged by whiteness due to affirmative action decisions, are innocent, then the implication is that [B]lacks or other beneficiaries of affirmative action are guilty. In this logic or context, social goods are distributed in a zero-sum game, and redistribution is inherently unfair because the guilty are rewarded with social goods. Thus, African Americans and other affirmative action beneficiaries become guilty and responsible for the burden on individual whites.[531]

The Court's post-*Brown* decisions on education provide a third example. The Court made it clear in *San Antonio Independent School District v. Rodriguez*[532] and *Milliken v. Bradley*,[533] two cases decided in 1970, that only municipalities that obviously discriminated on the basis of race—i.e., had city ordinances or state statutes in place mandating racially separate schools—could be constitutionally forced to integrate and diversify their schools. Otherwise, white tax dollars did not have to be used to educate children of color (*Rodriguez*), and white parents did not have to suffer their children being educated with students of color (*Milliken*).[534] The Court reaffirmed this point in 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*.[535] Because there were no statutes or ordinances expressly requiring school segregation in Seattle prior to *Brown*, white parents could block efforts to make their children's classrooms diverse.[536]

The Court's precedents between 1795 and 1945 prioritized white people's interests above all others. That prioritization has continued until the present, and, with the Court's present ensemble, this reality is unlikely to change anytime soon.

2. The Supreme Court Has Consistently Ignored and Denied the Idea that Racism

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531. Buntman, *supra* note 527.

532. 411 U.S. 1 (1973).

533. 418 U.S. 717 (1974).

534. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 (1973); Milliken v. Bradley, 418 U.S. 747 (1974).

535. 551 U.S. 701, 721 (2007).

536. *Id.*

is Widespread and Systemic.

The Court's decision in *United States v. Cruikshank* provides one of the earliest examples of the Court shutting its eyes and ears to widespread racism in America.[537] At the time *Cruikshank* was decided, there was intense racialized violence throughout the South. The congressional debates surrounding the Ku Klux Klan Act of 1871 demonstrated massive awareness of the constant carnage.[538] *Cruikshank* itself began as a criminal case against three white people involved in one of the bloodiest pogroms in the Reconstruction Era, the Colfax Massacre, in 1873.[539] Thus, it would be absurd to think that the Court was not aware of what was happening during that time. Yet the Court's opinion read in the abstract would suggest so; the Court disabled the federal constitution as a tool for combatting racial violence and left the protection of African Americans to the very states that were obviously not interested in protecting Black people.[540]

Further, the Court's state action doctrine announced in *Cruikshank* is rooted in ignoring widespread racism. After *Cruikshank* and *The Civil Rights Cases*, private discrimination was placed outside the reach of the U.S. Constitution. As such, much of the discrimination African Americans faced in the decades after Reconstruction came from private forces. White men lynched Blacks as frequently as two to three times per week in the late nineteenth and early twentieth centuries, often for the entertainment of other white men, white women, and white children.[541] White civilians rioted many times in the early twentieth century, with the worst of the racialized violence taking place in 1919.[542] White homeowners, bankers, real estate agents, and homeowners associations used racially restrictive covenants and other tools to residentially segregate.[543] As monumental as *Shelley v. Kraemer* was, the clear message was that the Court was blind to overt racial discrimination as long

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537. *Lynching in America: Confronting the Legacy of Racial Terror,* EQUAL JUSTICE INITIATIVE (3d Ed., 2017), https://lynchinginamerica.eji.org/report/.

538. *See, e.g.*, Cong. Globe, 42nd Cong. 1st. Sess. 217, 322 (speech of Representative William Stoughton of Michigan), 333-34 (speech of Representative George Hoar of Massachusetts), 394-95 (speech of Joseph H. Rainey of South Carolina), 428 (speech of Representative John Beaty of Ohio) (1871).

539. *Lynching in America*, *supra* note 537.

540. United States v. Cruikshank, 92 U.S. 542, 567–68 (1875).

541. LITWACK, *supra* note 278, at 284.

542. LOEWEN, *supra* note 64, at 165-66.

543. ROTHSTEIN, *supra* note 305, at 78-91.

as the government was not involved.[544] The Court got creative with the state action doctrine during the Civil Rights Movement in decisions like *Burton v. Wilmington Parking Authority*[545] and *Evans v. Newton*,[546] but never struck it down. During the post-movement backlash, the Court narrowed its reach with its decision in *Moose Lodge No. 107 v. Irvis*,[547] and it has continued to limit the applicability of the doctrine to private actors.[548]

The Court continued to deny the existence of widespread racism even when confronted with evidence of the same. The plaintiff in *Soon Hing v. Crowley* set forth allegations demonstrating the anti-Chinese bias that led to the enactment of the ordinance in question, an ordinance that impacted the operation of a business common to Chinese Americans.[549] Yet the Court did not care; because the statute did not expressly mention Chinese people, the Court found the ordinance constitutional in 1885.[550] The defendant in *Williams v. Mississippi* asserted facts showing Mississippi state officials' concerted effort to deny Black people the right to vote and, by extension, the right to sit on grand and petit juries.[551] Even though the Mississippi Supreme Court admitted this concerted effort, the U.S. Supreme Court did not care; because the laws in question did not specifically mention Black people, they were constitutional.[552] In 1903, the plaintiff in *Giles v. Harris* also provided evidence of Alabama state officials' deliberate effort to disenfranchise Black people.[553] The Court not only did not care, but it also proclaimed itself powerless to examine the Alabama government's motives.[554]

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544. *Kraemer*, 334 U.S. at 13. "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment."

545. 365 U.S. 715 (1961).

546. 382 U.S. 296 (1966).

547. 407 U.S. 163 (1972).

548. Soon Hing v. Crowley, 113 U.S. 703, 706 (1885).

549. *Id.* at 710.

550. *Williams*, 170 U.S. at 214.

551. *Id.* at 215-25.

552. *Giles*, 189 U.S. at 482.

553. *Id.* at 488.

554. *Dempsey*, 261 U.S. at 87-90.

The Court's criminal procedure cases of the 1920s and 1930s were also devoid of any recognition of widespread racism in the South. The Court's factual narrative in *Moore v. Dempsey* is the closest it came to discussing the environment of the South during the early twentieth century,[555] and that narrative is strictly limited to the defendants' case in Arkansas and likely only offered out of necessity to the Court's holding regarding the mob-like atmosphere of the trials that were held. Outside of *Dempsey*, the Court does not even mention the words "lynch" and "lynching."[556] It is not as if the Court is averse to discussing societal contexts; when it justified the Chinese Exclusion Act and the Scott Act in *Ping v. United States*, it went into detail about the context of the 1870s and 1880s: the Chinese were supposedly being standoffish and unassimilable, and white people were understandably afraid.[557] The Court could have taken the opportunity to comment on the farce that was Southern justice for Black people, but it declined to do so in keeping with tradition.

In fact, the Court offers little recognition of the historical role the criminal judicial system played in reinstituting slavery after the Thirteenth Amendment was ratified. The Court did talk about the black codes passed during Reconstruction but not much else.[558] Convict leasing was widespread throughout the south in the 1920s and 1930s, but the Court *never* talked about it in a single case.[559] Not even the Warren Court acknowledged the perversion of the Thirteenth Amendment's loophole; in its most progressive Thirteenth Amendment decision, it declared the Amendment to be "an absolute declaration that slavery or involuntary servitude

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555. *Id.*

556. *Id.* at 90.

557. 130 U.S. at 595.

558. A Westlaw search of "black codes" turned up seventeen Supreme Court cases. *See Bakke*, 438 U.S. 265; Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 181 (2023); McDonald v. City of Chicago, 561 U.S. 742 (2010); Bell v. Maryland, 378 U.S. 226 (1964); United States v. Madero, 596 U.S. 159 (2022); General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982); Goodman v. Lukens Steel Co. 482 U.S. 565 (1987); Timbs v. Indiana, 139 S.Ct. 682 (2019); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Garner v. Louisiana, 368 U.S. 157 (1961); City of Memphis v. Greene, 451 U.S. 100 (1981); City of Greenwood v. Peacock, 384 U.S. 808 (1966); City of Chicago v. Morales, 527 U.S. 41 (1999); New York State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S.Ct. 2111 (2022); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Monroe v. Pape, 365 U.S. 167 (1961).

559. Search terms used included "convict leasing," "leasing convicts," "leasing a convict," "lease convicts" "lease a convict," "leased convicts," and "leased a convict."

shall not exist in any part of the United States."[560] This is a declaration that has not been followed. The Court's ignorance of racism in the criminal judicial system continues into the age of mass incarceration. The Supreme Court does not recognize mass incarceration as "a tightly networked system of laws, policies, customs and institutions that operate collectively to ensure the subordinate status of a group defined largely by race."[561] Mass incarceration does not even merit the Court's discussion by the; the very term appears in only one Supreme Court case—as part of a link in a footnote.[562]

Even when the Court became more progressive in the 1940s and 1950s, it continued to ignore the presence of systemic racism. Again, *Brown v. Board of Education* exemplifies this.[563] Its virtues notwithstanding, *Brown* is not an antiracist opinion. The concept of "separate but equal" is not what made Blacks feel inferior; it was the fact that the "equal" part of the concept was entirely nonexistent. Many localities had no schools for Black children.[564] For municipalities that did, those schools were grossly under-resourced.[565] Further, Black schoolchildren in the south had shorter school days, went to school fewer than five days a week, had shortened school years, and completed far less than twelve grades of school.[566] The ratio of students to teachers in Black schools was far higher than it was in white schools, which made instruction even more ineffective.[567] Finally, Black schoolchildren lived in a world that constantly reinforced white superiority, as the doll test that *Brown* referenced demonstrated.[568] Racism, in other words, was the reason why Black students felt inferior to white students. Yet none of this history made it into

560. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968).

561. MICHELLE ALEXANDER, THE NEW JIM CROW 16 (2010).

562. Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876, 1890 n. 5 (2014).

563. *See generally Brown*, 347 U.S. 483.

564. ANDERSON, *supra* note 229, at 67-73.

565. *Id.*

566. *Id.*

567. *Id.*

568. *Id.* at 72-73 ("African Americans had no doubt that the moment the [NAACP] backed off, underlying assumptions of black inferiority and inability would reemerge and continue to translate into public policy—and not just in the schools but also in housing, employment, health care, and the vote.").

the Court's opinion.[569] Nor was Dr. Clark's conclusion that racism was "an inherently American institution" included in the decision.[570]

The Court's refusal to acknowledge systemic racism in *Brown* becomes even more damaging in cases after *Brown*. In *San Antonio Independent School District v. Rodriguez*, the Court fails to acknowledge the racism that made the schools in San Antonio unequal and the financing systems unequitable.[571] In *Milliken v. Bradley*, the Court is willfully ignorant of the racism that pervades the Detroit school system.[572] It is not that no showing was made; indeed, the trial court found the following:

> Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community-as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, *i.e.,* racially, and economically harmonious. The conditions created continue.[573]

The Sixth Circuit Court of Appeals affirmed these findings.[574] Thus, the Court chose to ignore the evidence and concluded that the petitioners showed no state-sanctioned racial discrimination.

The Court's discriminatory intent rule was—and still is—also rooted in a denial of systemic racism. The rule was formulated during a time of intense racism

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569. *Id.*

570. *A Revealing Experiment: Brown v. Board of Education and "The Doll Test,"* LEGAL DEFENSE FUND, https://www.naacpldf.org/brown-vs-board/significance-doll-test/ (last visited Nov. 1, 2023).

571. 411 U.S. 1 (1973).

572. *See generally Milliken*, 418 U.S. 717 (1974).

573. Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), 587 (1971).

574. Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), 258 (1973).

and was wholly—and deliberately—ineffective in addressing state discrimination from its inception. The doctrine's very concept demonstrated the Court's determination to deny and ignore state-sanctioned racial discrimination as long as the state did not admit to it in the specific case before it. Thus, the Court permitted state-sanctioned racial discrimination in *Virginia v. Rives*[575] in 1880, in *Soon Hing v. Crowley*[576] in 1885, in *Williams v. Mississippi*[577] in 1898, in *Cummings v. County Board of Education in Richmond County*[578] in 1899, in *Giles v. Harris*[579] in 1903, and in a host of criminal procedure cases in the early twentieth century.[580] The Warren Court limited its willingness to overrule nineteenth-century precedents to *Plessy* and never extended it to cases like *Cruikshank* and *The Civil Rights Cases*.[581]

The Court's post-Civil Rights Movement precedents regarding the discriminatory intent rule goes a pernicious step further: the Court verbalizes a refusal to acknowledge systemic racism out of fear that doing so would upend America's institutions. In 1976, for example, the Court said in *Washington v. Davis* that a rule acknowledging the full contours of systemic racism "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[582] In 1987, the Court in *McCleskey v. Kemp* worried that crediting the argument that "racial bias has impermissibly tainted the capital sentencing decision [would lead the Court to] be faced with similar claims as to other types of penalty."[583] The Court was also disturbed by the possibility of other so-called minorities raising Eighth and Fourteenth Amendment challenges in other contexts related to the criminal judicial system.[584] Instead of performing its judiciary duty

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575. 100 U.S. 313, 320 (1880).

576. 113 U.S. at 708.

577. 170 U.S. at 225.

578. 175 U.S. at 545.

579. 189 U.S. at 488.

580. *See, e.g.,* Bailey v. Alabama, 219 U.S. 219 (1911); Marbles v. Creecy, 215 U.S. 63 (1909).

581. *Brown*, 347 U.S. at 492.

582. 426 U.S. at 248.

583. 481 U.S. at 315.

584. *Id.* at 315-18.

and adjudicating claims of injustice, the Court prefers to act like injustice does not exist.

It is therefore no wonder that, as many scholars have noted, the Fourteenth Amendment remains weak and ineffective in combating racial discrimination;[585] it is hard to combat a problem when the Court that interprets the applicable law refuses to acknowledge that problem.

3. The Supreme Court Has Lived in the Spirit of *Dred Scott v. Sandford* and Deemed Black People's Rights Unworthy of White People's Respect.

Over 150 years ago, the second chief justice of the Supreme Court declared it axiomatic that African Americans were "so far inferior, that they had no rights which the white man was bound to respect."[586] The infamous opinion in which he made that declaration concluded that African Americans were not citizens and thus unqualified to maintain a federal lawsuit.[587] The decision Thirteenth Amendment, which abolished the peculiar institution the decision defended, and the Fourteenth Amendment, which conferred citizenship on all American-born Black people, including the formerly enslaved, superseded the decision.[588] Nonetheless, the Court has largely adhered to the spirit of *Dred Scott* by consistently ruling in a manner that evinces a lack of respect for the Black people's rights.

The Court has adhered to the spirit of *Dred Scott* by invalidating parts of statutes that the legislature enacted to protect Black people's rights, turning a blind eye when states and private citizens deprived Black people of their rights, and modifying legislation to make it ineffective. In the early years of Reconstruction, the Court invalidated congressional efforts to use the military to impose order in the South and protect African Americans from white violence.[589] This was the first of many times that the Court deemed Black people's right to life unworthy of the Court's respect. The Court found in 1872—four years *after* the Fourteenth Amendment was ratified—that the third section of the Civil Rights Act of 1866 did not permit litigants to remove a state case to a federal court where state law barred

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585. *See, e.g.*, Hutchinson, *supra* note 47, at 407-18.

586. *Dred Scott*, 60 U.S. at 407.

587. *Id.* at 427.

588. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1.

589. *See generally, Ex parte* Milligan, 71 U.S. 2 (1866); *Ex parte* Yerger, 75 U.S. 85 (1869).

Black people from testifying.[590] Apparently, Black people's right to testify, and their right to be treated equally to white witnesses, were not rights the white Supreme Court was bound to respect. Nor did Black people have any rights to equal access to public accommodations, which is why the Court struck down the Civil Rights Act of 1875 in 1883 and 1913.[591]

The Court has been at war with the Enforcement Acts since they were first enacted in the 1870s. The Court declared major portions of the Enforcement Act of 1870 unconstitutional in two separate cases. In one case, the Court declared that the Constitution did "not confer the right of suffrage upon any one, [sic]" and that the language of Section 3 was broader than the Fifteenth Amendment.[592] In the other case, the Court invalidated Section 6 of the Enforcement Act of 1870 on the grounds that the Fourteenth Amendment did not empower the government to regulate private conduct.[593] The Black people's right to vote, in essence, was not a right that the white Supreme Court was bound to respect. Additionally, Black people had no First or Second Amendment rights worthy of respect; the Court concluded that neither of those Amendments constricted state power.[594] Finally, because Southern states had no interest in protecting Black people and because the federal government was constitutionally forbidden from doing so, the Court effectively rendered Black people's right to life unworthy of the white Supreme Court's respect.

The Court then considered the Ku Klux Klan Act of 1871. In 1883, the Court struck down Section 2, which prohibited acts of insurrections by two or more persons.[595] The invalidation of that provision, which was designed to stop the Klan from murdering Black people, once again demonstrated the Court's lack of respect for Black people's right to life. Then, after nearly a century of sparse use, civil rights lawyers turned to Section 1 (now known as 42 U.S.C. § 1983) of the Ku Klux Klan Act as a means of redress.[596] The Court responded—under the stewardship of Earl Warren no less—by limiting its reach.[597] The Court introduced qualified immunity

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590. *Blyew*, 80 U.S. at 593.

591. *The Civil Rights Cases*, 109 U.S. 3.

592. *Reese*, 92 U.S. at 217.

593. *Cruikshank*, 92 U.S. at 551-54.

594. *Id.*

595. United States v. Harris, 106 U.S. 629, 644 (1883).

596. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971).

597. *See, e.g.,* Pierson v. Ray, 386 U.S. 547 (1967); Imbler v. Pachtman, 424 U.S. 409 (1976); Briscoe v. LaHue, 460 U.S. 325 (1983); Rehberg v. Paulk, 566 U.S. 356 (2012).

for police officers and absolute immunity for judges in 1967, which made it hard to sue police officers and impossible to sue judges.[598] In 1976, the Court granted absolute immunity to prosecutors at a time when the War on Drugs was in its infancy.[599] The Supreme Court also granted absolute immunity to trial witnesses[600] and grand jury witnesses[601] but, interestingly, not to public defenders.[602] The Court has expanded qualified immunity in the policing context since 1967 and has used the doctrine to excuse egregious police behavior.[603] Black people's right to hold state actors accountable for violating their constitutional rights—for actions such as killing them without just cause—has consistently been a right the white Supreme Court has not bound itself to protect. In fact, the Court has been so committed to neutralizing 42 U.S.C. § 1983 that, as Associate Justice Sonia Sotomayor documented, it has readily reversed denials of qualified immunity without briefing or argument but has not summarily reversed decisions granting qualified immunity.[604]

The Court's immunizing of criminal judicial system actors (police, prosecutors, judges, and trial and grand jury witnesses) was a major part of the Court's agenda to fashion the criminal judicial system into a mass incarceration weapon aimed primarily at Black people. The other part of the agenda was to narrow the rights of persons charged with crimes. The Supreme Court has effectively eviscerated Fourth, Fifth, Sixth, and Fourteenth Amendment protections and vastly expanded the bounds of permissible government conduct.[605] State and federal courts across the nation, with the Supreme Court leading the charge, have far more often than not declined to find constitutional violations, even when said violations are obvious;[606] created exceptions that excuse the state's actions where courts must

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598. *Pierson*, 386 U.S. 547 (1967).

599. *Imbler*, 424 U.S. 409 (1976).

600. *Briscoe*, 460 U.S. 325 (1983).

601. *Rehberg*, 566 U.S. 356 (2012).

602. Tower v. Glover, 467 U.S. 914 (1984).

603. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (granting qualified immunity where officer shot woman holding a knife four times without warning).

604. Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting).

605. *Id.*; Michael D. Cicchini, *The Collapsing Constitution*, 42 HOFSTRA L. REV. 731 (2014).

606. Cicchini, *supra* note 605, at 732-34.

recognize that a violation took place;[607] and find ways to deny accused persons any remedy, even when courts find an inexcusable violation.[608] Given that Black people were a primary target of the War on Drugs and the rush to criminalize from the 1970s onward, and given how the face of crime has consistently remained Black in America, the Court's gutting constitutional protections for criminal defendants is another example of Black people's rights that the white Supreme Court has not deemed worthy of respect.[609]

The Court has consistently found Black people's right to vote unworthy of respect. Invalidating relevant portions of the Enforcement Act of 1870 was the first example.[610] The Court's decisions that upheld Mississippi and Alabama laws that served to disenfranchise Black people further demonstrates this.[611] The Court protected Black people's right to vote in the 1960s but reversed course by 1980; the Court in *City of Mobile v. Bolden*[612] extended the discriminatory intent rule to Section 2 of the Voting Rights Act and found no constitutional violation where African Americans were essentially given "the right to cast meaningless ballots."[613] The Court's decision was short-lived: Congress legislatively overruled *Bolden* and enacted an effects test to prove racial discrimination under Section 2.[614] The decision angered then-DOJ attorney John Glover Roberts, who labored tirelessly to keep the discriminatory intent test in place.[615] In 2013, eight years after Roberts ascended to

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607. *Id.* at 735-37.

608. *Id.* at 737-41.

609. *See Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*, EQUAL JUSTICE INITIATIVE (March 25, 2016), https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/.

610. Sam Levine, *Supreme Court Leaves Intact Mississippi Law Disenfranchising Black Voters*, THE GUARDIAN (July 30, 2023), https://www.theguardian.com/law/202/jun/30/us-supreme-court-mississippi-voting-rights-case-black-voters.

611. *Id.*

612. 446 U.S. 55 (1980).

613. *Id.* at 104 (Marshall, J., dissenting).

614. Voting Rights Act of 1982, Pub. L. No. 97-205 (1982). *See also Summary: S.1992 — 97th Congress (1981-1982)*, CONGRESS.GOV, https://www.congress.gov/bill/97th-congress/senate-bill/1992 (last visited Nov. 3, 2023).

615. Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAGAZINE (Aug. 10, 2015), https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/.

the High Court, the Court got a second case involving the Voting Rights Act.[616] In spite of overwhelming evidence that Sections 4 and 5 of the Act were still necessary,[617] the Court struck down Section 4 and, by extension, rendered Section 5 useless.[618] A Supreme Court that does not care about Black people's right to vote made it possible to pass the restrictive voting laws passed in the wake of the *Shelby* decision and in response to Donald Trump's conspiracy stories regarding the theft of the 2020 election.[619]

The Court's school segregation precedents of the 1970s (*Rodriguez* and *Milliken*) and 2007 (*Parents Involved*) make clear that Black children have no right to an equitable grade school education that the Court is bound to respect.[620] The Court's affirmative action jurisprudence in the higher education context demonstrates that young Black adults have no right to an equitable college education that the Court is bound to respect.[621] The Court's affirmative action cases outside of the higher education context show that Black people have no right to remedy racial discrimination that the Court is bound to respect.[622] *Washington v. Davis* and its progeny illustrate that Black people have no right to be free of present discrimination that the Court is bound to respect.[623] Decisions like *City of Los Angeles v. Lyons*[624]

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616. *Shelby County*, 570 U.S. 529.

617. *Id.* at 559-66.

618. *See id.*

619. For a discussion of repressive laws passed in the wake of Shelby, *see The Effects of Shelby County v. Holder*, BRENNAN CENTER (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder. For a discussion of repressive laws passed in the wake of unfounded fraud allegations regarding the 2020 election, *see Voting Laws Roundup: October 2021*, BRENNAN CENTER (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021.

620. *See Parents Involved*, 551 U.S. 701.

621. Adewale A. Maye, *The Supreme Court's Ban on Affirmative Action Means Colleges Will Struggle to Meet Goals of Diversity and Equal Opportunity,* ECONOMIC POLICY INSTITUTE (June 29, 2023), https://www.epi.org/blog/the-supreme-courts-ban-on-affirmative-action-means-colleges-will-struggle-to-meet-goals-of-diversity-and-equal-opportunity/.

622. *See, e.g.,* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

623. Maye, *supra* note 621.

624. 461 U.S. 95 (1983).

prove that Black people have no right to be free of unwarranted police violence that the Court is bound to respect.[625] Decisions like *Connick v. Thompson*[626] indicate that Black people have no right to be free from egregiously unconstitutional prosecutions that the Court is bound to respect.

Today's Supreme Court is the most diverse in America's history; it features three justices of color and four women.[627] However, it is in spirit and in doctrine as committed to white supremacy as it has ever been. In the nineteenth century, the Supreme Court stated that Black people had no rights that whites were bound to respect.[628] In the twenty-first century, the Court's attitude remains unchanged.

IV. CONCLUSION

From Native American colonization to World War II, the United States Supreme Court has consistently promoted racism and hindered racial justice and equity. The Court has maintained America's relationship of conquest vis-a-vis Native Americans. It legitimized chattel slavery and played no role in ending it. It also kept Old Jim Crow intact for over six decades after destroying what was left of Reconstruction in the 1870s. The Court has handed down disastrous precedents more than a century ago that remain good law. Worst of all, the legacy of the Court as a white supremacist institution continues to shape law and society today.

With a comprehensive history on the Supreme Court's race-related precedents, academics and activists can more effectively brainstorm solutions to America's ever-present race problem. Law professors can also provide a well-rounded education to their students by giving them a far more accurate depiction of the Supreme Court than what is typically found in textbooks. Finally, the similarities between the Court's approach to race then and now rebut any claims that America is a post-racial society; the Court continues to uphold white superiority, deny systemic racism while tacitly conceding its existence, and abide by the axiom in *Dred Scott* that Black people are without rights worthy of respecting.

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625. *Challenging Police Violence . . . While Black*, REUTERS (Dec. 23, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-race/.

626. 563 U.S. 51 (2011).

627. The three justices of color as Clarence Thomas, Sonia Sotomayor, and Ketanji Brown Jackson. The four women are Sotomayor, Jackson, Elena Kagan, and Amy Coney Barrett.

628. *Dred Scott,* 60 U.S. at 407.