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ARTICLES

NOTHING TO SEE HERE: JUDICIAL SANEWASHING AND THE OBFUSCATION OF CONSTITUTIONAL DISORDER

ERIN M. CARR*

* Assistant Professor of Law, Seattle University School of Law. I am thankful to my brilliant and generous colleagues at Seattle University. Richard Delgado, Brooke Coleman, and Jeffrey Omari provided thoughtful commentary in the development of this article. For helpful research and technical assistance, I am additionally grateful for the support of Elaine McDaniel and the phenomenal editorial staff of the *Southern California Review of Law and Social Justice*.

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I. INTRODUCTION

Less than two years after critics cautioned of the dystopian results of “sanewashing” Donald Trump’s incoherent and factually untethered public pronouncements during the 2024 presidential elections, the country’s political and legal landscape has become unrecognizable. The federal government is engaged in a coordinated campaign of racial and ethnic profiling, endorsed by the Supreme Court.¹ Paramilitary government forces of masked men openly hunt immigrants and terrorize American cities.² Public executions of unarmed citizens, captured on video for all to see, are refuted by government officials as legally justifiable and entitled to absolute immunity.³ The notion that we are a nation of laws, rather than of men, is increasingly difficult to defend.⁴

The question is, how did we arrive here? How did basic due process protections, the rule of law, and an established system of checks and balances crumble so quickly and so spectacularly?⁵ The answer to that

¹ *Noem v. Vasquez Perdomo*, 606 U. S. ____ (2025) (permitting the Trump Administration to rely on race and ethnicity as factors to establish reasonable suspicion that a person is unlawfully in the United States)

² Thomas Fuller & Jazmine Ulloa, *‘Like a Military Occupation’: Clashes Rise With Federal Agents in Minneapolis*, N.Y. TIMES (Jan. 13, 2026), <https://www.nytimes.com/2026/01/13/us/ice-videos-minnesota-trump-immigration.html> [<https://perma.cc/B8ZB-YWHF>].

³ Hamed Aleaziz & Nicholas Nehamas, *Under Trump, a Shift Toward ‘Absolute Immunity’ for ICE*, N.Y. TIMES (Jan. 15, 2026), <https://www.nytimes.com/2026/01/15/us/politics/trump-ice-immunity.html> [<https://perma.cc/R4RV-MDVZ>]; see also The Ezra Klein Show, *What Stephen Miller Is Signaling to ICE Officers*, N.Y. TIMES (Jan. 23, 2026), <https://www.nytimes.com/video/opinion/100000010650076/what-stephen-miller-is-signaling-to-ice-officers.html> [<https://perma.cc/VQ32-MD42>] (advising “all ICE officers” that they have “federal immunity in the conduct of your duties” in response to the killing of Renee Good in Minneapolis); Avery Lotz, *Border Patrol Chief Praises Agents Who Killed Alex Pretti*, AXIOS (Jan. 25, 2026), <https://www.axios.com/2026/01/25/minnesota-shooting-border-patrol-greg-bovino> [<https://perma.cc/C6VL-YFFV>].

⁴ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (stating “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”); See also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearings before the S. Com. on the Judiciary, United States Senate, 109th Cong., U.S. (2005), <https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/nomination-process/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/E8JW-H4AQ>]; David E. Sanger, Maggie Haberman & Jonathan Swan, *Trump Lays Out a Vision of Power Restrained Only by ‘My Own Morality’*, N.Y. TIMES (Jan. 8, 2026), <https://www.nytimes.com/2026/01/08/us/politics/trump-interview-power-morality.html> [<https://perma.cc/V9CM-6LU3>].

⁵ Brianna Tucker, *Retired judges warn that the rule of law is unraveling*, WASH. POST (Nov. 28, 2025), <https://www.washingtonpost.com/politics/2025/11/28/judges-trump-administration-rule-of-law/> [<https://perma.cc/7BNR-QRUC>].

question is “judicial sanewashing.”⁶ We have only to look to the Roberts Court and its sanewashed treatment of law and facts to appreciate how the United States evolved from a nation of laws to a sanewashed system predicated on legal, political, and factual distortions.⁷

This article builds on an earlier piece examining the concept of “judicial sanewashing,” a term used to describe a growing phenomenon in which the Roberts Court relies on contrived interpretive methods and legal standards to radically rewrite the law and distort the true effects of its judicial decisions.⁸ Building upon the theoretical and taxonomical foundation set out in the first article, I now attempt to concretize the concept by examining the effects of judicial sanewashing techniques across several discrete but interrelated (and far from exhaustive) areas of the Supreme Court’s sanewashed jurisprudence. This article examines the effects of judicial sanewashing drawing upon case illustrations from the Court’s rapidly evolving jurisprudence with respect to the weakening of political and civil rights for disfavored groups, the erosion of separation of powers, and the expansion of executive power under the Trump regime. In this article, I also explore the particularly destructive convergence of sanewashing, whitewashing, and mansplaining.

II. THE ROBERTS COURT’S STRATEGIC SANEWASHING OF LAW AND FACT

There is no shortage of recent articles and social media commentary criticizing the Supreme Court.⁹ In the wake of major decisions rescinding

⁶ Erin M. Carr, *Judicial Sanewashing: The Roberts Court’s New Canon of Construction*, 55 U. MEM. L. REV. 1067 (2025) (introducing, inventorying, and interrogating the Roberts Court’s new canon of construction—“judicial sanewashing”).

⁷ Linda Qui, *Falsehoods Fueled Trump’s First Year Back in Office*, N.Y. TIMES (Jan. 21, 2026), <https://www.nytimes.com/2026/01/20/us/politics/trump-falsehoods-fact-check-first-year.html> [<https://perma.cc/4K2A-LYVW>] (describing how “[i]n the first year of his second term, President Trump has cited an arsenal of falsehoods, baseless claims and distortions to justify significant policy changes on the economy, immigration and deployments of the military.”).

⁸ Carr, *supra* note 6.

⁹ See, e.g., Kate Shaw, *Why Is This Supreme Court Handing Trump More and More Power?*, N.Y. TIMES (May 25, 2025), <https://www.nytimes.com/2025/05/25/opinion/supreme-court-trump-power.html> [<https://perma.cc/C9BM-SPUK>]; Jennifer Rubin, *The Trump immunity decision isn’t the end of democracy — but it is bad*, WASH. POST (Jul. 1, 2024), <https://www.washingtonpost.com/opinions/2024/07/01/scotus-trump-immunity-jan-6/> [<https://perma.cc/U6XN-EJUJ>]; Nikolas Bowie & Daphna Renan, *The Supreme Court Has Grown Too Powerful. Congress Must Intervene.*, N.Y. TIMES (Oct. 11, 2024),

constitutional protections for privacy rights,¹⁰ reversing hard-fought civil rights gains,¹¹ augmenting moneyed interests,¹² and empowering a President with unabashed authoritarian ambitions,¹³ the Court has

<https://www.nytimes.com/2024/10/11/opinion/laws-congress-constitution-supreme-court.html> [https://perma.cc/WA7P-TNCB]; Quinta Jurecic, *What, Exactly, Is the Supreme Court Thinking?*, THE ATLANTIC, (Apr. 9, 2025), <https://www.theatlantic.com/ideas/archive/2025/04/trump-deportations-scotus-ruling/682377/> [https://perma.cc/L492-UW9R]; Nancy Gertner & Stephen I. Vladeck, *This Supreme Court Is Its Own Worst Enemy*, N.Y. TIMES (Oct. 7, 2024), <https://www.nytimes.com/2024/10/07/opinion/supreme-court-legitimacy.html> [https://perma.cc/V2GH-8NBQ]; Editorial Board, *The Supreme Court Owes the Country Explanations for Its Big Decisions*, N.Y. TIMES (Jul. 28, 2025), <https://www.nytimes.com/2025/07/28/opinion/supreme-court-emergency-rulings.html> [https://perma.cc/866W-KWB9] (criticizing the Court for using the emergency docket to benefit the Trump Administration and, in doing so “changing its own job and the presidency before our eyes when the country needs the Supreme Court to be a force of stability.”).

¹⁰ See generally *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

¹¹ See generally *U.S. v. Skrametti*, 605 U.S. 495 (2025); *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013); *Louisiana v. Callais*, 608 U.S. ____ (2026).

¹² See, e.g., *National Republican Senatorial Committee v. Federal Election Commission*, 609 U.S. ____ (2026) (further limiting campaign finance restrictions in expanding First Amendment protections for large campaign donors); see generally *Diamond Alt. Energy v. E.P.A.*, 606 U.S. 100 (2025); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹³ Jamelle Bouie, *The Unreal Spectacle of Trump’s Authoritarianism*, N.Y. TIMES (Aug. 30, 2025), <https://www.nytimes.com/2025/08/30/opinion/trump-visual-symbols-authoritarian.html> [https://perma.cc/9VUA-AQ7F]; Josh Dawsey & Annie Linskey, *In Trump’s Second Term, a Bolder President Charges Ahead Unchecked*, WALL STREET J. (Aug. 27, 2025), <https://www.wsj.com/politics/policy/in-trumps-second-term-a-bolder-president-charges-ahead-unchecked-1c8c5b79> [https://perma.cc/K2ND-429Y]; *Trump v. CASA, Inc.*, 606 U.S. 831 (2025) (Sotomayor, J., dissenting) (“The Court’s decision is nothing less than an open invitation for the Government to bypass the Constitution.”); see, e.g., *Trump v. Slaughter*, 609 U.S. ____ (2026) (overturning nearly a century of legal precedent and endorsing the unitary executive theory expanding presidential power over administrative agencies to permit President Trump to fire agency heads without cause); see also *Dep’t of Homeland Sec. v. D.V.D.*, 145 S.Ct. 2153, 2153 (2025) (Sotomayor, J., dissenting) (“Rather than allowing our lower court colleagues to manage this high-stakes litigation with the care and attention it plainly requires, this Court now intervenes to grant the Government emergency relief from an order it has repeatedly defied. I cannot join so gross an abuse of the Court’s equitable discretion.”); Nina Totenberg, *The Supreme Court Has Created an Endless Summer of Work for Itself*, NPR (Jun. 30, 2025), <https://www.npr.org/2025/06/30/nx-s1-5449087/supreme-court-trump-nationwide-injunctions> [https://perma.cc/WXC3-X8XY] (stating “in the five months since President Trump took office, the court, with only the rarest exception, has repeatedly granted his wishes to accrue power to the presidency”); Peter M. Shane, *This Is the Presidency John Roberts Has Built*, ATLANTIC (Jul. 21, 2025), <https://www.theatlantic.com/ideas/archive/2025/07/supreme-court-roberts-trump-dictator/683576/> [https://perma.cc/8JVD-BC5P]; Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him*, WASH. POST (Jul. 21, 2025), <https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges/> [https://perma.cc/A4RG-R67Y] (finding that the Trump Administration has

increasingly found itself the subject of debate and discussion about its perceived corporate¹⁴ and partisan leanings,¹⁵ as well as its overall trustworthiness as the guardian of the constitutional order.¹⁶

Today, fewer Americans see the Supreme Court as a neutral and non-political institution. Once the most trusted branch of government,

disregarded more than one-third of rulings in the more than 160 cases brought against the Administration); Adam Serwer, *Why Trump Thanked John Roberts*, THE ATLANTIC (Mar. 5, 2025), <https://www.theatlantic.com/ideas/archive/2025/03/congressional-address-supreme-court/681926/> [https://perma.cc/A6BU-ZUF7]; Leah Litman & Daniel Deacon, *Legalistic Noncompliance*, 75 DUKE L. J. 1437, 1439 (2026) (describing the “unfathomably aggressive use of presidential power” during the first 100 days of the second Trump Administration, particularly the Administration’s practice of legalistic noncompliance to “obscure the truth” by “using legal vocabulary to describe why it need not comply with judicial orders or why it should be understood to be complying (when it is not)”).

¹⁴ Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 221 (2021) (concluding “Whether genuine conceptual difficulty or mere rhetoric, the Roberts Court’s struggle with analogies and realities involving corporations is reflected in a trend of case law expanding corporate rights and limiting their exposure to liability”).

¹⁵ Thomas Edsall, *The Supreme Court Has Finally Found a President It Likes*, N.Y. TIMES (Aug. 5, 2025), <https://www.nytimes.com/2025/08/05/opinion/supreme-court-trump-administration.html> [https://perma.cc/V6ZB-Q3QF].

¹⁶ Angela Onwuachi-Willig, *Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023); *Trust in U.S. Supreme Court Continues to Sink*, THE ANNENBERG PUB. POL’Y CTR., UNIV. PA. (Oct. 2, 2024), <https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink/> [https://perma.cc/646G-WQHW]; see also Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Crafted a Heads-I-Win, Tails-You-Lose Rule for Republican Presidents*, SLATE (Jul. 2, 2025), <https://slate.com/news-and-politics/2025/07/supreme-court-republican-presidents-kavanaugh-rule.html> [https://perma.cc/M7AF-DDYF] (quoting Howard University Professor Sherrilyn Ifill as stating that “the feature of this six-member supermajority” is a “kind of carelessness and recklessness by which they arrogate [...] power to themselves, that threatens the entire system.”); *Evaluating the Supreme Court: Harvard Law Faculty Weigh in on 2023-2024 SCOTUS Term*, HARV. L. TODAY (Jul. 2, 2024), <https://hls.harvard.edu/today/evaluating-the-supreme-court-harvard-law-faculty-weigh-in-on-2023-scotus-term/> [https://perma.cc/37FZ-PZHL] (quoting law professor, Kenneth Mack, as stating, “The most recent term reinforces the perception among many in the American public that, more than in any other period of modern American history, law — whether it be the law of statutory interpretation, administrative law, or constitutional law — as reflected in the Court, is simply politics by other means.”); see also D.V.D., 145 S.Ct. at 2163 (Sotomayor, J., dissenting) (“The Due Process Clause represents ‘the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.’ [...] By rewarding lawlessness, the Court once again undermines that foundational principle. Apparently, the Court finds the idea that thousands will suffer violence in farflung locales more palatable than the remote possibility that a District Court exceeded its remedial powers when it ordered the Government to provide notice and process to which the plaintiffs are constitutionally and statutorily entitled. That use of discretion is as incomprehensible as it is inexcusable.”).

Americans have lost faith in the Court.¹⁷ In less than five years, positive public perception of the Court has declined by 24% and now sits at an all-time low.¹⁸ Faltering confidence in the Supreme Court and in the overall health of the country's democracy have developed in parallel.¹⁹

The public is justified in its misgivings about the Court's conduct.²⁰ Since gaining a conservative majority with the appointments of Justices Brett Kavanaugh and Amy Coney Barrett,²¹ the Roberts Court has accelerated its pace of landmark-shattering decisions.²² In short order, the

¹⁷ Lawrence Hurley, *Poll: Confidence in the Supreme Court Drops to a Record Low*, NBC NEWS (Mar. 11, 2026), <https://www.nbcnews.com/politics/supreme-court/poll-confidence-supreme-court-drops-record-low-rcna262459> [<https://perma.cc/HQ4F-GWCK>].

¹⁸ Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx> [<https://perma.cc/8RB5-W9R8>].

¹⁹ Domenico Montanaro, *Poll: Most Feel Democracy Is Threatened and Political Violence Is a Major Problem*, NPR (Jul. 1, 2025), <https://www.npr.org/2025/07/01/nx-s1-5452527/poll-democracy-trump-immigration> [<https://perma.cc/UVJ2-UQRH>].

²⁰ See Lithwick & Stern, *supra* note 16 (quoting Georgetown University Law Center Professor Steve Vladeck describing the Roberts Court's current approach to judicial decision making as "creating an infrastructure in which they [the Supreme Court] can sign off on the things they want to sign off on, block the things they want to block, and not really have to work that hard to rationalize which ones are which"); see also Erwin Chemerinsky, *Supreme Court's Term Was All About Taking Sides on the Ideological Divide*, A.B.A. J. (Jul. 2, 2025), <https://www.abajournal.com/columns/article/chemerinsky-supreme-courts-term-was-all-about-taking-sides-on-the-ideological-divide> [<https://perma.cc/6GHA-3ZG5>]; *Evaluating the Supreme Court*, *supra* note 16 (quoting Martha Minnow as observing during the 2023-2024 Supreme Court term that "accountability, impartiality, clarity, and durability, key attributes of the rule of law, have taken big hits [this term]. It remains to be seen how viable is the constitutional democracy that the justices are entrusted to uphold."); Lawrence Hurley, *Justices Join Debate on Supreme Court's Legitimacy After Abortion Ruling*, NBC News (Sept. 18, 2022), <https://www.nbcnews.com/politics/supreme-court/justices-join-debate-supreme-courts-legitimacy-abortion-ruling-rcna47795> [<https://perma.cc/3JX5-LWZ9>] (quoting Justice Kagan as noting "When courts become extensions of the political process, when people see them as extensions of the political process, when people see them as just trying to impose personal preferences on society, irrespective of the law, that's when there's a problem.").

²¹ Amy Coney Barrett was confirmed along party lines to replace Justice Ruth Bader Ginsburg, who died a month before the 2020 presidential election. Although Republican Senate Majority Leader Mitch McConnell had objected to the appointment of a new member of the Court during an election year and refused to hold hearings on President Barack Obama's nomination of Merrick Garland in 2016 to fill the vacancy created by the death of Justice Antonin Scalia, he quickly ushered Coney Barrett's appointment to the Supreme Court shortly before the 2020 general elections. Brett Kavanaugh was installed to serve on the Supreme Court, also on a narrow partisan vote, following a hurried Senate hearing in which serious allegations of sexual misconduct were raised.

²² This article anchors the sanewashing practices and processes as a phenomenon within the Roberts Court not only because Chief Justice Roberts has led the Court during the period

Court has (1) eliminated constitutional protections for abortion access²³ and upended established civil rights precedents and protections,²⁴ federal administrative law,²⁵ election law,²⁶ and First Amendment doctrine;²⁷ (2) created an extrajudicial system that places gun owners and manufacturers outside of the purview of nearly all regulations;²⁸ and

examined in this article, but because he is a prolific sanewasher. Though there has been some recent discussion and debate about the strength of the Chief Justice's influence over his more conservative colleagues, he votes with the majority more than any other Justice. For the better or the worse, the modern Supreme Court is Chief Justice Roberts's Court. *See* Jack Karp, *Breaking Down The Vote: The High Court Term In Review*, LAW360 (Jul. 3, 2025), <https://www.law360.com/articles/2360220> [<https://perma.cc/D47K-9JX8>].

²³ *See* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)); *see also* *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357 (2025) (limiting the ability of Planned Parenthood to bring a § 1983 class action, thereby permitting states seeking to eliminate access to abortion care to evade liability for violating the rights of Medicaid recipients to select their own healthcare providers without government interference).

²⁴ *Onwuachi-Willig*, *supra* note 16; *see also* *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023) (finding that race-based college admissions practices are unconstitutional); *see also* *Stanley v. City of Sanford*, 606 U.S. 46 (Jackson, J., dissenting) ("It is lamentable that this Court so diminishes disability rights that the People (through their elected representatives) established more than three decades ago."); *Medina*, 606 U.S. at 397-98 (Jackson, J., dissenting) ("[T]he project of stymying one of the country's great civil rights laws continues [. . .] South Carolina asks us to hollow out that provision [Section 1983] so that the State can evade liability for violating the rights of its Medicaid recipients to choose their own doctors. The Court abides South Carolina's request."); *Louisiana v. Callais*, 608 U.S. ____ (2026).

²⁵ *See, e.g.*, *Trump v. Slaughter*, 609 U.S. ____ (2026); *see generally* *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024) (a Supreme Court decision that, along with *Relentless, Inc. v. Dep't of Com.* 603 U.S. ____, reversed the landmark 1984 decision, *Chevron v. Nat. Res. Def. Council*, in holding that courts are not permitted to defer to an agency's interpretation of the law where the statute is unclear).

²⁶ *Rucho v. Common Cause*, 588 U.S. 684 (2019); *Shelby Cnty. v. Holder*, 570 U.S. 529, 542 (2013) (invalidating the Voting Rights Act's coverage formula and constraining Congress's Fifteenth Amendment enforcement authority); *Callais*, 608 U.S. ____ (2026).

²⁷ *Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022) (overruling the governing standard established in the 1971 case, *Lemon v. Kurtzman*, and replacing it with a "history and tradition" test for evaluating constitutional challenges under the Establishment Clause); *see also* *Creative LLC v. Elenis*, 600 U.S. 570 (2023) (recognizing a First Amendment free speech defense to a state antidiscrimination law asserted by a business); *see, e.g.*, *National Republican Senatorial Committee v. Federal Election Commission*, 609 U.S. ____ (2026);

²⁸ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (invalidating a century-old New York law in concluding that modern gun laws must be evaluated solely by comparison to historical tradition); *see also* *Smith & Wesson Brands v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025) (holding that a suit brought against American gun manufacturers was barred under federal law).

(3) dramatically altered the balance of power²⁹ to enhance legal protections for corporations,³⁰ Christian, and conservative interests.³¹

This article aims to elucidate the causes of the Court's growing legitimacy crisis and the mounting concerns surrounding its trustworthiness as an honest and impartial judicial arbiter. In doing so, this article explores judicial sanewashing—the mechanism responsible for the Court's most controversial and undemocratic decisions.

“Judicial sanewashing,”³² a concept that I introduced in an earlier article, is central to understanding the Court's approach to judicial politics and judicial decision-making.³³ The term “judicial sanewashing” broadly refers to the process and practices of sanitizing judicial decisions by distorting legal reasoning and precedent to present inane, extreme, or

²⁹ Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); see also Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 75, 80 (2018) (discussing how the Roberts Court's use of canons of constructions undermines, rather than facilitates, legislative supremacy); *CASA*, 606 U.S. (limiting the power of Article III courts to issue nationwide injunctions citing separation of powers principles); Associated Press, *Trump Administration Sues All Of Maryland's Federal Judges Over Deportation Order*, NPR (Jun. 26, 2025), <https://www.npr.org/2025/06/26/nx-s1-5445843/justice-department-maryland-judges-deportation> [<https://perma.cc/83Q7-QP35>]; Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443 (2013) (discussing the 2011 Federal Judiciary's Year End Report in which Chief Justice John Roberts cast doubt on Congress's authority to regulate the Justices' ethical conduct and, “in his mild-mannered way” “set[s] the stage for a constitutional conflict between Congress and the Supreme Court.”); Lithwick & Stern, *supra* note 16 (quoting Georgetown University Law Center Professor Steve Vladeck in characterizing the conservative majority's current approach to separation of powers as being “very invested in preserving its own power, especially in context in which it can rein in the powers of other institutions that it currently views as at odds with itself.”); see, e.g., *Trump v. Slaughter*, 609 U.S. ____ (2026).

³⁰ *Diamond Alt. Energy*, 606 U.S. at 138 (2025) (Jackson, J., dissenting) (observing that the Supreme Court's cases “invites questions about inconsistent decisionmaking and whether this Court is holding business litigants to the same standards as everyone else.”).

³¹ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *303 Creative LLC*, 600 U.S. 570 (2023); *Mahmoud v. Taylor*, 606 U.S. 522 (2025); see, e.g., Sarah McCammon, Hansi Lo Wang & Domenico Montanaro, *Texas GOP Hopes to Redraw Congressional Map and Keep Control of U.S. House*, NPR (Jul. 21, 2025), <https://www.npr.org/2025/07/21/1256000567/texas-gop-hopes-to-redraw-congressional-map-and-keep-control-of-u-s-house> [<https://perma.cc/T5DY-BSWU>] (extreme partisan gerrymandering, which as disproportionately favored conservative politicians, is attributable to the Court's decision in *Rucho v. Common Cause*).

³² This article employs the term “judicial sanewashing” to capture the cultural zeitgeist associated with the current social, political, and cultural disinformation climate. Though this article makes use of “sanewashing” as a linguistic and conceptual framing device, the problematic nature of the term should be acknowledged in that it reflects ableist language and may be potentially stigmatizing to persons with mental health diagnosis.

³³ Carr, *supra* note 6

otherwise problematic legal decisions as more palatable.³⁴ Judicial sanewashing strategies—pernicious and highly effective in distorting the law and its outcomes—have been actively employed by the Court to legitimate the use of the law in the service of patently illegitimate causes.³⁵

The term “judicial sanewashing” is relatively new, but the phenomenon is not.³⁶ In my previous article, I argued that under Chief Justice John Roberts’s two-decade leadership, the Supreme Court has constructed and carefully deployed a sophisticated set of interpretive tools and novel legal theories to establish and naturalize a regressive application of the law.³⁷ These sanewashing strategies have been varied and often used in combination to amplify their effects.³⁸ Chief amongst the Court’s most tried and true sanewashing practices have been (1) the creation or repackaging of fringe legal theories,³⁹ (2) the systematic expansion and disingenuous application of the “history and tradition” standard,⁴⁰ (3) the misrepresentation and misuse of both legal precedent⁴¹ and facts,⁴² (4) the

³⁴ *Id.*; see also *Sanewashing*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/slang/sanewashing> [<https://perma.cc/8SUX-N7P5>] (defining “sanewashing” as minimizing or reframing extreme statements to make them appear more reasonable).

³⁵ Legal and policy objectives advanced through sanewashing include, but is not limited to, the elevation of Christian voices and values under the law, the dismantling of civil rights protections, and the legal and public erasure of the LGBTQ, immigrant, and non-white communities from society. See also *CASA*, 606 U.S. at 880 (Sotomayor, J., dissenting) (“No right is safe in the new legal regime the Court creates.”).

³⁶ “Sanewashing” is a phrase whose origins are attributed to a 2020 Reddit post. “Sanewashing” was added to the Merriam-Webster dictionary in 2025 and is defined as “the practice of making irrational, extreme, or otherwise problematic people or ideas appear more reasonable or normal than they really are.” *Sanewashing*, *supra* note 34.

³⁷ Carr, *supra* note 6.

³⁸ *Id.*

³⁹ See, e.g., *Trump v. Slaughter* 609 U.S. ____ (2026) (embracing the unitary executive theory); see also LEAH LITMAN, *LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES* (2025); Bernard W. Bell, *Loper Bright: Resurrecting Skidmore in a New Era*, 55 SETON HALL L. REV. 1577, 1586-87 (2025).

⁴⁰ Reva B. Siegel, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901 (2023); Cary Franklin, *History and Tradition’s Equality Problem*, 133 YALE L.J.F. 946, 947-949 (2024); see also *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (interpreting self-defense as a basic right of our “history and tradition”).

⁴¹ *Students for Fair Admission*, 600 U.S.; *Shelby Cnty.*, 570 U.S. at 588.

⁴² *Stanley*, 606 U.S. at 76 (Jackson, J., dissenting) (accusing her colleagues of “overlook[ing] both the actual facts presented in this case” and challenging the accuracy of their characterization of the facts); see also Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699 (2024) (discussing the problematic approach of the Roberts Court’s historical fact-finding processes, specifically citing *Dobbs v. Jackson Women’s Health Org.*, NY

misuse of textualism to engage in extreme linguistic acrobatics to interpret a word in a statutory or constitutional provision to support a desired outcome,⁴³ (5) procedural manipulation,⁴⁴ and (6) diminishing legal

State Rifle & Pistol Ass'n v. Bruen, and *Kennedy v. Bremerton Sch. Dist.* as examples); see, e.g., *U.S. v. Skrametti*, 605 U.S. 495, 594-97 (2025) (Sotomayor, J., dissenting) (criticizing the majority misuse of civil rights precedent and its characterization of the challenged statute).

⁴³ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Bruen*, 597 U.S. (“machine gun” interpretation); *Stanley*, 606 U.S. at 97, n.12 (U.S. Jun. 20, 2025) (Jackson, J., dissenting) (“... pure textualism’s refusal to try to understand the text of a statute in the larger context of what Congress sought to achieve turns the interpretive task into a potent weapon for advancing judicial policy preferences. By ‘finding’ answers in ambiguous text, and not bothering to consider whether those answers align with other sources of statutory meaning, pure textualists can easily disguise their own preferences as ‘textual’ inevitabilities. So, really, far from being ‘insufficiently pliable,’ I think pure textualism is incessantly malleable—that’s its primary problem—and, indeed, it is certainly somehow always flexible enough to secure the majority’s desired outcome.”); see also Mendelson, *supra* note 29, at 73, 75, 80 (detailing the Roberts Court’s increased reliance and often inconsistent use of canons of construction, including new canons it has created, as a “component of a distinct rise in so-called textualist methods of statutory interpretation.”); *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 406-07 (2025) (holding Medicaid’s “any qualified-provider provision” lacks “clear and unambiguous rights-creating language” even though the statutory text is plainly “phrased in terms of the persons benefited”); James J. Brudney & Lawrence Baum, *Does Textualism Constrain Supreme Court Justices?*, 12 NW. U. L. REV. 1375 (2026). (examining the use of interpretive resources in over 660 statutory decisions by the Supreme Court during the rise of textualism between 1969 – 2024 and finding that (1) a textualist approach had no constraining effect on the ideological predispositions of the justices and (2) that these findings were “especially robust for majorities authored by conservative justices” on the Roberts Court).

⁴⁴ Carr, *supra* note 6; see generally Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) (discussing the proliferation and misuse of the shadow docket under the first Trump Administration); see, e.g., *Barr v. East Bay Sanctuary Covenant*, 588 U.S. 942, 942 (2019) (departing from typical procedures to lift a lower court injunction halting the implementation of an interim rule by the Trump Administration restricting asylum applicants on the southern border, thereby allowing the Administration to implement the challenged policy pending litigation); Ken B. Morales, *A Troubling Milestone: Most Supreme Court Rulings Are Secretive Votes With Little Justification*, PROPUBLICA (Jul. 1, 2026), <https://www.propublica.org/article/supreme-court-shadow-docket-rulings-milestone> [<https://perma.cc/JX5N-L9EZ>]. See also D.V.D., 145 S.Ct. at 2159 (Sotomayor, J., dissenting) (“In light of the Government’s flagrantly unlawful conduct, today’s decision might suggest the Government faces extraordinary harms. Yet even that is not the case. Rather, following a recent trend, the Court appears to give no serious consideration to the irreparable harm factor. [...] Without a showing that a stay is necessary to avoid irreparable harm, however, this Court’s midstream intervention is inexcusable.”); *CASA*, 606 U.S. (concluding that lower federal courts lack the power to issue nationwide injunctions, thereby permitting the Trump Administration to deprive birthright citizenship rights to millions of people across the country while the case proceeds); Chemerinsky, *supra* note 20 (describing that while the number of decisions issued after briefing and oral argument remained comparable for the 2023-2024 and 2024-2025 terms, the number of decisions issued on the Court’s emergency docket doubled from 44 to 113); Lithwick & Stern, *supra* note 16 (quoting Georgetown University Law Center Professor Steve Vladeck

protections for marginalized constituencies by reclassifying constitutional and statutory rights as policy matters to be “returned to the people.”⁴⁵

An intended result of the increased reliance on judicial sanewashing has been the profound recalibration of power in favor of issues and groups favored by the Roberts Court,⁴⁶ in addition to the muscularization of the Court’s own judicial supremacy.⁴⁷ Sanewashing techniques have been employed to rewrite vast swaths of constitutional and statutory law to broadly align with the legal conservative movement.⁴⁸ Corporate interests are consistently elevated above the constitutional rights of ordinary

describing the “convergence” of the conservative supermajority’s approach to the shadow docket and the merits docket during the 2024-2025 Supreme Court term on observing that “we’ve seen some pretty bad behavior by the court procedurally on emergency applications for some time, and now that has spilled over into pretty bad behavior substantively”).

⁴⁵ Erwin Chemerinsky, *Judicial Deference?*, SCOTUSBLOG (Jul. 15, 2025), <https://www.scotusblog.com/2025/07/judicial-deference/> [<https://perma.cc/G8CD-67RS>].

⁴⁶ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507; 303 Creative LLC, 600 U.S. 570 (2023); *Mahmoud v. Taylor*, 606 U.S. 522; *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Medina*, 606 U.S. at 417-18 (Jackson, J., dissenting) (“At a minimum, it will deprive Medicaid recipients in South Carolina of their only meaningful way of enforcing a right that Congress has expressly granted to them [. . .] And, more concretely, it will strip those South Carolinians—and countless other Medicaid recipients around the country—of a deeply personal freedom: the ‘ability to decide who treats us at our most vulnerable.’”); *U.S. v. Skrmetti*, 605 U.S. 495 (2025); *see also* *Trump*, 606 U.S. at 880 (Sotomayor, J., dissenting) (accusing the conservative majority of “shamefully” “playing along” with the Trump Administration’s “apparent” “gamesmanship.”); *see* Chemerinsky, *supra* note 20 (“The profound question going forward is what it will mean for the judiciary and the nation to have the Supreme Court so clearly and consistently be on one side of the ideological divide.”); *see also* Leah Litman, *How the Supreme Court Gerrymandered the Law to Serve the GOP*, DEMOCRACY DOCKET, Jul. 1, 2025, <https://www.democracymarket.com/opinion/how-the-supreme-court-gerrymandered-the-law-to-serve-the-gop/> [<https://perma.cc/W6FL-Z45R>] (arguing that “in decision after decision, [...] the Republican justices have gerrymandered the law to generate a bunch of legal rules that fit pretty neatly into the Republican Party’s preferences”); *see also* Shane, *supra* note 13.

⁴⁷ *See* Steve Vladeck, *The Supreme Court’s (Self-Defeating) Supremacy*, 2025 SUP. CT. REV. (forthcoming 2026) (manuscript at 6-8) (arguing that the Court’s expansion of the emergency docket during the beginning of the second Trump Administration “exhibited repeated and sustained disrespect for both lower courts and Congress,” and was motivated by a desire to “preserve their supremacy,” which will ultimately be “self-defeating.”); Michael Klarman, *Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86 (2025).

⁴⁸ Litman, *supra* note 39; *see also* *Evaluating The Supreme Court*, *supra* note 16 (quoting Harvard Law Professor, Richard Lazarus, as describing the current Court as “deeply conservative” and “certainly far more conservative than any Supreme Court in [his] lifetime.”); Lithwick & Stern, *supra* note 16 (quoting Howard University Professor Sherrilyn Ifill explaining how the Court’s decision in *Trump v. CASA* advanced one of the conservative movement’s most significant projects—dismantling the 14th Amendment).

citizens.⁴⁹ Through various sanewashing strategies, the Court has also tactically recast the most fundamental rights of women, non-white Americans, immigrants, and the LGBTQIA+ community as policy matters best left to a hostile government to determine.⁵⁰ Conversely, when convenient, the Court has augmented or created new constitutional protections to advance preferred policy goals and constituents.⁵¹ Relying on judicial sanewashing, laws intended for the protection of historically disempowered and legally excluded groups have been reinterpreted and reoriented to instead benefit those never wanting for the protection of the law.⁵²

Judicial sanewashing has also been used to privilege originalism as the one true method of constitutional interpretation, all but ensuring the outcomes desired by the Court's conservative super majority. Although there is no definitional consensus amongst even the conservative majority who label themselves originalists, there is broad agreement that originalism

⁴⁹ Ann Southworth, *Conservative Legal Advocacy Organizations and Constitutional Change in the Roberts Court*, 93 FORDHAM L. REV. 1239, 1239, 1250 (2025); Diamond Alt. Energy, 606 U.S. at 129, 136 (2025) (Jackson, J., dissenting) (criticizing the majority for failing to even-handedly apply the standing doctrine and expressing concern that the Court's selective approach to standing fosters "the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens" and the resulting potential "reputational costs" to the Court); see also Burwell, 573 U.S. at 730-31; Citizens United, 558 U.S.; see also Pollman, *supra* note 14, at 221 ("While expanding corporate rights to political spending and religious liberty, the Court's opinions in these cases [*Citizens United v. FEC* and *Burwell v. Hobby Lobby Stores, Inc.*] gave little sense of the distance between its view of corporations and their reality to everyday people who participate in them and bear the weight of their activity.").

⁵⁰ Rucho, 588 U.S. (holding that questions of gerrymandering were outside of federal court jurisdiction and leaving the issue to the states); see also *Dobbs*, 597 U.S. at 215; Skrmetti, 605 U.S. 495; see also Chemerinsky, *supra* note 44.

⁵¹ See, e.g., *Kennedy*, 597 U.S. at 542-43 (condoning a public school teacher's on campus religious expression and findings that the Free Exercise Clause and the Establishment Clause did not conflict); 303 *Creative LLC*, 600 U.S. at 597 (elevating First Amendment protections for a conservative businessowner in concluding that discriminatory religious conduct is expressive speech); Bruen, 597 U.S. at 70-71 (expanding Second Amendment protections and holding that New York's "proper cause requirement" was unconstitutional); McDonald, 561 U.S.; Heller, 554 U.S. at 627-29 (interpreting the Second Amendment is an unassailable right); Citizens United, 558 U.S. (extending free speech protections to allow the infiltration of dark money in conservative politics); Nat'l Republican Senatorial Comm.v. Fed. Election Comm'n, 609 U.S. ____ (2026).

⁵² *Kennedy*, 597 U.S. 507 (finding that the Free Exercise Clause protects Christian practices in environments intended to be secular); 303 *Creative LLC*, 600 U.S. at 579-80 (providing protections for discriminatory practices claiming to be based in Christian values); Shelby Cnty. v. Holder, 570 U.S. 529, 588 (invention of the "equal sovereignty doctrine" to protect former confederate states); see also Serwer, *supra* note 13; Louisiana v. Callais, 608 U.S. ____ (2026).

delivers on conservative goals.⁵³ The subjectivity inherent in originalism—itsself sanewashed to project a false aura of impartiality and objectivity—has allowed the Roberts Court to claim constitutional authority under a sanewashed “history and tradition” standard, thereby advancing conservative legal interests.⁵⁴

Consequently, judicial sanewashing has proven remarkably adept at leveraging the law to expand a political and legal project that seeks to reify power to the most powerful. Because much of the potency and efficacy of judicial sanewashing practices and rhetoric lies in its careful, often concealed⁵⁵ usage to subtly recreate the law, judicial sanewashing has offered outsized benefits for favored principles and entities while allowing the Court to deny that it is aggressively changing the rules of the game.⁵⁶ The effect of this underappreciated phenomenon on good governance, the rule of law, and respect for basic equality has been to produce a deeply undemocratic, socially unjust, and unsound legal infrastructure that has failed to fully attract the scrutiny and ire it so richly merits.⁵⁷

⁵³ See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545 (2006) (arguing that the Rehnquist Court used originalism to inspire “counterrevolution”); Erin M. Carr, *The “History and Tradition” of the Sanctification of Structural Violence: A Review of the Cyclical Corrosion of Constitutional Protections*, 27 J. GENDER RACE & JUST. 1, 79 (2024) (discussing conservative justices’ use of originalism to discredit rights enumerated by the 14th Amendment).

⁵⁴ See, e.g., Laura Portuondo, *Gendered Liberty*, 113 Geo. L.J. 707 (2025) (demonstrating how the Roberts Courts has obfuscated its expansion of conscientious liberty protections under the First Amendment while concurrently seeking to naturalize diminishing liberty protections in the context of gender under the Fourteenth Amendment, creating new constitutional doctrines that have permitted the Court to “deny that it is engaged in a project of subordination at all.”).

⁵⁵ Since acquiring a conservative super majority, the Court has become more brazen and reliant on judicial sanewashing strategies, which is now attracting more attention and scrutiny.

⁵⁶ See generally Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205 (2021) (explaining how traditional legal rhetoric should be interrogated and remodeled because it is “deeply infected with racism, sexism, and elitism” and “because it carries such great power.”).

⁵⁷ Despite the Roberts Court’s professed commitment to legal tradition, the Court’s sanewashed judicial opinions lay waste to Ciceronian principles of consent-based government, separation of powers, checks and balances, and constitutionalism. See, e.g., *De Officiis* (“On Duties”), *De Legibus* (“On the Laws”), and *De Re Publica* (“On the Republic”), by Cicero, a philosopher, lawyer, and rhetorician whose views on republicanism influenced the development of the Anglo-American legal tradition. See also Jack Ferguson, *The Ciceronian Origins of American Law and Constitutionalism*, 48 HARV. J.L. & PUB. POL’Y 181 (2025); Mortimer N. Sellers, *The Influence of Marcus Tullius Cicero on Modern Legal and Political Ideas*, CICERONIANA, THE ACTI OF COLLOQUIUM TULLIANUM ANNI, MMVII (2009).

This section interrogates the subtle and more overt mechanisms employed by the Court to sanewash the law, providing a non-comprehensive review of the effects of judicial sanewashing as applied to the Court's rapidly evolving jurisprudence concerning political and civil rights and issues implicating the separation of powers. This section also considers the confluence and compounded legal distortions produced by sanewashing in combination with "whitewashing" and "mansplaining."

A. SANEWASHING THE EROSION OF POLITICAL AND CIVIL RIGHTS FOR DISFAVORED GROUPS

Legal doctrine implicating political rights is an area of the law particularly rife with evidence of judicial sanewashing. By adapting its procedural and substantive approaches to the law, the Court has created a new legal ecosystem in which it has reconstructed political and civil rights and, in the process, created an "anti-voter jurisprudence."⁵⁸ Increasingly, by relying on sanewashing, the Roberts Court has reinterpreted or altogether nullified legal precedent in various but interrelated areas of the law involving the Reconstruction Amendments, First Amendment speech protections, statutory civil rights protections, and the political question doctrine. The sanewashing of these areas of the law has reduced voting protections and diluted the political power of historically oppressed populations, while simultaneously enhancing the political representation of corporate and conservative interests.⁵⁹

⁵⁸ See generally Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 YALE L.J. 1673 (2025) (offering a comprehensive analysis of current election law that indicates election law is "retreating from the protection of voters"); JOSHUA A. DOUGLAS, *THE COURT V. THE VOTERS: THE TROUBLING STORY OF HOW THE SUPREME COURT HAS UNDERMINED VOTING RIGHTS* (2024) (describing how the Roberts Court's election-law cases have contributed to race-based voter suppression and disenfranchisement); See also Gilda R. Daniels, *Democracy's Distrust: The Supreme Court's Anti-Voter Decisions as a Threat to Democracy*, 134 YALE L.J. 1062 (2025) (arguing that the Roberts Court has played a central role in fostering distrust in democracy through its anti-voter decisions); Elaine Godfrey, *Republicans Want to Redraw America's Political Map*, THE ATLANTIC (Jul. 30, 2025), <https://www.theatlantic.com/newsletters/archive/2025/07/texas-gerrymandering-districts-house-congress/683716/> [<https://perma.cc/2L7X-3MEH>] (reporting on President Trump's request of the Texas Governor to redraw the state's electoral maps five years ahead of schedule to give the Republican Party control of 30 of the state's 38 House seats).

⁵⁹ *Rucho v. Common Cause*, 588 U.S. 684 (2019); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Shelby Cnty. v. Holder*, 570 U.S. 529, 588 (2013); see, e.g., Kenneth P. Vogel & David Yaffee-Bellany, *Donor List Suggests Scale of Trump's Pay-for-Access Operation*, NY

Procedurally, the Court has simultaneously shifted its stance towards justiciability doctrines—judicially-created rules and standards for determining when involvement by the federal courts is appropriate—to limit the role of the federal judiciary in deciding vital constitutional questions having to do with voting rights and political representation. In a series of cases, the Court has concluded that claims of egregious partisan gerrymandering cannot be adjudicated by federal courts.⁶⁰ The functional effect of the Court’s modified approach to the political question doctrine in determining that political gerrymandering constitutes a non-reviewable issue means that states with longstanding aims to suppress voting rights now have free rein to do so. For voters seeking redress through the federal courts for gerrymandered electoral maps that distort the democratic process, the doors to the federal courthouses are now closed. As a result, fewer than ten percent of congressional races were competitive in 2024,⁶¹ and congressional districts are likely to be even less competitive in 2026 as state legislatures openly engage in an all-out gerrymandering Armageddon invited by the Court.⁶²

TIMES (Aug. 2, 2025), <https://www.nytimes.com/2025/08/02/us/politics/donor-list-suggests-scale-of-trumps-pay-for-access-operation.html> [<https://perma.cc/M7UJ-VJD5>]; Lisa Mascaro, *Conservative Groups Draw Up Plan to Dismantle the US Government and Replace It with Trump’s Vision*, AP (Aug. 29, 2023), <https://apnews.com/article/election-2024-conservatives-trump-heritage-857eb794e505f1c6710eb03fd5b58981> [<https://perma.cc/YRJ8-M7GT>]; Nat’l Republican Senatorial Comm.v. Fed. Election Comm’n, 609 U.S. ____ (2026); *Louisiana v. Callais*, 608 U.S. ____ (2026); see also David D. Kirkpatrick, *How Much is Trump Profiting from The Presidency?*, THE NEW YORKER (Aug. 11, 2025), <https://www.newyorker.com/magazine/2025/08/18/the-number> [<https://perma.cc/Q4XG-V89K>] (detailing how Donald Trump, his family, and his personal businesses have financially benefitted from his Presidency and policies, which have been legally insulated by the Roberts Court); Adam Liptak, *In Election Cases, Supreme Court Keeps Removing Guardrails*, N.Y. TIMES (Aug. 11, 2025), <https://www.nytimes.com/2025/08/10/us/supreme-court-voting-redistricting.html> [<https://perma.cc/5RDG-4RU7>] (“In the two decades Chief Justice John G. Roberts Jr. has led the Supreme Court, the justices have reshaped American elections not just by letting state lawmakers like those in Texas draw voting maps warped by politics, but also by gutting the Voting Rights Act of 1965 and amplifying the role of money in politics.”).

⁶⁰ See, e.g., *Rucho*, 588 U.S. (holding that “Partisan gerrymandering claims present political questions beyond the reach of the federal courts.”)

⁶¹ Michael Li & Gina Feliz, *The Competitive Districts that Will Decide Control of the House*, The Brennan Center (Oct. 24, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/competitive-districts-will-decide-control-house> [<https://perma.cc/P2GQ-XSUL>].

⁶² See David A. Lieb, *Redistricting is Rampant Ahead of the US House Midterm Elections. What States Are Taking Action?*, AP NEWS (May 6, 2026), <https://www.ap.org/news-highlights/elections/2026/redistricting-is-rampant-ahead-of-the-us-house-midterm-elections-what-states-are-taking-action/> [<https://perma.cc/X6U9-UVW2>]; Eleanor Klibanoff, *U.S. Supreme*

The use of judicial sanewashing to create a more favorable procedural framework for dismantling voting rights has also enabled substantive changes to how the Court interprets and applies statutory and constitutional law in this area. In recent years, the Court has issued sweeping and far-reaching decisions gutting bipartisan, decades-old campaign finance⁶³ and voting rights legislation.⁶⁴ The aggregate effect of these sanewashed judicial decisions has been to corrupt the political process and dilute the representation of non-white and Democratic voters, all while claiming that these decisions are apolitical and serve to strengthen the democratic process. By failing to exercise appropriate deference to the legislative branch and systematically employing a number of sanewashing strategies, including the manipulation and outright disregard of *stare decisis*, the Roberts Court has undermined democratic institutions while insisting it is doing no such thing.⁶⁵

Furthermore, sanewashed opinions spanning nearly two decades have demonstrated a palpable hostility by the Roberts Court towards the political rights of historically disenfranchised populations, notably those of the poor and racially marginalized communities.⁶⁶ The Court's antagonism towards the political and civil rights of legally marginalized communities has been complemented by extreme solicitude for the participatory rights and guaranteed "freedom of expression" (as measured by campaign contributions) of corporations and the unregulated power of states and local governments to dictate political outcomes, often playing with their own skewed rulebook.⁶⁷ Taken together, these decisions have dramatically

Court Upholds Texas' Newly Redrawn Congressional Map, TEX. TRIBUNE (Apr. 27, 2026), <https://www.texastribune.org/2026/04/27/texas-redistricting-map-ruling-us-supreme-court-upheld-2026-midterms/> [<https://perma.cc/8G4Y-GC7N>]; Joseph Ax, *How Republicans Won the 2026 Congressional Redistricting War, State by State*, REUTERS (May 29, 2026), <https://www.reuters.com/legal/government/how-republicans-are-winning-war-over-us-congressional-redistricting-state-by-2026-05-29/> [<https://perma.cc/722N-XAZE>]; David Daley, *Trump, John Roberts and the Unsettling of American Politics*, N.Y. TIMES (Apr. 14, 2025), <https://www.nytimes.com/2025/08/14/opinion/trump-roberts-supreme-court-gerrymander.html> [<https://perma.cc/9DVH-SEBF>]; Joan Biskupic, *Chief Justice John Roberts Enabled Texas' Gambit to Gerrymander the State for the GOP*, CNN (Aug. 4, 2025), <https://edition.cnn.com/2025/08/04/politics/gerrymandering-supreme-court-texas> [<https://perma.cc/E9FD-MGPT>].

⁶³ *Citizens United*, 558 U.S. See, e.g., *Nat'l Republican Senatorial Comm.v. Fed. Election Comm'n*, 609 U.S. ____ (2026).

⁶⁴ *Shelby Cnty.*, 570 U.S. at 588.

⁶⁵ Carr, *supra* note 6 (describing the specific sanewashing strategies used by the Court in this area).

⁶⁶ Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 132 (2019).

⁶⁷ Carr, *supra* note 6; *Nat'l Republican Senatorial Comm.v. Fed. Election Comm'n*, 609 U.S.

concentrated political and economic power at the top, rendering the government less responsive to the needs of ordinary citizens and less democratic overall.⁶⁸

And, yet, the Roberts Court's forceful approach to the rapid recalibration of political power seems anything but consistent with the Chief Justice's characterization of the federal judiciary as a neutral arbiter who merely "call[s] the balls and strikes and not to pitch or bat."⁶⁹ By embracing sanewashing as its dominant canon of construction, the Roberts Court has been able to occupy every role on the proverbial baseball field by intentionally, and where convenient, either expanding or constraining the Court's power of judicial review and mischaracterizing law, history, and facts.⁷⁰

A favored sanewashing strategy in the area of political rights is the Court's strategic downplaying of an issue while simultaneously exaggerating its supposed diminished constitutional responsibility to provide an equitable judicial remedy. In *Rucho v. Common Cause*,⁷¹ for example, the Roberts Court justified classifying political gerrymandering as a nonjusticiable political question (something the Court has been reluctant to do in other constitutional settings) while concomitantly describing political gerrymandering as an unfortunate, but intrinsic feature of the American democratic experience.⁷²

The Court's reasoning that the federal judiciary cannot provide a legal remedy for political gerrymandering was based on the legal conclusion that there is no "judicially discoverable and manageable standard" for such

⁶⁸ See generally Michael J. Klarman, *The Degradation of American Democracy – and the Court*, 134 HARV. L. REV. 1, 22 (2020); see also Adelman, *supra* note 66, at 133.

⁶⁹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States*, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005) (statement of John G. Roberts, Jr.).

⁷⁰ Stanley, 606 U.S. at 84 (Jackson, J., dissenting) ("we need to remember that our Court's role is to decide what the law is for the entire Nation. That reach carries with it the heightened responsibility to tether the legal principles we pronounce to the facts of the case before us, lest we not only create unfairness for particular parties but also allow a poor vehicle to drive us—and the law—astray. Considering questions of law divorced from the actual facts raises doubts about our authority under Article III.").

⁷¹ *Rucho*, 588 U.S.

⁷² *Id.* at 2492; see also Robert Barnes, *Supreme Court Says Federal Courts Don't Have a Role in Deciding Partisan Gerrymandering Claims*, WASH. POST (Jun. 27, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-says-federal-courts-dont-have-a-role-in-deciding-partisan-gerrymandering-claims/2019/06/27/2fe82340-93ab-11e9-b58a-a6a9afaa0e3e_story.html [https://perma.cc/4GGR-UDTT].

cases.⁷³ But, as pointed out by the dissent and further demonstrated by the lower federal courts, a “judicially manageable” standard had indeed been discovered and was operating quite well when the Court issued its decision in *Rucho*, foreclosing future federal judicial review of political gerrymandering cases.⁷⁴

The lack of a “judicially discoverable and manageable standard,” moreover, has hardly served to deter the Roberts Court from adjudicating other constitutionally important questions where sensitive line drawing is required.⁷⁵ The Court, for instance, including under Chief Justice Roberts’s leadership, has been quite comfortable creating its own, sometimes arbitrary, standards to limit punitive damages under the Due Process Clause.⁷⁶ Similarly, the Court did not shy away from injecting itself in the debate over the legality of the Affordable Care Act (ACA), politicized as “Obamacare,” when it was required to engage in delicate line-drawing to determine what percentage of conditional federal grants constituted an unconstitutional degree of coercion of state governments.⁷⁷

As further evidence of its sanewashing maneuvering, many of these decisions have been framed by the Court as necessary to uphold democratic ideals, yet have had precisely the opposite effect.⁷⁸ The Roberts Court has produced a series of sanewashed campaign finance rulings that have nullified election reform, allowing corporations and billionaires to spend exorbitant sums of money in the political process to sway elections in their favor.⁷⁹ The systematic dismantling of anti-corruption measures has been

⁷³ *Rucho*, 588 U.S. at 696 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁷⁴ *Id.* at 733 (Kagan, J., dissenting).

⁷⁵ Klarman, *supra* note 68, at 192-93.

⁷⁶ *See, e.g.*, *Phillip Morris USA v. Williams*, 549 U.S. 346, 349 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424–25, 429 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996).

⁷⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583, 585 (2012) (opinion of Roberts, C.J.).

⁷⁸ The Court’s embrace of sanewashing to embed counter-constitutional features in the democratic process under the guise that it is serving democratic principles parallels the dystopian nature of an Orwellian plot. GEORGE ORWELL, 1984 (1949) (depicting a regime that obscures reality through linguistic manipulation to entrench political control); *Louisiana v. Callais*, 608 U.S. ____ (2026) (a decision in which the Court substituted an act of Congress with its own policy preferences, diluted the voting rights of tens of millions of Americans, and rewrote election law on the eve of the 2026 election to enable Republicans to gain as many as 19 additional congressional seats compared to 2024 maps).

⁷⁹ Klarman, *supra* note 68, at 195 (“In no field has the Court’s conservative majority done more damage to American democracy than in campaign finance.”); *see also* Fredreka Schouten et. al., *Musk Spent More Than a Quarter-Billion Dollars to Elect Trump, Including Funding a Mysterious*

facilitated by the Roberts Court under the guise that it is necessary to preserve free speech principles that are essential to democratic decision-making. Deeply disingenuous and in full disregard of constitutional and judicial norms, this systematic gutting of campaign finance reform has been effectuated through clever, carefully crafted sanewashing to obfuscate the controversial legal reasoning on which the Roberts Court has relied and the disastrous democratic consequences that have followed.⁸⁰

So, how did we get here, and how did the Court's sanewashing lead us to this outcome? For nearly two centuries, no one reasonably contemplated that political campaign funding could qualify as "speech" entitled to First Amendment protections.⁸¹ Legally, politically, and intuitively, the idea presented as absurd and indefensible. But, in 2010, the Roberts Court did just that, redefining speech to allow corporations to enjoy the same constitutional protections as individuals. In doing so, the Court held that restrictions on spending from corporations and other outside groups amount to unconstitutional suppression of their speech in violation of the First Amendment.⁸²

Issuing a far-ranging holding that went beyond the question before the Court,⁸³ *Citizens United* unleashed a torrent of unregulated corporate

Super PAC, New Filings Show, CNN (Dec. 6, 2024), <https://edition.cnn.com/2024/12/05/politics/elon-musk-trump-campaign-finance-filings> [<https://perma.cc/4ABM-UF5J>]; Nat'l Republican Senatorial Comm.v. Fed. Election Comm'n, 609 U.S. ____ (2026).

⁸⁰ See Gene Nichol, *Trumping Politics: The Roberts Court and Judicial Review*, 46 TULSA L. REV. 421, 423, 425-26 (2013) ("No one, literally no one, reading *Citizens United* and *Heller* could even approach the conclusion that the Roberts Five are behaving like modest, neutral arbiters – applying the rules, not making them; servants of text and process and precedent; cautious umpires, exercising only limited visions of judicial power. Hungrily casting aside precedent, reaching boldly beyond the actual cases presented, employing the widest possible compass, invalidating acts of Congress and state legislatures at whim and by boatload, constitutionalizing arenas of vibrant political controversy, weighing in potently, decidedly, in the interests and causes of previous political benefactors, the Roberts tribunal embodies activism writ large. Imagine if Chief Justice Roberts had, before the Senate Judiciary Committee, professed his intention to repeatedly ditch centuries of settled law, invalidating the fruits of the democratic process, without textual warrant, without historical justification, without a shred of precedent, without even the request of the parties, in order to further his particularized political ideology and to solidify the power of the strongest economic forces in the nation. At least it would have made for an interesting hearing.")

⁸¹ Klarman, *supra* note 68, at 195.

⁸² *Citizens United*, 558 U.S. at 343.

⁸³ *Id.* at 329 (The Court justified the issuance of its sweeping decision in asserting that, "the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is

spending in American politics, enabling “super PACs” to raise limitless funds from corporations and large donors to be covertly funneled to political candidates.⁸⁴ Neither fidelity to *stare decisis* nor the Court’s expected adherence to judicial modesty had any influence on the broad-ranging scope of the ruling, which invalidated a century’s worth of legal precedent and bipartisan, popularly supported federal legislation⁸⁵ in one fell stroke.

Dismissive that the appearance of influence or access would compromise voters’ faith in the democratic process or leave it vulnerable to corporate political domination,⁸⁶ the Court relied heavily on the rationale that because speech is integral to the integrity of the election process, more speech is always preferred to less.⁸⁷ The possibility of electoral engineering by the wealthiest, most powerful Americans and business interests only garnered fleeting attention in the Court’s opinion. Instead, the sanewashed narrative that won the day was that speech is indispensable to democratic decision-making, regardless of its source or potential to suppress other constitutionally protected speech and rights.

Reading the Court’s opinion, one might be forgiven for believing the Court’s reassurances that extending First Amendment speech protections to allow for unlimited, undisclosed, and unregulated corporate spending in elections would pose little threat to the integrity of the electoral system. The sanewashed opinion reads almost as a pro-democracy manifesto, reiterating the importance of free speech as “an essential mechanism of democracy” that “hold[s] officials accountable to the people.”⁸⁸ “People,” as defined by the Court, includes corporations, and “speech” encompasses dark money. Crafted without an iota of irony, the Court sought to position itself as a defender of “disfavored speakers,” refusing to permit government restrictions of any kind on corporate-funded speech.⁸⁹

central to the meaning and purpose of the First Amendment.”); *see also* Nichol, *supra* note 80, at 425 (describing the decision as “breathtaking in both its sweep and departure.”).

⁸⁴ *See* ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* 153–54 (2020); *see also* Abby K. Wood, *Citizens United Turns 10 Today. Here’s What We’ve Learned About Dark Money*, WASH. POST (Jan. 21, 2020), <https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/> [<https://perma.cc/U8MB-F9MF>].

⁸⁵ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2, 8, 18, 28, 36, 47, and 52 U.S.C.).

⁸⁶ *Citizens United*, 558 U.S.

⁸⁷ *Id.* at 334, 361.

⁸⁸ *Id.* at 339.

⁸⁹ *See generally* *Citizens United*, 558 U.S.

Since *Citizens United*, the Roberts Court has continued to invalidate campaign finance limitations based on the dubious constitutional theory that treats individual speech and corporate political spending as constitutional equivalents.⁹⁰ The predictable result of such sanewashed legal logic is that spending by outside groups has exploded, with a significant portion of that funding taking the form of untraceable dark money.⁹¹ In the first five years following the *Citizens United* decision, corporations and super PACs spent more than double what they had spent during the entire period spanning 1990 to 2008.⁹² In the post-*Citizens United* political landscape, working and middle-class voters exercise waning influence on federal policy and, in combination with the effects of partisan gerrymandered electoral districts permitted under *Rucho*, have increasingly limited power over state and local policy-making as well.⁹³

The erosion of political rights has occurred in tandem with the weakening of long-respected norms that require government resources not to be used to advance purely partisan priorities or engage in overt political favoritism.⁹⁴ The nonpartisan principle—the view that the Constitution imposes limits on political partisanship—has been embedded in judicial doctrine, legislation, and executive practices.⁹⁵ Where the nonpartisan

⁹⁰ See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (striking down a state law passed in response to corruption concerns that authorized matching funds for state candidates participating in the public campaign finance system if their privately funded opponents outspent them); *Nat'l Republican Senatorial Comm.v. Fed. Election Comm'n*, 609 U.S. ____ (2026); see also *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014) (plurality opinion)(invalidating campaign finance restrictions on the total amount that a donor can give to candidates, party committees, and PACs in an election cycle in holding that, “[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. ‘Ingratiation and access . . . are not corruption.’ ”).

⁹¹ DANIEL I. WEINER, THE BRENNAN CTR. FOR JUST., *CITIZENS UNITED FIVE YEARS LATER* (2015).

⁹² *Id.*

⁹³ BENJAMIN I. PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT* 95 (2020).

⁹⁴ Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563, 1571-72 (2024); see also *Trump pushing Texas to create more Republican-leaning congressional seats*, WASH. POST (Jul. 21, 2025), <https://www.washingtonpost.com/politics/2025/07/21/trump-presidency-news/> [https://perma.cc/3EUX-E5QL].

⁹⁵ Shaw, *supra* note 94, at 1626 (describing the importance of the nonpartisan principle as having “stood for so long as a feature of our constitutional order”).

principle has not been respected, as during the Watergate scandal, political and legal consequences have typically been swift and severe.⁹⁶

Though an important facet of constitutional culture that has endured historical moments of deep political dissension across countless presidential administrations, the Roberts Court has indicated a declining commitment to the nonpartisan principle.⁹⁷ Prior to the Roberts Court, the Court had shown fidelity to the nonpartisan doctrine. In diverse areas of constitutional law, spanning the legality of patronage dismissals of government officials⁹⁸ to the administration of elections⁹⁹ and government speech,¹⁰⁰ the Court had consistently endorsed the position that government authority and resources

⁹⁶ *Id.* at 1565, 1586-89. In the current sanewashed political and legal landscape, however, those accountability mechanisms no longer exist.

⁹⁷ *Id.* at 1565, 1568. The effects of the weakening of the nonpartisan principle are illustrated by executive orders and presidential actions taken during the first month of the Second Trump Administration exerting significant control over political agencies, dismissing en masse federal employees perceived as politically disloyal, and imposing political litmus test on career civil servants. Reporting on these developments, Russell Vought—an architect of Project 2025 and an influential member of both the first and second Trump administrations—has publicly expressed the Administration’s position in rejecting traditional legal norms respecting agency independence from partisanship, stating “[t]he notion of an independent agency —whether that’s a flat out independent agency like the FCC, or an agency that has parts of it that view itself as independent, like the Department of Justice — we’re planting a flag and saying we reject that notion completely.” Steve Inskeep, *Why Independent Agencies Were Created To Be Independent*, NPR, (Feb. 20, 2025), <https://www.npr.org/2025/02/20/nx-s1-5302537/history-congress-trump-independent-agencies> [<https://perma.cc/29S5-LCA2>]; Matthew Lee, Aamer Madhani & Jill Colvin, *Loyalty Tests and MAGA Checks: Inside the Trump White House’s Intense Screening of Job-Seekers*, L.A. TIMES (Jan. 25, 2025), <https://surl.li/feowpd> [<https://perma.cc/U9M2-QK8H>]; see also Lisa Rein, *How Trump Is Stretching Laws to Make the Federal Government More Political*, WASH. POST (Jan. 29, 2025), <https://www.washingtonpost.com/politics/2025/01/29/trump-federal-government-laws-schedule-f/> [<https://perma.cc/J84Q-3TQ5>]; *Trump v. Slaughter*, 609 U.S. ____ (2026).

⁹⁸ See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (where a plurality of the Court concluded that political patronage employment practices are unconstitutional under the First and Fourteenth Amendments); see also *Branti v. Finkel*, 445 U.S. 507, 508, 519 (1980) (holding that First Amendment protects government employees from dismissal based on their political beliefs); see generally Roy E. Hoffinger, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982).

⁹⁹ *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down a state law that imposed an early filing deadline on independent candidates for President in finding that the requirement discriminated against voters and candidates not associated with a major political party).

¹⁰⁰ See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring).

should be used for good democratic governance, not leveraged for purely partisan purposes.¹⁰¹

Recent decisions, however, have indicated a growing judicial tolerance of the intrusion of political motives and manipulation in areas of law and governance that have traditionally been shielded from partisan interference. The Court's historic partisan gerrymandering case, *Rucho v. Common Cause*,¹⁰² is but one example in which the Roberts Court limited the important gatekeeping function of the federal courts in protecting the integrity of the electoral process, effectively green-lighting the practice of state legislators, in their official capacity, to use their government authority and resources to legally rig elections.¹⁰³

Having learned valuable lessons from its earlier sanewashed decisions in *Shelby County v. Holder*,¹⁰⁴ *Citizens United*,¹⁰⁵ and *Rucho v. Common Cause*,¹⁰⁶ the Court again expanded its "anti-voter jurisprudence" and facilitated the politicization of the election process by eliminating the last meaningful mechanism of the Voting Rights Act mere months before the highly consequential 2026 midterm elections.¹⁰⁷ Without formally acknowledging the effects of its decision in *Louisiana v. Callais*, the Court nullified a landmark Civil Rights law that had withstood the test of time for 60 years and was regarded as the crown jewel of the Civil Rights movement and one of the most successful civil rights laws passed in the country's

¹⁰¹ Shaw, *supra* note 94, at 1593-98 ("[T]aken together, the cases do suggest that the Constitution imposes significant limitations, at least as a default matter, on considerations of partisanship in government employment, funding decisions, and the regulation of voting and elections"); J. David Goodman, Nick Corasaniti & Shane Goldmacher, *Texas Republicans Unveil Gerrymandered House Map, Trying to Please Trump*, NY TIMES (Jul. 30, 2025), <https://www.nytimes.com/2025/07/30/us/politics/texas-republican-redistricting.html> [<https://perma.cc/9LY3-AT6E>] (describing a "rare mid-decade redistricting" attempt by the Republican-dominated Texas legislature to redrawn electoral districts to dilute Democratically-held districts to allow the Republican party to gain five congressional seats and retain control of the House of Representative in 2026).

¹⁰² *Rucho*, 588 U.S. at 2506-07.

¹⁰³ Shaw, *supra* note 94, at 1617 (characterizing the *Rucho* decision as the Court "disavow[ing] any judicial role in enforcing a constitutional principle that would place limits on the manipulation of the democratic process for partisan advantage or entrenchment"); see also Blaise Gainey & Andrew Schneider, *The Texas House Just Passed a New District Map Designed to Give Republicans an Edge in Congress*, KUT NEWS (Aug. 20, 2025), <https://www.kut.org/politics/2025-08-20/texas-house-congressional-maps-vote-trump-redistricting> [<https://perma.cc/UNZ7-PUB6>].

¹⁰⁴ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

¹⁰⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁰⁶ *Rucho v. Common Cause*, 588 U.S. 684 (2019).

¹⁰⁷ *Louisiana v. Callais*, 608 U.S. ____ (2026).

history.¹⁰⁸ In unceremoniously gutting the Voting Rights Act, the Court replaced a bipartisan congressional mandate supported by an established legislative record with its own judicial fiat, rewriting the Reconstruction Amendments in the process. Sanewashing both law and fact, the *Callais* decision distorted American history and the modern political landscape to recast white, conservative interests as requiring heightened constitutional protections and judicial oversight.¹⁰⁹

Following its controversial decision in *Callais*, the Court further enhanced the sanewashed effects of its ruling by again leveraging its emergency docket and disregarding the Purcell Principle to allow the Republican-controlled state legislature to rely on a congressional map for the 2026 midterm elections after voting was underway despite it having been repeatedly found to be racially discriminatory.¹¹⁰

The Court's contribution to the erosion of political and civil rights for the most politically vulnerable, the decline of the non-partisan principle, and the intrusion of dark money in the democratic process have all been achieved through clever, continuous sanewashing. The subversive effects of sanewashing and the spurious legal reasoning underpinning these seismic legal decisions pose a significant threat to the nation's democratic and constitutional health. But, in reading the Court's sanewashed decisions in these areas, one would hardly be alerted that such a concern is warranted.

¹⁰⁸ See, e.g., *Introduction to Federal Voting Rights Laws*, JUSTICE.GOV (Aug. 6, 2015) (referring to the Voting Rights Act as “the single most effective piece of civil rights legislation ever passed by Congress”) <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0> [<https://perma.cc/9TAF-DHFG>]; *The Enduring Work of Protecting Voting Rights: 59 Years and Counting*, U.S. DEP’T OF JUST. OFF. PUB. AFFS. ARCHIVED BLOG (Aug. 24, 2026), <https://www.justice.gov/archives/opa/blog/enduring-work-protecting-voting-rights-59-years-and-counting> [<https://perma.cc/ZBL4-AMD3>] (quoting President Lyndon B. Johnson describing the Voting Rights Act as “one of the most monumental laws in the entire history of American freedom.”); Presidential Statement About Extension of the Voting Rights Act, 17 Weekly Comp. Pres. Doc. 1221 (Nov. 6, 1981) (where President Ronald Reagan expressed support for the Act, stating, “For this Nation to remain true to its principles, we cannot allow any American's vote to be denied, diluted, or defiled. The right to vote is the crown jewel of American liberties, and we will not see its luster diminished. To protect all our citizens, I believe the Voting Rights Act should and must be extended.”).

¹⁰⁹ *Callais*, 608 U.S. ____ (2026).

¹¹⁰ Steve Vladeck, *The Death of Purcell's “Principle,”* ONEFIRST (Jun. 8, 2026), <https://www.stevevladeck.com/p/231-the-death-of-purcells-principle> [<https://perma.cc/TRN6-G2BM>] (describing the Court as having “abandoned any semblance of ‘principle’ in its application of the ‘Purcell’ doctrine” and characteristic of an “overall pattern that reveals justices behaving in a way that has no obvious explanation *other than* politics.”)

Rather, as the Roberts Court would have us believe, they are the true defenders of democracy.

B. THE SYNERGISTIC HARM OF SANEWASHING IN CONJUNCTION WITH WHITEWASHING

The judicial sanewashing spectacle that has permeated the Supreme Court's jurisprudence in nearly every area of constitutional and statutory law has hardly occurred in a vacuum. A consistent theme within the Court's broader pattern of engaging in various forms of judicial sanewashing has been its combination with whitewashing.¹¹¹

"Whitewashing" has dual, equally applicable meanings within this context. The word is defined as "glossing over" or "covering up" imperfections or flaws,¹¹² but it can also be used to describe behaviors that "alter in a way that favors, features, or caters to white people."¹¹³ Legal scholars have long called attention to the use of whitewashing to maintain a white-centered normative perspective that rely on racialized constructs of legal and social norms.¹¹⁴

¹¹¹ In recounting the Roberts Court's sanewashing of racially regressive judicial opinions, this section relies on the phrase "people of color" to describe the racially minoritized communities who are most harmed by these legal decisions. The language choice adopted in this Article is informed by the work of Professor William Aceves, who advocates for the role of language as a means "to make visible that which is unseen or ignored." In arguing that "people of color" is an intentionally color-conscious term in a period in which colorblindness has become dominant within legal discourse, the deliberate use of the term represents "an inclusive effort to identify diverse groups that share a common experience and similar struggles," thereby "empower[ing] current generations by connecting their struggle for equality to past generations." William J. Aceves, *On the Meaning of Color and the End of White(ness)*, 17 HARV. L. & POL'Y REV. 79, 123, 129 (2022).

¹¹² Whitewash, *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/whitewash> [<https://perma.cc/JFZ8-ANRC>] (last visited Jan 12, 2025).

¹¹³ *Id.*

¹¹⁴ See, e.g., Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923 (2023) (examining the absence of race in the litigation of landmark Fourth Amendment cases); Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018); Alexis Hoag-Fordjour, *White Is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770 (2023) (arguing that the Sixth Amendment ineffective assistance of counsel standard is based upon a racialized presumption of reasonableness and competency); Francine J. Lipman, *Not Taxing Puerto Rico: Whitewashing Impoverishment in United States v. Vaello Madero*, TAXPROF BLOG (2024), <https://surl.li/yswfdp> [<https://perma.cc/XU8C-V4PM>] (describing the Court's "whitewashing" in the 2022 case of U.S. v. Vaello Madero in justifying the denial of supplemental social security income to Puerto Rican residents as a rational balancing of federal

The United States has a long, tortuous history of attempting to reconcile its democratic ideals with a legacy of racialized oppression borne of a proslavery founding document.¹¹⁵ For much of its history, the United States has been structured as a racial oligarchy.¹¹⁶ As demographics have shifted and the country has developed a multicultural democratic identity, white anxiety over the loss of status has been a persistent threat to legal equality.¹¹⁷ From the speedy demise of the Reconstruction Era in the aftermath of the Civil War to the white conservative backlash of the Civil Rights Movement,

tax contributions against federal benefits); Elisabeth Semel, Dagen Downard, Emma Tolman, Anne Weis, Danielle Craig & Chelsea Hanlock, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, BERKELEY L. DEATH PENALTY CLINIC (2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf> [<https://perma.cc/2RCF-65AU>] (last visited Jan. 12, 2025) (documenting the thousands of California citizens have been denied the right to serve on juries because of their race or ethnicity, as well as the sizeable number of criminal defendants have been tried by juries from which those citizens were excluded); MICHAEL K. BROWN, MARTIN CARNOY, ELLIOTT CURRIE, TROY DUSTER, DAVID B. OPPENHEIMER, MARJORIE M. SCHULTZ & DAVID WELLMAN, *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); Eric Petterson, *The (White) Washing of American History*, 17 FLA. A&M U. L. REV. 1 (2022).

¹¹⁵ See generally HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (2003); see also Rogers M. Smith, *The Reconstruction Amendments, American Constitutional Development, and the Quest for Equal Citizenship*, 2 J. AM. CON. HIST. 680 (2024); MICHELLE ALEXANDER, *THE NEW JIM CROW* 22-26 (2010) (explaining that the structure of American democracy rests on a “racist legal fiction,” codified in the Constitution, that enslaved people were not “a real, whole human being.”); see also RONALD W. WALTERS, *FREEDOM IS NOT ENOUGH: BLACK VOTERS, BLACK CANDIDATES, AND AMERICAN PRESIDENTIAL POLITICS* (2007) (“As slaves, Blacks were not a part of that original vision [of freedom and liberty], but had to seek a place in it, finding that the elements of the vision could not sustain their own freedom and that in fact, their status as slaves was a contradiction to the broader manifest goals of democracy.”).

¹¹⁶ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960'S TO THE 1990'S* 65-66, 67 (2d ed. 1994) (“For most of its existence as a European colony and as an independent nation, the U.S. was a *racial dictatorship*.”); see also Alexander, *supra* note 115, at 22-26 (“It may be impossible to overstate the significant of race in defining the basic structure of American society. The structure and content of the original Constitution was based largely on the effort to preserve a racial caste system – slavery – while at the same time affording political and economic rights to whites, especially propertied whites.”).

¹¹⁷ See, e.g., Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 Proc. Nat'l Acad. Sci. U.S.A. 4330 (2018); see also Kanisha D. Bond, Katherine Sawyer & H. Hannah Nam, *System justification and the American alt-right*, 13 POL. GRPS. & IDENTITIES, 842 (2025); see also Derrick Bell, *Racism as the Ultimate Deception*, 86 N.C. L. REV. 621, 621(2008) (“Seriously getting to the roots of racism [. . .] and pulling up those roots to eradicate them is, however, extraordinarily difficult. This is so despite the progress that supposedly has been made in race relations in this nation since the Emancipation Proclamation became effective in 1863.”).

recurrent racial resentment has followed most democratic advancements.¹¹⁸ With the exception of fleeting moments in the Court's history, the Court (also reflective of white power) has largely contributed to the reification of a system built and sustained on white supremacy.¹¹⁹

What distinguishes the Roberts Court's curtailing of civil rights from that of its predecessor Courts is the falsity of its judicial proclamations. Whereas earlier Supreme Court rulings denying equal rights to minoritized racial groups had been transparent in their white supremacist values,¹²⁰ the Roberts Courts has achieved similar outcomes while purporting to be acting neutrally and in service of constitutional norms through the application of a "colorblind" application of the law.¹²¹ These decisions, including *Parents Involved in Community Schools v. Seattle School District No. 1*,¹²²

¹¹⁸ Bell, *supra* note 117, at 629 ("The post-Civil War Amendments to the Constitution—much like the earlier Emancipation Proclamation and the later civil rights laws—promised black people much more than they could deliver, or more than whites were willing to permit them to deliver, while each amendment served to further what policymaking whites felt would be in at least whites' short-term interests.").

¹¹⁹ DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 8—17 (6th ed. 2008) (describing the sordid history of colorblind constitutionalism as a rediscovered 19th-century judicial philosophy employed by the Supreme Court to enforce false notions of "formal equality" that function to undermine meaningful progress towards racial equality).

¹²⁰ *See, e.g., Dred Scott v. Sandford*, 60 U.S. 393, 412 (1856) (finding it "impossible to believe that these rights and privileges [of citizenship] were intended to be extended to them [enslaved and free African American]"); *see also* The Insular Cases, a series of cases decided between 1901 and 1922, in which the Court denied full constitutional protections for Guam, Puerto Rico, and the Philippines premised on the racial inferiority of the majority non-white residents of the territories. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) ("We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens"); *Plessy v. Ferguson*, 163 U.S. 537, 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

¹²¹ *See, e.g., Bell, supra* note 119, at 9 (explaining how jurisprudence based on color-blindness serves to "reify rather than repair existing racial disparities" and have allowed equal protection to be used to the disadvantage of communities of color); *see also* Jonathan Feingold, *Colorblind Capture*, 102 *BOS. U.L. Rev.* 1949 (2022) (describing how the defendants, liberal elite universities, in the *SFFA* case relied on colorblind constitutionalism, which ultimately made no difference to a "hostile and ideologically motivated" Supreme Court).

¹²² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (invalidating school district plans that relied on race as a factor in assigning students to K-12

Crawford v. Marion County, *Shelby County v. Holder*,¹²³ *Students for Fair Admissions v. Harvard*,¹²⁴ and *Louisiana v. Callais*,¹²⁵ may initially appear merited and even legally sound. Reflected in these decisions is an overly simplistic, highly skewed telling of the nation's racial history that incorrectly suggests that structural racism has largely been cured.¹²⁶ This, of course, is a function of the efficacy of the Court's combined sanewashing and whitewashing efforts.¹²⁷

The Court's 2008 decision in *Crawford v. Marion County*¹²⁸ is one of several illustrations of the Roberts Court combining judicial sanewashing and whitewashing to weaken voter rights protections for non-white constituents. In 2005, the Republicans regained control over the Indiana state government for the first time in decades.¹²⁹ One of the state legislature's first acts was to quickly move to consolidate power by passing SEA 483,¹³⁰ a restrictive voter identification law.¹³¹ The identification requirements were known to disproportionately burden racial minorities, with data indicating that three times as many Black voting-age citizens lacked government-issued photo identification as compared to white voting-age citizens.¹³² At the time, tens of thousands of voting-age state residents were without the requisite voter identification, with the vast majority residing in an area with the highest concentration of Black voters in the state.¹³³

schools as a means of remedying the legacy of de jure segregation to address racial segregation) (Writing for the majority, Chief Justice Roberts famously opined that, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

¹²³ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

¹²⁴ *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023).

¹²⁵ *Louisiana v. Callais*, 608 U.S. ____ (2026).

¹²⁶ See generally Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1015-24, 1026-31 (2019) (explaining how the dominant, incomplete telling of the civil rights era provides an "oversimplified morality tale" that "renders our stock histories of the civil rights era reassuring, rather than unsettling.").

¹²⁷ See e.g., Yuvraj Joshi, *Racial Equality Compromises*, 111 CAL. L. REV. 529 (describing the equality gains reversed by the Roberts Court).

¹²⁸ *Crawford v. Marion Cnty Election Bd*, 553 U.S. 181 (2008).

¹²⁹ Cohen, *supra* note 84, at 178-79.

¹³⁰ Senate Enrolled Act 483, 2005 Ind. Acts 2005.

¹³¹ See Henry Rose, *How the Supreme Court Diminished the Right to Vote and What Congress Can Do about It*, 75 NAT'L LAW. GUILD REV. 22, 25 (2018).

¹³² *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CTR. FOR JUST., 3 (2006), <https://www.brennancenter.org/our-work/research-reports/citizens-without-proof> [<https://perma.cc/8SAK-J789>].

¹³³ *Crawford*, 553 U.S. at 218 (Souter, J., dissenting).

As observed by Professor Michael Klarman, *Crawford* should have been an “easy case.”¹³⁴ For half a century, the Court had robustly protected voting rights by requiring the government to establish that infringement of a fundamental right was necessary to serve a legitimate governmental interest.¹³⁵ But, in *Crawford*, the state did not even attempt to validate that voter fraud was an actual issue. With the state having failed to identify even a single case of voter fraud warranting severe voter identification requirements, the Court should have easily concluded that the law was unconstitutional.¹³⁶

But the Court graciously filled in the gaps for Indiana’s Republican legislature. In place of applying heightened judicial scrutiny, as is typically required in evaluating the constitutionality of government infringement on a fundamental right, the Court relied on a more deferential balancing test.¹³⁷ While acknowledging that there was no evidence “of any such fraud actually occurring in Indiana at any time in its history,” the Court nonetheless concluded that “flagrant examples of such fraud in *other* parts of the country” were sufficient to “demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.”¹³⁸ Devoid of a legal or historical predicate to ground its decision, the Court bizarrely cited the Tammany Hall political machine of late 19th century New York as a basis for Indiana’s interest in imposing the strictest voter identification requirements in 2005.¹³⁹ The abstract possibility of in-person voter fraud, disconnected from any credible evidence to suggest that such an issue existed or was likely to threaten the integrity of Indiana elections, was sufficient to satisfy the Court’s constitutional inquiry. The Court ultimately upheld Indiana’s voter identification law in a plurality opinion joined by Chief Justice Roberts.¹⁴⁰

¹³⁴ Klarman, *supra* note 68, at 184.

¹³⁵ See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667–68 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

¹³⁶ *Crawford*, 553 U.S. at 226 (Souter, J., dissenting); see also CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 56 (2018).

¹³⁷ *Id.* at 190.

¹³⁸ *Id.* at 195–96 (emphasis added).

¹³⁹ *Id.* at 195.

¹⁴⁰ Notably, Justice John Paul Stevens, who authored the plurality opinion, and Judge Richard Posner, who wrote the 7th Circuit opinion upholding Indiana’s voter identification law, would both come to regret their support for the law. ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 309 (2015).

Aside from the Court's specious analogical reasoning and general disregard of the factual record,¹⁴¹ the Court was additionally dismissive of the risk of voter suppression posed by the challenged state law¹⁴² and failed to recognize the racialized impact of the law's voter identification requirements.¹⁴³ To the extent that the voter identification law would place a "somewhat heavier burden [...] on a limited number of persons," the Court reasoned that the law was justified by a valid state interest in protecting "the integrity and reliability of the electoral process."¹⁴⁴ The problem with this doubly insane and whitewashed reasoning was that there was no evidence that in-person voter fraud was an issue,¹⁴⁵ but there was overwhelming evidence that the law would impose significant burdens on the right to vote and would impact a non-trivial number of Black voters.

The Court's application of a "flexible standard"¹⁴⁶ to hold that Indiana's voter identification law was a facially neutral, non-discriminatory law¹⁴⁷ that was justified by a legitimate government interest galvanized other states to embrace similarly severe voter repression legislation aimed at suppressing the Black vote.¹⁴⁸ Similar to the Indiana law that was greenlighted by the Court in *Crawford*, many of the strict voter identification laws that were subsequently passed were presented as

¹⁴¹ Klarman, *supra* note 68, at 185 (describing the Court's acceptance of the state's rationale for the need for strict voter identification requirements as "simply reward[ing] the Republican Party for a decade's worth of lies perpetuating the myth of voter impersonation fraud.").

¹⁴² *Id.* at 185–86.

¹⁴³ Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 25–27 (2022) (explaining how the Roberts Court's "impoverished conceptualization of what counts as race" has permitted the Court to justify there being no racial injury in present-day voter identification laws).

¹⁴⁴ *Crawford v. Marion Cnty Election Bd*, 553 U.S. 181, 204 (2008) (quoting Anderson, 460 U.S., at 788, n. 9).

¹⁴⁵ Jane Mayer, *The Voter Fraud Myth*, NEW YORKER (Oct. 29, 2012), http://www.newyorker.com/reporting/2012/10/29/121029fa_fact_mayer (Between 2000–2012, there were only seven convictions for voter impersonation fraud in the United States, and none of these cases involved conspiracies to commit voter impersonation fraud.); *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), <http://www.nytimes.com/2007/04/12/washington/12fraud.html> [<https://perma.cc/BY79-KHUF>].

¹⁴⁶ *Crawford*, 553 U.S. at 190 n.8 (plurality opinion).

¹⁴⁷ *See generally* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARV. L. REV. 1331, 1376–82 (1988) (providing further background and context on how the adoption of formal race-neutral policies made it possible for states to continue to sustain legalized racial discrimination to deny persons of color equal opportunities to vote, obtain gainful employment, receive a quality education, own a home, and generally engage in economic, civic, social and political life.).

¹⁴⁸ David M. Faherty, *The Post-Crawford Rise in Voter ID Laws: A Solution Still in Search of a Problem*, 66 ME. L. REV. 269 (2013) (describing the proliferation of stringent voter identification laws across the country in the period following *Crawford*); Berman, *supra* note 140, at 260.

racially-neutral, premised on false, unsubstantiated claims of voter fraud,¹⁴⁹ and had the effect of creating substantial barriers for voters of color.¹⁵⁰

Within a short order, states hostile to Black voting rights were no longer limiting their suppression efforts to voter identification laws peddled as fraud prevention measures. With a Court willing to sanewash and whitewash their questionable legal theories and non-existent factual records, the world was their oyster. Their next target was the Voting Rights Act of 1965, considered one of the “most noble and efficacious statutes in American history.”¹⁵¹

When the Act came into force in 1965, African Americans across the country, but particularly in the Jim Crow South, were without political power or protection.¹⁵² Even after the ratification of the Reconstruction Amendments, which guaranteed due process under the law and prohibited the denial of the right to vote based on race, African Americans were systematically and violently excluded from political participation.¹⁵³ In areas with the most extreme voter suppression laws and practices, there were no registered Black voters.¹⁵⁴ Despite making up the largest percentage of the population in southern states,¹⁵⁵ there was no African American representation in state legislatures or Congress from the South for most of the country’s post-Civil Rights history. In fact, the last African

¹⁴⁹ David M. Faherty, *The Post-Crawford Rise in Voter ID Laws: A Solution Still in Search of a Problem*, 66 ME. L. REV. 269, 270 (2013) (“[E]vidence of significant voter fraud has yet to be uncovered in the United States, despite many concerted attempts to do so.”).

¹⁵⁰ Sonya Ross, *Study: ID Laws Could Trip Up Young Minority Voters*, LAKOTA COUNTRY TIMES (Sept. 19, 2012) (Associated Press), <https://www.lakotatimes.com/articles/study-id-laws-could-trip-up-young-minority-voters/> [<https://perma.cc/58FG-R7QS>] (referencing a study that found that up to twenty-five percent of eligible young voters of color between the ages of eighteen and twenty-nine could become demobilized by new voter identification laws, which would account for a decrease in voter participation ranging from 538,000 to 696,000 votes).

¹⁵¹ Klarman, *supra* note 68, at 179; *see also* *Shelby Cnty. v. Holder*, 570 U.S. 529, 559 (2013) (Ginsburg, J., dissenting) (“In the Court’s view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated.”).

¹⁵² Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181 (2015).

¹⁵³ *Id.* at 194–208.

¹⁵⁴ *Id.*; Klarman, *supra* note 68, at 179.

¹⁵⁵ Campbell Gibson & Kay Jung, U.S. Census Working Paper No. 76, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States*, 2002, <https://www.census.gov/content/dam/Census/library/working-papers/2005/demo/POP-twps0076.pdf> [<https://perma.cc/W3RV-LRJR>].

American congressperson hailing from a southern state was George Henry White at the turn of the twentieth century during the short-lived Reconstruction Era.¹⁵⁶ It was only with the passage of the Voting Rights Act that Barbara Jordan, an African American representative from a former Confederate state, was able to gain entry into the halls of Congress in 1972.¹⁵⁷

The Court's dismantling of a key provision of the Voting Rights Act¹⁵⁸ in its landmark decision in *Shelby County v. Holder*¹⁵⁹ is another example of the undemocratic, logically unsupportable combined effects of sanewashing and whitewashing. Until *Shelby County*, the Court had repeatedly upheld the constitutionality of the Voting Rights Act, consistently rejecting challenges lodged by states hostile to voter enfranchisement that sought to undermine civil rights gains.¹⁶⁰ But in 2013, in an opinion authored by Chief Justice Roberts, the Court boldly declared that the Voting Rights Act was no longer necessary.¹⁶¹

Three decades earlier, during the early days of the Voting Rights Act and when much work remained to confront generations of legalized racism and voter oppression, John Roberts was a leader in efforts to weaken the Act.¹⁶² Long hostile to the Voting Rights Act, the Chief Justice began his legal career in the early 1980s working as a special assistant to Attorney General William French Smith in the Reagan Administration.¹⁶³ In that role, over a period of years, the Chief Justice drafted dozens of memos and ghostwrote op-eds advocating for erasure of the Voting Rights Act.¹⁶⁴

¹⁵⁶ ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA 1872–1901: THE BLACK SECOND 227–314 (1981).

¹⁵⁷ Kerri Lee Alexander, *Barbara Jordan*, Nat'l Women's History Museum (2019), <https://www.womenshistory.org/education-resources/biographies/barbara-jordan> [https://perma.cc/W3RV-LRJR].

¹⁵⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973b (recodified at 52 U.S.C. § 10303 (2012))).

¹⁵⁹ *Shelby Cnty. v. Holder*, 579 U.S. 529 (2013).

¹⁶⁰ Walters, *supra* note 115, at 21–22.

¹⁶¹ *Id.* at 535–36 (citing improvements in the race gap in voter registration, the Court concluded that, “[t]here is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions).

¹⁶² Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/> [https://perma.cc/LHW7-9ALH].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

During his 2005 Senate confirmation hearing to become Chief Justice of the Supreme Court, Representative John Lewis testified against Roberts's nomination.¹⁶⁵ Lewis, who had been attacked on "Bloody Sunday" while leading peaceful protestors across the Edmund Pettus Bridge in Selma, Alabama in a march for voting rights, cautioned of the damage to voting rights that could be expected of a Roberts-led Supreme Court. Speaking before the Senate Judiciary Committee in opposition to Roberts' nomination as Chief Justice, an impassioned Lewis said, "had Judge Roberts' narrow reading of the Voting Rights Act prevailed, fewer people of color would be serving in Congress and at both the state and local level today. We cannot afford to elevate an individual to such a powerful lifetime position whose record demonstrates such a strong desire to reverse the hard-won civil rights gains that so many of us sacrificed so much to achieve."¹⁶⁶

Representative Lewis's voiced concern about Roberts's commitment to voting rights prompted questioning from fellow colleagues, Senator Ted Kennedy and Representative Chuck Grassley. When Senator Kennedy pointedly asked whether Roberts had "any problem at all, any trouble at all, in terms of the constitutionality of the existing Voting Rights Act that was extended by the Congress," Roberts responded, "[t]he existing Voting Rights Act, the constitutionality has been upheld, and I don't have any issue with that."¹⁶⁷

But when presented with that same constitutional question eight years later in *Shelby County v. Holder* concerning the status of the recently reauthorized Voting Rights Act, Roberts showed no hesitation in gutting Section 5, the Act's crown jewel. Years later, in *Brnovich v. Democratic National Committee*, the Roberts Court would further weaken the remnants of the Voting Rights Act by narrowly interpreting Section 2 of the Voting Rights Act in a way that conflicted with the statute's text and purpose, further limiting the efficacy of law as a tool to combat race-based voter oppression.¹⁶⁸ The *Shelby County* decision, similar to *Crawford* and *Brnovich*, stealthily employed dual sanewashing and whitewashing methods to justify a nonsensical interpretation of the law and create a distorted reality of racial politics and history.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, SLATE (Jul. 8, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html> [<https://perma.cc/TVQ2-Y9FT>].

The opinion in *Shelby County*, which upended over half a century of judicial¹⁶⁹ and broad legislative support¹⁷⁰ for the Voting Rights Act, was made possible by the invention of the “equal sovereignty” doctrine.¹⁷¹ With little fanfare, the “equal sovereignty doctrine” was first announced in *Northwest Austin Municipal Utility District No. One v. Holder*¹⁷² four years prior to the *Shelby County* decision. The equal sovereignty doctrine, as amorphously conceptualized and applied by the Roberts Court, holds that federal laws must generally treat states “equally.” What precisely that doctrine means or how it should operate in practice was omitted from the Court’s opinion.¹⁷³ Aside from lacking workable standards and having no basis in law or legal history, the doctrine poses an added threat by limiting the legal mechanisms available to the federal government to compel states that openly disregard or flaunt democratic norms to comply with the Constitution.¹⁷⁴

Decided only three years after the Senate unanimously reauthorized the Voting Rights Act for the fifth time with a large, bipartisan majority, *Northwest Austin* was a precursor to *Shelby County* involving a parallel challenge to the Act’s preclearance requirements.¹⁷⁵ In *Northwest Austin*, the Supreme Court overturned a lower court decision holding that a small municipal utility district in Texas was exempt under the Voting Rights Act.¹⁷⁶ In reaching its decision, the Court relied on a novel theory (“equal sovereignty”) that proved prescient for *Shelby County*, a case similarly seeking to limit the Voting Rights Act’s and brought only four years later.¹⁷⁷

¹⁶⁹ See *S.C. v. Katzenbach*, 383 U.S. 301, 327–28; see also *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–85 (1999); *City of Rome v. United States*, 446 U.S. 156, 172–82 (1980); *Georgia v. United States*, 411 U.S. 526, 534–35 (1973).

¹⁷⁰ Voting Rights Act Amendments of 1970, Pub. L. No. 91–285, 84 Stat. 314 (1970); Act of Aug. 6, 1975, Pub. L. No. 94–73, Tit. I, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131.

¹⁷¹ Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1211 (2016) (describing the equal sovereignty doctrine as an “invented tradition—a social practice whose authority allegedly stems from longstanding observance, but which turns out to be somewhat recent in origin.”).

¹⁷² *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

¹⁷³ Litman, *supra* note 171, at 1213.

¹⁷⁴ *Id.* at 1214.

¹⁷⁵ The statute’s preclearance provisions required state and local governments with a documented history of racial discrimination and disenfranchisement to seek federal permission before making changes to their voting process.

¹⁷⁶ *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S.

¹⁷⁷ *Id.*

Chief Justice Roberts, who authored the opinions in both *Northwest Austin* and *Shelby County*, constructed the equal sovereignty doctrine by distorting the equal footing doctrine.¹⁷⁸ The cases cited by the Court in support of the “fundamental principle of equal sovereignty” all concerned the “equal footing doctrine,” which mandates that new states entering the union be placed on equal footing with other states. Contrary to the Court’s recognition of a “historic tradition that all the States enjoy ‘equal sovereignty,’”¹⁷⁹ the equal footing doctrine has never been interpreted or applied to the treatment of states once admitted to the Union.¹⁸⁰

Because the Court declined to invalidate the challenged preclearance provision in the Voting Rights Act, the Court’s invocation of a novel legal theory in *Northwest Austin* received minimal attention and even less scrutiny. In fact, the legal rationale on which the Court relied in promulgating its new constitutional theory was so anemic that the parties hardly addressed the matter in their briefs.¹⁸¹ Media coverage of the opinion was largely limited to extolling Chief Justice Roberts’s “judicial statesmanship”¹⁸² and celebrating the survival of the Voting Rights Act.¹⁸³ The guise of the decision as innocuous and as validating the status quo largely insulated it from criticism of its strained legal logic and long-term pernicious consequences. By presenting *Northwest Austin* as a seemingly

¹⁷⁸ *Id.* at 2133.

¹⁷⁹ The pertinent passage in the provision provides that, “The Act . . . differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); *see also Texas v. White*, 7 Wall. 700, 725–726 (1869). Distinctions can be justified in some cases. “The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.” *Katzenbach*, 383 U.S. at 328–329 (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

¹⁸⁰ Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2133 (2015); Litman, *supra* note 171, at 1210 (“The doctrinal basis of the equal sovereignty principle is far less compelling than these statements [by the Court in *Shelby County*] suggest.”).

¹⁸¹ *Id.*

¹⁸² Adam Liptak, *Justices Retain Oversight by U.S. on Voting*, N.Y. TIMES (Jun. 22, 2009), <https://www.nytimes.com/2009/06/23/us/23scotus.html> [<https://perma.cc/F5RN-WLBK>].

¹⁸³ *Id.*; Liz Halloran, *Supreme Court Avoids Voting Rights Act Showdown*, NPR, Jun. 22, 2009, <https://www.npr.org/2009/06/22/105762087/supreme-court-avoids-voting-rights-act-showdown> [<https://perma.cc/Q4RY-JYSC>]; Michael King, *Point Austin: The Supremes Bail Out Court Ruling Lets Voting Rights Act Live for Another Day* (Jun. 26, 2009), <https://www.austinchronicle.com/news/point-austin-the-supremes-bail-out-11745074/> [<https://perma.cc/MJ8K-4F6D>].

normal court opinion, the Court sanewashed the legal fiction of the equal sovereignty doctrine.

When the equal sovereignty doctrine was subsequently broadened and weaponized in *Shelby County* to invalidate the Voting Rights Act's preclearance requirements, legal scholars took note.¹⁸⁴ There was a strong consensus that the equal sovereignty doctrine was a legal fiction.¹⁸⁵ Former federal judge and legal scholar Richard Posner generously characterized the doctrine of equal sovereignty as non-existent and described the *Shelby County* decision as “rest[ing] on air.”¹⁸⁶ Likewise, Professor Michael McConnell described the equal sovereignty doctrine as an “attractive principle,” but one not based on the Constitution.¹⁸⁷ Constitutional scholar Leah Litman referred to the doctrine as an “invented tradition.”¹⁸⁸

But by then, it was too late. The effect of the judicial sanewashing employed in *Northwest Austin* was to make “the invalidation of a hugely popular, landmark ‘super-statute’ seem less radical and therefore, perhaps, more palatable.”¹⁸⁹ When the Court was primed to hear another constitutional challenge to the Voting Rights Act in *Shelby County*, it presented an opportunity to reaffirm and expand the equal sovereignty doctrine.

Particularly troubling in the Court’s opinion in *Shelby County* was the Court’s use of a newly created, constitutionally detached legal theory in combination with the systematic diminishment of racially motivated voting discrimination. Despite an extensive legislative record documenting the

¹⁸⁴ Litman, *supra* note 171, at 1211-1212 (2016) (explaining how *Shelby County* “changed” and “broadened the equal sovereignty principle beyond how it had been used in prior cases.”)

¹⁸⁵ See, e.g., Litman, *supra* note 171; see also Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 24 (2013); Compare, e.g., Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209 (2016); Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1198 (2012) (“[T]he Court's decisions that narrow the scope of the VRA on the grounds of ‘state sovereignty’ mischaracterize the historical and textual relationship between the states and the federal government over the matter of elections. As a result of this misunderstanding, the Court has been overly critical of federal legislation that alters or modifies state electoral laws.”).

¹⁸⁶ Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives' imagination.*, SLATE (Jun. 26, 2013), <https://surl.li/wcotxx> [<https://perma.cc/EX6J-GVD3>].

¹⁸⁷ Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court*, NPR (Jul. 5, 2013), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court> [<https://perma.cc/Q44A-KYVF>].

¹⁸⁸ Litman, *supra* note 171, at 1207.

¹⁸⁹ Katyal & Schmidt, *supra* note 180.

ongoing need for the Voting Rights Act's preclearance mandate, the Court substituted its own policymaking for that of Congress.

States hostile to voting rights quickly seized on *Crawford* and *Shelby County* as an open invitation to enact facially neutral voting restriction laws with the intent and effect of suppressing the participation of racially minoritized voters.¹⁹⁰ Since then, electoral and ballot-restricting measures have been sweeping and far-reaching, prompting protracted and expensive litigation that, more often than not, has failed to protect voting rights.¹⁹¹ Many of the laws passed in jurisdictions previously subject to the Voting Rights Act's preclearance requirements have been enacted under the false pretense that they are necessary to preserve electoral integrity and protect against voter fraud.¹⁹² But the overwhelming evidence is that voter fraud is non-existent and voter identification laws are nothing more than a pretense to facilitate widespread voter disenfranchisement of non-white constituents.¹⁹³

¹⁹⁰ Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, PBS FRONTLINE (Jun. 26, 2013), <https://www.pbs.org/wgbh/frontline/article/with-voting-rights-act-out-states-push-voter-id-laws/> [<https://perma.cc/9R3L-CSRT>].

¹⁹¹ Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation since Shelby County*, 127 YALE L.J. F. 799, 801 (2018); *see also* Brnovich v. Democratic National Committee, 594 U.S. 467 (2021) (narrowly interpreting section 2 of the Voting Rights Act to uphold two Arizona voting restriction laws).

¹⁹² Research by the Brennan Center for Justice at New York University determined that the rate of voter fraud is between 0.0003 - 0.0025%. These findings are supported by countless other studies that have similarly concluded that voter fraud is negligible and poses no risks to electoral integrity. *See the Brennan Center for Justice, Debunking the Voter Fraud Myth*, BC (Jan. 31, 2017), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth> [<https://perma.cc/WT4L-W8GB>]; *see also* Lorraine Minnite, *The Politics of Voter Fraud* 3-4, (Project Vote 2007), https://www.projectvote.org/wp-content/uploads/2007/03/Politics_of_Voter_Fraud_Final.pdf [<https://perma.cc/Z8M4-UFH6>] (finding that voter fraud is exceedingly rare and commonly used to limit the political participation of historically disenfranchised groups); *see additionally* Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [<https://perma.cc/N8HU-HN89>].

¹⁹³ Stephen Ansolabehere, Samantha Luks & Brian F. Schaffner, *The Perils of Cherry Picking Low Frequency Events in Large Sample Surveys*, COOPE. ELECTION STUDY AT HARV. U. (Nov. 5, 2014), <https://cces.gov.harvard.edu/news/perils-cherry-picking-low-frequency-events-large-sample-surveys> [<https://perma.cc/FW5R-8FPB>] (concluding that “the likely percent of non-citizen voters in recent US elections is 0”); *see also* U.S. Gov’t Accountability Off., *Issues Related to State Voter Identification Laws*, GAO-14-634 (Sept. 2014), <https://www.gao.gov/assets/gao-14-634.pdf> (involving a comprehensive review of literature and studies examining voter fraud in

By 2014, only a year after the Court's historic ruling in *Shelby County*, thirty-three states had enacted restrictive voter identification laws, many in anticipation of the midterm elections.¹⁹⁴ In North Carolina, where 40 jurisdictions were relieved from the Voting Rights Act's preclearance requirements after *Shelby County*,¹⁹⁵ the Republican-controlled legislature passed a law to eliminate a week of early voting and end same-day voter registration, impose a strict voter ID requirement that excluded college and out-of-state IDs, and expand the authority of poll observers to challenge voter eligibility.¹⁹⁶ The law, which was pending during the *Shelby County* litigation, was amended after the Supreme Court's decision to include additional voting restrictions and was swiftly passed within days, with no opportunity for public comment.¹⁹⁷ State legislators were well aware that the law would fall heavily on Black voters.¹⁹⁸ Ultimately, in confirming the unabashed racism of the law, the Fourth Circuit concluded that the only constant in the state's "reforms" was its harmful impact on Black voters, which the court found was targeted "with almost surgical precision."¹⁹⁹

Texas, another state with a history of actively and aggressively disenfranchising non-white voters,²⁰⁰ was similarly allowed to proceed with its statewide disenfranchisement efforts in the aftermath of the *Shelby County* case. The law, considered one of the strictest voter identification laws at the time, allow state-issued handgun licenses to serve as a permissible form of voter identification (though such licenses can be obtained by someone who is ineligible to vote), but not student IDs. Prior

finding "few instances of in-person voter fraud."); see also Atiba R. Ellis, "This Lawsuit Smacks of Racism": *Disinformation Racial Coding, and the 2020 Election*, 82 LA. L. REV. 453 (2022)(exploring the "epistemic crisis" in which a number of states have fabricated a crisis of confidence in the electoral process to enact voter restrictions that have a disparate impact on Black and Brown voters and that constitutes a "new wave of voter suppression"); see also Gilda R. Daniels, *Voting Realism*, 104 KY. L.J. 583 (2017) (combining the work of Derrick Bell and sociologist John Skrentny to conceive of a new concept—"voting realism"—that recognizes the persistence of racism as proof for the need for race-conscious legislative remedies to safeguard voting rights).

¹⁹⁴ U.S. Gov't Accountability Off., *Issues Related to State Voter Identification Laws*, GAO-14-634, at 1, (Sept. 2014), <https://www.gao.gov/assets/gao-14-634.pdf>.

¹⁹⁵ See N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 215–16 (4th Cir. 2016).

¹⁹⁶ Voter Information Verification Act, S.L. 2013–381, 2013 N.C. Sess. Laws 1505 (codified as amended in scattered sections of N.C. Gen. Stat).

¹⁹⁷ N.C. State Conf. of the NAACP, 831 F.3d at 228.

¹⁹⁸ *Id.* at 230, 238.

¹⁹⁹ *Id.* at 214.

²⁰⁰ Erika Eichelberger, *Texas Just Won the Right to Disenfranchise 600,000 People. It's Not the First Time* (Oct. 21, 2014), <https://www.motherjones.com/politics/2014/10/supreme-court-texas-voter-id-law-history/> [<https://perma.cc/8R8X-MXFK>].

to the invalidation of the Voting Rights Act's preclearance requirements, the Texas law had been enjoined by a federal court after concluding the law violated Section 5 of the Voting Rights Act and was likely to result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."²⁰¹ The law went into effect after the *Shelby County* decision, only to again be found to be racially discriminatory.²⁰² However, the Supreme Court vacated the lower court's judgment and remanded the decision for further consideration in light of *Shelby County v. Holder*.²⁰³ The Texas law was ultimately struck down as racially discriminatory after protracted litigation involving repeated judicial findings of racially discriminatory intent by the state, but not before several elections had already passed.²⁰⁴

Ohio, following suit, enacted its own voting restrictions that mirrored the racially discriminatory electoral changes in North Carolina and Texas. Ohio Senate Bill 238, amongst other things, reduced early voting times by eliminating all evening hours and nearly all Sunday voting.²⁰⁵ The Sixth Circuit affirmed a lower court's permanent injunction in finding that Black voters in Ohio were more likely to be disproportionately affected by the elimination of early voting opportunities because they were more likely to hold low-paying, inflexible jobs due to "stark and persistent racial inequalities ... [in] work, housing, education and health" that stem from "historical and contemporary discriminatory practices."²⁰⁶ On appeal, the Supreme Court stayed the injunction hours before the early voting in the 2014 midterm election was scheduled to begin.²⁰⁷

In the decade since the elimination of key protections under the Voting Rights Act, the frenetic pace of the passage of draconian voter restrictions and other facially neutral creative forms of racialized voter suppression has continued unabated.²⁰⁸ Despite the Court's sanewashed and whitewashed

²⁰¹ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated*, 568 U.S.289 (2013).

²⁰² Noelle Jolin, *Texas Senate Bill 14: A Solution Looking for a Problem*, 90 TUL. L. REV. 1031 (2016).

²⁰³ *Texas v. Holder*, 570 U.S. 928 (2013).

²⁰⁴ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

²⁰⁵ S.B. 238, 130th Gen. Assemb., Reg. Sess. (Ohio 2013) (as amended).

²⁰⁶ *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 542, 555 (6th Cir. 2014).

²⁰⁷ *Husted v. Ohio State Conf. of the NAACP*, 135 S. Ct. 42 (2014).

²⁰⁸ Hansi Lo Wang, *Trump Rescinds a Biden-Era Order Promoting Voter Registration*, NPR (Jan. 20, 2025), <https://www.npr.org/2025/01/20/g-s1-43925/trump-rescinds-a-biden-era-order-promoting-voter-registration> [https://perma.cc/38UD-PQTB]; see also Reginald Oh, *The Roberts*

judicial opinion in *Shelby County*, the Chief Justice’s proclamation that the Voting Rights Act is no longer necessary to ensure the protection of the voting rights of non-white Americans has been quickly disproven. Whereas in the period immediately preceding the *Shelby County* decision the racial voter turnout gap had been narrowing, the same is no longer true today. As documented by the Brennan Center for Justice, the white-Black turnout gap increased by over ten percentage points between 2012 and 2020 across five of the six states originally covered by Section 5 of the Voting Rights Act.²⁰⁹ The widening racial disparity in voting is greatest in jurisdictions that had previously been subjected to preclearance requirements under the Voting Rights Act.²¹⁰

Dissenting in *Shelby County*, the late Justice Ruth Bader Ginsburg famously cautioned that, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”²¹¹ As the nation now faces a torrent of racist voter suppression laws, Justice Ginsburg’s counsel has proven predictably precise.

Unremarkably, the Roberts Court’s reliance on sanewashing and whitewashing has not been limited solely to voting rights cases. Within the realm of affirmative action and immigration, the Court has been equally at ease with sanewashing the law and whitewashing the facts. In both areas, the Court has employed a multitude of disingenuous methods to minimize inconvenient truths and reinterpret the law, much like its approach in voting rights litigation. The Court’s reliance on a sanewashed notion of “colorblind constitutionalism” is but one such means of achieving these outcomes.

Through the dual deployment of sanewashing and whitewashing, the Roberts Court has embraced a “colorblind” interpretation of the Constitution to rewrite the Equal Protection Clause as a tool to preserve and

Court’s Anti-Democracy Jurisprudence and the Reemergence of State Authoritarian Enclaves, 12 J. RACE, GENDER & ETHNICITY 40, 52 (2023) (describing the *Shelby County* opinion, in tandem with *Rucho v. Common Cause*, as “set[ting]t the stage for the rise of white nationalism in the 2020s.”).

²⁰⁹ Kevin Morris, Peter Miller & Coryn Grange, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, BC (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights> [https://perma.cc/BW99-T7WR].

²¹⁰ *Id.*

²¹¹ *Shelby Cnty. v. Holder*, 570 U.S. 590 (2013).

protect white dominance.²¹² The phrase “colorblind constitution” is associated with Justice John Marshall Harlan’s dissent in the Court’s decision in *Plessy v. Ferguson*, which held that laws mandating racially “separate but equal” facilities were compatible with the Fourteenth Amendment’s Equal Protection Clause. Justice Harlan, the lone dissenter, denounced the opinion and its underlying rationale, stating: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”²¹³

Although the concept of colorblindness was initially introduced to argue against legalized racism, the sanewashed modern iteration of colorblindness has been co-opted to reinstate white supremacy in the law.²¹⁴ Colorblindness has become the “leading racial ideology on the Right.”²¹⁵ By presenting race as neutral, apolitical, and entirely divorced from legalized hierarchies of power, colorblindness has been a highly effective sanewashing tool that has rendered any race-conscious remedial measure unconstitutional under the Roberts Court.²¹⁶

²¹² In many ways, Chief Justice Roberts is continuing the project of his former boss and mentor, Chief Justice Rehnquist, who advocated for an interpretation of the Fourteenth Amendment that denied its history and purpose as an anti-subordination measure intended to affirmatively protect minority rights. Rehnquist, himself a Supreme Court law clerk during the term in which *Brown v. Board of Education* was decided, authored an internal memo to his boss, Justice Robert H. Jackson, expressing his view that *Plessy v. Ferguson* was correctly decided and bemoaning that he had been “excoriated” by his “liberal” colleagues for his “unpopular” position. The memo was eventually made public, and Rehnquist disavowed the memo, claiming it represented the views of Justice Jackson, not his own. Rehnquist’s questionable explanation of the memo generated criticism that he had been dishonest during his Senate Confirmation hearing. See *Memorandum from Supreme Court Law Clerk William Rehnquist to Justice Robert H. Jackson, A Random Thought on the Segregation Cases* (1952); see also Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631 (2012); Ian F. Haney Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Color-blindness, 59 STAN. L. REV. 985, 985 (2007) (discussing the evolution of colorblindness as a progressive demand to counter racial caste law to a reactionary one used to undermine antidiscrimination efforts).

²¹³ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Despite Justice Harlan’s stance against racial segregation in *Plessy*, he was far more tolerant of overt racism against other non-white populations, particularly Chinese Americans. See, e.g., Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157 (1996) (examining Justice Harlan’s persistent anti-Chinese bias and selective approach to “colorblind constitutionalism.”); see also *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

²¹⁴ Jonathan P. Feingold, *Affirmative Action after SFFA*, 48 J. COLL. & U.L. 239, 243–24 (2023).

²¹⁵ Feingold, *supra* note 121, at 195.

²¹⁶ Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 4 (1991); Feingold, *supra* note 214, at 245 (describing the “admittedly limited” “remedial rationale” employed by the Court in SFFA).

Yet, the Constitution is by no means colorblind.²¹⁷ The Constitution includes multiple provisions²¹⁸ that were designed to accomplish the project of embedding a racialized caste system in the new American “democracy.”²¹⁹ The Reconstruction Era Amendments that followed the Civil War, referred to as the “second founding,” represented an acknowledgment that the Constitution was not colorblind and was an attempt to rectify the white supremacy imbued in the original document.²²⁰

Recognizing the myth of colorblind constitutionalism²²¹ reinforces the breadth of the weaponization of a false colorblind constitutionalism

²¹⁷ Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307, 1309 (2024) (Despite attempts to revive the legitimacy through notions of republicanism, the original Constitution was by and for White men of property); see Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 307 (2023); see also *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 318 (2023) (Sotomayor, J., dissenting) (“The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind.”); Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651, 651 (2022) (“The United States Constitution is a document that, during every era, has helped further white supremacy.”).

²¹⁸ See, e.g., U.S. CONST. art. IV, § 9, cl. 1. Though intentionally omitting the term “slave,” this constitutional provision was referred to as the “Slave Trade Clause” and was one of several slavery-related constitutional compromises. The “Slave Trade Clause” prevented the national government from limiting the importation of enslaved persons for twenty years after the ratification of the Constitution.; see also U.S. CONST. art. IV, § 2, cl. 3 (the “Fugitive Slave Clause”); U.S. CONST. art. I, § 2, cl. 3 (the Three-Fifths Clause).

²¹⁹ William J. Aceves, *Amending a Racist Constitution*, 170 U. PA. L. REV. ONLINE 1, 2 (2021-2022) (“Ours is a racist Constitution. Despite its soaring language, it was founded on slavery and a commitment to racial inequality.”); see also Derrick Bell, *Revocable Rights and a Peoples’ Faith: Plessy’s Past in Our Future*, 1 RUTGERS RACE & L. REV. 347, 350 (1999) (describing the “dual standards” that “led the Constitution’s Framers to provide for the maintenance and protection of slavery, while refusing to use the word “slave” in a document heralded as guaranteeing freedom to all.”); see also Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, May 6, 1987 (highlighting that the Constitution was “defective from the start, requiring several amendments, a civil war, and momentous social transformations to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”).

²²⁰ See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*, (W.W. Norton & Co., 1st ed. 2019) (describing how the Thirteenth, Fourteenth, and Fifteenth Amendments represented a “second founding,” but that ultimately the ideals of the Reconstruction Amendments have not been realized because of the Court’s textually inconsistent interpretation and tepid application of the Amendments); see also Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) (explaining that “[a]n important purpose of the Civil War Amendments was the attack on racial caste.”).

²²¹ Colorblind constitutionalism has been criticized as a tool for further entrenching white supremacy in legal and political institutions. See generally Neil Gotanda, *A Critique of “Our*

paradigm that has enabled the Roberts Court to, amongst other regressive aims, peddle the theory of “reverse discrimination.”²²² As the theory goes and the tale is told, under a colorblind Constitution, any consideration of race under the law is strictly forbidden. Anyone can be injured by racial classifications, including non-subordinated groups. Racism and racialized power are disassociated from white supremacy and cleansed of their long-standing legal legacy and ongoing effects.

Eager to entertain “reverse racial discrimination” claims, the Roberts Court has reconstructed antidiscrimination law predominantly for the protection of white plaintiffs.²²³ Unlike the heightened evidentiary standard applied to racial discrimination allegations raised by Black plaintiffs who are typically challenging facially neutral laws as having an adverse racially disparate impact, no comparable requirement exists for “reverse racial discrimination” claims where the target is race-conscious remedial measures and affirmative action programs. The more deferential standard of judicial review applied by the Court in considering constitutional challenges to facially neutral laws with racially discriminatory intent or impact rarely fails to survive judicial scrutiny.

By contrast, the heightened strict scrutiny standard used to evaluate race-based classifications, whether the challenged law is racially discriminatory or race-conscious for purposes of redressing past systemic, legalized racial violence, is almost always fatal. Similar to the Roberts Court’s use of “history and tradition” in its approach to constitutional interpretation, the Court has sought to present its colorblind interrogation of

Constitution is Color-Blind, 44 STAN. L. REV. 1 (1991) (arguing that if Supreme Court relies on color-blind constitutionalism it risks ignoring racial inequality); see also Laurence H. Tribe, *American Constitutional Law* 1525 (2d ed. 1988) (“Even for [Harlan] this late nineteenth-century proponent of white dominance, it appears that the color-blind ideal was only shorthand for the concept that the fourteenth amendment prevents our law from enshrining and perpetuating white supremacy.”).

²²² “Reverse racism” is a legal and social fiction. Racism involves racial subjugation in conjunction with power, which has historically and continues to be denied to non-white Americans. Racism is “the favoring of one group, the white, over minority groups.” Bell, *supra* note 117, at 621; see also Erica L. Green, *Trump Says Civil Rights Led to White People Being ‘Very Badly Treated,’* N.Y. TIMES (Jan. 11, 2026), <https://www.nytimes.com/2026/01/11/us/politics/trump-interview-white-people-discrimination.html> [https://perma.cc/X698-2FSD].

²²³ See *Ames v. Oh. Dep’t of Youth Servs.*, 605 U.S. 303, 310 (2025) (ruling that the same legal standard of proving discrimination claims is applied to majority groups).

racial discrimination as entirely objective, rather than the highly interpretive exercise it is.²²⁴

Another sanewashing tool commonly used by the Roberts Court in its regressive racial jurisprudence is a shifting definitional philosophy regarding what precisely qualifies as a harm or injury entitled to a legal remedy.²²⁵ In opinion after opinion, the Roberts Court has treated racism as an objective fact, narrowly constructed around antiquated notions of blatant bias, rather than a complex, lived experience common to most non-white people in the United States.²²⁶ Modern racial injustices must fit neatly into the racist models of the pre-Civil Rights period to be recognized by the Court as sufficiently injurious to merit legal intervention. Under this deliberately restrictive framework, only intentional, well-documented racial discrimination qualifies as a cognizable harm.²²⁷ As explained by Khiara Bridges, by adopting a constrictive view of what “counts” as an injury to Black victims of racial discrimination and abuse, the Court is permitted to “do nothing to destabilize and disestablish the country’s existing racial

²²⁴ Bridges, *supra* note 143, at 27; *see also* Robert M. Cover, Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 7, 9 (1983) (explaining that law is determined by “our interpretive commitments” in which legal traditions are essential in creating our “complex normative world”).

²²⁵ *See, e.g.*, Melissa Murray, *Stare Decisis and Remedy* (2024), N.Y. U. SCH. OF L., 1571 (2024) (“The Court’s willingness to address amorphous injuries to white students stands in stark contrast to its insistence on remedying injuries to minorities that are historic, concrete, and the product of intentional acts of discrimination. In this regard, the bar to prevail as a minority claiming a racial injury is considerably higher than the bar for white claimants.”); *see also* Dep’t of Homeland Sec. v. D.V.D., 145 S.Ct. 2153, 2159 (2025) (Sotomayor, J., dissenting) (criticizing the majority for lifting a lower court injunction that had enjoined the Trump Administration from deporting, without minimal due process protections, individuals to third parties with which they have no connection, overlooking the “extraordinary harms” faced by the plaintiffs in the form of torture and potentially death while improperly permitting the government to satisfy the irreparable harm requirement based on its own “self-inflicted” harm); *CASA*, 606 U.S. at 894 (Sotomayor, J., dissenting) (“Simply put, it strains credulity to treat the Executive Branch as irreparably harmed by injunctions that direct it to continue following settled law”); Carolyn Shapiro, *Whose irreparable harm?*, SCOTUSBLOG (Jul. 10, 2025), <https://www.scotusblog.com/2025/07/whose-irreparable-harm/> [<https://perma.cc/MK9T-8Z8Y>].

²²⁶ Bridges, *supra* note 143, at 24 (“If the Court sees a resemblance between the present-day harm and the racism of yesteryear, the Court provides relief. If it sees no resemblance, it provides no relief.”).

²²⁷ *See, e.g.*, Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classifications in an Era of Color-blind Jurisprudence*, 57 MD. L. REV. 97, 148 (1998) (discussing how the Court’s preoccupation with intentional discrimination undermines the efficacy of legal mechanisms to remedy racial discrimination); *see also* Barbara J. Flagg, “Was Blind, But Now I See”. *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 982–83 (1993) (explaining that courts require intentional racial discrimination because without it courts would have to engage in too much judicial review).

hierarchy” and, while doing so, can claim to “maintain a modicum of legitimacy.”²²⁸

Claims of reverse racial discrimination by white plaintiffs, however, are not analogized to pre-Civil Rights Era injuries because, of course, there are no historical parallels. In the absence of a legacy of white racial inferiority or disadvantage, the Court has instead elected to focus on new, invented, alleged injuries flowing from feelings and expectations of racial inferiority by white claimants.²²⁹ The juxtaposition of the separate but-certainly-not-equal legal standards applied to racial discrimination claims by white and Black plaintiffs, in combination with a new reconceptualization of racial harm, has allowed the Roberts Court to radically reinterpret anti-discrimination law and the Reconstruction Amendments with the effect of producing deeply unequal outcomes. Sanewashing and whitewashing have enabled the Roberts Court to rewrite history and law from a white-centered, white-grievance, white-welfare orientation.

The Court’s 2023 decision in *Students for Fair Admissions v. Harvard* (SFFA), finding affirmative action programs in colleges and universities unconstitutional under the Equal Protection Clause, provides a prototype of a whitewashed, sanewashed Roberts Court opinion.²³⁰ The decision, which rested on a white-centered orientation of what constitutes legally cognizable harm, has had a cascading effect on anti-discrimination efforts in every sector and segment of American society.²³¹

²²⁸ Bridges, *supra* note 143, at 25.

²²⁹ *Id.* at 28-29 (2022).

²³⁰ See Jerry Kang, *Asians Used, Asians Lose: Strict Scrutiny from Internment to SFFA*, 113 CAL. L. REV. 975, 979 (2025) (describing the Court’s “bait-and-switch” approach to racial discrimination and how it was subversively employed to end affirmative action for underrepresented minorities).

²³¹ Tatyana Monnay, *The Activist Who Sued Harvard on Affirmative Action Is Going After Law Firms*, BLOOMBERG (Aug. 22, 2023), <https://www.bloomberg.com/news/articles/2023-08-22/affirmative-action-foe-sues-law-firms-over-dei-hiring-programs> [https://perma.cc/Z4NL-ABWV]; Michael J. Yelnosky, *Racial Preferences in Employment after Students for Fair Admissions v. Harvard*, 112 GEO. L.J. ONLINE 74 (2023) (predicting that, applying the legal reasoning from SFFA, employment programs that use racial preferences to attempt to address the underrepresentation of racial minorities would be unlikely to survive judicial scrutiny); see also Ralph Capio & Erin M. Carr, *Assessing the Potential Consequences of Students for Fair Admissions, Inc. (SFFA) on the Small Business Development Program*, 60 CAL. W. L. REV. 525 (2024) (examining the effects of the Court’s SFFA decision on litigation challenging the Small Business Administration’s Section 8(a) program supporting small and socially disadvantaged business); Mark Julian & Telford Taylor, *Law firms sued over diversity programs*, WASH. POST (Dec. 9, 2023), <https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law->

Although the *SFFA* decision was issued at a moment of extreme racial retrenchment,²³² the Court largely premised its sanewashed decision on the conclusion that racial discrimination had been effectively cured and, therefore, affirmative action programs in higher education “at some point [...] must end.”²³³ Much as the Court had declared in *Shelby County* that the realization of a post-racial America dictated that federal protections for non-white voters were no longer necessary,²³⁴ it similarly whitewashed and sanewashed its opinion in *SFFA* to minimize persistent racial inequities to rationalize adopting a new legal standard that reestablished a status quo imbued with facially neutral racial preferences for white applicants.²³⁵

Just like its voting rights counterpart in *Shelby County*, the *SFFA* opinion represents an abundance of sanewashing strategies in action. As with many of the novella-length opinions that have characterized the Court’s sanewashed decisions, the *SFFA* decision was anything but straightforward and uncontroversial. Spanning over 200 pages and spawning six separate opinions, the majority decision heavily relied on sanewashing and whitewashing to trivialize legal precedent, engage in a revisionist history exercise, rewrite the Reconstruction Amendments, draw false parallels to civil rights cases, and ultimately proclaim racism in higher education abolished.²³⁶

firms-dei/ [https://perma.cc/SKP6-HTM9]; Karen Sloan, ABA sued over diversity scholarships by conservative group, Reuters (Apr. 14, 2025), <https://www.reuters.com/legal/government/aba-sued-over-diversity-scholarships-by-conservative-group-2025-04-14/> [https://perma.cc/MUR2-EXUY].

²³² The late Derrick Bell wrote extensively of the enduring nature of racism, its ability to morph and transform over time, and, consequently, the cyclical pattern observed and experienced through American history in which Black interests are repeatedly sacrificed for the national interests (viewed as synonymous with white ambitions). See generally Bell, *supra* note 117.

²³³ *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 213 (2023); see generally Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625 (2023) (explaining how the legal enactment of biased perspectives of time perpetuates structural inequalities by enforcing unrealistic expectations for racial remedies); see also Feingold, *supra* note 214, at 245 (explaining how the narrative employed by the Court in *SFFA* “follows a centuries-long discourse that reframes civil rights remedies as a threat to civil rights.”).

²³⁴ See also Feingold, *supra* note 121, at 1954 (“This [racial] backlash shows little signs of abating. To the contrary, we are facing a threat to civil rights and multiracial democracy unseen since the fall of Reconstruction.”).

²³⁵ For a counter perspective on the need to preserve and expand race-conscious remedial efforts in higher education, see CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997).

²³⁶ See Angela Onwuachi-Willig, *Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023) (using *SFFA* as a case study to illustrate

Colorblind constitutionalism, in particular, was front and center in the Court's reasoning overruling decades of case law in *SFFA*.²³⁷ Under the Roberts Court, the Equal Protection Clause of the Fourteenth Amendment has increasingly been reconfigured under a reactionary colorblind constitutionalism philosophy to instantiate white privilege, counter to the Reconstruction Amendment's original intent in the aftermath of the Civil War to address the enslavement and violent subjugation of African Americans.²³⁸

In challenging sixty years of legal precedent, the attorneys for SFFA argued that not only did affirmative action programs fail to meet the strict scrutiny standard applied to racial classifications, but furthermore, the Equal Protection Clause of the Fourteenth Amendment outright prohibits any consideration of race.²³⁹ In oral arguments before the Court, counsel for SFFA were unabashed in advocating for an ahistorical interpretation and application of the Equal Protection Clause that would entrench white

the Roberts Court's "new understanding of what the Equal Protection Clause requires in the affirmative action landscape by revising history, precedent, and reality through omissions, misstatements, and untruths"); see also Richard Delgado, *Why Universities are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165 (1997) (offering a legal roadmap for preserving diversity admissions in higher education predicated on the role of government and higher education in perpetuating discrimination and class privilege).

²³⁷ Goldburn P. Maynard Jr., *Enforced Colorblindness*, 81 WASH. & LEE L. REV. 1749 (2025) (announcing that "[t]he time for race consciousness is over, and the era of enforced colorblindness is upon us"); see also Cara McClellan, *Evading a Race-Conscious Constitution*, 25 U. PA. J. CONST. L. ONLINE 1 (2023); Feingold, *supra* note 214, at 243–24 (describing how in *SFFA* the Chief Justice "marshalled the rhetoric of 'colorblindness' to refashion the Fourteenth Amendment and *Brown v. Board of Education*—two of our nation's most racially progressive precedents—as impediments to building more racially diverse and inclusive universities" while simultaneously "fail[ing] to engage the only actual evidence of discrimination presented in the litigation").

²³⁸ *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 318 (2023) (Sotomayor, J., dissenting) (describing the Equal Protection Clause of the Fourteenth Amendment as "enshrine[ing] a guarantee of racial equality" and characterizing the Court's decision as "not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment."); see also Kate Masur & Gregory Downs, *Designed to Ameliorate the Condition of People of Color: The Reconstruction Republicans and the Question of Affirmative Action*, 2 J. AM. CONST. HIST. 625 (2024) (questioning the historical accuracy of the Court's characterization of the Fourteenth Amendment as requiring race-neutrality); see also Ian F. Haney Lopez, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Color-blindness*, 59 STAN. L. REV. 985, 985 (2007) (explaining the rise of "reactionary colorblindness").

²³⁹ Brief for Petitioner at 50–51, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, No. 20-1199, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707 (May 2, 2022); see also David Hinojosa & Genevieve Bonadies Torres, *The Absurd Reach of a "Colorblind" Constitution*, 72 AM. U. L. REV. 1775, 1175–76 (2023) (discussing how a "stringent colorblind regime" advocated for by *SFFA* could spawn equal protection violations).

privilege under the guise of race-neutral policies while simultaneously prohibiting race-conscious remedial measures designed to address centuries of racialized subjugation under the law. Pointedly asked by Justice Ketanji Brown Jackson during oral arguments if the colorblind standard proposed by SFFA would allow universities to take into account a white student's experience as a fifth generation legacy student but bar consideration of a Black student sharing in their admission essay their family history as a fifth-generation descendant of enslaved peoples who would be attending college as first-generation student, the attorney for the SFFA responded that the latter would not be legally permissible.²⁴⁰

Despite the illogical results of sanewashing and whitewashing the Fourteenth Amendment to divorce it from the nation's long-standing racial caste system,²⁴¹ the Court was sympathetic to the petitioner's radical rewriting of the Constitution.²⁴² Justice Thomas, reading his concurrence from the bench, derided "rudderless" race-based admissions preferences as "fly[ing] in the face of our Colorblind constitution."²⁴³ The Chief Justice, writing for the Court, represented the Court's warm embrace of extreme

²⁴⁰ Transcript of Oral Argument at 65–69, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21–707 (U.S. 2022).

²⁴¹ Ediberto Roman, *SFFA v. Harvard College: Closing the Doors of Equality in Education*, 47 SEATTLE U. L. REV. 1333, 1333–34 (2024) (describing how the Court's decision distorted legal and legislative precedent to ignore the Fourteenth Amendment's primary purpose as an anti-subordination measure); see also William M. Carter, Jr., *The Anti-Klan Act In the Twenty-First Century*, HARV. L. REV. 251, 253 (2023) (describing how the Reconstruction Era Amendments were specifically intended to prevent and punish racial violence in the aftermath of the Civil War).

²⁴² Justice Sotomayor offered a powerful critique of the Court's malleable, self-serving approach to colorblind constitutionalism, stating:

In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181 357 (2023) (Sotomayor, J., dissenting). See also Feingold, *supra* note 121 (forecasting the Roberts Court's jurisprudential shift to prohibiting race-conscious university admissions practices, which he attributed to "two converging waves of racial retrenchment" stemming from the successes of the Civil Rights Movement and, more recently, the racial justice reawakening that emerged in 2020 after the murder of George Floyd).

²⁴³ *Students for Fair Admissions*, 600 U.S. at 285 (Thomas, J., concurring). By comparison, consider Justice Jackson's dissenting opinion, in which she rebuked her colleagues stating, "With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life." *Id.* at 407.

colorblind constitutionalism as a continuation of the Court's "vindicat[ion] of the Constitution's pledge of racial equality."²⁴⁴ Citing *Loving v. Virginia*, the landmark civil rights case striking down interracial marriage bans, the opinion purported to advance the Court's commitment to the "core purpose" of the Equal Protection Clause to eliminate all official state sources of invidious racial discrimination in the States."²⁴⁵

The Court's treatment of *stare decisis* in *SFFA* was also curious.²⁴⁶ The pre-Roberts Court decision in *Grutter* reaffirmed the Court's decades-long commitment to race-conscious remedial measures in higher education, provided that colleges not adopt a quota system or rely on racial stereotyping.²⁴⁷ In *Grutter*, the Court found that educational benefits derived from a diverse student body are a compelling state interest that satisfies the heightened standard of judicial review applied to race-based classifications.²⁴⁸ The Court in *SFFA* cited what it characterized as *Grutter*'s "sunset provision" as providing a basis to effectively overrule it, while insisting it was doing no such thing.²⁴⁹ Converting what was essentially dicta in *Grutter* into binding precedent, the Court in *SFFA* distorted *Grutter* as requiring rescission of constitutional support for affirmative action programs at an arbitrarily determined twenty-five year mark.²⁵⁰

The *SFFA* and *Shelby County* cases also shared another critical commonality—both cases were engineered by Edward Blum, a conservative, anti-affirmative action crusader who has made it his career and life's purpose to eliminate all forms of race-conscious laws and

²⁴⁴ *Id.* at 205.

²⁴⁵ *Id.* at 206.

²⁴⁶ *Id.* at 342 (Sotomayor, J., dissenting) ("It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*.")

²⁴⁷ 539 U.S. 306 (2003).

²⁴⁸ *Id.* at 329–330.

²⁴⁹ *Id.* at 251, 329–330. (Thomas, J., concurring) (stating if nothing other than transparent in his legal conclusions, lauded the majority opinion as "rightly mak[ing] clear that *Grutter* is, for all intents and purposes, [is] overruled.").

²⁵⁰ *Id.* at 212–213; (Kavanaugh, J., concurring) (representing *Grutter* as allowing "race-based affirmative action in higher education for another generation—and only for another generation"); see also Joshi, *supra* note 233, at 1667 (applying the concept of "racial time" in the Court's flawed legal reasoning in *SFFA*); see additionally Onwuachi-Willig, *supra* note 236, at 209 (2023) (describing how the Roberts Court "rewrote precedent to bolster the majority's holding and reasoning.").

affirmative action programs for non-white people.²⁵¹ In *SFFA* and *Shelby County*, Blum sought—and succeeded—in rebranding race-conscious legal remedies as illegal discrimination. Blum’s legal sanewashed strategy, which was ultimately adopted by the Court, reversed decades of Civil Rights gains in a matter of a few short years. In both cases, the Court disregarded and dismantled established legal precedent, overriding the expertise of Congress in *Shelby County* and of higher education experts in *SFFA*, to arrogantly and inaccurately represent anti-Black racial discrimination as a resolved social ill no longer requiring legal protections or judicial scrutiny. The strategic sanewashing of the law and facts in *Shelby County* and *SFFA* allowed the Court to declare the eradication of anti-Black racial discrimination and animus under the law, despite clear and ongoing evidence to the contrary.

Elected officials and conservative groups hostile to diversity, inclusion, and all things oriented towards racial equity correctly understood the Court’s decisions in *SFFA* and *Shelby County* as an open invitation to more aggressively and enthusiastically pursue a white supremacist agenda.²⁵² Under the Trump Administration, the Department of Education’s Office of Civil Rights has launched targeted investigations and threatened to withhold

²⁵¹ Lulu Garcia, *He Worked for Years to Overturn Affirmative Action and Finally Won. He’s Not Done*, N.Y. TIMES (Jul. 8, 2023), <https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html> [<https://perma.cc/FER9-EKDN>]; see also Jeannie Park & Kristin Penner, *The Absurd, Enduring Myth of the “One-Man” Campaign to Abolish Affirmative Action*, SLATE (Oct. 25, 2022), <https://slate.com/news-and-politics/2022/10/supremecourt-edward-blum-unc-harvard-myth.html> [<https://perma.cc/QU2H-ADSW>].

²⁵² See generally Erin Gretzinger, Maggie Hicks, Christa Dutton, Jasper Smith, Sonel Cutler & Aisha Baiocchi, *Tracking Higher Ed’s Dismantling of DEI*, THE CHRON. OF HIGHER EDUC., (Feb. 10, 2026), <https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei> (identifying over 60 bills, 8 of which were enacted, to limit diversity, inclusion, and equity efforts in higher education in 25 states and the U.S. Congress in the year after *SFFA*); Zolan Kanno-Youngs, *In Trump’s Ideal Picture of America, Diversity Is Taboo*, N.Y. TIMES (Aug. 22, 2025), <https://www.nytimes.com/2025/08/21/us/politics/trump-diversity-black-americans.html> [<https://perma.cc/XC48-55TM>]; see also Erin M. Carr & Nabil Yousfi, “Anti-Wokeism” & Authoritarianism: A Renewed Call for Constitutional Protections for Education, 74 SYRACUSE L. REV. 971 (2024) (describing the origins and expansion of the “anti-WOKE” movement in education); *The Conservative Activist Pushing Trump to Attack Colleges*, N.Y. TIMES (Apr. 11, 2025), <https://www.nytimes.com/2025/04/11/podcasts/the-daily/christopher-rufo-dei-critical-race-theory.html> [<https://perma.cc/UFH7-VFP5>]; Lexi Lonas Cochran, *Conservatives Play Offense on Higher Education*, THE HILL (Sept. 20, 2024), <https://thehill.com/homenews/education/4889153-conservatives-higher-education-colleges-affirmative-action-palestinian-protests-dei/> [<https://perma.cc/3QP4-Y5XH>]; Cory Turner, *Trump Orders Colleges to Share Admissions Data, With an Eye on Affirmative Action*, NPR (Aug. 7, 2025), <https://www.npr.org/2025/08/07/nx-s1-5495451/trump-college-admissions-affirmative-action> [<https://perma.cc/YR5E-2QCX>].

hundreds of millions of dollars in federal funding from colleges and universities that have supported diversity initiatives.²⁵³ The Trump Administration has further harnessed the power and resources of the federal government to force educational institutions to adopt its policy priorities—even while many were being challenged as illegal and unconstitutional—through threats, coercion, and intimidation.²⁵⁴ Lacking meaningful legal protections from a Court that has continuously prioritized conservative

²⁵³ See Exec. Order No. 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan. 21, 2025); see also Juliana Kim, *Over 50 universities are under investigation as part of Trump's anti-DEI crackdown*, NPR (Mar. 14, 2025), <https://www.npr.org/2025/03/14/g-s1-53831/dei-universities-education-department-investigation> [<https://perma.cc/4JTX-7AG5>]; Katherine Mangan, *George Mason Is the Latest University Under Fire From Trump. Its President Fears an "Orchestrated" Campaign*, PROPUBLICA (Jul. 11, 2025), <https://www.propublica.org/article/george-mason-university-antisemitism-investigation-trump> [<https://perma.cc/LH4T-D4TN>]; Vilmal Patel, *Faculty Support of George Mason's President Draws Federal Investigation*, N.Y. TIMES (Jul. 28, 2025), <https://www.nytimes.com/2025/07/28/us/justice-department-george-mason-faculty-senate-investigation.html> [<https://perma.cc/JX5S-3PRZ>]; Fernanda Zamudio-Suarez, *New Justice Dept. investigation says George Mason U.'s president discriminated against white people*, CHRON. OF HIGHER EDUC. (Jul. 22, 2025), <https://www.chronicle.com/newsletter/race-on-campus/2025-07-22> [<https://perma.cc/Y6YN-8J5H>]; Eric Tucker & Collin Binkley, *University of Virginia President, Pressured over DEI, Resigns Rather than 'Fight Federal Government'*, AP (Jun. 27, 2025), <https://apnews.com/article/university-of-virginia-dei-james-ryan-6f8cfc43738944ca8164ab20814c5695> [<https://perma.cc/DX2C-EQNJ>]; U.S. Dep't of Educ., *U.S. Department of Education Takes Action to Eliminate DEI* (Jan. 23, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-takes-action-eliminate-dei> [<https://perma.cc/SS26-L3A8>]; Michael C. Bender, Alan Blinder & Michael S. Schmidt, *Trump Wants Universities to Show Him the Money, or No Deal*, N.Y. TIMES (Aug. 19, 2025), <https://www.nytimes.com/2025/08/19/us/politics/trump-universities-financial-penalties.html> [<https://perma.cc/6HUN-QLL4>] (describing the “extortion” tactics used by the Administration against in conditioning billions of dollars in federal funding for American colleges and universities with acquiescing to government demands and the adoption of Administration policies).

²⁵⁴ See e.g. Ending Radical Indoctrination in K-12 Schooling, Exec. Order No. X, 82 Fed. Reg. X (Jan. 25, 2025) (“eliminating Federal funding or support for illegal and discriminatory treatment and indoctrination in K-12 schools, including based on gender ideology and discriminatory equity ideology”); see also Michael C. Bender & Anemona Hartocollis, *Trump Administration to Require Universities to Submit Data on Applicants' Race*, N.Y. TIMES (Aug. 7, 2025), <https://www.nytimes.com/2025/08/07/us/politics/trump-schools-race-data.html>; Laura Meckler, *Under Trump, the Education Dept. has flipped its civil rights mission*, WASH. POST (Aug. 18, 2025), <https://surl.li/zyifyu> [<https://perma.cc/3QE4-XPYR>].

political interests,²⁵⁵ students, college administrators, and educators have been increasingly subjected to well-funded attacks.²⁵⁶

Paralleling the near-immediate attack on voting rights and the accompanying decline in non-white voter participation observed in the aftermath of the whitewashed, sanewashed *Shelby County* decision,²⁵⁷ the consequences of *SFFA* on the college enrollment rates of underrepresented students have been similarly immediate and precipitous.²⁵⁸ At elite universities—beacons of power and prestige that have long relied on legacy admissions practices benefiting white, wealthy applicants—a 15-year trend, which had shown a gradual increase in the enrollment of Black and Hispanic students, was reversed almost overnight.²⁵⁹ Despite the best efforts of university administrators and educators to withstand mounting attacks, college campuses are increasingly becoming hostile, inhospitable environments for immigrant and non-white students.²⁶⁰

²⁵⁵ *McMahon v. New York* (U.S. Jun. 6, 2026) (order granting emergency relief—emergency order expanding presidential power to permit President Trump to abolish the Department of Education without congressional power).

²⁵⁶ Cochran, *supra* note 252; Athena D. Mutua, Jonathan Feingold, Angela Harris, Emily M.S. Houh, Matthew Patrick Shaw & Francisco Valdes, *The War on Higher Education*, 72 UCLA L. REV. DISC. 344 (2024); Danielle Kurtzeleben & Elissa Nadworny, *President Trump's War on Higher Education*, NPR (May 30, 2025), <https://www.npr.org/2025/05/30/nx-s1-5415678/president-trumps-war-on-higher-education> [<https://perma.cc/G9R5-62BE>]; see also Students Basic Needs Coalition, *Attacks on DEI Programs Are Making Students Rethink Their College Choices*, TEENVOGUE (Apr. 16, 2025), <https://www.teenvogue.com/story/attacks-dei-programs-students-college-choices>.

²⁵⁷ Stephen B. Billings et al., *Disparate Racial Impacts of Shelby County v. Holder On Voter Turnout*, 230 J. PUB. ECON. 105365 (Feb. 2024); see also Jane Delworth, *What's Past is Prologue: The Effects of Shelby County v. Holder in Georgia*, 1 ST. LOUIS U. L.J. ONLINE. 131 (2025); Kevin Morris & Coryn Grange, *Growing Racial Disparities in Voter Turnout, 2008–2022*, BC (Mar. 2, 2024), <https://www.brennancenter.org/our-work/research-reports/growing-racial-disparities-voter-turnout-2008-2022> [<https://perma.cc/ZLE3-R48N>].

²⁵⁸ Suevon Lee, *MIT Blames Supreme Court Decision for Less-Diverse Incoming Class*, WBUR (Aug. 21, 2024), <https://www.wbur.org/news/2024/08/21/mit-affirmative-action-decision-diversity> [<https://perma.cc/5PAM-54QC>]; Hilary Burns & Neena Hagen, *'It is heartbreaking': Black First-Year Enrollment Plunges at Top Colleges, Post-Affirmative Action*, BOS. GLOBE (Sep. 25, 2024), <https://www.bostonglobe.com/2024/09/25/metro/affirmative-action-colleges-black-enrollment/> [<https://perma.cc/R9Z3-UF7T>] Cochran, *supra* note 252.

²⁵⁹ Aatish Bhatia, *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. TIMES (Jan. 15, 2025), <https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html> [<https://perma.cc/6MP7-L264>].

²⁶⁰ Brandon Drenon & Robin Levinson-King, *Anxiety at US Colleges as Foreign Students Are Detained and Visas Revoked*, BBC NEWS (Apr. 18, 2025), <https://www.bbc.com/news/articles/c20xq5nd8jeo> [<https://perma.cc/X8P5-YF66>]; Elena Moore,

Judicial opinions employing sanewashing and whitewashing have not been limited solely to the domestic context. Sanewashed and whitewashed reasoning have also featured prominently in the Court's approach to immigration law, particularly its permissive stance towards the Trump Administration's systematic exclusion, detention, and deportation of non-white migrants.²⁶¹ Famously, in *Trump v. Hawaii*, the Court upheld an executive order issued by President Trump that restricted the entry of nationals from eight countries: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.²⁶² The executive order that was the subject of *Hawaii* was the third iteration²⁶³ in a series of travel bans that Trump had attempted to institute within days of taking office in January 2017.²⁶⁴ Though represented in court filings by the Administration as necessary for national security reasons,²⁶⁵ each of the three bans was intended to fulfill a campaign promise in which Trump pledged a "total and complete shutdown of Muslims entering the United States."²⁶⁶ Each of the three bans was

For Some Students Who Protested War in Gaza, Fear and Silence Is a New Campus Reality, NPR (Apr. 12, 2025), <https://www.npr.org/2025/04/11/nx-s1-5343940/college-students-say-trump-administrations-crackdown-on-activism-incites-fear> [<https://perma.cc/NK4A-AMA5>]; Gloria Oladipo, 'A warning for students of color': Ice agents are targeting certain protesters, say experts, GUARDIAN (Mar. 26, 2025), <https://www.theguardian.com/us-news/2025/mar/26/us-universities-students-israel-palestine-protests> [<https://perma.cc/LYE9-J2M7>]; see also Sara Weissman, *Black, Hispanic Students More Likely to Consider Leaving College*, INSIDER HIGHER ED (Mar. 26, 2024), <https://www.insidehighered.com/news/quick-takes/2024/03/26/students-color-more-likely-consider-stopping-out> [<https://perma.cc/B43M-RT7A>].

²⁶¹ D.V.D., 145 S.Ct. at 2158-59 (Sotomayor, J., dissenting):

The Government thus openly flouted two court orders, including the one from which it now seeks relief. Even if the orders in question had been mistaken, the Government had a duty to obey them until they were 'reversed by orderly and proper proceedings.' *Maness*, 419 U. S., at 459 (quoting *United States v. Mine Workers*, 330 U. S. 258, 293 (1947)). That principle is a bedrock of the rule of law. The Government's misconduct threatens it to its core. So too does this Court's decision to grant the Government equitable relief. This is not the first time the Court closes its eyes to noncompliance, nor, I fear, will it be the last. See *Trump v. J. G. G.*, 604 U. S. ____ (2025) (*per curiam*). Yet each time this Court rewards noncompliance with discretionary relief, it further erodes respect for courts and for the rule of law.

²⁶² *Trump v. Hawaii*, 585 U.S. 667 (2018).

²⁶³ Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

²⁶⁴ Protecting the Nation From Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), superseded by executive order, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

²⁶⁵ Presidential Proclamation No. 9645 § 1(h)(i), 82 Fed. Reg. at 45,164.

²⁶⁶ *Hawaii*, 585 U.S. at 700.

litigated, with lower federal courts overwhelmingly finding them constitutionally infirm and enjoining their enforcement.²⁶⁷

But, in a split decision authored by the Chief Justice, the Court rejected the statutory and constitutional challenges to the travel ban, finding that the executive order did not exceed the President's broad statutory authority under the Immigration and Nationality Act (INA) or violate core constitutional protections.²⁶⁸ With respect to the constitutional challenges to the travel ban, the Court concluded that the ban—despite targeting majority-Muslim countries and having been repeatedly lauded by the President as a solution to the United States's "Muslim problem"²⁶⁹—did not represent an impermissible religious preference and was not motivated by anti-Muslim animus. Rather, the Court uncritically accepted the legitimacy of the President's national security claim.²⁷⁰ Despite acknowledging the inherently discriminatory nature of the President's repeated statements and tweets in support of the travel ban, the Court concluded the President had a valid justification "independent of unconstitutional grounds."²⁷¹

Even under the highly deferential rational basis test that typically favors the government in matters of national security exceptionalism,²⁷² the challenged executive order was not rationally related to a legitimate government purpose.²⁷³ There was scant evidence to show that migrants

²⁶⁷ See, e.g., *Washington v. Trump*, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (order granting temporary restraining order); *Washington v. Trump*, 691 F. App'x 834, 835 (9th Cir. 2017) (order denying stay pending appeal); *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (order granting motion for temporary restraining order); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) (enjoining the second executive order on Establishment Clause grounds).

²⁶⁸ *Hawaii*, 585 U.S.

²⁶⁹ 86 *Times Donald Trump Displayed or Promoted Islamophobia*, MEDIUM (Apr. 19, 2018), <https://medium.com/nilec/86-times-donald-trump-displayed-or-promoted-islamophobia-49e67584ac10> [<https://perma.cc/NK53-YREN>].

²⁷⁰ *Hawaii*, 585 U.S. at 701-05.

²⁷¹ *Id.* at 700, 705.

²⁷² For a critique of the long-standing usage of the plenary powers doctrine in service of xenophobic immigration policy aims, see Karla McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 95, 99 (2020).

²⁷³ Brian L. Owsley, *Is the Supreme Court Irrational: Trump v. Hawaii*, 29 S. CAL. INTERDISC. L.J. 591 (2020) (arguing that Trump's travel ban was both overinclusive and underinclusive, failing to satisfy even the minimal standard imposed under rational basis review); see also *Hawaii*, 585 U.S. at 743 (2018) (Sotomayor, J., dissenting) ("But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is 'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is]

from the targeted countries presented a security risk or that the executive order would rectify the supposed threat presented by migrants from the banned nations.²⁷⁴ The ban's extreme over-inclusiveness and under-inclusiveness should have been fatal to even a highly generous rational basis review standard.²⁷⁵ Yet on the question of whether the ban was unconstitutionally overbroad, the Court blindly relied on the executive's presupposed institutional competence in concluding that it was not permitted to "substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'"²⁷⁶ The Court's unquestionable deference to the President and only marginal judicial oversight resulted in no meaningful standard of review at all.²⁷⁷

Moreover, rational basis review was arguably not the proper standard for the Court to apply. While rational basis is typically appropriate in cases involving immigration-related matters, evidence of racial or ethnic animus or other illegitimate government motives requires the Court to apply a heightened standard. Here, there was ample evidence, provided by the President himself, that the underlying aim of the travel ban was unrelated to a rational national security interest. Despite the overwhelming evidence of an impermissible discriminatory intent, the Court concluded that the issue before the Court was not "whether to denounce the statements" but to "consider not only the statements of a particular President, but also the authority of the Presidency itself" within the context of a facially-neutral "presidential directive."²⁷⁸ The boldly racist and xenophobic explanations repeatedly offered directly by President Trump and his Administration as the underlying motivation for the immigration ban were dismissed as having no legal or factual relevance in the Court's ruling.²⁷⁹

so discontinuous with the reasons offered for it' that the policy is 'inexplicable by anything but animus.'").

²⁷⁴ As surveyed by Professor Owsley, over a forty-year period predating the travel ban, no migrants from the targeted nations had been involved in any terrorist attacks resulting in deaths within the United States. During this same period of time, only three Americans were killed by refugees—all by Cubans in the 1970s. Owsley, *supra* note 273, at 591.

²⁷⁵ *Id.*

²⁷⁶ Hawaii, 585 U.S. at 708.

²⁷⁷ See Hawaii, 585 U.S. (Sotomayor, J., dissenting)

²⁷⁸ *Id.* at 702.

²⁷⁹ Neil S. Siegel, *The Supreme Court Is Avoiding Talking About Race*, THE ATLANTIC (Aug. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/supreme-court-doesnt-like-talk-about-race/614944/> [<https://perma.cc/7T3X-XH9S>]; see Hawaii, 585 U.S. at 739–40 (Sotomayor, J.,

Perhaps most remarkably, in a brazen showing of sanewashing, the Chief Justice used the *Hawaii* decision sanctioning animus-based, racially discriminatory government policy premised on false national security concerns to overrule *Korematsu v. United States*, the Court's equally shameful decision that permitted an animus-based, racially discriminatory government policy premised on false national security concerns to intern Japanese Americans during World War II.²⁸⁰ Functioning as "a modern-day adaptation of *Korematsu*,"²⁸¹ the *Hawaii* case is strikingly similar to its historical doppelganger not only in the Court's blind deference to the executive's wanton dishonesty but also in the complete abdication of judicial responsibility that both decisions represent. In both *Hawaii* and *Korematsu*—the former having ironically overruled the latter—the Court sanewashed its flawed legal reasoning to reconcile blatant discrimination at the highest levels of government with constitutional principles of democracy and equality under the law.

Legal scholars have predicted that the fate of *Hawaii* is destined to follow that of *Korematsu* in joining "the ranks of this country's most notorious antiprecedents—textbook cases of judicial decision-making gone wrong."²⁸² Despite criticism of the dubious legal reasoning employed in *Hawaii*, the use of sanewashing and whitewashing by the Roberts Court to sanction racist, constitutionally questionable conduct by the government has been elevated to new heights in the early months of the second Trump Administration.

Trump learned from the missteps of his first Administration and, in preparing for a second term, pledged to deport "as many as 20 million"

dissenting) ("Ultimately, what began as a policy explicitly 'calling for a total and complete shutdown of Muslims entering the United States' has since morphed into a 'Proclamation' putatively based on national-security concerns. But this new window dressing can- not conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.")

²⁸⁰ See *Hawaii*, 585 U.S. at 752 (Sotomayor, J., dissenting) (citing Brief for Japanese American Citizens League as Amicus Curiae Supporting Petitioner, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22), 1944 WL 42852, at *12–14) ("This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.")

²⁸¹ Neal K. Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J. F. 641, 648 (2019).

²⁸² *Id.* at 642.

people from the United States²⁸³—nearly double the number of people without legal status in the United States, according to the Department of Homeland Security.²⁸⁴ The prejudiced comments made by the former President on the campaign trail and the immigration policies and practices that swiftly followed once he returned to office reflected the same racist motivations that animated the judicially-sanctioned conduct of his government during his first term.²⁸⁵

Immediately upon entering office again, President Trump quickly moved to effectuate an aggressive and lawless anti-immigration policy.²⁸⁶ On the first day of his second term, President Trump signed an executive order entitled “Protecting the American People Against Invasion.”²⁸⁷ Within a matter of weeks, the Administration had enacted a new travel ban, rescinded the temporary legal status of hundreds of thousands of refugees and asylum seekers, limited foreign students from entering the United States, and conducted waves of immigration arrests across the country.²⁸⁸

²⁸³ *Read the Full Transcripts of Donald Trump's Interviews With TIME*, TIME (Apr. 30, 2024), <https://time.com/6972022/donald-trump-transcript-2024-election/> [https://perma.cc/4LW5-UPG6].

²⁸⁴ Bryan Baker & Robert Warren, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2018–January 2022* (Apr. 2024), https://ohss.dhs.gov/sites/default/files/2024-06/2024_0418_ohss_estimates-of-the-unauthorized-immigrant-population-residing-in-the-united-states-january-2018%25E2%2580%2593january-2022.pdf [https://perma.cc/W3RN-U2S4].

²⁸⁵ Mike Catalini, Julie Carr Smyth & Bruce Shipkowski, *WATCH: Trump Amplifies False Racist Rumor about Ohio's Haitian Immigrants in Debate*, PBS (Sept. 11, 2024), <https://www.pbs.org/newshour/politics/watch-trump-amplifies-false-racist-rumor-about-ohios-haitian-immigrants-in-debate> [https://perma.cc/7SS6-PN8G]; Myah Ward, *We Watched 20 Trump Rallies. His Racist, Anti-Immigrant Messaging Is Getting Darker*, POLITICO (Oct. 12, 2024), <https://www.politico.com/news/2024/10/12/trump-racist-rhetoric-immigrants-00183537> [https://perma.cc/53JF-UMPQ].

²⁸⁶ Kat Lonsdorf, *Trump's National Guard Deployments Aren't Random. They Were Planned Years Ago*, NPR (Nov. 3, 2025), <https://www.npr.org/2025/11/03/nx-s1-5593112/national-guard-mass-deportations-trump-2026> [https://perma.cc/LSD3-JLKT]. For insights into how psychological authoritarianism influences responses to immigrants and “predisposes individuals to cluster in groups behind a strong leader, such as a border vigilante who promises to address the threat,” see Richard Delgado, *Authoritarianism: A Comment*, 13 RUTGERS RACE & L. REV. 65, 74 (2011).

²⁸⁷ Protecting the American People Against Invasion, Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025).

²⁸⁸ Ali Bianco, *‘A Complete Sea Change’: Trump's Immigration Crackdown Goes into Hyperdrive*, POLITICO (Jun. 6, 2025), <https://www.politico.com/news/2025/06/07/donald-trump-immigration-agenda-ice-00392530> [https://perma.cc/HHB6-96PN]; Jeff Crisp, *Trump Is Building a Machine to Disappear People*, N.Y. TIMES (Jul. 23, 2025), <https://www.nytimes.com/2025/07/23/opinion/migration-deportation-sudan-trump.html> [https://perma.cc/9XSC-FWJ9].

To meet its daily quota of 3,000 immigration arrests,²⁸⁹ the Administration conscripted the National Guard to assist with immigration enforcement. Overnight, militarized zones appeared in urban centers, most visibly in Los Angeles, over the objections of city and state leaders.²⁹⁰ Soon thereafter, masked men began abducting Brown and Black residents—including citizens and individuals with lawful immigration status—from the streets of major American cities.²⁹¹ Individuals ensnared in the Administration's indiscriminate raids were detained in inhumane conditions, denied basic due process protections, and, in some cases, deported to third-party countries where they were subjected to torture and human rights abuses.²⁹²

²⁸⁹ Jose Olivares, *Trump Administration Sets Quota to Arrest 3,000 People a Day in Anti-Immigration Agenda*, THE GUARDIAN (May 29, 2025), <https://www.theguardian.com/us-news/2025/may/29/trump-ice-arrest-quota> [<https://perma.cc/7JDZ-MERW>].

²⁹⁰ Karina Tsui, *Trump Deploys National Guard After Second Day of Los Angeles Immigration Protests*, CNN (Jun. 7, 2025), <https://www.cnn.com/2025/06/06/us/los-angeles-immigration-enforcement-protesters> [<https://perma.cc/9BQJ-P3QC>].

²⁹¹ Eric Levenson, *Masked Agents And Public Arrests: A Closer Look At ICE's Increasingly Aggressive Tactics*, CNN (Aug. 25, 2025), <https://www.cnn.com/2025/08/25/us/masks-arrests-ice-tactics-immigration> [<https://perma.cc/H2G6-UGEA>]; Brittney Mejia & Rachel Uranga, *Fears Of Racial Profiling Rise As Border Patrol Conducts 'Roving Patrols,' Detains U.S. Citizens*, LA TIMES (Jun. 15, 2025), <https://www.latimes.com/california/story/2025-06-15/latinos-targeted-in-raids-u-s-citizens-detained-indiscriminate-sweeps-home-depot-lots-targeted> [<https://perma.cc/R4A5-CXAP>].

²⁹² Peter Charalambous & Laura Romero, *'It's Like You're Dead Alive': Families, Advocates Allege Inhumane Conditions At 'Alligator Alcatraz,'* ABC NEWS (Aug. 14, 2025), <https://abcnews.com/US/youre-dead-alive-families-advocates-allege-inhumane-conditions/story> [<https://perma.cc/WKE2-ZK7S>]; Miriam Jordan & Jazmine Ulloa, *Concerns Grow Over Dire Conditions in Immigrant Detention*, N.Y. TIMES (Jul. 1, 2025), <https://www.nytimes.com/2025/06/28/us/immigrant-detention-conditions.html> [<https://perma.cc/8LNL-PLPD>]; Elizabeth Findell & Mariah Timms, *In Immigration Crackdown, Migrants Are Denied a Day in Court*, WALL STREET JOURNAL (May 15, 2025), <https://www.wsj.com/politics/policy/trump-immigration-due-process-90e82ff8> [<https://perma.cc/AD53-4KPU>]; Perla Trevizo, Melissa Sanchez, Mica Rosenberg, Ronna Rísquez & Adrián González, *Now That They're Free*, PROPUBLICA (Jul. 30, 2025), <https://www.propublica.org/article/venezuelan-men-cecot-interviews-trump> [<https://perma.cc/4KP9-Q6BX>]; Samantha Schmidt, Helena Carpio, María Luisa Paúl, Silvia Foster-Frau & Teo Armu, *'Welcome To Hell': Inside The Mega Prison Where The U.S. Deported Migrants*, WASH. POST (Jul. 31, 2025), <https://www.washingtonpost.com/world/2025/07/31/venezuelans-deported-us-el-salvador-prison-cecot/> [<https://perma.cc/D39C-Z77R>].

The Administration's immigration policies have not only been blatantly racist and flagrantly lawless, but also gratuitously cruel.²⁹³ Dehumanizing racist rhetoric has been paired with government policies and operations leveraging legally dubious tactics targeting non-white communities.²⁹⁴ The government has made it a practice to rely on warrantless arrests,²⁹⁵ target schools for immigration raids, and has repeatedly arrested and detained American citizens.²⁹⁶

²⁹³ Ben Weider et al., 'Psychological Warfare': Internal Data Shows True Nature of Alligator Alcatraz, MIAMI HERALD (Jan. 5, 2026), <https://www.miamiherald.com/news/local/immigration/article311718011.html> [https://perma.cc/QY8J-6Z7E]; Ward, *supra* note 285.

²⁹⁴ *Live Updates: Trump Calls Somalis 'Garbage' in Anti-Immigrant Tirade*, N.Y. TIMES (Dec. 2, 2025), <https://www.nytimes.com/live/2025/12/02/us/trump-ukraine-putin-news> [https://perma.cc/F4CZ-JDU8]; Dareh Gregorian, *Trump Disparages Somali Immigrants for the Second Straight Day, Saying They've 'Destroyed Our Country,'* NBC NEWS (Dec. 3, 2025), <https://www.nbcnews.com/politics/donald-trump/trump-disparages-somali-immigrants-second-straight-day-ilhan-omar-rcna247271> [https://perma.cc/NYL6-B2EF].

²⁹⁵ Hamed Aleaziz and Charlie Savage, "ICE Expands Power of Agents to Arrest People Without Warrants," N.Y. TIMES, (Jan. 30, 2026), <https://www.nytimes.com/2026/01/30/us/politics/ice-expands-power-agents-warrants.html> [https://perma.cc/R79A-26XS].

²⁹⁶ Allison Sherry & Chuck Murphy, *Court Demands End to Unjustified Warrantless Arrests, Restricting a Tool ICE Frequently Uses to Detain Immigrants*, CPR NEWS, (Nov. 25, 2025), <https://www.cpr.org/2025/11/25/judge-orders-end-to-ice-warrantless-arrests-colorado/> [https://perma.cc/PU4S-HAMR]; Malcolm Ferguson, *Minneapolis Cancels School after Federal Agents Attack Students*, THE NEW REPUBLIC (Jan. 8, 2026), <https://newrepublic.com/post/205071/minneapolis-cancels-school-high-school-raid-students-teachers> [https://perma.cc/TUV5-TCB8]; Rebecca Cohen et al., *ICE Detains 4 Minnesota Students, Including 5-Year-Old, School District Says*, NBC NEWS (Jan. 22, 2026), <https://www.nbcnews.com/news/us-news/ice-detains-4-minnesota-students-5-year-old-school-district-says-rcna255366/> [https://perma.cc/NAZ3-ZFHC]; Nicole Foy, *We Found That More Than 170 U.S. Citizens Have Been Held by Immigration Agents. They've Been Kicked, Dragged and Detained for Days*, PROPUBLICA (Oct. 16, 2025), <https://www.propublica.org/article/immigration-dhs-american-citizens-arrested-detained-against-will> [https://perma.cc/H5X4-77BW]; Yesenia Amaro, *High School Senior, a U.S. Citizen, Detained by ICE in Oregon*, OR. LIVE (Nov. 24, 2025), <https://www.oregonlive.com/portland/2025/11/high-school-senior-in-oregon-a-us-citizen-detained-by-ice.html>; Joe Heim, *After 25 Days, ICE Releases Maryland Woman Who Says She is a U.S. Citizen*, WASH. POST (Jan. 7, 2026), <https://www.washingtonpost.com/dc-md-wa/2026/01/07/diaz-morales-maryland-woman-released-ice/> [https://perma.cc/BUA5-Q4MJ]; Jack Brook, *A U.S. Citizen Says ICE Forced Open the Door to His Minnesota Home And Removed Him in His Underwear After a Warrantless Search*, PBS NEWS (Jan. 20, 2026), <https://www.pbs.org/newshour/nation/a-u-s-citizen-says-ice-forced-open-the-door-to-his-minnesota-home-and-removed-him-in-his-underwear-after-a-warrantless-search> [https://perma.cc/9PW9-LBZC].

Predictably, the government's immigration policies and practices have spurred significant litigation.²⁹⁷ In dozens of cases filed across the country by state Attorney Generals, civil rights organizations, and attorneys representing detained persons, the government is alleged to have engaged in a pattern of brazen constitutional violations.²⁹⁸ In nearly every case brought against the Trump Administration challenging the legality of the government's immigration policies, lower courts have ruled in favor of the challengers.²⁹⁹ Federal judges appointed by Democratic and Republican presidents alike have reached the same preliminary conclusion—that the Administration's conduct is lawless—and have enjoined or limited the government from implementing many of its immigration policies.³⁰⁰ In public statements by government officials and in numerous court filings in these cases, the Administration has sanewashed facts, if not fabricated them entirely.³⁰¹

Judge James Harvie Wilkinson III, a Reagan appointee who authored a pivotal decision in the well-publicized case of Abrego Kilmar Garcia, the man wrongfully deported to an El Salvadoran super prison, wrote a powerful defense of the need for an independent judiciary for the preservation of fundamental due process protections:

²⁹⁷ Alex Lemonides et al., *The Trump Administration Has Been Sued 650 Times. Track These Cases*, N.Y. TIMES (Mar. 23, 2026), <https://www.nytimes.com/interactive/2026/us/trump-administration-lawsuits.html> [https://perma.cc/ZU9Z-JHZU].

²⁹⁸ Sam Lynch, *State Attorneys General on Track to File Record Number of Lawsuits Against Trump Administration*, AM. IMMIGR. COUNCIL (Aug. 20, 2025), <https://www.americanimmigrationcouncil.org/blog/state-attorneys-general-lawsuits-against-trump-administration/> [https://perma.cc/9V8T-9EAY].

²⁹⁹ Lemonides et al., *supra* note 297.

³⁰⁰ Steve Vladeck, *Setting the Record Straight on the Anti-Trump Injunctions*, ONE-FIRST (Mar. 31, 2025), <https://www.stevevladeck.com/p/136-setting-the-record-straight-on> (finding that one of every five rulings limiting Trump Administration policies were issued by Republican-appointed judges); Kyle Cheney, *Trump's Immigration 'Shock And Awe' Is Losing in the Court of Law*, POLITICO (May 2, 2025), <https://www.politico.com/news/2025/05/02/trump-immigration-court-losses-00324683> [https://perma.cc/FC9N-HNSM].

³⁰¹ Ainara Tiefenthäler et al., *Times Analysis Finds Errors in Trump's Supreme Court Filing That Calls for National Guard in Chicago*, N.Y. TIMES (Nov. 25, 2025), <https://www.nytimes.com/2025/11/25/us/trump-supreme-court-national-guard-chicago-errors.html> [https://perma.cc/GJ4M-DUTS]; Brit McCandless Farmer, *Some Courts Are Losing Trust in Trump Justice Department, According to a Study*, CBS NEWS (Oct. 22, 2025), <https://www.cbsnews.com/news/some-courts-losing-trust-in-trump-justice-department-study-shows-60-minutes/> [https://perma.cc/5M3W-L54W]; see also The Editorial Board, *The Trump Administration Is Lying to Our Faces. Congress Must Act*, N.Y. TIMES (Jan. 25, 2026), <https://www.nytimes.com/2026/01/25/opinion/alex-pretti-minneapolis-shooting-border-patrol.html> [https://perma.cc/Y2TQ-8X52].

It is difficult in some cases to get to the very heart of the matter. But in this case, it is not hard at all. The government is asserting a right to stash away residents of this country in foreign prisons without the semblance of due process that is the foundation of our constitutional order [...] This should be shocking not only to judges, but to the intuitive sense of liberty that Americans far removed from courthouses still hold dear.

[...] The basic differences between the branches mandate a serious effort at mutual respect. The respect that courts must accord the Executive must be reciprocated by the Executive's respect for the courts. Too often today this has not been the case, as calls for impeachment of judges for decisions the Executive disfavors and exhortations to disregard court orders sadly illustrate.³⁰²

As lower federal courts were consistently concluding that the Trump Administration was arbitrarily rounding up and deporting non-white persons without due process, the Administration was simultaneously seeking to deny birthright citizenship to the children of certain immigrants.³⁰³ Like the litigation that swiftly followed the Trump Administration's immigration crackdown, a coalition of state Attorney Generals and civil rights organizations again challenged the constitutionality of the President's executive order barring citizenship rights for children born in the United States to certain non-citizen parents.³⁰⁴ Once again, lower courts had no difficulty finding that the order was likely unlawful and entered preliminary injunctions barring it from taking effect.³⁰⁵

Several of the legal challenges to the aggressive immigration policies pursued in the early months of the second Trump Administration found their way before the Supreme Court, many through the Court's uncharacteristically active emergency docket.³⁰⁶ Whereas district and

³⁰² *Abrego Garcia v. Noem*, No. 25-1404, 2025, WL 1021113, at 2, 5 (4th Cir. 2025) (Wilkinson, J., opinion).

³⁰³ *Protecting the Meaning and Value of American Citizenship*, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

³⁰⁴ *Protecting the Meaning and Value of American Citizenship*, Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

³⁰⁵ *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723 (D. Md. 2025).; *Washington v. Trump*, 765 F. Supp. 3d 1142 (W.D. Wash. 2025); *Doe v. Trump*, 766 F. Supp. 3d 266 (D. Mass. 2025).

³⁰⁶ Steve Vladeck, *Bonus 157: Why the Supreme Court Keeps Granting Stays to President Trump*, ONE FIRST (Jun. 12, 2025), <https://www.stevevladeck.com/p/bonus-157-why-the-supreme-court->

appellate court judges spanning a diverse array of jurisdictions and judicial philosophies had overwhelmingly ruled against these policies, the Roberts Court was more receptive to the Administration's legal theories. Employing a cornucopia of sanewashing techniques, the Court's conservative majority systematically undermined lower court decisions and core constitutional principles to deliver victory after victory for the Trump Administration.³⁰⁷ Increasingly emboldened by the Court's willingness to sanewash the law and facts to enable the Administration to pursue constitutionally questionable policies, the Administration has itself responded by augmenting its own sanewashing and has misrepresented lower court injunctions as "emergencies" requiring immediate intervention by the Court.³⁰⁸

keeps [<https://perma.cc/Y2YD-K77C>]; Abbie VanSickle, *Justice Kagan Urges Supreme Court to Explain Itself in Emergency Decisions*, N.Y. TIMES Jul. 24, 2025), <https://www.nytimes.com/2025/07/24/us/justice-kagan-supreme-court-emergency-decisions.html> [<https://perma.cc/8TWW-SVMX>]; Abbie VanSickle, *At the Supreme Court, the Trump Agenda Is Always an 'Emergency'*, N.Y. TIMES (Apr. 10, 2025), <https://www.nytimes.com/2025/04/10/us/politics/supreme-court-trump-emergency.html> [<https://perma.cc/MSF6-PJSC>].

³⁰⁷ Vladeck, *supra* note 306 ("What is becoming increasingly clear is that the Trump administration is not just seeking an unprecedented number of stays from the justices, but that it is doing very well in those cases"); Sonam Sheth & Gabe Whisnant, *Supreme Court Hands Donald Trump 16th Win in a Row*, NEWSWEEK (Jul. 23, 2025), <https://www.newsweek.com/supreme-court-news-donald-trump-decision-2103173> [<https://perma.cc/W283-TSR9>]; Adam Liptak & Abbie VanSickle, *A Triumphant Supreme Court Term for Trump, Fueled by Emergency Rulings*, N.Y. TIMES (Jun. 30, 2025), <https://www.nytimes.com/2025/06/28/us/supreme-court-trump-victories.html> [<https://perma.cc/UGS8-P4WN>]; Thomas Edsall, *The Supreme Court Has Finally Found a President It Likes*, N.Y. TIMES (Aug. 5, 2025), <https://www.nytimes.com/2025/08/05/opinion/supreme-court-trump-administration.html> [<https://perma.cc/7BHV-GNMX>] (citing data from a Stanford political scientist that between May and August 2025, federal district courts ruled against the Administration 94.3% of the time but that the Supreme Court "flipped that outcome, siding with the administration in 93.7% of its cases.").

³⁰⁸ Steve Vladeck, *Bonus 174: Playing the Justices for Fools*, ONE FIRST (Aug. 27, 2025), <https://www.stevevladeck.com/p/bonus-174-playing-the-justices-for> [<https://perma.cc/CLJ3-HKL8>] (discussing the Trump Administration's evolving legal strategy to "take advantage of its expectation that it can receive emergency relief from the Supreme Court" by "contriving the procedural emergency that the Solicitor General now claims justifies intervention by the justices; downplaying the fact that the government *forfeited* the substantive claim on which it claims it is likely to succeed on the merits—by not properly raising it below; and misrepresenting what happened in the lower courts by conveniently leaving out any details that might draw the justices"); Jake Traylor, *Donald Trump Calls Supreme Court Birthright Citizenship Decision 'Amazing'*, POLITICO (Jun. 27, 2025), <https://www.politico.com/live-updates/2025/06/27/supreme-court-rulings-decisions-today-news-analysis/donald-trump-supreme-court-injunction-birthright-00427992> [<https://perma.cc/8CB2-VDT3>].

One of the many significant issues adjudicated by the Court on its emergency docket in the early months of the second Trump Administration was the President's birthright citizenship order denying.³⁰⁹ Notably, the government decided not to appeal the substance of the lower court orders enjoining the President's birthright citizenship order from going into effect.³¹⁰ Even for an Administration intent on pushing the bounds of constitutional norms, it understood that over a century of settled law interpreting and applying the 14th Amendment did not bode well for a direct facial challenge.³¹¹ Instead, the Administration purposefully sought to have the Supreme Court invalidate the district court injunctions on procedural grounds, arguing that district courts lacked the authority to issue "nationwide injunctions."³¹² And, to the shock and horror of many legal observers, scholars, practitioners, and the Court's dissenting justices, it proved to be a winning strategy before the Roberts Court.³¹³

³⁰⁹ The White House, *Protecting the Meaning and Value of American Citizenship* (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship> [<https://perma.cc/4R3U-CSCB>].

³¹⁰ See *CASA*, 763 F. Supp. 3d at 729–30; *Washington*, 765 F. Supp. 3d at 1147; See *Doe*, 766 F. Supp. 3d at 273–74, *remanded*, No. 25-1169 (1st Cir. July 3, 2025).

³¹¹ The Citizenship Clause of the Fourteenth Amendment provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The provision has been understood and interpreted to grant citizenship to all children born on U.S. soil, subject to limited exceptions. See generally Cong. Rsch. Serv., *Citizenship Clause Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-1-2/ALDE_00000812/ (last visited Aug. 26, 2025).

³¹² See Portia Pedro, *The Myth of the "Nationwide Injunction,"* 84 OHIO STATE L.J. 677 (2023) (describing how the absence of rules prohibiting nationwide injunctions, and the importance of the type of litigation in which nationwide injunctions are issued justify their continued usage).

However, when the issue was decided on its merits during the Court's 2025-2026 term, the Court only narrowly upheld birthright citizenship protections. See *Trump v. Barabara*. Legal scholars and commentators have expressed dismay that the decision was not unanimous. See e.g., Mark Joseph Stern, *The Supreme Court's 5–4 Vote in the Birthright Citizenship Case Is a Scandal*, SLATE, Jun. 30, 2026, <https://slate.com/news-and-politics/2026/06/supreme-court-birthright-citizenship-scandal-brett-kavanaugh.html>; see also *Howard University's Sherrilyn Ifill Discusses SCOTUS Decision to Uphold Birthright Citizenship on 'All In with Chris Hayes'*, Jul. 2, 2026, <https://thedig.howard.edu/all-stories/howard-universitys-sherrilyn-ifill-discusses-scotus-decision-uphold-birthright-citizenship-all-chris> (critiquing the Court's split decision as giving "legitimacy to the idea that birthright citizenship can be overturned"); Strict Scrutiny Podcast, *SCOTUS Just Barely Preserves Birthright Citizenship*, Jul. 1, 2026, <https://pod.link/1469168641/episode/YXVkaW9ib29tLTaxOWYxYTRjLWRjNWItN2RhNS04MjliLTY3MjM4OTljNzVhOA>.

³¹³ *CASA*, 606 U.S. at 921–22 (Jackson, J., dissenting) (characterizing the Court's decision as an "existential threat to the rule of law" that functions to create a "zone of lawlessness"); *CASA*, 606

In *Trump v. CASA*, the Court limited the ability of lower federal courts to issue nationwide injunctions to stop unconstitutional presidential actions and federal laws.³¹⁴ Although the challenged executive order was widely viewed as unconstitutional,³¹⁵ the Court's conservative majority strategically sidestepped the substantive issue, instead electing to rely on a procedural argument to allow the Administration to potentially nullify 14th Amendment citizenship rights for some immigrant children born in the United States as the case proceeded through litigation.

U.S. at 917 (Sotomayor, J., dissenting) (calling out the majority for extending “an open invitation for the Government to bypass the Constitution”); *CASA*, 606 U.S. at 922-23 (Jackson, J., dissenting) (criticizing the majority for engaging in a “mind-numbingly technical query” as “a smokescreen” that “obscures a far more basic question of enormous legal and practical significance” about the ability of the federal courts to require the Executive Branch to follow the law); Josh Gerstein, *Supreme Court hands Trump major win*, POLITICO (Jun. 27, 2025), <https://www.politico.com/live-updates/2025/06/27/supreme-court-rulings-decisions-today-news-analysis/birthright-citizenship-nationwide-injunctions-00428839> [https://perma.cc/4V2X-Q8WC]; Kate Shaw, William Baude, & Stephen I. Vladeck *‘There’s Just Too Much Lawlessness’: Three Legal Experts on an Embattled Supreme Court*, N.Y. TIMES Jul. 3, 2025), <https://www.nytimes.com/2025/07/03/opinion/supreme-court-trump.html> [https://perma.cc/8C4F-U98W]; Efrén C. Olivares, *Analyzing the Supreme Court’s Dangerous Decision in Trump v. CASA*, NAT’L IMMIGR. L. CTR (Jun. 27, 2025), <https://www.nilc.org/articles/analyzing-scotus-trump-v-casa/> [https://perma.cc/C7PF-AQ2F]; see also David Marcus, *The Class Action After Trump v. CASA*, 73 UCLA L. REV. DISCOURSE 2, 5 (Aug. 24, 2025) (describing the implications of the Court’s ruling as “breathtaking” and threatening “to leave countless people targeted by illegal White House policies without remedies for the harms they suffer.”).

³¹⁴ *CASA*, 606 U.S. (holding that nationwide injunctions likely exceed federal courts’ equity authority under the Judiciary Act of 1789 and that, consequently, a lower federal court may not grant injunctive relief that is “broader than necessary to provide complete relief” to the plaintiffs before the court).

³¹⁵ When Trump first suggested the prospect of eliminating birthright citizenship via executive order during his first term, legal scholars responded unequivocally, denouncing the suggestion as patently unconstitutional. See *Press Statement: Constitutional Law Scholars Respond to Trump’s Threats Against Birthright Citizenship*, HRP (Nov. 1, 2018), <https://hrp.law.harvard.edu/press-statement-constitutional-law-scholars-respond-to-trumps-threats-against-birthright-citizenship/> [https://perma.cc/WEN4-CDX5] (“President Donald Trump is reportedly considering an executive order to essentially rewrite the Citizenship Clause of the 14th Amendment to eliminate birthright citizenship. In an interview to be aired later this week, he explains that people are now telling him that he can do this ‘just with an executive order.’ As constitutional scholars who have studied the 14th Amendment, we write to say in no uncertain terms that he is wrong”); see also Verbatim Report of Proceedings Before the Honorable John C. Coughenour at 13, *State of Washington v. Trump*, Civ. No. 25–127 (W.D. Wash. Jan. 24, 2025) (describing the birthright citizenship order as “blatantly unconstitutional”).

Departing from established norms,³¹⁶ the Court limited the scope of federal courts to block presidential policies nationwide at a time when nationwide injunctions offered the most effective legal mechanism for constraining constitutionally dangerous executive action and to provide minimal legal protections for the non-white immigrant population targeted by the government. Many legal scholars and observers decried the Court's conclusions and methodology as "myopic and wrong" and "especially unwelcome during a period in which each passing day seems to bring new incursions by the executive branch upon individual rights, the separation of powers, federalism, and the rule of law."³¹⁷ Treating its sweeping, far-reaching decision as an "academic" exercise rather than a judicious response to a dire constitutional threat,³¹⁸ the Court's conservative majority relied on a "cherry-picked recounting of equity's historical constraints"³¹⁹ to construct a new, malleable standard that disinvests lower federal courts of its critical oversight function, empowers a lawless Administration, and grants itself an outsized role reallocating power to favored political interests.

Characterizing the opinion in *Trump v. CASA* as "an amalgam of bad history, fiat, and ipse dixit," Stanford Law Professor, Mila Sohoni, succinctly described the sheer scale of sanewashing embedded in the Court's reasoning and conclusions:

The Founding era is lauded as of critical importance, but no American Founding-era cases are cited. Rule 23 matters greatly because it allows class actions, but Rule 65 – the rule that actually addresses injunctions, and which does not limit preliminary or final injunctive relief only to

³¹⁶ Though not specifically addressed in this article, the Court has also applied sanewashing to dismantle administrative law and the administrative state. *See, e.g., Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). (The case decided alongside *Relentless, Inc. v. Dep't of Com.*, overruling the Chevron doctrine and, in doing so, transferring power from federal agencies to courts in interpreting ambiguous statutes); *see also* Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REG: NOTICE & COMMENT (Jun. 28, 2024), <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/> [https://perma.cc/PS3G-6YWQ] (describing parts of the Chief Justice's opinion in this case as "hard to square with reality" and "congressional practice").

³¹⁷ Mila Sohoni, *Trump v. CASA and the future of the universal injunction*, SCOTUSBLOG (Jul. 2, 2025), <https://www.scotusblog.com/2025/07/trump-v-casa-and-the-future-of-the-universal-injunction/> [https://perma.cc/C5Z7-FYLR].

³¹⁸ *CASA*, 606 U.S. at 868 (J. Alito, concurring).

³¹⁹ Sohoni, *supra* note 317.

the plaintiffs – apparently does not matter at all. Cases involving state laws (such as *Scott v. Donald*) count when they can be portrayed as casting doubt on universal injunctions, but not when they uphold such relief and explicitly deem it “appropriate” (see *Pierce v. Society of Sisters*). A landmark case decided in 1908, *Ex parte Young*, is an acceptable evolution of equity even though it worked an enormous change in our law, but then the clock mysteriously stops: Nothing else in the 20th century merits consideration.

Apart from these and other internal inconsistencies and faulty logical jumps, the decision’s utter disregard of real-world consequences stands in stark contrast to the court’s own recent precedent.³²⁰

The parallel track and synergistic effects of political and judicial sanewashing have become increasingly visible in the early months of the second Trump Administration as the Roberts Court has repeatedly intervened to legally insulate the President’s lawless policies. In the second Trump Administration, the Court has taken its dual whitewashing and sanewashing practices to new levels. As sanewashing and whitewashing become more normalized by the Court and the Administration, the resulting distortion, distraction, and diminishment of the resulting consequences will become further entrenched and more difficult to confront.

C. THE COMPOUNDED CONSEQUENCES OF SANEWASHING AND MANSPLAINING

As documented in earlier sections, sanewashing has been employed by the Roberts Court in multiple legal contexts, primarily to reconfigure constitutional protections in ways that benefit dominant groups and advance an impoverished view of democratic governance that is antithetical to a multicultural society.³²¹ Much as sanewashing has been utilized in combination with whitewashing to dismantle critical civil rights gains, so too has the Court’s nullification of decades of precedent protecting the

³²⁰ *Id.*

³²¹ Justin Jouvenal, *Supreme Court Seems Poised to Lower Bar for Whites to Sue for Job Bias*, WASH. POST (Feb. 26, 2025), <https://www.washingtonpost.com/politics/2025/02/26/supreme-court-workplace-discrimination-marlean-ames/>.

rights of women, non-binary, transgender, and queer people been achieved through a dual stratagem of sanewashing and mansplaining.

Unsurprisingly, many of the sanewashing techniques evident in the Court's rewriting of constitutional protections under the First, Second, Fourteenth, and Fifteenth Amendments are also present in recent regressive decisions that impact bodily autonomy and privacy. The malleability of the "history and tradition" test in particular has enabled the Roberts Court to recast constitutional rights for women and the trans community by imposing rigid temporal restraints on the Court's "history and tradition" inquiry to limit its inquiry to "whether the putative right in question fits within a pattern of practice relative to the Bill of Rights or Civil War Amendments."³²²

A vivid example of this joint sanewashing/mansplaining synergy is the *Dobbs* decision overturning *Roe v. Wade* and, in the process, vanquishing a half-century of constitutional protection for abortion access. The Court's conclusion that the Constitution offers no right to abortion was primarily predicated on a review of 18th and 19th century state statutes and common law rules that the Court concluded generally criminalized abortion.³²³ Applying a male-centric standard,³²⁴ the Court's provocative decision rescinding, for the first time in the Court's history, a constitutionally recognized right was defended on the basis that the right to abortion was not "deeply rooted in this Nation's history and tradition."³²⁵

This sanewashed approach to the application of the nation's "history and traditions" to reassess constitutional protections for abortion either failed to account for or actively distorted the public understanding of

³²² Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition,"* 98 S. CAL. L. REV. 1, 7 (Nov. 7, 2025); see also Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban,* 75 STAN. L. REV. 1091, 1100–01 (2023).

³²³ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 242 (2022). "Quickening" was defined as occurring when an "infant is able to stir in the mother's womb." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125. The Court posited that quickening occurs within sixteen and eighteen weeks of pregnancy. However, this judicial assumption overlooks the individualized nature of pregnancies, failing to recognize that this process may occur later for some pregnant persons. *Dobbs*, 597 U.S. at 242.

³²⁴ Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 431–32 (2014) ("[T]he Framers of both the original Constitution and the post-Civil War Amendments were quite conscious of their interests in preserving their male prerogatives in law.").

³²⁵ *Dobbs*, 597 U.S. at 242 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); see also MADIBA K. DENNIE, THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE, THE PEOPLE, CAN TAKE IT BACK 137 (2024).

pregnancy and abortion when the Fourteenth Amendment was ratified in 1868.³²⁶ In its opinion in *Dobbs*, the Court neglected or was unaware of the ambiguities and lived experiences surrounding pregnancy. There was, of course, no medical process in the mid-19th century to confirm a pregnancy, rendering the state statutes relied upon by the Court in denying a “history and tradition” of a right to abortion entirely unreliable.³²⁷

Irrespective of these laws, which were exclusively drafted by male legislators at a time when women were regarded as property with no political rights, historical accounts make clear that there was in fact a lengthy tradition of women-led abortion and reproductive care. Before medical care was commodified and professionalized, it was female-dominated and multiracial.³²⁸ Skilled midwives provided trusted, high-quality, essential reproductive health care, applying knowledge passed down across generations.³²⁹ Black and Indigenous women in particular were central to women’s healthcare infrastructure.³³⁰ Information about reproductive health, including abortion-inducing practices, was disseminated widely through social networks, midwives, and even through medical literature and newspapers.³³¹

Overlooking yet another critical piece of the nation’s “history and tradition,” the Court in *Dobbs* failed to acknowledge that abortion was a necessary and common practice amongst enslaved women, functioning as

³²⁶ Tang, *supra* note 322, at 1098–99 (noting that the Court in *Dobbs* “demonstrably erred” in its representation of the number of states with abortion restrictions at the time of the ratification of the Fourteenth Amendment); *see also* Serena Mayeri, *The Critical Role of History after Dobbs*, 2 J. AM. CONST. HIST. 171, 182 (2024) (discussing the discrepancies between how the law and social practices in early America treated abortion).

³²⁷ Evan D. Bernick & Jill Wieber Lens, *Original Public Meaning and Pregnancy's Ambiguities*, 122 MICH. L. REV. 1443, 1469–60 (2024); *see also* SHANNON WITHYCOMBE, LOST: MISCARRIAGE IN NINETEENTH-CENTURY AMERICA 29 (2019) (“[w]omen benefitted from this ambiguity between early pregnancy and delayed menstruation, not only because they may not have been able to tell the difference, but also because they may not have desired the pregnancy”).

³²⁸ BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD: TWO CENTURIES OF THE EXPERTS’ ADVICE TO WOMEN* (1978).

³²⁹ Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, ACLU (Jul. 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans> [<https://perma.cc/AK6S-NJMW>].

³³⁰ *Id.*

³³¹ Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN (Jun. 27, 2016), <https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html> [<https://perma.cc/E4QU-FKAZ>]; Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, 6 GUTTMACHER POL’Y REV. (Mar. 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> [<https://perma.cc/C6CS-8HRS>].

an important form of resistance against a racial apartheid system that brutally co-opted Black women's bodies for the profit of their white enslavers. Black women were subjected to sexual coercion, assault, and violence as part of a chattel slavery system that sustained the wealth of the nation and slaveholding families through forced reproductive labor.³³² As described by Thomas Jefferson, a "Founding Father" whose version of "history and tradition" is often centered by the Court, the violent exploitation of enslaved women's reproductive labor was necessary to the maintenance of the slave system:

I know no error more consuming to an estate than that of stocking farms with men almost exclusively. I consider a woman who brings a child every two years as more profitable than the best man of the farm. [W]hat she produces is an addition to the capital, while his labors disappear in mere consumption.³³³

But an accurate telling of reproductive and abortion care, as experienced by the persons who lived it, is entirely absent from the "history and tradition" used to justify the dismantling of these constitutional rights.³³⁴ More than 140 amicus briefs, many by prominent experts and well-respected organizations, were submitted to the Court and presented a radically different reality than the "historical account" given in *Dobbs*.³³⁵

³³² Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191 (2022).

³³³ *Id.* at 204

³³⁴ One of the few attempts by the Court in *Dobbs* to acknowledge the racialized aspects of reproductive care is in a footnote citing to Justice Thomas's concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, in which he advances a popular "abortion is eugenics" argument that emerged as a part of a broader campaign by antiabortion activists that sought to "discredit Black women's claims for reproductive autonomy by focusing Black nationalist grievances on abortion." Reva B. Siegel & Mary Ziegler, *Abortion-Eugenics Discourse in Dobbs: A Social Movement History*, 2 J. AM. CON. HIST. 75, 76 (2024); see also Melissa Murray, *Racing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021) (opining that an objective of Thomas's concurrence in *Box* associating abortion with racial eugenics was to "lay a foundation for discrediting — and overruling — *Roe v. Wade* on the alleged ground that the abortion right is rooted in, and tainted by, an effort to selectively target Black reproduction"); Serena Mayeri, *The Critical Role of History after Dobbs*, 2 J. AM. CONST. HIST. 171, 178 (2024).

³³⁵ MaryBeth Musumeci Laurie Sobel & Alina Salganicoff, *How a Supreme Court Decision Is Changing the Way Federal Laws Are Interpreted*, THE COMMONWEALTH FUND (Oct. 31, 2024), <https://www.commonwealthfund.org/blog/2024/how-supreme-court-decision-changing-way-federal-laws-are-interpreted> [https://perma.cc/H98A-CHHU]; see also Adam Liptak, *In Abortion*

According to legal historians, there was no evidence to conclude that abortion was criminalized throughout pregnancy in early America.³³⁶ Rather than heed the guidance of actual historians or seek sources representative of women's pregnancy and birthing experiences, the Court instead chose to rely on the "subject matter expertise" of Sir Matthew Hale, a 17th-century witch hunter and spousal rape advocate.³³⁷ As a result, the heavily sanewashed rights-stripping *Dobbs* opinion is more aptly characterized as a work of "historical fan fiction" than a credible judicial decision.³³⁸ The *Dobbs* decision painfully demonstrates how a biased and impoverished perspective of the nation's "history and tradition" can have

Cases, Legions of 'Friends' Seek to Persuade Supreme Court, N.Y. TIMES (Apr. 24, 2004), <https://www.nytimes.com/2004/06/24/us/supreme-court-abortion-briefs.html> [<https://perma.cc/5KTE-JSZH>]; The Court's disdain for subject-matter-experts—another commonly exercised sanewashing mechanism—is also observable in Court's recent anti-trans decision in *United States v. Skrametti*. See *United States v. Skrametti*, 605 U.S. 495, 530 (2025) (Thomas, J., concurring) (referring to medical professionals who support gender-affirming care for trans youths as "so-called experts" and "alleged experts" and stating that "there are particularly good reasons to question the expert class here, as recent revelations suggest that leading voices in this area have relied on questionable evidence, and have allowed ideology to influence their medical guidance.").

³³⁶ See Brief of American Historical Association and Organization of American Historians as Amici Curiae Supporting of Respondents at 2, 5–10, 30, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); see also *History, the Supreme Court, and Dobbs v. Jackson: Joint Statement from the AHA and the OAH*, AM. HIST. ASS'N (Jul. 6, 2022), <https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah/> [<https://perma.cc/XRD8-7JB2>] (expressing "dismay that the US Supreme Court 'declined to take seriously the historical claims of our [*amicus curiae*] brief' in its *Dobbs v. Jackson Women's Health Organization* decision" and instead "adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than thirty years. ... These misrepresentations are now enshrined in a text that becomes authoritative for legal reference and citation in the future. The court's decision erodes fundamental rights and has the potential to exacerbate historic injustices and deepen inequalities in our country.").

³³⁷ Gilbert Geis, "Lord Hale, Witches, and Rape," 5 BRIT. J. L. & SOC'Y 26, 30–35 (1978); see also Jill Elaine Hasday, *One Roe, Alito Cites a Judge Who Treated Women as Witches and Property*, WASH. POST (May 9, 2002), <https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist/> [<https://perma.cc/SM96-RZV9>].

³³⁸ MADIBE K. DENNIE, THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK 8 (2024); see, e.g., Serena Mayeri, *The Critical Role of History After Dobbs*, 2 J. AM. CON. HIST. 171, 183 (2024) (describing the Court's "deeply flawed" historical account in *Dobbs*); see also Tang, *supra* note 322, at 1099 (finding that the Court inflated the number of states with pre-quickening abortion bans in 1868); Aaron Tang, *The Supreme Court Flunks Abortion History*, L.A. TIMES (May 5, 2022), <https://www.latimes.com/opinion/story/2022-05-05/abortion-draft-opinion-14th-amendment-american-history-quickening> [<https://perma.cc/Q28N-TSBN>].

calamitous effects on the legal rights and lives of those whose history and tradition are excluded from judicial narratives.³³⁹

Beyond relying on the “history and tradition” standard to sanewash judicial decisions curtailing women’s rights, the Court has also been receptive to misogynistic laws disingenuously represented as being necessary for the protection of women.³⁴⁰ Men in positions of power, whether in robes or in state houses, have found the “health and safety” argument to be a reliable justification to legislate away women’s economic, political, legal, and bodily rights.³⁴¹ This common technique, which reemerged with a vengeance in response to *Roe v. Wade*, is reflective of a lengthy legal history and tradition of presupposing that men are best suited to make decisions about the welfare and bodies of women.

Shirley Chisholm, as the first Black woman elected to Congress, intimately understood the multiple systems synergy that threatens the legal and social status of women. A vocal proponent of gender and racial equality who introduced the Equal Rights Amendment (ERA) in 1969, Chisholm opposed proposed modifications to the ERA that would permit exceptions to prohibited gender discrimination on “health and safety” grounds.³⁴² Recognizing the proposed additions to the ERA as a Trojan horse that would

³³⁹ See Michele Goodwin, *How Dobbs Unleashed a Breathtaking Disregard for Human Rights*, THE NATION (Jun. 6, 2025), <https://www.thenation.com/article/society/dobbs-georgia-human-rights/> [<https://perma.cc/SWG7-QYZQ>]; see also ‘Baby in a Dumpster.’ *A Spate of Abandoned Newborns Unsettles Texas*, WASH. POST (Dec. 28, 2024), <https://www.washingtonpost.com/nation/2024/12/28/abandoned-baby-texas-abortion-ban/> [<https://perma.cc/X4LZ-C8YJ>]; see also NPR, *Lost Mothers: Maternal Mortality In The U.S.*, NPR, <https://www.npr.org/series/543928389/lost-mothers> [<https://perma.cc/4XW3-BRSM>]. Notably, the Court’s distorted approach to “history and tradition” in adjudicating constitutional questions has been extended to statutory interpretation. See, e.g., *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357 (2025) (Jackson, J., dissenting) (highlighting the majority’s narrow and ahistorical characterization of the Civil Rights Act of 1871—now codified at 42 U.S.C. § 1983—to conclude that Medicaid recipients do not have an enforceable right to select their own medical providers).

³⁴⁰ Michele Godwin, *Medina v. Planned Parenthood: The Supreme Court’s Making of the New Jane Crow*, 139 HARV. L. REV. 127 (2025).

³⁴¹ See generally *Bradwell v. Illinois*, 83 U.S. 130 (1872) (finding that a state may bar married women from entry into the legal profession); *Minor v. Happersett*, 88 U.S. 162 (1874) (holding a state law constitutionally permitted that prohibit women from voting in classifying women as constituting a “special category of nonvoting citizens”); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a 10-hour workday law for women on the basis that, as the weaker sex, they require special protection).

³⁴² *House Debates Amendment to End Sex Discrimination*, N.Y. TIMES (Oct. 7, 1971), <https://www.nytimes.com/1971/10/07/archives/house-debates-amendment-to-end-sex-discrimination.html> [<https://perma.cc/DR9R-A9V2>].

enable discriminatory laws that undermine the purpose of the ERA, Chisholm forcefully objected to the measure. Chisholm's concerns proved prophetic. In the lead-up to *Dobbs*, states hostile to abortion rights methodically chiseled away at *Roe v. Wade* by enacting legislation that purported to protect the health and safety of women but was in fact designed to curtail access to safe and legal abortion care.

In *June Medical Services LLC v. Russo*,³⁴³ a precursor to the dismantling of *Roe*, Chief Justice Roberts begrudgingly joined a narrow majority in allowing for the fleeting survival of the three remaining abortion clinics in Louisiana. The case centered on a state law that required medical providers who performed abortions to have admitting privileges at a hospital located within 30 miles of where the abortion was performed.³⁴⁴ Following a six-day bench trial, the district court concluded that, contrary to the assertions of the state, abortions are safe and rarely require that an abortion provider have admitting privileges at a hospital. The court further found that there was “no significant health-related problem that the new law helped to cure.”³⁴⁵ Accordingly, the district court held—and a plurality of the Supreme Court agreed—that enforcing the admitting-privileges requirement would significantly reduce the number and geographic distribution of abortion providers in the state, making it impossible for women to obtain a safe, legal abortion.³⁴⁶

Only four years earlier in *Whole Women's Health v. Hellerstedt*, the Court had invalidated a nearly identical law that imposed similarly stringent hospital admitting privileges and surgical center requirements in the provision of abortion care.³⁴⁷ Although Roberts dissented in *Hellerstedt*, chastising the majority for not paying “special care to apply settled procedural rules in a neutral manner” and advocating for an application of the governing *Casey* test that allowed for the type of “health and safety” law challenged in that case, he felt duty-bound to follow the Court's precedent when an indistinguishable restrictive abortion law made its way before the

³⁴³ *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299 (2020).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 339.

³⁴⁷ *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016).

Court only a few years later in the 2020 case of *June Medical Services LLC*.³⁴⁸

In *June Medical Services LLC*—unlike the *stare decisis*-required position he would ultimately reject in *Dobbs*—the Chief Justice joined the plurality in applying the *Hellerstedt* precedent to invalidate a state abortion restriction because “the two laws [the law in *Hellerstedt*] are nearly identical” and “[s]tare decisis instructs us to treat like cases alike.”³⁴⁹ Though reluctantly voting to strike down the abortion restriction in *June Medical Services LLC* because it was a virtual doppelganger of the law that the Court had recently invalidated, Roberts leveraged *June Medical Services LLC* as an opportunity to author a concurrence that would serve as a blueprint for how the Court could ultimately sanction “health and safety” justifications to rubber-stamp abortion restrictions. In doing so, Roberts was successful at leading his conservative colleagues down a path that would eliminate abortion access in certain states, without the need to explicitly overrule *Roe*.³⁵⁰

A brief reading of the Roberts Court’s reproductive rights cases illuminates how “history and tradition” is often itself sanewashed and mansplained to diminish and reappropriate the contributions and rights of women.³⁵¹ The sanewashed, mansplained decisions of the Roberts Court

³⁴⁸ Russo, 591 U.S. at 344 (Roberts, C.J., concurring) (“I joined the dissent in *Whole Woman’s Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman’s Health* was right or wrong, but whether to adhere to it in deciding the present case.”).

³⁴⁹ *Id.* at 345 (2020) (Roberts, C.J., concurring).

³⁵⁰ Reporting suggests that Roberts had hoped to persuade his conservative colleagues to adopt a similar tactic in *Dobbs*, killing *Roe* with a thousand small cuts rather than one attention-grabbing stab to the heart. Robert Barnes, Carol D. Leonning & Ann E Marimow, *How the Future of Roe Is Testing Roberts on the Supreme Court*, WASH. POST (May 7, 2022), <https://www.washingtonpost.com/politics/2022/05/07/supreme-court-abortion-roberts-alito/> [https://perma.cc/M93A-HTE4]; see also Alex Henderson, *Roberts Lobbied Conservatives to Save Roe—But Leaked Opinion Made It “All But Impossible”*: Report, SALON (Jul. 26, 2022), https://www.salon.com/2022/07/26/roberts-lobbied-conservatives-to-save-roe-but-leaked-opinion-made-it-all-but-impossible-report_partner/ [https://perma.cc/22VD-NTZE]; Adam Liptak & Jodi Kanter, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), <https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-ro-abortion.html> [https://perma.cc/2SH5-46WX].

³⁵¹ Countless women, many Indigenous and Black, have made invaluable contributions in the fields of science, literature, aviation, journalism, and politics. Yet they remain entirely absent from many history books. A small sample of the many remarkable women whose revolutionary achievements have largely been excluded or misappropriated in historical accounts include: Lise Meitner (a physicist who discovered nuclear fission), Katherine Johnson (NASA mathematician

intimate that women's rights are disposable and subject to the whims and fabricated historical accounts of men who think they know best.

In addition to sanewashing and mansplaining the nation's "history and tradition" in the abortion context to advance the erasure of women from society, the Court also justified its decision to rescind a constitutional right on the basis that it serves broader democratic principles and was necessary to resolve the abortion debate.³⁵² According to the Court, returning "authority to the people" would ameliorate the division and discord sown by *Roe* and finally solve the issue of abortion.

The legal reasoning and predicted outcome in *Dobbs* were thoroughly sanewashed and mansplained, the evidence of which became immediately apparent. Within hours of the issuance of the *Dobbs* opinion, the legal and medical landscape was plunged into chaos. Zombie laws resurrecting pre-*Roe* abortion bans were suddenly revived, resulting in millions of people in nine different states losing access to critical health care overnight.³⁵³ Rural hospitals closed their doors throughout states with abortion bans, not only creating maternal health care deserts but also decimating the entire health care infrastructure of many communities.³⁵⁴ Doctors, unclear what kind of

whose work proved essential in numerous historic space missions), Bessie Coleman (the first African American and the first Native American woman aviator who, due to racial discrimination in the United States, traveled to France to earn her pilot's license), Nellie Bly (pioneering investigative journalist whose late nineteenth-century reporting led to improved conditions in mental institutions), Ida B. Wells (journalist, social activist, and co-founder of the NAACP); Gwendolyn Brooks (teacher and poet who wrote about racial injustice and the first African American woman to be awarded the Pulitzer Prize), Rosalind Franklin (a chemist who took the photograph that was used to map the double helix structure), Alice Ball (the first woman and the first Black chemistry professor at the University of Hawaii who discovered a treatment for leprosy), Bessie Blount (a Black inventor who patented numerous devices, many of which were designed to aid disabled veterans), and Eunice Foote (a women's rights activist and scientist who first identified the greenhouse effect). See Tonya Mosely, *A Woman Invented the Rape Kit. So Why Was a Man Given Credit for It?*, NPR (Jan. 16, 2025), <https://www.npr.org/2025/01/16/nx-s1-5256205/rape-kit-history-marty-goddard-pagan-kennedy> [https://perma.cc/8JDM-M4HC]; see also Kate Mosse, *Why Are Women's Achievements So Easily Overlooked or Misattributed?*, HARPER'S BAZAAR INDIA (Mar. 1, 2023), <https://www.harpersbazaar.in/culture/story/why-are-womens-achievements-so-easily-overlooked-or-misattributed-565292-2023-03-01> [https://perma.cc/Q7JD-P2RY].

³⁵² *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 403-04 (2022).

³⁵³ William J. Aceves, *The Problem with Dobbs and the Rule of Legality*, 111 GEO. L.J. ONLINE 76, 81,90 (2022).

³⁵⁴ Sarah Kliff, *Most Rural Hospitals Have Closed Their Maternity Wards, Study Finds* (Dec. 4, 2024) N.Y. TIMES, <https://www.nytimes.com/2024/12/04/health/maternity-wards-closing.html> [https://perma.cc/W58S-GTG5]; see also Abby Wendle & Liana Simstrom, *Three Years After Roe*

medical care was prohibited under state abortion restrictions, told women bleeding out from pregnancy complications to go home; there was nothing that could be done for them.³⁵⁵ A brain-dead woman was required, against the wishes of her family, to remain on life support for the sole purpose of incubating her fetus.³⁵⁶ Because of the Court's sanewashed and mansplained *Dobbs* decision, pregnancy has become unnecessarily dangerous, particularly for individuals already disadvantaged by structural, racial, and economic inequities.³⁵⁷ Women have needlessly died.³⁵⁸ Maternal and infant mortality rates have soared in states with abortion care

Fell, More Women Are Managing Their Abortions Without Doctors, NPR (Jun. 22, 2025), <https://www.npr.org/2025/06/22/g-s1-73119/abortion-mifepristone-roe-v-wade> [<https://perma.cc/Q2ZM-JKD6>].

The proliferation of health care desserts has been exacerbated by efforts at the national level to defund Planned Parenthood, where approximately one in three women and 40% of Medicaid recipients receive health care services. See Shefali Luthra, *Most Planned Parenthood patients are insured through Medicaid. The Supreme Court just undercut that.*, THE 19TH (Jun. 26, 2025), <https://19thnews.org/2025/06/supreme-court-south-carolina-planned-parenthood-medicaid/> [<https://perma.cc/8YRZ-ULJH>]; see also Usha Ranji, Brittnei Frederiksen & Alina Salganicoff, *Major Federal and State Funding Cuts Facing Planned Parenthood*, KFF (May 15, 2020), <https://www.kff.org/womens-health-policy/major-federal-and-state-funding-cuts-facing-planned-parenthood/> [<https://perma.cc/GWG8-M73L>].

³⁵⁵ Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable*, PROPUBLICA (Sept. 16, 2024), <https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death> [<https://perma.cc/99U7-YXTW>]; see, e.g., Lizzie Presser et al., *Texas Banned Abortion. Then Sepsis Rates Soared*, PROPUBLICA, (Feb. 20, 2025), <https://www.propublica.org/article/texas-abortion-ban-sepsis-maternal-mortality-analysis> [<https://perma.cc/LE9C-UJCU>].

³⁵⁶ Praveena Somasundaram, *Brain-Dead Woman Taken Off Life Support After Delivering Baby, Family Says*, WASH. POST (Jun. 18, 2025), <https://www.washingtonpost.com/nation/2025/06/18/georgia-pregnant-life-support-birth/> [<https://perma.cc/9C76-2MSE>].

³⁵⁷ Jessica Grose, *Pregnancy Is Going to Be Even More Dangerous in America*, N.Y. TIMES (Jul. 9, 2025), <https://www.nytimes.com/2025/07/09/opinion/medicaid-pregnancy-danger.html> [<https://perma.cc/U9LE-7A3D>]; Ashley Kurzweil and Katherine Gallagher Robbins, *Three Years Post-Dobbs, Abortions & Criminalization Threaten More Than 15 Million Women of Color*, NAT'L P'SHIP (June 2025), <https://nationalpartnership.org/report/abortion-bans-and-criminalization-three-years-post-dobbs/> [<https://perma.cc/5QZB-HDAU>].

³⁵⁸ Helen Lewis, *The Women Killed by the Dobbs Decision*, THE ATLANTIC (Sept. 18, 2024), <https://www.theatlantic.com/ideas/archive/2024/09/women-killed-dobbs-decision-abortion/679921/> [<https://perma.cc/5R4V-CWNN>]; Lizzie Presser and Kavitha Surana, *A Third Woman Died Under Texas' Abortion Ban. Doctors Are Avoiding D&Cs and Reaching for Riskier Miscarriage Treatments*, PROPUBLICA (Nov. 25, 2024), <https://www.propublica.org/article/porsha-ngumezi-miscarriage-death-texas-abortion-ban> [<https://perma.cc/8M6B-K2CJ>]; Amy Yurkanin, *Georgia Dismissed All Members of Maternal Mortality Committee After ProPublica Obtained Internal Details of Two Deaths*, PROPUBLICA (Nov. 21, 2024), <https://www.propublica.org/article/georgia-dismisses-maternal-mortality-committee-amber-thurman-candi-miller> [<https://perma.cc/JL3J-2J29>]; Surana, *supra* note 355.

restrictions,³⁵⁹ while abortions have in fact increased.³⁶⁰ Women are being criminally charged for natural miscarriages.³⁶¹ Incensed voters have petitioned for ballot measures to codify abortion protections; the overwhelming majority of which have passed only to be subverted by state attorneys general, legislators, and supreme courts who refuse to accept the election results.³⁶² By virtually every metric, the issue of abortion is far from resolved.

More recently, in *Medina v. Planned Parenthood*, the Court further limited access to abortion and obstetrics care by again relying on sanewashing and mansplaining to conclude that Medicaid enrollees have no

³⁵⁹ Mississippi State Department of Public Health, *MSDH Declares Public Health Emergency on Infant Mortality* (Aug. 21, 2025), <https://msdh.ms.gov/page/23,30305,341.html>; Gender Equity Policy Institute, *Maternal Mortality in the United States After Abortion Bans*, GEPI (Apr. 2025), <https://thegepi.org/maternal-mortality-abortion-bans/> [<https://perma.cc/Q29A-45JB>]; Alison Gemmill et al., *US Abortion Bans and Infant Mortality*, JAMA (Feb. 13, 2025), <https://jamanetwork.com/journals/jama/fullarticle/2830298> [<https://perma.cc/6WBH-FLGW>].

³⁶⁰ Candace Gibson & Isaac Maddow-Zimmet, *Despite Bans, Number of Abortions in the United States Increased in 2023*, GUTTMACHER (May 10, 2024), <https://www.guttmacher.org/2024/03/despite-bans-number-abortions-united-states-increased-2023> [<https://perma.cc/SKR3-B9QZ>].

³⁶¹ Caroline Kitchener, *She Said She Had a Miscarriage — Then Got Arrested Under an Abortion Law*, WASH. POST (Oct. 19, 2024), <https://www.washingtonpost.com/investigations/interactive/2024/abortion-law-nevada-arrest-miscarriage/> [<https://perma.cc/NSG9-WQUA>]; Ali Velshi, *When Your Miscarriage Becomes the Subject of a Criminal Investigation*, MSNBC (Mar. 29, 2025), <https://www.msnbc.com/ali-velshi/watch/when-your-miscarriage-becomes-the-subject-of-a-criminal-investigation-235768389900> [<https://perma.cc/97KQ-55Z2>].

³⁶² See Alice Miranda Ollstein, *States Break Out New Tactics to Thwart Abortion Ballot Measures*, POLITICO (Jul. 31, 2024), <https://www.politico.com/news/2024/07/31/state-abortion-ballot-measure-tactics-00171804> [<https://perma.cc/4TZA-D36T>]; Susan Rinkunas, *Republicans Prove There Was a Big Catch About ‘Leaving Abortion to the States,’* DEMOCRACY DOCKET (Feb. 25, 2025), <https://www.democracymarket.com/opinion/republicans-prove-there-was-a-big-catch-about-leaving-abortion-to-the-states/> [<https://perma.cc/LL5R-XGN6>]; Mary Ziegler, *Votes Ended This State’s Abortion Ban. Then Conservative Judges Got Involved*, SLATE (Jun. 2, 2025), <https://slate.com/news-and-politics/2025/06/missouri-abortion-ban-explained-amendment-3.html> [<https://perma.cc/545Y-H784>]; see also Laura Portuondo, *Are Voters Allowed to Protect Abortion?*, 104 BOS. U.L. REV. ONLINE 237 (2024) (exploring the likelihood that courts will override voter-approved state abortion protections and, in doing so, contradict *Dobbs*’s claim to be returning the issue of abortion to “the people” by substituting judicial policy preferences for the will of the people); Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. 1068 (considering how the Comstock Act could be revived to undermine state efforts to codify *Roe* and protection abortion access); Jason Hancock, *Missouri Supreme Court Order Reinstates ‘De Facto Abortion Ban’ Across the State*, THE 19TH (May 28, 2025), <https://19thnews.org/2025/05/missouri-supreme-court-abortion-ban/> [<https://perma.cc/H4QD-GB4B>].

right to challenge a state's decision to classify abortion clinics as "unqualified" to provide healthcare services and by directing that Planned Parenthood be removed from the State's Medicaid program, thereby preventing medical clinics in the state operated by Planned Parenthood from serving any patients who rely on Medicaid.³⁶³ The Court rationalized its holding in *Medina* by invoking separation of powers principles, duplicitously claiming to support legislative supremacy while in fact assuming a legislative role in rewriting the Medicaid Act using a clever textualist maneuver and adopting an ahistorical reading of the statutory provision.³⁶⁴ Central to the Court's sanewashing and mansplaining was its specious conclusion that the law's freedom-of-choice provision does not, in fact, confer a "clear" and "unambiguous" enforceable right for poor women to exercise the freedom of medical choice to select their own healthcare providers.³⁶⁵

The same mansplaining and sanewashing strategies that have been used to undermine constitutional protections for the bodily autonomy of women and pregnant persons have been similarly employed against the trans community. By reframing constitutional questions as policy matters, the Court's conservative supermajority has empowered state legislators who are hostile to trans and women's rights to legislate away fundamental rights.

A week before the Court issued its decision in *Medina*, the Court sanctioned an anti-trans state healthcare ban in *United States v. Skrmetti*.³⁶⁶ There, the Court adopted the most generous standard of review afforded to the government—the rational basis test—to uphold a Tennessee state law that prohibited gender affirming care for trans youth.³⁶⁷ Though clearly

³⁶³ *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357 (2025).

³⁶⁴ *Id.*

³⁶⁵ See Elie Mystal, *The Supreme Court Has Dealt Another Devastating Blow to Women*, THE NATION (Jun. 26, 2025), <https://www.thenation.com/article/society/medina-v-planned-parenthood-ruling-supreme-court-elie-mystal/> [<https://perma.cc/SC3W-L8YR>] (describing the Court's decision in *Medina v. Planned Parenthood* as "twist[ing] logic, common sense, and the law to further the right-wing assault on bodily autonomy"); see also *Medina*, 606 U.S. at 410 (Jackson, J., dissenting) (criticizing the "majority's effort to resist the natural and obvious rights-creating reading of the Medicaid Act's free-choice-of provider provision"); *Planned Parenthood S. Arl. v. Kerr*, 27 F.4th 945, 959 (4th Cir. 2022) (holding that the free-choice-of-provider provision confers an enforceable, individual right on Medicaid recipients to select their own healthcare providers under 42 U.S.C. § 1983); *Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 154 (4th Cir. 2024) (reaffirming that Medicaid recipients have an enforceable right to choose their own health care providers).

³⁶⁶ *U.S. v. Skrmetti*, 605 U.S. 495 (2025).

³⁶⁷ Chemerinsky, *supra* note 45.

motivated by anti-trans animus, under the highly deferential rational basis standard that the Court chose to apply, the Court readily accepted the validity of the state's assertion that the restriction on critical medical care to trans youth was intended to protect children and youth.³⁶⁸ In both the *Skrmetti* and *Medina* opinions, the Court's conservative supermajority relied on the same sanewashed and mansplained logic and rhetoric on which it based the *Dobbs* decision to permit government restrictions on the bodily autonomy of women and transpeople under the pretense it was for their own safety and protection.³⁶⁹

In the sanewashed and mansplaining opinions represented by *Dobbs*, *Skrmetti*, and *Medina*, the Court carefully constructed a narrative of the law and facts deliberately divorced from the rights of the legally marginalized plaintiffs and dismissive of the documented and well-established life-and-death consequences that would predictably emanate from the Court's sanctioning of state medical restrictions. In each of these decisions, evidence of impermissible animus and discriminatory motivations by the government was sidestepped or altogether ignored, while the very real harm posed to the plaintiffs by the government's conduct was minimized or outright dismissed.³⁷⁰

Additionally, in the Court's decisions in *Dobbs*, *Skrmetti*, and *Medina*, the conservative majority perverted landmark civil rights precedent to justify eviscerating civil rights protections. In *Skrmetti*, the Court invoked *Loving v. Virginia*³⁷¹ in support of the proposition that "of course, a State

³⁶⁸ *Skrmetti*, 605 U.S. 495. The Trump Administration supported the Tennessee's health ban and, contemporaneously with the *Skrmetti* decision, ended funding for a national LGBTQ youth suicide prevention service. See also Mark J. Stern, *John Roberts' Anti-Trans Opinion Is a Garbled Mess. It's Easy to See Why*, SLATE (Jun. 18, 2025), <https://slate.com/news-and-politics/2025/06/skrmetti-john-roberts-anti-trans-supreme-court.html> [<https://perma.cc/YF8M-Y3YK>].

³⁶⁹ Compare *Medina*, 606 U.S. at 369 (stating "[t]he job of resolving how best to weigh those competing costs and benefits belongs to the people's elected representatives, not unelected judges charged with applying the law as they find it") to *Skrmetti*, 605 U.S. at 525 (stating "we leave questions regarding its policy to the people, their elected representatives, and the democratic process") and *Dobbs*, 596 U.S. at 232 (stating that "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

³⁷⁰ See, e.g., *Skrmetti*, 605 U.S. at 516–17 (declaring the allegations of sex stereotyping as "misplaced" by concluding that "the statutory findings to which the plaintiffs point do not themselves evince sex-based stereotyping" because "the plaintiffs fail to note that Tennessee also proclaimed a 'legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm.'").

³⁷¹ *Loving v. Virginia*, 388 U. S. 1 (1967) (invalidating a state anti-miscegenation law as unconstitutional race-based discrimination).

may not circumvent the Equal Protection Clause,” only to allow Tennessee to do precisely that by concluding that the challenged law did not implicate a prohibited sex-based discrimination.³⁷² Likewise, in *Medina*, the Court transformed landmark civil rights legislation into a vehicle to enable states to deny poor Americans lifesaving medical care.

The Court’s dual mansplaining and sanewashing manifests as profound hubris, in which it frequently substitutes its own scientific, medical, and historical judgment for that of actual experts. Sprinkled throughout the Court’s opinions is a perceptible disdain for historians, medical experts, and scientists who contradict the conservative majority’s desired results and personal views. Justice Thomas, in particular, has frequently used his concurrences to attack “self-proclaimed” and “alleged” experts, who he maintains do not “shed light on the meaning of the Constitution.”³⁷³ Instead, as demonstrated in the *Dobbs* and *Skrmetti* decisions, the Roberts Court prefers to rely on its own self-avowed expertise rather than that of qualified, unbiased authorities in their fields.³⁷⁴

Commingled sanewashing and mansplaining stratagems for the purpose of removing personal agency and autonomy from women and the trans community have also been extended to advance efforts to roll back LGBTQ+ rights in other areas. Only a decade after the Court recognized in *Obergefell v. Hodges* that same-sex couples cannot be denied the same constitutional rights to marry as their heterosexual counterparts, there are legitimate concerns that the Court will follow the path of *Roe* and eliminate

³⁷² *Skrmetti*, 605 U.S. at 514; see also *id.* at 579 (Sotomayor, J., dissenting) (analogizing a law that prohibits interracial marriage to a law that prohibits medical care that is “inconsistent” with “a patient’s sex”).

³⁷³ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 272-73 (2022); see also *Skrmetti* 605 U.S. at 530–31.

³⁷⁴ In providing a misleading characterization of the medical community’s broad support for gender-affirming care for transgender youth and creating the appearance of scientific disharmony around the issue, the Court refused to acknowledge that every major American medical association endorses health care for transgender people and youth. See, e.g., James L. Madara, *AMA to States: Stop Interfering in Health Care of Transgender Children*, AMA (Apr. 26, 2021), <https://www.ama-assn.org/press-center/ama-press-releases/ama-states-stop-interfering-health-care-transgender-children> [<https://perma.cc/2QA3-XFBA>]; AACAP *Statement Opposing Actions in Texas Threatening the Health, Mental Health and Well-Being of Transgender and Gender Diverse Youth and Their Families*, Am. Acad. of Child & Adolescent Psychiatry (Mar. 1, 2022), https://www.aacap.org/AACAP/zLatest_News/AACAP_Statement_Opposing_Actions_in_Texas.aspx [<https://perma.cc/HAE7-XS3B>].

that right as well.³⁷⁵ Emboldened by the Court’s effortless reversal of privacy protections for women in *Dobbs* and by the open solicitation by some members of the Court to roll back LGBTQ+ constitutional rights,³⁷⁶ at least four states have sought to relitigate same-sex marriage protections with the aim of reversing *Obergefell*.³⁷⁷

In the decade since the Supreme Court heeded the principle that “as for dignity in the eyes of the law” and affirmed that “the Constitution grants them that right,”³⁷⁸ more than 800,000 same-sex couples—double that prior to the *Obergefell* decision—have exercised the right to marry the person of their choice without government infringement.³⁷⁹ However, as noted by Justice Sotomayor in a dissent in one of several significant rights-regressive decisions issued by the Supreme Court during the 2024 – 225 terms, “no right is safe in the new legal regime the Court creates.”³⁸⁰

III. CONCLUSION

The Roberts Court’s accelerated use of judicial sanewashing has eroded basic constitutional protections for marginalized groups. The Court’s conservative majority has also rapidly expanded presidential powers beyond constitutional recognition to empower President Trump with near impenetrable immunity,³⁸¹ supported the denial of birthright citizenship to

³⁷⁵ *Obergefell v. Hodges*, 576 U.S. 644 (2015); see also Mansee Khurana & Leila Fadel, *He Sued for Marriage Equality and Won. 10 Years Later, He Fears for LGBTQ+ Rights*, NPR (Jun. 26, 2025), <https://www.npr.org/2025/06/26/nx-sl-5439207/gay-marriage-obergefell-hodges-10th-anniversary> [<https://perma.cc/D78N-QWR3>]; *On Its Tenth Birthday, Gay Marriage In America Is Under Attack*, THE ECONOMIST (Jun. 26, 2025), <https://www.economist.com/united-states/2025/06/26/on-its-tenth-birthday-gay-marriage-in-america-is-under-attack>.

³⁷⁶ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 330–31 (Thomas, J., concurring); Davis v. Ermold, 141 S. Ct. 3, 3–4 (2020) (statement of Thomas, J., and Alito, J., regarding denial of certiorari) (criticizing the *Obergefell* decision as “enable[ing] courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigot” and characterizing the Court’s decision as “ruinous consequences for religious liberty.”).

³⁷⁷ Kiara Alfonseca, *Some Republican Lawmakers Increase Calls Against Gay Marriage SCOTUS ruling*, ABC NEWS, (Mar. 3, 2025), <https://abcnews.go.com/Politics/republican-lawmakers-increase-calls-gay-marriage-scotus-ruling/story> [<https://perma.cc/57ES-7L4Z>]; Khaleda Rahman, *Republican Launches Bid To Overturn Gay Marriage*, NEWSWEEK (May 7, 2025), <https://www.newsweek.com/republican-bid-overturn-gay-marriage-2069064>.

³⁷⁸ *Obergefell*, 576 U.S. at 681.

³⁷⁹ Khurana & Fadel, *supra* note 375.

³⁸⁰ *Trump v. CASA, Inc.*, 606 U.S. 831, 880 (2025) (Sotomayor, J., dissenting).

³⁸¹ *Trump v. United States*, 603 U.S. 593 (2024) (concluding that President Trump has immunity for all official conduct); Ann E. Marimow et al., *Behind the Supreme Court’s Push to Expand*

children of immigrants and deportation of their parents to war zones without due process,³⁸² eliminated voting rights,³⁸³ and empowered the Trump Administration to weaponize the national government to target political enemies³⁸⁴ and politicize federal agencies.³⁸⁵

The outcome-determinative approach illustrative of the Roberts Court's anti-democratic rulings is a microcosm of how the Court has fueled the proliferation of judicial sanewashing. Pioneered and perfected by the Roberts Court over two decades, the extent and magnitude of the effects of sanewashing are now on full display, threatening to corrupt our constitutional system and shared sense of reality.³⁸⁶ The normalization of the distortion of law and fact has created a cartoonish, "Calvinball jurisprudence," the effects of which are anything but laughable.³⁸⁷ If sanity

Presidential Power, N.Y. TIMES (Dec. 12, 2025), <https://www.nytimes.com/video/us/100000010574596/behind-the-supreme-courts-push-to-expand-presidential-power.html>; see also Thomas B. Edsall, *Why Trump Won't Face Prosecution When He Leaves Office in 2029*, N.Y. TIMES (Nov. 25, 2025), <https://www.nytimes.com/2025/11/25/opinion/trump-corruption-crypto-immunity.html> [<https://perma.cc/AQZ2-GKN4>].

³⁸² Dep't of Homeland Sec. v. D.V.D., 145 S.Ct. 2153 (2025); CASA, 606 U.S. (granting the federal government's application to stay injunctions protecting birthright citizenship).

³⁸³ Louisiana v. Callais, 608 U.S. ____ (2026).

³⁸⁴ Michael S. Schmidt, *Trump's Retribution Push Has Expanded Even as It Hits Legal Barriers*, N.Y. TIMES (Nov. 25, 2025), <https://www.nytimes.com/2025/11/25/us/politics/trumps-retribution-legal-barriers.html> [<https://perma.cc/BGL8-BDM5>].

³⁸⁵ *Compare* Medina, 606 U.S. (allowing South Carolina to deny Medicaid funding to Planned Parenthood), and *Skrmetti*, 605 U.S. 495 (upholding Tennessee law which prohibited gender affirming care to minors), *with* Diamond Alt. Energy v. E.P.A., 606 U.S. 100 (2025) (allowing fuel producers to sue the E.P.A. over regulations that restrict the market), D.V.D., 145 S.Ct. at 2153 (granting the federal government emergency relief from an order halting deportations), and CASA, 606 U.S. (U.S. Jun. 27, 2025) (granting the federal government's application to stay injunctions protecting birthright citizenship).

³⁸⁶ See also Lithwick & Stern, *supra* note 16 (quoting Georgetown University Law Center Professor Steve Vladeck characterization of the 2024-2025 Supreme Court term, "I take these rulings together as this remarkable assertion of power for power's sake. The Supreme Court is saying, 'We will be the ones who decide whether what President Trump is doing is legal or not, not anybody else, including district courts.' And part of why that's so striking is because in the birthright citizenship case [*Trump v. CASA*], they didn't decide the case on the merits. They didn't decide whether what President Trump is doing is legal. Justice Brett Kavanaugh writes a concurrence where he says this is all about the need for a uniform national rule [about the issuance of nationwide injunctions]. A rule that the court didn't actually provide. It's this remarkable and bankrupt vision of judicial supremacy – where the Supreme Court is claiming all this power, and then not actually exercising it.").

³⁸⁷ Nat'l Insts. of Health v. Am. Pub. Health Ass'n, On Application for Stay, 145 S. Ct. 2658, 2675 (2025), (J. Brown, dissenting) ("This is Calvinball jurisprudence with a twist. Calvinball has only

is to be restored to the Court and, by extension, our democratic institutions and principles, it will require rejecting sanewashing in all its forms.

one rule: There are no fixed rules. We seem to have two: that one, and this Administration always wins.”).

INSIDE, OUTSIDE, AND IN BETWEEN: BLACK HOMEPLACE AS A BLUEPRINT FOR PRIVACY LAW

NINA-SIMONE EDWARDS*

Abstract

This article reimagines the meaning of home and privacy for Black Americans by interrogating the legal and technological systems that routinely collapse the sanctity of the homeplace. Using the no-knock warrant as a central case study, this article illustrates how state-sanctioned intrusions transform a space of rest, memory, and self-making into a site of violence. Although Fourth Amendment doctrine purports to guard against unreasonable searches, its prevailing binary framework—distinguishing only between “inside” and “outside” the home—renders Black domestic spaces uniquely vulnerable. Drawing from Critical Race Theory, particularly its social construction thesis, this article shows how race, law, and technology co-produce a regime in which Black privacy is treated as expendable.

By tracing the English common law maxim “[e]very man’s house is his castle,” this article examines the particular significance of the Black homeplace and critiques legal standards that fail to account for the layered zones of privacy within a home. Through storytelling and visual mapping, the article proposes a new framework for conceptualizing domestic privacy—one that recognizes the multiplicity of intimate, familial, memorial, and threshold spaces

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within the homeplace and understands how state power collapses them. This reconceptualization offers a path toward a jurisprudence that centers Black life, insisting that the homeplace is not merely a physical structure but a sanctuary deserving of meaningful legal protection.

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INTRODUCTION

Before the law ever enters the story, there is a home. Walls painted by someone's hands, a couch chosen for comfort, a hallway where morning light lands the same way every day. Every home is an architecture of expectations: that you can rest, breathe, pray, raise children, argue, spill cereal, and sleep.

Picture such a home in the early morning on a quiet street. The family inside—a mother, father, daughter, and grandmother—had been living in the home for ten years. The mother had spent countless hours crafting a home that radiated warmth—a picture-perfect haven to anyone who crossed its threshold. The grandmother, having been invited to live with her son's family when they bought the house, helped create the environment that made her granddaughter skip home with excitement, ready to eat delicious food and spend time with her family. The memories made in the home were what made it a place of refuge after a tiring day at work or school. No family is perfect, but having a place to relax, unwind, and figure out who you were becoming offered a kind of steady comfort.

At 4:12 am, the family was fast asleep, having spent the night before regaling each other with tales of the day. By 4:13 am, police officers moved swiftly toward the front door, no-knock warrant signed, preparing to violate the peace of the unsuspecting family sleeping inside. The father jolted awake at the noise of the police officers barging into the home. The daughter, startled, grabbed her phone in panic, not knowing whether to hide or record. The grandmother scrambled for her walker. The home, just moments before a place of refuge and warmth, suddenly felt different; the warmth that was carefully cultivated was stomped out by the intruders. By 4:15 am, everyone in the family was gathered in the living room with their hands up, looking around at their newly destroyed home, trying to figure out who, what, where, and, most importantly, why.

The police officers were looking for someone who did not live in this home. The moments from the intrusion to the confusion of the family members listening to the officers were stretched thin by fear. They did not know who the police officers were looking for, and it appeared as though the police officers shared their confusion.

An hour later, their home destroyed, their hearts still pounding, the family was finally left alone. The daughter would not be able to sleep in her room alone for months, and the mother jumped at any loud noise for the next year.

This outcome is considered the “best” case scenario. The trauma, the lingering feeling of being unsafe in a home that was previously a safe

haven—these things should never be forced on families, but when officers make horrific mistakes with their no-knock warrants, this is the best result. The worst result can also occur—the murder of those in the home. The occupants may be sleeping, doing absolutely nothing wrong, but an unnecessary intrusion can lead to their violent deaths.

Although there are Fourth Amendment rights that prohibit unreasonable searches and seizures, no-knock warrants make unreasonable searches and seizures “reasonable” without the knowledge of a home’s occupants. Generally, search warrants result in an officer knocking on a door and announcing their presence. No-knock warrants, true to their name, involve intrusions that eliminate the need to ask questions and often result in death.¹ The allowance of these warrants has been questioned, but this article proffers a new way to think about the home. In this new understanding, such warrants cannot stand.

For Black Americans, the home has always been a fragile sanctuary—a place both deeply protected and disproportionately violated. Mapping a home allows us to trace how state power moves through Black domestic space.

¹ *End Deadly No-Knock Police Raids*, NYCLU, <https://action.aclu.org/send-message/end-deadly-no-knock-police-raids> [<https://perma.cc/9MYJ-SB9W>]; *Banning No-knock and Quick Knock Warrants is the Only Way to Prevent More Tragic Killings*, AMERICAN CONSTITUTION SOCIETY (Mar. 11, 2022), <https://www.acslaw.org/expertforum/banning-no-knock-and-quick-knock-warrants-is-the-only-way-to-prevent-more-tragic-killings/> [<https://perma.cc/2SQ8-WQYZ>].

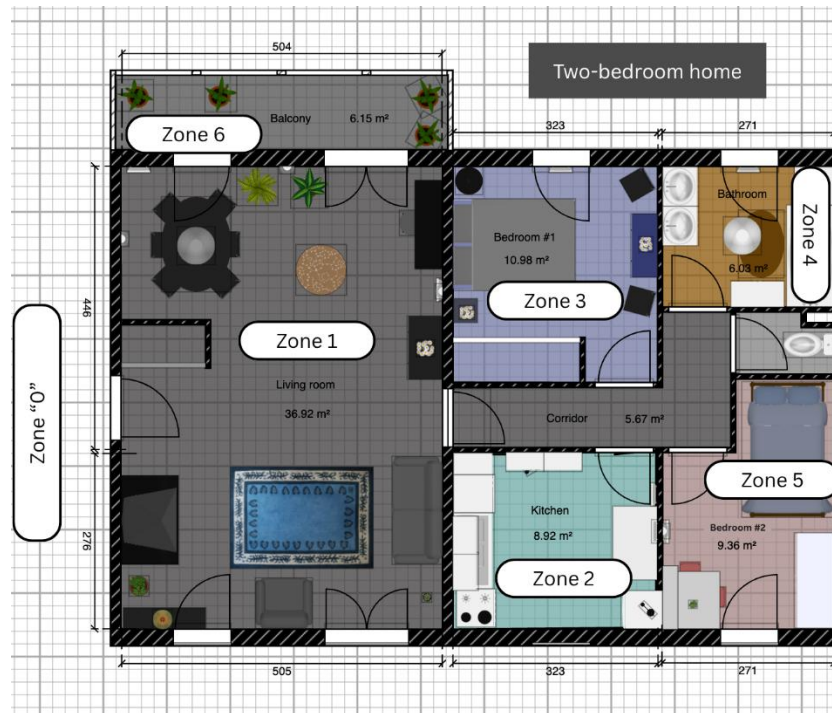


Figure 1. The family's two-bedroom home

Each area of this blueprint shows a different zone² of privacy. In bedrooms and bathrooms, there is intimate and bodily privacy. In the kitchen and dining room, there may be familial privacy. In the front room, there is memorial privacy.³ The entryway is semi-public, but there is also threshold privacy. From a large, expansive home to a home with only one room and a bathroom, each homeowner has the opportunity (and the privacy to do so) to carefully craft their space of refuge and the different zones of privacy. What they look like and how they enable privacy, is entirely up to the home's occupants. Violent intrusions, generally, and those permitted by no-knock warrants, collapse all these different zones of privacy. This collapse is reinforced by a binary framework—"inside" versus "outside" the home—through which officers interpret and navigate space, creating only two zones that are easily violated. Officers do not just enter a home—they shatter the distinctions between rooms, reducing the blueprint into a single, violent point of entry.

² "Zone," here, refers to physical zones, correlating to the areas in a homeplace, as seen in the blueprint of Figure 1. Although it is not wholly unrelated to the constitutionally protected zones of privacy described by Justice Douglas in *Griswold v. Connecticut*, the focus in this article is on physical barriers and areas. See generally *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.") (internal citations omitted); see also *Whalen v. Roe*, 429 U.S. 589 (1977).

³ See *infra* notes 17-20 and accompanying text.

This physical breach reflects a deeper structural dynamic. Though no-knock warrants illustrate one form of state intrusion, technology has become its constant companion—eroding privacy on its own while enabling law enforcement to breach it even further. As will be discussed later, technological innovations such as smart home devices or sensor-enabled cameras have increasingly been used in partnership with law enforcement to extend state surveillance without the use of warrants or even known intrusions.

Both legal and technological systems prioritize tactical efficiency over privacy in the home. The social construction that is race facilitates this prioritization, influencing the design of technological practices and the legal interpretations that follow. This article will use the framework of Critical Race Theory (CRT), which exposes how legal rules, social norms, and institutional structures produce and reproduce racial hierarchy, to critique this predominant prioritization and imagine new futures. The article will also draw specifically on CRT's social construction thesis,⁴ using it to peel back the layers of what privacy in the home has meant—and what it should mean—particularly within the Black *homeplace*.

CRT has been used by scholars to illuminate the social artifact that is technology, the social construction that is race, and the ways both constructions shape and are shaped by law. As legal scholar Jessica Eaglin explains, “technology shapes society and ideas of race construct social discourse, and the two converge through law. That is, racial meaning and technology are co-productive of one another in ways that seem invisible but have been legitimated by law.”⁵ In much the same way, the prevailing understanding of privacy is a legal and cultural invention that has accumulated meaning through the construction of public and private space and the infrastructures (including technological) that govern access and surveillance. This article engages directly with some of these constructions by adopting some nontraditional techniques employed by CRT scholars, such as storytelling and visual elements.

For Black individuals, CRT helps illuminate how the same forces that created race also structure the boundaries of who is permitted privacy and whose privacy is treated as expendable. According to Eaglin, applying CRT to law and technology opens space for legal scholars to analyze and critique the present social order and to imagine transformative

⁴ This thesis “holds that race and races are products of social thought and relation.” RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 9 (2017).

⁵ Jessica M. Eaglin, *When Critical Race Theory Enters the Law & Technology Frame*, 26 MICH. J. RACE & L. 151, 164 (2021).

interventions.⁶ At this intersection, law and technology scholarship can become the transformative literature it often claims to be.⁷

This article will first examine the maxim, “[e]very man’s house is his castle,” and trace how it has been eroded over time. Part 2 of this article will explore the need to reinvigorate and reapply the maxim, given the significance of the Black homeplace. Part 3 addresses legal frameworks, focusing on the history of the maxim and its inadequate application to Black lives. Finally, Part 4 proposes a new way to map and understand privacy in light of these insights.

As will be further explored, privacy legal standards are guided by a narrow binary of “inside” versus “outside” the home. This framework is too limiting and fails to adequately protect the homeplace. This article aims to develop a deeper understanding of the home as a homeplace, a space deserving of robust privacy protections. Such a perspective allows for a more nuanced interpretation of the Fourth Amendment—one that recognizes and centers the Black experience, underscoring the urgent need to safeguard the homeplace.

PART 1: AN EROSION OF “EVERY MAN’S HOUSE IS HIS CASTLE”

In a world rife with chaos, destruction, and turmoil, the home serves as a place of refuge—a space cultivated with time, money, and effort, where one has the freedom to be oneself. This idea of the home deserving special protection has been enshrined within the legal system in the United States since the 1800s: the Supreme Court described the sanctity of the home in an 1886 case as a “sacred right.”⁸ Although the English common law maxim, “Every man’s house is his castle,” may not be common in more recent privacy-related cases, it is the concept that served as guidance for the creation of the Fourth Amendment’s prohibition of unreasonable searches and seizures.⁹

With time, the maxim has expanded into legal standards such as a reasonable expectation of privacy. No longer is there such a strict focus on privacy being dependent on physical spaces (or one’s “castle”); instead, the focus is on a) whether one expects privacy and b) if society would agree

⁶ See *id.*

⁷ See *id.*

⁸ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

⁹ See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* (2009).

with that expectation, which would deem it a reasonable expectation to have.

When police officers knock on the door of someone's home, it is well known that they cannot just barge in without permission from the person who answered the door or a judge through some sort of warrant. The invisible barrier—reinforced by physical structures such as doors—created by the procedural expectation and requirement of judicial approval provides more than just an expectation of privacy. This procedural requirement is what makes the search (the intrusion) a reasonable one: police officers are expected to clearly articulate why they need to enter and search a home. In a perfect world, the Fourth Amendment creates a barrier around a home where individuals can expect to be safe and let alone behind their closed doors (at least from governmental intrusions), even if they do not feel safe outside.

Of course, this is not a perfect world. Police officers routinely burst through doors, with the most horrific examples ending with the death of unsuspecting occupants, who were simply existing in their homes. Instead of protecting people in a space they believed to be their “castle,” the law provides warrants as a loose cover to police officers presenting an unwelcome intrusion.

Even worse, technology now serves as an extension of police officers in an unexpected manner. Ring cameras, for example, that many employ for safety, are being used by law enforcement to surveil people in their own homes.¹⁰ In fact, Amazon has repeatedly shared Ring camera footage with police and maintained partnerships with law enforcement agencies, enabling video from private homes to be used for policing.¹¹

Whether police officers are utilizing their no-knock warrants which permits them to violently enter the home, or surveillance through a camera purchased by a homeowner (and often without their consent or knowledge), we see an erosion of any original ideas of safe “castles.”

Even as the legal notion of the home as a protected castle has been undermined, Black Americans have enacted their own vision of the home as a protected and meaningful space through the careful creation and

¹⁰ See, e.g., *Amazon gave Ring doorbell videos to US police 11 times without permission*, GUARDIAN (July 13, 2022), <https://www.theguardian.com/technology/2022/jul/13/amazon-ring-doorbell-videos-police-11-times-without-permission> [https://perma.cc/KWF9-A5R4].

¹¹ See *id.* There has also been a recent partnership between Ring and Flock, a surveillance company, which has further increased law enforcement surveillance using Ring camera footage. Eric Rosenbaum, *Amazon Ring Security Cameras Moving Deeper Into Law Enforcement With Flock Safety, Axon Deals*, CNBC (Oct. 16, 2026), <https://www.cnbc.com/2025/10/16/amazon-ring-cameras-surveillance-law-enforcement-crime-police-investigations.html> [https://perma.cc/266L-7KJT].

curation of the homeplace. bell hooks defines the Black homeplace as a place “where all black people could strive to be subjects, not objects, where we could be affirmed in our minds and hearts despite poverty, hardship, and deprivation, where we could restore to ourselves the dignity denied us on the outside in the public world.”¹² Black Americans have been able to develop their sense of self within their homeplace—free from the constricting reality of an othering, suffocating world. Free from unwanted intrusions, surveillance, and others’ forced conceptualization of who they are and what they are capable of. It is also a place of resistance, where Black Americans can shake off the perceptions and hate, and be free to just be, however they want to be, powering up to better resist the shackles of racial capitalism that exists in the world.

The law does not understand much about the Black experience, and the lack of protection of Black homes falls within that lack of understanding. Although there has been an erosion of the “home as castle” over time, the notion must be revived. Black people need and deserve a space free from intrusion. Given its centrality to a Black person’s sense of self, the homeplace must receive legal recognition and protection.

PART 2: THE BLACK HOMEPLACE

To reimagine legal frameworks, it is essential to understand the Black homeplace and its significance to Black life. This Part will weave together bell hooks’ insights with my own lived experiences to illustrate why centering the homeplace is crucial and how it can reshape our understanding of what privacy can—and should—look like.

In describing the Black homeplace, bell hooks invites us into her world as a young girl. Her mother, a housekeeper in a white home, would often take her to her grandmother’s house in a “poor white neighborhood” where she encountered “white faces . . . staring . . . with hate.”¹³ She recalled her joy and sense of safety the closer to her grandmother’s house they got: “Oh! that feeling of safety, of arrival, of homecoming when we finally reached the edges of her yard . . . Such a contrast, that feeling of arrival, of homecoming, this sweetness and the bitterness of that journey, that constant reminder of white power and control.”¹⁴ Her neighborhood was welcoming, but the inside of her home was a place of resistance. Inside, she and her mother were able to be the free Black women that they wanted to be, unbounded by societal expectations and restrictions known to Black

¹² BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 384 (1990).

¹³ *See id.* at 383.

¹⁴ *See id.*

Americans in the 1960s and 1970s, and still existing, although altered, today.

I was born more than 40 years after bell hooks, but her experiences speak to mine. When I was a young girl, I was confronted with the hostility that is home to all white schools in rural areas. My front porch was littered with KKK flyers, I was often compared to monkeys, and told that I was smart for a “Black girl.” While others in my classroom were content with learning to spell words like “tiger,” I was forced to ponder differences I had never before believed to be important. Though I was ignored by the other girls in my neighborhood and dismissed when I tried to ride bikes with them, I felt safe behind the closed doors of my home. Everyone inside my home looked like me, I was not judged by circumstances I could not control, and I was not forced to conform to expectations I could not meet. Outside, milk was poured on my afro. Inside, I was told that “Black is beautiful.”

My home was a place of refuge. As I grew older, I realized that my parents had intentionally cultivated this safe space. While I may have been unable to fit into boxes in the outside world that were not created for me, I was able to recharge in the comfort of my home. I was able to tell my tales without shame and be raised back up. I was able to be bold without being told that I should not be, could not be, because of who I was and what I looked like. As bell hooks describes, “[w]e could not learn to love or respect ourselves in the culture of white supremacy, on the outside; it was there on the inside, in that ‘homeplace,’ most often created and kept by black women, that we had the opportunity to grow and develop, to nurture our spirits.”¹⁵

My mom played a formative role in creating the homeplace where I grew up. In a way described by many scholars that is common in homeplaces cultivated by Black women,¹⁶ I came home to a clean home and beautifully prepared dinners that my family ate together over conversation about our days. My dad was instrumental in developing my internal voice that responded to hatred, but the homeplace itself, the physical home in which I felt comfortable, was carefully crafted and curated by my mom. Each burn on my forehead by the hot comb, the smell and taste of her home cooking that I watched her labor over and then later joined, the Black figurines and artwork that filled the space, the sound of her voice as she sang around the house—my homeplace was more than the many physical houses I grew up in, but the sensory memories I have and can recall.

I also spent time with my grandmother, whose homeplace included a “front room,” a marvelous space filled with memories of who we were and artifacts reflecting who we could become. Her front room featured a

¹⁵ See *id.* at 384.

¹⁶ See *id.*; see, e.g., sources cited *supra* notes 12-13.

stereo system (that played vinyl records) that was only turned on when company was over, bookshelves with decorations that I could only look at (but not get *too* close to), photographs of family members I did not know, a white couch with the plastic still on, and, of course, a variety of decorations adorning the walls. It was the kind of space that I thought originated with my grandmother—who else but my tenacious Gan-Gan would have a room that cannot be entered with things that cannot be touched? Yet, a front room is a historical institution, originating from the Victorian parlor and, for families of color, often featuring “[n]eatly dressed subjects pose[d].”¹⁷ Michael McMillan’s project, “The West Indian Front Room,” interrogated the idea of the front room and its history.¹⁸ He traced the roots of the front room to homes in the West Indies and illustrated these spaces in a photographic series, showcasing rooms that would ordinarily be seen only by family and friends. McMillan highlights the distinction between front rooms in white, working-class British homes and those in West Indian homeplaces: “the West Indian ‘front room’ is woven through with the experiences of migration and assimilation that underpin the stories of black settlers in Britain.”¹⁹ These front rooms are not only places of culture and creativity, but of active resistance and regeneration.

There is something that every oppressed group must resonate with about a space that is cultivated, yet untouched (until permitted) by outside forces. Within the space that cannot be touched, there is a careful curation of art, furniture, history, and other memorabilia. One can learn so much about someone and their family by their front room, which is “an ostentatious display of wealth through material reality, but it was also a treasuring for tomorrow of dreams that had been deferred.”²⁰ These front rooms may not be in every homeplace, but they offer many Black families a site where memory, design, and reimagining can be intentionally shaped within the privacy of the home.

The homeplace is, thus, more than a potentially uninspiring idea of architecture that one lives in. It is not just the physical creation of space; it is the intentional creation of a soul-reviving haven where the rhythms of daily life are met with comfort, freedom, and belonging. For Black Americans who find themselves battling white supremacist, racial capitalistic structures, the home is a place to reify the self and to intentionally rest. bell hooks, and many others who lived during the 1950s-70s, experienced Jim Crow laws, segregation, and figures like Bull Connor. After attempting to establish personhood and humanity by sitting at diners, marching on streets, and consequently being raped, beaten, and hosed down

¹⁷ Elizabeth Robles, *Maxine Walker: Imaging the Homeplace*, 40 OXFORD ART J. 1, 5 (2017).

¹⁸ Michael McMillan, *The West Indian Front Room: Reflections on a Diasporic Phenomenon*, 30 KUNAPIPI: J. POSTCOLONIAL WRITING & CULTURE 44 (2008).

¹⁹ See Robles, *supra* note 14, at 6.

²⁰ See *id.*

like dogs, safety and peace may have only been found (and allowed) in homeplaces. Today, the atrocities continue and are not only outdoors: Black Americans are still criminalized for existing. Laws that fail to protect marginalized communities allow individuals to be gunned down for walking with Skittles in hand, or to be surveilled, wrongfully arrested, and murdered through or after the use of facial recognition technology. Trayvon Martin was on his way home, to his place of refuge, and Robert Williams—the first known case of misidentification by facial recognition technology—was arrested in his own driveway.²¹ Even the home itself is not always safe: Breonna Taylor was brutally murdered in her own bed, the most secure place one can be.

Regardless of whether the home is violated by state authorities or by non-governmental actors encroaching on one's sense of self, the homeplace must be safeguarded. It is a site that upholds life, dignity, and the potential for survival for those who inhabit it.

PART 3: LEGAL FRAMEWORKS: HOME AS CASTLE

This Part breaks down each element of the maxim “[e]very man’s house is his castle,” and traces its historical development to fully describe the nature and impact of invasions on the homeplace. Although this maxim was never truly intended to include all people, in theory it offers a framework through which to understand and protect privacy more broadly.

In 1603, George Berisford, one of two tenants in a London home, died while in debt to Peter Semayne.²² To recover what he was owed, Semayne obtained a writ of attachment—a court order permitting the seizure of Berisford’s property located inside the home. When the Sheriff of London attempted to enter and collect the property, the surviving tenant refused him entry. Semayne then sued the tenant, giving rise to what became known as *Semayne’s Case*.²³

This case is often remembered for the maxim “Every man’s house is his castle,” a principle already circulating in English thought as early as the fifteenth century but brought into sharper legal focus here.²⁴ The court

²¹ Miriam Marini, *Farmington Hills man sues Detroit police after facial recognition wrongly identifies him*, DETROIT FREE PRESS (Apr. 13, 2021), <https://www.freep.com/story/news/local/michigan/2021/04/13/detroit-police-wrongful-arrest-faulty-facial-recognition/7207135002/> [https://perma.cc/QN2Z-4F6C].

²² *Semayne’s Case*, 77 ENG. REP. 195.

²³ *Id.*

²⁴ “As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man’s house to arrest him in a civil suit in debt or trespass.” *Miller v. United States*, 357 U.S. 301, 307 (1958). The idea that “a man’s house is his castle” comes from a 1499 case in which the right of Englishmen to defend themselves

ultimately held: “[I]n all cases when the King is party, the sheriff may (if the doors be not open) break the party’s house, either to arrest him, or to do other execution of the King’s process, if he cannot otherwise enter. But he ought to signify the cause of his coming, and to make request to open the doors.”²⁵

The reasoning in *Semayne’s Case* would echo across centuries. When the framers of the U.S. Constitution drafted the Fourth Amendment, they drew from this tradition, codifying the idea that the home is not merely a physical refuge but also a legally protected sphere of privacy against arbitrary government intrusion.²⁶

In U.S. law, the maxim has been cited in debates over gun rights and privacy,²⁷ but these arguments have largely overlooked the homeplace. The maxim that drove *Semayne’s Case* and influenced the Fourth Amendment’s protections against unreasonable searches and seizures was, in every word, exclusionary of Black people and their homeplace.

a. “Every man”

It was not until 1866 that “every” man was freed from chattel slavery in the United States. Until 1868, “every” man was not granted equal protection under the law, nor guarantees of birthright citizenship or due process.²⁸ Until the 1860s, Black men could not legally own land.²⁹ The word “every” did not genuinely mean “every” because Black men were purposefully, legally, and often, forcefully, excluded.

And what of Black women? The Homestead Act of 1862 (followed by the Civil Rights Act of 1866) began to open doors by providing opportunities for western land ownership,³⁰ but Black women struggled to find their place and ownership after chattel slavery ceased. Thus, it is not

from attackers in their home was described: “If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace. But a man’s house is his castle and defense, and where he has a peculiar right to stay. Y.B. Trin. 14 Henry 7 (1499), reported in Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) (“Anonymous.” No case name).” NICHOLAS JOHNSON, ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 2088 (3d ed. 2021); see also Brief for Petitioner, at 5-6, *Caniglia v. Strom*, 593 U.S. 194 (2021), (No. 20-157); *Semayne’s Case*, 77 ENG. REP. 195, 5 COKE REP. 91a (K.B. 1604).

²⁵ *Semayne’s Case*, 77 ENG. REP. 195.

²⁶ See Cuddihy, *supra* note 8.

²⁷ See, e.g., Brief for Petitioner, at 5-6, *Caniglia v. Strom*, 593 U.S. 194 (2021), (No. 20-157).

²⁸ See U.S. CONST. amend. XIV.

²⁹ *Significant Dates on Black Land Loss and Land Acquisition*, CIVIL RIGHTS TEACHING, <https://www.civilrightsteaching.org/resource/timeline-black-land> [https://perma.cc/UL8A-X28H].

³⁰ See *id.*

exactly true that “every man” was afforded the protections of his castle—Black people have had to fight for that right, and even when there was a legal right, discriminatory practices, discussed below, led to further exclusion.

b. “...house is his castle.”

Without the ability to own a home, the castle maxim does not have much use for Black Americans. Following decades of discrimination, Black Americans found refuge in the Fair Housing Act of 1968.³¹ Black and White homes were in separate and vastly unequal neighborhoods for the beginning of the 20th century. Following the Great Migration, when many Black families moved up north, local governments employed racist tactics to create racially segregated neighborhoods.³² Zoning laws, racially restrictive covenants, redlining, and good old-fashioned violence were among the strategies used to force a boundary between white and Black residential neighborhoods.³³ In the 1960s, following continued—and successful—efforts to sequester Black families into decreasing housing options, there was a push for fair housing.³⁴ In 1966, Dr. Martin Luther King, Jr. led a nonviolent protest against institutionalized housing discrimination.³⁵ This momentum reached Congress, and after years of advocacy, and following the assassination of Martin Luther King, Jr., President Lyndon B. Johnson urged Congress to pass the Fair Housing Act in 1968.³⁶ This act prohibited discrimination “in the sale, rental, and financing of housing on the basis of race, color, religion, or national origin.”³⁷ Although Black people were able to gain some legal protections during this fraught history, housing discrimination still exists in many forms. Black people are now able to, at least legally, own a home. In this way, they can claim their castle, and the legal protections that follow. Yet, these protections seem flimsy in the face of reality. The inability to receive a home loan persists today, but is reinforced by new technologies like artificial intelligence that sort and exclude based on human-encoded biases.³⁸ Redlining is also still rampant,

³¹ *Fair Housing Act*, HISTORY (Jan. 27, 2010) (last published May 28, 2025) <https://www.history.com/articles/fair-housing-act> [https://perma.cc/ZH7A-EPM5]; *Fair Housing: History*, CONGRESSIONAL BLACK CAUCUS FOUNDATION, <https://avoice.cbccfinc.org/exhibit/fair-housing/history/> [https://perma.cc/J6V4-TSVN].

³² *See Fair Housing: History*, CONGRESSIONAL BLACK CAUCUS FOUNDATION, <https://avoice.cbccfinc.org/exhibit/fair-housing/history/> [https://perma.cc/J6V4-TSVN].

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See, e.g.,* Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RIGHTS L. REV. 251, 276 (2020); *Fair Lending in the Digital Age*, GRANT THORNTON (June 9, 2023), <https://www.grantthornton.com/insights/articles/banking/2023/fair-lending-in-the-digital-age> [https://perma.cc/NG6K-F622]; Sadie Cavazos, *The Impact of Artificial Intelligence on Lending: A New Form of Redlining?*, 11 TEX. A&M J. PROP. L. 331 (2025).

and there are many other ways in which housing discrimination is still present.³⁹

Although the Englishmen from whom this maxim originated did not specify a race that would be excluded, there was an invisible asterisk. Every man's house is his castle, unless that man is Black, then he is not considered a man, or, if those rights are granted, he is not able to own a house. On paper, the Fourteenth Amendment and the Fair Housing Act solve these problems, but the roots of the United States are, primarily, white supremacy. The founders dug deep, got rid of the British foundation, and replaced it with an "American" foundation that sat atop the genocide of the Indigenous people. This "new" foundation, already resting on lies, was built—brick by brick—by the hands of enslaved people and the maxims of colonization, white supremacy, and racial capitalism. It makes sense, then, why it is difficult to fit a square block in a circular hole—of course, Black Americans and their experiences do not easily fit onto an English maxim. Nonetheless, this maxim does hold some wisdom. Moving beyond ownership specifically—as a rental agreement is one way to deem ownership, for some time—individuals deserve privacy of the space that they call home. The idea of a castle provides the imagery necessary to detail the amount of power one should have over their space.

Thus, this maxim requires an upgrade—not in its wording, but in its application. We must move beyond the "protections" of the Fourth Amendment, which can be easily overridden by judicial approval or rapid police judgment, and toward a deeper understanding of why the home itself must be protected. Such an understanding of privacy within the home could support a more nuanced interpretation and application of the Fourth Amendment. Crucially, this approach must also recognize the Black experience, which underscores the urgent need for this renewed application.

As bell hooks observes in her reflections on her homeplace, the home is more than a physical space—it is a site of identity, belonging, and refuge, especially for those navigating systemic oppression.⁴⁰ In my own experience growing up, the home was simultaneously a sanctuary and a site of constant vigilance; awareness of who could enter and how one's private life might be exposed shaped the way I understood freedom and protection. Our separate, but similar, experiences highlight the insufficiency of neutral legal frameworks that fail to account for the ways race and social power mediate the meaning of privacy.

³⁹ See, e.g., Alaina M. Beauchamp, et al., *Historical Bias in Mortgage Lending, Redlining, and Implications for the Uncertain Geographic Context Problem: A Study of Structural Housing Discrimination in Dallas and Boston*, 101 J. URB. HEALTH 1037 (2024).

⁴⁰ See hooks, *supra* note 11.

This is what necessitates a critical race theory application. CRT allows us to see the Fourth Amendment (and the legal treatment of “privacy”) as formalistic protections deeply shaped by racial history and inequity. Importantly, CRT does not offer a single solution; rather, it provides a lens to critique current frameworks, exposing the gaps and hidden hierarchies that make certain communities—particularly Black households—more vulnerable to invasion, surveillance, and legal indifference. By applying this lens, scholars and practitioners can better understand why existing doctrines often fail and where deeper, race-conscious reflection is needed.

c. The Invasion of the Castle

If the Fourth Amendment prohibits unreasonable searches and seizures, why are police officers often able to bust down a door? What part of a door, hanging off its hinges, is not unreasonable?

Unreasonableness has its own definition in the law. The Fourth Amendment is known to be “flexible” in certain situations, but there are still rules that must generally be followed.⁴¹ Of importance here is the “knock and announce rule.”

Police officers must announce their presence and provide those within the home an opportunity to open the door before executing a search warrant.⁴² This is an “ancient” common law principle that the Supreme Court has upheld many times.⁴³ In 1995, the Supreme Court found that this principle is “a command of the Fourth Amendment.”⁴⁴ In 2006, the Court described this as the “traditional protection [that] has been part of federal statutory law” since 1917.⁴⁵

There are, however, two exceptions to this “knock and announce” rule.⁴⁶ The first is exigent circumstances, where police officers have reasonable suspicion that announcing their presence would be destructive to the purposes of the investigation.⁴⁷ An example of this is where police may believe that a suspect will destroy evidence should they announce their presence. “Exigent circumstances” cannot be cited as a blanket reason for

⁴¹ “This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment’s flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.” *Wilson v. Arkansas*, 514 U. S. 927, 934 (1995).

⁴² *See id.*

⁴³ *Hudson v. Michigan*, 547 U.S. 586 (2006).

⁴⁴ *Wilson*, 514 U.S. at 931-36.

⁴⁵ *Hudson*, 574 U.S. at 589, currently codified at 18 U. S. C. §3109.

⁴⁶ PETER G. BERRIS & MICHAEL A. FOSTER, CONG. RSCH. SERV. LSB10499, “NO-KNOCK” WARRANTS AND OTHER LAW ENFORCEMENT IDENTIFICATION CONSIDERATIONS (2020).

⁴⁷ *See Mincey v. Arizona*, 437 U.S. 385, 394 (1978); *see also Kirk v. Louisiana*, 536 U.S. 635 (2002) (*per curiam*) (holding that police need either a warrant or probable cause *and* exigent circumstances to lawfully enter into a home).

police officers barging into a home; the exception must be based on the particular circumstances of each case.⁴⁸

Closely related is the unfortunately newsworthy no-knock warrant. Judges grant a no-knock entry, within search warrants, based on specific facts.⁴⁹ At times, the justifications for no-knock warrants are similar to those for exigent circumstances, but the difference between the two is temporal in nature. Officers must anticipate exigent circumstances before searching and ask for judicial approval to receive a no-knock warrant, whereas exigent circumstances alone can create an exception to the warrant requirement when an officer arrives at someone's door.⁵⁰

Flexibility is key here—the Fourth Amendment should not be read “to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.”⁵¹ Police officers will always retain the legal authority to assess a situation and act as they believe necessary. Despite legislative proposals and public protests, this structure persists—and will continue to persist—absent a fundamental shift in our governing system.

At issue is the ability of police officers to violate privacy with such force and disregard. Homeplaces, carefully crafted to allow Black bodies to grow, exist, and resist in a safe space, become shells of what they were, “legally desecrated,” after a police invasion.⁵² Beyond that, too many people have died when officers enter and shoot those not suspected of a crime, they get the address wrong, or the exigent circumstances listed to warrant no-knock entry did not exist.⁵³ Fourth Amendment jurisprudence must be reexamined in light of the privacy interests discussed in this article.

Before Breonna Taylor died in her home, she was struck with at least five bullets.⁵⁴ Police officers were executing a search warrant—one that did not list Breonna as a suspect—when she met a senseless death. Although this case gained media attention and even led to an ordinance banning no-knock warrants in Louisville, Kentucky, some scholars believe that her death would not have been prevented even with a ban on no-knock warrants. In fact, police officers claim that they did announce their presence before murdering Breonna.⁵⁵ With the increased militarization of police⁵⁶ leading

⁴⁸ See *Payton v. New York*, 445 U.S. 573, 590 (1980) (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”).

⁴⁹ See *Richards v. Wisconsin*, 520 U.S. 385 (1997) (laying out a test to justify no-knock warrants).

⁵⁰ See *id.*; see also *Kirk v. Louisiana*, 536 U.S. 635.

⁵¹ *Wilson*, 514 U.S. at 934.

⁵² Njeri Mathis Rutledge, *Real Justice for Breonna: Re-Envisioning Knock-and-Announce*, 50 SW. L. REV. 419 (2022).

⁵³ See sources cited, *supra* note 1.

⁵⁴ See Rutledge, *supra* note 49.

⁵⁵ Rutledge, *supra* note 49, at 420 (citing Richard A. Oppel, Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021)).

⁵⁶ Kolby K. Reddish, *A Clash of Doctrines: The Castle Doctrine and the Knock-and-Announce Rule*, 25 WIDENER L.J. 171 (2016); see also Rutledge, *supra* note 49.

to inflated police deference, police officers invade and kill, whether they announce their presence or not.

The ability for police officers to claim that there were exigent circumstances also leaves opportunities for police officers to, again, invade and murder. Without a more in-depth understanding of the privacy zones inherent in a homeplace, and particularly in a Black homeplace, ideas of privacy, and the accompanying rights, are limited.

As the next Part will show, privacy must be understood as more than just two zones: the “inside” and the “outside,” despite the Supreme Court’s insistence that the Fourth Amendment draws “a firm line at the entrance to the house.”⁵⁷ The “inside” is the homeplace—a structure that provides warmth, growth, and love—but even within the homeplace, each zone offers a different dimension of privacy. These zones must be acknowledged, and the law must be updated accordingly.

PART 4: MAPPING BEYOND INSIDE/OUTSIDE

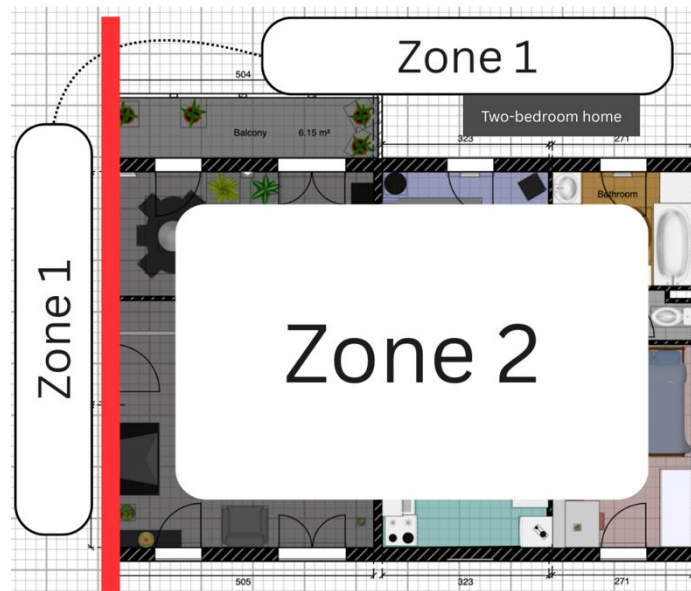


Figure 2. The 2 recognized zones

Right now, the law facilitates two zones: zone 1 for the “outside” and zone 2 for the “inside.” Zone 1 is always open for police officers: officers may use their own vision to see things in plain view and may even surveil outside and around the home. Getting to zone 2 is a bit harder: to be

⁵⁷ *Kyllo v. United States*, 533 U.S. 27, 35 (2001) (citing *Payton v. New York*, 445 U. S. 573, 586, 590 (1980)).

allowed into zone 2, there must be judicial approval, where police officers justify their need to enter the zone. These two zones are a limiting binary structure.

A more responsive legal structure would recognize that there are more than two zones. And even for some, their second zone starts on their front porch. Individuals have a right to privacy in their homeplace, but even more so, this right to privacy is tied to their right over all domains of their homeplace, their castle. There needs to be a permission structure for the entirety of the home, not just to pass the threshold.

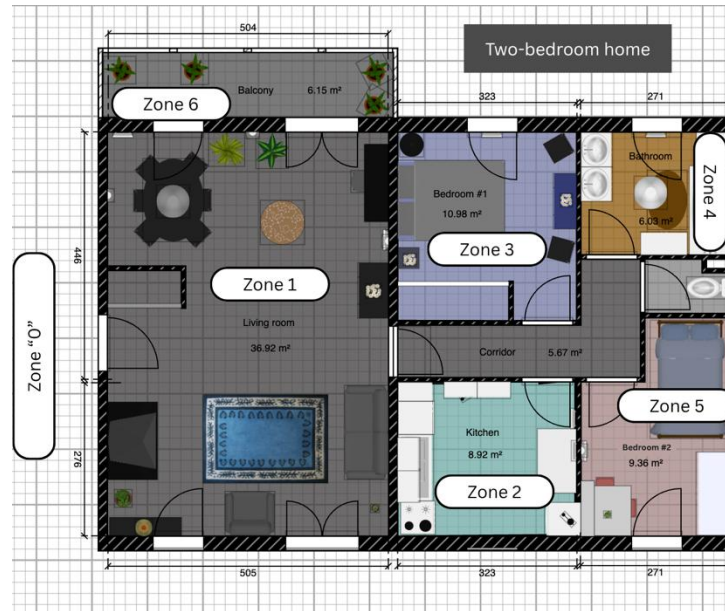


Figure 3. The family's two-bedroom home

This blueprint is primarily used to reorient the conception of privacy and the homeplace. Recognizing that the home is more than just a home, but for many Black Americans, a homeplace that serves as a place of refuge, belonging, and a brave space for cultivating resistance, calls for a critical reorientation of what privacy means in the homeplace. Although the distinction between inside and outside is crucial, there are many zones of privacy within the homeplace that must be considered.

When privacy is a binary, going from outside to inside is an easy hurdle to overcome. If there is danger or a perceived crime, privacy (all things inside) must be violated. However, when privacy is understood as multiple zones, it may not be necessary to invade all of the different zones, and it may also be harder to justify such an intrusion.

When individuals are invited into the home, there are often spaces that are closed and off-limits. If hosting primarily takes place in the front room or living room, there is no need for every single bedroom to be seen by the guest. The guest is also not welcome to open every door and cabinet—especially if they are closed. The general decorum that is respected by guests demonstrates the way that privacy is already understood. Yes, a guest is in the home, but that does not mean that the guest has access to everything inside the home.

There are zones of privacy in each of the areas of the home that the guest is not privy to. Perhaps there is intimate or bodily privacy that the homeowner wants preserved in the bedroom or bathroom. There may be familial privacy in some of the closed drawers. Memorial privacy in a front room that is open to the guest, but these memories are not to be tinkered with, only viewed. Although some hosts may prefer to give a tour of the full home, this, again, does not equate to opening every single drawer and cabinet. Even for the more open host, there is established privacy that is respected. These different zones of privacy must be recognized in the legal context as well.

This binary is further eroded through technology in the home. Smart devices provide efficiency and ease, but this data is also routinely provided to the government.⁵⁸ With the traditional binary of inside/outside, police officers often invade the “inside” privacy without a warrant. This binary is simply no longer useful. Technological advancements and no-knock warrants prove the need for a new conceptualization of privacy and the home.

A better legal framework would not treat a home as a single enclosure but as a layered environment of privacy. The blueprint makes visible what the Fourth Amendment too often flattens: privacy is not binary, but deeply spatial and deeply human.

When these distinct zones are ignored, privacy is violated on multiple levels. In Figure 4, the footprints represent more than a single intrusion. The first pair in Zone 0 marks the breach the law recognizes, but the others reveal the deeper wounds—those that constrict a person’s ability to feel safe, to create, and to heal within their own home. Even after the physical intrusion ends, the figure shows a lingering haze that settles over the space. The loss of privacy leaves the home stripped of safety and belonging, and the homeowner is left to rebuild from what remains.

⁵⁸ See, e.g., *supra* notes 9-10 and accompanying text.



Figure 4. *The haze*

For Black Americans, these intrusions cut deeper. In a world that so often perceives Black people as “other,” as lesser, or as a suspect before a neighbor, the homeplace becomes a refuge. It is where one can breathe, develop, create oneself, and craft a life shielded from prying eyes. So many Black people are forced to code-switch to survive: to adjust their speech, posture, or presence to meet the expectations of those who call the police for nonexistent infractions or judge based on long-held stereotypes. These paradigms, rooted deeply in the foundation of the United States, shape the daily realities of Black life. They can constrict in some moments and outright restrict in others.

The homeplace is the space where Black people can simply *be*—where memories are curated in the front room, where privacy is found in a bedroom, where living, without performance, is allowed. Police intrusions into these multiple zones of privacy abruptly shatter that possibility.

A critical race perspective of privacy invites a more theoretical approach to how we conceptualize it. This article infuses ideas of the homeplace into traditional understandings of the home and privacy to further develop the argument that our conception of privacy must evolve. Black homeplaces are sacred spaces; and in an era of pervasive technology, the longstanding legal binary of inside/outside only amplifies frustrations with how the law fails to protect them. This binary is not only an inaccurate representation of how privacy is actually experienced—especially when

considering the difference between simply crossing a home's threshold and entering the intimacy of one's bedroom—but it also sustains the very structures of governmental intrusion that have cost so many their lives. Recognizing these layered forms of privacy is the first step toward building legal frameworks that honor the fullness of Black life within the homeplace.

CONCLUSION

As a site of refuge and rehabilitation, the homeplace is more than the two zones currently legally recognized and protected. The constrictions Black people experience in daily life outside the home necessitate robust protection of the homeplace, allowing them space to rest, resist, and cultivate life. Yet violent governmental intrusions—through no-knock warrants—or more subtle, digitized forms of surveillance demonstrate that this homeplace is not adequately recognized. Although the maxim (or most of the other legal standards discussed here) was not created with Black people in mind, privacy must be reimagined and reframed to account for the lived experiences of those most impacted. Using Critical Race Theory to analyze these dynamics illuminates how law and policy often fail Black communities, highlighting the urgent need to center the homeplace in legal protections. Protecting the homeplace in this way is essential not only to safeguard individuals but to affirm the dignity and autonomy of Black life.

NOTE

THE HIGH COST OF LOW-PRICE PRODUCTS: CRIMINALIZING COUNTERFEIT INFLUENCING ON SOCIAL MEDIA

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I. INTRODUCTION

With the introduction of social media, it is easier than ever for replica products to make their way into our homes. Gone are the days of haggling over a fake Dior in a back room off Canal Street.¹ Today, you can be one of the 1.8 million members of r/LuxuryReps on Reddit² or click home a Louis Vuitton from China by following the “link in bio” of your favorite TikTok.³ Despite a robust legal framework intended to protect trademarks and intellectual property, counterfeit culture has exploded into a global, normalized phenomenon.⁴ Consumers knowingly purchase imitation goods, influencers promote them for profit, and e-commerce platforms facilitate their sale while profiting from the traffic.⁵

This Note argues that the existing legal paradigm no longer reflects the reality of the counterfeit economy. Enforcement remains disproportionately aimed at manufacturers and distributors, while the roles of knowing consumers, influencers, and digital platforms remain under-scrutinized and under-penalized.⁶ To respond effectively, U.S. law must address this enforcement gap and update both civil and criminal liability frameworks to reflect the democratization of counterfeit traffic.

Part II provides an overview of the American intellectual property system, tracing the development of trademark law from the Constitution to modern anti-counterfeiting statutes. Part III highlights the ethical and human costs of counterfeit products, including threats to consumer safety, links to organized crime, and labor exploitation. Part IV introduces the concept of “counterfeit culture,” emphasizing shifting consumer attitudes, the normalization of knowing infringement, and the pivotal role of influencers. Part V evaluates the inadequacy of current civil liability standards for online platforms and influencers, while Part VI proposes concrete reforms, both civil and criminal, to recalibrate responsibility across the counterfeit supply chain.

¹ Street in New York famed for selling counterfeit products. See e.g. Zachary J. King, *Knock-Off My Mark, Get Set, Go to Jail? The Improprieties of Criminalizing Post-Sale Confusion*, 88 N.Y.U. L. Rev. 2249, 2251 n. 155 (2013) (explaining that in-person illicit marketplaces are well-known: “Since knock-offs tend to be sold in known areas, such as on Canal Street in Manhattan”).

² Reddit communities like r/LuxuryReps use the terms *reps* and *replicas* to describe their counterfeit purchases and prompt each other to buy replicas rather than authentic products. See r/LuxuryReps, REDDIT, <https://www.reddit.com/r/LuxuryReps/> (last visited Mar. 24, 2026) [<https://perma.cc/7593-HG3D>].

³ AM. APPAREL & FOOTWEAR ASS’N, DUPE INFLUENCERS: THE CONCERNING TREND OF PROMOTING COUNTERFEIT APPAREL, FOOTWEAR, AND ACCESSORIES ON SOCIAL MEDIA 17 (2021).

⁴ See, e.g., Ani Khachatryan, *The Digital Dilemma: Counterfeit Culture And Brand Protection Reform In The E-Commerce Era*, 43 Loy. L.A. Ent. L. Rev. 247, 251 (2023). (“The rise of online marketplaces as a primary means of consumption has led to the rampancy of counterfeit culture in the digital age”).

⁵ *Id.*

⁶ See *infra* Part VI.

In an era where counterfeit goods are no longer hidden but celebrated, the law must evolve to meet the moment. Counterfeiting is not merely a branding issue—it is a public safety risk, a human rights concern, and a criminal enterprise. This Note offers a framework for legal reform that confronts counterfeit culture at every level: demand, promotion, and distribution.

II. LEGAL FRAMEWORK

A. HISTORY OF INTELLECTUAL PROPERTY RIGHTS IN THE UNITED STATES

Protecting intellectual property rights is not a modern legal concept: “Congress has protected copyrights and patents in some form under federal law since 1790.”⁷ The Intellectual Property Clause⁸ of the United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹ The IP Clause thus lays the foundation on which all federal and state laws protecting intellectual property in the U.S. rest. The clause has been interpreted to create an intellectual-property framework divided into two groups: authors, who create works of art in need of copyright protection, and inventors, who create inventions in need of patent protection.¹⁰ The clause exists because the Framers worried that, without proper protection of such rights, there would be no economic incentive to innovate, whether scientifically or artistically, which would hinder American prosperity.¹¹

Table 1:

Survey of selected relevant federal laws and cases protecting intellectual property rights in the United States since 1790.

Year	Act	Notes
1790	An act to promote the progress of useful arts ¹²	Patents

⁷ Cong. Rsch. Serv., Art. I, Sec. 8, Cl. 8, *Overview of Congress’s Power Over Intellectual Property*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060/ (last visited Mar. 27, 2026).

⁸ *Id.* (hereinafter “IP Clause”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (“[U]nder the IP Clause, copyrights and patents are based on a utilitarian rationale that exclusive rights are necessary to provide incentives to create new artistic works and technological inventions. Without legal protection, competitors could freely copy such creations, denying the original creators the ability to recoup their investments in time and effort, reducing the incentive to create in the first place. The IP Clause thus reflects an economic philosophy that the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”).

¹² Act of 1790, ch. 7, 1 Stat. 109.

1790	An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies (...) ¹³	Copyright
1870	An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights ¹⁴	Copyright, Patents, and Trade-Mark. ¹⁵
1872	An Act to punish the counterfeiting of trademarks and the sale or dealing in of counterfeit trademark goods. ¹⁶	Trademark, Counterfeits
1879	The Trade-Mark Cases ¹⁷	Trademarks not protected under Intellectual Property Clause
1881	Act to Revise, Consolidate and Amend Trademarks and Protect the Same ¹⁸	Trademarks
1891	International Copyright Act ¹⁹	Protection of certain works of foreign origin
1909	The Copyright Act of 1909 ²⁰	Copyright
1939	An Act to transfer jurisdiction over commercial prints and labels, for the purpose of copyright registration, to the Register of Copyrights ²¹	Copyright
1946	The Lanham Act ²²	Trademarks
1984	Trademark Counterfeiting Act ²³	Trademarks

¹³ Act of 1790, ch. 15, 1 Stat. 124.

¹⁴ Jeremy M. Wilson et al., *Product Counterfeiting Legislation in the United States: A Review and Assessment of Characteristics, Remedies, and Penalties*, 106 J. CRIM. L. & CRIMINOLOGY 521, 527 (2016).

¹⁵ In 1870, trademarks were referred to as “trade-mark.”

¹⁶ Act of 1876, 19 Stat. 141 (hereinafter Counterfeit Penalty Act of 1876). *See also* Trade-Mark Cases, 100 U.S. 82, 82 (1879) (syllabus).

¹⁷ *See generally* Trade-Mark Cases, 100 U.S. 82 (1879).

¹⁸ Trade-Mark Act of 1881, ch. 138, 21 Stat. 502.

¹⁹ International Copyright Act of 1891, ch. 565, 26 Stat. 1106; *see also* Benjamin W. Rudd, *Notable Dates in American Copyright*, 28 Q.J. LIBR. CONG. 137, 140 (1971) [<https://perma.cc/2JTT-BXWQ>].

²⁰ Copyright Act of 1909, ch. 320, 35 Stat. 1075; Rudd, *supra* note 19, at 141 (“Frank Currier introduced H.R. 28192, which was the successor to several similar bills for general revision of the copyright laws and which became the Copyright Act of March 4, 1909.”).

²¹ Copyright Act of 1939, ch. 396, 53 Stat. 1142; Rudd, *supra* note 19, at 142 (noting the 1940 effective date for relevant provisions).

²² Lanham Act, 15 U.S.C. §§ 1051 et seq. (2024) (establishing a national system of trademark registration and protecting against consumer confusion).

²³ Act of Oct. 12, 1984, Pub. L. No. 98-473, tit. II, ch. XV, 98 Stat. 2178; *see also* 1701. *Trademark Counterfeiting - Introduction*, U.S. DEP’T OF JUST., <https://www.justice.gov/archives/jm/criminal-resource-manual-1701-trademark-counterfeiting-introduction> [<https://perma.cc/94N7-VJZC>] (last visited Mar. 26, 2026).

1995	Federal Trademark Dilution Act ²⁴	Trademarks
1996	Anti-Counterfeiting Consumer Protection Act ²⁵	Anti-Counterfeit
1999	Anti-Cybersquatting Consumer Protection Act ²⁶	Trademarks (online)
2006	Stop Counterfeiting in Manufactured Goods Act ²⁷	Anti-Counterfeit
2008	Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act ²⁸	Intellectual Property; Anti-Counterfeit
2020	Trademark Modernization Act of 2020 ²⁹	Trademarks

B. EARLY FEDERAL LAW

While many of the overarching concepts of intellectual property rights in the United States have remained the same since its infancy, subsequent laws have undergone much trial and error to stay relevant after 1790.³⁰ In 1870, Congress enacted the first law that specifically included trademark protection, the Copyright Act of 1870, which established civil penalties for infringement.³¹ Congress also expanded trademark protection to include criminal liability, enacting “[a]n act to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods.”³²

C. CRIMINAL PENALTIES

Congress further expanded trademark protection by enacting the Counterfeit Penalty Act of 1876, a law that established criminal liability for trademark infractions: “punished by fine not exceeding one thousand dollars, or imprisonment not more than two years, or both such fine and imprisonment.”³³ In the “Trade-Mark cases,” a group of defendants

²⁴ Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. § 1125(c) (establishing protection against dilution of famous marks)).

²⁵ Anti-Counterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386 (codified at 18 U.S.C. § 2311).

²⁶ Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d).

²⁷ Stop Counterfeiting in Manufactured Goods Act of 2006, Pub. L. No. 109-181, 120 Stat. 285 (codified as amended in scattered sections of 18 U.S.C.).

²⁸ Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (codified as amended at 15 U.S.C. § 8101).

²⁹ Trademark Modernization Act of 2020, Pub. L. No. 116-260, div. Q, §§ 221–28, 134 Stat. 2208 (codified in scattered sections of 15 U.S.C.).

³⁰ Cong. Rsch. Serv., Art. I, Sec. 8, Cl. 8, *Overview of Congress’s Power Over Intellectual Property*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060/ (last visited Mar. 27, 2026).

³¹ Wilson et al., *supra* note 14 at 528.

³² Counterfeit Penalty Act of 1876.

³³ *Id.* (entitled “An Act to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods”).

challenged the law in court by arguing that Congress did not have the power necessary to regulate the use of trademarks.³⁴ As the Court explained, “the power of Congress to legislate on the subject, to establish the conditions on which these rights shall be enjoyed and exercised, the period of their duration, and the legal remedise for their enforcement, if such power exist at all, must be found in the Constitution of the United States (...).”³⁵

The defendants argued that Congress had overreached its Constitutional powers by seeking to protect trademarks so broadly, whether through the IP Clause or the Commerce Clause.³⁶ The Attorney General countered that interstate and international commerce were both directly and indirectly influenced by counterfeits, and therefore Congress had acted within its authority.³⁷ The Supreme Court of the United States sided with the defendants, concluding that Congress had overreached in enacting the Counterfeit Penalty Act of 1876.³⁸ For that reason, Congress passed a new act in 1881 known as the “Act to Revise, Consolidate and Amend Trademarks and Protect the Same.”³⁹ Unlike its predecessors, the new law did not include criminal sanctions and limited its reach to trademarks used in foreign, interstate, and intertribal commerce in order to rely on the Commerce Clause as the source of congressional power.⁴⁰ With these minor updates, that law remained the authority on federal trademark protection in the United States until the Lanham Act of 1946.⁴¹

D. THE LANHAM ACT OF 1946

Trademark law as we know it today is shaped by the 1946 “Trademark Act,” often referred to as the “Lanham Act.”⁴² The Lanham Act had two purposes: to protect consumers and trademark owners.⁴³

³⁴ *Trade-Mark Cases*, 100 U.S. 82.

³⁵ *Id.* at 93.

³⁶ *Id.* at 93-94 (concluding that trademarks are not synonymous with patents or copyright, therefore the power to regulate trademarks cannot come from the Intellectual Property Clause of the U.S. Constitution).

³⁷ *Id.* at 95 (“The argument is that the use of a trade-mark -- that which alone gives it any value -- is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the act in question is a lawful exercise of this power.”)

³⁸ *Id.* at 93-97 (holding that Congress lacked authority under the Intellectual Property Clause to enact trademark laws not limited to interstate or foreign commerce and concluding that the 1870 and 1876 Acts were unconstitutional) (“The ordinary trade-mark has no necessary relation to invention or discovery”) (“If its main purpose be to establish a regulation applicable to all trade ... it is obviously the exercise of a power not confided to Congress”).

³⁹ See Trade-Mark Act of 1881, ch. 138, 21 Stat. 502.

⁴⁰ Wilson et al., *supra* note 14, at 528.

⁴¹ *Id.* at 528-29.

⁴² *Id.*

⁴³ *Id.* at 529.

Trademarks are more than *branding*;⁴⁴ they represent the reputation and standard of a product or manufacturer, allowing consumers, who “cannot investigate the merits of every product they buy”⁴⁵ to choose products they trust on the basis of trademarks, and counterfeiting dilutes that trust.⁴⁶ Likewise, a manufacturer builds their reputation by consistently providing products of a certain standard, and when substandard products are sold using their trademark, those reputations are tainted.⁴⁷ The Lanham Act originally included criminal sanctions, but these were replaced by civil liability.⁴⁸ While the Lanham Act is considered the foremost legal protection against counterfeiting, some experts argue that it is ineffective “given the complexities of the counterfeiting operations in different industries (e.g., luxury goods versus pharmaceuticals) facing society today.”⁴⁹

E. THE TRADEMARK COUNTERFEITING ACT (TCA) OF 1984

In 1984, Congress recognized that counterfeit goods had become an increasing problem because counterfeiters had grown bolder and had “vastly expanded the scope of their operations,”⁵⁰ posing risks to both economic interests⁵¹ and public safety.⁵² Representative William J. Hughes testified before Congress that “the likelihood of failure of a counterfeit part that has not sustained the rigorous safety and strength tests which the authorized manufacturer would conduct is a clear risk to human life.”⁵³ Congress’s Committee on the Judiciary⁵⁴ recognized that counterfeiters had

⁴⁴ See, e.g., *Branding*, AM. MKTG. ASS’N, <https://www.ama.org/topics/brand-and-branding/> [<https://perma.cc/U43P-EZHP>] (last visited Mar. 27, 2026) (“Brand marketing aims to connect emotionally with consumers, build loyalty, and ultimately drive sales and market share through activities like advertising, public relations, and content marketing.”) (referring to the modern understanding of branding or brand marketing).

⁴⁵ S. REP. NO. 98-526, at 3 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627, 3629.

⁴⁶ S. REP. NO. 98-526, at 4 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627, 3630 (“Trademark counterfeiting— that is, selling or otherwise trafficking in goods or services through the use of spurious trademarks— poisons this crucial information system. It defrauds purchasers, who pay for brand-name quality and take home only a fake.”).

⁴⁷ *Id.* (“it cheats manufacturers of sales that their reputation has earned them, and tarnishes that reputation when the manufacturers are blamed for the flaws of goods they did not produce.”)

⁴⁸ Wilson et al., *supra* note 14 at 529 (citing 15 U.S.C. § 1116).

⁴⁹ *Id.*

⁵⁰ S. REP. NO. 98-526, at 4 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627, 3630.

⁵¹ *Id.*

⁵² *Id.* at 4-5 (“The Court found that the counterfeits were ‘critical parts whose failure would result in the inflight loss of control of the helicopter,’ and that the parts ‘were defective, not airworthy, and created a grave risk to human life and safety.’ The tragic result, that court found, was that ‘(s)everal helicopters have crashed resulting in injuries and death as a result of the failure of these parts manufactured and sold by the defendants.’”) (citing *Textron v. Aviation, Sales*, Civ. No. 77-1317 (C.D. Cal. Sept. 30, 1980)).

⁵³ Trademark Counterfeiting Act of 1984: Hearings on H.R. 2447 Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 98th Cong. 1 (1985) (statement of Rep. William J. Hughes).

⁵⁴ Hereinafter, “The Committee.”

begun to branch out into other industries beyond fashion⁵⁵ and agreed that “no industry is immune to this form of fraud.”⁵⁶

While it is difficult to determine the precise cost of counterfeiting to society, the Committee agreed that counterfeit goods likely amount to “several billion dollars”⁵⁷ and expressed frustration with the limitations of the Lanham Act, arguing that civil penalties were too weak to deter counterfeiters and that “many counterfeiters view potential civil penalties simply as a cost of doing their illegal business.”⁵⁸ Additionally, the Committee emphasized that counterfeiters can afford those costs because they sell products without bearing the costs of development, marketing, and building a reputation, all of which are borne by the original mark owner.⁵⁹ Finally, the Committee sought to provide greater consumer protection, given that counterfeits pose a significant risk to individuals and that consumers had no direct cause of action under the Lanham Act.⁶⁰ The TCA thus imposed criminal penalties for the intentional trafficking of counterfeit goods and provided enhanced sentencing.⁶¹ In fact, “the penalties for trafficking in counterfeit products carried fines of up to \$250,000 and up to five years in prison for a first offense and additional offenses carried fines up to \$1,000,000 and up to 15 years in prison.”⁶²

⁵⁵ Hearings, *supra* note 54 (William J. Hughes testified before the committee on the kind of products that are counterfeited: “Medicines, toiletries, clothing, airplane parts—the list is endless. All kinds of products are being counterfeited and one can only imagine what will turn up next on the list. It has become a multibillion dollar business”).

⁵⁶ S. REP. NO. 98-526, at 4 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3627, 3630 (“The Committee heard considerable testimony and saw substantial evidence that counterfeiters now traffic in automobile parts, cosmetics, fertilizers, chemicals, perfumes, watches, luggage, sporting goods, electronic equipment, computer components, medical devices, and [n]umerous other items”).

⁵⁷ *Id.* at 9 (based on the testimony of Gerald J. Mosinghoff, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks given in 1983: “It is generally believed that several billion dollars of counterfeit goods are sold annually.”) (citing Trademark Counterfeiting Act of 1983: Hearings on S. 875 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary, 98th Cong. 15 (1983)).

⁵⁸ S. REP. NO. 98-526, at 5 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3627, 3631 (“Although the Lanham Act provides for civil penalties for all forms of trademark infringement, including intentional trafficking in known counterfeits, penalties under that Act have been too small, and too infrequently imposed, to deter counterfeiting significantly.”).

⁵⁹ *Id.* (“—a cost they can well afford, given the enormous profits to be made by capitalizing on the reputations, development costs, and advertising efforts of honest manufacturers at little expense to themselves.”).

⁶⁰ Mark McKenna, *Criminal Trademark Enforcement and the Problem of Inevitable Creep*, 51 AKRON L. REV. 989, 991-92 (2017).

⁶¹ Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320

⁶² Wilson et al., *supra* note 14 at 530.

F. STOP COUNTERFEITING IN MANUFACTURED GOODS (SCMG) ACT OF 2006

The Stop Counterfeiting in Manufactured Goods Act was signed into law by President George W. Bush on March 16, 2006.⁶³ The Act aimed to protect and support Americans through a two-prong approach: (1) strengthening laws against counterfeit labels and packaging and (2) strengthening penalties for counterfeiters and giving prosecutors “new tools.”⁶⁴ Prior to this legislation, counterfeiters exploited a significant loophole by trafficking in counterfeit labels, patches, and packaging separately from counterfeit goods, which allowed them to escape prosecution because existing laws primarily targeted finished counterfeit products.⁶⁵ This gap allowed individuals to produce counterfeit branding materials independently and distribute them for later application to goods, thereby circumventing legal penalties.⁶⁶ In addition, the Act introduced new tools for prosecutors and courts, including requiring courts to “order the destruction of all counterfeit products seized as part of a criminal investigation” and requiring any convicted counterfeiter to “turn over their profits and any equipment used in their operations,”⁶⁷ as well as “reimburse the legitimate businesses they exploited.”⁶⁸

The SCMG was prompted by *United States v. Giles*, 213 F.3d 1247 (10th Cir. 2000), “where the court of appeals overturned a conviction under 18 U.S.C. Sec. 2320, holding that, based on the current language of the statute, no criminal liability could attach to trafficking in labels, patches, medallions, boxes, containers, cases, documentation, packaging and the like bearing registered marks, where the item bearing the registered marks were not attached to the goods.”⁶⁹ To overrule *United States v. Giles*, Congress expanded the definition of a “counterfeit mark” to include labels and packaging, which hindered counterfeiters from using branded packaging to “dress up unrelated goods.”⁷⁰ This broadened scope ensured that individuals trafficking in counterfeit components designed for later assembly into counterfeit products would be subject to criminal penalties.

The Bush administration took a special interest in counterfeiting in the early 2000s by launching STOP, the Strategy Targeting Organized

⁶³ *Fact Sheet: President Signs the Stop Counterfeiting in Manufactured Goods Act*, GEORGE W. BUSH WHITE HOUSE ARCHIVES (Mar. 16, 2006), <https://georgewbushwhitehouse.archives.gov/news/releases/2006/03/20060316-6.html> [<https://perma.cc/3GRQ-QDZC>].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ H.R. REP. NO. 109-68, pt. 1 (2005).

⁷⁰ See *Fact Sheet*, *supra* note 64; Arnold & Porter LLP, *The STOP Counterfeiting Act* (Mar. 2006), <https://www.arnoldporter.com/en/perspectives/publications/2006/03/the-stop-counterfeiting-act>

Piracy initiative.⁷¹ In a 2006 press release, the Administration stated: “Nine Federal agencies are coming together - including the Department of Justice, which has launched the most aggressive effort in American history to prevent intellectual property violations.”⁷² The Administration further emphasized that “specially trained prosecutors and FBI agents are being posted at American embassies in Asia and Eastern Europe”⁷³ and that the United States was supporting international efforts to “promote strong intellectual property laws, and [it is] cooperating with the private sector to raise awareness of counterfeiting.”⁷⁴

III. THE ETHICAL, SOCIAL, AND HUMAN COST

“The sheer recklessness of the most dangerous counterfeiters amounts to mass homicide.”⁷⁵

While much of the legal and policy discourse surrounding counterfeit goods may center on economic harm and trademark infringement, this narrow focus obscures the broader and more urgent consequences of counterfeit trafficking. Counterfeit products pose direct and often deadly risks to consumer health and safety, from toxic cosmetics to malfunctioning automobile parts.⁷⁶ Beyond the individual level, counterfeit networks generate billions in illicit revenue that fund organized crime, human trafficking, and other transnational threats.⁷⁷ At the farthest reaches of these supply chains are the exploited laborers, often children or victims of forced labor, who endure unsafe and abusive conditions to produce imitation goods.⁷⁸ This Part examines the true cost of counterfeit culture and argues that a broader, more justice-centered legal framework is needed to address the full scope of its harm.

A. CONSUMER SAFETY AND PUBLIC HEALTH RISK

Counterfeit products endanger consumers because they are often substandard and dangerous. Consider the dangerous substances found in or

⁷¹ *Fact Sheet*, *supra* note 64.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ David Shepherd et al., *The Impact of Deviant Social Media Influencers and Consumer Characteristics on Purchasing Counterfeit Goods*, 44 *DEVIANT BEHAV.* 1746, 1747 (2023).

⁷⁶ U.S. DEP’T OF HOMELAND SEC., *COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 16-18* (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_pley_counterfeit-pirated-goods-report_01.pdf [<https://perma.cc/M6J8-M9XL>].

⁷⁷ *See, e.g.*, U.N. OFF. ON DRUGS AND CRIME, *THE ILLICIT TRAFFICKING OF COUNTERFEIT GOODS AND TRANSNATIONAL ORGANIZED CRIME* 2 (2013) https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf [<https://perma.cc/W82F-L5RH>].

⁷⁸ INT’L LAB. ORG., *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* 90 (2022).

on illegitimate children's toys that regularly enter the United States.⁷⁹ Every year, U.S. Customs and Border Patrol seizes toys that contain lead or cadmium, both of which are highly toxic to humans, especially children and infants.⁸⁰ While legitimate children's toys undergo rigorous testing and must adhere to stringent regulations before entering the market, counterfeit toys do not.⁸¹ To make matters worse, regulatory authorities struggle to enforce safety standards in online counterfeit marketplaces, which continue to list dangerous products despite repeated warnings and removals.⁸²

Adults are also not immune to the dangers posed by counterfeit goods. One high-profile safety incident in the United States involved counterfeit airbags that exploded on impact, sending shrapnel into drivers and passengers.⁸³ These incidents were linked to at least twelve fatalities and prompted the National Highway Traffic Safety Administration (NHTSA) to issue a major recall warning in 2018.⁸⁴ Another striking example comes from the aviation sector. In *Textron v. Aviation, Sales*, Civ. 77-1317 (C.D. Cal. Sept. 30, 1980), counterfeit helicopter parts were implicated in a fatal crash.⁸⁵ According to the court, the counterfeit components resulted "in the inflight loss of control of the helicopter," and the counterfeit parts were "defective, not airworthy, and created a grave risk to human life and safety."⁸⁶ These examples underscore the fact that counterfeit goods are not merely a consumer nuisance; they present direct, and sometimes deadly, threats to public safety.

⁷⁹ OFF. OF THE U.S. TRADE REP., 2023 REVIEW OF NOTORIOUS MARKETS FOR COUNTERFEITING AND PIRACY 4 (2024)

https://ustr.gov/sites/default/files/2023_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy_Notorious_Markets_List_final.pdf [https://perma.cc/2G8F-HNP4] ("Every year, CBP Officers seize thousands of shipments containing counterfeit toys and games, which can be of poor quality and in some cases, include infringing labels that falsely indicate testing and safety certifications.").

⁸⁰ *Id.* ("[c]ounterfeit toys tend to be coated in excessive levels of lead paint, and authorities have warned of cases of counterfeit toys containing both lead and cadmium.").

⁸¹ *Id.* at 3-4 ("Children's products produced and sold through legitimate streams of commerce are subject to rigorous safety standards in the United States, over and above standards set for general use products, to ensure that these goods remain safe for children to handle. Third-party testing and certification are required by the Consumer Products Safety Commission (CPSC) for toys designed or intended primarily for children 12 and under. In contrast, counterfeit toys avoid compliance with these and similar safety standards and have no assurance of quality. Counterfeit manufacturers aim for the lowest cost product, and by doing so may use substandard, often unregulated materials with no government oversight. These counterfeit products are trading on the reliable reputation of a legitimate product, when in fact they may be more likely to break apart, break down, or contain harmful chemicals or dyes").

⁸² *Id.* at 4-5.

⁸³ *Id.* at 4-6.

⁸⁴ *Id.*

⁸⁵ S. REP. NO. 98-526, at 4-5 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627, 3630-31 (citing *Textron v. Aviation*).

⁸⁶ *Id.* at 5.

B. ORGANIZED CRIME

While the physical harm counterfeit products pose to consumers is immediate and tangible, the broader societal risks are no less urgent. Counterfeit trafficking is a key funding source for organized criminal enterprises worldwide, including those involved in drug trafficking, human smuggling, and even terrorism.⁸⁷ Unlike legitimate global supply chains, which are subject to regulatory scrutiny and traceability standards, counterfeit networks operate in the shadows, thriving on anonymity, bribery, and porous enforcement systems.⁸⁸ Far from being a victimless crime, the counterfeit economy sustains criminal ecosystems that endanger communities and undermine the rule of law on a global scale.⁸⁹ Yet many consumers remain willing to purchase counterfeit products that directly fund criminal activity: the UNODC has identified counterfeit goods as a major revenue source for transnational criminal organizations, including drug cartels, human trafficking networks, and terrorist groups.⁹⁰

Table 2:
Organized Crime in Counterfeiting

Criminal Organization	Counterfeiting	Human Smuggling	Narcotics Trafficking	Prostitution	Contract Killing
Camorra Mafia	yes	yes	yes	yes	yes
Wo Shing Wo Triad	yes	yes	yes	yes	yes
San Yee On Triad	yes	yes	yes	yes	yes
Yamaguchi-gumi Yakuza	yes	yes	yes	yes	yes
Los Ambulantes /Tepito	yes	yes	yes	no	no

Counterfeit goods are attractive to criminal networks because they generate high profits with relatively low risks of detection and prosecution compared to other illegal activities.⁹¹ For example, counterfeit DVDs are far more profitable than illegal drugs.⁹² In addition, the stakes are low: selling products online and across borders that cannot be sniffed out by dogs or identified as inauthentic with a simple scan, unlike drugs and weapons, makes counterfeit products especially attractive to such groups. Famous

⁸⁷ GREGORY F. TREVERTON ET AL., FILM PIRACY, ORGANIZED CRIME, AND TERRORISM 121 (2009), <https://www.rand.org/pubs/monographs/MG742.html>.

⁸⁸ U.N. Off. on Drugs and Crime, *supra* note 78, at 3.

⁸⁹ Treverton et al., *supra* note 88, at 125.

⁹⁰ U.N. Off. on Drugs and Crime, *supra* 78, at 4.

⁹¹ Treverton et al., *supra* note 88, at 28.

⁹² *Id.* (“Indeed, the profit margins (though not yet the total profits) are very high, much higher than those for drugs, for instance.”); on DVDs produced in Malaysia: (“The cross-border markup is three times higher than the markup for Iranian heroin and higher than that for Colombian cocaine.”).

organized crime groups, including the Camorra Mafia, the Yamaguchi-gumi Yakuza, and several Triads, have been found to participate in both counterfeit production and distribution.⁹³ Some experts have also linked the funding of the September 11, 2001 attacks in New York to counterfeit operations.⁹⁴

From a comparative perspective, Italy has adopted a zero-tolerance policy toward counterfeiting linked to organized crime, treating it as a national security threat rather than a mere intellectual-property violation.⁹⁵ Italian law imposes strict criminal penalties for counterfeiting and enables proactive enforcement, including undercover investigations, seizures, and enhanced sentencing for organized operations.⁹⁶ This link to organized crime has given Italian prosecutors a different tool: anti-corruption and anti-mafia legislation.⁹⁷ Those regulations treat counterfeiting as an offense connected to criminal enterprise, allowing for asset seizures and expanded criminal liability.⁹⁸ Although these regulations are not limited to criminal enterprises, because the effort is focused on limiting susceptibility to corruption, legitimate companies that violate them may also be sanctioned.⁹⁹ In the United States, the closest comparable legislative effort has historically relied on racketeering statutes, including the Racketeer Influenced and Corrupt Organizations (RICO) Act, which allows prosecutors to charge counterfeit operations as part of broader criminal enterprises.¹⁰⁰

C. HUMAN RIGHTS VIOLATIONS

Counterfeiting is not only a problem for public safety and national security; it also contributes to broader societal harms. At first glance, anti-counterfeit efforts may seem like pure intellectual-property disputes in

⁹³ U.N. Off. on Drugs and Crime, *supra* note 78, at 2 (“Groups such as the Mafia and Camorra in Europe and the Americas, and the Triads and Yakuza in Asia have diversified into the illicit trafficking of counterfeit goods, while at the same time being involved in crimes varying from drug and human trafficking, to extortion and money laundering.”).

⁹⁴ Colleen Jordan Orscheln, *Bad News Birkins: Counterfeit in Luxury Brands*, 14 J. MARSHALL REV. INTELL. PROP. L. 249, 260 (2015) (“The FBI believes that counterfeit goods financed the World Trade Center bombing in 1993, as well as the attack on September 11, 2001.”).

⁹⁵ U.N. Interregional Crime & Just. Rsch Inst. (UNICRI), *Report on Counterfeiting and Organized Crime: The Italian Case*, <https://unicri.org/index.php/focus/report-counterfeiting-and-organized-crime-italian-case> (last visited Mar. 27, 2026) [<https://perma.cc/NV8J-ZH5B>].

⁹⁶ Cesare Galli, *Procedures and Strategies: Anti-Counterfeiting in Italy*, WORLD TRADEMARK REV. (2021), <https://www.worldtrademarkreview.com/guide/anti-counterfeiting-and-online-brand-enforcement-archived/2020/article/procedures-and-strategies-anti-counterfeiting-italy> [<https://perma.cc/X3RL-YQ65>].

⁹⁷ Dante Figuerora, *Italy: New Law to Combat Organized Crime Takes Effect*, LIBR. CONG (Jan. 3, 2018), <https://www.loc.gov/item/global-legal-monitor/2018-01-03/italy-new-law-to-combat-organized-crime-takes-effect/>.

⁹⁸ *Id.*

⁹⁹ Emilio Parodi, *LVMH's Unit Put Under Court Administration in Italy Over Labour Exploitation*, REUTERS (Jun. 11, 2024) <https://www.reuters.com/business/retail-consumer/dior-unit-put-under-court-administration-italy-over-labour-exploitation-2024-06-10/> [<https://perma.cc/6ATW-VA73>].

¹⁰⁰ 18 U.S.C. §§ 1961-1968.

which global luxury brands attempt to keep a larger piece of the pie to themselves. In reality, however, the production and sale of counterfeit goods is a humanitarian crisis.¹⁰¹ TRACIT has identified counterfeit supply chains as a major source of modern slavery, with reports documenting widespread labor violations in counterfeit textile and electronics factories.¹⁰² Forced labor can be understood as a cost-effective way to produce goods because it allows producers to ignore labor laws, wage regulations, and break requirements. In a report by TRACIT, forced labor in the production of counterfeit goods is described as follows: “[w]orkers are treated as disposable components of the manufacturing and sales of illicit products, with little or no regard for their safety or life.”¹⁰³ Vulnerable members of society, including immigrants, are more likely to be victimized: “[m]igrants who have been smuggled into a country are coerced into selling counterfeit goods while irregular labour, including children, can be used in the production of counterfeit items.”¹⁰⁴

One argument made by counterfeit proponents is that many legitimate companies have been implicated in similar human-rights violations.¹⁰⁵ If consumers believe that the human cost is the same regardless of whether they shop for authentic or counterfeit goods, they may ask why they should not purchase the lower-cost goods. That view is overly simplistic, as one source explains, because “[i]f this can happen in global companies whose supply-chain practices are at least open to some degree of scrutiny, then the situation would be much worse for workers in a clandestine setting.”¹⁰⁶ While legitimate companies must consider their reputations, counterfeiters operate in the dark and trade on the reputation of the original trademark owners,¹⁰⁷ so they do not lose business because of negative press.¹⁰⁸

D. THE ETHICAL BLIND SPOT IN CURRENT LAW

While the protection of trademark holders and the economic interests of brand owners are valid concerns, they obscure the broader ethical landscape in which counterfeits operate. For instance, court decisions applying contributory liability rarely discuss the ethical

¹⁰¹ See, e.g., TRANSNAT'L ALL. TO COMBAT ILLICIT TRADE (TRACIT), THE HUMAN COST OF ILLICIT TRADE: EXPOSING DEMAND FOR FORCED LABOR IN THE DARK CORNER OF THE ECONOMY (2021) [<https://perma.cc/6TW5-SQGV>].

¹⁰² *Id.*, at 17-19.

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.* at 17 (citing UNODC, *Focus on the Illicit Trafficking of Counterfeit Goods and Transnational Organized Crime*).

¹⁰⁵ *Id.* (“Severe labor abuses in the supply chains of even some of the world’s major brands have been well documented, with instances such as threats of violence, exposure to hazardous materials, and deadly working conditions all having been noted.”).

¹⁰⁶ *Id.* at 17-18; see U.N. Off. on Drugs and Crime, *supra* note 77 at 4.

¹⁰⁷ S. REP. NO. 98-526, at 5 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627, 3631.

¹⁰⁸ U.N. Off. on Drugs and Crime, *supra* note 77 at 4.

consequences of failing to intervene.¹⁰⁹ In *Tiffany (NJ) v. eBay*, the Second Circuit focused narrowly on knowledge standards and platform neutrality, without acknowledging that counterfeit sales facilitated by eBay could fund exploitative labor practices or unsafe products.¹¹⁰ This compartmentalization is emblematic of a larger problem in intellectual property law: the isolation of doctrinal analysis from the social realities of enforcement gaps.

A more holistic legal approach would treat counterfeit goods not only as infringements of commercial rights but as vehicles of human suffering and structural violence. Incorporating these concerns into trademark enforcement, including platform liability standards, would not only align with principles of justice but may also enhance deterrence and public support for anti-counterfeiting efforts.

IV. COUNTERFEIT CULTURE

“Counterfeiting is no longer confined to street-corners and flea markets.”¹¹¹

It is no secret that the rise of e-commerce has had a significant impact on both the prevalence of counterfeit products in the marketplace and the growing acceptance of such products.¹¹² Today, counterfeiting spans TikTok influencers promoting “the gate,”¹¹³ e-commerce storefronts advertising replicas as luxury “dupes,”¹¹⁴ and widespread consumer acceptance of imitation goods.¹¹⁵ In this Note, “Counterfeit Culture” refers specifically to the increasing popularity and acceptance of replica products.¹¹⁶

¹⁰⁹ See, e.g., *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹¹⁰ *Id.* at 107 (“For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.”).

¹¹¹ U.S. Dep’t of Homeland Sec., *supra* note 76 at 4.

¹¹² See, e.g., Khachatryan, *supra* note 4, at 251 (“[T]he rise of online marketplaces as a primary means of consumption has led to the rampancy of counterfeit culture in the digital age”); see also, U.S. Dep’t of Homeland Sec., *supra* note 76 at 20 (“While e-commerce has supported the launch of thousands of legitimate businesses, e-commerce platforms, third-party marketplaces, and their supporting intermediaries have also served as powerful stimulants for the trafficking of counterfeit and pirated goods.”).

¹¹³ See, e.g., Asia Miller Ware, *What It Takes to Shop DHGate: My Journey Through the Final Frontier of Dupes*, THE CUT: (Jun. 2, 2023), <https://www.thecut.com/2023/06/dh-gate-dupes-how-to-shop.html> [https://perma.cc/T2GK-UHEV] (noting that many TikTokers use “The Gate” as a nickname for DHGate to avoid being flagged by TikTok for promoting the online site famed for its replica products).

¹¹⁴ *Id.*

¹¹⁵ EUR. UNION INTELL. PROP. OFF. (EUIPO), INTELLECTUAL PROPERTY AND YOUTH SCOREBOARD (2022) [https://perma.cc/PP32-2NTN].

¹¹⁶ Reddit communities, like [r/FashionRep](#) and [r/LuxuryReps](#) use replicas to describe their counterfeit purchases and prompt each other to buy replicas rather than authentic products.

A. CONSUMER ATTITUDES AND “MENS REA”

Despite widespread awareness campaigns, many consumers knowingly purchase counterfeit goods with full awareness of their illegality.¹¹⁷ The number of consumers who knowingly purchase counterfeits is also rapidly increasing.¹¹⁸ Two studies by the European Union Intellectual Property Office (EUIPO) showed that the number of young people¹¹⁹ who had knowingly purchased counterfeit products in the prior twelve months prior increased from 14% in 2019 to 37% in 2022.¹²⁰ Research also indicates that consumer risk perception often focuses on superficial concerns, such as product quality, social embarrassment, or the risk of getting caught, rather than the broader ethical or legal implications.¹²¹ Consumers nevertheless rationalize¹²² their behavior to “morally justify the purchases.”¹²³ A 2020 EUIPO study found that nearly one-third of respondents believed counterfeit products were safe, and 17% of purchasers did not believe such purchases harmed legitimate businesses or jobs.¹²⁴ In the context of counterfeit consumption, rationalizations include framing such purchases as acts of protest against economic inequality, as acceptable when the authentic product is perceived as overpriced, or as harmless when quality is deemed irrelevant.¹²⁵ Some consumers even rationalize their purchases by portraying them as protests against the winners of capitalism: a study of attitudes in the United Kingdom suggests that more than half of consumers see counterfeit purchases as an act of protest.¹²⁶ The question then becomes whether the law can do anything to prevent such attitudes.

Taken together, these findings demonstrate that many counterfeit buyers act with sufficient knowledge and *mens rea* to warrant reconsideration of their legal liability — not as unwitting victims,¹²⁷ but as complicit participants in a criminal act. There is likewise little doubt that “dupe influencers,” who promote counterfeit products on their social media

¹¹⁷ See, e.g., Eur. Union Intell. Prop. Off., *supra* note 116; Peggy E. Chaudhry, *Dupe Influencers Exploiting Social Media to Peddle Luxury Fakes*, 65 BUS. HORIZONS 719, 724 (2022).

¹¹⁸ Eur. Union Intell. Prop. Off., *supra* note 115 at 6.

¹¹⁹ *Id.* at 18 (Defined in the studies as people aged 15-24 who resided in one of 27 European Union member states).

¹²⁰ *Id.* at 54.

¹²¹ Shepherd et al., *supra* note 75 at 1748.

¹²² *Id.* (establishing that “Rationalization is frequently identified as an antecedent factor in purchasing counterfeits”)

¹²³ *Id.* (explaining rationalization as “the psychological process involved in reconciling a person’s deviant behavior with normative ethical standards”).

¹²⁴ *Id.* (citation omitted).

¹²⁵ *Id.* at 1754.

¹²⁶ *Id.* at 1753.

¹²⁷ King, *supra* note 1, at 2250 (On buying counterfeit products where safety and standards matter: “The only people who would buy these items are those that were duped at the point of sale into thinking they were authentic. Consumers would not knowingly purchase counterfeit versions of these items unless they had a death wish.”)

platforms, play a central role in legitimizing counterfeit goods for their audiences.¹²⁸ As counterfeit culture becomes more socially acceptable, influencers have emerged not just as tastemakers but as active members in a global illicit economy.¹²⁹ Like platforms, they profit from the visibility and desirability of counterfeits,¹³⁰ and like traffickers, they facilitate illegal transactions.¹³¹ As such, a more robust enforcement framework should extend to influencers who knowingly and repeatedly promote counterfeit goods for profit.

V. CIVIL ENFORCEMENT IN THE PLATFORM-DRIVEN COUNTERFEIT ECONOMY

The counterfeit economy has been fundamentally transformed by the rise of digital platforms that enable illicit commerce at scale. These platforms have not only facilitated the global reach of counterfeit sellers¹³² but also profited directly from the visibility, transaction fees, and affiliate marketing associated with counterfeit activity.¹³³ Despite this entanglement, most platforms have managed to avoid legal liability by invoking narrow interpretations of contributory infringement.¹³⁴

This Part argues that current trademark-enforcement frameworks fail to account for the central role that platforms play in sustaining counterfeit culture.¹³⁵ Drawing on the doctrine of contributory liability established in *Inwood Laboratories, Inc. v. Ives Labs.*,¹³⁶ and later applied to online intermediaries in cases such as *Tiffany (NJ) Inc. v. eBay Inc.*,¹³⁷ this Part contends that platforms should bear responsibility when they knowingly allow, facilitate, or profit from counterfeit sales. It further explores how the legal standard for contributory trademark infringement could be updated to reflect the modern realities of online commerce, including the increasing use of algorithms, influencer partnerships, and embedded storefronts that directly promote counterfeit products.

¹²⁸ Chaudhry, *supra* note 117, at 724 (“A consumer may wait years to justify the price of a real Gucci purse (high involvement), but within minutes an influencer can persuade the consumer to purchase a counterfeit Gucci purse (low involvement) for a fraction of the genuine price.”); Shepherd et al., *supra* note 75 at 1754.

¹²⁹ See, e.g., Chaudhry, *supra* note 117, at 720.

¹³⁰ *Id.*

¹³¹ See, e.g., Chaudhry, *supra* note 117 at 720-21.

¹³² See, e.g., Khachatryan, *supra* note 4.

¹³³ Zheping Huang, *TikTok Has a Few Main Ingredients for Making Money*, BLOOMBERG (June 28, 2022), <https://www.bloomberg.com/news/newsletters/2022-06-28/how-does-tiktok-make-money-app-relies-on-a-few-main-ingredients> [<https://perma.cc/3K5T-QUDC>].

¹³⁴ See, e.g., *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹³⁵ U.S. Dep’t of Homeland Sec., *supra* note 77, at 22 (“The popularity of social media also helps proliferate counterfeits across various e-commerce platforms.”).

¹³⁶ *Inwood Labs. v. Ives Labs.*, 456 U.S. 844 (1982).

¹³⁷ *Tiffany (NJ) Inc. v. eBay, Inc.*, *supra* note 109, at 93.

A. CONTRIBUTORY INFRINGEMENT

In *Inwood*, the Supreme Court established the foundational standard for contributory trademark infringement, holding that a party can be held liable if it “intentionally induces another to infringe a trademark, or continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.”¹³⁸ Under this framework, the focus is on actual knowledge of infringing conduct or willful blindness to that conduct.¹³⁹ However, when applied to digital platforms like eBay or Amazon, this standard appears inadequate to address the pervasive role these platforms play in facilitating counterfeit trade.¹⁴⁰

In *Tiffany (NJ) Inc. v. eBay Inc.*, the Second Circuit held that eBay could not be held liable for contributory trademark infringement because Tiffany failed to show that eBay had “actual knowledge” of specific counterfeit items being sold on its platform.¹⁴¹ The court emphasized that eBay’s general awareness of counterfeit listings did not meet the high threshold of knowledge required for liability. Although that decision was consistent with the *Inwood* standard, it highlights a critical gap in current law: while platforms may know that counterfeit goods are widely available on their sites, they are often able to avoid liability by invoking the safe harbor provisions under the Digital Millennium Copyright Act (DMCA)¹⁴² or by maintaining that they lacked specific knowledge of individual infringements.¹⁴³

Furthermore, online platforms often use algorithms and automated systems to recommend counterfeit goods based on users’ searches or past purchases,¹⁴⁴ and social-media platforms such as Instagram and TikTok facilitate the sale of counterfeit items through affiliate marketing, paid promotions, and in-app purchases.¹⁴⁵ These platforms profit from every paid promotion and in-app purchase.¹⁴⁶ Such actions go beyond the passive hosting of third-party content and constitute active involvement in the dissemination of counterfeit products. Yet under the current knowledge standard set by *Inwood* and reinforced by *Tiffany*, platforms can escape

¹³⁸ *Inwood Labs v. Ives Labs.*, *supra* note 136, at 852.

¹³⁹ *Id.*

¹⁴⁰ U.S. Dep’t of Homeland Sec., *supra* note 76, at 22.

¹⁴¹ *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹⁴² U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: RESOURCES ON ONLINE SERVICE PROVIDER SAFE HARBORS AND NOTICE-AND-TAKEDOWN SYSTEM (May 21, 2020) (“Section 512 contains limitations on liability—referred to as safe harbors— for four types of online service providers. The safe harbors shield qualifying online service providers from monetary liability for copyright infringement based on the actions of their users, in exchange for cooperating with copyright owners to expeditiously remove infringing content and meeting certain conditions.”).

¹⁴³ *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 109 (2d Cir. 2010).

¹⁴⁴ Huang, *supra* note 133.

¹⁴⁵ See, e.g., Huang, *supra* note 133.

¹⁴⁶ See, e.g., Mega Digital, *How Does TikTok Make Money? 2026 Full Monetization Guide*, MEGA DIGITAL.AI (Mar. 11, 2024), <https://megadigital.ai/en/blog/how-does-tiktok-make-money/> [<https://perma.cc/E8BZ-GW9J>].

liability by arguing that they lack "actual knowledge" of individual infringing items. Compare that to landlord liability in analogous cases. Critics of platform contributory liability distinguish landlords from online platforms by arguing that "landlords may be less culpable than their tenants, if they are aware of, complicit in, and indirectly profiting from the sale of infringing goods, they are not free from blame."¹⁴⁷ That argument falls short in 2025, when platforms such as TikTok have become the go-to-app for information about where to find the best dupes-or buy them directly.¹⁴⁸

B. RECOMMENDATIONS FOR THE FUTURE

The current safe harbor protections under the DMCA¹⁴⁹ should be amended to remove immunity for platforms that are found to have substantial notice of counterfeit activity but fail to act. Safe harbor should apply only to platforms that demonstrate genuine efforts to combat the sale of counterfeit goods, including robust anti-counterfeit technology, proactive monitoring systems, and the removal of counterfeit listings upon notice. Platforms that act as "marketplaces" for counterfeit goods, whether through direct listings, affiliate marketing, or promotion via algorithms, should bear at least shared liability for the illegal activities that occur on their networks.

C. WHY SCHEDULE A IS A NECESSARY TOOL

As discussed in Section IV, counterfeiters frequently operate as part of large illegal networks, enabling them to remain highly adaptive by rapidly opening new accounts on e-commerce and social-media platforms and just as readily abandoning or migrating those operations to avoid detection. This adaptability has forced litigators to confront a persistent enforcement dilemma: "those who deal in counterfeits make it a practice to destroy or transfer counterfeit merchandise when a day in court is on the horizon."¹⁵⁰ Thus, ordinary civil procedure, which requires notice, service of process, and an adversarial exchange before meaningful relief is granted,¹⁵¹ is inadequate against agile networks of counterfeiters.¹⁵²

¹⁴⁷ King, *supra* note 1, at 2251 (arguing that landlords should be held liable, but online marketplaces should not).

¹⁴⁸ See, e.g., Miller Ware, *supra* note 113.

¹⁴⁹ U.S. COPYRIGHT OFF., *supra* note 142.

¹⁵⁰ *Vuitton v. White*, 945 F.2d 569, 575 (3d Cir. 1991) (citing Joint Statement, 130 CONG. REC. at H12080 and note that this is from the 130th Congress (1984) long before the internet revolutionized counterfeiting).

¹⁵¹ Eric Goldman, *A Sad Scheme of Abusive Intellectual Property Litigation*, 123 COLUM. L. REV. F. 183, 197 (2023).

¹⁵² Paolo Beconcini, *Why Dismantling Schedule A Would Hand a Victory to Counterfeiters*, LINKEDIN BLOG (Aug. 18, 2025), <https://www.linkedin.com/pulse/why-dismantling-schedule-would-hand-victory-paolo-beconcini-17z3f/> [https://perma.cc/H4FZ-YX3W] (noting that "[c]ounterfeiting is an exceptional circumstance — defendants routinely destroy evidence, transfer funds, and vanish once alerted.").

In response, some courts have allowed “Schedule A”¹⁵³ lawsuits where “rightsowners bring lawsuits on an ex parte basis and obtain injunctions that freeze the merchant’s relationship with online marketplaces.”¹⁵⁴ Schedule A litigation is best understood not as a source of authority, but as a court-developed enforcement framework that operates within the bounds of established procedural rules and doctrines, including the temporary restraining orders under Federal Rule 65(b),¹⁵⁵ the Lanham Act’s ex parte seizure provisions,¹⁵⁶ and courts’ inherent equitable power to prevent irreparable harm and asset dissipation.¹⁵⁷

However, Schedule A litigation has drawn criticism from both judges and legal scholars. In *Eicher Motors Ltd. v. Partnerships & Unincorporated Associations Identified on Schedule "A,"* Judge John F. Kness expressed concern about how Schedule A cases have “inundated judges’ dockets” in the U.S. District Court of the Northern District of Illinois,¹⁵⁸ the federal district court with the highest number of such suits.¹⁵⁹ In the opinion, Judge Kness cites a journal article by Professor Eric Goldman arguing that Schedule A suits “create an environment in which rightsowners can nominally follow the rules and yet achieve abusive and extortive outcomes.”¹⁶⁰

Criticism of Schedule A litigation centers on two principal concerns: procedural abuse¹⁶¹ and insufficient justifications for asset restraints.¹⁶² The procedural-abuse critique focuses on misjoinder and the potential prejudice to defendants, as critics worry Schedule A invites strategic overreach by plaintiffs.¹⁶³ In particular, critics such as Judge Kness and Professor Goldman argue that Schedule A litigation contorts Rule 20 of the Federal Rules of Civil Procedure by grouping together sellers who allegedly operate independent storefronts and have no demonstrated transactional relationship beyond the use of similar marks or shared online

¹⁵³ “Schedule A” refers to the attachment to the complaint in which the plaintiff lists the (often) hundreds of defendants. See Goldman, *supra* note 151, at 184.

¹⁵⁴ Goldman, *supra* note 151, at 185.

¹⁵⁵ See Fed. R. Civ. P. 65(b); see also *Eicher Motors Ltd. v. P’ships & Unincorporated Ass’ns Identified on Schedule "A,"* 794 F. Supp. 3d 543, 551 (N.D. Ill. 2025).

¹⁵⁶ *Eicher Motors Ltd.*, 794 F. Supp. 3d., at 550 n.5 (noting in footnote that “[i]n trademark cases, the Lanham Act ‘expressly allows ex parte seizures’ in cases involving allegations relating to tangible counterfeit goods.”).

¹⁵⁷ *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308, 336 (1999) (Ginsburg, J., dissenting) (“[A] court of equity has unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties.”) (citation omitted).

¹⁵⁸ *Eicher Motors Ltd.*, 794 F. Supp. 3d., at 551.

¹⁵⁹ Goldman, *supra* note 151, at 195 (noting that cases in copyright, patent, or trademark with the term “Schedule A” listed as parties in a search done by the author showed that 88% of these were filed in the Northern District of Illinois.)

¹⁶⁰ *Eicher Motors Ltd.*, 794 F. Supp. 3d., at 555.

¹⁶¹ Goldman, *supra* note 151, at 197.

¹⁶² *Eicher Motors Ltd.*, 794 F. Supp. 3d., at 553.

¹⁶³ Goldman, *supra* note 151, at 198.

infrastructure.¹⁶⁴ They further argue that similarity of infringement alone is insufficient to justify joinder under traditional joinder doctrine.¹⁶⁵ In addition, critics maintain that Schedule A allows plaintiffs to circumvent ordinary filing fees, causing the government to lose revenue.¹⁶⁶ According to Goldman, “[i]f 200 defendants are improperly joined in a single complaint, the government loses \$80,000 in potential filing fees,” totaling more than \$250 million across the 3,200 Schedule A cases in federal courts.¹⁶⁷

The second concern is that prejudgment or ex parte asset restraints are unwarranted in Schedule A cases.¹⁶⁸ As part of Schedule A filings, “plaintiffs routinely seek an ex parte prejudgment freeze of defendants’ assets at the outset of the case.”¹⁶⁹ These requests are based on the concern that no equitable recovery will be available at the conclusion of the case unless assets are frozen before defendants receive notice.¹⁷⁰ However, in *Zorro Productions, Inc. v. Individuals*, Judge Seeger noted that equitable recovery “almost never happens” in Schedule A counterfeit cases because plaintiffs “typically don’t request and receive equitable monetary relief.”¹⁷¹ Instead Judge Seeger concluded, plaintiffs “rush into court, request and receive an asset freeze, and obtain a default judgment.”¹⁷² After receiving a default judgment, plaintiffs then request that the funds be unfrozen and that they be awarded statutory damages.¹⁷³ Judge Kness agreed with Judge Seeger’s comments, describing asset freezes at the outset of litigation as a “coercive goal in and of itself because, if obtained, the freeze immediately locks down defendants’ assets.”¹⁷⁴ In turn, that may cause “severe or fatal cash-flow problems for the defendant, which may not be able to pay its vendors, employees, or lawyers,” thereby forcing defendants to settle.¹⁷⁵

While concerns about the potential abuse of Schedule A litigation are understandable, many such critiques rest on an implicit assumption that Schedule A defendants are independent, small-scale online sellers.¹⁷⁶ That assumption fails to account for the prevalence of organized, foreign-based

¹⁶⁴ *Id.*

¹⁶⁵ Goldman, *supra* note 151, at 198 (referring to Fed. R. Civ. P. Rule 20 which allows joinder when defendants arise out of the same transaction or occurrence: “[D]efendants who are independently ...infringing the rightsowner’s IP rights in parallel with each other in the same marketplace do not satisfy this standard.”); *see also* Eicher Motors Ltd. v. P’ships & Unincorporated Ass’ns Identified on Schedule “A”, 794 F. Supp. 3d 543, 556 (N.D. Ill. 2025).

¹⁶⁶ Goldman, *supra* note 151, at 199.

¹⁶⁷ *Id.*

¹⁶⁸ Eicher Motors Ltd., 794 F. Supp. 3d., at 553.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Zorro Prods., Inc. v. Individuals*, No. 23-cv-5761, 2023 U.S. Dist. LEXIS 226550, at 10 (N.D. Ill. Dec. 20, 2023).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Eicher Motors Ltd., 794 F. Supp. 3d., at 553.

¹⁷⁵ Goldman, *supra* note 151, at 191.

¹⁷⁶ Goldman, *supra* note 151, at 186.

counterfeit networks in online marketplaces.¹⁷⁷ When Judge Kness and Judge Seeger characterize Schedule A litigation as a mechanism through which plaintiffs seek to coerce settlement or default, their framing presumes defendant behavior that is inconsistent with how counterfeit operations function in practice.¹⁷⁸ Counterfeit channels are routinely abandoned and reconstituted across platforms, such that “when [channels] are closed down, they are quickly replaced and the counterfeiting activity continues.”¹⁷⁹

Similar assumptions underlie Professor Goldman’s critique. Although he acknowledges that some defendants may fail to appear because they “infringed and know [they] would lose in court,” his analysis largely treats nonappearance as a product of judicial restraint or asset freezes.¹⁸⁰ In practice, however, counterfeit defendants often ignore lawsuits altogether because they operate as criminal organizations, and even if afforded full procedural protections “they would not appear in a court to defend themselves.”¹⁸¹ From this perspective, dismantling Schedule A would eliminate one of the few efficient and scalable mechanisms capable of disrupting counterfeit networks that deliberately exploit the delays and formalities of the U.S. legal system.¹⁸² Furthermore, such a result would disserve the public interest by impeding efforts to “remove dangerous, low-quality, or fraudulent goods from commerce.”¹⁸³

VI. CRIMINAL LIABILITY IN THE AGE OF COUNTERFEIT CULTURE

The modern counterfeit economy demands a recalibration of legal responsibility. As this Note has demonstrated, counterfeit consumption is no longer confined to hidden corners of commerce,¹⁸⁴ nor is it driven exclusively by deception. Consumers often knowingly purchase counterfeit goods,¹⁸⁵ influencers profit by promoting them,¹⁸⁶ and platforms facilitate and monetize the exchange.¹⁸⁷ Despite this evolution, the legal framework remains rooted in outdated assumptions about who bears culpability.¹⁸⁸ This Part proposes a set of legal reforms designed to reflect the realities of

¹⁷⁷ U.N. Off. on Drugs and Crime, *supra* note 77, at 2.

¹⁷⁸ *How Large-Scale Counterfeit Networks Operate*, CORESEARCH (Jul. 27, 2018), <https://corsearch.com/blogs/how-large-scale-counterfeit-networks-operate> [<https://perma.cc/KZ7J-ZC9K>] (describing the structure and tactics of transnational counterfeit networks).

¹⁷⁹ *Id.*

¹⁸⁰ Goldman, *supra* note 151, at 192.

¹⁸¹ Beconcini, *supra* note 152.

¹⁸² Beconcini, *supra* note 152.

¹⁸³ Beconcini, *supra* note 152.

¹⁸⁴ Dep’t of Homeland Sec., *supra* note 76 at 4.

¹⁸⁵ Eur. Union Intell. Prop. Off., *supra* note 115.

¹⁸⁶ Khachatryan, *supra* note 4.

¹⁸⁷ See, e.g., Shepherd et. al., *supra* note 75; see also Huang, *supra* note 133.

¹⁸⁸ S. REP. NO. 98-526, at 3 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627.

counterfeit culture and to expand criminal liability across the chain of facilitation — from consumers to influencers to platforms.

A. EXPANDING CRIMINAL LIABILITY FOR DUPE INFLUENCERS

As discussed above, the traditional justification for limiting criminal liability to producers and traffickers rests on the false assumption that counterfeit purchasers are unwitting victims of deception.¹⁸⁹ More concerning, however, is the rise of social-media influencers who do not simply consume counterfeit goods but actively promote them for profit.¹⁹⁰ Through affiliate links, sponsored content, and tutorial videos, influencers act not as personal consumers but as commercial intermediaries who normalize counterfeiting and drive traffic to known counterfeit sellers.¹⁹¹ These actions move beyond personal use and into the realm of trafficking, albeit through a modernized-digital lens. Yet current criminal enforcement does not account for this category of actors, who fall between the cracks of consumer protection and producer liability.

However, the discourse surrounding the TCA at the time of enactment reflects Congress's intent to impose criminal liability on traffickers.¹⁹² The TCA requires “two mental states” before it may be enforced against an actor: (1) the “intent” to traffic and (2) the “knowledge” that the product is counterfeit.¹⁹³ As this Note has shown, both are present when social-media influencers market counterfeit products. That is important because critics may argue that expanding enforcement and liability to include influencers will cause innocent parties to be prosecuted, but Congress stated when enacting the TCA: “The mental state standards chosen by the Committee are designed to ensure that no innocent person could be held liable under this bill.”¹⁹⁴ A revised § 2320¹⁹⁵ should explicitly address digital intermediaries, including influencers, affiliate marketers,

¹⁸⁹ See, e.g., King, *supra* note 1 at 2250 (On buying counterfeit products where safety and standards matter: “The only people who would buy these items are those that were duped at the point of sale into thinking they were authentic. Consumers would not knowingly purchase counterfeit versions of these items unless they had a death wish.”).

¹⁹⁰ S. REP. NO. 98-526, at 11 (1984), as reprinted in 1984 U.S.C.C.A.N. 3638 (explaining that individuals are currently not liable under the law (TCA) because purchases for personal use are best handled under the Lanham Act according to Congress, but a lot has changed since 1984, and the rise of influencers now indicate a new area where individuals are both shopping for personal use but are also promoting these practices to others: “The bill is not intended to reach private individuals who purchase counterfeit goods or services solely for their own personal use. The Committee believes that any trademark issues that may arise with regard to the above practices can best be resolved within the context of the Lanham act and other pertinent statutes.”)

¹⁹¹ Chaudhry, *supra* note 128, at 720, 723.

¹⁹² S. REP. NO. 98-526, at 11 (1984), as reprinted in 1984 U.S.C.C.A.N. 3627, 3638.

¹⁹³ *Id.*

¹⁹⁴ *Id.* (“In choosing these standards, the Committee determined that a ‘reckless’ standard would be too low. Such a test would permit a finding of liability even if the defendant did not intend to traffic in the goods or services in question, or did not know that the goods or services were counterfeit.”)

¹⁹⁵ 18 U.S.C. § 2320.

and brand ambassadors who knowingly promote counterfeit goods so that those acts qualify as enforceable “trafficking.” By conditioning criminal liability on knowledge and profit motive, such an amendment would avoid sweeping in casual users while holding accountable those who profit from the proliferation of counterfeit culture.¹⁹⁶ Additionally, enforcement against certain high-profile dupe influencers may help educate other influencers on their criminal liability.¹⁹⁷ If nothing else, enforcement against certain influencers can deter other aspiring influencers from peddling products from “the yellow app.”¹⁹⁸

B. FREE SPEECH ARGUMENTS

Critics may argue that imposing criminal liability on influencers who promote replica items on social media implicates First Amendment protections.¹⁹⁹ However, concerns about criminalizing speech are largely misplaced. The proposed changes target conduct, not expression. Influencers would not face liability for discussing luxury fashion, reviewing trends, or criticizing brand pricing. Liability would attach only when an individual knowingly promotes counterfeit goods with the intent to profit, thereby satisfying the same intent and knowledge requirements that already govern criminal trademark trafficking under § 2320.²⁰⁰ Courts have long distinguished between protected speech and commercial conduct that facilitates illegal transactions,²⁰¹ and influencer promotion through affiliate links or paid endorsements falls squarely within the latter category.

C. EXPANDING CRIMINAL LIABILITY FOR CONSUMERS

Because many consumers know that they are purchasing counterfeit goods and rationalize their behavior as economically justified, ethically neutral, or even politically expressive, there is substantial evidence supporting the conclusion that consumers satisfy both mental states required by § 2320.²⁰² However, because the TCA was specifically intended not to cover “personal use,” consumers can avoid liability.²⁰³ That may have been appropriate in 1984 when counterfeit goods had not yet proliferated and consumers were more knowledgeable, but it falls short in today. To address

¹⁹⁶ S. REP. NO. 98-526 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3627.

¹⁹⁷ Chaudhry, *supra* note 128 at 720 (noting that “dupe influencers may not understand the legal penalties involved in promoting the sale of counterfeits”); *but also* Chaudhry at 720 (“To counter this trend, other influencers are attempting to educate their followers about the illegality of selling counterfeits and about the bad actors associated with this illicit trade.”)

¹⁹⁸ Users on social media often refer to DHgate, a site known for selling counterfeit products as “the yellow app,” referencing its yellow logo, to avoid being flagged by the platform.

¹⁹⁹ U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”)

²⁰⁰ 18 U.S.C. § 2320.

²⁰¹ *See, e.g.,* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

²⁰² 18 U.S.C. § 2320.

²⁰³ S. REP. NO. 98-526, at 3 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3627, 3629.

this gap, Congress should consider amending 18 U.S.C. § 2320 to include tiered criminal liability based on consumer intent and profit motive. A one-time purchase of a counterfeit product for personal use, while ethically questionable, should not trigger the same criminal consequences as systematic resale or monetized promotion. However, consumers who repeatedly engage in counterfeit transactions, particularly those involving resale, online storefronts, or influencer promotion, should face misdemeanor liability, escalating to felony charges for sustained commercial conduct. This approach mirrors other areas of criminal law in which knowledge, intent, and repetition elevate the severity of the offense, such as drug possession versus trafficking.²⁰⁴

Additionally, “with the absence of penalties for consumers, purchasers in the United States have no incentive to stop buying counterfeit luxury goods and thus continue to play a substantial role in driving counterfeit supply.”²⁰⁵ Compare that with France, where consumers may be fined up to 300,000 euro for carrying counterfeit products or importing them into the country.²⁰⁶ French consumers and tourists are also educated about the dangers and consequences of owning counterfeit products through public campaigns.²⁰⁷ Similarly, in Italy, consumers can get up to two years in prison or a 10,000-euro fine for possessing a counterfeit product.²⁰⁸ And, as established in Section III, Italy appropriately treats counterfeiting as the security threat that it is.²⁰⁹ If the United States is serious about curbing intellectual-property theft, end-user penalties are essential. This author agrees that the United States should “enact a law that imposes a substantial monetary fine on those who purchase counterfeit goods when he or she knows, or should know, that the product is counterfeit.”²¹⁰

VII. CONCLUSION

Counterfeiting is no longer a fringe issue confined to back alleys, shady manufacturers, and duped consumers. It is a global, normalized, and digitally fueled industry that appears to thrive on mass participation,

²⁰⁴ 21 U.S.C. § 841(b); see also *United States v. Bell*, No. 23-11666, 2025 U.S. App. LEXIS 757, at 4 (11th Cir. Jan. 14, 2025) (concluding that the quantity of illicit product possessed will differentiate between personal use and intent to distribute (“A reasonable jury could also infer intent to distribute the methamphetamine because the quantity discovered, about three kilograms, exceeded the amounts typical of personal use.”)).

²⁰⁵ Dianna Michelle Martínez, *Fashionably Late: Why the United States Should Copy France and Italy to Reduce Counterfeiting*, 32 B.U. INT’L L.J. 101, 111 (2014).

²⁰⁶ *Id.* at 116.

²⁰⁷ Hayley Phelan, *New French Anti-Counterfeit Campaign Reminds Tourists That Knockoffs Could Get You Three Years in Jail*, FASHIONISTA (May 23, 2012), <https://fashionista.com/2012/05/new-french-anti-counterfeit-campaign-reminds-tourists-that-knockoffs-could-get-you-three-years-in-jail> [<https://perma.cc/F9M7-3LVE>].

²⁰⁸ Martínez, *supra* note 205, at 120.

²⁰⁹ Galli, *supra* note 96.

²¹⁰ Martínez, *supra* note 205.

minimal deterrence, and outdated enforcement frameworks. While American trademark law has evolved over centuries²¹¹ to protect commercial interests, it has failed to keep pace with the realities of modern counterfeit culture—a culture where consumers often know exactly what they are buying,²¹² influencers promote illicit goods for profit,²¹³ and platforms reap financial rewards while disclaiming responsibility.²¹⁴

This Note has argued that effective legal reform must address all tiers of the counterfeit ecosystem. That means not only holding producers and traffickers accountable but also extending civil and criminal liability to repeat consumers, profit-seeking influencers, and online platforms that knowingly facilitate infringement. Existing legal tools, such as the Lanham Act and 18 U.S.C. § 2320, must be updated to reflect the decentralized, algorithm-driven nature of modern commerce. Similarly, contributory infringement doctrine must evolve to treat platforms not as passive conduits but as active participants in a marketplace of infringement.

Reframing counterfeiting as a public harm, rather than a brand-protection issue, will enable more holistic enforcement strategies that emphasize consumer safety, labor rights, and economic integrity. By expanding the scope of liability, policymakers can begin to shift cultural attitudes and disincentivize the casual acceptance of illegal goods. Criminalizing intentional, profit-driven participation in the counterfeit economy is not excessive—it is necessary. As counterfeiting grows more sophisticated and socially accepted, the law must adapt not only to punish but also to prevent. The future of intellectual-property enforcement depends on our willingness to confront the full scope of counterfeit culture and to demand accountability from all who sustain it.

²¹¹ See generally Part II *supra*.

²¹² Eur. Union Intell. Prop. Off., *supra* note 115.

²¹³ See, e.g., Shepherd et. al., *supra* note 75; see also Chaudhry, *supra* note 117 at 720, 723.

²¹⁴ See Huang, *supra* note 133; see also Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93 (2d Cir. 2010).

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