Serving Only to Oppress: An Intersectional and Critical Race Analysis of Constitutional Originalism Inflicting Harm

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Serving Only to Oppress:  
An Intersectional and Critical Race Analysis of Constitutional Originalism Inflicting Harm

Ethan Dawson*

“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”

- Justice Anthony Kennedy, Lawrence v. Texas (2003)\(^1\)

This Note will first focus on a historical analysis of originalist constitutional interpretation, drawing attention to initial disparities in the Constitution incompatible with our current social context. It will discuss modern originalism as a method of perpetuating systemic shortcomings, drawing specific attention to originalist interpretation as a method of oppression against white women and people of color, specifically Black women.\(^2\) In analyzing the harm originalism does to those communities, this Note will utilize a Critical Race Theory analysis and intersectional framework concerning the oppression of Black women in Texas through three distinct disparities rooted in originalism: (1) voter disenfranchisement through discriminatory voting restrictions, (2) vote disempowerment through gerrymandering, and (3) restrictions on bodily autonomy through strict abortion laws.

I. DISPARITIES OF THE CONSTITUTION AND ORIGINALISM

A. What Are the Historic Inequalities of the Constitution?

“Originalism maintains that courts ought to interpret constitutional provisions solely in accordance with some feature of those provisions’ original character.”\(^3\) This application is demonstrated in the jurisprudence of U.S. Supreme Court Justice Antonin Scalia, who described the Constitution that he “interpret[ed] and appli[ed] as not living, but dead.”\(^4\) Justice Scalia elaborated that the Constitution “means today not what current society —much less the courts— thinks it ought to mean, but what it meant when it was adopted.”\(^5\) This view of constitutional interpretation is popular with modern conservatives and remains a dominant method of interpretation in the Roberts Court, with Justice Amy Coney

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\(^1\) Lawrence v. Texas, 539 U.S. 558, 579 (2003).

\(^2\) This Note will differentiate Black women from the broader term “people of color” to focus on the intersection of oppression that particularly affects Black women.


\(^5\) *Id.*
Barret as the latest addition of originalist practitioners.\(^6\) Justices Brett Kavanaugh and Neil Gorsuch, preceding appointees to the high Court by President Donald Trump, are similarly minded.\(^7\) In practice, this means that a substantial portion of the current Supreme Court believes in a “dead”\(^8\) Constitution, insulated from the shared 233 years of history and social growth since the Constitution was ratified.

Originalism comes in different varieties, and Justice Gorsuch may very well approach the methodology through a different lens than Justice Scalia did, and the same can be said for the other justices. There are originalists in Justice Scalia’s style,\(^9\) but there are proponents of new or “positivist originalism” as well, such as William Baude at the University of Chicago.\(^10\) Some focus on the intent of the drafters, others on original public meaning, and still others look to corpus linguistics to source how the words of the Constitution were used at the time it was written.\(^11\) Originalism is a hotly debated area of constitutional interpretation, with some theorists claiming that judges can and should reach progressive results through originalist means.\(^12\) Plenty of talented legal scholars have argued that unenumerated rights, such as abortion, should be housed under the Fourteenth Amendment, and there are well-reasoned originalist arguments to that effect.\(^13\) However, in arguing a progressive form of originalism, these scholars are emblematic of the general flaw in originalism: judges are always going to make

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\(^8\) Meant as Justice Scalia used the term, to say that the words and meaning of the Constitution were set at the founding and have not changed or adapted since.


\(^13\) See generally Jack M. Balkin, *Living Originalism* 220–73 (2011); Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019); Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter & Spirit* (2021) (supporting unenumerated rights interpretations under the 14th Amendment, with Barnett and Bernick specifically framing the Fourteenth Amendment as diametrically opposed to the effects of chattel slavery and, therefore, specifically broad enough to encompass the redress of the fundamental rights suppressed by slavery).
value judgments in how they interpret the law. When Justice Gorsuch selects which dictionary to use in determining what a word in a statute means, it is value judgment in action. Each judge will approach the analysis in their own way, bringing their own values and beliefs to the task of divining the intention of lawmakers from centuries ago. Those claiming that originalism is devoid of bias give far too much credit to a methodology that fails to adequately account for the many populations left out of the Constitution's drafting, who nonetheless find themselves governed by it.

If originalism simply applies the law scientifically and without bias, then why is it that judges who claim to practice originalism produce outcomes that meet a conservative policy agenda? Because originalism, as it is practiced, is inherently political, and it always has been. Originalism rose to prominence “directly out of political resistance to Brown v. Board of Education by conservative governing elites, intellectuals, and activists in the 1950s and 1960s.” Supposed judicial activism by the Warren Court was met with a countervailing push to rein in the Court and bind its decisions more closely to the “original meaning” of the Constitution. Originalism came into being as a response to judges like those on the Warren Court reading the Constitution as protecting more than the wealthy white elite it was written by. To ignore the origin and political nature of originalism is to deal in good faith with an ideology that is, at best, an act of resistance to a modern pluralistic society and, at worst, predisposed to justifying racial animus.

Originalist constitutional interpretation purports to rely upon the words of the Constitution at the time they were written. For the original framework of the Constitution and the Bill of Rights, the words were written by wealthy white men, mostly of English or European descent, many of whom were slaveowners. No women of any race were included in the process, and there was no representation by the breadth of groups that make up the modern American society, nor of the non-


16 See Robert Post & Reva Siegal, Originalism As a Political Practice: The Right’s Living Constitution, 75 FORDHAM L. REV. 545, 554-557 (2006) (“The political practice of originalism thus reflected (and continues to reflect) conservative commitments that are not determined by objective and disinterested historical research into the circumstances of the Constitution’s ratification.”)


18 Id. at 822.

19 Id. at 822; see generally Jamal Greene, Originalism’s Race Problem, 88 DENN. U. L. REV. 517 (2011) (emphasizing the function of originalism in diminishing


22 civil-war.
landowning lower social classes of that era.\textsuperscript{22} Ideals of self-determination and freedom were trumpeted during the Revolutionary War,\textsuperscript{23} but not so enshrined in the subsequent government as to extend democratic rights to \textit{all} Americans. Our staunch ally in the revolution, the Frenchman Marquis de Lafayette, is quoted having said, “I would never have drawn my sword in the cause of America, if I could have conceived that thereby I was founding a land of slavery.”\textsuperscript{24} His disappointment in our nation’s founding is a poignant analogy to the disappointment in the lackluster execution of the Thirteenth, Fourteenth, and Fifteenth Amendments, collectively known as the Reconstruction Amendments.\textsuperscript{25} Ambitious intention, radical for its day, is betrayed by originalist judges who honor text above values, just as the values of the revolution were betrayed by the continuance of slavery.

Justice Thurgood Marshall noted this incongruence in a speech at the bicentennial of the Constitution, stating that the government it created “was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”\textsuperscript{26} This view of the Constitution is informed by the fact that the same founders who wrote of all men being created equal created a nation of inequality. It took seventy-seven years and a bloody civil war before the Thirteenth Amendment was considered and ratified, formally ending chattel slavery of African Americans.\textsuperscript{27} Women waited 132 years for the Nineteenth Amendment to be ratified in 1920, giving \textit{some} women the right to vote.\textsuperscript{28} Modern society might blush at our history of school segregation, poll taxes, or bans on interracial marriage, yet such practices were perfectly legal under the Constitution for most of our nation’s history.\textsuperscript{29} These practices have now been found unconstitutional, and the question raised by such decisions is: when did facially discriminatory laws such as these become unconstitutional? Are we to accept that the timing of the amendment sets the implications of the amendment in stone?

During oral argument in \textit{Hollingsworth v. Perry}, Justice Scalia and lawyer Theodore Olson debated these same questions. When Justice Scalia asked when it had become unconstitutional to exclude homosexual couples from marriage, Olson responded by asking, “When did it become unconstitutional to prohibit interracial


\textsuperscript{26} Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987).

\textsuperscript{27} U.S. CONST. amend. XIII.

\textsuperscript{28} U.S. CONST. amend. XIX. \textit{But see} Indian Citizenship Act of 1924, 8 U.S.C. § 1401b (1924) (granting Native Americans, including Native American women, the right to vote four years after the passage of the Nineteenth Amendment).

marriages? When did it become unconstitutional to assign children to separate schools[?])”

While Justice Scalia answered by pointing to the adoption of the Equal Protection Clause in the Fourteenth Amendment, the cases where these practices were formally repudiated did not come for nearly a century after the ratification of the Fourteenth Amendment. The Thirty-Ninth Congress, which drafted and passed the Fourteenth Amendment, looked much the same demographically as the Founders who drafted the original ten amendments: white, land-owning men of European descent. The exception, however, was a greater representation of immigrants within their ranks than in the Founders’ era.

That representation is reflected in the inclusion of the Citizenship Clause of the Fourteenth Amendment, which guaranteed “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.” Representation of historically marginalized groups, in this instance immigrants, led to further protections for that group being explicitly enshrined in the Constitution. The legislative intent behind the remainder of the Fourteenth Amendment, however, does not suggest inclusivity so broad as to be accepting of the modern-day applications. Those applications grew out of the Fourteenth Amendment, not constrained by its drafters’ times, but emboldened by the Amendment’s spirit and in reaction to changing social values. In the legislative comments of the Thirty-Ninth Congress, representatives debated whether Congress had the power to enforce civil rights at all or whether President Andrew Johnson’s position of state-led Reconstruction was more proper. The legislators during Reconstruction “passed laws that were far more sweeping than many members of Congress may have realized at the time.” In expanding upon the protections of the original Constitution, the Reconstruction Amendments set forth what some scholars call a second founding. In explicitly rejecting slavery, the drafters of those amendments rejected a practice that was purposefully allowed in the original protections of the Constitution. The original intent was rejected in recognition of changing times.

31 Heffernan, supra note 30, at 346–47.
34 U.S. CONST. amend. XIV, § 1; Epps, supra note 33.
35 Epps, supra note 33, at 447–57 (comparing President Johnson’s defense of state-led reconstruction, justified as “eleven States are not at this time represented in either branch of Congress, it would seem to be [Johnson’s] duty, on all proper occasions, to present their just claims to Congress” with Rep. Thaddeus Stevens’s pursuit of reform led by Congress so “that no distinction would be tolerated in this purified Republic but what arose from merit and conduct”).
36 Id. at 439–40.
38 See generally FONER, supra note 13 (describing Reconstruction as a second American founding).
Despite his usual credo of originalism, Justice Scalia pointed to the Fourteenth Amendment as the moment in which school segregation and bans on interracial marriage became unconstitutional. In doing so, he correctly finds the validity of these implicated rights within the Fourteenth Amendment but draws the validity of those rights from the text as opposed to the spirit. It is not enough to stretch the words of the Fourteenth Amendment to cover only certain groups, limited by whatever parts of society the court of that era deems acceptable to protect. The spirit of the amendment would see far fewer groups left in the cold. In minimizing the spirit of the Reconstruction Amendments via originalism and textualism, a disservice is done in carrying out their intention.

Strict interpretations of the Fourteenth Amendment have not been sufficient to guarantee rights for those not represented among the Founders. Marginalized populations have instead had to seek out protections in the “emanations” and “penumbras” of the Constitution. In Griswold v. Connecticut, the Supreme Court found that the Constitution, while not explicitly detailing a right to privacy in its text, does include a right to marital privacy as implied in the Bill of Rights. This interpretation guaranteed individuals’ right to information regarding birth control, previously prohibited as obscene under Connecticut’s Comstock Law against the use of “any drug, medical device, or other instrument for the purpose of preventing conception.” From an originalist standpoint, such a reading of the Bill of Rights would be inappropriate. While the text of the Constitution is constrained by the time it was written, the ideals therein are closer to the “enduring” quality Justice Scalia lauded and can be applied today to correct the unequal foundations. The scope of those ideals should not be limited by the historical period in which the words were drafted. Instead, our modern reality must be applied in interpreting the principles and intention of the Constitution, allowing for protections to be shared with historically underrepresented groups. Only then would the Constitution be truly “enduring” for modern society.

B. Maintaining Inequalities

The application of originalism in the era of Griswold was not unique to laws regarding contraceptives. It was during that same period that cases on issues of

41 See generally Mark A. Graber, Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory, 62 ST. LOUIS U. L.J. 639, 643–44 (2018) (detailing the decision of the Supreme Court in Heart of Atlanta Motel v. United States as based on Congressional Commerce Clause powers rather than the Fourteenth Amendment).
43 See id. at 485-86.
44 Id. at 480.
45 Totenberg, supra note 4.
interracial marriage and segregation in public transit were decided.\textsuperscript{46} Both kinds of cases relied upon progressive interpretations of the Constitution to prohibit discrimination against ethnic minorities, applying the Constitution beyond the bounds of the time it was written.\textsuperscript{47} While the Supreme Court’s decision in \textit{Loving v. Virginia} was unanimous, the argument used by the Virginia Assistant Attorney General R.D. McIlwaine III was an originalist one. He claimed during oral argument that the legislative intent surrounding the Civil Rights Act of 1866, which preceded the Fourteenth Amendment’s ratification, did not suggest that the drafters of the Amendment meant it to protect a right to interracial marriage.\textsuperscript{48} Attorney General McIlwaine argued further that there was strong evidence as to interracial marriages being faced with “greater pressures and problems than those of the intra-married” and that Virginia was fulfilling a legitimate public policy interest in prohibiting such unions.\textsuperscript{49} The State’s concerns in this instance were mistaken and misguided; American society did not suffer from the Constitution protecting the right to interracial marriage.

Originalism in the modern era remains used in much the same way as it was during McIlwaine’s era. While during the 1960s the originalist argument would have seen the Court uphold a state ban on interracial marriage, the last three decades have similarly seen originalist arguments relied upon in opposition to same-sex marriage, same-sex conduct, and abortion rights, among other areas.\textsuperscript{50} When historically marginalized or disadvantaged groups seek equality in greater society, an originalist argument against such rights has been typical. It seems suspiciously convenient that conservative political ideology is detrimental to the same groups that originalist judges, typically appointed by conservatives, would see the Constitution “dead” in protecting.

Echoing McIlwaine’s arguments in \textit{Loving}, Justice Scalia relied heavily on originalist reasoning in his dissent in \textit{Obergefell v. Hodges}, the holding of which found that the Fourteenth Amendment protected the right to same-sex marriage.\textsuperscript{51} Justice Scalia assured the American people that the substance of the holding was “not of immense personal importance to [him]” but was nonetheless a “threat to American democracy” as it was a misappropriation of the Fourteenth Amendment to cover such liberties.\textsuperscript{52} As the social and political context in 1868 did not include same-sex marriage, Justice Scalia posited that the Framers of the Amendment


\textsuperscript{47} See \textit{Loving}, 388 U.S. at 1; Boynton v. Virginia, 364 U.S. 454 (1960).

\textsuperscript{48} See Oral Argument, \textit{Loving}, 388 U.S. at 1 (No. 395), https://www.oyez.org/cases/1966/395 (“No one who voted for, sponsored, or espoused the Civil Rights Act of 1866 dared to suggest that it would have the effect of invalidating state anti-miscegenation [sic] statutes.”).

\textsuperscript{49} Id.


\textsuperscript{52} Id. at 713 (Scalia, J., dissenting).
would not have intended it to be applied to guarantee that right. Substantively, this is the same argument McIlwaine asserted in *Loving*; the legislative history surrounding the Amendment suggests a narrower application than the Court's. Quick to name the Fourteenth Amendment as the moment interracial marriage bans or school segregation became unconstitutional, despite the legislative intent at the time, Justice Scalia borrows the originalist argument of McIlwaine but substitutes the marginalized group from which he would see rights deprived. The subsequent threat to American democracy from the *Obergefell* holding has been consistent with that seen after *Loving*—nonexistent.

Justice Kennedy wrote for the majority in *Lawrence v. Texas* that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Yet Chief Justice Roberts disagreed with Kennedy in his *Obergefell* dissent, telling proponents of same-sex marriage to “[c]elebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. *But do not celebrate the Constitution. It had nothing to do with it.*”

This refrain and spirit are evident throughout Justice Scalia’s dissent as well and refer to concerns of federalism and judicial overreach into the legislature. However, this view attempts to gatekeep the meaning of the Constitution by limiting what can be seen as a legitimate application of the Constitution. It lauds past generations for seeking and asserting their rights within the Constitution but would deny successive generations the same opportunity. This gatekeeping is originalist but not original. Much of the South was rife with similar indignation and concerns when Chief Justice Earl Warren handed down the opinion of *Brown v. Board of Education* in 1954. In response to Chief Justice Roberts, this Note respectfully argues: the Constitution, born in response to the founding generation’s oppressions, has everything to do with providing for the rights and freedoms of modern Americans who seek to escape oppression in their generations. The voting majority has proven itself a poor caretaker of the rights of the minority within

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53 Id.
society. The South did not vote to desegregate schools, and the U.S. did not vote emancipation into effect. Why should those facing discrimination have to wait for opposition to their plight to become popular? Why should not those oppressed look to the document that is intended to embody the American ideal of liberty? Why must our Constitution have died?

II. CRITICAL RACE AND INTERSECTIONAL ANALYSIS

As an approach to constitutional interpretation, Originalism has been a means of keeping constitutional rights from those historically underrepresented. Oppression is not, however, an equalizer. The experiences and challenges of oppressed populations are highly individualistic. It is necessary to look to individuals’ experiences to best understand the disproportionate burden on specific populations that originalist doctrine creates. Intersectionality, and Black feminist legal theory including Critical Race Theory, offer a more humanizing, realistic, and tangible analysis of legal doctrine than other mainstream schools of thought. Importantly, Critical Race Theory dispels the idea of discrimination as an aberration within American society and instead recognizes it as a symptom of purposeful, engrained mechanisms of oppression present since our founding. It addresses the "axes of differences" that maintain a system of discrimination.

Critical Race Theory is an evolving area of legal theory that rejects the historical framing of a linear narrative of racial progress through civil rights, while also highlighting the inherent “historically accumulated social effects of race.” Critical Race Theory is predicated on color consciousness, recognition of racial advantages, and movement past “colorblindness” as an aspirational process for

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60 See Raymond T. Diamond, No Call to Glory: Thurgood Marshall’s Thesis on the Intent of a Pro-Slavery Constitution, 42 Vand. L. Rev. 93, 105 (1989) (discussing the debate between constitutional convention delegates as to counting slaves as less than a whole person for census reasons). See generally Scott v. Sanford, 60 U.S. 393, 406 (1857) (“And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded.”).

61 This paper specifically focuses on Black women as a population experiencing historically perpetuated oppression in the form of modern Scalian originalism, and while it does rely on the work and expertise of Black women authors, it does not presume their understanding and experiences, instead focusing on the products of originalism’s purposeful application against them.


63 See id. at 34; see generally Kimberlé Crenshaw et. al, CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (1995) (discussing racial power dynamics as “not simply-or even primarily-a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which law shapes and is shaped by ‘race relations’ across the social plane”).


65 See Devon W. Carbado, Critical What What?, 43 Conn. L. Rev. 1593, 1608 (2011). See generally Derrick Bell, SILENT CONVERGENTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES OF RACIAL REFORM 69 (2004) (“Even when the interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear that the remedial policy is threatening . . . .”).

66 See Carbado, supra note 65, at 1618. (colorblindness can be taken as similar to race-neutrality, where race is not recognized or acknowledged as a factor of a person’s identity).
race neutrality. \(^{67}\) Intersectionality, as applied within Critical Race Theory and beyond, seeks to analyze and describe the intersections of different modes of power and oppression. \(^{68}\)

Applying these analytical methods together allows for a richer, more nuanced criticism of Scalia’s \(^{69}\) Originalism. Originalism’s foundational roots are embedded in racism. \(^{70}\) Instead of addressing race, it asserts that the doctrinal guidance of the founding generation is politically and racially neutral. \(^{71}\) Even if this were so, race-neutrality is not the benchmark as it erases “the privilege and disadvantage [race] produce[s].” \(^{72}\) The concept of neutrality as the benchmark of equality can be applied logically to gender and sex discrimination as well, distinct issues with their emblematic weaponization within the systems of oppression. \(^{73}\)

To illustrate the effects of Scalia’s Originalism on the individual, an effective case study is the experiences of Black women in Texas. Texas has for years been considered an ideologically conservative stronghold and currently is home to multiple methods of oppression largely supported by Originalism, among them: targeted legislation restricting the freedom and ability of Black voters, redistricting and gerrymandering conducted in such a way as to disempower Black voters, and state anti-abortion laws constructed in defiance of then-recognized abortion rights under the Constitution. \(^{74}\)

The remainder of this Note will examine the experience of Black women affected by Texas Senate Bill 7 (SB7) placing targeted voting restrictions in Texas, \(^{75}\) the 2021 redistricting maps signed into effect by Texas Governor Greg Abbott, \(^{76}\) and Texas Senate Bill 8 (SB8) granting private citizens a right of action against any person performing, aiding, or abetting an abortion before “six weeks after a woman’s last menstrual period, . . . [or] intend[ing] to engage in such conduct.” \(^{77}\)

\(^{67}\) Id at 1609; see generally Devon W. Carbado & Cheryl I. Harris, New Racial Preferences, 96 CALIF. L. REV. 1139, 1194-1207 (2008) (discussing the feasibility, reality, and desirability of colorblindness and race neutrality).


\(^{69}\) Meaning the originalism practiced by Justice Scalia.


\(^{72}\) Carbado, supra note 65, at 1617; see also Adarand Constrs. v. Pena, 515 U.S. 200, 239 (Scalia, J., concurring) (“In the eyes of the government, we are just one race here. It is American.”).

\(^{73}\) See generally Philip N. S. Rumney, In Defense of Gender Neutrality Within Rape, 6 SEATTLE J. SOC. JUST. 481 (2007) (analyzing use of gender neutrality in sexual assault statutes and criticism thereof).

\(^{74}\) See Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., dissenting) (“In open defiance of this Court’s precedents, Texas enacted Senate Bill 8 . . . .”).


\(^{77}\) See also United States v. Texas, 142 S. Ct. 14, 14–15 (2021) (Sotomayor, J., concurring).
The scope of these laws oppresses multiple communities and historically marginalized groups yet overlaps such that Black women in Texas are disproportionately affected, precisely because of the intersections of racialized, gender-based, and other forms of oppression that they face. In that way, Black women have a unique experience with these laws. For instance, while a White woman in Texas may have her reproductive freedoms reduced by Texas SB8, she is more likely to live in a district that was drawn in such a way as to give greater power to her vote.78 She is also less likely to live in a community most affected by Texas SB7’s elimination of twenty-four-hour voting stations, amongst other targeted voting restrictions.79 While White women may face a reduction of their constitutional rights, they are more likely to have greater power in voting for those reducing their rights or in choosing an alternative representative.80

A. Texas SB7: Voting Restrictions

The 2020 general election brought new challenges to voting across the country, compounding upon existing difficulties.81 Anticipated high turnout, the ongoing COVID-19 pandemic crisis, and concerns regarding mail-in versus in-person voting all contributed to a unique election, whether those concerns were grounded in reality or not.82 In reaction to the challenges of the 2020 election, some counties, such as Harris County in Texas, established twenty-four-hour voting locations to make it easier for voters to reach the polls.83 It worked, and at least 66% of the seventeen million registered voters in Texas cast their ballot in the general election, a 6.6% increase from the 2016 general election.84 Despite that success, Texas swiftly passed a law targeted at limiting those practices.85 Such laws have become more frequent since the Supreme Court’s rulings in Shelby County v.

78 See generally Laura Odujinrin, The Dangers of Racial Gerrymandering in the Frontline Fight for Free and Fair Elections, 12 U. MIA RACE & SOC. JUST. L. REV. 164, 188-189 (2022) (discussing the impact Texas voting rights laws have on heavily minority geographic areas.); see also Bush v. Vera, 517 U.S. 952,1002 (1996) (Thomas, J., concurring) (“[Texas] intentionally created majority-minority districts and . . . those districts would not have existed but for its affirmative use of racial demographics”).
79 Id.
80 See generally Kyla Schuller, The Trouble with White Women: A Counterhistory of Feminism (2021) (examining the history of white feminism’s relationship, and often betrayal of, Black feminism in collusion with patriarchal white supremacy).
82 See generally Steven M. Bellovin, Mail-In Ballots Are Secure, Confidential, and Trustworthy, COLUM. NEWS (Oct. 23, 2020), https://news.columbia.edu/in-mail-absentee-ballots-secure-vote-election (detailing the security of mail-in ballots and the reality of what little voting fraud exists).
83 See Ura, supra note 75; see also Kristen Shaw, Texas Democratic Party v. Abbott: Fifth Circuit Narrowly Interprets Twenty-Sixth Amendment, Putting Life and Liberty on the Ballot for Young Texas Voters, 95 TUL. L. REV. ONLINE 71 (2021).
Holder, which eliminated the preclearance requirement of the Voting Rights Act, and Brnovich v. Democratic National Committee, which weakened Section 2 of the Voting Rights Act. These rulings and the related state laws have a disproportionate impact on the ability of people of color, low-income people, and disabled people to vote.

These cases, and subsequently SB7 (now law), are predicated on an “originalist orientation” to the Voting Rights Act. “[T]he Supreme Court majority’s originalist orientation will likely further erode the egalitarian approach to democracy, thereby rendering democratic self-government less inclusive, less equal, and less responsive to the people.” The law applies two key components of Originalism: the Fixation Thesis and Constraint Principle. The Fixation Thesis emphasizes that “original meaning . . . was fixed at the time each provision was framed and ratified.” Justice Scalia’s comment regarding the “dead” Constitution falls in line with this thesis because when the Thesis is applied to the Constitution, the words and meaning are narrowly constrained to the time in which they were written. This Thesis is taken in conjunction with the Constraint Principle where judges are ideally “constrained by the original meaning when they engage in constitutional practices.” Combined, these concepts result in originalist judges operating within a constrained framework of constitutional rights. In addition to the application of these principles, Chief Justice Roberts relies on a traditional originalist argument in Shelby County concerning the Tenth Amendment and federalism in states having greater autonomy in the regulation of election

87 141 S. Ct. 2321 (2021).
88 See Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the Voting Rights Act After Shelby County, 115 Col. L. Rev. 2143, 2144-45 (2015) (“[S]ection 2 of the statute further prohibits state and local governments from structuring elections ‘in a manner which results in a group defined by race or color hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice’”).
92 Id. at 611.
practices. These concepts and arguments were applied to the Voting Rights Act and led the Court to base its justification of disempowering the Act upon concerns of federalism. The Court was correct in recognizing that the circumstances present at the Act’s passing are not the same as now, but mistook the Act’s effectiveness for evidence of it not being necessary.

The effect of this originalist orientation, and the current conservative-leaning makeup of the Supreme Court, is that laws like SB7 receive less scrutiny than they might have before the Shelby County and Brnovich decisions. Before Shelby County, Texas was blocked by a federal court from implementing a restrictive voter ID law as the law did not pass Section 5 preclearance due to its effects on voters of color. Immediately after Shelby County stripped Section 5, the restrictive voter ID law was reimplemented. That law was later assessed as being intentionally discriminatory in its impact on African and Latinx voters, with over 600,000 individuals lacking the ID necessary to vote under the law’s restrictions. Those effects are similar to what advocates expect to appear under SB7 with the limitations to early voting, drive-through voting, and vote-by-mail, amongst other provisions previously relied upon as effective in more urban parts of Texas and amongst voters of color. The originalist orientation’s effect on voting rights ignores, either out of ignorance or indifference, the reality of these often-reactionary laws: that people of color will be disenfranchised or less likely to vote given the restrictions.

**B. Gerrymandering Diluting Voting Power of Black Communities**

Even when people of color do get to the polls and jump the hurdles set for them to vote, the power of their vote is actively being diminished through redistricting schemes such as Texas’s most recently drawn congressional district map. The more originalist members of the Court, such as Chief Justice Roberts, emphasize federalism and have pushed back against calls for judicial intervention

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97 See id. at 539–40 (exhibiting Chief Justice Roberts’s reliance on federalism concerns as the basis of the majority opinion).
99 Id. at 9.
100 Id.
in partisan gerrymandering. Chief Justice Roberts made that position clear during oral argument in Gill v. Whitford, telling petitioners challenging partisan gerrymandering, “[Y]ou’re taking the issues away from democracy and you’re throwing them into the courts pursuant to . . . [what] I can only describe as sociological gobbledygook.” His position echoes his condemnation of the Obergefell decision: the right being asserted, no matter how compelling, could not be found under the Constitution and was therefore beyond the Court’s institutional scope.

This is in keeping with Justice Frankfurter’s originalist reading in Colegrove v. Green of the Elections Clause in Article I, Section 4 of the Constitution, stating, “[T]he Constitution has conferred upon Congress exclusive authority to secure fair representation by the States.” The Court since then has become more inundated with originalist judges who are similarly skeptical of the role of the judiciary in addressing the issue. However, the Originalism in practice in this issue appears selective at best and hypocritical at worst.

While Originalism is at least theoretically intended to rely on the intent of the drafters, the position of the conservative justices seems at odds with the record of the Reconstruction Amendments and their text. In perhaps an example of Scalia-style Originalists bending history to meet conservative policies, the justices rely more on the federalism concerns of the constitutional framers than the goals of the Reconstruction Amendments’ drafters. Yet Justice Scalia himself acknowledged the “long and persistent history of racial discrimination in voting” necessitating the application of strict scrutiny under the Fourteenth Amendment. Professor Franita Tolson points out aptly that Section 2 of the Fourteenth Amendment provides a strong constitutional footing for the judiciary, as it threatens states who “in any way abridge[]” “the right to vote” with a reduction of representation in Congress. Why would originalists shy away from an amendment’s powerful command for accountability?

Such strong constitutional language coupled with historically lackluster jurisprudence utilizing that language gives weight to Derrick Bell’s interest convergence theory. Bell’s theory claims that “[t]he interests of [black people] in
achieving racial equality will be accommodated only when it converges with the interests of [white people].” The interests of the Reconstruction Amendments’ drafters aligned briefly with those seeking racial justice following the Civil War, and the failure of the Court to enforce those amendments fully is evidence of how racial equality was bargained away by the Court in the interest of federalism or discriminatory interests masked as federalism. The result of this failure is the overtly partisan congressional maps seen in many states today, such as the one implemented in Texas. The intent of the Texas map is obvious. Of the fourteen districts with a less than ten-point margin in the 2020 election, only three would remain with such a margin under the new map, with ten of those districts now showing a ten-point or greater margin for former President Trump.

C. Reproductive Rights and SB8: Flagrantly Unconstitutional

With intersecting layers of oppression in Texas, a Black woman living in Texas is uniquely affected. With the Voting Rights Act weakened, Texas passed laws placing roadblocks to her voting, despite the state having been found to have discriminatory intent in their voter ID laws previously. This Black woman is also likely to have her congressional district redrawn in such a way as to have her vote lose its potency, either clustered specifically with others like her or parceled out into predominantly White communities. With both her opportunity and power in choosing her representation mitigated, Texas comes for her body. At the time of its passage, SB8 was, as Justice Sotomayor pointed out, “flagrantly unconstitutional” because it flew in the face of then-established Supreme Court precedent in both Roe v. Wade and Planned Parenthood v. Casey.

Since the passage of SB8, the legal landscape for abortion rights in the U.S. has changed dramatically: Justice Samuel Alito’s majority opinion in Dobbs v. Jackson Women’s Health Organization overturned the near half-century precedent

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112 See Bell, supra note 111, at 523.
113 See generally Alexander Tsesis, Enforcement of the Reconstruction Amendments, 78 WASH. & LEE L. REV. 849, 885–886 (2021) (discussing the effort of the Reconstruction Amendments to change the antebellum model of federalism, and the failure of that effort in the Court ruling on The Civil Rights Cases); Robert J. Kaczorowski, Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted, 42 HARV. J. ON LEGIS. 187, 263 (2005) (discussing original intent of the framers of the Fourteenth Amendment in enforcing civil rights).


115 See generally Brief of Amici Curiae National Health Law Program and National Network of Abortion Funds Supporting Petitioners-Cross-Respondents at 2–4, June Med. Servs., 140 S. Ct. 2103 (Nos. 18-1323, 18-1460), 2019 WL 6698205 (arguing that Black women, LGBTQ+ people, and disabled people experience intersecting layers of harm from reproductive rights restrictions such as the Texas restrictions).

of *Roe v. Wade*. In briefing the case, Mississippi took an originalist position against the right to abortion, “emphasizing the Constitution must be interpreted on its text and where necessary on its original meaning at the time it was enacted.”

The originalist argument in the brief is mirrored in the opinion, where Justice Alito writes that a right to abortion is “not mentioned anywhere in the Constitution” and “is not deeply rooted in the Nation’s history and tradition.” It is true the Constitution does not mention abortion, just as much as it is true it does not mention women at any point. Black women, especially those in the LGBTQ+ community, while seemingly forgotten in the Constitution, will be among those feeling the impact of *Dobbs* most.

Abortion is not simply an issue of women’s rights. Just as a rising tide raises all ships, the opposite is true. In overturning *Roe* and *Casey*, the *Dobbs* decision “diminish[es] the rights of pregnant people outside, but also inside, [the] LGBTQ+ communities” by crumbling the same foundations that LGBTQ+ constitutional protections are built upon. By diminishing the underlying rights of bodily autonomy, the *Dobbs* decision “involves racial justice, women’s equality, and LGBTQ+ rights, and it does so all at once.” These groups are interconnected through their reliance on a progressive interpretation of the Constitution for protection. While rights for those groups can be provided through acts of Congress, “rights need to be entrenched, and that is what constitutions do.” It is only then that the rights would be “protected against politicians’ whims,” although *Dobbs* shows that even a half-century of a right being taken as constitutionally protected does not shield it from the Originalism of conservative traditionalist judges.

The right to abortion did not vanish overnight. States such as Texas had pushed and flaunted the protections of *Roe* and *Casey* for years up until the *Dobbs* decision. Texas SB8 is not the first instance of the state enacting laws with the effect of depriving its citizens of their abortion rights. In *Whole Women’s Health v. Hellerstedt*, the Court applied the undue burden test articulated in *Casey* to strike down a Texas law requiring abortion facilities to have both a surgical center and a physician with admitting privileges.

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119 See *Dobbs*, 142 S.Ct. 2228 at 2235–36.
122 Id. at 109.
123 Id.
124 See Nourse, supra note 120, at 27.
125 Id.
126 See 136 S. Ct. 2292, 2300 (2016).
127 See id. at 2301.
SB8 is the creation of a private action for parties to sue abortion providers performing abortions later than six weeks since conception, or anyone who helps or intends to help a person obtain an abortion after six weeks. The result is the same as in *Hellerstedt*, with a dramatic “chilling effect” seen on Texas abortion providers. Adam Serwer’s oft-quoted phrase during the Trump administration rings true here: “The cruelty is the point.” In effect, Texas lawmakers grant their citizens a mechanism for policing reproductive bodies to restrict people seeking an abortion from practicing a right they disagree with and grant those private citizens a $10,000 bounty for doing so. While many Texans, even post-*Dobbs*, could surely leave the state to receive their reproductive healthcare, that is a luxury not available to those who are poor, disabled, incarcerated, or restrained by other obligations such as education or employment. Nor should individuals need to leave their home state to exercise their bodily autonomy.

*Dobbs* and SB8 highlight an ongoing effort to police reproductive bodies, particularly targeting low-income individuals and people of color. This effort is at heart an originalist one, and one that does harm. The originalist and textualist viewpoints on abortion are quite clear. Justice Scalia believed women’s liberty to have an abortion could not be protected under the Constitution because “the Constitution says absolutely nothing about it.” Dissenting in *Roe v. Wade*, Justice Rehnquist was similarly quick to point out that abortion was illegal in most states at the time of the Fourteenth Amendment. As came to be seen in *Dobbs*, under originalist jurisprudence, the hard-fought right of reproductive choice is no right at all.

This stance remains ignorant of a long and painful history and the efforts made to remedy it. As noted, abortion was certainly left out at the time of the drafting of the Constitution. However, concerted efforts by male physicians to ban abortion did not achieve widespread success until 1880, with the criminalization of abortion lasting until *Roe*’s ruling in 1973. The Constitution as originally written also allowed for the denial of freedom and bodily autonomy to people of color and left the policing and control of reproductive capacity of enslaved women to white

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131 Kaye & Hearron, *supra* note 128.


patriarchy.\textsuperscript{136} Even for non-enslaved women, there existed common legal disabilities which could be used to strip married women of their legal personhood and subjugate them to the authority of their husbands.\textsuperscript{137} Both Dobbs and Texas SB8 sit atop this long history of treating women as property, where their physical self may be legislated as those in power see fit. It conflicts not only with the longstanding abortion jurisprudence of the Court but also with the intent of the Reconstruction Amendments, something originalists purport to care for.\textsuperscript{138}

Professor Andrew Koppelman describes slavery as “a bundle of disabilities” of which reproductive control was one of, if not the, most integral.\textsuperscript{139} Applying the intent of the Thirteenth Amendment to wipe away the “badges and incidents” of slavery, should not the legislative intent of the Reconstruction Amendment’s framers be clear?\textsuperscript{140} Despite the illegality of abortion at the time, it stretches the imagination that our concept of reproductive control and its integral harm should be constrained to the era when the harm was most perpetuated. Simply adhering to the status of abortion at the time ignores that the mechanisms of slavery were used to oppress in other contexts as well, including against women generally.\textsuperscript{141} Reproductive control being perpetuated outside of slavery does not change its distinct relationship to slavery itself. The fact that this method of control has persisted to the present day does not erase it from the bundle of disabilities and instead should be a hallmark of the improper enforcement of the Supreme Court in fulfilling the promise of the Reconstruction Amendments. True originalists and textualists would keep the promise of those who wrote the Thirteenth Amendment instead of perpetuating the type of harm the Amendment sought to end.

Like Koppelman, Professor David Gans of the Constitutional Accountability Center takes a broad approach to the Reconstruction Amendments. Gans posits that a true originalist reading of the Fourteenth Amendment would go so far as to protect the right to abortion, contrary to the longstanding conservative originalist claim that abortion rights were created by the Supreme Court “without a shred of support from the Constitution’s text.”\textsuperscript{142} He reads the original meaning of the Fourteenth Amendment as “broadly protect[ing] fundamental rights, including rights not specifically mentioned elsewhere in the four corners of the Constitution’s text.”\textsuperscript{143} By framing the Fourteenth Amendment as “the gem of the Constitution,”

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\item[136] See generally Andrew Koppelman, \textit{The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implication}, 112 COLUM. L. REV. 1917, 1918 (2012) (describing in part how reproductive control was an integral part of chattel slavery, overseen by the white patriarchal slave-owning society).
\item[138] See generally Koppelman, supra note 136, at 1917–18 (asserting that the Thirteenth Amendment, and intent of the framers thereof, can be applied to abortion rights).
\item[139] See id. at 1943.
\item[141] See Koppelman, supra note 136, at 1942–43; see also Planned Parenthood v. Casey, 505 U.S. 833, 847–848 (1992) (applying the Fourteenth Amendment as not constrained simply to “those practices . . . that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified”).
\item[143] Gans, supra note 12, at 192.
\end{enumerate}
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the Amendment is tasked with necessarily redeeming the remainder of the document, with unenumerated rights necessarily derived from the Fourteenth Amendment. In a bizarre irony, this appears to be an instance of Originalism losing its original meaning, with progressive Originalism.

In changing so much it supports the unenumerated rights that Originalism arose in opposition to. This is not the Originalism in practice today, and if more jurists undertook the multifaceted historical analysis used by Gans, the spirit of the Reconstruction Amendments would be carried out in protection of those its drafters meant to protect and more. Instead, the originalists on the Court model their Originalism after Scalia or Robert Bork’s concept of the doctrine: ignorant and selective in reading the history of the Fourteenth Amendment and bending that history to further conservative policy goals.

D. In Conclusion: “[S]ome [G]eniuses”

Originalism is fundamentally flawed and used as a guise for oppression, shrouding discriminatory policies in the thoughts and opinions of long-dead patriachs as some false equivalent to legitimacy. Enter Jonathan Mitchell, former Solicitor General of Texas and architect of Texas SB8. He is not unique. In devising a strategy of implementation specifically to avoid judicial review, Mitchell takes his place in a succession of patriarchal enforcers such as many of those on the Supreme Court today. He steps beyond Chief Justice Roberts’s dissent in Obergefell, telling those seeking greater rights and freedoms that not only is the Constitution closed to them but the courts are as well. In effect, Mitchell’s approach tells the people of Texas they have no right, and no redress either.

Black women in Texas face restrictions on their ability to vote, restrictions on the power of their vote, and restrictions on their bodies. Originalism provides a


\[148\] Transcript of Oral Argument at 57–58, Whole Woman’s Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463) (“And the fact that . . . some geniuses came up with a way to evade the commands of that decision, as well as the . . . broader principle that states are not to nullify federal constitutional rights . . . I guess I just don’t understand the argument.”).


\[150\] See supra text accompanying note 57.
white-male rendition of the rights and responsibilities of people of color and then goes a step further in asking that those rights and responsibilities be read only through the lens of the generations which held them in bondage. Far from necessary and proper, the Originalism practiced by those such as Mitchell and Justice Alito restrains our Constitution, holding hostage the potential and promise of Black lives, women’s equality, and our country. As these laws overlap in their harm against those in the non-white minority, their purpose is clear: they serve only to oppress.

The solution this Note proposes to Originalism requires that society rethink our relationship with the judiciary and the Constitution. We can consider judges mere umpires “call[ing] balls and strikes,”151 as Chief Justice Roberts famously said, but doing so relegates judges to a role that someday soon a sophisticated legal thinking computer might do.152 The computer would analyze the statute in question, the legislative intent of the body that created the law, and the common public meaning at the time it was passed. I suspect from that data such a computer would extrapolate much the same legal outcome as would a pure originalist judge if that judge was somehow not subject to racial or political bias. But would it be right? Should the law be right? Judges are not elected by the public, yet it is “emphatically the province and duty of the judicial department to say what the law is.”153 What can we do when the mechanisms for electing our representatives, who do nominate and confirm judges, are kept from us for political partisanship? Most of the Court now will not defend voting rights,154 will not combat discriminatory congressional maps,155 and will allow our freedoms to be deprived regardless.156

Even when the Constitution has been amended to enshrine equal protection and voting rights, those amendments were read narrowly and depowered by the concerted effort of successive Supreme Courts. When the people demanded those rights be set into law, Congress passed the Voting Rights Act and civil rights legislation. Then, over the next generation, the Supreme Court minimized and depowered those laws as well.157 Abortion was given protection in 1973, and for fifty years the conservative legal movement ground towards revoking that fundamental

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154 See supra text accompanying notes 85–101.

155 See supra text accompanying notes 102–114.

156 See supra text accompanying notes 115–38.

right after generations of Americans counted upon it. To those left out of the
Constitution at the founding, what are they left with? They cannot find protection
in Constitutional amendments or acts of Congress. They cannot even count on long-
established Supreme Court precedent. Must they wait through another generation
and hope for a Supreme Court that will deign to find their rights worthy of the
Constitution? The backlash to the Court’s rulings has a necessary and vital role in
forming a “democratically responsive Constitution.” It is through that backlash
that we “challenge[] the presumption that citizens should acquiesce in judicial
decisions that speak in the disinterested voice of law.”

We must continue to ask more of our Constitution and provide backlash when
the judiciary falls short in its interpretation. Some purport that living
constitutionalism is the answer, focusing on the idea that “[a] constitutional
provision can maintain its integrity only by moving in the same direction and at the
same rate as the rest of society.” Asking our judges to do more than simple legal
computation is difficult because it requires them to be able to see and respond to
that “direction” and change in society. But that difficulty is allayed when the Court
itself is representative of society. Justice William Brennan emphasized that the
Constitution is “a living document subject to ‘contemporary ratification’ and that
the judiciary must interpret the text to promote human dignity in light of society’s
changing values and needs.” It is not for judges to “make stuff up” but rather to
interpret and apply the Constitution’s fundamental values to the needs of modern
American society, centering the protection of the least among us, not further
marginalizing them as the Roberts Court has done. As political philosopher Hannah
Arendt wrote, the Supreme Court exerts its authority in “a kind of continuous
constitution-making, for the Supreme Court is indeed . . . ‘a kind of Constitutional
Assembly in continuous session.’” That Constitutional Assembly should not be
dogged by the same failings as the Founders’ assembly, but rather empowered by
the diversity and representation of modern pluralistic society. Some assert the
Court should see its authority diminish, through jurisdiction stripping, or that the

158 See Charlie Savage, For Conservative Legal Movement, a Long-Sought Triumph Appears at Hand, N.Y.
Times (May 03, 2022), https://www.nytimes.com/2022/05/03/us/conservative-legal-movement-roe-v-
wade.html.
159 See Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C.R.-C.L.
160 Id.
161 See Charles A. Reich, Mr. Justice Black and the Living Constitution, 76 HARV. L. REV. 673, 736 (1963)
(emphasis added).
162 See Arlin M. Adams, Justice Brennan and the Religion Clauses: The Concept of a “Living Constitution”, 139
Contemporary Ratification, Speech at Georgetown University (Oct. 12, 1985), reprinted in ALPHEUS THOMAS
MASON & D. GRIER STEPHENSON, AMERICAN CONSTITUTIONAL LAW 607 (1987)).
163 See Peterson, supra note 7.
164 See HANNAH ARENDT, ON REVOLUTION 200 (1965) (quoting LEWIS MUMFORD, THE CITY IN HISTORY 328
(1961)).
Court be reformed to be more responsive to the public.\textsuperscript{165} Whether judicial reform or packing occur, the judges interpreting our laws must reject Originalism and recommit to the hard but important work of preserving a constitution responsive to and fundamentally for the American people. Our Constitution is alive and has a place in every American life, not as a dead monolith of white patriarchal power, but as a powerful tool for justice within a modern pluralistic society. Our path forward is in recognizing the shortcomings of the Constitution and building upon its aged words until it meets the modern moment.

\textsuperscript{165} See Ryan Doerfler & Elie Mystal, \textit{The Supreme Court is Broken. How Do We Fix It?}, THE NATION (June 6, 2022), https://www.thenation.com/article/society/how-to-fix-supreme-court/.