
ESSAY

AMELIORATIVE CONSTITUTIONALISM

PAUL GOWDER[†]

The basic problem of American constitutional theory is that (a) the U.S. Constitution, morally speaking, lacks full democratic legitimacy due to the continuing effects of its unjust and undemocratic history, yet (b) we have no realistic chance in the foreseeable future of replacing it with something free from those legacies of exclusion and oppression. This Essay draws from philosophy and political science to sketch a way forward.

From philosophy comes a methodological tool that argues backwards from something that we need (or want) to be true, to the constraints on the cognitions we must have to make that aspiration (here, constitutional legitimacy) possible. From political science comes the idea that a key function of constitutions, including our own, is to create the conditions for a sustainable shared life across lines of social conflict. But to serve this function, a constitution must protect the most important interests and be compatible with the political agency of all who live together under it, such that each social group has good reasons to adhere to the law and participate in constitutional methods of social change rather than risk conflict to improve their conditions.

Bringing these two ideas together while understanding that the U.S. Constitution is susceptible to numerous possible interpretations suggests a strategy for bootstrapping it into legitimate democratic authority: when applying it, we should rely on only those interpretive resources consistent with the idea that it protects the basic interests and is compatible with the political agency of all who live under it.

DOI: <https://doi.org/10.58112/uplr.173-7.7>

[†] Professor of Law, Northwestern Pritzker School of Law. Thanks to Zach Clopton, Adam Davidson, Andy Koppelman, John McGinnis, and participants in the Langston Midwest Scholars Workshop, the National Conference of Constitutional Law Scholars, and the present Symposium for generous feedback, and to Megan Mitchell for invaluable research assistance. Thanks also to the editors of the *University of Pennsylvania Law Review* for their thoughtful and careful editing.

This approach, when applied to the use of the past, counsels us not just to permit but to prefer subaltern histories as a resource in constitutional interpretation.¹ Such histories, together with the advocacy of those in present-day social movements who continue the legacies of the social movements for inclusion of the past, are our best evidence for what would protect the basic interests and express the political agency of those who are excluded by dominant-group doctrine and history.

In short, the Constitution can oblige us to live under the government it creates only if we read it from below.

INTRODUCTION	2038
I. THE ORIGINALIST CONSTITUTION LACKS LEGITIMATE AUTHORITY	2045
A. <i>Partial Legitimacy Isn't Good Enough: The Problem of Structural Racism</i>	2049
B. <i>Whites as Trumps, or, How Structural Racism Defeats Originalist Alternatives to Popular Sovereignty</i>	2056
II. A THEORY OF "LIMIT THE STAKES OF POLITICS": HEALING OPPRESSION-GENERATED CONFLICT	2060
III. HOW READING FROM BELOW COULD REBUILD THE CONSTITUTIONAL DEMOS (POTENTIALLY)	2066
A. <i>How to Do Ameliorative Constitutional History</i>	2069
B. <i>Ameliorative Constitutionalism Is Unavoidably Tied to Practical Politics, and That's Fine</i>	2077
CONCLUSION	2079

INTRODUCTION

At the turn of the twenty-first century, philosopher Sally Haslanger wrote a landmark article in which she posited that the right way to make sense of the ideas of race and gender is to begin, not end, with our ambition to promote justice.² This Essay applies an analogous approach to the project of constitutional interpretation and the use of the past therein.³

¹ I use “subaltern” in the sense ordinarily used by critical scholars, and expressed nicely in Peter D. Thomas, *Refiguring the Subaltern*, 46 POL. THEORY 861, 861-62 (2018), as “a figure of exclusion” and the “opposite of the citizen.” In the U.S. context, the primary subaltern histories will be those of social movements associated with subordinated groups.

² Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them To Be?*, 34 NOÛS 31, 35-36 (2000).

³ In this Essay, I use “interpretation” to mean all acts of going from the written document to a concrete legal outcome or doctrine. That usage subsumes the cognitive exercises that some originalists separate out into “interpretation” and “construction.” See, e.g., Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 272 (2017) (explaining the difference between the

Such a project is necessary because the U.S. Constitution⁴ is not, as it currently stands, fully legitimate.⁵ It lacked democratic authority for its enactment, and that failure of authority has not been cured by anything that has happened in the interim (not even Reconstruction).⁶

Unfortunately, under both current and long-term American political conditions, we are likely stuck with the illegitimate Constitution we have. In the short term, efforts at enacting a new Constitution or even sufficiently amending it to fix the flaws detailed here would undoubtedly be futile due to our extreme and violent political polarization. Witness the events of January 6, 2021, and the two assassination attempts on Donald Trump during the 2024 election.⁷ Nor is violent polarization any aberration in this country. At least through the 1960s, the political order of the United States was regularly reinforced by violence, particularly the killings of Black Americans who questioned that order.⁸ As Farah Peterson has aptly emphasized, the use of violence as a method of constitutional contestation is more ordinary in the United States than extraordinary and was consistent with the practice of the Founding generation.⁹ In the context of America's overall politics, the period

two concepts). The difference between the two is not relevant for present purposes, as the instant argument is normatively prior to efforts to parse out the precise words of the Constitution and their meaning.

⁴ There is an inevitable ambiguity in an essay like this in even the act of describing the U.S. Constitution. When I refer to the Constitution, do I mean the raw text? Do I mean the Constitution as I propose it be interpreted? As originalists interpret it? At various points, all these descriptions become viable, but for the purposes of denying the Constitution's full legitimacy, I mean to deny the full legitimacy of the Constitution's text as it has been applied in the course of its history running to the present, in conjunction with the social conditions that the text as thus interpreted has created. I also mean to deny that the Constitution, as (right-leaning) originalists would interpret it, is fully legitimate.

⁵ I use "legitimate" in this Essay in a normative (not a sociological) sense. A legitimate constitution would give us some moral reason, on democratic grounds, to obey the authority of the government operated under it. It would also provide a basis for justifying the power of judicial review, which calls upon the (alleged) authority of the Constitution to overturn something that otherwise might present itself as the public will.

⁶ See *infra* Part I for further explanation.

⁷ Ned Parker & Peter Eisler, *New Cases of Political Violence Roil US Ahead of Contentious Election*, REUTERS (Oct. 21, 2024, 6:22 PM), <https://www.reuters.com/world/us/new-cases-political-violence-roil-us-ahead-contentious-election-2024-10-21> [https://perma.cc/F2R2-G8HH]; see also Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160 (2021) (describing the recent growth in American political violence and partisan and issue-related trends in that violence).

⁸ See Desmond King, *American Political Violence (The Government and Opposition/Leonard Schapiro Lecture 2023)*, GOV'T & OPPOSITION, 2025, at 9-10 (describing the use of violence to reinforce white supremacy from the end of Civil War until the "deployment of national guards in the 1950s and 1960s to suppress racist-based violence").

⁹ Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1548 (2022).

of relative civic peace between the assassination of Martin Luther King Jr. in 1968 and the coup attempt in 2021 may be only a blip in our history.¹⁰

Under our present circumstances, a peaceful process of constitutional transition seems like a pipe dream. Moreover, even if we accepted the violence that would attend any such transition, its outcome could easily be worse than what we have, sacrificing some of those constitutional provisions that might be susceptible of justice-promoting use.

Moreover, even as the Constitution we have is, I argue, not democratically legitimate, it also is in dire need of defense.¹¹ As I write these words, the most prominent challenge (of many) to the U.S. Constitution by the current President of the United States is that he has unilaterally ordered hundreds of immigrants deported without any judicial process, in apparent violation of a court order, directly into a maximum security prison in El Salvador.¹² Americans should not lightly sacrifice any basis to criticize a President's claim to despotic powers like imprisonment without trial. If some American political institutions (or even some ordinary citizens who might otherwise

¹⁰ "Relative peace" may be an overstatement. Political scientist Desmond King aptly describes this apparent lull as a "false dawn," noting that at the street or grassroots level this period experienced significant police violence and escalating conflict in response to that violence. King, *supra* note 8, at 11-12. But at least at the highest levels, that period seems to me to have been peaceful, insofar as it was marked by nonviolent governmental transitions, a lack of successful high-profile political assassinations, and the like.

¹¹ See, e.g., Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989) (explaining the need for scholars and advocates from subordinated groups to sometimes condemn the U.S. legal system and simultaneously call on it for defense).

¹² Michael Kunzelman & Regina Garcia Cano, *A Timeline of the Legal Wrangling and Deportation Flights After Trump Invoked The Alien Enemies Act*, ASSOCIATED PRESS (Mar. 21, 2025, 5:02 PM), <https://apnews.com/article/trump-deportation-courts-aclu-venezuelan-gang-timeline-43e1deaf66fcied4e934ad108ead529> [https://perma.cc/Y6KL-2VLY] (describing the deportation and the controversy over whether the federal judge's court order was obeyed). Because of the lack of due process, at least some people with no known criminal records appear to have been sent to a foreign prison through this process, such as the professional soccer player Jerce Reyes Barrios, who allegedly entered the United States legally, had no criminal record, was detained because he had a tattoo that immigration personnel misidentified as signifying gang affiliation, and then was deported without process even though he had a hearing date scheduled for a month later. Armando Garcia, *Man Deported to El Salvador Under Alien Enemies Act Because of Soccer Logo Tattoo: Attorney*, ABC NEWS (Mar. 20, 2025, 11:41 AM), <https://abcnews.go.com/Politics/man-deported-el-salvador-alien-enemies-act-soccer-logo-tattoo-attorney/story?id=119983892> [https://perma.cc/KMF5-9WH4]. The President of El Salvador has announced that deportees will be held for at least a year and arguably implied that they may be subjected to forced labor. Nayib Bukele (@nayibbukele), X (Mar. 16, 2025, 8:13 AM), <https://x.com/nayibbukele/status/1901245427216978290> [https://perma.cc/NB6Q-HWB Y] (describing the deportees' duration of time in prison as "one year (renewable)" and referring to the "more than 40,000 inmates engaged in various workshops and labor under the Zero Idleness program" as a technique to make El Salvador prison system financially "self-sustainable"). On the unconstitutionality of such acts, see *Wong Wing v. United States*, 163 U.S. 228, 235-38 (1896) (holding that infliction of punitive imprisonment on an alien subject to removal without full judicial criminal process is unconstitutional).

support brutality toward migrants as a matter of policy) still respond to constitutional arguments, that counsels preserving whatever normative force the Constitution might have as one possible impediment to such abuses of power.

In short, we cannot hope for a wholesale replacement of the Constitution, or even a peaceful, meaningful use of the Article V amendment process, to cure its legitimacy gap in the immediate future. The best we can hope for is that we may occasionally be fortunate enough to have moments where our politics allow us to achieve some steps toward incremental reform through amendments, and even that seems overly optimistic. Perhaps the current constitutional crisis may reach a point where more ambitious amendments, such as to clarify and restrain the scope of the President's powers, may become viable. Absent those contingencies, we need to find some way of working with the constitutional text we have.

Three alternatives remain. First, we can abandon or drastically reduce the scope of our practice of constitutionalism, such as by letting go of judicial review or of appeals to the Constitution in everyday life. However, this would only shift the legitimacy problem to our day-to-day politics, which are irrevocably tainted by, among other things, the unjust resource endowments derived from our existing constitutional practice.¹³ Moreover, this risks depriving us of the constitutional resources we need to resist abuses of power by officials in the moment. Second, we can surrender ourselves to a kind of hateful constitutional captivity, living under a constitution that poisons our politics and our daily lives. Finally—the alternative I consider here—we can try to figure out how to reconcile ourselves to the Constitution we have, to make the best out of the unjust mess and perhaps even to carry out, as scholars like Jack Balkin have described, a program of redemption.¹⁴

The basic approach in the literature to this last option is to argue that something after the Constitution's original enactment might restore its claims to legitimacy. One might argue, for example, that the enactment of the Reconstruction Amendments followed by the Nineteenth Amendment redeemed the Constitution's illegitimacy.¹⁵ In light of the continuing existence of race, gender, and indigeneity-based subordination in the United

¹³ See the discussion of structural racism *infra* Part I. I thank Zach Clopton for urging me to consider this option.

¹⁴ See generally JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

¹⁵ See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 107-08, 111-12 (2013) (arguing there is a "strong case" that the Reconstruction Amendments and Nineteenth Amendment "substantially corrected" the exclusion of African Americans and women from the constitutional enactment process).

States, however, such arguments are not plausible.¹⁶ More promising examples from the left, which propose inclusive, and hence pro-democracy, readings of the Constitution include Balkin's above-noted constitutional redemption,¹⁷ James Fox Jr.'s "counterpublic originalism,"¹⁸ Dorothy Roberts's "abolition constitutionalism,"¹⁹ a recent contribution by Joy Milligan and Bertrall Ross II which bears particular affinities to the instant Essay,²⁰ and my own argument, drawn from Black American intellectual history, for conditional attachment combined with retroactive legitimization.²¹ We can broadly call these theories, which align with one another in many respects, "internally redemptive," to capture their shared quality of aspiring to find the capacity for reform within the resources provided by the existing Constitution and its history.

To my mind, these internally redemptive theories have more potential than their alternatives. This Essay aims to advance them with two contributions which are admittedly somewhat technical—the goal is not to modify the substantive implications of those theories but to solidify part of their shared foundation.

The first contribution this Essay aims to make to the foundations of internally redemptive constitutionalism comes about by (loosely) borrowing a characteristic argumentative technique from philosophy. The lodestar example of this technique is Sally Haslanger's ameliorative conceptual

¹⁶ I argue against them in more detail *infra* Part I.

¹⁷ BALKIN, *supra* note 14.

¹⁸ See generally James W. Fox Jr., *Counterpublic Originalism and The Exclusionary Critique*, 67 ALA. L. REV. 675 (2016).

¹⁹ See generally Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

²⁰ See generally Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305 (2023). Among the aforementioned affinities with the instant Essay, Milligan and Ross agree that the original Constitution is not democratically legitimate, *id.* at 306–09, and even use the word "ameliorative" to characterize part of their approach to fixing it, *id.* at 357. I see this Essay as largely in accord with Milligan and Ross's work, and adding to its methodological foundations in three respects: (1) a philosophical theory about how ameliorative work can retroactively legitimate our shared life under the Constitution; (2) a political science-based theory about how to determine what kinds of legal outcomes are necessary to move from democratic illegitimacy to legitimacy; and (3) a different (though complementary) approach to justifying present-day rights claims under conditions of epistemic exclusion (Milligan and Ross propose default rules for rights claims on behalf of the subaltern when history provides insufficient evidence to support a right otherwise, *id.* at 364–66, while I propose using the claims of past and present-day social movements to supplement and perhaps sometimes supplant the historical sources used in dominant practices of interpretation).

²¹ See generally Paul Gowder, *Reconstituting We The People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335 (2019) [hereinafter Gowder, *Reconstituting We The People*].

analysis.²² Her analysis of race and gender is “ameliorative” in that it interprets those concepts not empirically (i.e., as people actually use them), but normatively, to support the efforts of those who deploy such concepts to pursue racial and gender justice.²³

In this Essay, I call a similar teleological strategy “ameliorative constitutionalism.” Like Haslanger’s ameliorative conceptual analysis, it begins with an end to be achieved—in the instant case, a Constitution that can be legitimate in a normative sense. It then uses that end as a constraint and a signpost: the decisions an interpreter makes about how to read the Constitution (and how to use sources such as text and history) are limited to those that are compatible with the normative goal and guided by the pursuit of that goal. Like Haslanger’s approach, ameliorative constitutionalism is not in the first instance empirical: unlike originalism, it does not start with a question about how dominant groups have in fact understood the Constitution but instead focuses on what—and critically *whose*—understandings of the Constitution are necessary (but perhaps not sufficient) for it to be an exercise of democratic authority capable of binding us all today. In short, I reason from the premise of the possibility of constitutional authority to an account of the preconditions of that authority.²⁴

The second key contribution is to elucidate an account, loosely borrowed from political science, of the function of constitutions.²⁵ One major function of democratic constitutions as a tool of collective self-governance, when operated correctly, is to mitigate group-based social conflicts, such as those resulting from the deep-rooted injustices that span America’s history and its present.²⁶

This functional account fills out the content of the ameliorative analysis for the U.S. Constitution. If the Constitution is not fully legitimate because it perpetuates disadvantage rooted in democratic exclusion, and that disadvantage is mutually self-reinforcing with the conflict caused when a

²² See Sally Haslanger, *What Good Are Our Intuitions?*, 80 ARISTOTELIAN SOC’Y SUPPLEMENTARY VOLUME 89, 95 (2006) (“Ameliorative projects . . . begin by asking: What is the point of having the concept in question . . . ?” (emphasis omitted)).

²³ Haslanger, *supra* note 2, at 37. Another, somewhat more distant, philosophical analogy would be to Immanuel Kant’s method of transcendental deduction, which defends certain concepts as necessary conditions for various kinds of human experience. See Derk Pereboom, *Kant’s Transcendental Arguments*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Fall 2024 ed.) (describing Kant’s method).

²⁴ To be clear, I don’t claim to be following precisely in Haslanger’s footsteps, as the instant Essay is not a work of philosophical conceptual analysis; instead, I am deploying similar strategies of argument with similar underlying motivations.

²⁵ This is also inspired by Haslanger’s description of the ameliorative method, which inquires as to the “point” of the object under examination (or, we might say, its valuable function) to inform the analysis of what it is. Haslanger, *supra* note 22, at 95.

²⁶ See *infra* Part II.

society creates groups of oppressors and oppressed, then the task is to read the Constitution to enable its potential anti-oppressive, conflict-mitigating function.²⁷ In Balkin's terms,²⁸ the Constitution and its constitutional law can be more than merely *objects* of redemption, but also *tools* of their own redemption—and ours. I argue that our Constitution can only serve that function under interpretive constraints that invoke the present and the past interests and ambitions of subordinated groups.

Part I of this Essay presses the case for understanding the Constitution as illegitimate and argues that this poses an insurmountable problem for mainstream interpretive theories—especially, but not exclusively, conservative originalism. It then shows that several recent efforts by conservative originalists to avoid the problem of illegitimacy fail.

Part II sketches the conflict-mitigating function of democratic constitutions through an interpretation of the classic political science-tinged description of their capacity to “limit the stakes of politics.”²⁹ It argues for subaltern constitutional interpretation as the right way to read the Constitution in order to carry out that function. The central claim is that reading the Constitution in a way compatible with the interests and political agency of *all*, with an emphasis on historically excluded groups, permits it to serve a conflict-mitigating function and makes it possible for the Constitution to be read in such a way that it could be described as democratically legitimate.

Part III sketches the constraints implied by ameliorative constitutionalism through two oft-discussed examples of the use/misuse of history in constitutional law, *Dobbs*³⁰ and *McDonald*,³¹ as well as one oft-discussed case less frequently considered from a historical perspective, *Students for Fair Admissions*.³²

²⁷ See *infra* Part II.

²⁸ See BALKIN, *supra* note 14, at 5-6 (arguing for “a narrative of redemption”).

²⁹ Barry R. Weingast, *Capitalism, Democracy, and Countermajoritarian Institutions*, 23 SUP. CT. ECON. REV. 255, 277 (2015); see also Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century*, 29 J.L., ECONS., & ORG. 278, 279 (2013) (explaining that “[l]owering the stakes” creates constitutional stability); William Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1301 (2005) (arguing for a pluralism-facilitating theory of constitutional interpretation that ameliorates tensions arising from a pluralist democracy).

³⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

³¹ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

³² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

I. THE ORIGINALIST CONSTITUTION LACKS LEGITIMATE AUTHORITY

I offer the following series of propositions as a model originalist argument, capturing what I believe to be the main line of thinking for most originalists.³³

1. The enactment of the Constitution was an act of legitimate political authority (probably the democratic sort): the Framers and Ratifiers of the original Constitution (and its amendments) had the right to make a legal framework to construct the U.S. government.
2. If a constitution is an act of legitimate political authority, that counts as some (potentially defeasible) reason to obey it, both for ordinary people by following the laws of a government acting under its authority and for officials by following its commands in how they carry out their jobs.
3. To obey an act of political authority, we need to figure out what that act amounted to—what precisely is it that the political authority holder commanded (because that's what we're obliged to do).
4. To figure out what a political authority holder commanded, we need to appeal to the historical context of the command, such as (depending on one's interpretive theory) linguistic meaning, intention, or extant legal rules at the time the command was given.

The argument as written is far from uncontroversial. Just about any of its component propositions might be denied. For example, a philosophical anarchist who rejects the notion of obligatory political authority would object to the second proposition. A wholehearted living constitutionalist might reject the third proposition, denying that obeying the Constitution amounts to obeying the will of a particular authority-holder. A transgenerational constitutional theorist like Bruce Ackerman would likely deny a combination of propositions one and four, instead arguing that political authority extends across time rather than at a single moment of enactment.³⁴ Jonathan

³³ While I am not aware of anyone who has articulated it in precisely this way, it would clearly be congenial to mainstream accounts of the approach. For example, it makes sense of William Baude and Stephen Sachs's version of originalism, which is premised on the notion of a continuous legal system from the Founding onward which must be interpreted in accordance with legal rules established at the time and internal changes to that system. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810-11 (2019).

³⁴ See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1754 (2007) ("The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people in history"); Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519 (1997) ("Constitutional meaning is not primarily created by judges out of texts but emerges in the course of the struggle by ordinary Americans to hammer out fundamental

Gienapp's historical case against originalism amounts to the claim that originalists misunderstand propositions three and four because the framing generation did not unproblematically understand the written text of the Constitution as reflecting an exclusive description of the structure of fundamental law.³⁵ Of course, originalists have potential answers to all of those objections, and the model originalist argument seems to me to be a helpful way to frame the debate about whether those answers are sufficient.

This Essay focuses on a different and much easier objection that addresses proposition one. The Framers and Ratifiers purported to have the authority to rule over those whom they enslaved, conquered and committed genocide against, or held in a quasi-chattel relationship of gender domination.³⁶ It is impossible to enact laws with a morally justifiable claim to political authority over people whom the enactors are treating in such a way, particularly when those same people also had drastically unequal opportunities to democratically participate in that enactment and thereafter.³⁷

Without formulating an answer to the basic illegitimacy objection, not only originalism but any method of constitutional application that relies on the political authority of the Founding generation is simply a non-starter. The notion that present-day women, Black people, and Native Americans ought to obey the collective "democratic" will of a bunch of men who radically excluded women, enslaved Black people, and committed genocide against Native Americans, just because they happened to have military hegemony over the territory between roughly 1783 and 1861 and felt compelled to write down some laws favoring their own caste, requires something more than just the de facto reality that the Constitution they wrote still exists today. Many of us in the United States are the descendants of victims of conquest and

political understandings."); see also JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 176-77 (2001) (articulating a similar idea of transgenerational commitment).

³⁵ JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 12 (2024).

³⁶ With respect to the characterization of slavery and Native conquest throughout this Section, see *infra* note 38 (explaining the accurate use of the strong language, such as "genocide"). With respect to the oppression of women, see generally *Declaration of Sentiments* (1848), <https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm> [<https://perma.cc/4Y4E-AAPR>] (listing complaints of early women's rights activists, including deprivation of electoral franchise, property rights, employment, and education, as well as susceptibility to deprivation of liberty and "chastisement").

³⁷ By "unequal opportunities to democratically participate in that enactment and thereafter," I mean to cover unjust exclusion, as when one social group disenfranchises another, directly or indirectly, such as the conditions under which the original Constitution was ratified. I also mean to cover ongoing processes of unjust disenfranchisement after the original enactment. For example, contemporary felon disenfranchisement laws under conditions of racist mass incarceration would count as indirect group-based disenfranchisement. See Gowder, *Reconstituting We The People*, *supra* note 21, at 363-70 (describing the racialized history and consequences of felon disenfranchisement).

kidnapping in unjust wars, and the descendants of the conquerors and kidnappers still claim the right to rule over us on the basis of the laws they enacted to regulate those acts of conquest and kidnapping.³⁸

Although the problem of unjust exclusion and oppression is most commonly articulated as an objection to originalism,³⁹ it is a deeper problem with the Constitution as such. That document claims authority for itself and governments authorized by it under the color of an act of self-rule. It begins with the pronouncement that it is an act of “We the People,”⁴⁰ and while it contains (or has been interpreted to contain) elements that seem to be in tension with democratic self-rule, such as the practice of constitutional judicial review by elite jurists,⁴¹ defenses of those elements have often been

³⁸ Should the reader object to the term “conquest,” see Johnson & Graham’s *Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (“Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”); *see also* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 563 (2021) (“Federal Indian law is not the law of Indian people; it is primarily the law of conquest.”). For the reader who objects to my characterization of wars of conquest as unjust, see MICHAEL WALZER, JUST AND UNJUST WARS 51-63 (5th ed. 2015) (arguing that wars of aggression and conquest are unjust). For the reader who objects to my characterization in the previous sentence of these events as genocide, see generally Margaret D. Jacobs, *Genocide or Ethnic Cleansing? Are These Our Only Choices?*, 47 W. HIST. Q. 444 (2016) (arguing that while “settler colonialism” is a better term, genocide is one of several terms that also captures important dimensions of U.S. acts toward Native Americans). For the reader who objects to the word “kidnapping”, see generally France Nkodomane Ntloedibe, *Revisiting Modes of Enslavement: The Role of Raiding, Kidnapping and Wars in the European Slave Trade*, 16 AFR. IDENTITIES 349 (2018) (describing the prevalence of kidnapping in transatlantic slavery); CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865* (1994) (describing the kidnapping of free Blacks into slavery in the United States). Black Abolitionists such as Frederick Douglass were quite clear about the relationship between slavery and kidnapping and the right of resistance. For example, on June 2, 1854, Douglass published an essay entitled “Is it Right and Wise to Kill a Kidnapper.” Frederick Douglass, *Is It Right and Wise to Kill a Kidnapper?*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 277-80 (Philip S. Foner & Yuval Taylor eds., 1999) [hereinafter Douglass, *Kill a Kidnapper*]. Douglass’s answer to the essay’s title was in the affirmative, on the grounds “that when government fails to protect the just rights of any individual man, either he or his friends may be held in the sight of God and man, innocent, in exercising any right for his preservation which society may exercise for its preservation. Such an individual is flung, by his untoward circumstances, upon his original right of self defence.” *Id.* at 278-79. The previous year, he expressed his gratitude for the gift of a large cane which he called “a terror to kidnappers,” explaining that it would be “foolish” to “[attempt] to soften a slave-catcher’s heart without first softening his head.” Frederick Douglass, *A Terror to Kidnappers*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 271 (Philip S. Foner & Yuval Taylor eds., 1999).

³⁹ See, e.g., Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 518 (2011) (explaining this argument); Fox, *supra* note 18, at 685-86 (discussing this “exclusionary critique”).

⁴⁰ U.S. CONST. pml.

⁴¹ See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348-49, 1406 (2006) (“[R]ights-based judicial review is inappropriate for reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members disagree about rights.”).

framed in terms of their compatibility with or protection of self-rule.⁴² But none of those claims of authority are meaningful in the face of the Constitution's original democratic failure.

While the claim that the Constitution is illegitimate is stated in quite strong terms, I think it is less controversial than it seems on the surface. To see the illegitimacy of the Constitution prior to the Thirteenth Amendment, simply consider the following question: were the rebellions of Gabriel, Nat Turner and John Brown (among other less famous examples) permissible on an all-things-considered moral basis?⁴³ If your answer is yes, then you agree that the original Constitution was illegitimate, since it is difficult to see how someone could permissibly raise a rebellion against a legitimate legal order.

Frederick Douglass explains why such rebellions were legitimate, attributing the proposition to Brown: "Slavery was a state of war, and the slave had a right to anything necessary to his freedom."⁴⁴ "State of war" clearly refers to the absence of (legitimate) political authority and the absence of anyone to carry out the core duty of such an authority, namely to provide peace and protection. The enslaved had no sovereign. A few pages later, Douglass also praises violent resistance to the enforcement of the Fugitive Slave Act of 1850.⁴⁵ If you agree that the United States had no right to rule over the Black people whom it was enslaving, it follows that it had no right to provide for their kangaroo court kidnapping.⁴⁶ In the absence of legitimate political authority, one has a right to violently resist a kidnapper regardless of whose laws they purport to be enforcing.⁴⁷

⁴² See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (defending judicial review as protection for democratic authority of people over officials); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 8 (1980) (offering an account of judicial review as protection of representative democracy).

⁴³ See generally *Death or Liberty: Gabriel, Nat Turner and John Brown*, LIB. VA., <https://edu.lva.virginia.gov/death-or-liberty> [<https://perma.cc/YWG9-AYKJ>] (last visited Apr. 13, 2025) (describing rebellion attempts of enslaved Gabriel and Turner and abolitionist Brown).

⁴⁴ FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 341 (Hartford, Conn., Park Publ'g Co. 1882).

⁴⁵ *Id.* at 348-49.

⁴⁶ The Fugitive Slave Act tribunals are correctly described as kangaroo courts, since they were egregiously biased against those accused of being runaway slaves, to the point where the commissioners who exercised judicial authority in them were paid more to rule in favor of a slave catcher than against them. See PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 54-59 (2021) [hereinafter GOWDER, THE RULE OF LAW] (describing the history of Fugitive Slave Act tribunals and the biased adjudications in them); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 HARV. L. REV. F. 200, 202-05 (2021) (summarizing various definitions of a kangaroo court).

⁴⁷ See also Douglass, *Kill a Kidnapper*, *supra* note 38, at 277-80 (defending violence to resist kidnapping under the Fugitive Slave Act); HISTORY OF THE OBERLIN-WELLINGTON RESCUE 175-78 (Jacob B. Shipherd ed., Boston, John P. Jewett & Co. 1859) (quoting Black abolitionist Charles Langston asserting the right to self-defense against seizure under the Fugitive Slave Act).

Accepting as permissible the rebellions of Gabriel, Turner, Brown, and others who rebelled as or on behalf of the enslaved or violently resisted laws meant to enforce slavery, like the Fugitive Slave Act, thus rules out every argument that appeals to the legitimate political authority of anything in the Constitution before December 6, 1865, unless the Thirteenth Amendment alone or with other Amendments could retroactively confer authority on the Founding generation.

A. Partial Legitimacy Isn't Good Enough: The Problem of Structural Racism

One might object to the argument thus far by claiming that a constitution with undemocratic *origins* can nonetheless be democratically legitimate in *application* if it creates an inclusive system of self-rule going forward. And surely that is true to some degree: moral legitimacy is undoubtedly a continuum property, and the existing U.S. government is *more* legitimate than it was before the Civil War. I take it that most Americans believe that violent political change is no longer justifiable (and hence condemn more recent such efforts, like the January 6, 2021 coup attempt).⁴⁸ As will be discussed at greater length below, this partially weakens the critical force of the case against originalism presented so far, but it does not eliminate the moral need to identify a method of constitutionalism that permits us to confer greater legitimacy on the Constitution we have.

I contend that full legitimacy is unavailable to a Constitution that continues to generate undemocratic forms of day-to-day political decisionmaking, such as by the malapportionment of the Senate and Electoral College, in ways that are identifiably continuous with the exclusions of the Founding era. That malapportionment disproportionately favors white voters in small, rural states over voters of color in states with major urban areas,⁴⁹

⁴⁸ See, e.g., Anthony Salvanto, *CBS News Poll on Jan. 6 Attack 3 Years Later: Though Most Still Condemn, Republican Disapproval Continues to Wane*, CBS NEWS (Jan. 6, 2024, 10:04 PM), <https://www.cbsnews.com/news/jan-6-opinion-poll-republican-disapproval-wanes-2024-01-06> [https://perma.cc/2XEZ-Q4AM] (describing disapproval of the January 6 coup attempt by large majorities). This may, however, have changed to the extent that Trump's pardon of those attackers shifted public opinion. See Ashley Lopez & Elena Moore, *Some Trump Voters Express Reservations with His Sweeping Jan. 6 Pardons*, NPR (Jan. 22, 2025, 5:00 AM), <https://www.npr.org/2025/01/22/nx-s1-5269733/january-6-pardons-trump-voters> [https://perma.cc/4Q65-T6XG] (describing poll results finding that only thirty percent of Republicans disapproved of the pardons).

⁴⁹ See Richard Johnson & Lisa L. Miller, *The Conservative Policy Bias of U.S. Senate Malapportionment*, 56 POL. SCI. & POL. 10, 11, 16 (2023) (finding that population-based representation in the Senate would likely both generate a substantial increase in representation for states with large proportions of voters of color and shift Senate vote outcomes toward progressive causes); Neil Malhotra & Connor Raso, *Racial Representation and U.S. Senate Apportionment*, 88 SOC. SCI. Q. 1038, 1045 (2007) (calculating underrepresentation of Black and Latino voters in the Senate due to their concentration in high-population states); John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEGIS. STUD. Q. 405, 420-25 (2006) (reporting similar results by a

and the Constitution as currently interpreted permits racially regressive politicians to continue to put a thumb on the scale in the voting booth.⁵⁰ Moreover, those contemporary forms of democratic failure plausibly descend directly from the Founding oppressions, particularly slavery.⁵¹ That same malapportionment carries through into the constitutional amendment process, which gives residents of less-populous states like Wyoming disproportionate influence compared to residents of highly-populous states like California.⁵² The same goes for the process of judicial interpretation, since the federal judiciary is appointed by a President chosen by a malapportioned Electoral College and confirmed by a malapportioned Senate. Three of the current Supreme Court Justices were nominated and confirmed in Donald Trump's first term—a term he enjoyed even though he lost the popular vote.⁵³ Two others were nominated in George W. Bush's second term, even though he gained that term arguably in part because of the incumbency advantage from his first term, which he won through the Electoral College after losing the popular vote.⁵⁴ For those reasons, a majority of the current Supreme Court is arguably illegitimate by basic majoritarian standards. Another flagrantly undemocratic feature is the Constitution's

different calculation method, further reporting that Senators from low-population, overrepresented, states tend to oppose policies advocated by racially progressive groups).

⁵⁰ See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 544, 557 (2013) (gutting the Voting Rights Act); *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1233-34 (2024) (holding that the Constitution will not impede states from race-based redistricting unless plaintiff shows that race is a "predominant" or "overriding" consideration in districting).

⁵¹ See Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDozo L. REV. 1145, 1146-47 (2002) (arguing that the Electoral College was partly motivated by slave states' desire to reinforce the electoral advantage of the Three-Fifths Clause). But see Earl M. Maltz, *The Presidency, the Electoral College, and the Three-Fifths Clause*, 43 RUTGERS L.J. 439, 440-41 (2013) (criticizing Finkelman's argument). Today, the Electoral College favors whites via the advantage it gives low-population states in apportioning Senators. See generally Johnson & Miller, *supra* note 49; Malhotra & Raso, *supra* note 49; Griffin, *supra* note 49. The movement of people of color to cities in higher-population states was, of course, a consequence of the Great Migration, in turn a result of Jim Crow oppression. See Stewart E. Tolnay, *The African American "Great Migration" and Beyond*, 29 ANN. REV. SOCIO. 209, 214-16 (2003) (documenting the deprivations suffered by southern Blacks prior to the Great Migration). Thus, it is fair to say that the Electoral College has served the interests of white supremacy both at the Founding and today (though not necessarily in the same way), given that the advantages provided to whites at the Founding—which endured after the Civil War as persistent wealth and social status advantages, contributing to whites' power to implement the Jim Crow regime that drove Blacks to northern cities—were a direct causal factor in their modern electoral advantages.

⁵² To be more specific, individuals in less-populous states have disproportionate influence because, much like in Senate and Electoral College apportionment, the ratification of amendments counts by states, not by people. U.S. CONST. art. V.

⁵³ 2016 Presidential Election Results, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [https://perma.cc/NAL9-BQJB].

⁵⁴ 2000 Electoral College Results, NAT'L ARCHIVES (Jan. 20, 2022), <https://www.archives.gov/electoral-college/2000> [https://perma.cc/N9AY-NF74].

tolerance of felon disenfranchisement despite its racially disparate effects and its origins in Jim Crow.⁵⁵

It should be unsurprising, in light of the thumb on the scale in favor of racially regressive interests that all of these facts create, that constitutional doctrine in recent years has also run decidedly in a similar direction. There is a kind of vicious cycle that can serve as one key example of the phenomenon that critical race theorists have called “structural racism”⁵⁶: the allocation of political power favors regressive white interests, who then pick Supreme Court Justices who make constitutional decisions permitting the further promotion of those same interests through the electoral process, perpetuating the cycle indefinitely.⁵⁷

Because “structural racism” is a highly controversial idea, not least because it might seem to some to deny the possibility of individual responsibility for individual outcomes and to attribute guilt to present-day whites for past evils,⁵⁸ permit me a moment to say what I mean by it. I understand structural racism, as it operates over the course of constitutional history, as a thumb on the scale of probabilities over a space of social outcomes.⁵⁹ That is, the lingering consequences of slavery in the Constitution did not deterministically dictate our recent racially regressive Supreme Court decisions. Many contingencies (like James Comey’s “October surprise” in the 2016 election) that could have been different stood on the causal pathway to those decisions.⁶⁰ Rather, the structural remnants of slavery in the Constitution load the dice in favor of racially regressive outcomes, making it such that whenever there is a shock to our existing political equilibrium, it is easier for the system to shift in a regressive direction rather than in a positive direction, such that, on the whole, we can expect the central tendency of the constitutional order to be racially regressive. In the context of the 2016

⁵⁵ See Gowder, *Reconstituting We The People*, *supra* note 21, at 364 (describing the racially discriminatory intent and application of felony disenfranchisement).

⁵⁶ For accounts of structural racism, see generally John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008); Daria Roithmayr, *Them That Has, Gets*, 27 MISS. COLL. L. REV. 373 (2008).

⁵⁷ See *supra* note 50 (identifying Supreme Court decisions demonstrating this phenomenon).

⁵⁸ This is a misunderstanding that is sometimes found among non-specialists. See, e.g., Cathleen Chen, ‘White Guilt’ Video Kerfuffle: Should Schools Teach Structural Racism?, CHRISTIAN SCI. MONITOR (Feb. 12, 2016, 11:23 AM), <https://www.csmonitor.com/USA/2016/0211/White-guilt-video-kerfuffle-Should-schools-teach-structural-racism> [https://perma.cc/6SD9-DPR4] (reporting on parents’ perceptions that an educational video about structural racism was teaching “white guilt”).

⁵⁹ I thank Adam Davidson for urging me to clarify this point.

⁶⁰ See Michael S. Schmidt, *Comey’s October Surprise Shook America Four Years Ago Today. His Wife Tried to Stop It*, NBC NEWS (Oct. 28, 2020, 6:53 AM), <https://www.nbcnews.com/think/opinion/comey-s-october-surprise-shook-america-four-years-ago-today-ncna1245018> [https://perma.cc/RQS9-SPWV] (explaining Comey’s October surprise to reopen investigation into Democratic Presidential nominee Hillary Clinton).

election that led to the rightward ideological shift of the Supreme Court, for example, consider that the built-in biases of the Electoral College toward rural whites made it much easier for an October surprise to swing an election toward a white supremacist candidate rather than away from one.

I contend that such structural racism is a general dynamic underpinning the Constitution's continuing illegitimacy. The Constitution supported an allocation of political, social, and economic power which frustrated and continues to frustrate efforts to reform it, even efforts as drastic as the Reconstruction Amendments. Thus, contra scholars who have argued that those amendments, plus the Nineteenth Amendment, cured the Constitution's democratic failings,⁶¹ I argue that the original Constitution has, in many ways, created the conditions for the perpetuation of its own injustices.

The original Constitution locked in various inequalities under the guise of property rights and local political autonomy.⁶² It enabled white Southerners to unjustly monopolize land and wealth by sanctioning both slavery and the disparate political power of the Three-Fifths Clause.⁶³ Furthermore, enslavers and others who benefitted from the system of slavery kept their unjustly acquired non-slave property after the Civil War and Reconstruction Amendments.⁶⁴ That enabled them to withhold the economic and social preconditions for full citizenship from freed people even as the legal preconditions were established, simultaneously facilitating the undermining of those self-same legal preconditions. For example, when you have a class of recently freed slaves who are impoverished, it becomes relatively simple to disenfranchise them by taking away the vote from those convicted of petty theft and to perpetuate their economic subordination

⁶¹ See, e.g., MCGINNIS & RAPPAPORT, *supra* note 15, at 109-11 (arguing that "the plight of African Americans during the Jim Crow era" "was principally the result of a failure to enforce the Constitution's original meaning," in particular that of the Reconstruction Amendments).

⁶² See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-52 (1857) (citing constitutional protection of property rights and the limited powers of Congress relative to states as reasons to strike down a federal ban on slavery in unincorporated territories).

⁶³ U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1.; *id.* art. IV, § 2, cl. 3. See generally Adam Rothman, *The "Slave Power" in the United States, 1783-1865*, in RULING AMERICA: A HISTORY OF WEALTH AND POWER IN A DEMOCRACY 64 (Steve Fraser & Gary Gerstle eds., 2005) (describing antebellum political domination of slaveholders, known to abolitionists as the "slave power").

⁶⁴ See GOWDER, THE RULE OF LAW, *supra* note 46, at 65-69 (describing the failure of post-Civil War land reform). The portions of such property that could be fairly described as "unjustly acquired" include, at a minimum, those lands forcibly acquired from Native American nations as well as those acquired by increases in wealth attributable to the use of slave labor. Also included would be lands acquired under racially discriminatory land claim statutes, like the legislation commonly known as Donation Land Claim Act of 1850. Donation Land Claim Act of 1850, ch. 76, 9 Stat. 496 (1850) (providing for land grants in the Oregon Territory to white settlers only).

through the sharecropping system.⁶⁵ More abstractly, changing deeply embedded social, economic, and political arrangements is more complex than just rewriting the original legal text that authorized them.⁶⁶ Insofar as the underlying economic, social, and (thereby) political inequalities were reinforced by the pre-Reconstruction Constitution, by permitting those inequalities to continue, the Reconstruction Amendments established superficial rather than genuine Black citizenship and thereby failed to sufficiently correct for the Constitution's original democratic failure.

In these ways, the Constitution is rooted in, and continues to perpetrate, America's historical injustices of race, as well as (through parallel processes) indigeneity and gender.⁶⁷

This continuing illegitimacy is, as I said, not severe enough to generate a present-day right to rebellion, because the Constitution-as-presently-applied might still be more democratic than immediately viable alternatives that might result from change by amendment (or destruction) under our current burdened politics, and no longer authorizes the world-historical evil of chattel slavery. But I take it that many of us want more from constitutional legitimacy than no longer having a right to rebel. In particular, many of us may want to believe that the democratic will of one's fellow citizens, as expressed in our laws, gives us some reason to obey. Under a genuinely democratic constitutional order, I can express my respect for the shared project of political freedom and self-rule in which we all participate by obeying even those laws with which I disagree. And under such a system, an elected official can express their respect for the political will of the people extended over

⁶⁵ See generally Pippa Holloway, *"A Chicken-Stealer Shall Lose His Vote": Disfranchisement for Larceny in the South, 1874–1890*, 75 J.S. HIST. 931 (2009) (describing the Southern enactment of disenfranchisement for petty theft).

⁶⁶ See Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369, 384–88 (1999) (describing social scientific approaches to the problem of “path dependency,” in which prior historical circumstances exercise outsized influence on institutional development going forward).

⁶⁷ On continuing injustices of gender alone and in conjunction with race, we need look no further than the total neglect of the role of reproductive rights in women's lives or in Black women's history in *Dobbs*. See Paul Gowder, *Anti-Liberal Rights Retrenchment as a Threat to the Rule of Law*, 73 EMORY L.J. 1173, 1198–208 (2024) (describing the neglect of women's reliance interests); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1180–93 (2023) (describing Dobbs's neglect of women's history). On indigeneity, see Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 2–8 (2023) (describing the history of colonial oppression of Native Americans and present-day neglect of Native Americans in constitutional law); *id.* at 19 (arguing that the plenary power doctrine “obscures the constitutional law, principles, and values of American colonialism that continue to shape our colonial relationships today, without addressing difficult questions of justification”).

time by obeying the constitutional rulings of the Supreme Court which speaks for that extended will.⁶⁸

The Constitution is unable to supply that kind of legitimacy. Consider the hypothetical example of a woman who experiences an unwanted pregnancy in a state that criminally punishes abortion, perhaps (to intensify the point) descended from Indigenous people conquered by the United States (but to avoid choice of law complications, not an enrolled member of one of the Native nations that preserves some degree of sovereignty). The “authority” over her exercised by the United States and the state is derived from unjust conquest. The legal system continues to neglect the interests of people like her in ways that are recognizably descended from that conquest. From the internal perspective of that conqueror’s legal system,⁶⁹ the power to outlaw abortion was derived from a decision of the U.S. Supreme Court which purported to examine the “history and tradition” of the American people without in any way attending to the history and tradition of people who shared any identity or interests with her⁷⁰—replicating the original act of conquest in a legal analysis that takes only the conqueror’s perspective to have jurisgenerative power. That decision was made possible by the Supreme Court nominations of a President who lost the popular vote and was ushered into office thanks to an Electoral College system that has favored the interests of whites since the Founding and continues to do so to the present day.⁷¹

It is hard to see how our hypothetical Indigenous woman has any moral reason to respect the law prohibiting abortion. If she does obey it, that is because of the threat of state violence, not because she is in any meaningful way a democratic co-author of the constitutional system that suddenly made way for that law after half a century of saying that she had an individual right which would have foreclosed it.⁷²

⁶⁸ Cf. THE FEDERALIST NO. 78 (Alexander Hamilton) (offering such an account of judicial review).

⁶⁹ Cf. *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (openly characterizing relationship of U.S. courts to Indigenous peoples as “[c]ourts of the conqueror”).

⁷⁰ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248-56 (2022) (discussing “history and tradition” of American abortion regulation without mentioning Indigenous peoples, their laws, or their traditions, with the sole exception of a short reference to the law of the Kingdom of Hawaii).

⁷¹ See *supra* note 53 and accompanying text.

⁷² The reader might fairly ask how an illegitimate Constitution and Supreme Court could have generated a right to abortion in the first place. However, if you accept the claim of this Essay that constitutional legitimacy can be partial, then it should not be too difficult to believe that something like an abortion right can be legitimate even under a constitution that lacks full legitimacy. After all, part of the ground of the Constitution’s illegitimacy is its neglect of the interests of women. A judicially discovered right that takes into account the interests of women can be seen as a move toward greater legitimacy, and hence as a genuinely obligation-generating, independent of a critique of the constitution as a whole.

Nor is the particular hypothetical under consideration unique. I offer one additional example. As LaToya Baldwin Clark explains, our municipalities treat access to their schools as property and attendance in a school district by a nonresident as theft.⁷³ Consider the position of Black parents who, thanks to the legacy of segregation, live in an under-resourced municipality that provides substandard schools. The Constitution, as interpreted by the Supreme Court under conditions of structural racism, refuses to permit serious remedies for the legacy of segregation by tying school integration programs to specific district-by-district acts of de jure segregation and ignoring the much longer legacy of residential segregation that created concentrated racial disadvantage across the lines of municipal boundaries.⁷⁴ Dare the rest of us criticize such parents for committing a so-called “theft” by lying about their address?

Numerous other questions follow from the admission that the U.S. Constitution remains substantially illegitimate in ways that at least sometimes warrant legal defiance. For example, does the moral license to defy the law extend to the entire population or just to members of oppressed groups? Does it extend to all laws, to all laws for which there is not some independent ground of obedience (I take it that we all have reasons to obey the laws against murder), or only to laws that represent a particular disregard of the interests or agency of those called upon to obey them?⁷⁵ But for present purposes, it is not necessary to answer these questions, so long as the reader is willing to concede some degree of illegitimacy with practical implications

⁷³ LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 398, 406 (2019) (explaining how municipalities treat education as a resource that can be stolen by outsiders); LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. REV. 566, 573 (2021) (“Parents purportedly ‘steal’ an education when they falsify a nonresident child’s address to be able to benefit from a school district’s schools that are designated only for resident children.”).

⁷⁴ See *Milliken v. Bradley*, 418 U.S. 717, 752 (1974) (overturning a multi-district remedy for school segregation on the claim that each district had not been shown to have committed de jure segregation); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11 (2007) (overturning integration by school district); Gregory R. Weiher, *Public Policy and Patterns of Residential Segregation*, 42 W. POL. Q. 651, 651-56 (1989) (describing the relationship between post-*Brown* segregation and municipal boundaries); NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS 36-37, 83-92 (1994) (describing the creation of racialized municipal boundaries).

⁷⁵ Cf. Paul Gowder, *Equal Law in An Unequal World*, 99 IOWA L. REV. 1021, 1023-26 (2014) (giving account of the rule of law principle of generality focused on laws that represent disregard of equal standing of those called upon to obey them); GOWDER, THE RULE OF LAW, *supra* note 46, at 73-75 (interpreting Martin Luther King Jr.’s case for civil disobedience in similar terms). Note that I argue here that defiance, not mere civil disobedience, is permissible. A traditional civil disobedient arguably respects the legitimacy of the legal system as a whole, represented by the traditional willingness to accept punishment under it. I can see no reason why our Indigenous woman seeking an abortion ought to accept punishment if she can avoid it.

for the behavior of ordinary people and actors within the legal system, and hence the need to do something to correct it.

B. *Whites as Trumps, or, How Structural Racism Defeats Originalist Alternatives to Popular Sovereignty*

Right-leaning originalists are aware of the problems with the Constitution's claim to democratic political authority. Two attempts to avoid the problem by offering accounts of constitutional legitimization that do not depend on popular sovereignty or that aim to redeem the Constitution's democratic credentials are worth addressing here.

McGinnis and Rappaport argue that the (originalist) Constitution is likely to be welfare maximizing because it was enacted by a supermajority.⁷⁶ Of course, they realize that the original Ratification was not a true supermajority because of the Founding exclusions, and they further contend that the original meaning of the Reconstruction Amendments, which had the potential to rectify this supermajoritarian failure,⁷⁷ was frustrated by the failure of the United States to comply with those Amendments for over a century.⁷⁸ Nonetheless, they offer a kind of argument from the second best, suggesting that the decisional risks (like partisanship and bias) from "judicial correction" outweigh the ongoing consequences of this failure.⁷⁹

It might be possible to read McGinnis and Rappaport as willing to count as originalist an interpretation of the Reconstruction Amendments that fully embraces the most vigorous demands of their Black founders (rather than just the white radical Republicans).⁸⁰ If so, perhaps some "judicial correction" would actually be pro-originalist rather than anti-originalist by their lights.

However, McGinnis and Rappaport resist such arguments, suggesting that Black Americans were not "part of the enactment process" and that even a method of interpretation that aims to incorporate Black interests would be unlikely to lead to provisions that present-day racial progressives support, like affirmative action.⁸¹ Based on this, I will assume that their version of

⁷⁶ See MCGINNIS & RAPPAPORT, *supra* note 15, at 62 ("[W]e show that these rules [for enacting and amending constitutional text] impose strict supermajoritarian requirements and that such requirements have produced some of the most beneficial constitutional provisions.").

⁷⁷ Albeit only partially, due to the continuing exclusion of women and Native Americans.

⁷⁸ See MCGINNIS & RAPPAPORT, *supra* note 15, at 109 ("Although the original meaning of the Reconstruction Amendments would have provided blacks with substantial, if not complete, protection against discrimination, the three branches of the federal government failed to respect that original meaning, to the great detriment of African Americans."). I thank John McGinnis for clarifying their argument for me.

⁷⁹ *Id.* at 108.

⁸⁰ See GOWDER, THE RULE OF LAW, *supra* note 46, at 69-72 (arguing for Black authorship of the Reconstruction Amendments).

⁸¹ MCGINNIS & RAPPAPORT, *supra* note 15, at 108.

originalism about the Reconstruction Amendments does not include robust claims for economic inclusion, such as the “40 acres” land redistribution, which many advocated for at the time, or modern-day heirs to such ideas, such as affirmative action and reparations proposals.

If this is true, however, then it is hard to see how the Constitution as amended by the Reconstruction Amendments can be described as welfare-maximizing or enacted by a supermajority. The initial Constitution and its political background created a sharply divided society with ascriptive classes having opposed political interests. Because that built-in conflict has persisted across generations,⁸² the whites that have long exercised power have not needed to take the interests of people of color into account, except insofar as those interests have incidentally coincided.⁸³ Thus, at least through the Jim Crow period—which further entrenched white advantage through various wealth- and power-hoarding mechanisms such as segregation—nothing resembling multiracial acceptance (supermajority or otherwise) could be ascribed to the Constitution or the institutional order it created.⁸⁴

Conventional constitutional law thinking tends to overemphasize the distinction between legal rights and the underlying social conditions for their enjoyment. The Reconstruction Amendments—as interpreted by dominant groups, including originalists, from their addition until now—have failed to embody principles that could have been genuinely welfare-maximizing and assented to by a cross-racial supermajority. To remedy this, we need to read the Amendments to incorporate a vision of Black political inclusion that also protects the social and economic preconditions for exercising the rights of citizenship.

For McGinnis and Rappaport, this would amount to “judicial correction” rather than constitutional amendment.⁸⁵ But once we let go of originalism with its legitimacy problem, we need not accept a stark opposition between constitutional fidelity and “judicial correction.” For a non-originalist, trying to make sense of what a diverse supermajority enacted or understood some words to mean will inevitably require the present-day interpreter to make

⁸² In addition to ordinary observation of our existing racial politics, political science also illuminates that persistence: the prevalence of slavery at the dawn of the Civil War is empirically measurable in racial voting patterns today. See generally AVIDIT ACHARYA, MATTHEW BLACKWELL & MAYA SEN, *DEEP ROOTS: HOW SLAVERY STILL SHAPES SOUTHERN POLITICS* (2018); Avidit Acharya, Matthew Blackwell & Maya Sen, *The Political Legacy of American Slavery*, 78 J. POL. 621 (2016).

⁸³ See Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing the theory of “interest-convergence” as a key but limited way that the interests of people of color are served in our law).

⁸⁴ Cf. CHARLES TILLY, *DURABLE INEQUALITY* 10 (1998) (offering a theory of the persistence of group-based inequality centered on “opportunity hoarding”).

⁸⁵ MCGINNIS & RAPPAPORT, *supra* note 15, at 17.

choices about which evidence to attend to, choices that invariably will implicate the interpreter's own understanding and values. This is due to well-known difficulties with making sense of both group cognitions and collective political wills.⁸⁶ On the other hand, any "judicial correction," at least on the basis of the program offered by this Essay, will necessarily partake in at least some of the democratic welfarist benefits that McGinnis and Rappaport attribute to the constitutional amendment process.⁸⁷ This "correction" will still depend on concrete political victories (albeit incremental, since the political pathologies preventing effective Article V amendments also likely prevent more drastic short-term change) won by social movement groups.⁸⁸

Randy Barnett offers a very different right-originalist approach to legitimate constitutional authority, rooted in natural law theory.⁸⁹ He denies that collective self-rule (i.e., democracy) can be the basis for the Constitution's authority.⁹⁰ Barnett argues that even supermajorities lack the right to bind nonconsenting individuals, so the only kind of popular sovereignty that could do the trick would be unanimity.⁹¹ Barnett's alternative theory of legitimization is the protection of natural rights.⁹² He combines that with a conception of an individual's "presumed" consent to a government that protects those rights.⁹³ This serves as a case for originalism insofar as one accepts that the original Constitution, entrenched by the Article V amendment process, protected natural rights.⁹⁴

But it is hard to see how Barnett's argument can handle the continuous pattern of violations of the natural rights of the oppressed, which extends from the Founding through the present. Accepting Barnett's premise that pre-political natural rights exist, so long as one supposes that some degree of collective self-determination or at least freedom from conquest, kidnapping,

⁸⁶ See Paul Gowder, *Constitutional Sankofa*, 112 GEO. L.J. 1437, 1452-53 (2024) ("[S]ocial choice theory suggests that the dream of a unified will of a multi-member body proceeding by a vote is inevitably futile.").

⁸⁷ See MCGINNIS & RAPPAPORT, *supra* note 15, at 13-14 (discussing the "rich deliberative process of constitution making" associated with their supermajoritarian account of the amendment process).

⁸⁸ See *infra* Section III.o.

⁸⁹ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 11 (rev. ed. 2014) [hereinafter BARNETT, RESTORING]; Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576 (2014) [hereinafter Barnett, *We the People*].

⁹⁰ See BARNETT, RESTORING, *supra* note 89, at 11; Barnett, *We the People*, *supra* note 89, at 2592.

⁹¹ BARNETT, RESTORING, *supra* note 89, at 21; Barnett, *We the People*, *supra* note 89, at 2592.

⁹² BARNETT, RESTORING, *supra* note 89, at 44; Barnett, *We the People*, *supra* note 89, at 2596-97.

⁹³ BARNETT, RESTORING, *supra* note 89, at 29-30; Barnett, *We the People*, *supra* note 89, at 2599-600.

⁹⁴ BARNETT, RESTORING, *supra* note 89, at 53; Barnett, *We the People*, *supra* note 89, at 2605.

or enslavement is among those natural rights, then the original Constitution violated those rights to an extreme degree.⁹⁵ To the extent that the continuing legacy of those initial violations means that populations descended from their initial victims are more likely to both bear the burdens of protecting others' natural rights and to have their own natural rights violated, we cannot simply appeal to natural rights to justify present-day constitutional authority—not when a constitution untainted by the legacy of the Founding exclusions might do better at protecting those rights. This is so even if the present-day Constitution protects the natural rights of the oppressed to some limited degree.

Structural racism and the continuing legacy of the unjust exclusions entail that present-day burdens on natural rights are distributed unequally. Consider the protection of private property. Racial disparities in policing and criminal justice force Black Americans to take on a disparate burden in protecting the property of whites.⁹⁶ Many Black Americans live in segregated communities that are subject to harsh policing in order to protect the property of their white neighbors, while having their own property less protected.⁹⁷ Similarly, many Indigenous peoples have historically held territories or exercised rights of movement crossing the present-day U.S. border, but their descendants are now labeled unauthorized immigrants in the United States with grotesquely degraded legal rights.⁹⁸ It can be aptly said that “[t]he [b]order [c]rossed” them.⁹⁹ Each of these represents a burden that those who were excluded from the original Constitution are currently forced

⁹⁵ See Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1304–05 (2015) (asserting that the 1868 conception of natural rights derived from John Locke included rights against enslavement and more generally to liberty); see also *id.* at 1315–17 (describing the American genesis of Lockean natural right ideas in George Mason’s 1776 proposals for the Virginia Declaration of Rights and the recognized tension between those ideas of natural rights and slavery). More to the point, if we’re evaluating the Constitution from a present-day moral perspective (as we must if we are to decide whether we ought to allow ourselves to be ruled under its purported authority), then any theory of natural rights capable of morally binding us would have to be acceptable to common present-day moral understanding. It is difficult indeed to imagine how a contemporary conception of natural rights could be compatible with conquest or enslavement.

⁹⁶ See Paul Gowder, *Is Criminal Law Unlawful?*, 2023 MICH. ST. L. REV. 61, 156 (2023) (describing how segregation allows advantaged communities to externalize the costs of protecting property onto disadvantaged communities).

⁹⁷ See *id.*

⁹⁸ See Eileen M. Luna-Firebaugh, *The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas*, 17 WICAZO SA REV. 159, 159 (2002). As I finalize this Essay at the dawn of the second Trump administration, even members of Indigenous groups within the United States are reporting (deeply ironic) immigration-based harassment. See Arlyssa D. Becenti, *Navajo Nation Leaders Address Reports of ICE Detaining Tribal Citizens*, ARIZ. REPUBLIC (Jan. 24, 2025, 11:18 PM) <https://www.azcentral.com/story/news/local/arizona/2025/01/24/navajo-nation-leaders-address-reports-of-ice-detaining-tribal-citizens/77911978007> [<https://perma.cc/YJN2-VUJ8>].

⁹⁹ Luna-Firebaugh, *supra* note 98, at 159.

to bear. And even if Barnett were to argue that those natural rights violations also violate the Constitution, understood in an originalist way after the Reconstruction Amendments, I once again emphasize that the post-Reconstruction Constitution is still partly responsible for their perpetuation because those Amendments failed to cure the locked-in social, political, and economic advantages that the antebellum Constitution supported.

What's more, Barnett's argument only works assuming a preexisting conception of natural rights to which the original Constitution happens to correspond. But even if you believe that pre-legal natural rights exist as an ontological matter, we ought to adopt a little bit more humility about our ability to discover them. As Elizabeth Anderson argues, the epistemology of morality is socially contingent: people (and societies) learn moral values from experience, and moral intuitions can be biased by hierarchical advantage.¹⁰⁰ Consider property rights: I posit that the belief that property rights are particularly important, even relative to other rights, is much easier to hold for those who happen to own lots of property.¹⁰¹ To discern the balance between property and other rights suitable for all Americans under a more humble moral epistemology, we should take a more empirical approach and ask how all Americans, including those who have experienced subordination, have understood the scope of natural rights. That is precisely the strategy that the rest of this Essay defends, albeit not for natural rights-related reasons. I now proceed to that defense.

II. A THEORY OF “LIMIT THE STAKES OF POLITICS”: HEALING OPPRESSION-GENERATED CONFLICT

The originalist strategy criticized in the previous Part reasons from political authority to an argument about what interpretive tools respect that authority (i.e., “public meaning” and the discovery thereof), and then to legal outcomes. That strategy fails at step one.

¹⁰⁰ Elizabeth Anderson, *Moral Bias and Corrective Practices: A Pragmatist Perspective*, 89 PROC. & ADDRESSES AM. PHIL. ASS'N 21, 21, 26 (2015); Elizabeth Anderson, *The Social Epistemology of Morality: Learning from the Forgotten History of the Abolition of Slavery*, in THE EPISTEMIC LIFE OF GROUPS: ESSAYS IN THE EPISTEMOLOGY OF COLLECTIVES 75–94 (Michael S. Brady & Miranda Fricker eds., 2016).

¹⁰¹ In *Cedar Point Nursery v. Hassid*, for example, the Supreme Court prioritized the property rights of landowners over the associational rights of workers. 141 S. Ct. 2063, 2074 (2021). For further discussion of the primacy of property rights, see Paul Gowder, *The Paradox of Property in the American Rule of Law*, L. & POL. ECON. PROJECT (Jan. 17, 2022), <https://lpeproject.org/blog/the-paradox-of-property-in-the-american-rule-of-law> [https://perma.cc/XR37-X7FK].

The ameliorative approach goes the opposite direction. It starts with the functions that any constitution serves,¹⁰² and then considers the interpretive tools that are consistent with those functions. We select the functions and tools from among the universe of possible functions and tools based on their compatibility with the idea of the Constitution as an exercise of legitimate political authority.

That selection process begins with the observation that even though the basis for the Constitution's failure as a product of political authority is the persistent exclusion and oppression on which it is based and which it perpetuates, many of the victims of this exclusion and oppression have also held it out as a beacon of hope to remedy those conditions. The most prominent example is that many antebellum Black Americans saw the Constitution, read together with the universalizing ambitions of the Declaration of Independence, as containing the latent potential for their liberation.¹⁰³ This is not simple opportunism. Rather, there has long seemed to be a connection between the ideals of constitutionalism—limited government, the rule of law rather than arbitrary will—and democracy—the rule of masses rather than elites, government by the consent of the governed, majoritarianism and the equal say of all—and the dream of freedom and equality for the oppressed. Thus, constitutional abolitionists, including Frederick Douglass, argued that there was an inherent tension between the arbitrary power conferred by the slavocracy and the liberal legal ideals expressed by the Constitution.¹⁰⁴

I propose to understand this connection and tension through institutional political science. One canonical political science-inflected account of constitutions is that they limit the stakes of politics.¹⁰⁵ Unasked in that account is why precisely we might need the stakes of politics to be limited? After all, not every successful country features constitutional limitations on politics, and those that do have such limitations frequently do not limit their politics as much as the United States. To pick one example, the United Kingdom regularly implements vast changes to its fundamental political

¹⁰² Such functions need not be coextensive with concrete legal outcomes but they will presumably have some impact on them. For example, we could safely rule out a legal outcome that entails dictatorship because it is incompatible with any reasonable constitutional function. *But see* *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024) (holding that presidents have immunity from criminal prosecution for official acts undertaken during their tenure in office).

¹⁰³ See Gowder, *Reconstituting We The People*, *supra* note 21, at 373–408 (discussing examples of Black Americans' aspirational appeal to the Constitution).

¹⁰⁴ See Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Antislavery?*, in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS* 380, 380–390 (Philip S. Foner & Yuval Taylor eds., 1999).

¹⁰⁵ Eskridge, *supra* note 29, at 1293–96; Mittal & Weingast, *supra* note 29, at 279; Weingast, *supra* note 29, at 258.

ordering through ordinary legislation, including Brexit, the creation of a supreme court, and the rise and fall of the Fixed-Term Parliaments Act 2011 (which briefly took away the right of the government in power to call a snap election).¹⁰⁶ Yet British politics is not, to my knowledge, characterized by the same kind of fear of one party or leader running totally rampant over fundamental political norms. When Labor won the 2024 election, no one (again to the best of my knowledge) feared that Rishi Sunak would refuse to give up power. Nobody stormed the Palace of Westminster.

Limiting the stakes of politics seems to matter when and where ordinary political conflict poses an existential risk to some interest group within the polity or to the political order itself. Other than the United States, the countries with the most famous constitutional limitations on politics tend to be fragile or transitional democracies, where there is a real risk that the winning party might seek bloody revenge against the loser or upset an institutional settlement protecting some important interest groups. Consider, for example, Chile's tortuous constitutional history, which aimed to protect Augusto Pinochet from justice as well as limit the capacity of popular majorities to alter the balance of power between military and civilian institutions and among the military branches.¹⁰⁷ Here, "limiting the stakes of politics" makes sense, and it should serve as a clue as to the kinds of polities in which constitutions do genuine work. Coinciding with this intuition, political scientists sometimes frame the stake-limiting feature of constitutions in terms of what Rui de Figueiredo and Barry Weingast call "[t]he [r]ationality of [f]ear."¹⁰⁸

Focusing on the notion that one only needs to limit the stakes of politics when politics poses obvious catastrophic dangers reframes some of our most treasured constitutional provisions. For example, one of the original meanings of the Equal Protection Clause was about the word that we so often ignore today, to wit, *protection* from violence, and that meaning is so important both in the past and in the present because legions of white supremacists have long been eager to claim and use power to favor those with their preferred

¹⁰⁶ Constitutional Reform Act 2005, c. 4 (UK) (creating the Supreme Court of the United Kingdom); Dissolution and Calling of Parliament Act 2022, c. 11 (UK) (repealing the Fixed-Term Parliaments Act).

¹⁰⁷ For more discussion of Pinochet's rule over Chile and its constitutional consequences, see Robert Barros, *Personalization and Institutional Constraints: Pinochet, the Military Junta, and the 1980 Constitution*, 43 *LATIN AM. POL. & SOC'Y* 5, 21-23 (2001); Octavio Ansaldi & María Pardo-Vergara, *What Constitution? On Chile's Constitutional Awakening*, 31 *L. & CRITIQUE* 7, 13-19 (2020); Ricardo Lagos, Heraldo Muñoz & Anne-Marie Slaughter, *The Pinochet Dilemma*, 114 *FOREIGN POL'Y* 26, 31-33 (1999).

¹⁰⁸ Rui J.P. de Figueiredo Jr. & Barry R. Weingast, *The Rationality of Fear: Political Opportunism and Ethnic Conflict*, in *CIVIL WARS, INSECURITY, AND INTERVENTION* 261, 261-67 (Barbara F. Walter & Jack Snyder eds. 1999); Mittal & Weingast, *supra* note 29, at 279.

racial identities.¹⁰⁹ The core failure of Reconstruction was the federal government's failure to protect Black political empowerment from the white supremacist terrorists who conducted a violent coup—quite literally withholding the protection of law from Black voters and officeholders.¹¹⁰

More broadly, the stake-limiting perspective encourages us to see the Reconstruction Amendments as an effort at political healing—at building a multiracial democracy out of the ashes of slavery. On that reading, the Amendments represent an effort to build power-sharing institutions so that such a democracy could be built while at the same time protecting the newly enfranchised in their core interests so that they might have a reason to adhere to that democracy. By attempting to rule out political outcomes that would have led to dire harms to the freed, the Reconstruction Amendments sought to limit the stakes of politics to safely integrate them into a shared polity.

Under that interpretation, Reconstruction follows in the oldest constitutional tradition of them all. The very first example of a democratic

¹⁰⁹ On readings of the Equal Protection Clause that take “protection” seriously, see Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 25–35 (2021) (discussing how abolitionists and the Fourteenth Amendment’s framers thought that equal protection included protection from violence); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 510, 546 (1991) (arguing that one of the Fourteenth Amendment’s key purposes was to compel states to stop the widespread violence against Black people in the South). On white-supremacist violence during the post-Reconstruction period, see, e.g., David T. Ballantyne, *Remembering the Colfax Massacre: Race, Sex, and the Meanings of Reconstruction Violence*, 87 J.S. HIST. 427, 427–28 (2021) (describing details of Colfax Massacre, which “[l]eft three white and at least sixty-three Black men dead on Easter Sunday 1873” after “the Fusionist sheriff claimant Christopher Columbus Nash led an attack on the building. With the help of a steamboat cannon, the white paramilitaries burned the courthouse, forcing the Black militiamen to surrender. Later, the attackers murdered most of the prisoners.”); *see also* NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 96–97 (2006) (describing the widespread use of violence to restore white control to the South after Reconstruction). I trust the reader will not object to my use of the word “terrorism” to describe these events. With respect to the ongoing persistence of race-based claims to violent control of the United States, see Vida B. Johnson, *White Supremacy’s Police Siege on the United States Capitol*, 87 BROOK. L. REV. 557, 558 (2022) (noting the presence of white-supremacist groups at the U.S. Capitol on January 6, 2021). *See generally* LEONARD ZESKIND, *BLOOD AND POLITICS: THE HISTORY OF THE WHITE NATIONALIST MOVEMENT FROM THE MARGINS TO THE MAINSTREAM* (2009) (describing the development of modern white nationalism in the United States and its electoral and violent wings).

¹¹⁰ *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 554 (1876) (disabling the federal government from criminally punishing white-supremacist terrorism by holding that the Fourteenth Amendment does not apply to individual action); GOWDER, *THE RULE OF LAW*, *supra* note 46, at 86–95 (discussing the notion of Equal Protection as *protection* and describing the failures in *Cruikshank*, which prevented the government from responding to the Colfax Massacre).

constitution was ancient Athens.¹¹¹ Aristotle (or one of his students)¹¹² explains the origins of Athenian democracy as the product of conflict and injustice: conflict between the wealthy and the masses plagued the city, largely because the former regularly enslaved the latter for debt.¹¹³ Eventually, the warring parties turned to Solon to settle their dispute.¹¹⁴ The constitution that Solon handed down, in addition to abolishing enslavement for debt, established a system of power-sharing.¹¹⁵ Although many of the specific offices continued to be reserved for the wealthy, the bulk of the people were admitted to the key institutions of the assembly and the jury.¹¹⁶

In effect, by giving the masses (among citizen males) a share in the governance of the state, Solon enabled them to preserve their own interests. The subsequent course of Athenian constitutionalism can be seen as a further development of the political settlement between the wealthy and the masses. This was, to be sure, not completely successful because—depending on which side one believes—the rich were mad that they no longer could plunder and abuse the poor with impunity, or the poor abused their access to the courts to extort wealth from the rich. That continued conflict led to two prominent oligarchic coups in the fifth century, but, tellingly, Athens responded to these conflicts by more robustly entrenching the basic power-sharing arrangements of its constitution.¹¹⁷

In both the Athenian and Reconstruction cases, democratic constitutions limited the stakes of politics in order to permit conflicting parties to live together and hopefully reconcile.¹¹⁸ The Athenians pursued reconciliation in part by building a shared political tradition that identified their laws with a kind of collective identity to which both sides could patriotically appeal.

¹¹¹ Although Athens did not—at least until the Fourth Century B.C.E.—have a constitution in the American sense of an entrenched higher law, it did have a constitution in the less rigid British sense (i.e., core principles of how the institutions of government were set up) and even had legal procedures that were arguably analogous to judicial review. See Paul Gowder, *Democracy, Solidarity, and the Rule of Law: Lessons from Athens*, 62 BUFF. L. REV. 1, 8 (2014) [hereinafter Gowder, *Lessons from Athens*] (describing *graphē paranomon*, the rough Athenian version of judicial review).

¹¹² See P.J. Rhodes, *Introduction to THE ATHENIAN CONSTITUTION WRITTEN IN THE SCHOOL OF ARISTOTLE* 5-6 (P.J. Rhodes trans., 2017) (discussing whether Aristotle or someone else wrote the text describing the Athenian constitution).

¹¹³ CONSTITUTION OF THE ATHENIANS (n.d.), reprinted in THE ATHENIAN CONSTITUTION WRITTEN IN THE SCHOOL OF ARISTOTLE 47, 49, 51 (P.J. Rhodes trans., 2017) [hereinafter CONSTITUTION OF THE ATHENIANS].

¹¹⁴ *Id.* at 51.

¹¹⁵ *Id.* at 53, 55.

¹¹⁶ *Id.*

¹¹⁷ Gowder, *Lessons from Athens*, *supra* note 111, at 9-10.

¹¹⁸ For a discussion of many issues closely related to the problems discussed in this Essay, see Josiah Ober, *ATHENIAN LEGACIES: ESSAYS ON THE POLITICS OF GOING ON TOGETHER* 69-71, 82-84 (2005). Ober's account of Athenian collective self-rule has greatly influenced everything in this Part.

Thus, the Athenians raised Solon and other constitutional reformers who followed him to the status of Balkinian “culture heroes,” to whom Athenians could refer to draw political legitimacy.¹¹⁹

The Athenian example prompts us to reflect on our own Constitution and whether its power-sharing arrangements can similarly promote peace despite America’s ongoing and historical injustices and conflicts. It also prompts reflection on whether the problem of political authority upon which this Essay is premised might be solved with a kind of bootstrapping process. That is: we start with dire social conflict, rooted in injustice and exclusion, but we manage, through heroic efforts (and a Civil War) to achieve a constitutional framework that at least gives lip service to universal political inclusion and protection for the basic rights of the previously subordinated. Such a constitution—if actually implemented in a democratic way—can create a collective agent (*a demos*) capable of exercising legitimate political authority. And once that agent is created, perhaps it is capable of retroactively legitimating the constitution under which it was created by using that constitution to implement an ongoing process of genuinely equal self-rule.

To summarize, the ameliorative approach begins with the idea that constitutions limit the stakes of power to permit people on all sides of persistent social conflicts to live together by protecting their core interests. Democratic—that is, egalitarian public-empowering—institutions are particularly suited to serve this function, because (if well-designed) they enable people across lines of conflict to protect their own interests. Finally, we observe that it is *precisely that failure* of democracy that delegitimizes the current Constitution in the first place. This prompts us to search for techniques to read our Constitution democratically, so that it can serve as a tool to heal those conflicts and project the legitimacy it might gain from such a reading back to its own claims to political authority.

While our Constitution has particularly burdened origins because of chattel slavery and Native genocide, the ameliorative approach is potentially more broadly applicable as an approach to the problem of constituent power—of understanding how a constitution can be legitimated by the popular will when the constitution also defines the legitimating *demos*. As an attempt at a contribution to the political philosophy of constitutional democracy beyond the U.S., the ameliorative approach may be compared to

¹¹⁹ In a landmark essay, M.I. Finley traced the practice of constitutional ancestor-worship through Athens to the United Kingdom and the United States. M.I. FINLEY, *The Ancestral Constitution*, in THE USE AND ABUSE OF HISTORY 34, 34-59 (1975). One of Finley’s key points is that such ancestor-worship is always somewhat fictionalized. *Id.* at 41. See also JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 20 (2024) (discussing the use of “[a]rguments from honored authority” that reference the beliefs and behaviors associated with “culture heroes” like the Founders (emphasis omitted)).

Rousseau's Social Contract. On one interpretation of Rousseau, the constitutional framework for the *demos* is first created by a lawgiver standing outside the system; that framework (and hence the legal identity of the *demos* itself) is then ratified and made democratic by the general will of the *demos* thus constituted.¹²⁰ The ameliorative approach adds a dimension of time to this reading of Rousseau, identifying that the *demos* might fail to have a general will and thus fail to legitimately effectuate its own ratification immediately after the act of lawgiving, but may later, and as a product of the struggle for inclusion, build itself into a position where it has the power to do so. As an application of this modified version of Rousseau we can then conclude that the original Founders and their illegitimate Constitution nonetheless created the institutional preconditions for the eventual development of an inclusive *demos* capable of legitimating it.

III. HOW READING FROM BELOW COULD REBUILD THE CONSTITUTIONAL DEMOS (POTENTIALLY)

At a perhaps unhelpfully abstract level, we can characterize the condition to be remedied by a democratic constitution as the lack of unity and equality among the *demos*. An ordinary understanding of longstanding political conflict (informed by reflecting on the course of American history) suggests that inequality and disunity are mutually reinforcing. Inequality breeds disunity because the oppressed are typically dissatisfied with their condition. Disunity breeds inequality because the powerful, under conditions of entrenched social conflict, tend to use their power to reinforce their own social, economic, and political dominance. Disunity and inequality together are poison to democratic legitimacy because they prevent the *demos* from acting like an agent with a collective will capable of ruling itself, and the Constitution and the government operating under its authority become the instruments of caste rule instead.

Supposing that this loose abstract model of our conflict and its consequences is correct, if the Constitution is to remedy that condition, it must begin to operate like a constitution of unified equals. Such a constitution has the capacity to transcend its own illegitimacy: insofar as it genuinely achieves those claims of unity and equality, future generations may—at least

¹²⁰ See Eoin Daly, *Alchemising Peoplehood: Rousseau's Lawgiver as a Model of Constituent Power*, 47 HIST. OF EUR. IDEAS 1278, 1280-83 (2021) (giving *demos*-crafting interpretation of Rousseau's lawgiver); Joel I. Colón-Ríos, *Rousseau, Theorist of Constituent Power*, 36 OXFORD J. LEGAL STUD. 885, 900 (2016) (discussing ratification by the people).

potentially—ratify the constitution they find themselves with through their successful self-governance under it.¹²¹

However, the “insofar as it genuinely achieves those claims of unity and equality” proviso of the previous paragraph is demanding. A people cannot ratify their own constitution until they become a people, that is, until each person who is subject to the constitution’s rule is genuinely treated as an equal citizen capable of partaking in the collective agency of self-rule. This Part argues that the unity and equality proviso imposes substantive constraints on the content of constitutions and by extension constitutional interpretation.¹²²

At a minimum, the logic laid out above implies two concrete conditions on constitutional interpretation to satisfy the unity and equality proviso:

1. The Constitution must be interpreted to protect the *fundamental interests* of all. That is, the rationality of fear must be resolved, and the stakes of day-to-day politics must be lowered: the Constitution must provide a framework for political power such that no group need fear that losing a few elections could lead to severe oppression.
2. The Constitution must be interpreted to protect and respect the *agency* of all. It must be consistent with the authorship of all (even if that authorship is partly fictionalized), so that the whole community may understand itself as engaged in a joint project of self-rule.

¹²¹ To be clear, I do not claim to be able to articulate a full set of sufficient conditions for that ratification. (I also do not take a position on whether some explicit act of ratification by a more democratically self-ruling *demos* would be required, or whether simply successfully living together under a more democratic constitutional framework would be enough.) Many other questions would need to be answered, including how we might tell whether subsequent generations genuinely endorse their constitution or merely grudgingly tolerate it, whether majoritarianism would provide a sufficient basis for that ratification, and what to do about disparities in the degrees of assent across social groups. The claim of this Essay is more modest: that if these problems could be solved, ratification could be a democratic pathway to constitutional legitimization available to the United States, and it may be the only realistic pathway.

¹²² These principles potentially extend beyond constitutional text. Of particular interest are Native American treaties, which might serve a similar function as constitutions insofar as they were meant to establish the terms of peaceful coexistence between Indigenous peoples and the United States. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993) (reading Chief Justice Marshall to “envision an Indian treaty as quasi-constitutional in nature” that “provided the structural framework and linkages between the United States and the tribe for what promised to be a long-standing, if not eternal, sovereign-to-sovereign relationship”). Kristen A. Carpenter has argued that the interpretation of such treaties should draw on Native traditions expressed in Native languages. Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111, 121 (2008). Insofar as such treaties establish the conditions for shared citizenship between Native Americans and the descendants of colonizers (or shared decisionmaking between sovereign Native nations and the United States), this Essay supports Carpenter’s argument.

These two conditions are closely related in two respects. First, one obvious way to ensure a group's fundamental interests are actually protected is to empower them to protect those interests themselves by protecting their constitutional agency.

Consider again Athens. The author of the Aristotelian Constitution of Athens identified the *courts* as containing two of the three most democratic elements of Solon's Constitution (the third was the abolition of debt-slavery)—not, as might otherwise be supposed, the legislative powers of the assembly.¹²³ The most obvious reason why this would be the case is that the courts gave the masses control over the interpretation and implementation of the laws in a durable fashion, rather than mere day-to-day policymaking. Control over the laws entailed the capacity to protect their fundamental interests by controlling both public authority and private power. One example was their interpretation and implementation of the law against *hybris*, conduct that threatened the equal status of citizens.¹²⁴

Second, permitting a social group to understand itself as having constitutional agency—in the context of defective preexisting politics where not all have had equal access to influence the textual content of the Constitution—will entail protecting the rights of subordinated groups, *as members of those subordinated groups have expressed them*, for only then will the members of those groups at least be capable of understanding that they were heard.

Those criteria also fit into a tradition of understanding the capacity to be the source of rules of law, even in a constructive sense, as a constraint on political legitimization. An important example is the version of hypothetical consent offered by Immanuel Kant in the conclusion of his essay, *On the Common Saying: This May be True in Theory, but Does Not Hold in Practice*.¹²⁵ Kant observes that, even though there has never actually been an act of contracting into sovereign authority, the social contract can nonetheless function as an “idea of reason” that “obligates every legislator to pass laws in such a way that they would have been able to arise from the united will of an entire people and to regard every subject, insofar as it wishes to be a citizen, as though it has given its assent to this will.”¹²⁶

I defend a more demanding version of Kant’s strategy in this Essay. From the passage quoted from Kant above, it appears that one could evaluate a law in isolation and *a priori*—either it could have been the object of a united will

¹²³ CONSTITUTION OF THE ATHENIANS, *supra* note 113, at 57.

¹²⁴ Gowder, *Lessons from Athens*, *supra* note 111, at 9, 25.

¹²⁵ Immanuel Kant, *On the Common Saying: This May Be True in Theory, but It Does Not Hold in Practice*, in TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 41 (Pauline Kleingeld ed., David L. Colclasure trans., 2006).

¹²⁶ *Id.* at 51 (emphasis omitted).

or it couldn't, and we can figure it out from the philosopher's armchair. We could easily plug Kant's account of hypothetical consent into, for example, Barnett's natural rights constitutionalism without changing anything of substance. But for the reasons noted with respect to Barnett and drawing on Anderson's arguments about moral epistemology,¹²⁷ under conditions of social diversity and conflict, the best way to figure out whether or not some group of people could have assented to some law (for Kant's inquiry), or whether some constitutional doctrine is compatible with the fundamental interests and political agency of that group (for mine), is at least partly empirical, rooted in the actual experiences and statements of those whose interests and agency are implicated.

A. *How to Do Ameliorative Constitutional History*

With that last point, we get to the topic of this Symposium—the use of history in constitutional interpretation. Let us return to proposition three in the model originalist argument that began this Essay.¹²⁸ The conventional right-leaning originalist approach to the use of the past rests on a connection between different historical facts and the exercise of authority. For example, some historical facts (legal doctrine at the time of the Founding, James Madison's writings, eighteenth-century dictionaries, etc.) might reflect the then-current meaning of words in the Constitution and count as relevant to the content of legal authority.¹²⁹ Balkin's approach to the past is somewhat more catholic, not necessarily in terms of the variety of sources that are admissible but in the loosening of the connection between those sources and a conception of authority. He would, for example, permit us to call upon history for hortatory purposes.¹³⁰

Ameliorative constitutionalism calls upon the past to serve the democratizing ambitions of constitutional legitimacy. This approach is closer to right-leaning originalism than to Balkin's originalism in the sense that it still aims to fit our uses of history into an account of the exercise of constitutional legislative authority. However, it rejects the right-originalist

¹²⁷ See *supra* note 100.

¹²⁸ See *supra* Part I.

¹²⁹ At the outer margins of such an approach, consider examples of negative authority. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) can be useful to an originalist interpreting the Thirteenth Amendment insofar as it represents a collectively salient authoritative account of what slavery amounted to, and hence a description of what that Amendment abolished. (I thank Andy Koppelman for suggesting this example.) The same might be said about, say, the practices of the colonial vice-admiralty courts and the 1850 Fugitive Slave Act commissions as negative examples for the jury trial right.

¹³⁰ See, e.g., BALKIN, *supra* note 119, at 3–6, 10 (noting a wide variety of historical arguments for many different purposes).

account of how that authority was exercised, aiming to replace it with an account that draws from the advocacy of those who ought to have been included in that authority from the get-go.

As I have argued at length elsewhere, Black Americans, among other groups, have had much to say about our Constitution, and much Black American advocacy is recognizably continuous across time.¹³¹ Permitting Black Americans today to understand themselves as equal citizens, whose fundamental interests are protected and whose role in the country's shared political agency is respected, entails attending to the actual (albeit indirect) authorial role Black Americans have had in the Constitution as well as to the claims of Black advocates for freedom and equality thereafter. This means, for example, reading the Thirteenth and Fourteenth Amendments as encapsulating the expressed aspirations of Black abolitionists and Freedpeople as well as the continuing interests of Black Americans today. The same is true for other portions of the constitutional text and other people whose subordination might be relieved by them, including women and Native Americans.¹³²

I must immediately introduce a limitation of this argument. Constitutional legitimacy is a continuum rather than a binary on-off switch. As I argued in Part I, our Constitution as currently interpreted is no longer illegitimate enough to warrant a right to revolution, but it is not legitimate enough to genuinely give the victims of oppression moral reason to comply with laws rooted in that oppression.¹³³ There is unlikely to ever be what we could fairly describe as a "fully legitimate" constitutional state—if only because the permanent challenge posed by the "boundary problem," or defining which group of people counts as "in" and which as "out" for the purposes of political legitimization, is probably unsolvable in the absence of a

¹³¹ See, e.g., GOWDER, THE RULE OF LAW, *supra* note 46, at 8-15, 69-75 (emphasizing the "role of subordinated groups in American society in the development and articulation of the American conception of the rule of law"); Paul Gowder, *The Constitutional Ambition of Black Liberation*, 17 DEPAUL J. FOR SOC. JUST., Winter 2023, at 1, 4-6 ("In reality, there is a substantial historical record of Black abolitionists, then Freedpeople, linking economic inclusion, political inclusion, and freedom from enslavement in a variety of ways that were critical to the campaign against slavery and its vestiges.").

¹³² See generally Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022) (noting the absence of women from stories about the making of the Constitution and offering an account of how that absence may be challenged); Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243 (2023) (discussing numerous ways in which Native Americans contested and exercised influence over Constitution and its interpretation both before and after ratification).

¹³³ See *supra* Part I.

world state.¹³⁴ The democratic legitimacy of a constitution is, in the Kantian sense, a regulative ideal—an unrealizable aspiration that nonetheless represents the culmination of a process in which we can actually engage.¹³⁵

Likewise, it seems most plausible that the short-term application of the fundamental interests and agency criteria in practice has a flexible, continuum-like quality to it. We may not be able to identify when an interpretive strategy is sufficiently subaltern-regarding to say that the fundamental interests and agency criteria have been fully satisfied. However, we can criticize the failure to consider the subaltern. More importantly, we can identify cases of constitutional interpretation that are deficient because they are clearly insufficiently subaltern-regarding. Such a deficiency licenses us to say that an interpretation fails to be potentially legitimating, and hence is ruled out by the ameliorative approach.

This point potentially weakens the critical bite of the case against originalism from Part I of this Essay. Once we admit the prospect that our task is more complex than just saying “this thing is illegitimate, throw it out,” it might be that there are other legitimacy-conferring features of a method of constitutional interpretation with respect to which originalism is superior to its competitors.¹³⁶ But that doesn’t weaken the case for a more subaltern-regarding approach. Such an approach would nonetheless improve our capacity to describe the commands of the Constitution (thus interpreted) as rightfully binding, *ceteris paribus*, holding constant a given interpretive strategy’s advantages with respect to whatever originalist theory is in play. A subaltern-regarding approach may even improve the Constitution’s compliance with whatever theory grounds an originalist account of legitimacy. Consider as an example Barnett’s argument that the authority of the originalist constitution comes from its protection of natural rights.¹³⁷ I submit that attending to subaltern constitutional ideas is likely to improve the degree to which the Constitution protects the natural rights of subordinated persons under any plausible conception of those rights.¹³⁸

¹³⁴ See generally Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in LIBERAL DEMOCRACY: NOMOS XXV 13 (J. Roland Pennock & John W. Chapman eds., 1983) (describing the perennial challenge of the boundary problem).

¹³⁵ Here, I follow Dorothy Emmet in understanding regulative ideals as “unrealisable” “concepts of what would be the final state of a practice according to some absolute standard.” Dorothy Emmet, THE ROLE OF THE UNREALISABLE: A STUDY IN REGULATIVE IDEALS 6 (1994).

¹³⁶ One obvious claim is that originalism is better at yielding consistency and constraint on judges. However, that proposition is, to say the least, highly debatable. See, e.g., Eric J. Segall, ORIGINALISM AS FAITH 175-77 (2018) (arguing against consistency and constraint accounts of originalism).

¹³⁷ See *supra* notes 89-94 and accompanying text.

¹³⁸ For example, it is easy to characterize the disparate harms experienced by Black Americans and others who frequently live in segregated and over-policed communities from arbitrary arrest

Accordingly, Barnett can follow his own theory in a better (more natural rights-protecting) way if he attends specifically to whether a proposed interpretation, among the many that may be permissible under his originalist methods, adequately protects the interests and agency of subordinated. The rest of us, of course, can apply this attention more broadly.

All this theoretical work has concrete doctrinal applications. First, it provides a foundation for the critiques scholars have levied against several recent Supreme Court decisions on grounds of their neglect of subaltern history. For example, in *Dobbs v. Jackson Women's Health Organization*, the Court emphasized the absence of abortion in American history and tradition before *Roe v. Wade*.¹³⁹ Contrary to the Court's assertion, attending to the experience of non-dominant groups reveals plenty of evidence that abortion was at least informally accepted in many contexts when the Fourteenth Amendment was enacted and that the campaign around that period to ban abortion was polluted by racism and misogyny.¹⁴⁰ There is also evidence that abortion played a role in the period prior to the Fourteenth Amendment in helping enslaved women secure some small measure of bodily and family autonomy in the face of their rape and attempted forced birth by enslavers.¹⁴¹

The *Dobbs* opinion was fatally flawed because of its neglect of this subaltern history. Since the practice alleged to be of constitutional status would only ever have been exercised by members of a subordinated group (women were legally second-class citizens until well after the Reconstruction

and disparate police violence as a violation of natural rights, as those harms amount to a tax on their liberty, protection, and property interests to promote a sense of safety in others. *See supra* note 96 and accompanying text. Attending to the constitutional advocacy of Black Americans from social movements aimed in part at remedying arbitrary policing accordingly has the capacity to do a better job at constitutional legitimacy even by the lights of a natural rights originalism. *See also* GARRETT FELBER, THOSE WHO KNOW DON'T SAY: THE NATION OF ISLAM, THE BLACK FREEDOM MOVEMENT, AND THE CARCERAL STATE 97-103 (2020) (describing the legal strategy of the early Nation of Islam in police violence cases, which was focused in part on invoking ideas of property rights in the home).

¹³⁹ *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248-56 (2022) (reviewing the history of abortion regulation in the United States and asserting that there was "an unbroken tradition of prohibiting abortion on pain of criminal punishment . . . from the earliest days of the common law until 1973").

¹⁴⁰ *See Siegel, supra* note 67, at 1184-93 (presenting evidence of abortion's acceptance to show that "*Dobbs* employed [a] . . . selective account of America's history to define the reach of the Fourteenth Amendment's liberty guarantee"); Reva B. Siegel, Commentary, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 Hous. L. Rev. 901, 923-932 (2023) (discussing how the push to ban abortions in the nineteenth century was motivated by racism and misogyny).

¹⁴¹ Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 374-75 (1993); *see also* Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 SUP. CT. REV. 111, 176-80 (situating the reproductive resistance of Black women within the broader struggle for bodily autonomy in the context of slavery).

Amendments), it would be hard to discover a record of history and tradition of abortion by solely consulting male-dominated sources, such as legislation. By adopting a conception of history and tradition that demands a focus on such sources, the Supreme Court effectively put a thumb on the scale against even attending to the history of women's self-assertion. Moreover, to the extent the Court imagines itself as inquiring into a constitutional tradition shared across lines of ascriptive identity and social caste, under conditions where some groups have used the legal system to oppress others, it cannot do its job without inquiring into traditions that were initially in *defiance* of the law. This is doubly the case when the constitutional provision being interpreted, the Fourteenth Amendment, was supposed to undo the legal system that contained evils like the forced reproduction of enslaved women and the denial of enslaved women's familial autonomy.¹⁴²

The problem with using purely legal materials to extract traditions of rights exercised by subaltern populations is a special case of the problem that Saidiya Hartman has identified with subaltern histories generally: existing archival materials tend to be produced by dominant groups, and, for that reason, tend to represent the subordinated only in ways that serve the interests of those who dominate them.¹⁴³ Accordingly, the ameliorative constraints on historical practice in constitutional law recommend seeking out non-legal sources when attempting to discover whether or not "history or tradition" supports a claimed fundamental right held by a subaltern group. With respect to the agency constraint described in Part II, I argue that subaltern groups are likely to have seized or demanded rights that may not be reflected in the legal materials but ought to be included as part of the collective will-formation leading to constitutional doctrine. A legal-materials-only inquiry also risks failing the stake-reduction constraint because that inquiry is likely to lead to doctrine that fails to fully protect the fundamental interests of subaltern groups.

Students for Fair Admissions v. Harvard illustrates a different failure mode for constitutional historicism.¹⁴⁴ There, the Justices carried out a historical debate about whether the various remedies enacted after the Civil War, such as the Freedman's Bureau Act, were race-neutral or not, with Justice Thomas arguing in concurrence that those measures were focused on prior enslavement, not race.¹⁴⁵

¹⁴² Davis, *supra* note 141, at 374-75.

¹⁴³ See generally Saidiya Hartman, *Venus in Two Acts*, SMALL AXE, June 1, 2008, at 1 (reflecting on the challenge of recovering subaltern histories from dominant-group archives).

¹⁴⁴ 143 S. Ct. 2141, 2185 (2023).

¹⁴⁵ *Id.* at 2185.

In the antebellum period, however, free Black Americans in the North were also subject to oppression, including oppression directly associated with the slave system (such as their vulnerability to kidnapping under the auspices of the Fugitive Slave Act) as well as their general deprivation of citizenship and associated rights.¹⁴⁶ Of course, after abolition, the sharp line between the free North and the slave South blurred, as Jim Crow affected all Black Americans regardless of the extent to which their ancestors had been enslaved in the South or the recency of that enslavement.¹⁴⁷ Many Black Americans from the antebellum period through the present day have understood themselves to share a solidaristic national identity rooted in shared interests and shared oppression.¹⁴⁸

To this day, those who wish to resist efforts to pursue racial justice have aimed to undermine that self-understanding and solidarity. A recent salient example is a lawsuit filed against the City of Evanston, Illinois, by white residents opposed to its effort to pay reparations for the city's prior acts of housing and other discrimination.¹⁴⁹ As the lawsuit frames it, the reparations program is aimed at rectifying the city's past discrimination but is overinclusive (and thus fails strict scrutiny) because it covers both descendants of those directly victimized by the city and any Black people in the jurisdiction.¹⁵⁰ That approach ignores the shared interest among racial groups whose members have been subjected to segregation-promoting policies like housing discrimination. Neighborhood segregation harms all those in the neighborhood, even those who have not been directly subject to some specific discriminatory act.¹⁵¹

¹⁴⁶ See, e.g., Gowder, *Reconstituting We The People*, *supra* note 21, at 384-86 (discussing the advocacy of Black citizens who unsuccessfully attempted to resist their disenfranchisement in Pennsylvania in 1838).

¹⁴⁷ For a vivid rendition of the racist harms suffered by Black Americans who traveled north in the Great Migration, see generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

¹⁴⁸ See, e.g., PATRICK RUEL, *BLACK IDENTITY AND BLACK PROTEST IN THE ANTEBELLUM NORTH* 12-14 (2002) (describing antebellum efforts by northern Black abolitionists to forge solidaristic racial identity).

¹⁴⁹ Complaint at 1, Flinn v. City of Evanston, No. 1:24-cv-04269 (N.D. Ill. May 23, 2024) ECF No. 1.

¹⁵⁰ *Id.* at 8.

¹⁵¹ See Stephen L. Ross, *Understanding Racial Segregation: What is Known About the Effect of Housing Discrimination?*, in *NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA* 288, 288-301 (Harriet B. Newburger, Eugenie L. Birch & Susan M. Wachter eds., 2011) (reviewing complex causal pathways between housing discrimination and segregation); Douglas S. Massey & Mary J. Fischer, *How Segregation Concentrates Poverty*, 23 ETHNIC & RACIAL STUD. 670, 687-89 (2000) (summarizing empirical evidence that those in racially segregated neighborhoods experience higher degrees of concentrated local poverty). While scholars have posited a number of consequences for such concentrated poverty, the most straightforward and obvious is the deprivation in public goods enjoyed by residents of such areas as a result of their

In affirmative action and reparations cases, the ameliorative approach counsels us to attend to the longstanding self-understanding by Black Americans of their own shared interests and collective identity and seek out interpretations of the Freedman's Bureau Act and the broader aspirations of Reconstruction offered, not just by white legislators and courts, but by Black Americans in the North and South. By failing to investigate or to introduce such perspectives, the Court in *Students for Fair Admissions* missed the opportunity to draw on Black understandings of their shared interests and aspirations from the time of the Fourteenth Amendment to the present.¹⁵²

I hasten to note that ameliorative constraints on constitutional historical interpretation do not have to lead to left-wing results. I part ways with the standard left-wing historical critiques of the Roberts Court when it comes to *McDonald v. City of Chicago*.¹⁵³ Regardless of the opinion's other flaws (including its historical flaws), it at least succeeded at recognizing the experiences of Black Americans with disarmament and drawing on those experiences to ground the fundamentality of the Second Amendment right.¹⁵⁴

It may be that, as Fox suggested, the Court interpreted its Black sources in a ham-fisted way, plagued by anachronism and filtered through (or rather distorted by) white advocates.¹⁵⁵ Even so, I depart from Fox in a way that might offer a (tentative and partial) defense of the *McDonald* Court: I

depleted local tax bases while increasing the cost of needed services. See Pascale M. Joassart-Marcelli, Juliet A. Musso & Jennifer R. Wolch, *Fiscal Consequences of Concentrated Poverty in a Metropolitan Region*, 95 ANNALS ASS'N AM. GEOGRAPHERS 336, 349 (2005) ("To the extent that poverty both increases the demand for services and reduces the ability to provide them, poor cities will face an unfair disadvantage against wealthier cities and are likely to experience growing fiscal pressures.").

¹⁵² Black solidarity, in this case cross-racial, is also constitutionally relevant to current litigation challenging President Trump's executive order purporting to end birthright citizenship for children of undocumented immigrants and temporary visitors, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025). The President has claimed that the Fourteenth Amendment's Birthright Citizenship clause was just about "the babies of slaves." Brendan Rascius, *Trump Says Birthright Citizenship Was About 'Babies of Slaves.' Experts Disagree*, MIA. HERALD (May 15, 2025, 5:10 PM), <https://www.miamiherald.com/news/nation-world/national/article306490936.html> [https://perma.cc/XXT5-SXVP]. But, as an amicus brief by two distinguished historians explained, Black abolitionists understood that their fate was linked to that of other oppressed groups and understood birthright citizenship to be a general principle of law rather than a specific benefit for themselves. See Brief of Historians Martha S. Jones and Kate Masur as Amici Curiae in Support of Appellees and Affirmance, *Doe v. Trump*, No. 25-1169 (1st Cir. 2025, May 28, 2025). For example, they understood themselves as sharing with Native Americans the vulnerability to involuntary removal. *Id.* at 11-12. There's a sensible logic behind this: if a status so fundamental to the enjoyment of any rights as citizenship is subject to political discretion and line-drawing, it puts the rights of all in danger; Black abolitionists understood that. See *id.* at 15.

¹⁵³ 561 U.S. 742 (2010).

¹⁵⁴ See *id.* at 770-78 (describing disarmament of Black Freedpeople by white terrorist mobs after the Civil War and opposition to such disarmament by predominantly white radical Republicans in Congress).

¹⁵⁵ Fox, *supra* note 18, at 702.

contend that the continuity of interest between Black Americans around the time of Reconstruction and Black Americans today allows us to also read this history through the lens of present concerns. To legitimize the Constitution, we need a way to read it that genuinely incorporates the agency and interests of Black Americans from the past and the present; that reading is entitled to help itself to all of the available information about what those interests amount to.

The gun control debate is complicated by racial disparities in the enforcement of firearms laws both historically and in the present, which have led some progressives to support the conservative expansion of Second Amendment rights as an indirect means to alleviate the racism of the criminal justice system.¹⁵⁶ In *New York State Rifle & Pistol Association v. Bruen*,¹⁵⁷ an organization of Black Legal Aid lawyers, together with several New York public defender offices, filed an amicus brief in favor of the petitioners, arguing that “virtually all our clients whom New York prosecutes for exercising their Second Amendment right are Black or Hispanic. And that is no accident. New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities.”¹⁵⁸

It is far from obvious that robust gun rights are the best answer. After all, Black Americans also have an important shared interest in being free from gun violence. I am not arguing against gun control laws in this Essay. But I am arguing that any acceptable interpretation of the Second Amendment must reckon with disparate access to the capacity for violent self-defense as a continuous feature of the Black American experience. Contested Black claims to an equal right to wield violence span American history, from when Frederick Douglass dared to fight back against the “slave-breaker” Covey,¹⁵⁹ to when Breonna Taylor was murdered by the police because her boyfriend fired on a suspected home invader in the middle of the night.¹⁶⁰ As Kellie

¹⁵⁶ On the history of racist enforcement of firearms laws, see Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 537–48 (2022). For a critique of the progressive challenge to gun control laws, see Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 449–51 (2022).

¹⁵⁷ 142 S. Ct. 2111 (2022).

¹⁵⁸ Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners at 5, N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

¹⁵⁹ See FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE 57–77 (1845) (describing his fight with Covey).

¹⁶⁰ That home invader turned out to be the cops enforcing a no-knock warrant to search for drugs associated with someone who didn’t even live there. *Breonna Taylor: What Happened on the Night of her Death?*, BBC NEWS (Oct. 8, 2020), <https://www.bbc.com/news/world-us-canada-54210448> [https://perma.cc/UFZ2-PZYF]; Matthew Brown & Tessa Duvall, *Fact Check: Louisville Police Had a “No-Knock” Warrant for Breonna Taylor’s Apartment*, USA TODAY (June 30, 2020, 5:54 PM), <https://www.usatoday.com/story/news/factcheck/2020/06/30/fact-check-police-had-no-knock->

Carter Jackson shows, Black abolitionists led the way in understanding the need for violent, not merely peaceful, resistance to slavery.¹⁶¹ Across U.S. history, Black violence has posed a threat to white supremacy in several ways. From an individualistic standpoint, Black violence threatens white supremacy through the simple physical capacity to resist oppression. More collectively, violence can be a claim to status in several ways. First, it can be used to claim political equality through participation in military service, understood as a core responsibility and privilege of republican citizenship.¹⁶² Second, it can be a claim to group-based status and independence in the form of community self-defense.¹⁶³

B. *Ameliorative Constitutionalism Is Unavoidably Tied to Practical Politics, and That's Fine*

I suggested above that constitutional legitimacy is a regulative ideal: we are never likely to fully achieve it. But it might be objected that the same politics that make root-and-branch reform unlikely would also vex any ameliorative project.¹⁶⁴ Yet the advantages of intra-constitutional, incremental amelioration are that (a) it might occur gradually, rather than with the sort of discontinuous break represented by the amendment process, and (b) we have some evidence from the Warren Court era that some progressive shifts (driven by social movements) are possible.

In the long run, moreover, its subjection to practical politics may actually be an advantage for ameliorative constitutionalism, for the theory stated thus far is subject to two additional objections. First, how will judges actually be constrained in the context of an expanded constitutional vision? We don't want to just cede power to the judiciary.¹⁶⁵ Second, in the context of diverse and often conflicting subaltern voices from the past and present, how are we to select which voices to listen to, particularly while avoiding the ever-present danger of substituting our own elite lawyer, judge, and academic ideas for

warrant-breonna-taylor-apartment/3235029001 [https://perma.cc/9J8J-M8Y7]. For discussion of the way that the murder of Taylor reflects weakened Black rights to self-defense in the home compared to rights enjoyed by whites, see GOWDER, THE RULE OF LAW, *supra* note 46, at 125.

¹⁶¹ KELLIE CARTER JACKSON, FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE 13-14 (2019).

¹⁶² See, e.g., CARTER G. WOODSON & CHARLES H. WESLEY, THE NEGRO IN OUR HISTORY 526-28 (10th ed. 1947) (describing Jim Crow targeting of Black veterans returning from war).

¹⁶³ Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 983-90 (1999) (describing gun control laws in California aimed at disarming Black Panthers).

¹⁶⁴ See Louis Michael Seidman, *America's Racial Stain: The Taint Argument and the Limits of Constitutional Law and Rhetoric*, 2 AM. J.L. & EQUAL. 165, 188-89 (2022) (expressing skepticism about the possibility for redemptive constitutional politics or constitutional law).

¹⁶⁵ See *id.* at 174-75 (raising that objection).

those actually held by subordinated populations?¹⁶⁶ This last problem is inherent to the task of drawing from any subaltern sources.¹⁶⁷ Dominant group sources like legal materials have a built-in selection mechanism for whose words count, to wit, the recorded wills of those who have exercised formal legislative power. Those who have been excluded have *ipso facto* not generated the same kinds of focal sources.

To see how these objections may be answered together, observe that to implement even an incrementalist project of constitutional reform, social movements will have to engage in effective political action, both in building coalitions with allies and using the tools offered by the political system to influence elected officials and the courts. This means we might be able to use the selection mechanism of political victories after all, just in a forward-looking rather than backward-looking fashion. Those present-day social movement activists who manage to win political victories get to speak for their communities, at least *de facto*, because it is they who have the power to create the positive outcomes on the ground on which legal theory may build and which judicial action may entrench. This approach may also mitigate (though never eliminate) the problem of selecting which subaltern voices from the past are to be emphasized insofar as successful present-day movements may draw on identifiable legacies from the past.

Ultimately, any progressive approach to constitutionalism can only serve as the theoretical foundation for consolidating the victories of social-movement groups in the political sphere. There is ample reason to think that legal doctrine is influenced by political power, even while it has its own internal logic of operation.¹⁶⁸ The job of the constitutional theorist is to create the possibility of translating political successes into that internal logic in order to make them suitable for implementation by legal officials.

¹⁶⁶ In the postcolonial studies literature, the classic discussion of this problem comes from Gayatri Chakravorty Spivak, *Can The Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

¹⁶⁷ Although, as the many versions of originalism suggest, picking whose voice counts isn't exactly easy even when those voices do exercise formal power.

¹⁶⁸ See generally Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019) (reviewing various ways in which political polarization affects judicial outcomes); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (defending authors' account of Supreme Court outcomes as driven by political beliefs). But judicial decisions cannot be purely political, since the effectiveness of those decisions in actually driving political outcomes likely depends at least in part on their compliance with acceptable legal methods. See Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 370 (2020) (describing evidence that Supreme Court decisions that appear to abandon legal for political reasons undercut the Court's sociological legitimacy).

CONCLUSION

In recent years, a number of scholars have argued for the inclusion of subaltern histories in constitutional interpretation while retaining the originalist label. Two examples are particularly notable. James Fox Jr. has defended a “counterpublic originalism” that abandons the “fixation thesis,” accepting that the Constitution can shift in meaning after Ratification, and demands investigations into what those who were not included in the legal debates at the time of a given act of Founding would have understood the Constitution’s words to mean.¹⁶⁹ And over a series of books culminating in *Memory and Authority*, Jack Balkin has articulated a theory of “living originalism” or “framework originalism” that endorses the core originalist claim that there is something important about the constitutional system established at the Founding (the framework), yet—justified from within originalist theory by the notion that Larry Solum’s “construction zone” is overwhelmingly vast—is compatible with both counterpublic claims from the past and “living constitution”-style nonoriginalist arguments from the present. Like Fox, Balkin is self-consciously responsive to the Constitution’s legitimacy gap—giving not only subsequent generations but also those who previously would have unjustly been excluded a voice in constitutional doctrine through the outcomes of liberationist social movements.¹⁷⁰

There are also prominent left approaches to history that seem to be less comfortable with the notion of “originalism.” Dorothy Roberts’s “abolition constitutionalism” is of particular interest.¹⁷¹ There, as elsewhere,¹⁷² Roberts expresses a kind of ambivalence as to the compatibility of the Constitution with genuine justice, while remaining open to its tactical deployment in justice movements.¹⁷³ As I read Roberts, part of the reason the Constitution might be incompatible with true justice—full abolition—is because of the contingent historical facts surrounding its enactment, particularly the political need for compromise that the most radical reformers required in order to get the Reconstruction Amendments enacted, such as the infamous criminal conviction exception to the Thirteenth Amendment.¹⁷⁴ Accordingly, she argues that the Reconstruction Amendments ought to be read in the way that “[a]ntislavery activists and Republicans in the Thirty-Ninth Congress”

¹⁶⁹ Fox, *supra* note 18, at 718–20.

¹⁷⁰ See BALKIN, *supra* note 119, at 131–33 (arguing that the Constitution’s democratic legitimacy may be “refreshed” by the ongoing work of social movements).

¹⁷¹ See generally Roberts, *supra* note 19.

¹⁷² See Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1762 (1997) (contending that “[t]he Constitution is not the standard of justice we should faithfully uphold; equal citizenship is”).

¹⁷³ Roberts, *supra* note 19, at 9–10, 105–10, 120–22.

¹⁷⁴ *Id.* at 65–67.

envisioned it, rather than under textual interpretations that were compatible with infamies like convict leasing.¹⁷⁵ Generally, she argues for an approach to reading the Constitution rooted in the ideals underneath abolition and the vision of universal freedom and multiracial democracy that animated it.¹⁷⁶

This Essay has aimed to contribute to this growing literature in part by replacing the technical questions within originalism (e.g., weakening the fixation thesis, like Fox suggests, or placing everything in the construction zone, like Balkin suggests) with a different set of questions rooted in political theory. For instance, what would it take to have a democratically legitimate constitution in the face of a legacy of injustice? To what extent can we deploy the claims of social movements of the present to represent the long-run aspirations of the groups who compose them through our history? While I do not claim to have conclusively answered those questions, I hope to have at least revealed a possible non-originalist methodological pathway to bring together originalists' (left or right) aspirations to democratic authority with attention to the transhistorical values of freedom and equality advocated by scholars like Roberts.

¹⁷⁵ *Id.* at 69-70.

¹⁷⁶ *Id.* at 70-71, 108-10.