

# CONSTITUTIONAL FUTURISMS

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**ABSTRACT**—How do we reckon with the past? The Supreme Court’s recent embrace of originalism as a mode of constitutional analysis relies almost exclusively on a view of history and tradition that would bind us to an understanding of principles and ideals that legitimized the exclusion of minority voices. Cases such as *New York State Pistol and Rifle Ass’n v. Bruen* use flavors of originalism as a framework to define rights and governmental powers through their historical antecedents, but this broad standard of interpretation is notably absent in the Court’s recent discussions of histories and traditions of racism in the United States. In *Students for Fair Admissions v. Harvard*, the Court instead relies on an ahistorical framing of equal protection as colorblindness. This selective history ignores both the social context of cases such as *Plessy v. Ferguson* and *Brown v. Board of Education*, and the conceptual origins of affirmative action itself. This results in a vision of a colorblind present and future that is silently constrained and controlled by racisms of the past. Building on Professor Bennett Capers’s work on Afrofuturism and Professor Paul Gowder’s *Constitutional Sankofa*, I advance a new, futurist methodology of constitutional interpretation—one that incorporates a plurality of histories and traditions, and imagines alternative futures of race and the law.

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*“History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”*

—Justice Ketanji Brown Jackson<sup>†</sup>

INTRODUCTION

Octavia Butler’s *Kindred* tells the story of Dana, a Black woman unstuck in time.<sup>1</sup> Dana is suddenly transported between her present in 1970s California and a plantation in nineteenth-century Maryland. Moments in the present become weeks in the past. Dana realizes that her time travel is driven by trauma.

Butler explained that, unlike many time travel stories that play with notions of fate and technology in the relationship between the past, present, and future, *Kindred* is not science fiction because:

there’s no science in it . . . . *Kindred* is the story of a modern-day Black woman who goes back in time to the antebellum South and who has to struggle to survive slavery . . . . That experience marked her as slavery marked Black people in this country.<sup>2</sup>

Reading the Supreme Court’s decisions in *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, I felt a similar dizziness to Dana. Chief Justice John Roberts’s opinion recounts a “faithful” history of the Equal Protection Clause that mandates a colorblind constitutionalism and prohibits

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<sup>†</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2268 (2023) (Jackson, J., dissenting).

<sup>1</sup> OCTAVIA E. BUTLER, *KINDRED* (Beacon Press 2004) (1979). This framing of time travel is usually associated with Billy Pilgrim in Kurt Vonnegut’s novel *SLAUGHTERHOUSE-FIVE* (1969), but it can also be associated with many excellent time-travel stories in which the narrator or protagonist unintentionally experiences time in a nonlinear fashion, where past, present, or future are remixed and fused together. See ALAN MOORE, *WATCHMEN* (1987) (featuring Dr. Manhattan, an omnipotent being who experiences time simultaneously and, to the observer, out of order); *Star Trek: The Next Generation: All Good Things...* (Paramount Television May 23, 1994) (featuring Captain Jean Luc Picard, who shifts through past, present, and future to prove to the omnipotent Q that humanity is worth saving); *Lost: Flashes Before Your Eyes* (ABC Feb. 14, 2007) and *Lost: The Constant* (ABC Feb. 28, 2008) (featuring Desmond Hume, whose conscious inadvertently shifts through time, slowly killing him, until he can find his constant to ground him in the present).

<sup>2</sup> Bookworm, *Octavia Butler*, KCRW (Apr. 15, 2004), <https://www.kcrw.com/culture/shows/bookworm/octavia-butler> [https://perma.cc/7AEA-NPYT].

universities from using race in admissions—all while accusing dissenting Justices of “wrench[ing] our case law from its context, going to lengths to ignore the parts of that law it does not like.”<sup>3</sup> Like Dana, we have become unstuck in time. The past becomes the present which controls the future. A white supremacist gloss on history, Justice John Marshall Harlan’s colorblind constitutionalism<sup>4</sup> has become the binding jurisprudence of the present, determining what futures are possible.

Rather than simply using the past to inform or contextualize the Constitution’s application to modern problems, the Court has adopted an express “history and tradition” standard in cases such as *New York State Rifle & Pistol Ass’n v. Bruen*:

[R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a pre-existing right—is, in our view, more legitimate, and more administrable, than asking judges to ‘make difficult empirical judgments’ about ‘the costs and benefits of firearms restrictions,’ especially given their ‘lack [of] expertise’ in the field.<sup>5</sup>

Even in cases such as *Students for Fair Admissions*, that do not invoke history so explicitly as a methodology, the Court roots its analysis in both a timeless historiography of the Constitution as colorblind and the notion that racism is a thing of the past.<sup>6</sup> Instead of relying on current studies of issues facing the Constitution, the jurisprudence of originalism—a “family of contemporary theories of constitutional interpretation and construction”<sup>7</sup>—has come to dominate the Court’s decision-making on constitutional issues.

Legal scholars such as Lawrence Solum have identified two guiding principles to this large body of constitutional scholarship:

First, the communicative content of the constitutional text is fixed at the time each provision is framed and ratified—the Fixation Thesis.

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<sup>3</sup> 143 S. Ct. at 2175. Importantly, the Court’s use of “faithful” in the context of the opinion is a pointed rebuke of the dissenting opinions’ uses of history, pointing to the majority’s adherence to its perceptions of ideological fidelity rather than pure historical accuracy. I emphasize it here for what I view as hyperbolic and contradictory invocations of historical narrative that imposes the Court’s current conceptualization of colorblindness.

<sup>4</sup> Referring to Justice John Marshall Harlan who served on the Supreme Court from 1877 to 1911, not his grandson Justice John Marshall Harlan II who served on the Supreme Court from 1955 to 1971.

<sup>5</sup> 142 S. Ct. 2111, 2130 (2022) (second alteration in original) (emphasis omitted) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010) (plurality opinion)).

<sup>6</sup> See Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307, 1347–48 (2024) (calling Chief Justice Roberts’s majority opinion in *Students for Fair Admissions* an “empty paean[] to racial equality” because the reasoning “inverts the Fourteenth Amendment’s promise of providing for equality to those who had been previously racially oppressed and instead protects the interests of those who are the beneficiaries of accumulated advantage”).

<sup>7</sup> Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017).

Second, constitutional practice should be constrained by that communicative content of the text, which we can call the ‘original public meaning’—the Constraint Principle.<sup>8</sup>

In other words, the text of the law inscribes a meaning rooted in the context it was created in, and future interpreters of the text should attempt to maintain fidelity to the understanding of the voters who adopted the text.<sup>9</sup> Whether called a set of “neutral principles,”<sup>10</sup> a set of “standards and decision procedures,”<sup>11</sup> a robust means of judicial “constraint,”<sup>12</sup> or simply the “lesser evil,”<sup>13</sup> originalism has become the predominant means of constitutional interpretation in recent years, deployed in various formulations in the Court’s major cases on abortion,<sup>14</sup> guns,<sup>15</sup> religion,<sup>16</sup> the scope of executive power,<sup>17</sup>

<sup>8</sup> *Id.*

<sup>9</sup> Justice Antonin Scalia explains this as an “ordinary meaning” in *District of Columbia v. Heller*:

In interpreting this text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’ Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

554 U.S. 570, 576–77 (2008) (citations omitted) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

<sup>10</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

<sup>11</sup> Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 778, 780 (2022).

<sup>12</sup> John W. Compton, *What Is Originalism Good For?*, 50 TULSA L. REV. 427, 428 (2015).

<sup>13</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 849 (1989).

<sup>14</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); see also Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 69 (2023) (“[H]istory is hard and often uncertain—a reality *Dobbs* never grapples with. What is more, this underdeterminacy is even more problematic when one recognizes the normative concerns that plague an approach to constitutional rights that is fixed to the worldviews of white male voters centuries ago.”); Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1130 (2023) (examining the “forms of hard (state) and soft (storytelling) power that the political practice of originalism employs”).

<sup>15</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022); *United States v. Rahimi*, 144 S.Ct. 1889 (2024); see also Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 105 (2023) (highlighting *Bruen*’s reliance on analogous reasoning as a historical methodology and noting that post-*Bruen* cases in the lower courts “reveal an erratic, unprincipled jurisprudence, leading courts to strike down gun laws on the basis of thin historical discussion and no meaningful explanation of historical analogy”).

<sup>16</sup> See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); see also Russell Powell, *Religious Originalism*, 69 WAYNE L. REV. 311, 344 (2024) (describing the development of originalist jurisprudence in First Amendment religion cases, particularly Justice Neil Gorsuch’s use of “historical practices and understandings” in interpreting the Establishment Clause in *Bremerton*).

<sup>17</sup> See, e.g., *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024); see also Jed Handelsman Shugerman, “Heads-I-Win, Tails-You-Lose” Originalism and “Vibe” Originalism 1–2 (Nov. 10, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4629679> [<https://perma.cc/W64V-BV7U>] (discussing *Jarkesy* as a turning point after which the legal academy fractured into contradictory positions, one of which is “Vibe

and even affirmative action.<sup>18</sup> Yet for all the descriptive typologies and methodologies of originalism as a jurisprudence that have been articulated in the academic literature over the past fifty years, the Supreme Court has yet to develop a consistent interpretive standard beyond history and tradition.<sup>19</sup>

Past events, histories, and traditions of course influence present conditions, but how and why those past events are made relevant, useful, or even weaponized in the present is dependent on the interpretive tools used to understand the past. The past is not some independent, verifiable fact when the past itself is subject to interpretation and reinterpretation through lenses of power in the present. Anthropologist Michel-Rolph Trouillot explains that history is much more than a catalogue of established, objective facts: “History is the fruit of power, but power itself is never so transparent that its analysis becomes superfluous. The ultimate mark of power may be its invisibility; the ultimate challenge, the exposition of its roots.”<sup>20</sup> The Court’s deployment of originalist jurisprudence thus becomes not just a lens for looking at the history of the law, but also a potential map for understanding the historical relation and production of power. Looking behind the veil of neutrality (imposed by the blunt, matter-of-fact historiography<sup>21</sup> the Justices use) reveals the exercise of judicial power to construct the present by reconstructing the past, and ultimately (but covertly) defining the future.

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Originalism”: an approach where scholars make ideological assumptions about a given text—a “vibe” framed as common sense—without historical support).

<sup>18</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023); see also Kimberly West-Faulcon, *The SFFA v. Harvard Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355, 1355, 1389–90 (2024) (arguing *Students for Fair Admissions* “conceals and perpetuates a moral falsehood” in constructing a “traditional” model of civil rights that suits colorblind ideologies of the present in opposition to racial justice efforts of the twentieth and twenty-first centuries).

<sup>19</sup> Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 476 (2023) (“The invocation of “history and tradition” in *Dobbs*, *Bruen*, and *Kennedy* has generated considerable buzz, but a close look at the cases themselves does not reveal a dramatic shift in the roles that history and tradition play in constitutional jurisprudence.”).

<sup>20</sup> MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* xxiii (1995).

<sup>21</sup> Historiography was first defined by historian Carl Becker as “the study of the history of historical study.” Carl Becker, *What Is Historiography?*, 44 AM. HIST. REV. 20, 20 (1938). Becker criticized historians who engaged in illusory objectivity of historical study, particularly those studying historians to assemble “a neat balance sheet of the ‘contributions’ which each historian has made to the sum total of verified historical knowledge.” *Id.* Becker argued that “[t]he chief object of such enterprises in historiography is to assess, in terms of modern standards, the value of historical works for us.” *Id.* Instead of this presentist historical navel-gazing, Becker proposed historiography that is both reflective and contextual, recognizing the role of the researcher or historian in crafting historical narratives in the same vein as predecessors like W. E. B. Du Bois or later scholars like Michel-Rolph Trouillot.

History is not just a story of the past, but also an indicia of choices—what stories are told, left silent, or silenced<sup>22</sup>—that tell another story about those who write history. By taking stock of both history and historiography, the story of the storyteller reveals what W. E. B. Du Bois called “the propaganda of history.” The propaganda of history purposefully directs the understanding of future generations to alleviate the burdens and responsibilities of the present in remedying the wrongs that have already occurred and in influencing the status quo:

We have too often a deliberate attempt so to change the facts of history that the story will make pleasant reading for Americans. . . . But are these reasons of courtesy and philanthropy sufficient for denying Truth? . . .

If, on the other hand, we are going to use history for our pleasure and amusement, for inflating our national ego, and giving us a false but pleasurable sense of accomplishment, then we must give up the idea of history either as a science or as an art using the results of science, and admit frankly that we are using a version of historic fact in order to influence and educate the new generation along the way we wish. . . . Nations reel and stagger on their way; they make hideous mistakes; they commit frightful wrongs; they do great and beautiful things. And shall we not best guide humanity by telling the truth about all this, so far as the truth is ascertainable?<sup>23</sup>

This Essay is therefore guided by Du Bois’s historiography and Trouillot’s anthropology in listening to *both* the stories and silences of originalist jurisprudence, drawing examples from the Court’s historiographies of fundamental rights, equal protection, and enumerated rights under the Constitution. In no way should this be taken as a complete or comprehensive overview of the Court’s historical frameworks. Rather, this is more of a mixtape,<sup>24</sup> amalgamating and arranging samples of major

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<sup>22</sup> TROUILLOT, *supra* note 20, at 26–27.

<sup>23</sup> W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 713–14 (1935).

<sup>24</sup> A mixtape, particularly within rap music and hip-hop culture, is a collection of songs that might feature samples, unreleased tracks, or collected music that is woven together to create a continuous listening experience. Whether sold, streamed, or bootlegged, the mixtape is an alternative to an album that offers its own inspiration to theory and pedagogy as an “intentional construction of a popular understanding of the world that produces conventional wisdoms or the common sense that is often ‘more common than sense.’” JARED A. BALL, I MIX WHAT I LIKE! A MIXTAPE MANIFESTO 13 (2011). Professor Jared Ball argues that the mixtape can be a form of “emancipatory journalism” or “mass media that can help disseminate those visions and dreams of fallen struggles (and call for their re-emergence).” *Id.* at 11, 13. I have argued elsewhere that the mixtape and remix analogy offers a way of understanding how the Supreme Court uses post-racialism to legitimize subordination, appropriating the language of justice and civil rights to perpetuate white supremacy. See Jeremiah Chin, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369, 371, 397 (2012). Mixtapes have also become part of the streaming age as substitutes or additions to albums. See, e.g., MEGAN THEE STALLION, MEGAN: ACT II (Hot Girl

originalist opinions to consider how the Court uses history and what that says about the present state of the law, and what the future may hold. Like *Kindred*, we see how the past influences the present through the stories we tell about it, here without the time travel or grievous injury.

In Part I, I draw inspiration from Du Bois’s final chapter in *Black Reconstruction*, “The Propaganda of History,” to compare some of the methods identified by the Court in its originalist historiography. I argue that the inconsistencies within this framework make clear that the only true constant present in the Court’s history and tradition framework is the operation of power—rejecting the iteration and imaginaries of the present parties, in favor of the Court’s understanding of the past. Part II focuses on the mode of history deployed in Chief Justice Roberts’s opinion in *Students for Fair Admissions*, examining how and if history controls the present analysis, and considers Justice Ketanji Brown Jackson’s poignant insight that “[h]istory speaks”<sup>25</sup> by remaining mindful of the silences that Trouillot emphasizes are critical to the story and ideologies of the tellers. Part III argues for an alternative framework to understand the past’s relationship to present cases by looking to Afrofuturism as a mode of analysis. Afrofuturism relies on the past, emphasizing the stories and perspectives of marginalized communities and Black subjectivities to imagine futures that resist the subordination and oppression that are still felt today.

Originalism is not a neutral retelling of the past, but rather is a mode of historiography that obfuscates the motivations of the present and concretizes the rhetoric of the past to define the future. The Supreme Court has become a key vehicle for Du Bois’ propaganda of history. He used the phrase to expose the Lost Cause narrative of the Civil War, which appeared in historiographies of the late nineteenth and early twentieth centuries and deployed a romanticized view of white supremacy to discredit Reconstruction and abolition democracy.<sup>26</sup> An intimately linked version of this propaganda comes in the originalist instantiation of the founding of the

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Productions 2024) (adding thirteen new tracks to the album *Megan* released a few months earlier, including original songs and remixes of tracks from *Megan*, and often featuring lengthy, recognizable samples). For this Essay, I use “mixtape” in a more traditional sense of collecting and interpolating the histories presented by the Court for critical consumption.

<sup>25</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2268 (2023) (Jackson, J., dissenting).

<sup>26</sup> DU BOIS, *supra* note 23, at 713 (quoting his own statement that the *Encyclopaedia Britannica* refused to print: “White historians have ascribed the faults and failures of Reconstruction to Negro ignorance and corruption. But the Negro insists that it was Negro loyalty and the Negro vote alone that restored the South to the Union; established the new democracy, both for white and black, and instituted the public schools”); see also Jeremiah Chin, *Antimatters: The Curious Case of Confederate Monuments*, 103 B.U.L. REV. 311, 317 n.29 (2023) (citing original and secondary sources of the Lost Cause narrative, particularly historian Edward Alfred Pollard, who coined the term).

Constitution, *The Federalist Papers*, and the same Reconstruction-era historiography Du Bois exposed, treating them as absolute limits on constitutional interpretation and the exercise of power for the foreseeable future. In my view, originalism mistakes the map for the territory;<sup>27</sup> it creates a Constitution of stone, valorizing the stele displaying the Laws of Hammurabi (written for all to see and obey), rather than the interpreting and understanding the laws themselves as an organic, lived practice.<sup>28</sup> It need not be either/or, but instead can be both/and.<sup>29</sup> The propaganda of history is a false and myopic historicism, perpetuating narratives of history that are most convenient to power, obfuscating the function of modern frameworks, and allowing confirmation bias to reign supreme. I argue that by decentering originalism and investing in futurism, particularly Afrofuturism, we can use the past as an influential guide rather than a binding authority. This means learning from multiple sources—taking inspiration from both insiders, like the authors of the Constitution, and outsiders,<sup>30</sup> including people who are marginalized, excluded from the rooms of power, and fractionated as “other persons.”<sup>31</sup>

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<sup>27</sup> Sylvia Wynter, *On How We Mistook the Map for the Territory, and Reimprisoned Ourselves in Our Unbearable Wrongness of Being*, of *Desêtre: Black Studies Toward the Human Project*, in *A COMPANION TO AFRICAN-AMERICAN STUDIES* 107, 108, 116 (Lewis R. Gordon & Jane Anna Gordon eds., 2006) (using the metaphor to explain how some attempts to uplift Blackness within mainstream Liberal universalism fall into the trap of cooptation, accepting the “map” of racialization imposed by Western-European thought onto the “territory” of humanity, rather than recognizing that the centrality of Blackness in Black studies and thought is an embrace of the inherent humanity of Blackness).

<sup>28</sup> See PAMELA BARMASH, *THE LAWS OF HAMMURABI: AT THE CONFLUENCE OF ROYAL AND SCRIBAL TRADITIONS* 14 (2020) (arguing that the laws of early Mesopotamia (in the modern geographic boundaries of Iraq and Iran), written in cuneiform on a stone stele, both represent a tradition of written legal culture and create a culture of (mis)interpretation and translation around the classic text).

<sup>29</sup> See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 246 (2d ed. 2000) (arguing for a rejection of the false binaries of oppression represented by either/or frameworks in favor of transversal politics that recognizes “all individuals and groups possess varying amounts of penalty and privilege in one historically created system”).

<sup>30</sup> See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (suggesting critical scholars must begin by “looking to the bottom” by drawing on the lived experiences of marginalized peoples, “adopting the perspective of those who have seen and felt the falsity of the liberal promise” of rhetorics like equal protection); see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2322 (1989) (coining the term “outsider jurisprudence” for this framework).

<sup>31</sup> U.S. CONST. art. I, § 2, cl. 3 (apportioning representatives and direct taxes by “adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons”).

## I. THE PROPAGANDA OF HISTORY AND TRADITION

In this Part, I first describe how constitutional historiography, as used by originalism, invariably involves making subjective choices about whose history to champion and whose history to ignore. Next, I provide examples of opinions that, when broken down, demonstrate those subjective choices. In Section I.A., I track how Justice Antonin Scalia’s *Michael H. v. Gerald D.* opinion spins constitutional historiography to suggest that, when identifying traditions that support or oppose a purported fundamental right, judges should zoom in on the most “specific” form of the tradition. In Section I.B., I analyze more recent applications of the history and tradition framework through Justice Clarence Thomas’s *N.Y. State Rifle & Pistol Ass’n v. Bruen* opinion, Justice Samuel Alito’s *Dobbs v. Jackson Women’s Health Organization* opinion, and Justice Neil Gorsuch’s *Kennedy v. Bremerton School District* opinion. These three opinions reveal the presence of a historiography that is both arbitrary in its narration of the past and inconsistently applied, even though the opinions’ conclusions are framed as guided by a purely neutral standard.

At the Supreme Court, history is less of a field of study than a rhetorical device used to dress subjective argumentation as objective fact. As Professor Jack Balkin notes, history is an appeal to authority and a “resource for argument because we are made out of it.”<sup>32</sup> Constitutional history and historiography are themselves constructs because “[t]he constitutional tradition in the United States is a dialectical tradition full of disagreements and multiple perspectives from many different people and groups, from every period in the nation’s history, and from every part of society.”<sup>33</sup> The choices the Court makes in constructing a constitutional history thus reveal ideological modes of conserving power—even inconsistent results or methods may reveal consistent functions and purposes.

The past is not fixed but subject to the memory and storytelling of the historian (whether lay or professional), just as the Constitution is constantly created and recreated through its interpreters.<sup>34</sup> Professor Reva Siegal terms this relationship as “constitutional memory.”

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<sup>32</sup> JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 3, 11 (2024).

<sup>33</sup> *Id.* at 8.

<sup>34</sup> In this discussion of history, as fact or narrative, the ideas are always mediated through the view of the historian, storyteller, or the narrator. As Trouillot reminds us:

The meaning of history is also in its purpose. Empirical exactitude as defined and verified in specific context is necessary to historical production. But empirical exactitude alone is not enough. Historical representations—be they books, commercial exhibits or public

Constitutional interpreters produce constitutional memory as they make claims on the past that can guide decisions about the future. It is the role of constitutional memory to legitimate the exercise of authority; but constitutional memory plays a special role in legitimating the exercise of authority when constitutional memory systematically diverges from constitutional history. Systematic divergence between constitutional memory and constitutional history can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance.<sup>35</sup>

Constitutional memory is defined both by the stories it tells and the silences it perpetuates. “Through these stories about how things came to be (and what these stories make salient or forget), people get a sense of how society should be ordered, what needs to be preserved and defended, and whether and how society needs to change.”<sup>36</sup> The methods and methodologies of the storytellers, particularly under broad labels like “originalism,” identify the operation of power by the choices the Justices make in *how* and *what* stories are told.

Silences help naturalize the present status quo relations of power through what sociologists Pierre Bourdieu and Jean-Claude Passeron call “genesis amnesia[,] which finds expression in the naive illusion that [‘]things have always been as they are’, as well as in the substantialist uses made of the notion of the cultural unconscious”; this amnesia “can lead to the eternizing and thereby the ‘naturalizing’ of signifying relations which are the product of history.”<sup>37</sup> Even though the Constitution’s text shapes the institutions and the power they wield, the stories and silences of history and origins therefore help to make apparent the social and legal constructions of

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commemorations—cannot be conceived only as vehicles for the transmission of knowledge. They must establish some relation to that knowledge. Further, not any relation will do. Authenticity is required, lest the representation becomes a fake, a morally repugnant spectacle. . . .

But the historicity of the human condition also requires that practices of power and domination be renewed. . . . The so-called legacies of past horrors—slavery, colonialism, or the Holocaust—are possible only because of that renewal. And that renewal occurs only in the present. Thus, even in relation to The Past our authenticity resides in the struggles of our present. Only in that present can we be true or false to the past we choose to acknowledge.

TROUILLOT, *supra* note 20, at 149, 151.

<sup>35</sup> Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19, 23–24 (2022).

<sup>36</sup> BALKIN, *supra* note 32, at 182.

<sup>37</sup> PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 9 (Richard Nice trans., Sage Publ’ns 1990) (1970).

these institutions and frameworks which are too often presented by the Court as innate, natural, or the apex of legal thought.<sup>38</sup>

Balkin explains that “[c]onstitutional memory shapes and organizes people’s views about what the law means and why people have authority, what is normal and what is abnormal, usual or unusual, and what arguments about the Constitution are plausible and implausible.”<sup>39</sup> Thus, before we examine the stories and silences in *Students for Fair Admissions*, it is important to contextualize the story as part of a lineage of an originalist methodological framework that narrows and naturalizes particular views of rights, power, benefits, and privilege.

Rather than argue with the particularities of history or tradition, I examine the ways the Court has identified its history and tradition standard as historiography, focusing on *how* the Justices use history and how their opinions guide future courts in doing so. Originalist frameworks, like the original public meaning or fixation theses,<sup>40</sup> tend to focus on *The Federalist Papers*, or the words of the authors when “the use of a particular word or phrase by an opponent of the Constitution should be just as authoritative as usage by a proponent.”<sup>41</sup> Justices invoke the authority of the Framers as “heroic historical figures [to] validate the conclusions modern judges reach in hard cases.”<sup>42</sup> The choice of heroes and the processes for selection, if discussed or merely implicit in the reasoning of the Court, thus say more about the preoccupations of the Court at the time of its writing than the words of a Framers might as a historical artifact. Because of the power the Court wields as the final authority on the meaning of the Constitution, the rhetoric of the Justices in defining history and tradition, and the frameworks for determining both (if discussed at all) are key sites for discussing how and to

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<sup>38</sup> This is true not only of the courts, but also of universities and other social institutions whose “beginnings are steeped in violence, they are marinated in myths, and their continuation is based in erasure.” Bryan McKinley Jones Brayboy & Amanda R. Tachine, *Myths, Erasure, and Violence: The Immoral Triad of the Morrill Act*, *NATIVE AM. & INDIGENOUS STUD.*, Spring 2021, at 139, 139. This also means relegating peoples and ideas to the past, despite the fact that they persist now and into the future. See Bryan McKinley Jones Brayboy & Jeremiah Chin, *On the Development of Terrortory*, *CONTEXTS*, Summer 2020, at 22, 23 (defining the concept of “terrortory” as a temporal and spatial relationship, “the lawful use of fear and violence to alienate peoples and land for power”).

<sup>39</sup> BALKIN, *supra* note 32, at 192.

<sup>40</sup> See Solum, *supra* note 7, at 269–70.

<sup>41</sup> BALKIN, *supra* note 32, at 164 (citing Jamal Greene, *The Case for Original Intent*, 80 *GEO. WASH. L. REV.* 1683, 1693–94 (2012)).

<sup>42</sup> Jamal Greene, *The Case for Original Intent*, 80 *Geo. Wash. L. Rev.* 1683, 1701 (2012).

what end the Court creates, restores, or even questions present and future relations of power—particularly for social constructs like race.<sup>43</sup>

*A. Narrowing the Field*

One prime example of the Court’s historiographical frameworks is Justice Scalia’s in *Michael H. v. Gerald D.*,<sup>44</sup> where Justice Scalia’s opinion reflects his personal views of morality, values, and traditions more than any historical gloss he has added to the substantive discussion of rights.

Writing for a plurality, Justice Scalia’s disdain for the nontraditional relationships at issue starts with framing the facts, which he stated “are, we must hope, extraordinary.”<sup>45</sup> Victoria D., a child, and her biological father, Michael H., challenged the California statutory presumption of paternity if a married couple are cohabitating at the time of the child’s birth.<sup>46</sup> Carol D., the biological mother of Victoria, was married to Gerald D. at the time of Victoria’s birth, and the two were legally cohabitating, but Carol D. conceived Victoria with Michael H., the next-door neighbor, and lived in “a variety of quasi-family units” until Carol D. and Gerald D. reunited.<sup>47</sup> Michael H. sought visitation rights based on biological paternity and previous cohabitation with Victoria and Carol, while Victoria sought to maintain a filial relationship with her biological father. The two challenged the California statutory presumption under the Due Process and Equal Protection Clauses of the 14th Amendment.

Faced with a nontraditional familial unit, Justice Scalia’s plurality rooted the due process analysis of liberty interests in requiring it be both fundamental and “an interest traditionally protected by our society.”<sup>48</sup> Tradition, for rights and liberty interests, need not be traditionally protected, but “must at least exclude . . . a societal tradition of enacting laws *denying*

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<sup>43</sup> Law and race are intricately linked, crafted by social norms, values, and people. Though they may be rooted in some physical traits, they do not represent inherent categories. Rather, race is a social construct, and law plays a large part in it. *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 105 (3d ed. 2015) (theorizing “race-making” to track historical shifts in racial identity consistent with “state-imposed classifications” and related challenges); *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xxv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (explaining how critical race theorists formed a movement centered on “uncovering how law was a constitutive element of race itself: in other words, how law *constructed* race”); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 2 (10th anniversary ed. 2006) (explaining how courts played a pivotal role in defining and constructing race, and whiteness in particular, in deciding which factors were relevant to legal status).

<sup>44</sup> 491 U.S. 110 (1989) (plurality opinion).

<sup>45</sup> *Id.* at 113.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 113–15.

<sup>48</sup> *Id.* at 122.

the interest.”<sup>49</sup> Justice Scalia explained that the history and tradition framework is necessary based on “respect for the teachings of history [and] solid recognition of the basic values that underlie our society.”<sup>50</sup> Thus, Michael H. must have established “not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them.”<sup>51</sup> However, Justice Scalia fails to interrogate the how or why such a tradition was established or continues in practice. The historical standard that recounts a pattern of acceptance or denial therefore also suffers from genesis amnesia—history without an origin story, silencing purpose and function for a pattern.

But if this history and tradition analysis were not a narrow enough restriction on the rights of a child and father to have their connection legally recognized, Justice Scalia narrows the analysis even further in a footnote, joined only by Chief Justice William Rehnquist:

We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. . . .

Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views. The need, if arbitrary decisionmaking is to be avoided, *to adopt the most specific tradition as the point of reference*—or at least to announce, as JUSTICE BRENNAN declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted—is well enough exemplified by . . . the present case . . . .<sup>52</sup>

Thus, Michael H.’s assertion of parental rights or Victoria’s argument for her rights as a child to have a legal relationship with her biological father, regardless of whether her household is viewed as traditional, are rejected because “[t]his is not the stuff of which fundamental rights qualifying as liberty interests are made.”<sup>53</sup> The Court’s interpretations of history and tradition are therefore definitive interpretations of rights, and analogous reasoning is cabined to the small degree of specificity to be determined by a future Court.

Why narrow the analysis of fundamental rights and equal protection to such a small window of opportunity? Justice Scalia makes it plain early in the opinion: the purpose of this specific tradition analysis is “to prevent

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<sup>49</sup> *Id.* at 122 n.2.

<sup>50</sup> *Id.* at 122–23 (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment)).

<sup>51</sup> *Id.* at 126.

<sup>52</sup> *Id.* at 127 n.6 (emphasis added).

<sup>53</sup> *Id.* at 127.

future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.”<sup>54</sup> Genesis amnesia once again dictates the understanding of rights, naturalizing a decision made once upon a time as the way things always are, have been, and thus always should be. Justice Sandra Day O’Connor, joined by Justice Anthony Kennedy, who both signed on to all but Justice Scalia’s specificity footnote, argued that “I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”<sup>55</sup> Justice O’Connor cites the same Justice John Marshall Harlan II opinion that Justice Scalia relied on to assert that history and tradition dictate present interpretations of fundamental rights. Importantly, Justice Harlan rejected such formulaic approaches to history or tradition like the plurality offers in *Michael H.*, instead recognizing “the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”<sup>56</sup> Thus, the reliance on history and tradition lacks an important counterfactual: how and why should we break with tradition?

Instead, the majority relies on a set of assumptions about the sanctity of “the unitary family” adding an unspoken gloss of marital status to parental rights, since “[w]e have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man.”<sup>57</sup> Such assumptions not only privilege a framing of family as rooted in monogamy,<sup>58</sup> but also consider only the history of recognized familial status, rather than the history of the removal of children of color from marital households, the nonrecognition of the status of children of married or unmarried children of enslaved peoples,<sup>59</sup> different cultural

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<sup>54</sup> *Id.* at 122 n.2.

<sup>55</sup> *Id.* at 132 (O’Connor, J., concurring in part) (citing *Poe v. Ullman*, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting)).

<sup>56</sup> The quote continues: “A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

<sup>57</sup> *Michael H.*, 491 U.S. at 125.

<sup>58</sup> See, e.g., Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1508 (2011) (discussing the assumptions around family that privilege monogamous marital relations at the expense of polyamorous relationships, nonmarital children, and even parents and children writ large).

<sup>59</sup> See, e.g., DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (discussing the family regulation system’s recognition and nonrecognition of family units and how family law tends to police Black families severely, enforcing white patriarchal notions of the nuclear family).

attitudes toward the definition of the “unitary family,”<sup>60</sup> or simply children’s rights as a general concept.<sup>61</sup>

Though rarely cited for footnote 6, *Michael H.* establishes a level of specificity that has come to be accepted as normal and neutral in the current Supreme Court. History and tradition are defined through the narrow frames deployed by the Court, requiring a pattern of recognition that can be traced back to the stated purpose of the authors or the dictionary definition in existence at the time of adoption of the law or constitutional provision. Originalism thus deploys history and tradition in the construction of constitutional rights and principles through “the determination of legal effect in the form of the articulation of constitutional doctrine and the decision of constitutional cases.”<sup>62</sup> This reliance on historical precedent anchors decisions in interpretations of past courts, creating a framework that resists revision or adaptation. But the question remains whether a previous construction of constitutional tradition is wholly binding on the future, pliable and adaptable, or needs to be broken.<sup>63</sup>

Originalists such as Professors Randy Barnett and Lawrence Solum define traditions as “practices or customs that are generally accepted in the United States, and which have been established for some time.”<sup>64</sup> How much time is “some time”? How general is “generally accepted”? Who counts for general acceptance? History and tradition provide a conveniently flexible operationalization of constitutional construction; as Professor Jack Balkin points out, the application of the past to contemporary problems often obfuscates the role of the Court in the process:

Originalists with thick conceptions of original meaning shift to thinner, more abstract conceptions when necessary, all the while denying that their methods have changed. They make allowances for contemporary values, constructions, and understandings that would be too embarrassing, difficult, or delegitimizing

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<sup>60</sup> See, e.g., Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 248 (2013) (noting that “[b]ecause of the long tradition of strong and extended family structures in Native American and African American families, these families do not often fit the nuclear family norm”).

<sup>61</sup> See *Michael H.*, 491 U.S. at 141–46 (Brennan, J., dissenting) (arguing the majority has focused entirely on the state’s interest and the marital relationship, rather than on the relationship at issue, which is between the parent and child).

<sup>62</sup> Solum, *supra* note 7, at 293.

<sup>63</sup> In Part II, I situate the Court’s race jurisprudence of affirmative action as a frequent bending and breaking of tradition—at times breaking traditions of segregation and exclusion in favor of inclusion, and at others breaking with new traditions of inclusion to realign with previous traditions of white supremacy and subordination. In my estimation, *Students for Fair Admissions* falls firmly in the latter category.

<sup>64</sup> Barnett & Solum, *supra* note 19, at 442.

to disavow, either by creatively updating their readings of historical materials or by selectively adhering to precedent.<sup>65</sup>

The rule of law thus becomes the rule of the past—general acceptance is whatever the dominant majority believed at a time when they were both dominant and the majority, and “some time” is as long as necessary to establish a pattern beyond a single precedent.

### B. *Recent Articulations of Originalism*

The Supreme Court’s recent turn to the history and tradition brand of originalism thus comes as no surprise. Its retrenchment against changes to social norms, seeking acceptance in the past, where such views were more popular—or at least where the dissenting views are less well preserved—is a return to what the Justices may view as common sense.

In the spring of 2022, the Court brought history and tradition to the forefront as the central test for understanding the Constitution, in both enumerated and unenumerated rights. The trilogy of *N.Y. State Rifle & Pistol Ass’n*, *Dobbs*, and *Kennedy*, did not invent history and tradition analysis.<sup>66</sup> The decisions do not even diverge significantly from previous applications of this line of reasoning.<sup>67</sup> However, these recent decisions of the Court have ushered in waves of new originalist scholarship and public criticism that previous articulations did not.<sup>68</sup> In part, this may be due to the subject matter

<sup>65</sup> BALKIN, *supra* note 32, at 169.

<sup>66</sup> Barnett & Solum, *supra* note 19, at 492 (reviewing the use of history and tradition in the three cases and concluding: “[U]pon close examination, we find that none of the cases from the October 2021 Supreme Court term represent a radical departure from prior uses of history and tradition by both public meaning originalists and constitutional pluralists”).

<sup>67</sup> See Kimberly West-Faulcon, *Liberty Bound: Obergefell’s Eclipse of Power to Limit Sexual Autonomy*, 49 LOY. L.A. L. REV. 351 (2015) (discussing the uses of history and tradition in court decisions, focusing on *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

<sup>68</sup> See, e.g., Emily Bazelon, *How ‘History and Tradition’ Rulings Are Changing American Law*, N.Y. TIMES (Apr. 29, 2024), <https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html> [<https://perma.cc/B5U2-W7VN>] (“The flurry of history-and-tradition opinions prompted an uproar among liberal court-watchers.”). Anecdotally, according to a Lexis+ search in winter of 2025, *Kennedy* has been cited in 470 law review articles, *Bruen* in 733, and *Dobbs* in 1,991. Contrast that with *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), cited in a not-insignificant, but decidedly fewer, 181 law review articles. Decided in the same term as the trio discussed in this section, *Castro-Huerta* controversially and significantly attempts to alter understandings of criminal jurisdiction in Indian Country in Federal Indian Law announced just two years earlier in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *Castro-Huerta* offers its own view of the role of history in both Justice Brett Kavanaugh’s majority opinion and Justice Gorsuch’s searing dissent, yet it has not sparked the same quantity of analysis despite its significant departure from precedent, history, and tradition. See Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 325–26 (2023) (discussing tribal history and a duty of protection owed by the federal government within Federal Indian Law that *Castro-Huerta* substantively ignores).

of the three cases—abortion, religion, and gun ownership are contested political issues that have long been the focus of critiques of the Supreme Court. Yet, for all the public controversy that erupted after the trio of opinions, Professor Mary Ziegler notes that “the Court staked its claim to the legitimacy of *Dobbs*—and other decisions that will implement its history-and-tradition method—on the neutrality such an approach ostensibly delivers.”<sup>69</sup> Thus, the controversy stirred by this history and tradition trilogy is “not *whether* but *how* we talk about history in legal and constitutional argument, and in politics.”<sup>70</sup> Analyzing these cases as a trilogy is crucial for triangulating how a rhetorically neutral standard like history and tradition is conceptualized by the Court to influence interpretation of the Constitution both as a document and as a system. These cases are not discrete issues limited to their facts, but rather signal the direction of the Court for years, if not generations, to come.

Justice Thomas’s opinion in *Bruen* makes this web of analysis clear, tying his interpretation of history and tradition under the Second Amendment to First Amendment precedent through Justice Scalia’s analysis in *District of Columbia v. Heller*.<sup>71</sup> Because it would be absurd to expect the past to accurately predict all the minutiae of technological developments, text, history, and tradition inform analogical reasoning in cases regarding the Free Speech Clause, the Confrontation Clause, and the Establishment Clause.<sup>72</sup> Courts therefore must “assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.”<sup>73</sup> Justice Thomas characterizes this vague analytical guidance of history and tradition as “straightforward” and “simple” in the context of *Bruen*—in contrast to the “difficult empirical judgments” proffered by intermediate means–ends scrutiny and scientific data.<sup>74</sup> However, he maintains the binding power of history and tradition is “neither a regulatory straightjacket nor a regulatory blank check” and that it requires a search for a “historical *analogue*, not a historical *twin*.”<sup>75</sup>

Yet, “not all history is created equal,” and “to the extent later history contradicts what the text says, the text controls.”<sup>76</sup> What degree of contradiction between histories of practice and text are acceptable? Whose

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<sup>69</sup> Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J. F. 161, 162 (2023).

<sup>70</sup> Serena Mayeri, *The Critical Role of History After Dobbs*, 2 J. AM. CONST. HIST. 171, 174 (2024).

<sup>71</sup> 554 U.S. 570 (2008).

<sup>72</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

<sup>73</sup> *Id.* at 2131–32.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2133.

<sup>76</sup> *Id.* at 2136–37.

historical understanding controls? Whose stories of gun control and regulation matter? What happens when the text and historical practices are contradictory? Historian Michael A. Bellesiles's analysis of colonial gun regulations concludes that "[t]he framers of the Constitution and Bill of Rights created a theoretical structure of freedoms that they never intended for universal application."<sup>77</sup> The text's neutral phrasing is therefore frustrated by the history and tradition of "encouragement of male citizens to bear arms, and the state's right to regulate who could bear arms and when."<sup>78</sup> But Justice Thomas gives us no means of resolving this contradiction, other than his conclusory reliance on his gloss and framing of historical legislative text, labeling any contrary legislation as "a few late-19th-century outlier jurisdictions."<sup>79</sup>

If the practices and text are contradictory, does this not imply that the text, intent, and public understanding must change to meet the present day? Should we not instead break with history and tradition rather than allow them to bind our current applications of the text? Without a firm answer to these questions in the text of Justice Thomas's *Bruen* opinion, it is difficult to understand how the history and tradition test provides any less discretion and empowerment to the judiciary. It simply substitutes the judicial interpretation of empirical data with selective historiography under the guise of neutrality.

This illusion weakens the authority of both the speaker and the argument by masking a lack of reflexivity and reflection with assertions of strength—engaging in what legal scholar Felix Cohen called "transcendental nonsense" by obfuscating through abstraction.<sup>80</sup> Judges, lawyers, and the law are part of society, created by people, and their opinions have weight because the power they wield is socially constructed. Recognizing the situatedness and positionality of the law and those who interpret it simultaneously (and paradoxically) strengthens legal argumentation by making it contestable, adding layers and lenses to the analysis—like Du Bois's double consciousness, which gives a "second-sight"<sup>81</sup> in seeing problems and

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<sup>77</sup> Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 L. & HIST. REV. 567, 589 (1998).

<sup>78</sup> *Id.*

<sup>79</sup> *Bruen*, 142 S. Ct. at 2156.

<sup>80</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820–24 (1935) (arguing for a "functionalist" approach to law that would focus on "[h]ow do courts actually decide cases of a given kind?" and "[h]ow ought they to decide cases of a given kind?").

<sup>81</sup> W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 8 (Brent Hayes Edwards ed., Oxford Univ. Press 2007) (1903) (arguing the paradox of Black people in the United States is to both see and understand racism and inevitably be caught up in it, the book recognizes that Black lived experience presents a different perspective of life in the United States that informs a greater truth).

solutions from multiple perspectives rooted in lived experience.<sup>82</sup> History and tradition can certainly be compelling reasons for deciding an issue, but claiming dispositive neutrality undercuts the lessons and experiences that make history informative. Broad claims of truth and neutrality from a singular perspective only enhance judicial discretion and make the Court more like the Wizard of Oz, urging the audience to pay no attention to the people behind the curtain.<sup>83</sup>

Justice Alito's opinion in *Dobbs* takes history and tradition a step further, using the framework to come to the "inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation's history and traditions" and to reject precedent that understood due process's liberty interest to include abortion.<sup>84</sup> The uncritical historical narrative of laws prohibiting abortion "is inaccurate and misleading at best, distorted and disingenuous at worst."<sup>85</sup> History and tradition are used to overturn precedent that broke with Justice Alito's understanding of history and tradition, and his opinion provides five factors to consider when determining whether precedent should be overruled: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."<sup>86</sup> Justice Alito compares *Roe v. Wade* to *Plessy v. Ferguson*, opinions "egregiously wrong and deeply damaging" that betray the neutral principles embodied in the text of the law, wrong "on the day [they were] decided" and that therefore "should have been overruled at the earliest opportunity."<sup>87</sup> Justice Alito then attacks the reasoning and rules of *Roe* for lack of "grounding in the

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<sup>82</sup> I return to this with Afrofuturism in Part III, but the notions of "neutrality" in law and social sciences are well contested, by legal realists such as Cohen and sociologists such as Du Bois, and in modernity by critical race theorists, new legal realists, and many others. *See, e.g.*, Jeremiah Chin, *Modern Authorities from Brandies to Brnovich: For Jurists Who Have Considered Social Science / When Doctrine Was Not Enough*, 13 ALA. C.R. & C.L. L. REV. 265 (2022) (discussing notions of objectivity in law and social sciences); JOHN P. JACKSON JR., SCIENCE FOR SEGREGATION: RACE, LAW, AND THE CASE AGAINST BROWN V. BOARD OF EDUCATION 15 (2005) (arguing "both the neutrality of science and the neutrality of law offered segregationists a unique opportunity to claim the mantle of objective truth"); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 43 (collecting arguments originating critical race theory as a deconstruction of the neutrality of the law through lived experiences of marginalized peoples); 1 THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE (Elizabeth Mertz, Stewart Macaulay & Thomas W. Mitchell eds., 2016) (an edited volume of scholarship arguing for interdisciplinary research that blends law and social science from multiple perspectives).

<sup>83</sup> THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

<sup>84</sup> *Dobbs*, 142 S. Ct. at 2253–54.

<sup>85</sup> Mayeri, *supra* note 70, at 180 (providing analysis of the historian amicus briefs).

<sup>86</sup> *Dobbs*, 142 S. Ct. at 2265.

<sup>87</sup> *Id.*

constitutional text, history, or precedent”<sup>88</sup> while using the same techniques of counting state laws, claims of original understanding, and the relative novelty of laws protecting the rights at issue used to defend segregation in *Plessy* and by opponents of *Brown v. Board of Education*.<sup>89</sup>

Issues with line drawing in the majority opinion seem less about the issues with the constitutional text or principles, but more about the fact that lines were drawn at all. Just as Justice Thomas’s selective historiography in *Bruen* only describes traditions supporting his position, Justice Alito conveniently picks trends of public perception of *Roe* in noting the United States “as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, and then asked the Court to overrule it once more in *Casey* itself.”<sup>90</sup> This account excises the context of politics from the issue of abortion, conveniently ignoring the fact that it was the Reagan administration’s opposition to abortion that led to the repeated asks to overturn *Roe*.<sup>91</sup> It also omits the warnings from *Casey* that the Court should not overturn *Roe* to address error: “if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”<sup>92</sup> After walking through the five reasons for overturning *Roe*, Justice Alito rebukes the legitimacy argument from *Casey*, contending that the Court cannot settle the issue of abortion and that any foreseeable reaction from overruling *Roe* and *Casey* should not “influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.”<sup>93</sup> The future is not known; however, Justice Alito did have months of public reaction between the leaked draft opinion and announcement in *Dobbs*<sup>94</sup> to understand “how our political system or

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<sup>88</sup> *Id.* at 2266.

<sup>89</sup> For a more thorough analysis, see generally Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 *YALE L.J.F.* 99, 159 (2023) (concluding “[t]he voice of *Plessy* speaks through *Dobbs* when the Court declares that the Constitution is indifferent and impotent to intervene.”).

<sup>90</sup> *Dobbs*, 142 S. Ct. at 2271 (citation omitted).

<sup>91</sup> See generally MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 29–30 (2015) (describing the conservative coalition formed in opposition to abortion rights, coalescing around Ronald Reagan’s campaigns in 1980 and during his two terms in office).

<sup>92</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

<sup>93</sup> *Dobbs*, 142 S. Ct. at 2279.

<sup>94</sup> See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted To Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (last updated May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/YA7X-VNQB>] (leaking the draft opinion, more than a month before the above cited decision in *Dobbs*); Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*,

society” will react.<sup>95</sup> Justices regularly invoke future generations when estimating the scale or scope of the impact of decisions, musing on the weight of their decision and public reaction. It is particularly odd for Justice Alito, who is known to be attentive to public perception,<sup>96</sup> to be so dismissive of the future consequences of the Court’s decision.

Finally, in Justice Gorsuch’s majority opinion in *Kennedy v. Bremerton*, we see another use of history and tradition to overturn a longstanding precedent, though with much less fanfare than *Bruen* or *Dobbs*. In part it may be due to Justice Gorsuch’s rhetoric and lack of methodology, presenting the end of the *Lemon* test as a foregone conclusion.<sup>97</sup> Because the *Lemon* test had been adapted, questioned, and modified in the fifty years since the decision, it was now an “‘ambitiou[s],’ abstract, and ahistorical approach . . . that this Court long ago abandoned.”<sup>98</sup> Instead, the Establishment Clause should be interpreted under the *Town of Greece v. Galloway* standard, decided only eight years prior, through “reference to historical practices and understandings” which “has long represented the rule rather than some ‘exception’ within the Court’s Establishment Clause jurisprudence.”<sup>99</sup> The Ninth Circuit was therefore reversed because it relied on *Lemon* and failed to apply this history and tradition standard, instead attempting to legitimize a “reprisal rest[ing] on a mistaken view” of the Establishment Clause.<sup>100</sup>

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N.Y. TIMES (Dec. 15, 2023), <https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html> [<https://perma.cc/J5PE-SX5W>] (discussing internal and external reactions to the leak of the draft opinion by Politico).

<sup>95</sup> *Dobbs*, 142 S. Ct. at 2279.

<sup>96</sup> See Samuel A. Alito Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda> [<https://perma.cc/YG3L-CT4X>] (responding via the opinion section of the Wall Street Journal to published disclosures of his financial ties to parties before the Court, condemning the reporting and explaining, but not denying, the failures to disclose); Letter from Justice Samuel A. Alito Jr. to Sens. Richard J. Durbin and Sheldon Whitehouse (May 29, 2024), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20from%20Justice%20Alito%20to%20Senators%20Durbin%20and%20Whitehouse.pdf> [<https://perma.cc/H9TD-43ZW>] (writing to the senators arguing against any impropriety or need for recusal based on his wife’s display of support of then-former-President Trump by flying flags outside the Alitos’ Virginia home).

<sup>97</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (consolidating the history of Establishment Clause decisions into a three-part test requiring that statutes must (1) have a secular legislative purpose, (2) not have the primary or principal effect of advancing or inhibiting religion, and (3) not foster excessive entanglement with religion).

<sup>98</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (alteration in original) (quoting *Am. Legion v. Am. Humanist Ass’n*, 139 S.Ct. 2067, 2080 (2019) (listing cases where the Court has expressly or implicitly declined to extend *Lemon*)).

<sup>99</sup> *Id.* at 2428 (internal quotation marks omitted) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014) (allowing the practice of holding a Christian prayer before legislative gatherings in the town of Greece)).

<sup>100</sup> *Id.* at 2433.

Without a clear test to apply into the future, the Court rejects the ahistoricism of the past with a historically grounded argument that does little to delineate boundaries of the test itself. History and tradition become abstractions, ready for the Court to deploy as it deems necessary. Rather than concern itself with the precise contours of history and tradition, the Court spends much of its opinion on Kennedy’s free exercise, while dismantling an Establishment Clause test that applied to individuals and institutions who make their personal religious exercise a state-mandated activity. How Kennedy’s activities comport with history or traditions of interpretations of the Establishment Clause are redirected into gaslighting the school district for creating “phantom” conflicts between the Establishment and Free Exercise Clauses.<sup>101</sup> Justice Gorsuch’s lack of historical analysis stands in stark comparison to his robust and extensive use of history in his majorities and concurrences in cases dealing with federal Indian law.<sup>102</sup> Instead, we are left with a standard of history and tradition with minimal discussion of history or traditions of the clause at issue.

The completion of the history and tradition trilogy of 2022 comes full circle to genesis amnesia,<sup>103</sup> which fuels the history and tradition analysis of the Court. Each case prescribes the same standard in theory, yet despite varying implementations of that standard, each case presents the same assertion that the way the decision comes out is the only natural, commonsense conclusion that could possibly be reached. From the demand for historical specificity in *Michael H.* to the vague historical breadth of *Kennedy*, the history and tradition analysis paradoxically relies on historical narrative to forget the origins of legislation. In focusing on histories of the lawmakers while professing adherence to history and traditions that build on “public meaning”<sup>104</sup> or accepted understandings at the time of adoption, all these opinions fail to include histories and perspectives of those who were legally excluded from participation at the time of the ratification of the Constitution.

## II. TIMELESS COLORBLINDNESS

Having spent the majority of this Essay discussing historiography and the history and tradition analysis of the Court, readers unfamiliar with

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<sup>101</sup> *Id.* at 2432.

<sup>102</sup> For example, compare *id.*, with *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020) (providing a brief history of the treaty-making between the Muscogee Creek Nation and the United States that sets up an expansive and convincing history of relations between the Federal government and Indigenous nations).

<sup>103</sup> BOURDIEU & PASSERON, *supra* note 37, at 9.

<sup>104</sup> *Solum*, *supra* note 7, at 275–76.

*Students for Fair Admissions* might assume the opinion relies extensively on the same line of analysis, while readers familiar with *Students for Fair Admissions* might be wondering what the extensive discussion of history and tradition originalism is doing in an essay ostensibly centered on *Students for Fair Admissions*. My goal is to try and amplify the silences in the Court's historical narratives. When the Court emphasizes history and tradition, the history is almost exclusively of the white men who catalogued and archived the events of the past. However, as Trouillot reminds us:

[P]resences and absences embodied in sources (artifacts and bodies that turn an event into fact) or archives (facts collected, thematized, and processed as documents and monuments) are neither neutral or natural. They are created. As such, they are not mere presences and absences, but mentions or silences of various kinds and degrees. By silence, I mean an active and transitive process: one "silences" a fact or an individual as a silencer silences a gun. One engages in the practice of silencing. Mentions and silences are thus active, dialectical counterparts of which history is the synthesis. . . .

Sources are thus instances of inclusion, the other face of which is, of course, what is excluded.<sup>105</sup>

Thus, the *lack* of a history and tradition standard with race and equal protection only serves to amplify the dismissive attitude Chief Justice Roberts takes towards affirmative action. Even the universities in *Students for Fair Admissions* tasked with the defense of programs designed to remedy histories of oppression, marginalization, and subordination avoid confronting their own histories of exclusion and exploitation of the same communities of color that would legitimize their use of affirmative action.<sup>106</sup> My point is not to go bar for bar with Chief Justice

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<sup>105</sup> TROUILLOT, *supra* note 20, at 48.

<sup>106</sup> See Jonathan P. Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 HARV. C.R.-C.L. L. REV. 143, 143 (2023) (exploring how universities have acquiesced to false narratives of justifiable discrimination, delegitimizing affirmative action's necessity as antiracist, antidiscrimination efforts to mitigate preferential treatment afforded white applicants); Jonathan P. Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949, 1955 (2022) (explaining how universities fail to foreground how facially race-neutral policies confer substantial advantages to white students that affirmative action is theoretically designed to mitigate); CRAIG STEVEN WILDER, *EBONY & IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES* 9 (2013) (exploring how the slave trade was used to fund and construct elite universities such as Harvard and the University of North Carolina); Brayboy & Tachine, *supra* note 38, at 139 (exploring how the mythmaking of land-grant Universities build on genocide and violent removal of Indigenous peoples on the lands which they continue to use, profiting from that erasure even as the myth is revisited, retold, and often obfuscated in land acknowledgements).

Roberts’s historiography<sup>107</sup> or to suggest the opinion would be better served by expressly adopting or rejecting the history and tradition standard, but to highlight the mythos his historical narrative constructs: consigning racism to the past with a false narrative of racial progress.<sup>108</sup> His mythos hinges on the idea that affirmative action is *not* necessary because racism *happened*, past tense, and today we have the “transcendent” Equal Protection Clause that protects us.<sup>109</sup>

Where the cases in the prior Section supplant a means–ends test with a history and tradition analysis, *Students for Fair Admissions* covertly blends the two into a three-part analysis of the narrow restrictions left by previous decisions on affirmative action: “University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end.”<sup>110</sup>

Chief Justice Roberts comes to this test at the conclusion of his synthesis of the Court’s Equal Protection Clause and affirmative action jurisprudence that breezes through the “ignoble history” where the United States and the Court “quickly failed to live up to the Clause’s core commitments.”<sup>111</sup> Deviation from his perception of colorblind equal protection is “inherent folly” except for *Brown v. Board*’s “unmistakably clear” conclusion that public education “must be made available to all on equal terms.”<sup>112</sup> Chief Justice Roberts extols the virtues of the Court in overturning state-sanctioned racism, yet provides little acknowledgement of the pervasive history of white supremacy that necessitated such action and the mass hostility decisions like *Brown* faced after announcement.<sup>113</sup>

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<sup>107</sup> A task already undertaken and, by my estimation, accomplished by the dissenters in *Students for Fair Admissions*, see *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2225 (2023) (Sotomayor, J., dissenting); *id.* at 2263 (Jackson, J., dissenting), and by scholars, see, for example, Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307, 1307 (2024) (providing a “quick tour” through United States racial history and white supremacist racialization in constitutional history); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991) (arguing the Court’s emphasis on colorblindness in constitutional interpretation “fosters white racial domination”).

<sup>108</sup> See, e.g., Brayboy & Chin, *supra* note 38, at 22–23 (discussing the erasure of Indigenous peoples through the infamous Iron Eyes Cody environmental PSA that perpetuates the vanishing native mythos while invoking Indigenous peoples to shame the presence of pollution).

<sup>109</sup> *Students for Fair Admissions*, 143 S. Ct. at 2159.

<sup>110</sup> *Id.* at 2166.

<sup>111</sup> *Id.* at 2149.

<sup>112</sup> *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>113</sup> See, e.g., Danielle Wingfield-Smith, *Movement Lawyers: Henry L. Marsh’s Long Struggle for Educational Justice*, 56 U. RICH. L. REV. 1339, 1367 (2022) (describing the lawsuits filed in Virginia after *Brown* to combat school districts’ defiance of *Brown*); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 51 (2004) (providing

Avoiding this history leads Chief Justice Roberts to question whether affirmative action programs are “sufficiently measurable,”<sup>114</sup> when such measurement is impossible in the historical vacuum that the Court provides by decontextualizing the need and continuing purpose for affirmative action. The silencing of the history of oppression gives voice only to the triumphs of the Court in providing equal protection, rather than explaining why such redress was *necessary* in a society defined and shaped by white supremacist racial projects.<sup>115</sup> In order to understand how race might be measured, we must understand why race mattered and continues to matter in the United States. Without any description or understanding of America’s history of racism and racialization, any use of race becomes “inescapably imponderable” and leaves no room for “exceedingly persuasive justification that is measurable and concrete enough to permit judicial review” in a university’s use of race.<sup>116</sup> Thus, any use of race can be reduced to an impermissible stereotype, and current racial identification is seen not as a synthesis of the material history of racism in the United States, but as a differentiation based exclusively on skin color<sup>117</sup>—a factor that, in reality, universities do not consider, instead allowing applicants to self-identify with race and the histories that come with it.<sup>118</sup>

Finally, Chief Justice Roberts’s requirement of an end point runs contrary to the predictions of the future that Justice Alito disclaimed in *Dobbs*.<sup>119</sup> The modified test explodes the “dicta mine”<sup>120</sup> embedded in Justice O’Connor’s approval of affirmative action in *Grutter v. Bollinger*: an aside

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extensive history of the role of the Court in segregation and desegregation, noting “Jim Crow law reflected, more than it produced, segregationist practices”).

<sup>114</sup> *Students for Fair Admissions*, 143 S. Ct. at 2166 (quoting *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381 (2016)).

<sup>115</sup> See OMI & WINANT, *supra* note 43, at 3, 13 (“Race and racism in the United States have been shaped by a centuries-long conflict between white domination and resistance by people of color [informed by] . . . [r]acial projects [which] shape the ways in which human identities and social structures are racially signified, and the reciprocal ways that racial meaning becomes embedded in social structures.”).

<sup>116</sup> *Students for Fair Admissions*, 143 S. Ct. at 2167–68.

<sup>117</sup> *Id.* at 2169.

<sup>118</sup> See OMI & WINANT, *supra* note 43, at 106 (advancing an understanding of race as a social construct and “master category—a fundamental concept that has profoundly shaped, and continues to shape, the history, polity, economic structure, and culture of the United States” while still inextricably linked and co-constructed with other social categories such as class, gender, and sexuality).

<sup>119</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2332 (2022).

<sup>120</sup> Professor Frank Rudy Cooper explains a “dicta mine” is a metaphor for dicta, or an “unnecessary statement[] in a court’s opinion” that “a [c]ourt later silently recharacterizes as having already resolved an issue, . . . exploding it into a significant doctrine.” Frank Rudy Cooper, *Dicta Mines, Pretext, and Excessive Force: Toward Criminal Procedure Futurism*, 112 CALIF. L. REV. 1007, 1014 (2024) (coining, defining, and applying the “dicta mine” metaphor to understand pretextual policing jurisprudence after *United States v. Robinson*, 414 U.S. 218 (1973)).

noting that affirmative action programs should have a “logical end point” because *Grutter* happens twenty-five years after the Court’s first flirtation with affirmative action in *Bakke*, thus creating an “expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>121</sup> Chief Justice Roberts’s opinion paradoxically detonates and defuses the twenty-five year sundown: making the “logical end point” dicta precedent, simultaneously ignoring and reaffirming the idea that advances in race relations will make affirmative action unnecessary, when the existence of government programs such as affirmative action are a substantial reason race relations have improved in the years following *Brown* and *Grutter*.<sup>122</sup> Chief Justice Roberts concludes “there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon,” making the five years remaining on the clock irrelevant.<sup>123</sup>

Perhaps the loudest silencing of history occurs at the end of the Chief Justice’s pejorative rebuttal to the dissents of Justices Sonia Sotomayor and Ketanji Brown Jackson, invoking Justice Harlan’s dissent in *Plessy v. Ferguson*: “[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>124</sup> This selective quotation is not only factually dubious,<sup>125</sup> but leaves out the extensive white supremacist rhetoric and anti-Asian American sentiment captured in Justice Harlan’s full dissent:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt

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<sup>121</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

<sup>122</sup> This redundancy paradox is a familiar argument for Chief Justice Roberts’s view of race relations. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007), the Chief Justice argued that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” in eliminating programs that ensure racially diverse schools because schools have some degree of racial diversity. Similarly, in *Shelby County v. Holder*, 570 U.S. 529, 547 (2013), he decided the preclearance formula of the Voting Rights Act was unwarranted because Black voter turnout increased in elections where the Voting Rights Act existed to ensure Black voter turnout. Justice Ginsburg’s dissent in *Shelby County* aptly describes the redundancy paradox: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” *Id.* at 590 (Ginsburg, J., dissenting).

<sup>123</sup> *Students for Fair Admissions Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2173 (2023).

<sup>124</sup> *Id.* at 2175 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>125</sup> See, e.g., OMI & WINANT, *supra* note 43, at 12, 13, 105 (describing the history of racialization and racial projects in the United States that have entrenched racial hierarchy); ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 9, 15 (2020) (linking racialization in the United States to international caste systems in the operation of racial hierarchy of white supremacy).

not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . .

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.<sup>126</sup>

Mythologizing the history and tradition of race relations in the United States is now complete, with the genesis amnesia surrounding the concept of colorblindness. Justice Harlan's dissent in *Plessy* is irrevocably tied to his white supremacy and anti-Chinese sentiments,<sup>127</sup> and its incomplete invocation becomes all the more absurd in a case like *Students for Fair Admissions*, which relies on an assumed disadvantage to Asian American students.

Chief Justice Roberts concludes with a return to (selective) history to finalize his rejection of affirmative action as an unacceptable failure to recognize a student as an individual. While consideration of race in a personal essay describing how a particular student “overcame racial discrimination” is acceptable, a program of affirmative action judges students by “the color of their skin. Our constitutional history does not tolerate that choice.”<sup>128</sup> That tortured reading of the history of the United States, replete with legalization of racial discrimination, silences past discrimination to deny any kind of future remedy. It assumes that racism does not lawfully impact present conditions. Yet it paradoxically permits students to talk about those same present conditions of racial discrimination.

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<sup>126</sup> *Plessy*, 163 U.S. at 559, 561.

<sup>127</sup> Justice Harlan also notably joined Chief Justice Melville Fuller's dissent from the recognition of birthright citizenship for Chinese Americans in *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898). See also Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996) (situating Justice Harlan's jurisprudence on Chinese civil rights and citizenship as part of a trend towards exclusion and constructing ambiguities against Chinese litigants).

<sup>128</sup> *Students for Fair Admissions*, 143 S. Ct. at 2176.

Importantly, *Students for Fair Admissions* does not expressly, nor even indirectly, overrule *Grutter* or *Fisher v. University of Texas at Austin (Fisher II)*,<sup>129</sup> two instances where the Court approved limited uses of race in admissions, based on significant empirical research demonstrating that such uses were necessary to achieve the compelling government interest of a racially diverse classroom. Despite the lengthy discussion of affirmative action jurisprudence and the uses and silencing of histories of racial discrimination throughout the opinion, the Court has little to offer the future, other than questions about how affirmative action might continue. I suggest an answer might lie in histories and traditions of the marginalized—not the same vague and frustrating framework described in Part I, but a use of history and tradition in the present to consider the future.

### III. ALTERNATIVE HISTORY: CONSTITUTIONAL FUTURISMS

Rejecting the false premise that the law has overcome racism by now is almost trite in legal scholarship, considering the large influence of Critical Race Theory on the legal field—both through its scholars and as a target of fearmongering around the role of history in education.<sup>130</sup> But if Chief Justice Roberts’s opinion in *Students for Fair Admissions* does anything, it reminds us that no matter how much the Court may deny the persistence of racism, the racisms of the past are still felt and enacted in the present. Racism may also be permanent.<sup>131</sup> Yet this assertion of permanence is not a call to nihilism—we should not give up on antiracism efforts because they will not yield total victory.<sup>132</sup> Instead, it is a reminder to look to how past generations have fought against racisms for a better future, and that the current racial strife is just the latest iteration of the same old story of white supremacy.

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<sup>129</sup> *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016).

<sup>130</sup> See, e.g., LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L. J. 2139, 2139 (2023) (cataloging and critiquing anti-Critical Race Theory legislation, noting how the rhetorical push against race in the classroom is both ahistoric and protects Whiteness through paternalist parental rights frameworks); Aziz Rana, *Anti-“CRT,” A Century Old Tradition*, 58 HARV. C.R.-C.L. L. REV. 551, 551 (2023) (situating attacks on public schools and critical race theory in the history of false universalism in public schooling).

<sup>131</sup> See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992) (arguing that accepting the permanence of racism necessitates enduring struggle, resisting the easy and unrewarding assumption that racial equality is inevitable).

<sup>132</sup> Antiracism also should not, and perhaps cannot, embrace total victory since antiracism is articulated in a variety of contexts. I tend to think of antiracism as a challenge to hierarchical social ideologies—race is fraught with histories of subordination, but maintaining racial categories does not intrinsically subordinate without oppression and social dominance. Professor Justin Driver provides a nuanced view of antiracism in equal protection jurisprudence and scholarship emphasizing its “malleability—and, indeed, its manipulability—in our contemporary constitutional order.” Justin Driver, *The Strange Career of Antiracism*, 91 U. CHI. L. REV. 651, 656 (2024).

In resisting the tropes of history and tradition proscribed by the Court, I want to echo Professor I. Bennet Caper's and others' work on Afrofuturism in the law to imagine "different, and better worlds."<sup>133</sup> Rather than allow the past to permanently control the present through history and tradition as discussed in Part I, or allow present assumptions about race and education to triumph over histories of racial discrimination like Chief Justice Roberts's *Students for Fair Admissions* opinion discussed in Part II, we should acknowledge that "past, present, and future co-exist[] and are always in flux."<sup>134</sup> We must "center how current inequities are only fully intelligible through past inequities."<sup>135</sup> Professor Paul Gowder suggests the principle of *Sankofa*, "a Twi word from the Akan people (associated with the modern nation of Ghana) which translates as 'go back and fetch it,' and captures the idea of recovering from the past in order to build the future," explaining, "One function of Afrofuturist *Sankofa* is to resist hegemonic white/European conceptions of the future as inevitably built on assumed (and hence invisible) European cultural traditions."<sup>136</sup>

If Afrofuturism is built on the "insistence that people of color in fact *have* a future, and commitment to disrupting racial, sexual, and economic hierarchies and categories,"<sup>137</sup> then a futurist understanding of constitutional law must also recognize that people of color *have* a past. Not a past frozen in time like *Encino Man*<sup>138</sup> or *Captain America*,<sup>139</sup> to be thawed out and disoriented with the brave new world they enter, but a past that confirms, counters, and reinterprets visions of the past proffered by originalism. Professor Gowder explains that a "*Sankofa* approach gives us a way to democratically re-read the Constitution by reconstructing the authorial agency of the oppressed."<sup>140</sup> Instead of restricting the teaching of history for fear that it may upset some, we must ask: "What knowledge, what

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<sup>133</sup> I. Bennett Capers, *Afrofuturism and the Law: A Manifesto*, 112 GEO. L.J. 1361, 1367 (2024).

<sup>134</sup> *Id.* at 1368.

<sup>135</sup> *Id.* at 1369.

<sup>136</sup> Paul Gowder, *Constitutional Sankofa*, 112 GEO. L.J. 1437, 1439 (2024) (quoting Angi Porter, *Africana Legal Studies: A New Theoretical Approach to Law & Protocol*, 27 MICH. J. RACE & L. 249, 261 (2022)).

<sup>137</sup> I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 11 (2019).

<sup>138</sup> See *ENCINO MAN* (Hollywood Pictures 1992) (depicting two high school friends who find a Neanderthal Brendan Frasier frozen in ice when digging a hole their southern California back yard).

<sup>139</sup> See JACK KIRBY & STAN LEE, *THE AVENGERS: CAPTAIN AMERICA LIVES AGAIN* (1964) (depicting Steve Rogers, a.k.a. Captain America, who is found frozen in ice in the Atlantic Ocean, having been in a state of suspended animation since falling into the water during World War II).

<sup>140</sup> Gowder, *supra* note 136, at 1464.

unplumbed experience for the future, can even the cruel experience of being enslaved, of being mechanized, teach?"<sup>141</sup>

The work of recovering the past also requires a more explicit description of our imagination. Since history is produced,<sup>142</sup> it can also be played with, as demonstrated in the works of Professors Saidiya Hartman<sup>143</sup> and C. Riley Snorton,<sup>144</sup> whose histories catalogue archives of Black queer folk, imagining their daily lives in the past while providing a “conceptual framework to understand the ongoing struggle in the present by way of a future (aspiration) in which black lives *will have mattered* to everyone.”<sup>145</sup> The future is neither fixed nor inevitable, but imagined and reimagined constantly. Progress is almost equally as propagandistic as history; as Professor Ruha Benjamin reminds us, “[s]o much of mainstream futurist work is about ‘moving beyond’ or ‘overcoming’ the past, a narrative riddled with hostility toward those racialized as nonwhite or non-Western or ‘primitive.’ Oppressive structures historically erased many positive, rejuvenating, liberatory elements of marginalized peoples and cultures in the name of ‘progress.’”<sup>146</sup> The way forward is not to simply speak into existence equality that has never occurred and may never occur in the United States. If we go back and fetch the past, and imagine the potential futures, we can consider the implications of historical silences and present constructions of the Constitution.

Afrofuturism<sup>147</sup> requires stating our visions of the future and keeping them in view, recognizing that aspirations require concrete action in order to be achieved. The Court, by contrast, takes the view on race that an aspiration alone is enough and does not require any concrete present decision-making beyond denial of the past through colorblindness. In sum, a constitutional futurism inspired by Afrofuturism interrogates assertions of the past and present by looking to the authority, context, and aspirations expressed in the

<sup>141</sup> *Id.* at 1465.

<sup>142</sup> See TROUILLOT, *supra* note 20, at 19 (discussing the production of history in and outside of university settings).

<sup>143</sup> See generally SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF SOCIAL UPRHEAVAL (2019).

<sup>144</sup> See generally C. RILEY SNORTON, BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY (2017).

<sup>145</sup> *Id.* at 198.

<sup>146</sup> RUHA BENJAMIN, IMAGINATION: A MANIFESTO 104 (2024).

<sup>147</sup> I rely on Afrofuturism as expressed by Professors Capers, Gowder, Benjamin and many others, but remain mindful that there are as many visions of the future as there are peoples, and we should not be bound to one particular modality, instead remain in conversation with Indigenous, Latinx or Latine, Asian, Arab, and other futurisms. As Professor Capers notes, “The last thing Afrofuturist legal scholars should do is fall into the colonialist trap of thinking ourselves the center of the universe. There are many centers.” Capers, *supra* note 133, at 1383.

law and opinions of the Court—considering past, present, and future as inevitably linked rather than as discrete objects of analysis.

History gives critical context and foundation, a reminder that the issues we face today are not only not completely novel, but expressly dependent on past interpretations and reinterpretations of history itself. Authority allows us to interrogate the underlying motivations or experiences that might overtly or covertly inspire a particular way of being or knowing. Aspirations are neither fixed nor inevitable, but imaginings that can be fleeting or made concrete by actions in the present and plans for the future. Importantly, our aspirations should not be binding, and the context must be multifaceted. I want to suggest that rather than adopting a myopic view on how the original public meaning is fixated in a text, we take a more organic approach.

Constitutional futurism is therefore a direct response to originalist methodologies of constitutional interpretation. Drawing again on Afrofuturism, and to paraphrase Octavia Butler, law is change.<sup>148</sup> We can use constitutions and methods of interpretation to imagine other, different worlds. I envision constitutional futurism to be premised on three central ideas: (1) *Sankofa*—the past is past, and we may use it to see the development of ideas, principles, and values. The past is a seed that grows and germinates, and we can trace the stem to roots by looking to the interconnected contexts. The text is given meaning by authors and readers of the time, and that meaning can vary between groups, change, and grow over time. Law is not static but fluid, yet interconnected and contingent. It may be consistent, or contradictory, but neither is inherently disqualifying. (2) Law changes, and consequential changes can be both intended and unintended. Just as history relies on tellers and silences, each legal decision adds some interpretive gloss to the text and meaning of the law, shifting power to some degree. (3) Change is power, and the authority of the speakers of the past, present, and future is dependent on who is spoken for, of, to, and

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<sup>148</sup> In Octavia Butler's *Parable of the Sower*, Lauren Olamina has the power of hyper-empathy—the ability to feel completely the emotions of other people she sees—and in a postapocalyptic world, theorizes a new religion she titles Earthseed: The Book of the Living. Lauren explains:

There are the Tibetan and the Egyptian Books of the Dead. Dad has copies of them. I've never heard of anything called a book of the living, but I wouldn't be surprised to discover that there is something. I don't care. I'm trying to speak—to write—the truth. I'm trying to be clear. I'm not interested in being fancy, or even original. Clarity and truth will be plenty, if I can only achieve them. If it happens that there are other people outside somewhere preaching my truth, I'll join them. Otherwise, I'll adapt where I must, take what opportunities I can find or make, hang on, gather students, and teach.

OCTAVIA E. BUTLER, *PARABLE OF THE SOWER* 125 (Grand Central Publishing 2000) (1993).

left out entirely. The positionality<sup>149</sup> of the author and audience are central to ensuring an empathetic interpretation that recognizes the humanity of parties and groups under the law. An antisubordination interpretation rooted in empathy seeks to prevent what Professor Derrick Bell called “racial-sacrifice covenants,” where disputes between groups are resolved by harming another marginalized community.<sup>150</sup> “Kindness eases Change.”<sup>151</sup> Futurism therefore imagines different worlds from the those we have already seen, grounded in lived experiences, maximizing the voices and communities involved. Aspirations are stated openly, but not taken for granted.

If the ideal is racial equality, Chief Justice Roberts’s anticlassification view treats an aspiration as a statement of fact. From an originalist perspective, the text is fixed to the original public meaning at the time a law was enacted.<sup>152</sup> If laws are to be updated, then it is on the legislature to pass new laws rather than allow the judiciary discretion to modify or update constitutional texts when such a power is expressly described in the Constitution.<sup>153</sup> Yet the words of the Equal Protection Clause and other constitutional protections are written with a broad enough meaning to allow for future interpretation; this is the feature and the bug of constitutional law. Limits on judicial discretion are certainly necessary, and they are critical for maintaining a sense of constitutional order or rule of law. Constitutional futurism would not return to a common law mode of interpretation that shifts with judicial temperament. Instead, if law is change it means recognizing that meanings can and do change, and it shifts the question from what the fixed original public meaning of the text *was* to what changes does a text envision; what different, other worlds exist and grow from the past?

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<sup>149</sup> Positionality considers how and to what extent a speaker is self-aware of their own lived experience and social location—factors often labeled as identity politics.

<sup>150</sup> DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 31 (2004). Racial-sacrifice covenants are the counterpoint to Bell’s Interest Convergence thesis, or that racial justice is only secured when there is an overriding benefit to whiteness. Bell goes throughout U.S. history for different examples of how Black interests in particular are sacrificed in the name of keeping peace between disparate groups of white men—like the slavery compromises in the Constitution that ensured the interests of slave owners in the name of unification, at the expense of enslaved Black people. *Id.* We see sacrifice covenants today, particularly in the exploitation of fear narratives around trans rights, immigration, or even felon disenfranchisement. Rather than recognize the humanity and need for rights, these populations are quickly sacrificed in the name of security, unity, or peace. A common failure and dissatisfaction with legal resolution is what Martin Luther King Jr. identified as “a negative peace which is the absence of tension [instead of] a positive peace which is the presence of justice.” Martin Luther King Jr., *Letter from a Birmingham Jail*, UNIV. PA. AFR. STUD. CTR., [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) [<https://perma.cc/R882-HK6A>].

<sup>151</sup> BUTLER, *supra* note 148, at 167.

<sup>152</sup> See Solum, *supra* note 7, at 269.

<sup>153</sup> U.S. Const. art. V.

Rather than take for granted the work of the future, constitutional futurism should center children’s constitutional rights—not simply as the adults of the future, but as present-day thinkers with imagination, in the same way that legacies like *Brown* centralized the subjective qualities of children to make space for youth imaginings of what the Constitution and the nation could look like. Professor Catherine Smith reminds us that *Brown*’s power was not simply in its dismantling of segregation, but in “including the qualities and characteristics of Black young people into its constitutional calculus and acknowledging, even if indirectly, how they were often used to maintain racial hierarchies.”<sup>154</sup> Rather than hold today’s youth to the strictures of the past, we should follow Professor Sarah Medina Camiscoli’s call to “write[] and think[] alongside these youth movement leaders” to “expand the landscape of children and the law to capture the material implications of law from the perspective of children.”<sup>155</sup> Who better to imagine the future than those who are most likely to live in it? Centering constitutional interpretation on the rights of children, imagining *with* rather than *for* youth, provides a direct knowledge transfer between past, present, and future, minimizing harmful speculation, while dreaming together of something we *all* want to live in and for.

#### CONCLUSION

*“Why did I even want to come here. You’d think I would have had enough of the past.”*

*“You probably needed to come for the same reason I did.” He shrugged.  
“To try to understand. To touch solid evidence that those people existed.  
To reassure yourself that you are sane.”*

—Octavia Butler, *Kindred*<sup>156</sup>

In *Kindred*, Dana’s traumatic journeys through time soon reveal that she is not just drawn to any antebellum past, but her temporal disorientation is linked to Rufus—a young white boy living on a plantation who has several near-death encounters. Dana realizes she is drawn to the past when Rufus’s life is in danger, and returns to her present when her life is in danger. Dana soon understands Rufus is also one of her ancestors. Rufus would grow up, inherit the plantation and enslave, claim to love, and rape Dana’s ancestor Alice Greenwood. Alice kills herself when Rufus says he has sold her (their)

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<sup>154</sup> Catherine E. Smith, *Brown’s Children’s Rights Jurisprudence and How It Was Lost*, 102 B.U. L. REV. 2297, 2323 (2022).

<sup>155</sup> Sarah Medina Camiscoli, *Youth Movement Law: The Case for Interpreting the Constitution with Mobilized Youth*, 26 J. CONST. L. 1558, 1616 (2024).

<sup>156</sup> BUTLER, *supra* note 1, at 264.

children into slavery, when he has actually only sent them away temporarily. Rufus attempts to trap Dana in the past to replace Alice, until Dana kills Rufus, returning her to the present permanently.

The colorblind originalism of *Students for Fair Admissions* similarly tries to trap us in the past—to hold the law to an imagined aspiration of equality that is actually rooted in white supremacy, to play a role predetermined by those in power, a hurtful cycle of oppression in the name of order. The text and the past are critical guides in constitutional understanding, but they are neither timeless nor permanent. In teaching constitutional law, I am motivated by the same understanding Professor Derrick Bell encouraged of his students:

The singular and key understanding at which I would hope every student arrives is that rather than a revered relic bequeathed by the Founding Fathers, to be kept under glass and occasionally dusted, the Constitution is a living document, one locus of battle over the shape of our society, where differing visions of what should be, compete to become what is, and what will be.<sup>157</sup>

Central to principles of constitutional law and interpretation is understanding the lines and rules that govern the Constitution. That means understanding what rules to break, bend, and reinforce. Originalism presents a model of testing the rules that only relies on the understanding of the rules that the designers created. Reliance on *The Federalist Papers* is an irony because they are looking to a bunch of thirtysomethings writing their understanding of the rules based on what they've learned from those who came before.<sup>158</sup> Rules are made to be broken; the key is understanding how, where, and when to break them. *The Federalist Papers* explained how, where, and why they were breaking with the British monarchy. Originalist modes of interpretation, however, inhibit the same kind of collective soul searching. Like the *Federalist* authors, we should take a more serious look at how the rules affect us now, in the present, and consider how to better break them and rebuild them in the future.

Constitutional futurism as a mode of interpretation provides some judicial discretion that is similarly unaccountable to democratic decision making—opinions of the courts cannot and should not represent a unanimous or even majoritarian consensus. Incorporating *Sankofa*, change, and positionality provides greater accountability through reflexive listening, but is not a panacea or cure to oppression. Interpretation framed through

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<sup>157</sup> Derrick Bell, *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U. L. REV. 1039, 1043 (1998).

<sup>158</sup> THE FEDERALIST: A COLLECTION OF ESSAYS, WRITTEN IN FAVOUR OF THE NEW CONSTITUTION, AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787 (1788). At the time of publication, Alexander Hamilton was either 31 or 33, James Madison was 37, and John Jay was 43.

constitutional futurism is only a part of a culture shift, as John Calmore explained—“law reform is necessary, but not sufficient.”<sup>159</sup> Policies such as affirmative action are direct consequences of organizing, social movements, and negotiated change. *Students for Fair Admissions*’ conclusion that such policies must end, and are ideologically inconsistent with the binding authority of colorblindness, attempts to negate the fluid shape of the law created by time and subsequent interpretation. Ironically, this return to the past is creating insurgent change as people question and challenge the assumptions and silences from decisions like *Students for Fair Admissions*. Constitutional futurism provides some additional questions that we can answer presently and collectively in conversations for the future, rather than be consistently thrown into the past by trauma.

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<sup>159</sup> John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1098 (2002).

