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Whose Streets? Race and the Right to Protest

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This Article traces historical patterns in systemic responses to protest movements along racial lines. It contrasts the militarized response to protests advocating for racial justice with the leniency shown towards predominantly White-led demonstrations, arguing that the different systemic responses to the Black Lives Matter movement and the January 6th insurrection illustrate the enduring impact of racialized policing and systemic racism in the modern context. It further advocates for non-reformist approaches that challenge systemic inequalities rather than perpetuate them. The Article concludes by urging continued collective resistance and the pursuit of justice in the face of entrenched power structures and systemic racism.

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INTRODUCTION

Everything now, we must assume, is in our hands; we have no right to assume otherwise. If we . . . do not falter in our duty now, we may be able, handful that we are, to end the racial nightmare, and achieve our country, and change the history of the world. If we do not now dare everything, the fulfillment of that prophesy, re-created from the Bible in song by a slave, is upon us: *God gave Noah the rainbow sign, No more water, the fire next time!*

—James Baldwin¹

Six decades have passed since Baldwin penned those words, and that transformative fire, meant to cleanse and make way for new growth, rages still.² At the time of writing, protests have exploded across the country against the second Trump administration's immigration policies and targeted ICE raids.³ In response to protests in Los Angeles, the LAPD arrived in full tactical gear, often meeting protesters with rubber bullets, flash bangs, and smoke bombs.⁴ Then, over California Governor Gavin Newsom's objections,⁵ President Trump commandeered California's National Guard and deployed thousands of troops and hundreds of U.S. Marines, intensifying crackdowns on protests. President Trump justified his response to the protests by asserting, "If our troops didn't go into Los Angeles, it would be burning to the ground right now."⁶ The last time a U.S. president deployed

1. JAMES BALDWIN, *THE FIRE NEXT TIME* 105 (1962).

2. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 92 (1992) (contending that racism is permanent in this country).

3. Sarah Shamim, *Which US Cities Have the LA Immigration Protests Spread to?*, AL JAZEERA (June 12, 2025), <https://www.aljazeera.com/news/2025/6/12/which-us-cities-have-the-la-immigration-protests-spread-to> [perma.cc/M8VM-8AEY].

4. Frank Stoltze, *Did LAPD Cooperate with Immigration Agents When Responding to ICE Protests?* LAIST (June 11, 2025), <https://laist.com/news/criminal-justice/did-lapd-cooperate-with-immigration-agents-when-responding-to-ice-protests> [perma.cc/AU5F-APL3].

5. Christopher Weber, *What to Know About the Protests Over Trump's Immigration Crackdown in LA and Other Cities*, ASSOCIATED PRESS (June 13, 2025), <https://apnews.com/article/insurrection-act-trump-troops-newsom-military-national-guard-a842f79e1c0e244039be274a6f266a7a> [perma.cc/9U44-WUFY].

6. Kayla Epstein, *Trump Has Long Called for Using the Military to Quash Protests. Los Angeles Gave Him and Opening*, BBC NEWS (June 12, 2025), <https://www.bbc.com/news/articles/c626y7gjdzeo> [perma.cc/Y5MW-GAM5].

the national guard in such a manner was in Alabama in 1965—two weeks after Bloody Sunday—to protect civil rights protesters from the threat of violence after segregationist Governor George Wallace refused to guarantee their safety.⁷

However, today's militarized police response to political protest is no anomaly. The scenes flickering across television screens nationwide, while perhaps shocking, are nevertheless the inevitable result of decades of state violence aimed at suppressing racialized political protest. These tactics, though not new in kind, were refined and perfected during the 2020 uprising.⁸

In the summer of 2020, while millions of Americans were in lockdown because of the COVID-19 pandemic, civil unrest spread across the nation after the police killing of George Floyd in Minneapolis was caught on video and shared widely across social media.⁹ The protests that followed, estimated to be the largest in American history,¹⁰ reflected a continued response to centuries of racialized state violence and broader issues of systemic inequities in the United States, laid bare by the global pandemic.¹¹

During one such protest, I was kettled¹² on the Manhattan bridge, along with hundreds of other protesters, by dozens of police officers in riot gear. They threatened us with mass arrests for violating New York City's eight p.m. COVID-19 curfew while simultaneously preventing us from complying. A call rippled through the crowd, instructing White attendees to move to the front line. Even as I acquiesced, my body resisted and my feet dragged as I compelled myself to confront men with guns, their faces obscured behind riot shields. I was afraid of being arrested, pepper sprayed, or worse. After hours of being crammed together on that bridge between lines of police preventing us from reaching solid ground, we were slowly marched back to Brooklyn and peaceably dispersed. Although I cannot say whether the presence of White bodies between the police and the mostly Black protesters had any impact on police behavior that night, the logic was sound. All summer,

7. Jeremy W. Peters, *Here Is What Happened When President Johnson Bypassed a Governor to Deploy the National Guard*, N.Y. TIMES (June 8, 2025), <https://www.nytimes.com/2025/06/08/us/lbj-national-guard-alabama-1965.html> [perma.cc/T9FU-PRXX].

8. Sandhya Kajeepeta & Daniel K.N. Johnson, *Police and Protests: The Inequity of Police Responses to Racial Justice Demonstrations*, THURGOOD MARSHALL INST. (Nov. 2023), <https://tminstitutdf.org/police-and-protests-the-inequity-of-police-responses-to-racial-justices-demonstrations/> [web.archive.org/web/20260108222607/https://tminstitutdf.org/police-and-protests-the-inequity-of-police-responses-to-racial-justices-demonstrations/].

9. Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/03/20/us/protests-police-ing-george-floyd.html> [perma.cc/9B4W-RYLY].

10. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [web.archive.org/web/20260321043227/https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html].

11. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME MAG. (June 4, 2020), <https://time.com/5847967/george-floyd-protests-trump/> [perma.cc/BDQ6-A845].

12. Jen Kirby, *The "Kettling" of Protesters, Explained*, VOX (June 6, 2020), <https://www.vox.com/2020/6/6/21282509/george-floyd-protests-kettling-new-york-nypd> [web.archive.org/web/20260315070308/https://www.vox.com/2020/6/6/21282509/george-floyd-protests-kettling-new-york-nypd].

police response to the Black-led, mostly peaceful,¹³ protests had been staggering.¹⁴ Protesters were met with officers in riot gear, pepper spray, sound cannons, and mass arrests,¹⁵ while then-President Trump referred to protesters as “thugs.”¹⁶ That night on the Manhattan Bridge, however, we were eventually allowed to disperse.

Compare then, the starkly different responses to White-led protests. On January 6, 2021, for example, when right-wing, mostly White extremists violently¹⁷ attacked the nation’s capital to protest what they thought was a stolen presidential election,¹⁸ law enforcement’s response was slow and measured, and President Trump himself encouraged the protestor’s actions.¹⁹ Four years later, on the first day of his second term, President Trump issued a sweeping pardon for 1,500 people who had been convicted for participating in the January 6 riot.

Part I of this Article traces the intersecting genealogies of the political, social, and legal constructions of race in this country that have led us to this moment in history. Part II argues that this history manifests itself in the contemporary responses to Black-led political protests, which are themselves responding to centuries of oppression, resulting in a denial of citizenship rights and entitlements for racialized groups. It proposes that these responses are characterized by militarized police forces and state violence, in stark contrast to the response to White-led protests, which are met with leniency, and even support. Part III argues that collective action is the best way forward by spotlighting ongoing efforts of various activists, organizers, and communities working together to redirect power away from carceral systems of control and back to the people, striving to ensure that we all have a say in building a brighter future.

I. CONSTRUCTING WHITENESS

The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status). Whiteness

13. I mention the peacefulness of the protests only to highlight the extreme and disparate nature of the state’s violent response; see e.g., Sanya Mansoor, *93% of Black Lives Matter Protests Have Been Peaceful, New Report Finds*, TIME (Sep. 5, 2020), <https://time.com/5886348/report-peaceful-protests/> [perma.cc/8RTV-EP4K].

14. Barker et al., *supra* note 9.

15. *Id.*; Tabatha Abu El-Haj, *Breathing Room for the Right of Assembly*, 28 WM. & MARY J. RACE, GENDER, & SOC. JUST. 29, 35 (2021).

16. Maggie Haberman & Alexander Burnd, *Trump’s Looting and ‘Shooting’ Remarks Escalate Crisis in Minneapolis*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/05/29/us/politics/trump-looting-shooting.html> [web.archive.org/web/20250930180212/https://www.nytimes.com/2020/05/29/us/politics/trump-looting-shooting.html].

17. Martha Mendoza & Juliet Linderman, *Officers Maced, Trampled: Docs Expose Depth of Jan. 6 Chaos*, ASSOCIATED PRESS (Mar. 10, 2021), <https://apnews.com/article/docs-expose-depth-january-6-capitol-siege-chaos-fd3204574c11e453be8fb4e3c81258c3> [web.archive.org/web/20260208180909/https://apnews.com/article/docs-expose-depth-january-6-capitol-siege-chaos-fd3204574c11e453be8fb4e3c81258c3].

18. Shelly Tan, Youjin Shin & Danielle Rindler, *How One Of America’s Ugliest Days Unraveled Inside and Outside the Capital*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/> [web.archive.org/web/20260118041944/http://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/].

19. Luke Broadwater, *Capital Police Told to Hold Back on Riot Response on Jan. 6, Report Finds*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/04/13/us/politics/capitol-police-riot-report.html> [perma.cc/X7DV-CWAQ].

at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.

—Cheryl I. Harris²⁰

To understand the motivations behind both the Black Lives Matter (“BLM”) movement and the January 6 protests, as well as the responses from both the state and public, we must first make an honest assessment of our past.²¹ This includes a hard look at “an origin story that places slavery, Jim Crow, and contemporary White supremacy, nationalism, and racism in proper discussion and contexts alongside the more popular, traditional American narratives that center the revolutionary spirit of White Americans who fought against the British to stake a claim for their equality and dignity.”²² Thanks in large part to the efforts of numerous Black scholars and other scholars of color, this historical assessment has been made accessible to those who would approach it with sincerity.²³ An honest examination of our history makes evident that today’s American racial concept flows directly from the dark waters of our nation’s troubling origin story, and its legacy has profound implications for our collective future.²⁴

The late Professor Derrick Bell observed that racism is permanent in this country.²⁵ This permanence, then, makes it crucial to confront the underlying racial myths that persist in our society as we forge ever forward, and never back.²⁶ Race itself is a social phenomenon constructed by Europeans landing in the new world in order to distract from and justify genocide, kidnapping, and forced labor.²⁷ Since its inception, the concept of Whiteness has been formed and reformed by social, political, and especially legal forces.²⁸ Thus, while Blackness has remained fixed, Whiteness boasts a historical fluidity, its definition reimagined to meet the needs of the ruling class.²⁹ Whiteness, accordingly, is in part defined by its legal entitlements, which maintain political, economic, and social privileges over and at the expense

20. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1725 (1993).

21. BELL, *supra* note 2, at 13.

22. Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 267 (2021).

23. See, e.g., BELL, *supra* note 2; MICHELLE ALEXANDER, *THE NEW JIM CROW MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

24. See Goodwin, *supra* note 22, at 309.

25. BELL, *supra* note 2, at 15.

26. BELL, *supra* note 2, at 15.

27. See MICHAEL OMI & HOWARD WINANT, *Racial Formations*, in *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO 1990S* 53 (Michael Omi & Howard Winant eds., 2d ed. 1994); Harris, *supra*, note 20, at 1709; Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 28–29 (1994).

28. OMI & WINANT, *Paradigms of Race: Ethnicity, Class, and Nation*, in *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S*, *supra* note 27, at 8, 13 (“The effort must be made to understand race as an unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.”).

29. *Compare In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (defining White persons as members of the “Caucasian race” which included Europe and Western Asia), and *Takao Ozawa v. United States*, 260 U.S. 178, 197 (1922) (using fluid definition of Caucasian to decide who is qualified to naturalize), with *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923) (redefining Caucasian by its “popular” usage, meaning “White”).

of others.³⁰ Perhaps no single institution has greater influenced the development of this racial hierarchy than the Supreme Court of the United States.³¹

A. Judicial Complicity: The Court as a Pillar of White Supremacy

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

—J. Roberts³²

The following Part provides a chronological account of the U.S. Supreme Court’s racial jurisprudence, exposing the ways the Court has simultaneously denied and codified White supremacy and systemic racism through its construction of the law. In its infamous opinion in *Dred Scott v. Sandford*,³³ for example, the Court declared that Africans were not recognized as persons under the Constitution, thus denying their humanity and access to constitutional rights and reinforcing the institution of chattel slavery. The Court further claimed that it lacked the authority to determine the justice implications of that law, thereby refusing any responsibility for its own contribution to the existing status quo.³⁴

On the other hand, in *The Civil Rights Cases*,³⁵ the Court asserted its authority and struck down parts of the Civil Rights Act of 1875 as unconstitutional, undermining Congressional efforts to promote racial equality during the post-Civil War Reconstruction era and weakening legal protections against discrimination for Black Americans. Just fifteen years after the Emancipation Proclamation, in a highly ahistorical interpretation, the Court declared, “When a man has emerged from slavery, and by aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws . . .”³⁶ The decision established the state action doctrine, finding that the Fourteenth Amendment³⁷ is confined to restricting only discriminatory state action, while simultaneously and severely limiting the reach of the Thirteenth Amendment³⁸ into private conduct. This ruling, along with *Plessy v. Ferguson*,³⁹ marks an early iteration of the Court’s staggeringly premature post-racial jurisprudence, in which it prioritizes “formalistic equality” over substantive equity.⁴⁰

30. See Neil Gotanda, *A Critique of “Our Constitution in Color-Blind”*, 44 STAN. L. REV. 1 (1991).

31. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (describing the White race as perceiving itself as dominant in “prestige, in achievements, in education, in wealth and in power,” even as he asserts that the Constitution is “color-blind.”).

32. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (this is the last line in J. Roberts’ opinion holding that Seattle violated the 14th Amendment by attempting to remedy *de facto* school segregation with no showing of *de jure* segregation).

33. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

34. *Id.*

35. *The Civil Rights Cases*, 109 U.S. 3 (1883) (banning Congress from authorizing civil suits against racial discrimination in public accommodations and transport).

36. *Id.* at 31.

37. U.S. CONST. amend. XIV.

38. U.S. CONST. amend. XIII.

39. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (finding that a facially neutral law maintaining segregated train cars did not violate the 13th or 14th Amendment, signaling the birth of the “separate but equal” doctrine).

40. CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT 2 (2022).

In *Plessy*, the Court explained that the government was not tasked with ensuring social equity, but only equality under the law, thereby refusing to acknowledge the ways in which “legal recognition implicates the social navigation of identity.”⁴¹ In so doing, it established the separate-but-equal doctrine, prioritizing the social preferences of racist White people over those of Black people wishing to be afforded an equal exercise of their citizenship. The Court’s justification for both doctrines lay in a literal interpretation of equality: slavery had been abolished, Black people had gained the right to vote and were therefore “equals” under the law.⁴²

The Court’s post-racial sentiment expressed in *Plessy* and *The Civil Rights Cases* is still present today,⁴³ despite occasional past deviations⁴⁴ that were buoyed by “interest convergence.”⁴⁵ In *Brown v. Board of Education*, the Court’s support of anti-segregation efforts may be attributed in part to the political and economic value that it conferred on White people.⁴⁶ As Bell argues, racial progress is made in the legal sphere only where the interests of Black Americans converge with the interests of White Americans.⁴⁷ Consequently, “the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for [B]lacks where the remedy sought threatens the superior societal status of middle and upper class [W]hites.”⁴⁸ Therefore, cases like *Brown* are the exception, not the rule, when it comes to the Supreme Court’s racial jurisprudence. Over the last century, the emergence of three constitutional doctrines enabled the Court to continuously

41. See Swethaa Ballakrishnen, *Blasé Discrimination Lawyers Experience of Deviance and the Case For QuEer-CRT* (unpublished manuscript); see also Harris, *supra* note 20, at 1746–47 (underscoring the hypocrisy of SCOTUS’s sentiment, is the fact that Plessy himself appeared White, and was in fact only 1/8 African American; Plessy decried this incident and subsequent ruling as harming the ‘reputation’ he had previously enjoyed as a White man).

42. POWELL, *supra* note 40, at 18.

43. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 971 (2010) (“This tendency to ignore or minimize the substantive importance of racial difference in judicial opinions was, in effect, the Court’s default approach to equal protection analysis for decades.”).

44. See *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding state law segregating schools was inherently suspect and not rationally related to state interest); *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding state law excluding Mexican Americans from juries did not withstand strict scrutiny); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding there were no compelling state interests nor narrowly tailored means to achieve anti-miscegenation law, finding it in violation of the Fourteenth Amendment).

45. Derrick Bell, *Brown v. Board of Education and The Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

46. *Id.* Bell contends that the ideological struggle against communism, the experience of Black Vietnam veterans and White people’s desire to industrialize the south contributed to the Courts willingness to break from the racial jurisprudence established in *Plessy*.

47. *Id.*

48. *Id.* at 523.

thwart efforts toward racial justice: (1) an unjust application of strict scrutiny,⁴⁹ (2) color-blind constitutionalism,⁵⁰ and (3) the intent doctrine.⁵¹

The Court's application of strict scrutiny to laws that rely on facially racial classifications, as well as a color-blind refusal to differentiate between benign and invidious discrimination based on race,⁵² effectively hinders most attempts at ameliorating the impacts of systemic racism.⁵³ This confluence enables the appropriation of Equal Protection, leading to claims of reverse discrimination where remedial attempts are made.⁵⁴ The Court further frustrated any such attempts in *Washington v. Davis*, holding that a constitutional discrimination claim would only receive strict scrutiny if there was proof of a discriminatory purpose.⁵⁵ The Court found that a showing of disparate impact on its own could not suffice to prove that the government was discriminating on the basis of race.⁵⁶ Consequently, the intent doctrine all but neutralizes the enforcement power of Section Five of the Fourteenth Amendment⁵⁷ in three ways: it (1) "require[s] plaintiffs alleging intentional discrimination to prove that the government adopted a particular policy because of its negative racial effects, rather than in spite of these effects;"⁵⁸ (2)

49. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (early articulation of what later became strict scrutiny which requires the government to have a compelling interest, achieved through narrowly tailored means when it attempts to legislate with racial classifications); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079 (2011); Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLAL. REV. 2, 15 (2022) (suggesting that strict scrutiny is also a social regime).

50. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens."); see Barnes et al., *supra* note 43, at 974 ("The impulse to declare society post-race has surfaced repeatedly in U.S. constitutional jurisprudence. Most recently, it is found in judicial assertions that the Equal Protection Clause requires colorblindness and bars any effort at race-based remedies for discrimination and segregation.").

51. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding the purpose of the Equal Protection Clause of the Fourteenth Amendment was to prevent *only* official conduct with a discriminatory purpose); Barnes & Chemerinsky, *supra* note 49, at 1080.

52. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (overturning city municipal race-based set-asides for minority business lacking evidence of past particularized race discrimination); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990)) (approving a lower standard of review for benign race considerations under the Fifth Amendment).

53. See Mario Barnes, *We Will Turn Back?: On Why* Regents of the University of California v. Bakke *Makes the Case for Adopting More Radically Race-Conscious Admissions Policies*, 52 U.C. DAVIS L. REV. 2265, 2281 (2019); Carbado, *supra* note 49, at 19; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (finding schools district's attempt to diversify schools violated the 14th Am. by using race as a factor in its plan); *Personnel Administrator v. Feeny*, 442 U.S. 256 (1979) (upholding state law with discriminatory impact on female workers because of no "discriminatory intent"); *Milliken v. Bradley*, 418 U.S. 717 (1974) (overturning school district's attempt to remedy de facto segregation).

54. See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 429 (2014).

55. *Washington v. Davis*, 426 U.S. 229 (1976) (rejecting Fifth Amendment claim that a police-employment test was racially discriminatory based on disparate impact of an exam).

56. *Id.*

57. U.S. CONST. amend. XIV, § 5.

58. Barnes et al., *supra* note 43, at 998.

requires direct evidence of specific racism, even where empirical evidence shows racially disparate impact and;⁵⁹ (3) does not recognize implicit racial bias.⁶⁰

Perversely, the majority of racial discrimination claims heard by the Supreme Court today are brought forth by White students and parents challenging affirmative action, a paradoxical distortion of laws originally intended to ensure equity for Black people.⁶¹ Notions of White innocence and White moral desert are inherent in these claims and in the decisions that follow.⁶² This logic again prioritizes the feelings of White people over the material conditions of Black people and other people of color. Most recently, the Court has arguably rung the death knell for affirmative action in higher education with its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.⁶³ Applying strict scrutiny to two affirmative action policies, the Court reaffirmed its commitment to maintaining the racialized social order by prohibiting schools from considering race in their admissions while leaving intact legacy admissions, which overwhelmingly privilege White applicants.⁶⁴ The decision also left the diversity rationale intact for military academies.⁶⁵ As a result, any anti-subordination principles one might glean from the civil rights amendments are practically refuted in favor of anti-classification principles.⁶⁶

While the Fourteenth Amendment's Equal Protection Clause applies only to government action, private discrimination is typically addressed through federal and state laws such as Titles VI and VII of the Civil Rights Act of 1964.⁶⁷ Titles VI and VII prohibit discrimination based on race, color, or national origin in programs receiving federal financial assistance and in employment. However, these laws often require plaintiffs to meet an almost prohibitively high burden of proof and navigate procedural hurdles, resulting in high rates of summary judgment for defendants.⁶⁸

59. *Id.*; see *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). Interestingly, certain federal statutes like Titles VI and VII, and the Fair Housing Act for example, do recognize disparate impact claims, at least for now.

60. *Id.*

61. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013) (narrowing strict scrutiny).

62. See *Harris*, *supra* note 20, at 1768 (“Whites concede that Blacks were oppressed by slavery and by legalized race segregation and its aftermath, but protest that, notwithstanding this legacy of deprivation and subjugation, it is unfair to allocate the burden to innocent whites who were not involved in acts of discrimination.”); see also *Bakke*, 438 U.S. at 298, 307–08 (describing *Bakke* and others like him in terms of innocence three different times).

63. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

64. *Harris*, *supra* note 20, at 1777 (“Materially, these advantages became institutionalized privileges, and ideologically, they became part of the settled expectations of whites—a product of the unalterable original bargain. The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable.”).

65. *Students for Fair Admissions, Inc.*, 600 U.S. at 213 n.4.

66. *Id.* at 246–47 (Thomas, J., concurring) (“Despite the extensive evidence favoring the colorblind view, . . . it appears increasingly in vogue to embrace an ‘antisubordination’ view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment.”).

67. 42 U.S.C. § 2000d; 42 U.S.C. § 2000e-2(a).

68. Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 751 (2013); See *Ricci v. DeStefano*, 557 U.S. 557, 592–93 (2009) (holding that employer could not remedy disparate impact of hiring process with intentional

Additionally, the Thirteenth Amendment, which abolished chattel slavery and involuntary servitude, has been limited in scope and effectiveness in addressing contemporary forms of racial exploitation and discrimination and notably allows for exceptions in the context of criminalization.⁶⁹ As a result, plaintiffs who endeavor to address systemic racism in the private sector similarly face significant legal obstacles and limitations. At bottom, the Court has both upheld and denied the existence of systemic racism, thus contributing to the codification of White supremacy and racialized inequities across the social sectors, all while accusing so-called liberals of doing so.⁷⁰

B. A Legacy of Inequity: Enduring Racial Hierarchies in Lived Realities

Sadly, even though there have been wonderful advances in anti-discrimination-based civil rights laws and public agendas, there has been no profound effort to destroy the roots of racism. Instead, we live in a society that claims via our government and public policy to condemn racial discrimination even as imperialist White supremacist capitalist patriarchy shapes our politics and culture.

—bell hooks⁷¹

Of course, the Court is not solely to blame for our racial predicament. The history of race in America is complex and deeply rooted in various systems of domination that have shaped the social and political landscape of the nation. However, as we detangle racial myth from fact, the Court's racial jurisprudence provides insight into why the United States has been unable to become truly "post-racial." This insight reveals that the very notion of Whiteness requires an *other* to subjugate, thus maintaining its privileged place in the hierarchy.⁷² From chattel slavery and colonization, to the discriminatory laws, policies, and social practices of the Black Codes and Jim Crow, race has played a significant role in shaping the lives of individuals and their communities, and our present historical context is marked by these legacies.⁷³

Today, still a far cry from a "post-racial" society, we continue to grapple with entrenched racial hierarchies, which operate through historical roots, cultural norms, and political and structural inequities.⁷⁴ After the abolition of slavery, which lasted for over two centuries, White America subjected Black people and communities to the Black Codes, lynching, and Jim Crow laws, enforcing segregation and perpetuating racial disparities in education, housing, employment, and voting rights.⁷⁵ Similarly, colonization and the forced relocation of Indigenous peoples resulted in

"discrimination" without showing that they would have been subject to a disparate impact claim); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973) (establishing burden shifting schema for disparate impact claims, requiring employee to both show discrimination and negate employer's explanation for it as part of *prima facie* case).

69. See *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (finding it "too clear for argument" that the 13th Amend. could not reach segregation).

70. See, e.g., MEHRSA BARADARAN, *THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA* 175 (2024).

71. BELL HOOKS, *WRITING BEYOND RACE: LIVING THEORY AND PRACTICE* 296 (2013).

72. See Harris, *supra* note 20, at 1717.

73. See ALEXANDER, *supra* note 23, at 26.

74. *Id.* at 40; Barnes et al., *supra* note 43, at 982.

75. See Barnes et al., *supra* note 43, at 983.

the displacement, marginalization, and oppression of Native American communities, leading to ongoing struggles for sovereignty and recognition.⁷⁶

The concomitant social attitudes and cultural norms surrounding race in America likewise play a significant role in shaping a racial caste system where stereotypes and implicit bias contribute to the differential treatment of differently racialized groups.⁷⁷ Communities of color, particularly Black and Indigenous ones, are subjected to harmful stereotypes that perpetuate a narrative of inferiority, criminality,⁷⁸ and othering, which negatively impact material conditions, including housing,⁷⁹ employment,⁸⁰ healthcare,⁸¹ education,⁸² and interactions with law enforcement.⁸³ The cultural norms surrounding race, power, and privilege contribute to shaping social structures, policies, and practices that perpetuate inequality.

Political factors, supported by these social norms—such as voter suppression and gerrymandering—have restricted access to political power for historically marginalized communities.⁸⁴ Policies restricting access to social entitlements along with mass criminalization⁸⁵ and over-policing of communities of color further lead to loss of life,⁸⁶ liberty, and opportunities. The history of policing is founded in both class and racial subordination along with White supremacy, in which state-sanctioned violence is directed at Black and Brown people with few repercussions.⁸⁷ As a result of this history and its contemporary iteration, mass incarceration has:

Swept millions of poor people and people of color behind bars . . .
[relegating] them to a permanent second-class status, stripping them of the

76. HOOKS, *supra* note 71, at 120.

77. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 961 (2006).

78. Ariela Rutbeck-Goldman & L. Song Richardson, *Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science*, 8 ALA. C.R. & C.L. L. REV. 145, 149 (2017).

79. Barnes et al., *supra* note 43, at 986.

80. *Id.* at 988.

81. See, e.g., Brett Milano, *With COVID Spread, 'Racism - Not Race - Is the Risk Factor*, HARV. GAZETTE (April 22, 2021), <https://news.harvard.edu/gazette/story/2021/04/with-covid-spread-racism-not-race-is-the-risk-factor/> [perma.cc/L49Y-BBRD]; Kelsey Butler, *U.S. Maternal Mortality Rate Among Black Women Is Nearly Triple That of White, Hispanic Peers*, BLOOMBERG (Feb. 22, 2022), <https://www.bloomberg.com/news/articles/2022-02-23/u-s-black-maternal-mortality-rate-triple-that-of-white-hispanic-women-in-2020#xj4y7vzkg> [perma.cc/NG4G-ZAHX].

82. See Barnes, *supra* note 53, at 2267.

83. Barnes et al., *supra* note 43, at 991; DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 14, 155 (2022).

84. Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 269 (2018).

85. ALEXANDER, *supra* note 23, at 40.

86. AMNESTY INT'L, USA: THE WORLD IS WATCHING: MASS VIOLATIONS BY U.S. POLICE OF BLACK LIVES MATTER PROTESTERS' RIGHTS 1, 5 (2020), <https://www.amnesty.org/en/documents/amr51/2807/2020/en/> [web.archive.org/web/20260313230147/https://www.amnesty.org/en/documents/amr51/2807/2020/en/] ("More than 1,000 people are killed each year by police in the USA. . . . While Black people represent 13.2% of the US population, they represent 24.2% of deaths from police use of firearms. The use of lethal force against people of colour in the USA should be understood as part of the wider pattern of racially discriminatory treatment by law enforcement officers, including unjustified stops and searches, excessive use of force and racial profiling.").

87. See Elise Jamison, *The Chilling Cycle of Police Violence and Black Civil Rights Protest*, 20 FIRST AMEND. L. REV. 76, 83 (2021) (detailing modern policing's lineage from Slave Patrols, state sanctioned lynching in concert with the KKK and COINTELPRO's assassination of Black Panther Party Leaders).

very civil and human rights supposedly won in the Civil Rights Movement, including the right to vote, the right to serve on juries, and the right to be free of legal discrimination in employment, housing, access to education, and basic public benefits.⁸⁸

Where social, political, and legal structures work together to enable disparate access to social and legal entitlements along economic and racialized lines, it is understandable that many feel compelled to engage in political protest, motivated by both anger⁸⁹ and by love.⁹⁰ The very human instinct to resist subjugation, of course, is not limited to any one identity group. The allegory of David and Goliath has been reimagined and retold for centuries, and most of us likely identify more closely with the humble shepherd than we do with the monster. Nevertheless, when we examine our nation's racial hierarchy with integrity, the question of who is David and who is Goliath becomes clear. Though Goliath in this modern context is more complex than one individual, the construct of Whiteness quite simply takes on the mantle of the monster.

For many White Americans, understandably, this is a difficult reality to accept. White people too, often suffer as a result of the policies shaped by racialized social control, with the negative impacts most often felt by White people of lower economic classes who have reduced access to the benefits associated with Whiteness as property.⁹¹ For example, while mass incarceration empirically harms a larger percentage of Black and Latinx Americans, White Americans make up the majority of inmates, and White Americans with felony convictions face similar—though still lesser—difficulties upon release from jail or prison as people of color with criminal records do.⁹² White workers too, may suffer as a result of labor policies shaped by the racialized social control privileging wealthy employers.⁹³ One need not be Black or Brown to be harmed by racial capitalism, but one must understand that one is never harmed by it because of one's Whiteness.⁹⁴ Surely, some White people and others deliberately exploit the racial hierarchy to gain an advantage over others.⁹⁵ Meanwhile, there are likely even more who passively let these hierarchies divert progress toward solutions to the problems in our shared reality—solutions that could benefit us all.⁹⁶ There are still others who see the

88. BELL, *supra* note 22, at xiii.

89. Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 699 (2018).

90. BELL HOOKS, *ALL ABOUT LOVE: NEW VISIONS* xviii (2000).

91. See Harris, *supra* note 20, at 1718 (“In some instances, the advantage of race privilege to poorer whites may be materially insignificant when compared to their class disadvantage against more privileged whites. But exposing the critical core of whiteness as property as the unconstrained right to exclude directs attention toward questions of redistribution and property that are crucial under both race and class analysis.”).

92. ALEXANDER, *supra* note 23, at 204; see Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (2003) (finding in a study on criminal records and employment opportunities that the “effect of a criminal record is . . . 40% larger for blacks than for whites.”)

93. See, e.g., Harris, *supra* note 20, at 1741.

94. See Olufémi O. Táíwò, *A Framework to Help Us Understand the World*, Hammer & Hope (2023), <https://hammerandhope.org/article/issue-1-article-8> [perma.cc/3S6H-QS2H].

95. See CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 3 (2016).

96. See, e.g., JONATHAN M. METZL, *DYING OF WHITENESS* ix (2d ed. 2024) (quoting a terminally ill White man rejecting the American Care Act for fear it would serve “Mexicans or welfare queens.”).

dynamics for what they are and strive to remake the world in a more humane and beautiful image.⁹⁷

It is from this context that we may understand the motivations and objectives of movements like BLM, as well as those of White supremacist groups like the Proud Boys and the Oath Keepers,⁹⁸ along with the structural responses to both. In this light, we see that the criminalization of political protests led by communities of color in direct response to racial injustice exemplifies a perverse cycle of violence which further maintains our uniquely American racial hierarchy.⁹⁹

II. RACE AND POLITICAL PROTEST: COMPARING BLACK AND WHITE RESISTANCE MOVEMENTS

The structural responses to Black-led protests have paralleled the histories that ignited and fueled the need for them in the first place. Black-led advocacy for social justice has been met, time and again, with suppression, surveillance, and violence—often by police.¹⁰⁰ The breadth of state sanctioned violence and surveillance inflicted on Black freedom fighters over time exceeds the purview of this paper, but the following examples represent the depth of the problem.

Slave patrols in the South in the 1700s were designed to punish Black people escaping plantations and to deter revolts.¹⁰¹ In the North, the first police departments in the mid-1800s were used to deter labor strikes and worker riots against the wealthy elite.¹⁰² After Nat Turner’s rebellion of enslaved people in 1831, the Virginia legislature responded by enacting more restrictions and harsher penalties on Black Americans.¹⁰³ Congress passed the Fugitive Slave Laws of 1793 and 1850, which enabled enslavers to behave like police, allowing them to cross state lines to retrieve people who had escaped enslavement.¹⁰⁴ Police violence in response to the Civil Rights Movement was “so consistent and predictable that it became a part of the movement’s strategy,” and J. Edgar Hoover’s “secret FBI” kept dossiers on many of the movement’s leaders.¹⁰⁵ In 1969, the Chicago police assassinated Fred Hampton, the chair of the Illinois Black Panther Party, in his home.¹⁰⁶ Philadelphia police bombed the MOVE Black liberation group’s

97. See *infra*, Part III.

98. MEHRSA BARADARAN, THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA 319 (2024).

99. See Jamison, *supra* note 87, at 86 (“The Civil Rights Era was more than fifty years ago, but the patterns and injustices remain: police brutalize and unlawfully arrest Black Americans, protests emerge, and police respond with more brutality, arrest, and murder.”).

100. Brandon Hasbrouck, *Who Can Protect Black Protest?*, 170 U. PA. L. REV. ONLINE 39, 44 (2022).

101. Jamison, *supra* note 87, at 81, 87 (“The American South went from whipping slaves to brutalizing Black ‘criminals’ without missing a beating—police murder more Black people in counties that had higher rates of lynching from 1877–1950.”).

102. MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 14 (Tamara K. Nopper ed., 2021).

103. *Nat Turner’s Rebellion*, NAT’L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/stories/nat-turners-rebellion> [perma.cc/8JKL-KHKW] (last visited Jan. 6, 2025).

104. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

105. Hasbrouck, *supra* note 100, at 44; see also Angela A. Allen-Bell, *The Incongruous Intersection of the Black Panther Party and the Ku Klux Klan*, 39 SEATTLE U. L. REV. 1157, 1183 (2016).

106. Allen-Bell, *supra* note 105, at 1184 (explaining officers were indicted but not convicted).

residence in 1985, killing five children.¹⁰⁷ During the 1992 protests in Los Angeles against the police beating of Rodney King and the subsequent acquittal of the officers involved, fifty-three people died, including seven killed by police and the national guard.¹⁰⁸

It is not difficult to trace the genealogies of the systemic responses to Black freedom fighters from Nat Turner, to Dred Scott, Selma, Chicago, Los Angeles, and Ferguson.¹⁰⁹ These violent responses aim to suppress uprisings by a people who were deemed not ‘persons’ by the Court fewer than 200 years ago,¹¹⁰ were subjected to legal segregation fewer than seventy years ago,¹¹¹ and continue to face exclusion in every meaningful sense with regard to a fully-realized exercise of citizenship.¹¹² In fact, the present-day police response to Black-led protests is yet another example of normalized violence in response to Black power-building.¹¹³ State-sanctioned violence against Black-led protests thus demonstrates the way racialized groups, particularly Black and Indigenous ones,¹¹⁴ are systematically denied the civil entitlements guaranteed by the Constitution.

One such entitlement is protected by the Fourth Amendment to the Constitution: the right to be free from unreasonable government searches and seizures.¹¹⁵ The Fourth Amendment is “arguably the most significant constitutional provision for regulating police conduct.”¹¹⁶ However, despite the unambiguous language of the law, the Court has interpreted the Fourth Amendment as allowing police to approach, stop, question, frisk, search—and at times—even strip people based on ancestry¹¹⁷ and racial stereotypes.¹¹⁸ In other words, the Court has quite literally legalized what many would consider to be unreasonable searches and seizures.¹¹⁹ Consequently, Fourth Amendment protections are not enjoyed equally by all persons, as evidenced by the disparate degree of policing and criminalization experienced by Black and other communities of color. What’s more, courts often rely on police policies to help determine whether an officer’s actions are reasonable

107. Hasbrouck, *supra* note 100, at 45.

108. *Of 58 Deaths, 50 Have Been Ruled Homicides*, N.Y. TIMES (May 17, 1992) <https://www.nytimes.com/1992/05/17/us/after-the-riots-of-58-riot-deaths-50-have-been-ruled-homicides.html> [perma.cc/S6CD-NZGP].

109. Hasbrouck, *supra* note 100, at 45; U.S. DEPT. OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (March 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [perma.cc/P9E-FVJP].

110. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

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

112. Barnes et al., *supra* note 43, at 982.

113. See ORISANMI BURTON, *TIP OF THE SPEAR BLACK RADICALISM, PRISON REPRESSION, AND THE LONG ATTICA REVOLT* 19 (2023).

114. *Standing Rock Special: Unlicensed #DAPL Guards Attacked Water Protectors with Dogs & Pepper Spray*, DEMOCRACY NOW! (Nov. 24, 2016), https://www.democracynow.org/2016/11/24/standing-rock_special_unlicensed_dapl_guardes [web.archive.org/web/20260117110533/https://www.democracynow.org/2016/11/24/standing-rock_special_unlicensed_dapl_guardes].

115. U.S. CONST. amend. IV.

116. CARBADO, *supra* note 83, at 14.

117. *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (holding ancestry can be a factor in the totality of the circumstances to validate reasonable suspicion for an immigration checkpoint stop).

118. *Whren v. United States*, 517 U.S. 806 (1996) (finding no issue with law enforcement officers racial profiling as long as there exists other articulable facts for stop, e.g., running a stop sign).

119. KABA, *supra* note 102, at 91 (“Young people of color, young Black people in particular, have no presumption of privacy. That idea is an abstraction.”).

under the Fourth Amendment, suggesting that police departments are not strictly beholden to Fourth Amendment precedent, but often take part in shaping it.¹²⁰ This relational dynamic between Black communities and police lays the foundation for understanding some of the impetus of recent BLM protests, including the often-violent police response to Black protesters exercising rights protected by the First Amendment.¹²¹

The right to peacefully protest is covered by the First Amendment rights of free speech, association, and assembly¹²² and, ostensibly, any governmental restrictions on those rights must be content neutral.¹²³ However, for “centuries, the unspoken policy of responding to Black protest with force . . . has created an unchecked barrier to the First Amendment[.]”¹²⁴ and in fact, the content of the protest can help predict the response by police and courts.¹²⁵ The Supreme Court has said that even the mere threat of sanctions may “deter the exercise” of the “delicate and vulnerable, as well as supremely precious” First Amendment rights.¹²⁶ However, police and courts’ response to Black political protest continues to do just that for Black protesters by chilling civil rights speech.¹²⁷

During the civil rights era, in a brief moment of interest convergence, there were some exceptions to this predictable narrative when the Supreme Court overturned convictions for Black protesters who had been arrested during an act of civil disobedience.¹²⁸ However, these decisions did little to expand access to First Amendment rights for Black protesters in the long run. Rather, the Court’s message was only that *these* protests were acceptable in *this* moment.¹²⁹ As interest convergence made way for an inevitable period of retrenchment,¹³⁰ the moment passed when the Court upheld the convictions of Black student protesters for trespass to a local jail in *Adderley v. State of Florida*.¹³¹ In *Adderley*, the students protested prior arrests of their classmates, and more general concerns about segregation,¹³² and instead of singing religious songs, they marched with fists raised.¹³³ The Court upheld their convictions without considering First Amendment rights in

120. CARBADO, *supra* note 83, at 19; Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281 (2019) (applying Lauren Edelman’s theory of legal endogeneity to 4th Amend. jurisprudence).

121. U.S. CONST. amend. I.

122. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”).

123. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

124. Jamison, *supra* note 87, at 94.

125. Hansford, *supra* note 89, at 692.

126. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

127. Hansford, *supra* note 89, at 685.

128. *Id.* at 692; *Boynton v. Virginia*, 364 U.S. 454 (1960) (overturning a Black law student’s trespass conviction for sitting at a Whites-only counter); *Cox v. Louisiana*, 379 U.S. 536 (1965) (overturning convictions of disturbing the peace for peaceful protest against segregation at capital building); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (overturning unlawful arrest of peaceful student protesters for disturbing the peace).

129. In both *Cox*, 379 U.S. at 536 and *Edwards*, 372 U.S. at 229, the Court cited overly vague and broad local statutes governing disturbing the peace as insufficient to uphold the convictions.

130. *See BELL*, *supra* note 2, at 6.

131. *Adderley v. State of Fla.*, 385 U.S. 39 (1966).

132. *Id.*

133. Hansford, *supra* note 89, at 697.

its decision.¹³⁴ “In a way, *Adderley* signifies the end of the Court’s interest convergence with civil rights protesters.”¹³⁵

The same year as the *Adderley* decision, the Black Panther Party¹³⁶ was born, and “protests took on a more militant ‘Black Power’ orientation that included uprisings in major cities and a more aggressive condemnation of police brutality. This eviscerated the sympathy of White liberals like the Supreme Court Justices who supported desegregation goals, but perhaps not other goals like police reform.”¹³⁷ One year after *Adderley*, images of armed Black Panthers at the California statehouse so unsettled White America that even the National Rifle Association, a staunch supporter of broadly applied Second Amendment rights, supported the passage of new gun control laws.¹³⁸

In direct contrast to the histories of the state-sanctioned chilling of Black protesters’ assembly rights, First Amendment jurisprudence has shown commitment to protecting White supremacist hate speech and assembly rights where it does not intentionally incite imminent violence.¹³⁹ Concerning to those who have been paying attention, deciding where an assembly becomes violent, and thus unlawful, is left to the discretion of law enforcement officers.¹⁴⁰ Furthermore, where police departments are called upon to quell protests specifically targeting racialized policing practices, the inherent conflict is intensified, magnifying the very issues protesters are rallying against.

A. Opposition and Obstruction: History Repeats Itself

Today’s BLM movement, sparked by the vigilante killing of seventeen-year-old Trayvon Martin in 2012,¹⁴¹ is part of the activist tradition of Black political protest to the ongoing violence outlined in Part Two, *supra*. The movement describes itself as life-affirming and expansive, with policy advocacy that includes addressing police and judicial violence, climate justice, and political reform.¹⁴²

134. See *Adderley*, 385 U.S. at 52 (Fortas, J., dissenting) (“We do violence to the First Amendment when we permit this ‘petition for redress of grievances’ to be turned into a trespass action.”).

135. Hansford, *supra* note 89, at 697; see, e.g., *NAACP v. Overstreet*, 142 S.E.2d 816 (1965) (holding NAACP responsible for damages caused by picketing).

136. Giovanni Russonello, *Fascination and Fear: Covering the Black Panthers*, N.Y. TIMES (Oct. 15, 2016), <https://www.nytimes.com/2016/10/16/us/black-panthers-50-years.html> [perma.cc/4S5JH-7XT4].

137. Hansford, *supra* note 89, at 698.

138. Thaddeus Morgan, *The NRA Supported Gun Control When the Black Panthers Had the Weapons*, HISTORY (Aug. 29, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act> [perma.cc/CZE3-2J47]. NRA support for gun control is exceedingly rare and almost certainly inspired by racial considerations. Consider that other NRA legislative campaigns, in today’s context of rampant school shootings, include support for expansion of concealed carry permits and stand your ground laws.

139. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Hansford, *supra* note 89, at 705 (noting Hoover’s lack of FBI surveillance of KKK marches despite history of terrorism and violence); Allen-Bell, *supra* note 105, at 1182 (detailing how FBI COINTELPRO shared intelligence with Klan members to thwart civil rights workers, even as they were meant to be working to stop the Klan).

140. John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 5 (2017) (describing how officials can disperse a protest if they decide that protesters are planning to engage in violent or forceful lawbreaking, although some places do not require the violence caveat).

141. *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [web.archive.org/web/20260310203253/https://blacklivesmatter.com/about/] (last visited May 6, 2024).

142. *Policy*, BLACK LIVES MATTER, <https://impact.blacklivesmatter.com/policy/> [web.archive.org/web/20260128222414/https://impact.blacklivesmatter.com/policy/] (last visited May 6, 2024).

Responding to the normalization of Black death, BLM is literally fighting for Black lives. When Minneapolis police officer Derek Chauvin murdered George Floyd in May of 2020, an uprising quickly unfolded across the country and around the world, drawing attention to ongoing issues of police brutality and systemic racism.¹⁴³

The responses to the 2020 uprising from law enforcement,¹⁴⁴ politicians,¹⁴⁵ courts, and cable news pundits¹⁴⁶ alike, reflected a predictable backlash to such racial justice advocacy.¹⁴⁷ The brutal, militarized response to the protests echoes a historical pattern of using excessive force in an attempt to silence Black voices.¹⁴⁸ An open source investigation by Amnesty International documented the violence from state and local police, federal agents, and National Guard troops, which included beatings, misuse of tear gas and pepper spray, indiscriminate firing of “less lethal projectiles,” mass detentions, mass arrests, and targeting of media representatives, legal observers, and street medics.¹⁴⁹ Nationally, eight people were blinded after being hit with police projectiles.¹⁵⁰ The National Guard was activated in over two dozen states.¹⁵¹ In Los Angeles, over 500 people were arrested in a single sweep.¹⁵² In Detroit and New York, police drove SUVs through crowds,

143. AMNESTY INT’L, *supra* note 86.

144. Hansford, *supra* note 89, at 686, 693 (identifying, in an intelligence assessment from 2017, the FBI stated “Black Identity Extremists” as an emerging domestic terror threat sweeping the nation, incentivizing the agency to surveil, monitor, and deploy informants to gain intelligence it believes to be Black Identity Extremists, not unlike a modern day COINTELPRO).

145. Attorney General Jeff Sessions Delivers Remarks at the Valor Survive and Thrive Conference, U.S. DEP’T OF JUST.: ARCHIVES (Feb. 5, 2025), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-valor-survive-and-thrive-conference> [web.archive.org/web/20250202022617/https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-valor-survive-and-thrive-conference] (responding to efforts to reform policing tactics, AG Jeff Sessions remarked: “[I]f you want more shootings and more death, then listen to the ACLU, BLM, or Antifa. If you want public safety, then listen to the police professionals who have been studying this for 35 years.”).

146. Justin Baragona, *Tucker Warns Fox Viewers That Black Lives Matter ‘Mob’ Will ‘Come for You’*, DAILY BEAST (June 8, 2020), <https://www.thedailybeast.com/tucker-carlson-warns-fox-viewers-that-the-black-lives-matter-mob-will-come-for-you> [web.archive.org/web/20260216183654/https://www.thedailybeast.com/tucker-carlson-warns-fox-viewers-that-the-black-lives-matter-mob-will-come-for-you/].

147. Tasnim Motala, “Foreseeable Violence” & Black Lives Matter: How Mckesson Can Stifle A Movement, 73 STAN. L. REV. ONLINE 61, 64 (2020) (stating that due to “the growth of the [BLM] movement nationwide, there has been a concurrent increase in attempts to criminalize and create new avenues of liability for protest, thereby stymieing calls for racial justice and police accountability.”); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61 (2021).

148. Motala, *supra* note 147, at 71 (“Armored tanks rolled through the streets. Law enforcement officers dressed in army fatigues and riot gear toted military-grade assault rifles and flash grenades. Tear gas and rubber bullets besieged crowds that included children.”).

149. *Black Lives Matter Protests: Mapping Police Violence Across the USA*, AMNESTY INT’L (June 23, 2025), <https://www.amnesty.org/en/latest/news/2020/06/usa-unlawful-use-of-force-by-police-at-black-lives-matter-protests/> [perma.cc/94XC-5J9C] (“These human rights violations by US police against peaceful protesters – which were neither proportionate nor necessary to achieve a legitimate law enforcement objective – are particularly egregious as they have occurred at demonstrations denouncing just such police behavior.”).

150. Barker et al., *supra* note 9.

151. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021) <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [perma.cc/GE9G-HS8D].

152. Ruben Vives & Dakota Smith, *L.A. Reels from Looting and Arrests Not Seen in Decades*, L.A. TIMES (May 31, 2020), <https://www.latimes.com/california/story/2020-05-31/l-a-reels-from-looting-and-arrests-not-seen-in-decades> [perma.cc/3YVP-FMKL].

injuring protesters.¹⁵³ The Seattle city government has since paid a \$10 million settlement to plaintiff protesters for its police department's excessive use of force, which resulted in injuries to protesters, including "cardiac arrest, a seizure and coma, a partially blown off finger, permanent hearing loss, broken bones, concussions, and wounds."¹⁵⁴ Nationwide, at least six people were killed.¹⁵⁵

A number of reports on municipal police departments' responses to the protests of 2020 have been conducted since, and "in city after city, the reports are a damning indictment of police forces that were poorly trained, heavily militarized and stunningly unprepared."¹⁵⁶ More often than not, police arrived dressed in riot gear with batons at the ready, and their presence, instead of guaranteeing the peaceful exercise of protesters' First Amendment rights, only made matters worse.¹⁵⁷ Police militarization is partially responsible for escalating the conflicts,¹⁵⁸ but the nature of the protests also played a significant role. The protests challenged the police themselves, who often became "defensive and emotional in the face of criticism."¹⁵⁹ Police violence in the face of such criticism cannot be described as aberrant, but is rather an escalation of centuries of state-sanctioned violence against Black people and communities.¹⁶⁰

In the media, politicians blamed protesters for the apparent chaos taking place in cities across the country. In Minnesota, Governor Tim Walz deployed the National Guard and said at a press conference, "Let's be very clear. The situation in Minneapolis, is no longer, in any way, about the murder of George Floyd. It is about attacking civil society, instilling fear and disrupting our great cities."¹⁶¹ In June, then-President Trump threatened to deploy military troops to "quickly solve the problem" for governors who were unable to "dominate the streets."¹⁶² This came after he delivered his infamous threat on Twitter, calling the protesters "thugs" and saying, "When the looting starts, the shooting starts."¹⁶³ This

153. Jamison, *supra* note 87, at 106; Motala, *supra* note 147, at 651.

154. Amy Sundberg, *Seattle Pays Out \$10 Million Settlement to Protesters in Excessive Force Case*, URBANIST (Jan. 25, 2024), <https://www.theurbanist.org/2024/01/25/seattle-pays-out-10-million-settlement-to-protesters-in-excessive-force-case/> [perma.cc/57TE-6P3A].

155. Bryson Taylor, *supra* note 151.

156. Barker et al., *supra* note 9 (reporting that in N.Y., L.A., Dallas, Philadelphia, Minneapolis, and Indianapolis after-event reports show police lacked recent and adequate training, and departments had failed to properly plan for the mass protests.).

157. *Id.* ("The reports repeatedly blamed police departments for escalating violence instead of taming it. At times, police looked as if they were on the front lines of a war.")

158. Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 126 MICH. J. RACE & L. 105 (2018).

159. Barker et al., *supra* note 9 (describing Denver officers shooting non-lethal projectiles at protesters who were yelling about their behavior; in Raleigh body-cam footage showed indiscriminate pepper spraying).

160. *See, e.g.*, U.S. DEPT. OF JUST., *supra* note 109.

161. The Associated Press, *Minnesota Governor Fully Mobilizes State National Guard*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/video/us/politics/100000007165040/minnesota-national-guard-floyd-protests.html> [web.archive.org/web/20251022082527/https://www.nytimes.com/video/us/politics/100000007165040/minnesota-national-guard-floyd-protests.html].

162. Darlene Superville, Tim Sullivan & Aaron Morrison, *Trump threatens military force against protesters nationwide*, AP NEWS (June 1, 2020), <https://apnews.com/article/mo-state-wire-in-state-wire-mi-state-wire-election-2020-virus-outbreak-a2797b342b4fc509e43f404817a56aa9> [perma.cc/35MMCKH7].

163. Haberman & Burnd, *supra* note 16; *see also* Tommy Beer, *Trump Called BLM Protesters 'Thugs' But Capitol-Storming Supporters 'Very Special'*, FORBES (Apr. 14, 2022), <https://www.forbes.com>.

proclamation was problematic not only for the obvious reasons, but also on legal grounds because of constitutional principles of federalism and limitations on executive power.¹⁶⁴

The courts responded only marginally better. In some cases following the George Floyd uprising, there were positive outcomes for protesters who experienced police violence in the form of large settlements amounts,¹⁶⁵ as well as some facially useful injunctive relief.¹⁶⁶ However, while it may be positive in the short term that injunctions are being granted to protect protesters from police violence, their long-term effectiveness is questionable because they merely enforce preexisting laws that should not have been at issue in the first place. This is reminiscent of the ineffectual outcomes seen in similar cases during the interest convergence of the civil rights movement.¹⁶⁷ Furthermore, while individual settlement monies paid to injured protesters is just, the damage of chilling free speech has already been done, and long term access to constitutional rights are unlikely to be expanded by these remedies.¹⁶⁸ Without addressing the root causes of such state-sanctioned violence, any reforms are likely only to provide similarly superficial balms.

In fact, courts have made decisions that stand to further limit access to First Amendment Rights for Black protesters in the long term.¹⁶⁹ A police officer who was hit by an object thrown by an unidentified protester during a protest in Louisiana responding to the police killing of Alton Sterling, sued BLM activist DeRay Mckesson for his role in organizing the protest.¹⁷⁰ The Fifth Circuit found that Mckesson could be held liable for negligence regarding a foreseeable risk of

com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/?sh=3e6c23963465 [perma.cc/YQ5C-6AEP].

164. Unless requested by state governments, presidents are limited in deploying such force with exceptions pursuant to the Insurrection Act (10 U.S.C. § 253) which include upholding federal law, suppressing insurrections, and protecting civil rights. *See also* Jeremy Campbell, *Amending Insurrection: Restoring the Balance of Power in the Insurrection Act*, 9 TEX. A&M L. REV. 239, 256 (2021) (stating that the most recent invocation of the Insurrection Act was in 1992, at the behest of then-California Governor Pete Wilson who requested President George Bush send federal troops to Los Angeles to quell the so called “Rodney King Riots”). These very issues are being litigated today after Trump sent the National Guard into Los Angeles to quell immigrant-rights protests. *See, e.g.,* Newsom v. Trump, 141 F.4th 1032 (9th Cir. 2025).

165. *See In re N.Y.C. Policing During Summer 2020 Demonstrations*, 548 F. Supp. 3d 383 (S.D.N.Y. 2021) (holding that plaintiffs had adequately stated claims of official policies of excessive force and constitutional violations for police response to Bronx protest); Maria Cramer, *New York Will Pay Millions to Protesters Violently Corralled by Police*, N.Y. TIMES (March 1, 2023) <https://www.nytimes.com/2023/03/01/nyregion/nypd-kettling-blm-protests-settlement.html> [web.archive.org/web/20251117191125/https://www.nytimes.com/2023/03/01/nyregion/nypd-kettling-blm-protests-settlement.html] (city settled class action, awarding upwards of twenty-one thousand dollars to individual class members).

166. *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (granting temporary injunction on use of peppers pray for “peaceful protests,” without meaningfully curtailing officer discretion); *Breathe v. City of Detroit*, 484 F. Supp. 3d 511 (E.D. Mich.), *order clarified*, No. 20-12363, 2020 WL 8575150 (E.D. Mich. Sept. 16, 2020) (granting injunctive relief against inter alia driving cars into crowds and conducting mass arrest without probable cause).

167. *See, e.g.,* *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965).

168. *See* Brentin Mock, *How Cities Offload the Cost of Police Brutality*, BLOOMBERG (June 4, 2020), <https://www.bloomberg.com/news/articles/2020-06-04/the-financial-toll-of-police-brutality-to-cities> [perma.cc/MTF6-KASD].

169. *Doe v. Mckesson*, 71 F.4th 278 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 913 (2024).

170. *Id.*

violence that occurred during the protest.¹⁷¹ After making its way up and down the legal hierarchy, the Supreme Court most recently denied Mckesson's petition for a writ of certiorari, leaving in place the Fifth Circuit's decision.¹⁷² This decision, and the Court's refusal to adjudicate it on constitutional grounds, sets a dangerous precedent for those engaged in protest and civil disobedience nationwide, and will likely spur similar litigation in the future.¹⁷³

In the spring of 2024, similar scenes unfolded on college campuses nationwide in response to student activists protesting their universities' economic complicity in Israeli apartheid and Palestinian genocide. At the University of California, Los Angeles, for example, the Los Angeles Police Department broke up the student encampment using flash-bangs, rubber bullets, and batons.¹⁷⁴

The night before, police failed to intervene for hours while violent counter-protestors attacked the encampment; the police eventually dispersed the counter-protestors without making any arrests, again highlighting the racialized nature of policing political protest.¹⁷⁵ In a press conference shortly after the clearing of the encampment, then-President Joe Biden condemned the "violent" protests, explaining that property damage and trespass is violent.¹⁷⁶ He was notably silent on the widespread police violence toward student activists which was video-recorded and shared across social media almost daily over the previous few weeks. While this rhetoric from the former Democratic president is not nearly as provocative as that of Republican President Trump's regarding BLM, the material conditions experienced by marginalized protesters under their respective administrations are arguably the same. This underscores the fact that the perpetuation of the racial hierarchy transcends conservative politics and is implicit in the very fabric of American power structures. At my own university campus, for example, our Chancellor, Howard Gillman unironically lauded what he termed the "year of free speech" while calling in over fifteen local police precincts to disperse and arrest his own peaceful student encampment, illustrating the contradictions inherent in much of legal liberalism's approach to rights.¹⁷⁷

171. *Id.*

172. *Mckesson v. Doe*, 144 S. Ct. 913 (2024) (Sotomayor, J., statement respecting the denial of certiorari) (noting the Court's subsequent holding in *Counterman v. Colorado*, 600 U.S. 66 (2023), barring objective standard, including negligence, for punishing speech).

173. See Motala, *supra* note 147, at 70; Olalekan N. Sumonu, *Shot in the Streets, Buried in Courts: An Assault on Protester Rights*, 52 SETON HALL L. REV. 1569, 1597 (2022).

174. *Riot Police Dismantle Peaceful Pro-Palestinian Protest at UCLA*, Al Jazeera (May 2, 2024), <https://www.aljazeera.com/news/2024/5/2/tensions-high-at-ucla-as-police-order-pro-palestinian-protesters-to-leave> [perma.cc/T652-HWXA].

175. *Id.*

176. Adam Cancryn, *Biden Condemns Campus Violence: No 'Right To Cause Chaos'*, POLITICO (May 2, 2024), <https://www.politico.com/news/2024/05/02/biden-condemns-campus-protest-culture-no-right-to-cause-chaos-00155710> [web.archive.org/web/20251106035913/https://www.politico.com/news/2024/05/02/biden-condemns-campus-protest-culture-no-right-to-cause-chaos-00155710].

177. Jonathan Wolf, *Protesters Clash with Police as U.C. Irvine Encampment Is Cleared*, N.Y. TIMES (May 16, 2024), <https://www.nytimes.com/2024/05/16/us/protest-uc-irvine-clash-police.html> [web.archive.org/web/20240525113905/https://www.nytimes.com/2024/05/16/us/protest-uc-irvine-clash-police.html]; see also Howard Gillman, *Announcing a University-wide Thematic Year on Free Speech, Academic Freedoms, and Conversations Across the Divide*, UC IRVINE OFF. OF CHANCELLOR (May 22, 2023) <https://chancellor.uci.edu/communications/campus/2023/230522-year-on-free-speech-announcement.php> [perma.cc/2M98-NY8B].

Recently, President Trump, in his second term, made good on a promise issued in Executive Order 14188, by unlawfully detaining student-organizer Mahmoud Khalil (among others), a legal permanent resident, for his participation in the Columbia University encampments.¹⁷⁸ Alleging that Columbia has not taken sufficient measures to combat antisemitism, Trump and his education secretary, Linda McMahon—of World Wrestling Entertainment fame—halted millions of dollars in funding for the university, and in response, the university offered up the names of its students as sacrificial lambs.¹⁷⁹ While this has all been done under the guise of combating antisemitism, it is difficult to reconcile these actions with Trump's praise for the participants of the Unite the Right Rally whose chants and very motivations included violent antisemitic tropes.¹⁸⁰ This doublespeak illustrates the elasticity of Whiteness to serve those who would seek to manipulate it for their own gain.

B. Resisting While White: The Privilege to Protest

The militarized response to BLM, indigenous, and pro-Palestine protests greatly diverges from the ways police respond to presumptively peaceful White protests.¹⁸¹ One prime example is the 2017 Unite the Right rally in Charlottesville, Virginia, which was organized against the removal of a Robert E. Lee monument.¹⁸² Though the rally was openly discussed on far-right message boards as a violent uprising,¹⁸³ local and state police failed to adequately prepare for violence. On the day of the rally, Neo-Nazi protesters marched in helmets, carrying clubs, shields, and semi-automatic weapons.¹⁸⁴ The police stood by watching as rally attendees engaged in outright brawls with counter-protesters before marching them out of the park and onto the streets, where one of them killed Heather Heyer by driving into a crowd of counter-protesters.¹⁸⁵ The rally was not teargassed, there were no tanks, no police in riot gear. Thirty-five people were injured that day—none by police.¹⁸⁶

178. Kayla Epstein, *Columbia Activist Mahmoud Khalil Freed from Detention*, BBC (June 20, 2025), <https://www.bbc.com/news/articles/clylv796ekgo> [perma.cc/B9CF-Z6PN].

179. Jennifer Peltz, *Trump Administration Cancels \$400M in Grants and Contracts with Columbia University*, AP NEWS (March 7, 2025), <https://apnews.com/article/columbia-university-protests-antisemitism-palestine-israel-9c209ce040e4b60d2702b40b9c2fb321> [perma.cc/T6KT-UHU7].

180. Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/> [perma.cc/956G-2YW5].

181. George Joseph, *White Supremacists Joked About Using Cars to Run Over Opponents Before Charlottesville*, PROPUBLICA (Aug. 28, 2017), <https://www.propublica.org/article/white-supremacists-joked-about-using-cars-to-run-over-opponents-before-charlottesville> [web.archive.org/web/20260302164028/https://www.propublica.org/article/white-supremacists-joked-about-using-cars-to-run-over-opponents-before-charlottesville] (noting that organizers of the White supremacist “Unite the Right Rally” worked closely with police, assuming they would focus on counter-protesters).

182. *Id.*

183. Motala, *supra* note 147, at 72.

184. A.C. Thompson, *Police Stood by as Mayhem Mounted in Charlottesville*, PROPUBLICA (Aug. 12, 2017), <https://www.propublica.org/article/police-stood-by-as-mayhem-mounted-in-charlottesville> [perma.cc/ZKX9-SVX2].

185. Motala, *supra* note 147, at 72; Hansford, *supra* note 89, at 707.

186. Thompson, *supra* note 184.

This example demonstrates that police are capable of responding to protests non-violently, even where protesters' actions are less than peaceful.¹⁸⁷

The protesters also received kinder treatment from politicians—most notably—when Trump referred to them as “very fine people.”¹⁸⁸ Of course, here, there were two glaring differences from the BLM protests described above: the protesters were mostly White, and they were not protesting police violence or systemic racism. It is not difficult to imagine how differently the day would have turned out if the armed marchers were Black.

Similarly, on January 6, 2021, when hundreds of Trump supporters stormed the U.S. Capitol in an effort to overturn an election they erroneously believed was stolen, law enforcement agencies failed to adequately prepare for the assault despite its planning happening openly online.¹⁸⁹ A day before rioters stormed Congress, an FBI office in Virginia issued an explicit warning that extremists were preparing to travel to Washington to commit violence and “war.”¹⁹⁰ Despite these warnings, according to a report by the Inspector General, law enforcement leaders instructed officers not to employ their most aggressive tactics to hold off the mob of rioters.¹⁹¹ Even with knowledge of a planned attack on Congress, there was no barricading of the capitol or requests for support from the D.C. police until after the protesters attacked Capitol Police. In stark contrast to his responses to BLM protests, President Trump did not offer support from the National Guard or reserve forces before or during the protest.¹⁹²

187. See Aymann Ismail, *The Anti-Lockdown Protests Prove Police Know How to Treat Protesters Fairly*, SLATE (May 28, 2020), <https://slate.com/news-and-politics/2020/05/police-response-george-floyd-minneapolis-shutdowns.html> [perma.cc/M2H2-MXLB] (noting that police responded peacefully to heavily armed COVID anti-lockdown protesters).

188. Rosie Gray, *Trump Defends White-Nationalist Protesters: ‘Some Very Fine People on Both Sides’*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/> [web.archive.org/web/20260314201945/https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/].

189. Peter Hermann, Carol D. Leonnig, Aaron C. Davis & David A. Fahrenthold, *How the U.S. Capitol Police Were Overrun in a ‘Monumental’ Security Failure*, WASH. POST (Jan. 8, 2021), https://www.washingtonpost.com/politics/capitol-police/2021/01/07/fa3114b8-5114-11eb-83e3-322644d82356_story.html [web.archive.org/web/20230420232541/https://www.washingtonpost.com/politics/capitol-police/2021/01/07/fa3114b8-5114-11eb-83e3-322644d82356_story.html].

190. Devlin Barret & Matt Zapotosky, *FBI Report Warned of ‘War’ at Capitol, Contradicting Claims There Was No Indication of Looming Violence*, WASH. POST (Jan. 12, 2021), https://www.washingtonpost.com/national-security/capitol-riot-fbi-intelligence/2021/01/12/30d12748-546b-11eb-a817-e5e7f8a406d6_story.html [perma.cc/3C5M-XTZE] (“An online thread discussed specific calls for violence stating ‘Be ready to fight. Congress needs to hear glass breaking, doors being kicked in, and blood from their BLM and Pantifa slave soldiers being spilled. Get violent. Stop calling this a march, or rally, or a protest. Go there ready for war. We get our President or we die. NOTHING else will achieve this goal.’”).

191. Broadwater, *supra* note 19 (finding that Capitol Police leaders ignored or overlooked intelligence reports warning of attacks on lawmakers, department leaders ordered a special crowd-control unit not to use its most powerful nonlethal weapons, officers responded with defective protective equipment).

192. On the other hand, Trump had used the National Guard six months earlier to clear a BLM protest for a photo opportunity, a move since condemned by top military officials and then-Secretary of Defense. See Tom Gjelten, *Peaceful Protesters Tear-Gassed to Clear Way for Trump Church Photo-Op*, NPR (June 1, 2020), <https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visit-angers-church-officials> [perma.cc/9AEX-LHYN]; Helene Cooper, *Milley Apologizes for Role in*

The failure to prepare was compounded “by the slow response on the day of the siege, when Capitol Police and other federal agencies did not head off a mass of Trump supporters who descended on the Capitol building, egged on by the President himself.¹⁹³ After Trump gave a speech at his “Save America Rally,” where he railed against Democratic lawmakers and supposed election fraud, his supporters, many of them armed, broke windows and doors to enter the Capitol building, forcing Congress to adjourn and take shelter.¹⁹⁴ Seven people died in conjunction with the riot, including a rioter and a police officer who died during the attack, and two officers on duty that day who took their own lives in the days following.¹⁹⁵

Here, it is worth stating the obvious: if the January 6th insurrectionists were Black, it is very likely things would have turned out quite differently, and it is very possible that more people would have died. Though convictions and indictments of individuals followed—most of whom have now been pardoned—the very fact that protesters were able to do all that they did that day speaks volumes.¹⁹⁶ Moreover, when juxtaposing the legal responses to the BLM protests and the events of January 6th, a narrative emerges of a “reformist counterinsurgency.”¹⁹⁷ In both the BLM and January 6th court cases, the emphasis on individual remedies and individual penalties, respectively, along with *McKesson’s* troubling precedent, can be viewed as efforts to quell Black civil unrest. Furthermore, litigation over the January 6th insurrection may actually serve to strengthen the resolve of White supremacist Trump supporters who believe that the government is out to get them,¹⁹⁸ a bitter irony in light of the historical context.

III. WHAT IS TO BE DONE?

What if abolition isn’t a shattering thing, not a crashing thing, not a wrecking ball event? What if abolition is something that sprouts out of the wet places in our eyes, the broken places in our skin, the waiting places in

Trump Photo Op: ‘I Should Not Have Been There’, N.Y. TIMES (Sept. 28, 2021) <https://www.nytimes.com/2020/06/11/us/politics/trump-milley-military-protests-lafayette-square.html> [web.archive.org/web/20260210210023/https://www.nytimes.com/2020/06/11/us/politics/trump-milley-military-protests-lafayette-square.html].

193. Hermann et al., *supra* note 189.

194. Tan, *supra* note 18.

195. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [perma.cc/7R9K-NKY7].

196. Annie Linskey, Chelsea Jane, and Amy B. Wang, *Biden Denounces Racial Inequities In Blasting Capitol Riot*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/politics/biden-racial-inequity-capitol-mob/2021/01/07/07d5961e-5112-11eb-b96e-0e54447b23a1_story.html [web.archive.org/web/20240329173214/https://www.washingtonpost.com/politics/biden-racial-inequity-capitol-mob/2021/01/07/07d5961e-5112-11eb-b96e-0e54447b23a1_story.html] (“You can’t tell me that if it had been a group of Black Lives Matter protesters yesterday they wouldn’t have been treated very differently than the mob of thugs that stormed the Capitol.”).

197. See, e.g., Burton, *supra* note 113, at 149; See Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2520 (2023) (“Reformism becomes an essential strategy of the ruling class to reestablish its rule; to do as little as possible to quell revolt that might force deeper changes and self-rule.”).

198. See Robert Draper, *Far Right Pushes a Through-the-Looking-Glass Narrative on Jan. 6*, N.Y. TIMES (June 23, 2023), <https://www.nytimes.com/2023/06/23/us/politics/jan-6-trump.html> [web.archive.org/web/20260218065842/https://www.nytimes.com/2023/06/23/us/politics/jan-6-trump.html].

our palms, the tremble holding in my mouth when I turn to you? What if abolition is something that grows?

—Alexis Pauline Gumbs¹⁹⁹

In the face of such enormous violence, the temptation to triage is strong. “For those of us who see the world around us on fire, the question is what is to be done. For the law professor, the lawyer, and even the law student, reform and regulation are the ever-present terrain.”²⁰⁰ However, the urge to concoct remedies for surface wounds often comes at the expense of allowing the root of the problem to fester. To address the issue of police violence, for example, some police reformers have suggested better training, increased numbers of body-worn cameras, jailing ‘killer cops,’ and community policing.²⁰¹ Rather than moving toward long-term goals of peace and abundance, reforms like these tend to direct more funding to police departments while masking the systemic nature of the issue.²⁰²

Where liberal reforms serve to entrench rather than dismantle or remake corrupt systems of domination,²⁰³ non-reformist reforms, on the other hand, aim to undermine these systems and “build democratic power toward emancipatory horizons.”²⁰⁴ Because the problem of unequal access to First Amendment protections is a symptom of larger issues stemming from racial capitalism,²⁰⁵ solutions that address the root cause of the protests would also serve to expand access to these, and other, constitutional entitlements. Some examples include reparations, abolishing the electoral college, and investing in a social safety net, thereby creating conditions that make policing and prisons obsolete.²⁰⁶

In her book *Golden Gulag*, Professor Ruth Wilson Gilmore defines non-reformist reforms as “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.”²⁰⁷ Effective organizing in this vein strategically engages with systems as they are, while practicing radical imaginings toward a brighter future.²⁰⁸ To that end, organizers and communities are applying pressure at the city, state, and federal levels.²⁰⁹ Where police brutality has been at the

199. Alexis Pauline Gumbs, *Freedom Seeds: Growing Abolition in Durham, North Carolina*, in ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 145 (The CR10 Publication Collective ed., 2008).

200. Akbar, *supra* note 197, at 2502.

201. *See id.* at 2538.

202. *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE (May 14, 2020), <https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing/> [perma.cc/E2HG-JUEQ].

203. *See* Akbar, *supra* note 197, at 2518; *Reformist Reforms vs. Abolitionist Steps in Policing*, *supra* note 202.

204. Akbar, *supra* note 197, at 2507.

205. *See* Táíwò, *supra* note 94. If you do not like this term, then call it what you will, but let us not deny ourselves the benefit of history’s teachings, which expose systemic issues of racism, greed, and White supremacy.

206. *See* KABA, *supra* note 102, at 3, 66 (“[Prison Industrial Complex] abolition is a vision of a restructured society in a world where we have everything we need: food, shelter, education, health art, beauty, clean water, and more things that are foundational to our personal and community safety.”); *see generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (Greg Ruggiero ed., 2003).

207. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (Earl Lewis et al. eds., 2007).

208. Akbar, *supra* note 197, at 2510.

209. Notably scarce, are non-reformist reforms targeting the judicial branch. *But see, e.g., Policy*, *supra* note 142 (lobbying efforts against Amy Coney Barrett’s SCOTUS nomination).

center of nearly every major uprising in this country going back to the early 1900s, non-reformist reforms aimed at that particular problem merit special attention.²¹⁰

Organizer and abolitionist Mariam Kaba published a short article entitled *Police “Reforms” You Should Always Oppose*, in which she provides a simple guide for evaluating suggested reforms to policing.²¹¹ She recommends opposing pro-police reforms such as those that allocate more money to police, advocate for more police (even under the guise of community policing), focus on technology, or focus on individual, tax-funded dialogue with police.²¹² Instead, she supports non-reformist reforms like reparations for victims of police violence, defunding police and prisons, and increased data transparency.²¹³ Similarly, the California-based organization, Critical Resistance,²¹⁴ offers a simple guide to reformist reforms versus non-reformist reforms aimed at policing.²¹⁵ Some examples of their non-reformist reforms include holding officers accountable for their violent misconduct by placing them on unpaid leave, withholding pensions, and ending qualified immunity, as well as reducing the size of police forces and withdrawing from police militarization programs.²¹⁶ The ultimate goal of such reforms is to quite literally abolish the police. Redirecting police funds to community health and safety needs paves the road to not only police abolition, but to creating material conditions in which police are obsolete.²¹⁷ I turn now toward ongoing efforts of organizers, activists, and communities who are applying pressure to various levers of power aimed at building safer, healthier communities.

A. Federal Power

The Movement for Black Lives offered support for various federal legislation to address the hyper-criminalization of Black and other communities of color.²¹⁸ For example, the Marijuana Opportunity Reinvestment and Expungement Act would have decriminalized and descheduled marijuana at the federal level, and provided expungement and reinvestment into communities harmed by the War on Drugs.²¹⁹ The People’s Justice Guarantee, a house resolution introduced by Representative Ayanna Pressley that never made it out of committee, would have likewise decriminalized drug-related offenses, truancy, and sex work.²²⁰ Measures like these seek to reduce opportunities for contact with police, and if passed, could have a major impact on the lives of people who are subjected to systemic discrimination and over-policing.

210. KABA, *supra* note 102, at 75 (“The reason that’s the case, and has always been the case in this country, is because [police brutality] is the most clear example of being treated unjustly in the county. It’s the clearest way that almost every Black person can see that they are second class.”).

211. KABA, *supra* note 102, at 70.

212. *Id.*

213. *Id.*

214. *About CR*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/> [perma.cc/ZXQ9-CURL] (last visited Nov. 23, 2025).

215. *Reformist Reforms vs. Abolitionist Steps in Policing*, *supra* note 202.

216. *Id.*

217. KABA, *supra* note 102, at 12, 16.

218. *Policy Platform: End the War on Black People*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-on-drugs/> [perma.cc/5FD3-GKMX] (last visited Nov. 23, 2025).

219. Marijuana Opportunity Reinvestment and Expungement Act, H.R. 5601, 118th Cong. (2nd Sess. 2023).

220. The People’s Justice Guarantee, H. Res. 702, 116th Cong. (2021).

Another bill that died before receiving a vote would have repealed the military surplus program.²²¹ The U.S. Department of Defense makes excess military equipment, including weaponry and vehicles, available to local law enforcement agencies (LEAs) through its 1033 program.²²² While there is no evidence that the 1033 program keeps communities safe, there is a growing body of research that indicates that increased militarization in fact does the opposite, especially for racialized communities.²²³ A 2017 study showed a significant positive statistical relationship between 1033 equipment allocations and fatalities from officer-involved shootings.²²⁴ This, in part, is attributable to what psychologists have dubbed the “weapons effect,” wherein “[g]uns not only permit violence, they can stimulate it as well. The finger pulls the trigger, but the trigger may also be pulling the finger.”²²⁵ Where racialized bias and systemic racism remain unchecked, adding tanks and military grade weapons to the mix is like adding fuel to a fire.²²⁶ Ending military equipment allotments to LEAs would both improve protesters’ ability to exercise their constitutional rights as well as help keep civilians safer in their daily lives.²²⁷

Consider now the executive branch of the government. In 2015, President Obama effectuated various recommendations to help curtail the negative impacts of the 1033 program with Executive Order (“EO”) 13688.²²⁸ These included increased community oversight on 1033 acquisitions, particularized trainings on use of military-grade weaponry, and prohibiting certain 1033 acquisitions altogether.²²⁹ The EO recommendation notes that the reforms were in part responding to “voiced concerns about what has been described as the ‘militarization’ of law enforcement due to the types of equipment at times deployed by LEAs and the nature of those deployments.”²³⁰ It goes on to cite the militarized police response to the 2014 Ferguson uprisings as particularly problematic. Perhaps predictably for critics of reformism, however, the ACLU reports that after the 2015 EO reforms were adopted, the impacts of the program remained unchanged, while many LEAs were

221. Demilitarizing Local Law Enforcement Act, H.R. 7143, 116th Cong. (2020).

222. Joseph B. Doherty, *Us vs. Them: The Militarization of American Law Enforcement and the Psychological Effect on Police Officers & Civilians*, 25 S. CAL. INTERDISC. L.J. 415, 447 (2016).

223. Charlotte Lawrence & Cyrus J. O’Brien, *Federal Militarization of Law Enforcement Must End*, ACLU (May 12, 2021), <https://www.aclu.org/news/criminal-law-reform/federal-militarization-of-law-enforcement-must-end> [perma.cc/BJA4-KVW8].

224. Casey Delehanty, Jack Merwhirter, Ryan Welch & Jason Wilks, *Militarization and Police Violence: The Case of the 1033 Program*, RES. & POL., April-June 2017, at 1–7.

225. Brad Bushman, *Get Psyched: The “Weapons Effect”*, PSYCH. TODAY (Jan. 18, 2013), <https://www.psychologytoday.com/blog/get-psyched/201301/the-weapons-effect> [perma.cc/H5ZW-D6LS].

226. See Wayne McElrath & Sarah Turberville, *Poisoning Our Police: How the Militarization Mindset Threatens Constitutional Rights and Public Safety*, PROJECT ON GOV’T OVERSIGHT (June 9, 2020), <https://www.pogo.org/analysis/2020/06/poisoning-our-police-how-the-militarization-mindset-threatens-constitutional-rights-and-public-safety> [perma.cc/D3AV-6DKK] (Police fear plus racial bias has deadly results for Black Americans.).

227. See *id.* (Breonna Taylor was killed by police conducting a no-knock raid meant for someone else after they broke down her door with a battering ram.).

228. LAW ENFORCEMENT EQUIPMENT WORKING GROUP, RECOMMENDATIONS PURSUANT TO EXECUTIVE ORDER 13688: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION (May 2015), <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/L-E-Equipment-WG-Final-Report.pdf> [perma.cc/MP67-UJT6].

229. See McElrath & Turberville, *supra* note 226.

230. LAW ENFORCEMENT EQUIPMENT WORKING GROUPS, *supra* note 228, at 6.

able to circumvent oversight protocols and offer overtime pay for training officers on the new equipment.²³¹

There have been other, similar federal attempts at reforming the police. For example, the House of Representatives twice passed the George Floyd Justice in Policing Act, which did not make it through the Senate, and President Biden signed EO 14704 on “Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety.”²³² Both of these efforts focused on reformist reforms and allocated more funding to police departments in the process.²³³ Despite these setbacks and non-starters, organizers continue to mobilize and pressure the federal government to make real, lasting change to policing.

B. State Power

In California, the Californians United for a Responsible Budget (“CURB”) coalition²³⁴ is organizing at the state level to divest from prison and policing and reinvest in communities.²³⁵ It focuses on the state budget as part of a larger campaign to reduce the number of jailed Californians, reduce the number of jails and prisons in California, and to divest carceral spending towards community health and safety.²³⁶ CURB, along with a long list of community organizations, including the Ella Baker Center for Human Rights²³⁷ and the California Coalition of Women Prisoners,²³⁸ co-sponsored the California Racial Justice For All Act (“RJA”).²³⁹ The California Legislature enacted the RJA “to eliminate racial bias from California’s criminal justice system.”²⁴⁰ The RJA was introduced, in part, as a response to the Supreme Court decision in *McCleskey v. Kemp*,²⁴¹ in which the Court ruled that a criminal defendant who alleges an equal protection violation must demonstrate purposeful discrimination by a decision maker in their case that resulted in a discriminatory effect on the case’s outcome.²⁴² In contrast, the RJA, among other things, allows defendants in criminal cases to seek redress for racial bias using statistical evidence to demonstrate systemic racism’s impact on their case, without the need to prove intentional discrimination. This includes racism on behalf of any

231. Lawrence & O’Brien, *supra* note 223.

232. This EO has seemingly drawn inspiration from the M4BL’s Breath Act. *See Our Six Demands for Accountability for This Moment*, BLACK LIVES MATTER (Jan. 13, 2021) <https://blacklivesmatter.com/our-six-demands-for-accountability-for-this-moment/> [web.archive.org/web/20260128203203/https://blacklivesmatter.com/our-six-demands-for-accountability-for-this-moment/].

233. Akbar, *supra* note 197, at 2521. That act was rife with reforms that concurrently allocated hundreds of millions of dollars to police departments.

234. *About Us*, CURB, <https://curbprisonspending.org/about-us> [perma.cc/A4C3-L65] (last visited Nov. 25, 2025).

235. *Close California Prisons*, CURB, <https://curbprisonspending.org/close-ca-prisons> [perma.cc/8TG8-FU4D] (last visited Nov. 25, 2025).

236. *Why Budget Advocacy?*, CURB, <https://curbprisonspending.org/why-budgets> [perma.cc/HF7L-K7X8] (last visited Nov. 25, 2025).

237. *Policy Wins*, ELLA BAKER CTR. FOR HUM. RTS., <https://ellabakercenter.org/policy/policy-wins/> [perma.cc/T6TR-AFYB] (last visited Nov. 25, 2025).

238. *Our Mission*, CCWP, <https://womenprisoners.org/about-us/> [perma.cc/6FZ4-UG8] (last visited Nov. 25, 2025) (CCWP is a “grassroots abolitionist organization” challenging institutional violence).

239. CAL. PENAL CODE § 745.

240. Assemb. B. 2542, 2019–2020 Reg. Sess. (Cal. 2020).

241. *McCleskey v. Kemp*, 481 U.S. 279 (1986).

242. S. Comm. on Pub. Safety, Sen. Nancy Skinner, Chair, 2019–2020 Reg. Sess. (Cal. 2020).

state actors, from arresting officers to judges and even juries. Although its effectiveness is still being tested in courts, the RJA may hold significant potential to impact California's criminal legal system in the long term. Though not strictly a non-reformist reform, the RJA provides pathways to challenge systemic racism for individuals involved with the criminal legal system and does not appear to further entrench carceral power. Ongoing legislative efforts to clarify its procedures will be crucial for achieving its lofty goals.

(CONCLUSION) ALL POWER TO THE PEOPLE

[P]ower shrinks when hoarded and multiplies when shared.

—Mehrsa Baradaran²⁴³

We who believe in freedom are faced with formidable odds. The Court is stacked with Conservative justices committed to the fallacies of colorblindness and post-racialism. We are bearing witness to the barrage of devastation ushered in by a new Trump era, with left and progressive voters increasingly disenfranchised by the two-party system. Neo-Nazis and White supremacists are marching in our streets, armed and unafraid, while racial justice protesters are beaten and jailed by militarized police forces. It is difficult not to adopt a pessimistic view of the future of our democracy. But take heart, because we are not alone! We can choose hope! Not hope as just a feeling, but “hope as a discipline,” one that we practice every day.²⁴⁴

The impact of the 2020 uprising is far greater than the effect it had on policing protests. BLM demonstrated the potential of a decentralized and non-hierarchical social movement, and the organizing that it birthed continues today. Despite continued opposition, people and communities continue to brave all odds, coming together to fight back against those who profit from our misery. Global movements for climate justice, racial justice, and economic justice are being led by young people who refuse to give up on our collective futures. There is a place for each of us in the movement. Understanding that racism may well be permanent, we can still embrace hope as we struggle toward justice, even as we acknowledge that we may never fully attain it. Against all odds, “we who believe in freedom cannot rest until it comes.”²⁴⁵

243. MEHRSA BARADARAN, *THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA* 357 (2024).

244. KABA, *supra* note 102, at 27.

245. SWEET HONEY IN THE ROCK, *Ella's Song*, YOUTUBE (Dec. 2, 2008), <https://www.youtube.com/watch?v=S2T216XgiO0> [web.archive.org/web/20260106014347/https://www.youtube.com/watch?v=S2T216XgiO0&t=24].