

MOVEMENT JUDGES

BRANDON HASBROUCK*

Judges matter. The opinions of a few impact the lives of many. Judges romanticize their own impartiality, but apathy in the face of systems of oppression favors the status quo and clears the way for conservative agendas to take root. The lifetime appointments of federal judges, the deliberate weaponization of the bench by reactionary opponents of the New Deal and progressive social movements, and the sheer inertia of judicial self-restraint have led to the conservative capture of the courts. By contrast, empathy for the oppressed and downtrodden renders substantive justice possible and leaves room for unsuccessful litigants to accept unfavorable outcomes. But some judges—movement judges—bring more to the bench than just empathy, raging against systemic injustice with an understanding of its burdens on real human lives. This Article argues that we need movement judges to realize the abolitionist and democracy-affirming potential of the Constitution. Although the judiciary is often described as the “least democratic” of the three branches of government, it has the potential to be the most democratic. With movement judges, the judiciary can become a force for “We the People.”

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INTRODUCTION

"We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."

—Justice Sonia Sotomayor, 2016¹

In the spring of 2021, I applied to become a federal judge on the Fourth Circuit Court of Appeals.² After multiple rounds of interviews, I was extended an invitation to meet with Senators Tim Kaine and Mark Warner. During the final round of interviews with Senators Kaine and Warner, Senator Kaine asked me what kind of judge I would be. I responded, "A movement judge." I told the Senators that

¹ *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

² Obviously, I was not among those whose names were forwarded to President Biden. Senators Kaine and Warner may have had any number of reasons for that choice, but I can't imagine my age wasn't a factor in the decision. At 34, I would have been the youngest nominee ever to the Fourth Circuit.

I understood a movement judge to be a jurist who understands that our Constitution contains the democracy-affirming tools we need to dismantle systems of oppression and to achieve true equality for all people. I wanted to be not just a judge who would reliably interpret the laws and Constitution in a broad framework to protect the rights of individuals, but a judge who would consistently bear in mind the consequences cases have for individuals' real lives beyond the courtroom. I wanted to be a judge who would simultaneously consider both the people who must live with a decision and its collateral legal effects. I wanted to bring an abolition constitutionalist legal philosophy to the bench, focusing on the Constitution's potential to dismantle modern systems of oppression—particularly those deriving from slavery—in order to promote substantive liberty and justice and create a more humane and democratic society.³

Courts matter. Judges without a serious commitment to preserving democratic processes and institutions can clear the way for political actors to preserve power irrespective of the will of the people.⁴ In Florida, after voters overwhelmingly passed a state constitutional amendment to allow felons to vote after their release from prison, the legislature responded by limiting voting to those who had finished paying all fines, fees, and restitution.⁵ While voters challenged this law as an unconstitutional poll tax, the Eleventh Circuit Court of Appeals ruled against them, effectively preventing the participation of hundreds of thousands of people that Floridians had voted to enfranchise.⁶ The Supreme Court's refusal to intervene in that case and the political gerrymandering cases fits with the general pattern of

³ See Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7–10 (2019) (providing a succinct explanation of abolition constitutionalism in the context of prison abolition).

⁴ See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (declining to address partisan political gerrymandering even though it flouts the will of the people because such claims present “political questions beyond the reach of the federal courts”).

⁵ See Lawrence Mower & Langston Taylor, *In Florida, the Gutting of a Landmark Law Leaves Few Felons Likely to Vote*, PROPUBLICA: ELECTIONLAND (Oct. 7, 2020), <https://www.propublica.org/article/in-florida-the-gutting-of-a-landmark-law-leaves-few-felons-likely-to-vote> [<https://perma.cc/5LG9-LRWM>] (“Amid the confusion, the one certainty is that Florida’s Republican governor and Legislature have tamped down the felon vote . . .”).

⁶ See *Jones v. Governor of Fla.*, No. 20-12003-AA, 2020 U.S. App. LEXIS 22403 (11th Cir. July 1, 2020) (granting a stay of the district court’s injunction without opinion); Nina Totenberg, *Supreme Court Deals Major Blow to Felons’ Right to Vote in Florida*, NPR (July 17, 2020), <https://www.npr.org/2020/07/17/892105780/supreme-court-deals-major-blow-to-ex-felons-right-to-vote-in-florida> [<https://perma.cc/D2UA-JFMT>] (“But earlier this month, the 11th Circuit Court of Appeals, without explanation and two months after the court of appeals decision, stopped Hinkle’s order [a preliminary injunction against enforcement of the restriction] from going into effect.”).

rights-restrictive decisions in voting cases.⁷ As Justice Kagan noted in her dissent to *Rucho v. Common Cause*, in which the majority deemed the matter of political gerrymandering a nonjusticiable political question, “[p]art of the Court’s role in [our system of government] is to defend its foundations.”⁸ But the Roberts Court and lower courts following its lead consistently abdicate that responsibility. Even worse, the Roberts Court has taken to using the shadow docket to advance anti-democratic decisions without the scrutiny and consideration of the Court’s typical rulings.⁹ With such a strong anti-democratic streak, it should come as no surprise that the courts fail to protect individual rights and frustrate legislatures’ efforts to do so.

Judges are supposed to enforce the law as it is written and remain impartial.¹⁰ But the outcome of a particular case depends on the facts presented, and the law is not always clear.¹¹ What sources and experiences a judge draws on in such situations determines what kind of judge they will be. When the judiciary is homogenous in appearance and philosophy, the law is crafted to serve the ruling class: white affluent America.¹² But the “fundamental forms of social misery in American society neither can be adequately addressed nor substantially transformed within the context of existing legal apparatus struc-

⁷ See, e.g., *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (holding that Arizona’s restrictive out-of-precinct voting and ballot collection statutes did not violate the Voting Rights Act); *Shelby County v. Holder*, 570 U.S. 529 (2013) (finding the coverage formula in section 4 of the Voting Rights Act to be unconstitutional).

⁸ See *Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting).

⁹ See *Wis. Legislature v. Wis. Elections Comm’n*, 142 S. Ct. 1245, 1251 (2022) (Sotomayor, J., dissenting) (“Despite the fact that summary reversals are generally reserved for decisions in violation of settled law, the Court today faults the State Supreme Court for its failure to comply with an obligation that, under existing precedent, is hazy at best.”).

¹⁰ See THE FEDERALIST NO. 78 (Alexander Hamilton) (describing the role of the judiciary in the United States Constitution). But see SHELDON WHITEHOUSE, AM. CONST. SOC’Y, A RIGHT-WING ROUT: WHAT THE “ROBERTS FIVE” DECISIONS TELL US ABOUT THE INTEGRITY OF TODAY’S SUPREME COURT 16 (2019), <https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf> [<https://perma.cc/RB5D-ABLS>] (“[M]oney, influence, and partisanship, rather than objective legal analysis and interpretation, are reshaping some of the most important areas of the law in the United States.”).

¹¹ See Louis Fisher, *Methods of Constitutional Interpretation: The Limits of Original Intent*, 18 CUMB. L. REV. 43, 44 (1987) (stating that law is “shaped by fundamental social and economic changes and by the interactions among all three branches of government”).

¹² See Jeff Guo, *Researchers Have Discovered a New and Surprising Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 24, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/24/researchers-have-discovered-a-surprising-racial-bias-in-the-criminal-justice-system> [<https://perma.cc/2R6S-RP58>] (“For a nation as diverse as the United States, the judiciary is quite male and white. In theory, this shouldn’t matter. . . . In practice, of course, it’s much messier. People can’t help but see the world through the lens of their own experiences.”).

tures.”¹³ To actualize abolition democracy—the ambitious project of creating the fresh institutions necessary to achieve lasting racial equality¹⁴—American courts cannot whitewash the American people. Judges must turn their attentions to the people and see them in living color. Doing so is central to movement judging.

Movement judges can serve as a counterweight to the conservative legal project’s influence. Where possible, a movement judge must seek consensus for decisions that protect marginalized communities and affirm democratic principles, relying on a variety of jurisprudential bases from equitable principles to critical originalism.¹⁵ Rather than simply believing in the power of law to build a better world, as a progressive judge does, a movement judge must be repulsed by inequity and must heartily dissent when the majority creates it.¹⁶ Equity requires that all injuries have a remedy—including slavery and its progeny—and that justice not be done in half measures. The complete remedy for our country’s history of subordination is the establishment of abolition democracy. The movement judge must critique precedent and champion the dismantling of oppressive regimes for a better and just society. This requires the movement judge to shatter insular thinking and seek answers from historically repressed communities.¹⁷ Those communities recognize the kinds of judges they need, and if we listen, we can hear them speaking:

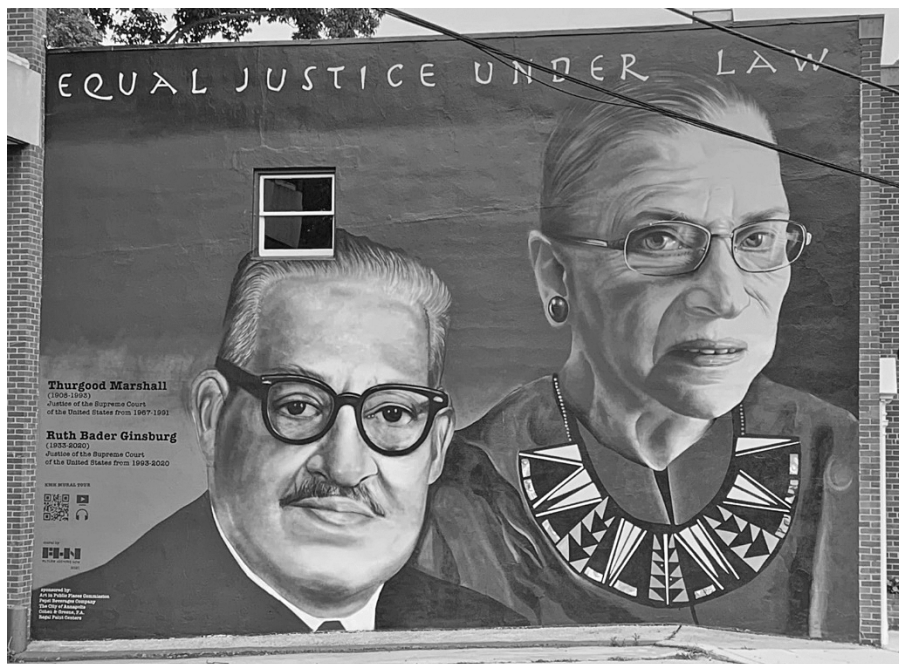
¹³ Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1797 (1990).

¹⁴ See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 289 (Transaction Publishers 2013) (1935) (describing how, during Reconstruction, “[a]bolition-democracy demand[ed] for Negroes physical freedom, civil rights, economic opportunity and education and the right to vote”); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* (2005) (applying Du Bois’s vision of a racially just society to evaluate modern systemic injustices).

¹⁵ See Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 841 (2014) (“Critical Originalism is the melding of anti-subordination deconstruction principles of Critical Race Theory with the interpretive methodology of Originalism Theory.”). This consensus building is apparent in Justice Gorsuch’s opinion for the Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

¹⁶ See Linda Greenhouse, *The Truth Teller of the Supreme Court*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/17/opinion/justice-sonia-sotomayor-supreme-court.html?smid=url-share> [<https://perma.cc/8VSD-53SH>] (highlighting Justice Sotomayor’s dissent in *Utah v. Strieff*, 136 S. Ct. 2056 (2016), as an example of an opinion “calling attention to the world beyond the four corners of a particular legal dispute”).

¹⁷ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987) (advocating for critical scholars to heed the “actual experience, history, culture, and intellectual tradition of people of color in America”).

FIGURE 1¹⁸

Movement law informs the movement judge. Movement law, as distinct from movement lawyering, is the scholarly construction of legal theories in solidarity with collective struggle, such as Black Lives Matter or labor organizing.¹⁹ Movement law is “situated within twin aspects of our current moment: the increasingly clear failures of neoliberal law and politics and the surge of social movement activity and grassroots organizing.”²⁰

Movement judges, then, are receptive to the arguments of movement lawyering.²¹ For example, when Ruth Bader Ginsburg argued for gender equality before the Supreme Court, Justice Thurgood Marshall consistently sided with her anti-discrimination arguments.²² Likewise, Chief Judge Roger Gregory of the Fourth Circuit Court of

¹⁸ *Equal Justice Mural Project*, FUTURE HIST. NOW (2021), <https://www.futurehistorynow.org/projects/equal-justice-mural> [<https://perma.cc/3K8L-B9ES>] (depicting a mural in Annapolis, Maryland).

¹⁹ See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825–26 (2021).

²⁰ *Id.* at 847–48.

²¹ This is not to say that movement judges must have been movement lawyers. See *id.* at 826 (distinguishing movement law from movement lawyering).

²² See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

Appeals reliably scrutinizes the behavior of government and private entities to ensure strict compliance with environmental statutes when environmental advocates bring suits in the Fourth Circuit.²³ Even outside a movement judge's personal experience as an advocate or member of a marginalized community, they will find the advocacy of movement lawyers more persuasive than their peers on the bench will.

Movement judging need not rely on convoluted interpretations of laws and the Constitution. The Constitution already contains the crowning achievements of the abolitionist movement: the Reconstruction Amendments. While past precedents have twisted these Amendments into poor shadows of their intended functions, judges can look to the original meanings of key phrases to enforce powerful protections of individual rights.²⁴ The inertia of *stare decisis* discourages this reevaluation, but there is no good reason to allow respect for precedent to be limited to a one-way ratchet against individual rights. After all, reactionary judges routinely discard long-

²³ See, e.g., *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 266 (4th Cir. 2018) (vacating pipeline permits because agency decisions were arbitrary and capricious); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 417 (4th Cir. 2003) (holding that a private company violated the Clean Water Act by draining wetlands on its property because the Army Corps was able to assert jurisdiction over the wetlands); *Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251, 255 (4th Cir. 2020) (granting a stay of the Corps's verification that a pipeline project met criteria for a nationwide permit because that verification was likely issued in contravention of applicable law).

²⁴ See, e.g., James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1510 (2019) ("Republican members of Congress also held that the Amendment prohibited the infliction of servitude as punishment for offenses so minor as to make it improbable that servitude had actually been imposed to punish the particular 'crime whereof the party shall have been duly convicted.'"); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 205 (2005) ("[T]he framers of the Fourteenth Amendment asserted that the Thirteenth Amendment determined that the status of all Americans . . . is that of freemen, which they equated with . . . United States citizenship. The framers . . . also asserted that the [Fourteenth] Amendment delegated to Congress the power to . . . define and enforce the rights of United States citizenship."); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1089 (2000) ("[I]n the thirty-five years or so before the 1868 ratification of the Fourteenth Amendment, common usage often referred to Bill of Rights liberties as 'privileges,' 'immunities,' or 'rights' of Americans or of citizens of the United States."); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 480 (2010) ("[T]he orthodox view of due process rights in 1866, as evidenced by judicial decisions at both the state and federal level, would almost certainly have included at least the vested rights version of substantive due process and most likely the general law reading as well."); Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) ("The debates in the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866 confirm that the constitutional right to protection was understood to include protection against private violence.").

standing precedent in the service of corporate and police authority, unconcerned with jurisprudential norms that might limit their project.²⁵ Movement judges can bring abolition constitutionalism to bear in the service of true equality under law.

This Article is the first to describe a movement judge and advance the argument that we need movement judges. A movement judge is more than just a progressive judge. Where the progressive judge takes comfort in the belief that the law can work genuine improvements in people's lives, the movement judge recognizes the barriers to significant change. Where the progressive judge trusts in judicial norms to eventually bring about a more just society, the movement judge engages in the hard work of shifting fundamental understandings of how the law operates. Where the progressive judge is committed to progressive constitutionalism, the movement judge is committed to abolition constitutionalism. In some cases, that favors gradually shifting precedents, but in others, such a fundamentally different constitutional vision requires upsetting stare decisis. This Article will explore the need for movement judges and their potential for promoting transformational change in the justice system.

The Biden Administration is making strides to appoint more diverse judges to the federal bench.²⁶ Biden's nominees to appellate courts are a marked departure from the usual blend of BigLaw and prosecutors, with picks including public defenders, labor organizers, and civil rights advocates.²⁷ Neither trend guarantees that Biden's nominees will be movement judges, though they both increase the likelihood. While shooting in the right direction is a good start, aiming at the target would be better. If the President and his allies in the Senate (or their successors) really want to use the judiciary to advance abolition democracy, they should center the question of whether their nominees will be movement judges. A confirmation process retooled to prioritize judges with an understanding of the Constitution as a

²⁵ See Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL'Y 733, 753–54 (2020) (discussing key antitrust and qualified immunity decisions that benefited such corporate and police interests).

²⁶ Mark Sherman & Darlene Superville, *Biden's Judges: More Diverse and More of Them*, ASSOCIATED PRESS (Aug. 2, 2021), <https://apnews.com/article/joe-biden-us-supreme-court-8f20d7cd2768ec028de1c29e89a9d9e4> [<https://perma.cc/3BHX-EP33>] (“[T]he nominees Biden has put forward so far [are] more diverse racially, by gender and legal experience than were Trump’s picks They include public defenders, civil rights lawyers and attorneys for organized labor”).

²⁷ See Tierney Sneed, *Inside Democrats’ Quest to Nominate Judges Who Break the Ex-Prosecutor Mold*, CNN (July 30, 2021), <https://www.cnn.com/2021/07/28/politics/biden-judicial-nominations-public-defenders-professional-diversity/index.html> [<https://perma.cc/XFV9-XK99>].

document containing the seeds of abolition democracy is essential to appointing them. This Article aims to provide the blueprint for that project.

Part I begins by discussing the present crisis of the judiciary. This Part explores the Supreme Court's anti-democratic jurisprudence as well as that of lower courts to illustrate the crisis's insidious nature. Part II discusses movement law and further highlights the potential for movement judges to stand in solidarity with movements including Black Lives Matter, abolition, and environmental justice. Part III begins with an exploration of what it means to be a movement judge, beginning with a description and proceeding to contrast movement judging with the concept of progressive judging. It then proceeds to discuss several movement judges, both past and present, on the Supreme Court, lower federal courts, and state courts. Part III concludes with a discussion of abolition constitutionalism to highlight the transformative potential of this legal philosophy in the hands of movement judges. Although the judiciary is often described as the "least democratic" of the three branches of government, it has the potential to be the most democratic. Movement judges must be a democratizing force.

I

THE CAPTIVE JUDICIARY

"Money speaks for money, the devil for his own"

—Billy Bragg, 1986²⁸

Our democracy is in danger. It is threatened by judges who give unqualified protection to a few rights at the expense of many others;²⁹ who are more concerned with protecting government prerogatives than individual interests;³⁰ and who are particularly apathetic to the

²⁸ BILLY BRAGG, *There Is Power in a Union, on TALKING WITH THE TAXMAN ABOUT POETRY* (Go! Discs 1986).

²⁹ See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART*, at xx (2021) ("U.S. courts recognize relatively few rights, but strongly. They should instead recognize more rights, but weakly.").

³⁰ See Elie Mystal, *How the Supreme Court Gave Cops a License to Kill*, NATION (Apr. 8, 2021), <https://www.thenation.com/article/society/chauvin-supreme-court> [<https://perma.cc/A3ZS-W2RK>] (discussing *Graham v. Connor*, 490 U.S. 386 (1989), where the Supreme Court framed Fourth Amendment violations from the viewpoint of a "reasonable [police] officer"); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 33 (1992) ("The Court's current approach to due process is thus avowedly pro-government. Indeed, Erwin Chemerinsky has argued that the Constitution has been interpreted to favor the government so consistently that the Constitution is virtually vanishing." (citing Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989))); James Leonard, *Ideology and Judicial Behavior: A Statistical Study of the Ohio Supreme Court*:

rights of Black and Brown individuals.³¹ Though the media tends to blame former President Donald Trump and his judicial appointees for the judiciary's current legitimacy crisis,³² the truth is that he only exacerbated a long-running problem. The problem is that presidents from both political parties have been taking the wrong approach to judicial appointments for decades.³³ Presidents typically appoint judges who share their policy goals and will protect the legislation they champion from judicial challenges. Franklin D. Roosevelt appointed judges to sustain the New Deal.³⁴ Ronald Reagan appointed judges to limit (and reverse where possible) the rights-protective decisions of the Warren Court.³⁵ Donald Trump sought to appoint Supreme Court Justices with the express purpose of undermining *Roe v. Wade*.³⁶ These judges do what they were appointed to do: defer to the policy objectives of the executive and legislative branches of government—so long as those policies align with the political ends they were appointed to serve—at the expense of the values and interests of ordinary citizens.³⁷ But Democratic presidents have long favored suppos-

1970, 1975, 1980, and 1985 Terms, 57 U. CIN. L. REV. 935, 957–60 (1989) (discussing the pattern of favoring government and corporate interests over those of the individual across different case types).

³¹ See Roberts, *supra* note 3, at 74 (“The Justices interpreted the Reconstruction Amendments narrowly to bar white state majorities from passing explicit slave laws but left their power to restrict [B]lack people’s freedom untouched.”).

³² See Maggie Jo Buchanan, *Trump’s Politicization of the Justice System*, CTR. FOR AM. PROGRESS (Feb. 20, 2020), <https://www.americanprogress.org/issues/courts/news/2020/02/20/480659/trumps-politicization-justice-system> [<https://perma.cc/86YU-65GY>] (describing Trump’s politicization of the judiciary).

³³ See Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 903, 910 (2016) (arguing that liberal Justices are equally to blame for the Supreme Court’s rights-restrictive jurisprudence, and that the problem is with “the type of liberal that Presidents Clinton and Obama appointed to the Supreme Court”).

³⁴ See Lesley Kennedy, *This Is How FDR Tried to Pack the Supreme Court*, HISTORY (June 28, 2018), <https://www.history.com/news/franklin-roosevelt-tried-packing-supreme-court> [<https://perma.cc/6FWA-QJJF>] (stating that Roosevelt’s infamous “court-packing plan” was “[l]argely seen as a political ploy to change the court for favorable rulings on New Deal legislation” and that his later appointments amounted to packing the Court “the old-fashioned way”).

³⁵ See David M. O’Brien, *Why Many Think that Ronald Reagan’s Court Appointments May Have Been His Chief Legacy*, HIST. NEWS NETWORK, <https://www.historynewsnetwork.org/article/10968> [<https://perma.cc/DMQ9-KPTG>] (explaining how the Reagan Administration used judicial selection as a tool to achieve its policy goals).

³⁶ See Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [<https://perma.cc/2L2M-C5YU>] (explaining Trump’s vow to restrict abortion rights).

³⁷ See Bagenstos, *supra* note 33, at 910 (explaining that the Court, including its liberal Justices, “invoke[] the need to protect administrative discretion and policymaking against interference by litigants and judges” to justify conservative, rights-restrictive outcomes).

edly moderate nominees, often from the ranks of prosecutors and BigLaw firm partners, even as Republicans have abandoned these norms and increasingly appoint committed conservative nominees.³⁸

The result is that many individual interests fall through the cracks. When judges do rule in favor of individual interests, they protect a small number of rights almost absolutely and at the expense of other rights they deem less important.³⁹ Even where courts select a right for robust protection, they frequently limit that right for marginalized groups.⁴⁰ They justify this overzealous protection of a select number of rights on grounds that these rights were identified by the Framers of the Constitution as requiring protection.⁴¹ But the Framers were more concerned with the ability of citizens to determine for themselves what rights were worthy of protection than with unqualified protection of, for example, freedom of speech.⁴² Modern courts have, similar to the British Parliament in the late seventeenth and early eighteenth century, usurped the power of “We the People” to define our country, our democracy, and our values.⁴³ A healthy justice system requires judges who understand the interests ordinary people have in the law and who will do what the Constitution requires: protect individuals, their communities, and their values from

³⁸ See Emma Green, *How Democrats Lost the Courts*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/politics/archive/2021/07/liberal-judges-supreme-court-breyer/619333> [<https://perma.cc/2MPG-BKEH>] (examining the differences between past nomination processes under Democratic and Republican presidents).

³⁹ See GREENE, *supra* note 29, at 3 (“American courts draw firm lines, often in morally arbitrary ways, between the interests they consider rights, and those they don’t. The interests that courts count, they protect robustly from democratic politics, while those that they don’t count remain wholly at the government’s mercy.”).

⁴⁰ See generally *Radwan v. Univ. of Conn. Bd. of Trs.*, 465 F. Supp. 3d 75 (D. Conn. 2020) (explaining that a female collegiate athlete at a public university who lost her athletic scholarship and was kicked off her athletic team for raising her middle finger after a game could not recover damages); *Feiner v. New York*, 340 U.S. 315, 321 (1951) (failing to protect the free speech rights of an individual who advocated for equal rights for Black citizens); *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990) (failing to protect the First Amendment rights of members of the Native American Church).

⁴¹ See GREENE, *supra* note 29, at 3.

⁴² See *id.* at 4 (“The Bill of Rights, the Constitution’s iconic collection of original rights, is best understood less as a charter of individual liberty than as a paean to self-government.”).

⁴³ See *id.* at 9 (“The colonists’ demand was less for particular rights than for the right to decide for themselves, to forge their own path to liberty *through* law.”); Tyler Olson, *Trump-Appointed Judges Obstruct Biden’s “Pen and Phone” Policies Just Months into Term*, FOX NEWS (June 26, 2021), https://www.foxnews.com/politics/trump-appointed-judges-block-biden-policies.amp?__twitter_impression=true [<https://perma.cc/BJJ3-R4HV>] (describing the judiciary’s significant and unusual obstruction of the prerogatives of the executive branch); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting) (describing the Court’s use of the standing doctrine as “a tool of judicial aggrandizement”).

hostile executive actors and legislators.⁴⁴ Instead, our justice system is currently captive to both the inherently conservative inertia of its precedents and the fruits of a decades-long reactionary project to pack the bench with ideologues.

A. *The Supreme Court's Anti-Democracy Precedents*

Supreme Court precedent has been historically rights-restrictive and anti-Black. This is true across diverse areas of the law. Professor Dorothy Roberts has attributed what she calls the Court's "anti-abolitionist" jurisprudence to three doctrines: "colorblindness, the discriminatory purpose requirement, and fear of too much justice."⁴⁵ Wrapped up in these three doctrines is a disregard for individual interests in the outcome of a case and a disregard for the effect the Court's decision will have on individuals, especially on Black and Brown people.⁴⁶ Rather than engage with the effect laws have in perpetuating oppressive institutions founded on white supremacy, the Court "typically strikes down race-conscious affirmative action measures as racially biased while upholding ostensibly race-neutral . . . practices that repress communities of color."⁴⁷

The Court's voting rights jurisprudence provides a clear example. Despite frequent proclamations of the importance of the right to vote in maintaining a healthy democracy, the Court has repeatedly impaired the ability of individuals to participate in the political process. In its voting rights jurisprudence, the Court has constructed almost insurmountable procedural and evidentiary hurdles to limit the scope of the Voting Rights Act⁴⁸ and Fifteenth Amendment.⁴⁹ This effectively bars suits attempting to actualize the promise of equal voting rights for minority voters. At the same time, by requiring race-conscious legislation aimed at remedying past discrimination to withstand strict scrutiny, the Court limits the ability of state legislatures to

⁴⁴ See THE FEDERALIST NO. 78, at 236 (Alexander Hamilton) (Michael A. Genovese ed., 2009) (explaining that it is the duty of the judiciary to strike down legislative acts "contrary to the manifest tenor of the Constitution" and that "all the reservations of particular rights or privileges would amount to nothing" if the judiciary does not exercise this power). The need to apply this principle is particularly acute when law is applied to marginalized communities.

⁴⁵ Roberts, *supra* note 3, at 76.

⁴⁶ See *id.* at 77–93 (describing these three doctrines).

⁴⁷ *Id.* at 87.

⁴⁸ 52 U.S.C. § 10301(a)–(b).

⁴⁹ See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 62, 74 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. . . . The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.").

act affirmatively to ensure minority votes are not diluted.⁵⁰ The Court has justified its application of strict scrutiny in this context, which serves to constitutionalize efforts to dilute minority voting strength, by relying on “our country’s long and persistent history of racial discrimination in voting.”⁵¹ The irony of this application of history has not been lost on scholars.⁵² Further, the analysis overlooks the impact voting legislation has on the ability of citizens to participate in democracy, focusing instead on the state’s interest in enacting the legislation.⁵³ The result is that, despite two constitutional amendments and the passage of the Voting Rights Act in 1965, voting rights of minority voters remain under siege by state legislatures that remain free to pass restrictive voting legislation without meaningful judicial oversight.⁵⁴ Movement judges, by contrast, would develop a standard focusing scrutiny in the other direction: Remedial legislation could be justified by the government’s legitimate interest in promoting participatory

⁵⁰ See *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (“[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.”).

⁵¹ *Id.* at 650.

⁵² See James U. Blacksher, *American Political Identity and History*, 95 Nw. U. L. REV. 715, 719 (2001) (reviewing ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000)) (noting the “novel use” to which the Court “put America’s history of racial discrimination and of the constitutional law developed to combat discrimination” in *Shaw*).

⁵³ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (downplaying the law’s burden on the right to vote while overstating the legitimate state interests at stake); *Shelby County v. Holder*, 570 U.S. 529, 580 (2013) (Ginsburg, J., dissenting) (“The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story.”).

⁵⁴ Two common examples of tools used to disenfranchise voters are voter ID laws, see, e.g., GA. CODE ANN. § 21-2-417 (West 2021); IND. CODE § 3-5-2-40.5 (West 2021); MO. ANN. STAT. § 115.427 (West 2017); TENN. CODE ANN. § 2-7-112 (West 2021); WIS. STAT. ANN. § 6.79 (West 2021), and restrictions on early voting, see, e.g., Matt Dixon, *Gov. Rick Scott Signs Election Bill that Cuts Early-Voting Days*, FLA. TIMES-UNION (May 19, 2011), <https://www.jacksonville.com/story/news/politics/2011/05/19/gov-rick-scott-signs-election-bill-cuts-early-voting-days/15903217007> [<https://perma.cc/N2YQ-SAB6>] (reducing early-voting days from fifteen to eight); Alexandra Olgin, *Early Voting Changes in North Carolina Spark Bipartisan Controversy*, NPR (Oct. 17, 2018), <https://www.npr.org/2018/10/17/657928248/early-voting-changes-in-north-carolina-spark-bipartisan-controversy> [<https://perma.cc/7S42-WA5C>] (discussing a new state law that resulted “in nearly 20 percent fewer places to cast votes before Election Day”). At least one scholar has also argued that campaign finance laws systematically “exclude communities of color from the political process.” John Powell, *Campaign Finance Reform Is a Voting Rights Issue: The Campaign Finance System as the Latest Incarnation of the Politics of Exclusion*, 5 AFR.-AM. L. & POL’Y REP. 1, 2 (2002); see also Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [<https://perma.cc/5QEX-WQZU>] (discussing various election procedures that result in disenfranchisement of certain groups of voters).

democracy, while restrictions on voting rights that effectively disenfranchise minority voters would be subjected to strict scrutiny.

In *Brnovich v. Democratic National Committee*,⁵⁵ the Court doubled down on its efforts to impair the ability of voters to vindicate their right to vote. Mere hours after the opinion was handed down, it was severely criticized for its unrealistic portrayal of the burdens of voting in Arizona and its tortured reading of section 2 of the Voting Rights Act.⁵⁶ At the outset, Justice Alito's majority opinion contended, despite clear evidence of the burden imposed on minority voters by the challenged regulations, that Arizona law "generally makes it quite easy for residents to vote."⁵⁷ The Court went on to hold that states may limit the ways in which voters can cast their ballots so long as *some* avenues to voting remain open.⁵⁸ This reasoning is reminiscent of Fourth Amendment cases in which the Court has frequently refused to apply the exclusionary rule, contending that plaintiffs can seek civil damages against the law enforcement officer notwithstanding the fact that such suits are often barred by qualified immunity.⁵⁹

Likewise in *Brnovich*, Justice Alito concluded that all voters still had the option to vote in person or by mail for almost a month before the election, despite the fact that some voters, particularly minority voters, lived far away from polling places and post offices, making these options unfeasible in practice even though they were available in theory.⁶⁰

Brnovich established a multi-factor test to determine whether section 2 plaintiffs have shown "denial or abridgement" of the right to

⁵⁵ 141 S. Ct. 2321 (2021).

⁵⁶ See, e.g., Mark Joseph Stern, *The Supreme Court Just Mangled the Voting Rights Act Beyond Recognition*, SLATE (July 1, 2021), <https://slate.com/news-and-politics/2021/07/brnovich-voting-rights-act-alito.html> [<https://perma.cc/4W8X-PXH3>].

⁵⁷ *Brnovich*, 141 S. Ct. at 2333; see *id.* at 2366–67 (Kagan, J., dissenting) (describing evidence of how Arizona's voting policies disproportionately affect minority voters).

⁵⁸ See *id.* at 2344 (characterizing Arizona's out-of-precinct rule and ballot-collection law as "unremarkable burdens" that do not violate the Voting Rights Act because there are "other easy ways to vote").

⁵⁹ See *Lange v. California*, 141 S. Ct. 2011, 2027–28 (2021) (Thomas, J., concurring) (stating that criminal defendants may not rely on the exclusionary rule "when it would encourage bad conduct by criminal defendants" and that defendants must instead "rely on other remedies" but failing to note that these other remedies are largely foreclosed); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1522 (2016) ("[T]he qualified immunity regime erects a significant doctrinal hurdle to holding police officers accountable for acts of violence.").

⁶⁰ 141 S. Ct. at 2330 ("All voters may vote by mail or in person for nearly a month before election day . . ."); *id.* at 2370 (Kagan, J., dissenting) (noting the difficulty for some voters, especially "Native Americans in rural Arizona," of accessing post offices to mail their ballots).

vote. This test, purporting to reflect the “totality of the circumstances,” includes several factors that are in no way relevant to whether the plaintiffs had the ability to vote, such as the state’s alleged interest in the election regulation at issue.⁶¹ Simultaneously, the majority opinion “decried the dissent’s discussion of several factors that, according to Justice Alito, ‘have little bearing on the question’ before the Court, such as the Supreme Court’s 2013 decision in *Shelby County v. Holder*, ‘voting rules that are not at issue,’ and ‘points of law that nobody disputes.’”⁶² In its decision in *Brnovich*, the Supreme Court severely hobbled the ability of the people to participate in their democracy.⁶³ This impairment of rights, coupled with the fact that the Court repeatedly interferes to counteract majoritarian impulses while failing to check government abuses of power, indicates that the present judiciary poses a severe threat to our democracy. Movement judges in such cases would enforce the Voting Rights Act in accord with its text and historically evident purpose to protect minority voting rights against state government abuses.

In housing discrimination cases, the Court has made it similarly impracticable for plaintiffs to carry their burden of proof, while simultaneously making it easy for the state to justify discriminatory conduct. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,⁶⁴ the Court held that plaintiffs can bring disparate impact claims under the Fair Housing Act (FHA),⁶⁵ but it immediately imposed a heavy burden on such plaintiffs. A plaintiff seeking relief on a disparate impact claim must be able to point to a *policy* the defendant follows that caused the disparity—a defendant’s “one-time decision [causing a disparate impact] may not be a policy at all.”⁶⁶ Even if the plaintiff is able to point to a policy causing the disparate impact, the plaintiff will only succeed if

⁶¹ See *id.* at 2338–40 (majority opinion).

⁶² Elena Schiefele, Note, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn’t Be So Quick to Praise* Bostock, 78 WASH. & LEE L. REV. 1105, 1142 n.253 (2021) (citation omitted) (quoting *Brnovich*, 141 S. Ct. at 2341).

⁶³ *Brnovich* dealt a significant blow to the continuing vitality of the VRA, but two Justices might have gone even further to gut section 2. In a short, one-paragraph concurrence, Justice Gorsuch, joined by Justice Thomas, stated that section 2 may not even “furnish[] an implied cause of action,” but nonetheless joined the Court’s opinion in full because “no party argues that the plaintiffs lack a cause of action here.” *Brnovich*, 141 S. Ct. at 2350 (Gorsuch, J., concurring).

⁶⁴ 576 U.S. 519 (2015).

⁶⁵ 42 U.S.C. §§ 3601–3619, 3631.

⁶⁶ *Inclusive Cmty. Project*, 576 U.S. at 543 (“A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a *prima facie* case of disparate impact.”).

the challenged policy is “artificial, arbitrary, and unnecessary.”⁶⁷ If the Government can point to a reasonable state interest that the decision or policy serves, even though that interest is clearly pretextual, it can usually cleanse otherwise discriminatory conduct.⁶⁸ In this way, like in its voting rights jurisprudence, the Court has insulated government decisionmaking rather than protecting societal interests and ensuring government accountability to the people. Movement judges, faced with such fact patterns, would be able to treat pretextual reasoning as unworthy of deference, instead examining the actual motivations for discriminatory policies.

B. The Judiciary’s Anti-Democracy Problem Is Pervasive

The problem is not limited to the Supreme Court. Federal judges in Wisconsin and Florida struck down the Biden Administration’s efforts to remedy a history of racial and ethnic discrimination against farmers and ranchers.⁶⁹ The program, part of the American Rescue Plan Act of 2021, was intended to address the USDA’s “past and present discrimination” and “assur[e] that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice.”⁷⁰ The Wisconsin court determined that “the program grants privileges to individuals based solely on their race,” and thus applied strict scrutiny.⁷¹ In so doing, it focused on the government’s interests and the harm to the white plaintiffs.⁷² It completely ignored the plight of the farmers of color, struggling against the lasting effects of over a century of discrimination. The decision simply cast aside the

⁶⁷ *Id.* at 540 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

⁶⁸ For example, in *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1113 (8th Cir. 2017), the Eighth Circuit rejected the plaintiffs’ claim that they were victims of excessive and discriminatory code inspections on grounds of a “widespread and severe” rodent problem of which there was little to no evidence.

⁶⁹ See *Faust v. Vilsack*, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021) (“Defendants’ use of race-based criteria in the administration of the program violates [Plaintiffs’] right to equal protection under the law.”); Laura Reiley, *Federal Judge Halts Black Farmers’ Debt-Relief Program in New Legal Blow*, WASH. POST (June 23, 2021), <https://www.washingtonpost.com/business/2021/06/23/black-farmers-debt-relief-preliminary-injunction> [<https://perma.cc/9KRB-B6FU>] (describing a Florida federal court’s injunction blocking—as discriminatory—a measure meant to redress the inequitable distribution of previous coronavirus debt relief to farmers by earmarking some federal aid for Black farmers).

⁷⁰ *Faust*, 519 F. Supp. 3d at 475.

⁷¹ *Id.* For another example of a court applying strict scrutiny to a program meant to increase opportunities for Black people and striking down the program because of an insufficient record of past discrimination, see *Podberesky v. Kirwan*, 38 F.3d 147, 154 (4th Cir. 1994) (“[M]ere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy.”).

⁷² See *Faust*, 519 F. Supp. 3d at 475–78 (considering the relative harm and interest of the Government and plaintiffs but not of those individuals whom the program was designed to benefit).

societal values reflected in the policy decisions of a democratically elected president—values that mirrored increased support for racial justice initiatives expressed in the Black Lives Matter movement.⁷³ A movement judge, examining the same statute, could instead see its clear remedial purpose and the underlying legacy of racial discrimination that Congress sought to address, and uphold the statute’s constitutionality.

Nor is the problem confined to problems of racial justice or areas of law commonly understood to cause racial disparities. The Supreme Court recently decided *Cedar Point Nursery v. Hassid*.⁷⁴ In *Hassid*, the Supreme Court struck down a California regulation granting labor organizations a right to access agricultural employers’ property.⁷⁵ The majority’s opinion is reminiscent of the Court’s infamous decision in *Lochner v. New York*,⁷⁶ in that it is based on value judgments about what regulations are desirable rather than on reasoned, impartial constitutional analysis.⁷⁷ Its reasoning threatens anti-discrimination laws, fair housing laws, endangered species protection laws, and all manner of other laws regulating businesses and property use.⁷⁸ Ad hoc exceptions discussed in the opinion are based on nothing more than policy preferences.⁷⁹ This decision, in the midst of continuing popular support for the pro-labor movement,⁸⁰ is distinctly counter-

⁷³ See Gary Langer, *63% Support Black Lives Matter as Recognition of Discrimination Jumps: Poll*, ABC NEWS (July 21, 2020), <https://abcnews.go.com/Politics/63-support-black-lives-matter-recognition-discrimination-jumps/story?id=71779435> [<https://perma.cc/HHZ5-U46H>] (“Sixty-three percent of Americans support the Black Lives Matter movement and a record 69%—the most by far in 32 years of polling—say Black people and other minorities are denied equal treatment in the criminal justice system . . .”).

⁷⁴ 141 S. Ct. 2063 (2021).

⁷⁵ *Id.* at 2074.

⁷⁶ 198 U.S. 45 (1905).

⁷⁷ See Ian Millhiser, *The Supreme Court Just Handed Down Disastrous News for Unions*, VOX (June 23, 2021), <https://www.vox.com/2021/6/23/22547182/supreme-court-union-busting-cedar-point-hassid-john-roberts-takings-clause> [<https://perma.cc/495R-YVP5>] (comparing *Hassid* to *Lochner*); GREENE, *supra* note 29, at xxiv (“[T]he *Lochner* era wasn’t just about the overprotection of the right to contract. Courts during this period were equally conspicuous in their indifference to basic civil rights and civil liberties.”).

⁷⁸ See Niko Bowie (@nikobowie), TWITTER (June 23, 2021, 11:30 AM), <https://mobile.twitter.com/nikobowie/status/1407722797653233668> [<https://perma.cc/R86R-N7P7>] (criticizing the implications of the Court’s opinion in *Hassid*).

⁷⁹ See *Hassid*, 141 S. Ct. at 2077 (professing an exception for businesses “generally open to the public”); Bowie, *supra* note 78 (discussing the exception).

⁸⁰ See Megan Brennan, *At 65%, Approval of Labor Unions in U.S. Remains High*, GALLUP (Sept. 3, 2020), <https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx> [<https://perma.cc/63NJ-JBZH>] (“Americans’ 65% approval of labor unions is once again the highest it has been since 2003. Public support for labor unions has been generally rising since hitting its lowest point of 48% in 2009, during the Great Recession.”).

majoritarian.⁸¹ Movement judges, examining the relevant statutes and property interests, could apply well-established constitutional principles to analyze the intrusion upon property rights along the lines of a regulatory taking or exaction which was ultimately justified by the state's police power. Here, too, the problem is not with the Supreme Court or Republican appointees alone. A study recently found that "there is a statistically significant relationship between a judge's corporate background or prosecutorial experience and whether he/she votes in favor of the claimant in employment cases."⁸² These judges currently represent seventy percent of active federal circuit judges and a similar fraction of federal district judges.⁸³ Consequently, judicial outcomes in employment cases cannot reflect societal values.

In a different case, a federal judge blocked the Biden Administration's suspension of new oil and gas leases.⁸⁴ The suspension was part of the Administration's broader efforts to address climate change.⁸⁵ Without acknowledging the immediacy of the climate crisis, the judge determined that the Administration had failed to provide "any rational explanation in cancelling the lease sales, and in enacting the Pause."⁸⁶ He cynically alluded to the loss of revenue that pays for efforts to restore coastal wetlands, but ignored the continuing detrimental effects of climate change on coastal wetlands around the world.⁸⁷ Environmental conservation is also an issue with broad pop-

⁸¹ See Aída Chávez, *Will Democratic Court Nominations Live Up to Biden's Promises?*, NATION (June 16, 2021), <https://www.thenation.com/article/politics/democrat-court-appointments> [<https://perma.cc/LP35-X6RZ>] (noting President Biden's promise to be the "most pro-union president in history").

⁸² JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 15 (2021), <https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> [<https://perma.cc/2AEN-VF3Z>].

⁸³ See *id.* at 2–4 (noting the high percentage of federal circuit judges with prior experience in private practice or as a federal prosecutor); Carrie Johnson, *Corporate Lawyers Who Become Judges Less Likely to Side with Workers, Study Says*, NPR (Feb. 24, 2021), <https://www.npr.org/2021/02/24/970538084/how-judges-work-experience-can-impact-court-rulings-and-legal-precedent> [<https://perma.cc/8KFH-4UVV>] ("Former prosecutors and corporate lawyers make up nearly 7 in 10 judges on the federal district courts . . .").

⁸⁴ See generally *Louisiana v. Biden*, No. 21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021) (holding that the suspension of oil and gas leases exceeded the Administration's authority on several grounds).

⁸⁵ See Kevin McGill, *Federal Judge Blocks Biden's Pause on New Oil, Gas Leases*, ASSOCIATED PRESS (June 16, 2021), <https://apnews.com/article/joe-biden-climate-change-environment-and-nature-business-9751c4909a8b1baba28f3bcff9d5fa6e> [<https://perma.cc/5QZQ-EE44>] (describing the decision as a "blow to . . . Biden's efforts to rapidly transition the nation away from fossil fuels and thereby stave off the worst effects of climate change").

⁸⁶ *Biden*, 2021 WL 2446010, at *18.

⁸⁷ See *id.* at *22 ("Local government funding, jobs for Plaintiff State workers, and funds for the restoration of Louisiana's Coastline are at stake.").

ular support, and this case further demonstrates the judiciary's apathy toward the values of ordinary people.⁸⁸ A movement judge easily could have considered the urgency of climate change and found a rational basis for the executive action.

Federal abortion cases also demonstrate this apathy. Despite the fact that seventy-five percent of Americans view the Supreme Court's 1973 decision in *Roe v. Wade*⁸⁹ favorably,⁹⁰ circuit judges have repeatedly called for the Supreme Court to reexamine and overrule *Roe* and the Court's subsequent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹¹ On May 17, 2021, the Supreme Court finally heeded their calls when it granted the petition for a writ of certiorari in *Dobbs v. Jackson Women's Health Organization*.⁹² At the time of this writing, the Court has not yet reached a decision in the case, but pro-choice advocates have expressed serious concerns that the Supreme Court's decision in *Dobbs* will likely mark the end of the *Roe* era.⁹³ Their concerns were validated when Mississippi's Attorney General filed a brief on behalf of the parties defending Mississippi's

⁸⁸ See Cary Funk & Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RSCH. CTR. (Apr. 21, 2020), <https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts> [<https://perma.cc/SFQ5-9TY6>] (explaining that nearly two-thirds of Americans believe that "protecting the environment should be a top priority for the president and Congress").

⁸⁹ 410 U.S. 113 (1973).

⁹⁰ Domenico Montanaro, *Poll: Majority Want to Keep Abortion Legal, But They Also Want Restrictions*, NPR (June 7, 2019), <https://www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions> [<https://perma.cc/SA2J-TAKJ>].

⁹¹ 505 U.S. 833 (1992); see *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 286 (5th Cir. 2019) (Ho, J., concurring in the judgment) ("[F]ederal courts, without any basis in the constitutional text or original meaning, restrict the ability of states to regulate in the area of abortion. But that is of course what decades of Supreme Court precedent mandates. Accordingly, I am required to affirm."); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 692 (8th Cir. 2021) (Shepherd, J., concurring) ("Because the Court's opinion applies binding Supreme Court precedent, I join it in full. I write separately, however, to reiterate my view that 'good reasons exist for the [Supreme] Court to reevaluate its jurisprudence' regarding the viability standard as announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*." (alteration in original) (quoting *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015))). State legislatures are continuing to restrict abortion rights, despite popular support. See Elizabeth Nash & Sophia Naide, *State Policy Trends at Midyear 2021: Already the Worst Legislative Year Ever for U.S. Abortion Rights*, GUTTMACHER INST. (July 1, 2021), <https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion> [<https://perma.cc/P5NN-8YYX>] ("More abortion restrictions—90—have already been enacted in 2021 than in any year since the *Roe v. Wade* decision was handed down in 1973.").

⁹² 141 S. Ct. 2619 (May 17, 2021) (mem.) (order granting the writ of certiorari).

⁹³ See Nina Totenberg, *In Challenge to Roe, Supreme Court to Review Mississippi Abortion Law*, NPR (May 17, 2021), <https://www.npr.org/2021/05/17/997478374/supreme-court-to-review-mississippi-abortion-ban> [<https://perma.cc/H37N-7N9X>].

restrictive abortion law expressly urging the Court to overrule *Roe*.⁹⁴ Rather than continuing to justify further intrusions into the privacy reasoning of *Roe*, movement judges could apply abolition constitutionalism to uphold reproductive rights under a Thirteenth Amendment rationale.

State courts have also handed down their share of rights-restrictive decisions.⁹⁵ These decisions receive less media attention because they are more local in nature and do not often present the same immediately apparent and far-reaching dire consequences as do federal court decisions. It is easy to focus on the federal judiciary, but the fact is that ninety-five percent of all cases in the United States are filed in state courts.⁹⁶ State judges are just as important as federal judges in preserving individual rights and protecting societal values, if not more so.

As the examples in this Section attempt to demonstrate, the rot in our system is pervasive. Examples of counter-majoritarian and anti-democratic judicial decisionmaking abound. Hiding behind judicial restraint, courts increasingly strike down or significantly narrow democratically enacted legislation, often dealing painful blows to individual rights.⁹⁷ At the same time, they limit the scope of constitutional rights and the availability of remedies for those rights. These decisions all share a common trait—like the infamous *Dred Scott* decision,⁹⁸ they are clothed in terms of the mainstream constitutional discourse of their time.⁹⁹ Their consequences are not apparent to the untrained eye. Even when they are not in the majority, movement judges serve

⁹⁴ See Brief for Petitioners at 14, *Dobbs*, No. 19-1392 (July 22, 2021) (“This Court should overrule *Roe* and *Casey*. . . . *Roe* and *Casey* are egregiously wrong. . . . And nothing but a full break from those cases can stem the harms they have caused.”).

⁹⁵ See Jess Bravin, *Breaking with Tradition, Some Judges Speak Out on Racial Injustices*, WALL ST. J. (June 13, 2020), <https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400> [<https://perma.cc/6UYC-XV5Y>] (describing “statements” by state supreme courts on “the judiciary’s role in perpetuating injustices and pledging to root out racial bias”).

⁹⁶ *Top Court Filing Statistics from Around the Country*, ONE LEGAL (Apr. 3, 2019), <https://www.onelegal.com/blog/top-court-filing-statistics-from-around-the-country> [<https://perma.cc/26KN-PDEY>].

⁹⁷ For a comprehensive and insightful discussion of the danger the Supreme Court’s statutory interpretation jurisprudence poses to individual rights, see generally Schiefele, *supra* note 62.

⁹⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁹⁹ See Jeannie Suk Gersen, *The Importance of Teaching Dred Scott*, NEW YORKER (June 8, 2021), <https://www.newyorker.com/news/our-columnists/the-importance-of-teaching-dred-scott> [<https://perma.cc/CSK2-N8UC>] (stating that *Dred Scott* and other now-reviled Supreme Court decisions “are not necessarily poorly reasoned according to the forms of constitutional analysis that we still use today, involving the interpretation of text, structure, and history”).

the vital function of alerting their colleagues, future courts, and the public to the consequences these decisions will have.¹⁰⁰ We need movement judges at every level—state and federal, trial and appellate—to protect our democracy.

Right now, the judiciary is filled with former prosecutors, corporate attorneys, and academics who are completely detached from the communities whose rights they are supposed to protect.¹⁰¹ Judges like Thurgood Marshall and Ruth Bader Ginsburg, who engaged with the social movements of their time and understood the realities of the struggle against institutional oppression, are largely absent from the bench.¹⁰² As Supreme Court Justice Sandra Day O'Connor wrote:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection.¹⁰³

Today, this perspective is sorely lacking on the bench. For instance, few current Supreme Court Justices have ever represented individuals against the government to vindicate their constitutional rights.¹⁰⁴ That is not to say that one cannot become a movement judge after being appointed to the federal bench. Justice Sonia Sotomayor, Fourth Circuit Chief Judge Roger Gregory, and Southern District of Mississippi Judge Carlton Reeves, whose jurisprudence is discussed in Part III of this Article, all demonstrate that this is possible. But these judges have one thing in common: They are people of color who grew

¹⁰⁰ See Greenhouse, *supra* note 16 (stating that Justice Sotomayor's separate opinions "enlarge[] the frame within which the debate over the precise legal issues play[s] out").

¹⁰¹ See Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/F5U8-5SNK>] ("[I]t is generally perceived that a disproportionate number of federal judges served as government lawyers before donning a robe.").

¹⁰² Though Justice Sonia Sotomayor's career prior to her appointment to the federal bench differs from Justices Marshall and Ginsburg, I consider her to be a movement judge. Her opinions demonstrate an understanding of the consequences of the Court's decisions for everyday Americans, and she is not afraid to call out her colleagues for failing to give these consequences proper consideration. See *Heien v. North Carolina*, 574 U.S. 54, 74–75 (2014) (Sotomayor, J., dissenting) (examining the "human consequences—including those for communities"—of the majority's decision).

¹⁰³ SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 133 (Craig Joyce ed., 2003).

¹⁰⁴ *But see* Richard A. Serrano, *Roberts Donated Help to Gay Rights Case*, L.A. TIMES (Aug. 4, 2005), <https://www.latimes.com/archives/la-xpm-2005-aug-04-na-roberts4-story.html> [<https://perma.cc/2EJ9-838G>] ("In *U.S. vs. Halper*, Roberts' first appearance before the high court, he argued that adding a civil penalty to a criminal one was double jeopardy and therefore unconstitutional.").

up in marginalized communities.¹⁰⁵ Thus, even though they did not engage with social movements in their careers prior to their judicial appointment, they nonetheless carried the perspective of the people to the bench because of their own lived experiences. By appointing more movement judges, judges who understand contemporary societal values and the consequences their decisions have in the real world, we can reverse the current trend of rights-restrictive jurisprudence.¹⁰⁶ This is the only way we can save our democracy.

II

MOVEMENT LAW, MOVEMENT LAWYERING, AND THEIR DEMANDS

"I wish I could say that racism and prejudice were only distant memories. . . . We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. . . . We must dissent, because America can do better, because America has no choice but to do better."

—Justice Thurgood Marshall, 1992¹⁰⁷

¹⁰⁵ Specifically, Judges Reeves and Chief Judge Gregory are Black, and Justice Sotomayor is Puerto Rican, and both Chief Judge Gregory and Justice Sotomayor were the first individuals from their backgrounds to achieve appointment to their respective courts—a distinction indicative of the marginalization their communities historically face. See Ariane de Vogue, *Meet the Judge Who Took on Donald Trump*, CNN (Apr. 17, 2019), <https://www.cnn.com/2019/04/17/politics/judge-carlton-reeves-donald-trump/index.html> [<https://perma.cc/PLZ2-YMUF>] (“[Judge Reeves] is the second African-American to be appointed as a federal judge in Mississippi and has spoken about the hate mail he has received since becoming a judge.”); *The Hon. Roger L. Gregory*, AM. L. INST., <https://www.ali.org/members/member/439578> [<https://perma.cc/78FX-6MTX>] (“He is the first African-American to sit on the United States Court of Appeals for the Fourth Circuit”); *Sonia Sotomayor*, OYEZ, https://www.oyez.org/justices/sonia_sotomayor [<https://perma.cc/44NM-E7PQ>] (“Sotomayor was born in the Bronx on June 25, 1954 to Juan Sotomayor and Celina Baez, both native Puerto Ricans.”). Judge Reeves grew up in a segregated community in Mississippi. See Kenya Downs, *The Man Behind the Speech: Judge Carlton Reeves Takes on Mississippi’s Past*, NPR (Mar. 2, 2015), <https://www.npr.org/sections/codeswitch/2015/03/02/387477815/the-man-behind-the-speech-judge-carlton-reeves-takes-on-mississippi-past> [<https://perma.cc/TS6Z-KZBG>] (“It’s a Mississippi that Reeves knows all too well, having grown up in the rural Yazoo City, 40 miles north of Jackson, where ‘everybody knew their place,’ he said in an interview. ‘It was divided by railroad tracks, and you knew where you could and could not go.’”).

¹⁰⁶ See *Comrade Thomas*, STRICT SCRUTINY, at 19:17 (June 25, 2021), <https://strictscrutinypodcast.com/podcast/comrade-thomas> [<https://perma.cc/KK7E-946N>] (describing the Court’s decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), as “a real failure to empathize with people who might be in a different financial situation or socioeconomic status as [the members of the Court]”).

¹⁰⁷ THURGOOD MARSHALL, *Acceptance Speech After Receiving the Liberty Award: We Must Dissent* (July 4, 1992), in *SUPREME JUSTICE: SPEECHES AND WRITINGS* 311, 313–14 (J. Clay Smith, Jr. ed., 2003).

The judiciary's captivity blinds our law to the needs of its people. Turning to the teachings of movement law can remedy this.¹⁰⁸ Distinct from movement lawyering,¹⁰⁹ movement law "approaches scholarly thinking and writing about law, justice, and social change as work done in solidarity with social movements, local organizing, and other forms of collective struggle. As it begins in solidarity and with commitments to justice and freedom, it often begins outside of the law as traditionally conceived."¹¹⁰ Instead of regurgitating ivory tower concepts of the law, movement law acknowledges "We the People." It links arms with grassroots resistance and idealism. It champions a law of many faces—beyond the milky white visage of the Framers.¹¹¹

Various social movements inform movement law's development. By studying and emulating how movements build and shift power *beyond* courts and the Constitution, movement law may use complementary strategies to change our courts and the Constitution.¹¹² The values and goals of these social movements cannot be approached individually but instead must be considered in relation to each other.¹¹³ Similarly, movement law is inclusive and intersects multiple

¹⁰⁸ See Akbar et al., *supra* note 19, at 825–26.

¹⁰⁹ See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1690 (2017) ("[M]ovement lawyering is the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define." (emphasis omitted)).

¹¹⁰ Akbar et al., *supra* note 19, at 826; see *id.* at 847–48 ("[Movement law's] necessity [falls] within . . . the increasingly clear failures of neoliberal law and politics and the surge of social movement activity and grassroots organizing. . . . [W]hen the right and left are [in] a crisis of legitimacy of the status quo, scholars of law can play an important role.").

¹¹¹ See *id.* at 856 ("[O]rganizers are keenly aware that the lives of workers—as women, people of color, differently abled, and queer and trans—are intersectional and that understanding their intersectional identities grounds organizing strategies.").

¹¹² See *id.* at 852 ("Movement law requires studying how movements build and shift power—beyond courts and the Constitution—and prefigure the economic, social, and political relationships of the world they are working to build.").

¹¹³ See *id.* at 839 ("Using intersectionality, legal scholars might attend to overlapping forms of oppression and 'map[] the margins,' looking, for example, to how courts render invisible the experiences of Black women, or to how antiracist and feminist struggles fail to attend to the multiple marginalization of women of color." (alteration in original) (footnotes omitted)); *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about> [<https://perma.cc/YTL2-WKQY>] ("We affirm the lives of Black queer and trans folks, disabled folks, undocumented folks, folks with records, women, and all Black lives along the gender spectrum. Our network centers those who have been marginalized within Black liberation movements."). See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145 (1989) (analyzing how separate racial and gender subordination theories could not fully address discrimination against Black women); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV.

movements. As movement law transforms to accommodate new waves of thought, it seeks to become greater than its parts.¹¹⁴

Grassroots movements must be distinguished from their top-down imitators, though.¹¹⁵ The strategy of imitation movements goes beyond vaguely-named groups¹¹⁶ acting as fronts for business; monied interests go so far as to construct vast networks to astroturf an entire movement.¹¹⁷ Even when aristocrats successfully recruit foot soldiers for their class warfare campaigns, their organizations and strategies remain distinct from those of liberationist movements. For example, the Federalist Society may claim a large number of members—60,000, according to its website¹¹⁸—but it simply is not a grassroots organization; it continues to take corporate funding, and was initially financed by the Olin Foundation.¹¹⁹ Even the anti-abortion movement sprang from a top-down structure: Paul Weyrich and Jerry Falwell only pushed its adoption by evangelical churches when they realized that segregation in private schools—while quite motivating to church

1241, 1243–44 (1991) (exploring the intersectional relationship between discrimination on the basis of race and gender).

¹¹⁴ While legal academia produces some interpretive movements of its own (i.e., law and economics or originalism), movement law is not about the study of such schools of thought.

¹¹⁵ See Edward T. Walker, *What's the Difference Between Political Grassroots and Big-Interest Astroturf?*, UCLA NEWSROOM (July 8, 2014), <https://newsroom.ucla.edu/stories/whats-the-difference-between-political-grassroots-and-big-interest-astroturf> [<https://perma.cc/4AX5-4GBR>] (discussing the strategies and methods of corporate-funded campaigns designed to mimic grassroots movements).

¹¹⁶ See *id.* (predicting the attempts of telecommunications companies to use organizations named “Broadband for America” and “American Consumer Institute” to influence the debate over net neutrality).

¹¹⁷ See Eric Zuesse, *Final Proof the Tea Party Was Founded as a Bogus AstroTurf Movement*, HUFFINGTON POST (Dec. 6, 2017, 9:54 AM), https://www.huffpost.com/entry/final-proof-the-tea-party_b_4136722 [<https://perma.cc/TW3L-CLL2>] (documenting the years-long project backed by the Koch brothers aimed at curbing government spending on social programs that resulted in the apparently sudden emergence of the Tea Party).

¹¹⁸ See *About Us*, FEDERALIST SOCIETY, <https://fedsoc.org/about-us> [<https://perma.cc/566R-486X>].

¹¹⁹ See *id.* (claiming that the Society receives funding from foundations and corporations); Dylan Matthews & Byrd Pinkerton, *The Incredible Influence of the Federalist Society, Explained*, VOX (June 3, 2019, 9:00 AM), <https://www.vox.com/future-perfect/2019/6/3/18632438/federalist-society-leonard-leo-brett-kavanaugh> [<https://perma.cc/VXD5-ENH6>] (discussing the Olin Foundation’s early funding of the Federalist Society as part of a network of anti-democratic, tax-exempt money). The Olin Foundation’s money derives from munitions and chemical manufacturing. See Lizzy Ratner, *Olin Foundation, Right-Wing Tank, Snuffing Itself*, OBSERVER (May 9, 2005, 12:00 AM), <https://observer.com/2005/05/olin-foundation-rightwing-tank-snuffing-itself> [<https://perma.cc/626V-9PXY>] (“Its benefactor, John Merrill Olin, was a wealthy Midwestern industrialist and heir to an ammunition company that merged with a chemical corporation in the mid-1950’s.”).

leaders—would not drive parishioners to the polls.¹²⁰ The power dynamics of anti-democratic pressure campaigns necessarily separate them from the liberationist movements of marginalized and oppressed people.

To reach an understanding of the law informed by relevant social movements, scholars must pay close attention to these social movements and everyday people.¹²¹ Scholars Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson recently summarized the interrelated moves required to progress towards movement law:

First, movement law scholars pay close attention to modes of resistance by social movements and everyday people. . . . Second, movement law scholars work to understand the strategies, tactics, and experiments of resistance and contestation. . . . Third, movement law scholars take seriously the epistemologies and histories of the social movements they study. Fourth, movement law scholars move with a sense of solidarity and accountability to the social movements they study.¹²²

Movement judges must be receptive to the arguments of movement lawyering and conscious of the explorations of movement law.

Where movement law attempts to carve out a space within legal scholarship to *think* alongside social movements, movement lawyering *works* alongside those movements in legal practice.¹²³ Movement lawyering seeks to advance social justice by aligning—and at times subordinating—legal practice to grassroots social movements.¹²⁴ While movement lawyering often operates within existing legal principles, it must also recognize the need to develop alternative legal structures.¹²⁵ The conception of such alternative structures is fertile ground for the interaction of movement law and movement lawyering—a process which legislatures and movement judges would do well to heed. In the

¹²⁰ See Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133> [<https://www.perma.cc/79YQ-2SW2>] (documenting the deliberate efforts of Weyrich and Falwell to sell abortion as a political issue that evangelicals would use as a litmus test following the political awakening of their ministers over segregation).

¹²¹ See Akbar et al., *supra* note 19, at 848 (“[M]ovement law scholars pay close attention to organizing, social movements, and collective resistance by everyday people.”).

¹²² *Id.*

¹²³ *Id.* at 826 (distinguishing between movement law and movement actors).

¹²⁴ See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447–48 (2001) (discussing a paradigm for social change emphasizing the role of traditional legal practice in favor of community-directed advocacy).

¹²⁵ See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 556 (2021) (“Indeed, for those who are committed to decreasing political inequality, alternative legal structures that encourage the growth of countervailing organizations are imperative.”).

service of social movements, movement lawyers engage in bold and creative arguments that can open new jurisprudential avenues for movement judges. By remaining in touch with such bottom-up citizen democracy, movement judges can avoid the authoritarian tendencies of the judiciary while applying abolition constitutionalism. This Part will explore the accomplishments and goals of Black Lives Matter, prison abolition, critical feminism, environmental justice, and the union movement as examples before addressing the structures they challenge, the legal barriers to their goals, and the potential for movement judges to clear their paths forward.

A. A Selection of Liberationist Movements

Black Lives Matter (BLM) is an “ideological and political intervention in a world where Black lives are systemically and intentionally targeted for demise.”¹²⁶ In 2013, Alicia Garza, Patrisse Cullors, and Opal Tometi created #BlackLivesMatter in response to the acquittal of Trayvon Martin’s murderer, George Zimmerman.¹²⁷ The movement became prominent as police tragically continued killing innocent Black people.¹²⁸ Its mission is simple, yet resounding: to eradicate white supremacy and protect those suffering from it.¹²⁹ In some ways, BLM is like the Black-led resistances of the past—united by a common motive and push for equality.¹³⁰ BLM was inspired by the 1960s civil rights movement and the 1980s Black Feminist movement, as well as the Pan-African movement, political hip-hop movement,

¹²⁶ *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory> [https://perma.cc/JM3Y-QDKV].

¹²⁷ *Id.*

¹²⁸ See Caitlin O’Kane, “Say Their Names”: The List of People Injured or Killed in Officer-Involved Incidents Is Still Growing, CBS NEWS (June 8, 2020), <https://www.cbsnews.com/news/say-their-names-list-people-injured-killed-police-officer-involved-incidents> [https://perma.cc/H57R-BWHF] (describing the social media response to killings by police). For a list of victims of police brutality alongside an artistic rendering, see Alia Chughtai, *Know Their Names: Black People Killed by the Police in the US*, AL JAZEERA, <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html> [https://perma.cc/3Q73-84W6].

¹²⁹ See *Herstory*, *supra* note 126.

¹³⁰ See Verena Daniel, *How the BLM Movement Compares to the MLK Jr. Era Civil Rights Movement*, STATE NEWS (Jan. 18, 2021), https://statenews.com/article/2021/01/blm-compared-to-mlk-era-civil-rights?ct=content_open&cv=Cb|ox_latest [https://perma.cc/M2T9-F57V] (“Although there are several differences in the civil rights and BLM movements, their common motive and methods show a clear continuation in the push for equality from the MLK days to now.”); see also Ian Thomsen, *How Do Today’s Black Lives Matter Protests Compare to the Civil Rights Movement of the 1960s?*, NEWS@NORTHEASTERN (June 4, 2020), <https://news.northeastern.edu/2020/06/04/how-do-todays-black-lives-matter-protests-compare-to-the-civil-rights-movement-of-the-1960s> [https://perma.cc/RQ46-8UHQ] (evaluating the similarities between the national crises of the civil rights era and the present).

and the 2000s LGBTQ+ movement.¹³¹ But unlike its MLK-era predecessors, BLM is “leader-full,” consisting of decentralized groups across the world, rather than a travelling body of leaders.¹³² This permits BLM to respond more rapidly and share its message beyond America’s borders.

Growing sick of America’s reliance on concrete boxes for punishment, abolitionists work tirelessly to eradicate them.¹³³ Renowned abolitionist Mariame Kaba defines prison abolition as “the complete and utter dismantling of prisons, policing, and surveillance as they exist within our culture. And it’s also the building up of new ways of . . . relating with each other.”¹³⁴ Abolitionists pursue a society that actually provides liberty and justice for all.¹³⁵ Accomplishing this means tearing down the walls this country has built to hide today’s enslaved people.¹³⁶

From the suffragette movement in the early 1900s to the reproductive and workers rights movements in the 1960s, feminism has swelled and retracted over the past century.¹³⁷ Now, in the wake of

¹³¹ Isabella Mercado, *The Black Lives Matter Movement: An Origin Story*, UNDERGROUND R.R. HISTORY, <https://undergroundrailroadhistory.org/the-black-lives-matter-movement-an-origin-story> [https://perma.cc/RQ46-8UHQ].

¹³² See Daniel, *supra* note 130 (“[BLM] is a ‘leader-full’ movement that prizes collaboration over having one central figure [T]here is coordination and a set of shared values spread across a decentralized structure that prizes local connections and fast mobilization in response to police violence.”).

¹³³ See John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition> [https://perma.cc/XB4F-KV9M] (“[A] growing collection of activists and writers have not only been working to humanize the cages, and not only to *tear down* the cages, but to build a more equitable society in which we don’t need to rely on cages at all.”); Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [https://perma.cc/SYV9-CX72] (quoting Kaba as explaining that “I am looking to abolish what I consider to be death-making institutions, which are policing, imprisonment, sentencing, and surveillance”).

¹³⁴ Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019) (citing *Episode 29 - Mariame Kaba*, AIRGO (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba> [https://perma.cc/GTC7-PN34]).

¹³⁵ Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [https://perma.cc/8KQ9-PMFK] (“We want a society that centers freedom and justice instead of profit and punishment.”).

¹³⁶ ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 103 (2003) (“Despite the important gains of antiracist social movements over the last half century, racism hides from view within institutional structures, and its most reliable refuge is the prison system.”).

¹³⁷ See Prue Clarke, *Stuck on the Third? A Guide to Fourth Wave Feminism*, FUTURE WOMEN, <https://futurewomen.com/leadership/gender-diversity/fourth-wave-feminism-guide> [https://perma.cc/V4JJ-LSUQ] (describing the different waves of feminist movements of the last century).

#MeToo¹³⁸ and Time's Up,¹³⁹ an unprecedented amount of discussion about women's rights issues is taking place.¹⁴⁰ This new wave, known as fourth wave feminism, is larger by design. Where early feminist movements elevated white cisgender straight women, modern feminism seeks to be more inclusive.¹⁴¹ Generally speaking, today's feminists work to create a world that supports women—"including Black women, indigenous women, poor women, immigrant women, disabled women, lesbian, queer, bisexual and trans women, and women of every religious, non-religious, and atheist background"¹⁴²—by eliminating shared injustices. The movement's focus areas include glass ceilings,¹⁴³ rape culture,¹⁴⁴ harassment,¹⁴⁵ objectification,¹⁴⁶ domestic violence,¹⁴⁷ and reproductive rights,¹⁴⁸ among other issues.

¹³⁸ For more information on #MeToo, see Tarana Burke, *History & Inception*, ME TOO, <https://metoomvmt.org/get-to-know-us/history-inception> [https://perma.cc/7H28-8XHY].

¹³⁹ For more information on Time's Up, see *Our Story*, TIME'S UP, <https://timesupnow.org/about/our-story> [https://perma.cc/7KGR-DET4].

¹⁴⁰ See Clarke, *supra* note 137 ("But in the last year, as #MeToo and Time's Up gained momentum and a record number of women prepared to run for office, it's clear feminism was reaching a level of cultural relevance it hadn't enjoyed in years.").

¹⁴¹ See Jessica Abrahams, *Everything You Wanted to Know About Fourth Wave Feminism—But Were Afraid to Ask*, PROSPECT MAG. (Aug. 14, 2017), <https://www.prospectmagazine.co.uk/magazine/everything-wanted-know-fourth-wave-feminism> [https://perma.cc/9UER-GJFB] ("These questions are part of a broader debate on 'intersectionality'—the idea that different groups of women experience oppression in different ways—and the criticism that feminism has often been dominated by the concerns of the privileged.").

¹⁴² See *About Us*, WOMEN'S MARCH GLOB., <https://womensmarchglobal.org/about> [https://perma.cc/CDU3-7JXC].

¹⁴³ See Marilyn Loden, *100 Women: 'Why I Invented the Glass Ceiling Phrase'*, BBC NEWS (Dec. 13, 2017), <https://www.bbc.com/news/world-42026266> [https://perma.cc/A3UA-H76K] ("The term 'glass ceiling' refers to the sometimes-invisible barrier to success that many women come up against in their careers.").

¹⁴⁴ See Reina Gattuso, *Rape Culture Is a Contract We Never Actually Signed*, FEMINISTING (May 26, 2015), <http://feministing.com/2015/05/26/rape-culture-is-a-contract-we-never-actually-signed> [https://perma.cc/YMQ5-HGW7] ("Sometimes there's a moment when I'm having sex that I think a lot of us have felt . . . It's the fear that, if I asked the person to stop, they wouldn't.").

¹⁴⁵ See Moira Donegan, *How #MeToo Revealed the Central Rift Within Feminism Today*, GUARDIAN (May 11, 2018), <https://www.theguardian.com/news/2018/may/11/how-metoo-revealed-the-central-rift-within-feminism-social-individualist> [https://perma.cc/FEH3-B3GH] ("By saying 'me too', an individual woman makes herself a part of a broader group, and chooses to stand with others who have been harassed, assaulted or raped. This solidarity is powerful.").

¹⁴⁶ See Ronnie Ritchie, *How Can You Tell If You're Being Sexually Empowered or Objectified? Ask Yourself This Simple Question*, EVERYDAY FEMINISM (Apr. 14, 2015), <https://everydayfeminism.com/2015/04/empowered-vs-objectified> [https://perma.cc/Z5GK-CAPF] (exploring the role of power and consent in distinguishing between sexual empowerment and sexual objectification).

¹⁴⁷ See Hazel Cills, *When Are Police Officers Going to Stop Underestimating the Link Between Domestic Violence and Murder?*, JEZEBEL (Dec. 10, 2018), <https://jezebel.com/when-are-police-officers-going-to-stop-underestimating-1830981823> [https://perma.cc/

Environmentalism is a movement that crosses party lines more than others.¹⁴⁹ The movement dates to 1907 with the coinage of the term “conservation movement” in response to egregious forest exploitation.¹⁵⁰ “Save the forests” sounds simple. But this sentiment was rooted in the more complex notion that the earth was being ravaged for the benefit of the few at the expense of all; the natural earth, with green trees and blue waters, should be the public domain.¹⁵¹ Since then, the conservation movement has grown to focus on climate change.¹⁵² Alexandria Ocasio-Cortez’s Green New Deal reaches toward the broad goals of modern environmentalists.¹⁵³ Its aim is to “reduce greenhouse gas emissions in order to avoid the worst consequences of climate change while also trying to fix societal problems like economic inequality and racial injustice.”¹⁵⁴ Like the forest conservation movement at the turn of the previous century, today’s environmental movement is conscious of the interaction between the needs of people and the planet.¹⁵⁵ Notably, advocates are more con-

WB6F-5F9N] (“As we’ve seen just this year in the murders of women like Aisha Fraser, Tiffany Wilson, Tamara O’Neal, and Jaelynn Willey, and multiple studies, there is a direct link between domestic violence and murdered women in this country . . .”).

¹⁴⁸ See Kylie Cheung, *The Feminist Argument for Court Expansion*, MARY SUE (Oct. 27, 2020), <https://www.themarysue.com/feminist-argument-court-expansion> [https://perma.cc/4GUS-A8ZF] (“In red states and blue states alike, women—and disproportionately women of color—already face criminal charges and have even been jailed for miscarriages, stillbirths, ‘pregnancy-endangering’ behaviors, and self-managed abortions.”).

¹⁴⁹ See Grant McConnell, *The Environmental Movement: Ambiguities and Meanings*, 11 NAT. RES. J. 427, 427 (1971) (“The supporters of ‘ecology’ . . . are a very mixed lot; they include individuals and groups from both the left and the right, as well as from the amorphous center.”).

¹⁵⁰ *Id.* at 428.

¹⁵¹ See *id.* at 429–30.

¹⁵² See Dana R. Fisher & Sohana Nasrin, *Climate Activism and Its Effects*, 12 WIREs CLIMATE CHANGE 1 (2021), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/wcc.683> [https://perma.cc/UZ6U-V5NL] (describing the growth of climate activism).

¹⁵³ See Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html> [https://perma.cc/8XQS-X689].

¹⁵⁴ *Id.*

¹⁵⁵ See Ed Potosnak, Opinion, *This Juneteenth, Let’s Look at Race and the Environmental Movement*, NJ.COM (June 18, 2021), <https://www.nj.com/opinion/2021/06/this-juneteenth-lets-look-at-race-and-the-environmental-movement-opinion.html> [https://perma.cc/N4GH-23MS] (“Clean energy will not only improve our air and water quality but is one of the fastest-growing industries in America and provides a huge opportunity for high-quality union jobs that can help rebuild the middle class and provide new opportunities . . . [for] workers in Black and [B]rown communities.”); Audrey Nakagawa, *Out for Sustainability: The Intersection of the LGBTQIA+ and Environmental Movements*, ECOWATCH (July 7, 2021), <https://www.ecowatch.com/out-for-sustainability-2653703495.html> [https://perma.cc/R9A8-7MNF] (discussing how environmental issues and social justice are intimately tied together).

frontational than those of the past—and more diverse.¹⁵⁶ Shedding the “mainstream environmentalism” image of being too elite, white, and focused on scenery is a critical element of achieving environmental justice.¹⁵⁷ It emblazons the group’s organizing principle that “everything is connected.”¹⁵⁸

The labor movement—or union movement—was born in response to exploitive business practices used against employees.¹⁵⁹ It grew out of the desperate need to protect the common worker’s interest against that of industry.¹⁶⁰ Because the voices of many are more powerful than a lone voice, labor unions were formed to fight for increased wages, reasonable hours, and safe working conditions.¹⁶¹ Today, strong labor unions engage in sectoral bargaining, where workers and unions negotiate with employers and their associations across entire industries regionally or nationally (e.g., auto manufacturing, health care, education, etc.).¹⁶² This permits unions to improve the lives of both union and nonunion workers.¹⁶³ Centralized bargaining of this type results in progress and is exemplified by the House of Representatives’ recent passage of the Protecting the Right to Organize (PRO) Act on March 9th, 2021.¹⁶⁴ Although the PRO Act faces an uphill battle before the U.S. Senate, the step forward symbolizes the country’s shifting perspective towards unions.¹⁶⁵

¹⁵⁶ See Jedediah Britton-Purdy, *Environmentalism Was Once a Social-Justice Movement*, ATLANTIC (Dec. 7, 2016), <https://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831> [<https://perma.cc/J9UE-EREC>] (“The incoming Trump administration is likely to see the greatest revival of environmentalism as a confrontational, grassroots, sometimes radical movement since at least 1970, when more than a million people took part in the first Earth Day.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *Labor Movement*, HISTORY (Mar. 31, 2020), <https://www.history.com/topics/19th-century/labor> [<https://perma.cc/BS4M-44LY>] (“The earliest recorded strike occurred in 1768 when New York journeymen tailors protested a wage reduction.”).

¹⁶⁰ *Id.*

¹⁶¹ See *id.* (discussing the history of labor organizing in the United States).

¹⁶² See Trent McDonald, *Why Sectoral Bargaining Matters for the Labor Movement*, JACOBIN (July 4, 2021), <https://www.jacobinmag.com/2021/07/sectoral-national-industry-wide-bargaining-contracts-us-unions> [<https://perma.cc/8DJ4-82LJ>].

¹⁶³ See *id.* (outlining how higher union membership leads to higher wages, better benefits, and more workplace democracy for both union and nonunion workers).

¹⁶⁴ *Id.*

¹⁶⁵ See Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021), <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [<https://perma.cc/RJ79-7KNV>] (discussing the PRO Act); Sarah Jones, *The PRO Act Could Do More Than Revive Unions*, N.Y. MAG.: INTELLIGENCER (Mar. 13, 2021), <https://nymag.com/intelligencer/2021/03/what-is-the-pro-act.html> [<https://perma.cc/E8RK-98QP>] (same).

B. *The Strategies of Liberationist Movements Demand Movement Judges*

All of these movements embrace a variety of strategies to challenge the status quo. They must, for those who benefit from the status quo can bring considerable resources to bear in its defense; money can buy them media influence,¹⁶⁶ political influence,¹⁶⁷ and excellent lawyers.¹⁶⁸ Corporate media and policy groups continue to fuel racism in America.¹⁶⁹ Prisons rely on racism and classism to maintain their relevance.¹⁷⁰ Statistics illustrating the gross disparity between imprisoned

¹⁶⁶ See Paul Farhi, *Washington Post Closes Sale to Amazon Founder Jeff Bezos*, WASH. POST (Oct. 1, 2013), https://www.washingtonpost.com/business/economy/washington-post-closes-sale-to-amazon-founder-jeff-bezos/2013/10/01/fca3b16a-2acf-11e3-97a3-ff2758228523_story.html [https://perma.cc/Y22X-LFSX] (reporting the transfer of the newspaper to the billionaire for \$250 million); Timothy Burke, *How America's Largest Local TV Owner Turned Its News Anchors into Soldiers in Trump's War on the Media*, DEADSPIN (Mar. 31, 2018), <https://deadspin.com/how-americas-largest-local-tv-owner-turned-its-news-anc-1824233490> [https://perma.cc/2PPJ-U2SU] (describing how broadcast giant Sinclair uses over 200 local television stations to broadcast its political commentary).

¹⁶⁷ See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (forbidding regulation of independent corporate political expenditures); Andrew Prokop, *40 Charts That Explain Money in Politics*, VOX (July 30, 2014), <https://www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain> [https://perma.cc/4CGJ-5EUW] (“Money suffuses our political system. . . . Some studies have found companies can get as much as a 22,000 percent return on their lobbying dollars . . .”).

¹⁶⁸ See Kathryn Rubino, *Biglaw Firms Are Charging How Much? For ASSOCIATES?*, ABOVE THE LAW (May 26, 2020), <https://abovethelaw.com/2020/05/biglaw-firms-are-charging-how-much-for-associates> [https://perma.cc/Q6JM-G5YA] (discussing hourly rates for associates’ time of over \$1,000 from Kirkland & Ellis, Skadden, Arps, Slate, Meagher & Flom, and Weil, Gotshal & Manges); Sammy Roth, *Meet the Law Firms Helping Fossil Fuel Companies Heat the Planet*, L.A. TIMES: BOILING POINT (Aug. 19, 2021), <https://www.latimes.com/environment/newsletter/2021-08-19/meet-the-law-firms-helping-fossil-fuel-companies-heat-the-planet-boiling-point> [https://perma.cc/JWF2-Y3ZF] (noting that Vault 100 law firms represented major polluters in at least 350 suits and \$1.36 trillion of fossil fuel transactions between 2016 and 2020).

¹⁶⁹ See Rashad Robinson, Opinion, *Corporations Profit from Racism. It’s Time for Us to Stand Up to Them*, GUARDIAN (May 16, 2019), <https://www.theguardian.com/commentisfree/2019/may/16/racial-justice-corporations> [https://perma.cc/HD68-6PBQ] (“What goes unreported too often, however, is the role of corporations in sustaining, or worsening, the forces of racism in America.”); Robert B. Reich, Opinion, *Who Profits from Racism*, RICHMOND CNTY. DAILY J. (June 15, 2020), <https://www.yourdailyjournal.com/opinion/94848/robert-reich-who-profits-from-racism> [https://perma.cc/7M2K-883Y] (detailing ongoing racist practices at some of America’s largest and most profitable corporations).

¹⁷⁰ See Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998) [hereinafter Davis, *Masked Racism*], <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> [https://perma.cc/4WPY-WTEZ] (“Once the aura of magic is stripped away from the imprisonment solution, what is revealed is racism, class bias, and the parasitic seduction of capitalist profit.”).

people of color and white people are widely known.¹⁷¹ Incarceration shatters the lives of millions¹⁷²—particularly young Black and Brown men—but fails to deter crime.¹⁷³ But nothing is done because prisons operate *as intended*.¹⁷⁴ They abuse the enslavement loophole created by the Thirteenth Amendment¹⁷⁵ and return enormous profits to those in charge.¹⁷⁶ Sexism remains similarly profitable.¹⁷⁷ And exploiting the environment remains a strong business model: “Just 100

¹⁷¹ See Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities> [<https://perma.cc/5XZ9-XCW7>] (including statistics on racial disparities in prisons, policing, and arrests); ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/2G52-5ZBH>] (same).

¹⁷² See Camonghne Felix, *Aching for Abolition: As a Survivor of Sexual Violence, I Know Prison Isn’t the Answer*, CUT: ONE GREAT STORY (Oct. 1, 2020), <https://www.thecut.com/2020/10/aching-for-abolition.html> [<https://perma.cc/63YK-NA7P>] (“I knew what prison was. I knew that horrible, bad things happened there. That sometimes people were starved to death, or beaten to death, or sexually assaulted until they killed themselves.”).

¹⁷³ See Bob Yirka, *Study Suggests Imprisonment Does Not Deter Future Crime*, PHYS.ORG (May 14, 2019), <https://phys.org/news/2019-05-imprisonment-deter-future-crime.html> [<https://perma.cc/9YXG-VNBN>] (summarizing study finding evidence that imprisonment does not deter crime); NAT’L INST. OF JUST., U.S. DEP’T OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/6KPT-59LX>] (“Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime.”).

¹⁷⁴ See Davis, *Masked Racism*, *supra* note 170 (“Mass incarceration is not a solution to unemployment, nor is it a solution to the vast array of social problems that are hidden away in a rapidly growing network of prisons and jails.”).

¹⁷⁵ See Caroline M. Kisiel, *Loopholes Have Preserved Slavery for More than 150 Years After Abolition*, WASH. POST (Jan. 27, 2021), <https://www.washingtonpost.com/outlook/2021/01/27/loopholes-have-preserved-slavery-more-than-150-years-after-abolition> [<https://perma.cc/39PS-U44S>] (discussing how the Thirteenth Amendment operates as a loophole); Cristal Mesa, *Yes, The Thirteenth Amendment Really Does Have a Loophole that Allows Slavery—Just Look at Our Prison System*, MITÚ (June 19, 2020), <https://wearemitu.com/wearemitu/entertainment/yes-the-thirteenth-amendment-really-does-have-a-loophole-that-allows-slavery-just-look-at-our-prison-system> [<https://perma.cc/UY6Z-VEH8>] (“Today’s so-called prison systems are indeed just slavery of a different name.”).

¹⁷⁶ See Davis, *Masked Racism*, *supra* note 170 (“As prisons proliferate in U.S. society, private capital has become enmeshed in the punishment industry. And precisely because of their profit potential, prisons are becoming increasingly important to the U.S. economy.”); see also Rupert Neate, *Welcome to Jail Inc: How Private Companies Make Money off US Prisons*, GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit> [<https://perma.cc/V32H-8LH6>] (“Getting locked up is unlikely to be good for your health but it’s ‘terrific, terrific’ business for the booming private industry supplying doctors and nurses to jails and prisons.”); Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. AM. PROGRESS (Aug. 30, 2019), <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profiting-trump-administration> [<https://perma.cc/K24A-RZGD>] (“[One private prison company] and its employees have spent about \$3 million on campaign contributions to federal candidates and PACs since 1990. Eighty-five percent of

companies have been the source of more than 70% of the world's greenhouse gas emissions since 1988"¹⁷⁸ The ruling elite demonize unions because they are—when allowed to operate and organize unfettered—so effective at shifting wealth and power downward.¹⁷⁹ Unfortunately, one of the unifying themes of these popular social movements is the tremendous wealth arrayed against them.

There is little reason to believe that judges drawn from the same pool of corporate attorneys and prosecutors would tend to break with the status quo. But when these movements and their allies bring legal challenges, movement judges can be more receptive to their arguments. BLM's rise to prominence has reinvigorated legal scholarship on the racial inequities of our justice system.¹⁸⁰ Movement lawyers are

[the company's] contributions to federal candidates since 1990 have gone to Republicans" (footnote omitted)).

¹⁷⁷ See Catherine Clifford, *Global Wealth Inequality is "Founded on Sexism," Says Oxfam International*, CNBC (Jan. 19, 2020), <https://www.cnbc.com/2020/01/17/global-wealth-inequality-is-founded-on-sexism-oxfam-international.html> [<https://perma.cc/G9FY-KSSP>] (reporting on how men have used their position of social dominance to control fifty percent more of global wealth than women); Lee Dye, *How Sexist Men Profit*, ABC News (Sept. 23, 2008), <https://abcnews.go.com/Technology/AheadoftheCurve/story?id=5868121&page=1> [<https://perma.cc/UGJ5-GND5>] (detailing the salary advantages that men with sexist attitudes enjoy over their egalitarian counterparts); Kelly Gilblom, *Activision, Battling Workplace Controversy, Beats Estimates*, BLOOMBERG (Aug. 3, 2021), <https://www.bloomberg.com/news/articles/2021-08-03/activision-battling-sexism-complaints-tops-analysts-estimates> [<https://perma.cc/L842-2982>] ("Activision Blizzard Inc., the video-game giant currently at the center of controversy over harassment and sexism in the industry, reported quarterly results that beat Wall Street projections and raised its outlook for the year.").

¹⁷⁸ Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, GUARDIAN (July 10, 2017), <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> [<https://perma.cc/UZ7G-B9MA>].

¹⁷⁹ See McDonald, *supra* note 162. This is probably why corporations are scared to death of unions and work so hard to prevent them from proliferating. See GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., *FEAR AT WORK 1* (July 23, 2020), <https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing> [<https://perma.cc/S7M8-Y5M4>] ("Employers—including many respectable, name-brand companies—collectively spend \$340 million per year on 'union avoidance' consultants who teach them how to exploit these weakness[es] of federal labor law to effectively scare workers out of exercising their legal right to collective bargaining.").

¹⁸⁰ See, e.g., Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 631 ("Had there been no uprisings in Ferguson (and Baltimore), there would have been much less attention paid to why [B]lack people are so angry about policing."); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08 (2018) ("In conversations with intellectuals and organizers around the country, I realized the Movement for Black Lives (M4BL or Movement)—the larger movement configuration in which the chapter-based Black Lives Matter network functions—was having a far richer and more imaginative conversation about law reform than lawyers and law faculty." (footnote omitted)); Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 543 ("At the heart of the Black Lives

taking notice and adopting arguments influenced by this scholarship.¹⁸¹ And movement judges are responding in their opinions.¹⁸² The application of abolition constitutionalism will aid in bringing about an end to racist policing and establishing a basis for color-conscious remedies such as reparations.¹⁸³ If abolition constitutionalism is to bear fruit for racial justice, the courts will need movement judges to tend to the project.

Prison abolitionists' willingness to fight for a series of small victories rather than attempting to achieve the abolition of the carceral state overnight lends itself to the litigation strategy successfully deployed in the civil rights movement leading up to *Brown v. Board of Education*¹⁸⁴ and the ACLU's women's rights advocacy in the 1970s.¹⁸⁵ The slow process of shifting constitutional interpretation to protect individuals in ways not previously recognized benefits tremen-

Matter movement is the insistence that regardless of any perceived non-respectable behavior—from Walter Scott evading a police officer during a traffic stop to Sandra Bland's non-compliant interactions with an officer—their lives matter and should not be treated with deadly disregard.”); Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L.Q. 3, 5–6 (2020) (“The Movement demands an end to racial injustice and oppression in America, with a particular emphasis on stopping police brutality against Black people and eradicating systemic racism.” (footnote omitted)); Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68, 88 (2017) (“The BLM’s ‘Campaign Zero’ platform lists ten specific policy solutions for which BLM advocates should campaign in their jurisdictions, but strikingly does not yet address any child welfare policy reforms.”).

¹⁸¹ See, e.g., Brief of the American Civil Liberties Union et al. as Amici Curiae in Support of Petitioner at 15, *Oliva v. Nivar*, 141 S. Ct. 2669 (2021) (mem.) (order denying petition for writ of certiorari) (No. 20-1060), 2021 WL 870557, at *15 (citing scholarship on racist policing influenced by BLM); Brief of the DKT Liberty Project et al. as Amici Curiae in Support of Petitioner at 13, *Lange v. California*, 141 S. Ct. 2011 (2021) (No. 20-18), 2020 WL 7388348, at *13 (citing scholarship on community perceptions of the legitimacy of law enforcement).

¹⁸² See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting) (citing a veritable bookshelf of Critical Race Theory scholarship to explore the collateral consequences of the majority’s decision); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 390–92 (S.D. Miss. 2020) (criticizing qualified immunity for its role in perpetuating systemic racism in an opinion citing to Derrick Bell, Sherrilyn Ifill, and Fred O. Smith, Jr., among others); *United States v. Curry*, 965 F.3d 313, 332–34 (4th Cir. 2020) (Gregory, C.J., concurring) (taking Judge Wilkinson’s dissent to task for failing to understand the realities faced by racial minorities with citations from scholars stretching from Frederick Douglass to James Baldwin to Michelle Alexander).

¹⁸³ See Roberts, *supra* note 3, at 122 n.750 (discussing the alternative constitutionalism of Black radicals as a basis for reparations and changes in police power).

¹⁸⁴ 347 U.S. 483 (1954).

¹⁸⁵ See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 763–64 (2004) (“After conducting extensive legal research, [Pauli] Murray proposed a litigation strategy modeled on the civil rights movement’s successful transformation of the Fourteenth Amendment’s judicial meaning. . . . Murray sought to emulate the success of organizations like the NAACP Legal Defense Fund in winning rights through organized litigation.”).

dously from judges—and especially Supreme Court Justices—who are amenable to such shifts. To the extent that modern abolition relies upon expansive interpretation of the Constitution, movement judges can play an integral role in completing the project.

The feminist movement has a demonstrated history of benefiting from movement lawyering and movement judges.¹⁸⁶ While feminists have won significant victories in prior litigation, a potentially game-changing dispute looms if Congress modifies its time limit for passage of the Equal Rights Amendment, creating an opportunity to ratify it.¹⁸⁷ Even if the ratification is considered valid, further interpretive battles await movement lawyers. The ERA's concept of "sex" is broad enough to include gender and sexuality,¹⁸⁸ but as with the Fourteenth Amendment, the Court could willfully ignore this publicly understood meaning.¹⁸⁹ Abolition constitutionalism would interpret the ERA with the same urgency it brings to the Reconstruction Amendments, ensuring its intersectional application. We need movement judges to ensure that courts will respect the intended breadth of the ERA and to preserve feminist victories elsewhere.

Environmental law is particularly susceptible to judicial interpretation, as it consists almost entirely of individual statutes and regulations.¹⁹⁰ While Congress's Commerce Clause power is likely sufficient to support most environmental regulation,¹⁹¹ this does not guarantee a favorable interpretation for environmentalists. Shifting agency regula-

¹⁸⁶ See Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMANS. 187, 228–30 (2006) (describing the rapid shift in jurisprudence and legislation regarding sex discrimination at the urging of activists and movement lawyers in the 1970s).

¹⁸⁷ See generally THOMAS H. NEALE, CONG. RSCH. SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES (2019), <https://fas.org/sfp/crs/misc/R42979.pdf> [<https://perma.cc/2237-4473>] (discussing numerous arguments for and against considering the Equal Rights Amendment to be validly ratified if Congress modified its initial time limit).

¹⁸⁸ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750–51 (2020) (“[D]uring debates over the [ERA], others counseled that its language—which was strikingly similar to Title VII’s—might also protect homosexuals from discrimination.”).

¹⁸⁹ See generally *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (interpreting narrowly the Privileges or Immunities Clause of the Fourteenth Amendment as pertaining only to privileges and immunities conferred by U.S. citizenship); *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating portions of the Civil Rights Act of 1875 based on a narrow reading of the Thirteenth and Fourteenth Amendments).

¹⁹⁰ See David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621 (1994) (“Environmental law has no explicit unifying principles that could serve to organize the jumble of statutes, regulations, cases, and academic analyses that collectively form the academic subject of environmental law.”).

¹⁹¹ See Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1260 n.127 (2014) (“EPA statutes operate largely under the authority of the Commerce Clause; natural resource statutes operate largely under the authority of the Property Clause.”).

tions and novel interpretive arguments can potentially undermine apparently robust statutory regimes.¹⁹² Even if movement judges only serve to enforce environmental laws in their intended scope, that would significantly aid the cause of the environmental movement.

Like environmental law, much of labor law relies upon statutory protections—statutes the courts have largely rendered toothless.¹⁹³ Courts are hesitant to defer to the statutory authority of the National Labor Relations Board, particularly when collective rights are at stake.¹⁹⁴ Yet a broad interpretation of constitutional rights has the potential to provide a better solution: “The freedom of association model incorporates a central lesson of the experience under the NLRA, namely that using the law to institutionalize any particular model or models of worker organization runs a high risk—approaching a certitude—of choking the movement as conditions change.”¹⁹⁵ The freedom of association model draws from both the labor movement’s history and its international analogs while providing stronger protections to existing unions, workers who seek to unionize, and workers who do not wish to join a union.¹⁹⁶ In the wrong hands, though, the Constitution can be used to achieve *Lochner*-like union-busting.¹⁹⁷ Abolition constitutionalism provides movement judges with the means to distinguish between constitutional interpretations that curtail associative rights or render statutes a

¹⁹² See *The Clean Water Case of the Century*, EARTHJUSTICE (Oct. 2021), <https://earthjustice.org/features/supreme-court-maui-clean-water-case> [<https://perma.cc/C29Y-836N>] (“If the Supreme Court had sided with Maui County and overturned the Ninth Circuit’s ruling, it would have allowed industry to freely pollute U.S. waters as long as the pollution isn’t directly discharged into a water source.”).

¹⁹³ See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011) (“[T]he prevailing view of contemporary labor law is that although the NLRA is a failed statute, the possibility for state and local innovation is choked off by one of the most expansive preemption regimes in American law.”).

¹⁹⁴ See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1564 (2002) (“Even when the Board is operating within the constraints of language and precedent, the courts give the NLRB a rather short leash, one that often strangles innovation. . . . [T]he judicial leash is shortest—at least since the 1960s—when it is the most ‘collective’ of labor’s rights that are at stake.”).

¹⁹⁵ Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 535 (2006).

¹⁹⁶ See *id.* at 543–45 (exploring the details of the freedom of association model of labor organizing).

¹⁹⁷ See Erin Mayo Adam, *The Supreme Court Struck Down a Key United Farm Workers Win. The Decision Has Some Infamous Echoes.*, WASH. POST (July 2, 2021), <https://www.washingtonpost.com/politics/2021/07/02/supreme-court-struck-down-key-united-farm-workers-win-decision-has-some-infamous-echoes> [<https://perma.cc/79AJ-EUN5>] (discussing the resemblance of the Supreme Court’s recent anti-labor decisions to the *Lochner* era’s reasoning for curtailing workers’ rights).

dead letter, concentrating bargaining power in the hands of the wealthy, and a rights-affirming vision of the Constitution that enables workers to benefit from its guarantees. With the Roberts Court's penchant for pro-business decisions, our labor rights may well depend on the work of movement judges.

Advancing these specific movements' goals is far from the only benefit of appointing movement judges. All of them seek to build a more just society. Movement judges aren't good for society because they aid the causes of these social movements; the movements benefit from the overall fairer application of the law. Popular social movements regularly inspire legal academics to explore new legal structures, which in turn can blaze a trail for judges—this is, after all, analogous to the development of originalism or law and economics. But unlike those legal philosophies—which all too often merely serve to justify inequitable concentrations of wealth and power—movement law promotes a vision of justice whose protections extend to all. Movement judges provide attorneys working toward that public good a receptive audience while remaining fully aware of the human import of any legal proceeding.

III MOVEMENT JUDGES

"It is the chief glory of Courts of Justice, that they are regarded as the safest sanctuaries of Human Freedom. May such ever be the honorable distinction of this court!"

—Salmon P. Chase, 1847¹⁹⁸

Between the courts' captivity by anti-democratic forces and the prominence and popularity of rights-affirming mass movements, the stakes could not be higher. Reactionary courts can diminish constitutional protections, deny Congress the authority to protect individuals by limiting congressional powers, and prevent states from taking up the baton through strained interpretations of the Constitution. Movement judges, by contrast, can find broad protections of individual rights within the Constitution, adopt a permissive stance toward congressional protection of individual rights, and apply cooperative federalist principles toward complementary state legislation. Even at the state level, judges can apply similar reasoning to interpret and enforce rights-affirming provisions of state constitutions and statutes.

¹⁹⁸ S.P. CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF *Wharton Jones v. John Vanzandt* 107 (1847).

Because of the court system's hierarchical nature, it is impossible to ignore the impact the nine Supreme Court Justices have.¹⁹⁹ And while they have the power to drive progress,²⁰⁰ they can equally wreak havoc.²⁰¹ Lately, the Court has occupied its time by bludgeoning justice.²⁰² Fully aware, conservative groups and states are challenging vulnerable human rights with the explicit intent of eradicating them. For example, Mississippi's Attorney General recently asked the Supreme Court to overturn *Roe v. Wade*.²⁰³ Terrifyingly—but unsur-

¹⁹⁹ See James Pasley, *45 Landmark Supreme Court Cases that Changed American Life as We Knew It*, INSIDER (Aug. 29, 2019), <https://www.businessinsider.com/landmark-us-supreme-court-cases-2019-8> [<https://perma.cc/YE55-NF2C>] (discussing impactful Supreme Court cases).

²⁰⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that women could not be excluded from the citizen-soldier program offered at Virginia Military Institute); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that states must recognize lawful same-sex marriages); *Roe v. Wade*, 410 U.S. 113 (1973) (protecting women's bodily autonomy by limiting the power of States to criminalize abortions).

²⁰¹ For a non-exhaustive list of the Supreme Court's worst decisions, see generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that Black people, whether freed men or enslaved, could not be considered American citizens), *Buck v. Bell*, 274 U.S. 200 (1927) (upholding forced sterilization for those with intellectual disabilities), *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans during World War II), *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitting "separate but equal" treatment of Black citizens), *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a discriminatory Georgia sodomy statute that criminalized sexually active homosexual relationships), *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law limiting bakery work hours to ten hours a day), *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a federal law banning interstate commerce in products of child labor because that law exceeded congressional authority), *Kelo v. City of New London*, 545 U.S. 469 (2005) (permitting taking land from one private party and giving it to another private party for economic development as "public use"), *Bush v. Gore*, 531 U.S. 98 (2000) (halting the vote recount for the 2000 presidential election), *United States v. Morrison*, 529 U.S. 598 (2000) (destroying parts of the Violence Against Women Act), and *Shelby County v. Holder*, 570 U.S. 529 (2013) (ravaging the Voting Rights Act).

²⁰² In the final case of the term, Justice Alito dismantled the remains of the Voting Rights Act by entirely ignoring the reality of discrimination within the United States. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021) ("Small disparities are less likely . . . to indicate [inequality]. . . . [N]eutral regulations . . . may well result in . . . disparities in [voting]. But the mere fact [of] disparity in impact does not necessarily [indicate inequality]. The size of any disparity matters. . . . [A] meaningful comparison is essential. . . . [V]ery small differences should not be artificially magnified."); see also Stern, *supra* note 56 (discussing how Justice Alito's opinion in *Brnovich* destroyed the substance of the Voting Rights Act); Mary Harris, *The Catastrophe of this Supreme Court Term Should Not Be Underestimated*, SLATE (July 7, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-voting-rights-roberts-alito-brnovich-fulton-bonta.html> [<https://perma.cc/U5G9-AYXM>] (same); Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court's Conservatives Have Laid the Groundwork for the Devastation to Come*, SLATE (July 5, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-conservatives-destroy-voting-rights.html> [<https://perma.cc/8REA-HJ72>] (same).

²⁰³ Ariane de Vogue, *Mississippi Asks US Supreme Court to Overturn Roe v. Wade*, CNN (July 22, 2021), <https://www.cnn.com/2021/07/22/politics/mississippi-ro-v-wade-abortion/index.html> [<https://perma.cc/4Y2G-ZB4E>].

prisingly—such responses are inevitable when the Court embraces a reactionary posture. Due to this outsized influence and urgency, this Part will focus first—but not exclusively—on Supreme Court Justices to define, distinguish, and explore the work of movement judges.

The scale of the reactionary response highlights the dire importance of the presence of movement judges within our judiciary. This Part will proceed first with an exploration of what makes a movement judge, including a discussion of the distinction between a movement judge and a progressive judge. Next, this Part will explore the work of several movement judges, past and present, at various levels of the judiciary. Finally, this Part will discuss abolition constitutionalism's potential for a radical reimagining of the scope of the Constitution's protections of individual rights. This will elucidate the legal structures movement judges can use to create a more just society.

A. What Makes a Movement Judge

Movement judges develop their democracy-affirming jurisprudence in solidarity with mass social movements. They embrace abolition constitutionalism, advocating—often in dissent—for greater protections of fundamental rights. A movement judge applies broad vision to each case, refusing to ignore the broader legal and factual implications of a ruling. When difficult questions are squarely presented in a case, movement judges do not engage in procedural contortions to avoid addressing them. Movement judges insist that the anti-democratic *structure* of the courts should not encourage anti-democratic jurisprudence.

The particular social movements that movement judges stand in solidarity with have shifted over time, and likely will again. Regardless of the era, though, these movements share common characteristics. They are committed to an expansive concept of rights for all, not merely the powerful and traditionally privileged classes. They embrace an intersectional approach, understanding that the rights of one disadvantaged group must not come at the expense of another and that the effects of discrimination and disparate impact do not neatly compartmentalize into single-characteristic categories. These movements are all acutely aware of the law's role in perpetuating injustice, so a movement judge's solidarity with movements would result in a jurisprudence committed to a democratic reimagining of the law.

Movement judges' vision—both of the collateral consequences of their decisions and of the law's potential reconstruction—distinguishes them from merely progressive judges. Where a progressive

judge is committed to a progressive vision of the Constitution, a movement judge works toward abolition constitutionalism. Progressive constitutionalism treats the Constitution as a set of principles and applies judicial discretion to determine when to respect or override the modern, democratic interpretation and implementation of those principles.²⁰⁴ Abolition constitutionalism, by contrast, considers those historical principles in conjunction with the means of their implementation and calls on judges to consistently examine the consequences of applying various means to ensure they are rights- and democracy-affirming. A progressive judge looks to the particular law and facts of a case and then chooses whether to defer to majoritarian legislative and executive action or whether to intervene on behalf of higher ideals of democracy.²⁰⁵ A movement judge, by contrast, views the law and facts in their full social context, applying consistently democracy-affirming interpretations with an eye to collateral consequences.

The distinction between progressive and movement judges is best clarified by example. Progressive constitutionalism saw its apex during the Warren Court, which frequently ruled with more concern for outcomes than for developing a coherent legal theory.²⁰⁶ While the results were often significant advances for individual rights, they also included jarringly contradictory limitations in the realm of criminal procedure.²⁰⁷ This failure of coherence has had dire consequences for Black and Brown people.²⁰⁸ This must be contrasted with the attention of movement judges to the collateral consequences of their decisions and long-term development of a broader protection of individual

²⁰⁴ See William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1254–56 (2011) (exploring the two major components of progressive constitutionalism: (i) understanding that the principles underlying the Constitution do not change but their application does, and (ii) understanding “when the democratic process requires judicial intervention”).

²⁰⁵ See *id.*

²⁰⁶ See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 550 (2015) (“The Warren Court followed . . . *Brown* with . . . revolutionary opinions seeking to rectify perceived injustices The challenge for liberals was how to reconcile . . . this judicial activity with . . . the cornerstone of liberal constitutional theory—that judicial deference is essential . . . to avoid the unpalatable error of *Lochner*.”).

²⁰⁷ See, e.g., Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1309 (1998) (“[*Terry*] signaled the end of the Warren Court’s due process revolution. *Terry* would not be another *Miranda*. *Terry* indicated that the Court was no longer prepared to force change . . . on police departments and officers who ignored or resisted the application of constitutional commands.”).

²⁰⁸ See *id.* at 1321 (“[T]hose that have been the most vocal defenders of *Terry* tend to come from socio-economic and racial backgrounds that are predominately free from police harassment. For many [B]lack and other disfavored groups, however, the *Terry* Court wrongly subordinated their Fourth Amendment rights to police safety.”).

rights. The next Section provides several examples of this, including Justice McLean's commitment to the power of states to exclude slavery within their borders, Justice Brandeis's vision of freedom of speech, and Judge Gregory's efforts to extend Fourth Amendment protections against racist policing. All these movement judges share a commitment to a more democratic constitution and the vision to realize it.

B. Movement Judges Past and Present

Some of the most recognizable examples of movement judges—particularly in past eras—served as Supreme Court Justices. The original abolitionist movement informed Justices John McLean and Salmon P. Chase, whose opinions brought the original incarnation of abolition constitutionalism to Supreme Court jurisprudence. Justice Louis Brandeis embraced a bold vision of individual rights—especially those of privacy, freedom of speech, and labor—in an era of overwhelming corporate and government power. Justices Thurgood Marshall and Ruth Bader Ginsburg were stalwarts of abolition constitutionalism both in practice and on the bench. On the Roberts Court, Justice Sonia Sotomayor carries on this tradition, though usually in dissent. Movement judges have made an indelible mark on Supreme Court jurisprudence. This Section will begin with an analysis of past movement judges on the Supreme Court before analyzing Justice Sotomayor's jurisprudence.

The Supreme Court's decisions are far-reaching because of their finality,²⁰⁹ but the decisions of lower federal courts and state courts are often immediately felt in their communities. Lower court and state court judges often have much clearer understandings of the impacts their decisions will have in the communities they serve. To illuminate examples of movement judges in these roles, this Section will examine the jurisprudence of Chief Judge Roger Gregory of the Fourth Circuit, Judge Carlton Reeves of the Southern District of Mississippi, and Justice Anita Earls of the North Carolina Supreme Court. All three have brought the perspective of the people to the bench and display elements of movement judging in their opinions. Notably, only Justice Earls engaged with social movements in her legal career prior to her appointment. But all three, like Justice Sotomayor, grew up in marginalized communities and bring their lived experiences to bear in their opinions. After the discussion of movement judges on the

²⁰⁹ See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (“We are not final because we are infallible, but we are infallible only because we are final.”).

Supreme Court, this Section will explore each of these three judges' jurisprudence in turn.

1. *Historical Movement Judges on the Supreme Court*

The past Justices whom this Section will examine advanced radical visions of individual rights and equality to varying degrees of success. This Section is not intended as a hagiography—many of these Justices were deeply flawed, and none of them could be identified as the ideal of a movement judge. Chief Justice Chase supported dismissing the prosecution of Confederate President Jefferson Davis.²¹⁰ Justice Brandeis joined the majority in *Buck v. Bell*.²¹¹ Justice Ginsburg has faced criticism for her failure to hire more than a single Black law clerk in her career on the bench.²¹² These failures leave much to be desired. But we should not discard the entirety of their accomplishments for these failures. Their historical examples—particularly their triumphant moments—can inform the sorts of jurisprudence that this Article proposes modern movement judges should seek to advance in their own.

The first movement judges on the Supreme Court were involved with the original abolitionist movement. John McLean was, for the bulk of his career on the Court, the lone antislavery voice among his peers.²¹³ From his time on the Ohio Supreme Court, McLean developed the skill of criticizing unjust laws he was compelled to uphold.²¹⁴ “Slavery, in McLean’s view, violated all natural law as well as the

²¹⁰ See *Case of Davis*, 7 F. Cas. 63, 102 (C.C.D. Va. 1867) (No. 3,621a) (considering dismissing the indictment for treason against Jefferson Davis); C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1182–85 (2009) (detailing Chase’s extended ex parte maneuvers to avoid trying Davis for treason).

²¹¹ See *Buck v. Bell*, 274 U.S. 200 (1927) (upholding forced sterilization for those with intellectual disabilities).

²¹² See Paul Butler, Opinion, *Ruth Bader Ginsburg Can Learn Something from Brett Kavanaugh*, WASH. POST (Oct. 15, 2018), https://www.washingtonpost.com/opinions/ruth-bader-ginsburg-can-learn-something-from-brett-kavanaugh/2018/10/15/b8974a86-cd77-11e8-a360-85875bac0b1f_story.html [<https://perma.cc/HB4U-FS6V>] (“Ginsburg . . . has hired only one African American law clerk in her 25 years on the Supreme Court. This is an improvement from her 13-year tenure on the U.S. Court of Appeals for the District of Columbia Circuit, when Ginsburg never had any [B]lack clerks.”).

²¹³ See Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 541 (2009) (“McLean was constrained by fidelity to a Constitution that protected slavery in significant ways. Throughout his judicial career, McLean struggled harder than any other federal judge to work around these constraints.”).

²¹⁴ See *State v. Carneal*, Ohio Unrep. Cas. (1817), reprinted in OHIO UNREPORTED JUDICIAL DECISIONS: PRIOR TO 1823, at 133, 135 (Ervin H. Pollack ed., 1952) (“From . . . our federal compact, and the laws of our national legislature, this Court [is] bound to respect as property . . . that which is made property by the laws of a sister state, however repugnant, in our conception, to justice, and contrary to the policy of our own laws.”).

Ohio Constitution and could only be protected in Ohio to the extent the federal Constitution required such protection.”²¹⁵ On the Supreme Court, McLean consistently dissented from decisions extending the institution of slavery,²¹⁶ even going so far as to support the interests of slave states when the legal reasoning for doing so would strengthen states’ power to exclude slavery.²¹⁷ While this sort of concession to the interests of enslavers might not immediately seem to fit with the radical approach of a movement judge, it is important to contextualize the legal conflicts of McLean’s era. Abolitionists were not only working to end slavery everywhere but were also locked in a defensive struggle to prevent its advance into states where it was already ostensibly forbidden.²¹⁸

Later, prominent abolitionist Salmon P. Chase would become Chief Justice as the Reconstruction project began.²¹⁹ While in private practice, Chase advocated for radical abolitionist positions, going so far as to challenge Ohio’s evidentiary bar to the testimony of Black witnesses.²²⁰ Chase’s antislavery advocacy was even more pronounced in his political career.²²¹ On the Court, Chase provided critical support

²¹⁵ Finkelman, *supra* note 213, at 543.

²¹⁶ See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 671–73 (1842) (McLean, J., dissenting) (supporting Pennsylvania’s right to prohibit “the forcible abduction of persons of colour”); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 531 (1857) (McLean, J., dissenting) (arguing that free status and domicile in a state sufficed to make the plaintiff a citizen with access to federal courts).

²¹⁷ See Finkelman, *supra* note 213, at 553–54 (noting how McLean rejected the constitutional avoidance of the majority to address northern states’ rights to exclude slavery).

²¹⁸ See Paul Finkelman, *When International Law Was a Domestic Problem*, 44 VAL. U. L. REV. 779, 790–97 (2010) (discussing the heated disputes in Antebellum constitutional law over how conflicts of laws regarding the free or enslaved status of Black people traveling between states should be resolved—disputes often summarily resolved by a presumption that all Black people were enslaved).

²¹⁹ See Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 CASE W. RES. L. REV. 653, 675–76 (2013) (describing the circumstances surrounding Chase’s nomination as Chief Justice in late 1864).

²²⁰ See Matthew A. Axtell, *What Is Still “Radical” in the Antislavery Legal Practice of Salmon P. Chase?*, 11 HASTINGS RACE & POVERTY L.J. 269, 271 (2014) (“Flouting Ohio rules restricting testimony from people of color in open court, [Chase] challenged the judge to treat Clarke like the equivalent of a white man, to hear Clarke’s story directly from his client’s lips.”).

²²¹ See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 73 (1995) (“Chase developed an interpretation of American history which convinced thousands of northerners that anti-slavery was the intended policy of the founders of the nation, and was fully compatible with the Constitution.”).

to the Reconstruction project,²²² maintaining a strongly abolitionist vision of the Constitution and the power of the Reconstruction Amendments.²²³ Chase consistently opposed the Johnsonian interpretation of the Reconstruction Amendments. While riding circuit, he ruled that forced apprenticeship contracts violated the Thirteenth Amendment, which guaranteed that even a juvenile Black woman had the rights of a citizen.²²⁴ Unfortunately, failing health prevented Chase from authoring dissents in two major cases interpreting the Reconstruction Amendments near the end of his life—the *Slaughter-House Cases*²²⁵ and *Bradwell v. Illinois*.²²⁶ *Bradwell* in particular deserves attention, as Chase alone stood willing to interpret the Fourteenth Amendment to protect individuals from discrimination not merely on grounds of race but also on those of gender.²²⁷ Like McLean before him, Justice Chase consistently pursued a jurisprudence affirming the rights of individuals far beyond what his peers on the Court were willing to support. These abolitionist Justices established the tradition of movement judges relentlessly advancing a more democratic interpretation of the Constitution, even if only in dissent.

Before becoming a Supreme Court Justice, Louis Brandeis first devoted much of his practice to advocacy for the common person.²²⁸

²²² See Barnett, *supra* note 219, at 677–83 (describing Chase’s major opinions on the attempts to reinstate slavery under other names and the legal status of the Confederate state governments).

²²³ See *id.* at 694–97 (discussing Chase’s dissent from the *Slaughter-House Cases* and belief that the Privileges or Immunities Clause supported the equal civil rights of women).

²²⁴ See *id.* at 677–79 (discussing Chase’s decision to this effect in *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247)).

²²⁵ 83 U.S. (16 Wall.) 36 (1873).

²²⁶ 83 U.S. (16 Wall.) 130 (1872); see Barnett, *supra* note 219, at 696 (“Chase was too weak and ill from a series of previous st[r]okes to write opinions in either case. Three weeks after the decisions on *Slaughter-House* and *Bradwell* were announced, a final stroke took his life.”).

²²⁷ See Barnett, *supra* note 219, at 696–97 (noting Chase as the sole dissenter in *Bradwell*).

²²⁸ See Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 860–61 (2001) (“Brandeis is considered an icon in American legal culture because we purport to understand his public-spirited approach to the law as having elevated our expectations of lawyers and judges and transformed our perceptions of the purpose of law in civilized society.”); see also Frederick M. Lawrence, *The Continuing Vitality of Louis D. Brandeis’s Free Expression Jurisprudence*, 33 Touro L. REV. 131, 132–33 (2017) (calling Brandeis the “people’s lawyer”). That said, Brandeis’s relative silence on matters of racial justice makes him an imperfect candidate for inclusion in a list of movement judges. See Bracey, *supra*, at 878–84 (discussing how Brandeis’s lack of advocacy in matters of racial injustice is conspicuous in light of the actions of his contemporaries); *id.* at 885 (“Brandeis was willing to go quite far in the defense of certain rights of the public. Unfortunately, the liberty and equality interests of African-American citizens were not among those rights.”). Ultimately, his advocacy and jurisprudence resulted in advances that aided the cause of the civil rights movement, even if he himself lacked the will or desire to push them to that end.

He was motivated in large part by his vision that America could become a freer, fairer democracy.²²⁹ Brandeis sought to establish fairness in the relationship between capital and labor and recognized the necessity of increasing the relative power of labor to reach this end.²³⁰ His famous “Brandeis Brief”—one that relied more on scientific and testimonial information than on pure legal arguments—initiated a change in the varieties of evidence appellate courts would consider while winning a significant victory for labor protection laws.²³¹ Along with his law partner, Samuel D. Warren, Brandeis wrote the seminal article *The Right to Privacy*,²³² which precipitated the development of common-law and constitutional privacy protections.²³³ “He earned the accolade ‘the People’s Lawyer’ through his advocacy against monopolies, support for workers’ rights, opposition to political corruption, [and] robust defense of the rights to privacy and freedom of expression”²³⁴ Brandeis’s commitment to advocating for the public good

Jeffrey Rosen, *Revisiting The Tenure of Supreme Court Justice Louis Brandeis, The ‘Jewish Jefferson,’* NPR (June 7, 2016), <https://www.npr.org/2016/06/07/481076322/revisiting-the-tenure-of-supreme-court-justice-louis-brandeis-the-jewish-jeffers> [https://perma.cc/K4W4-QDZT] (“Brandeis has a blind spot. And that is race. He was personally courteous to African-Americans, but he was not a crusader for racial equality in the way he was, or at least became, for gender equality, for example.”); Larry M. Roth, *The Many Lives of Louis Brandeis: Progressive-Reformer. Supreme Court Justice. Avowed Zionist. And a Racist?*, 34 S.U. L. REV. 123, 165 (2009) (comparing the research Brandeis aided the NAACP in to challenge segregation in transportation—which he set aside to accept his nomination to the Supreme Court—with the later arguments against segregation in *Brown*).

²²⁹ See Jonathan Sallet, *Louis Brandeis: A Man for This Season*, 16 COLO. TECH. L.J. 365, 373 (2018) (exploring Brandeis’s philosophy “that America was built on a unique set of principles, that its tools of democratic governance formed the fulcrum on which those principles could be vindicated and extended, and that the work of seeking democratic and economic progress would never be done”).

²³⁰ See L.S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 NW. U. L. REV. 596, 640–41 (1988) (discussing Brandeis’s optimism that a mutually beneficial circumstance could be reached in labor relations and his realization that the process would require long struggle and government intervention to redistribute bargaining power).

²³¹ See Clyde Spillenger, *Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon*, 22 CONST. COMMENT. 5, 6 (2005) (“Certainly the ‘Brandeis brief’ has been, in many major cases, an important weapon in the arsenal of appellate litigators, and its immediate impact on the movement for protective labor legislation was considerable.”).

²³² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²³³ See Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133, 1135 (1992) (“Warren and Brandeis made their important contribution by giving legal definition to this boundary between personal and public space—between occasions when personal information should be the business of others and occasions when it should be no one else’s affair.”).

²³⁴ Russell G. Pearce, Adam B. Winer & Emily Jenab, *A Challenge to Bleached Out Professional Identity: How Jewish Was Justice Louis D. Brandeis?*, 33 TOURO L. REV. 335, 335 (2017).

was deeply held and became foundational to the modern view of such work as an obligation on all lawyers.²³⁵

On the bench, Brandeis advanced many of the same causes he advocated as an attorney. He laid the foundations of an expansion of the freedom of speech²³⁶ and a right of privacy.²³⁷ Brandeis consistently worked against the application of substantive due process as a bludgeon against legislative protection of workers.²³⁸ Ultimately, he formed part of the majority to abrogate *Lochner* in *West Coast Hotel v. Parrish*.²³⁹ Justice Brandeis's movement judging, while often in concurrences and dissents, was vindicated in many cases through its adoption by later majorities.²⁴⁰ He consistently applied democracy- and rights-affirming jurisprudence, in solidarity with popular movements and with a clear vision for reshaping constitutional interpretation.²⁴¹

²³⁵ See Lawrence, *supra* note 228, at 132–33 (“Brandeis provided representation gratis for those who could not afford his legal services, and for cases that he thought raised significant public issues, anticipating and championing what would become a well-accepted obligation for an attorney to dedicate some proportion of her or his time to *pro bono* work.”).

²³⁶ See Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 334 (“[Brandeis's concurrence in *Whitney*] has been celebrated as one of the most conceptually influential and rhetorically powerful justifications for First Amendment liberties.”).

²³⁷ See Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1338 (2010) (discussing Brandeis's view that privacy is “not primarily about maintaining the status of elites, but preserving the dignity and autonomy of a self-governing citizenry”).

²³⁸ See Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 345 (1986) (contrasting Brandeis's support for substantive due process in human rights contexts with his opposition to its application to invalidate economic regulation).

²³⁹ 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and thus abrogating *Lochner v. New York*, 198 U.S. 45 (1905)).

²⁴⁰ See Joel K. Goldstein & Charles A. Miller, *Brandeis: The Legacy of a Justice*, 100 MARQ. L. REV. 461, 462 (2016) (“[Brandeis's] concurrences and dissents, which the Court later used to mold new and enduring doctrine, left a wider imprint.”).

²⁴¹ Brandeis's free speech dissents, often in cases involving radical political movements, advanced a lonely constitutional vision—that the right to participate in debates regarding the governance of the United States was so fundamental as to already have been inviolable prior to the passage of the Fourteenth Amendment. See Lawrence, *supra* note 228, at 133–38 (exploring Brandeis's structuralist approach to free speech in his jurisprudence). While he did not advocate extensively for the rights of women and people of color before his appointment to the bench, he was open to the constitutional interpretations of those who did. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2356 (2002) (“While neither Holmes nor Brandeis had the kind of egalitarian constitutional vision the early suffragists or anti-apartheid thinkers had, they were open to updating the Constitution to protect women and people of color from harm.”). This history on race and gender fits well with his economic jurisprudence, which reveals that the popular movement he most clearly associated with was not the labor movement or an identity-based social movement, but the Progressive movement. See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as*

More recently, Justices Thurgood Marshall and Ruth Bader Ginsburg have served as examples of the preferred type of Justice for liberals and activists.²⁴² And rightly so. Both fundamentally changed and accelerated civil rights prior to their appointments.²⁴³ Justice Marshall famously won *Brown v. Board of Education*,²⁴⁴ successfully arguing that school segregation was a violation of individual rights under the Fourteenth Amendment.²⁴⁵ Ruth Bader Ginsburg argued six gender discrimination cases before the Supreme Court, winning five of them.²⁴⁶ On the bench, their practice of fighting for equality and justice only continued. Both Justices developed reputations as passionate advocates for civil rights and activism generally.²⁴⁷ Both authored opinions that challenged the ideology of the Court and remembered the law's interaction with people.²⁴⁸

People's Lawyer, 105 YALE L.J. 1445, 1462 (1996) ("Brandeis's rhetoric of both 'industrial democracy' and 'social efficiency' reflected the dual character of Progressive reform, a vision that was at once humanitarian and organizational, serving the ideals of both social justice and social control, both uplift and efficiency.").

²⁴² See generally Stephen L. Carter, *What Thurgood Marshall Taught Me*, N.Y. TIMES MAG. (July 15, 2021), <https://www.nytimes.com/2021/07/14/magazine/thurgood-marshall-stories.html?referringSource=articleShare> [https://perma.cc/NQ3Q-82D7]; Robert Cohen & Laura J. Dull, *Teaching About the Feminist Rights Revolution: Ruth Bader Ginsburg as "The Thurgood Marshall of Women's Rights,"* ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2017/november/teaching-about-the-feminist-rights-revolution-ruth-bader-ginsburg-as-the-thurgood-marshall-of-womens-rights> [https://perma.cc/DN4L-5CF5]; Kimberly Strawbridge Robinson & Jordan S. Rubin, *Ginsburg's Career, Replacement Parallel Thurgood Marshall's*, BLOOMBERG L. (Sept. 28, 2020), <https://news.bloomberglaw.com/us-law-week/ginsburgs-career-replacement-parallel-thurgood-marshalls> [https://perma.cc/MUZ3-3DPJ].

²⁴³ Both also benefited in their advocacy from the strategic work of Pauli Murray. See Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray> [https://perma.cc/9KMT-RDMZ] (noting the influence of Murray's writing on both Marshall's advocacy to overturn *Plessy* and Ginsburg's advocacy to include sex within the protections of the Equal Protection Clause).

²⁴⁴ 347 U.S. 483 (1954).

²⁴⁵ See Sherrilyn Ifill, *How Thurgood Marshall Paved the Road to 'Brown v. Board of Education,'* SMITHSONIAN MAG. (Mar. 10, 2021), <https://www.smithsonianmag.com/history/how-thurgood-marshall-paved-road-brown-v-board-education-180977197> [https://perma.cc/X7Y6-JT4J].

²⁴⁶ Anthony D. Romero, *In Memory of Justice Ruth Bader Ginsburg (1933-2020)*, ACLU (Sept. 19, 2020), <https://www.aclu.org/news/civil-liberties/in-memory-of-justice-ruth-bader-ginsburg-1933-2020> [https://perma.cc/N4HQ-34UB] ("While at the ACLU, Ginsburg played a role in 34 Supreme Court cases, and won five of the six cases she argued before the court . . .").

²⁴⁷ See *supra* notes 242–46 and accompanying text.

²⁴⁸ See generally *Thurgood Marshall*, OYEZ, https://www.oyez.org/justices/thurgood_marshall [https://perma.cc/85SQ-EDPX]; *Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/justices/ruth_bader_ginsburg [https://perma.cc/3XT2-NZKL].

2. *Justice Sonia Sotomayor: The Truth Teller of the Supreme Court*

On today's Court, Justice Sotomayor best illustrates the constitutional vision and solidarity of a movement judge.²⁴⁹ Like Justices Marshall and Ginsburg, Justice Sotomayor uses her personal experiences of discrimination to inform her opinions.²⁵⁰ Like Justices Marshall and Ginsburg, she is mindful of discrimination beyond her lived experiences. "Her voice, in all its forms, has become the liberal conscience on a conservative court, one that speaks out in defense of minorities, immigrants, criminal defendants and death row inmates."²⁵¹ An examination of some of her recent opinions will demonstrate her contributions as a movement judge.

The Roberts Court continued its constriction of the Fourth Amendment in *Utah v. Strieff*.²⁵² The Court granted certiorari to discuss how the attenuation doctrine²⁵³—allowing the unconstitutionality of a practice to be excused when it is a sufficiently remote cause from the evidence obtained by it—applies when an unconstitutional deten-

²⁴⁹ See Greenhouse, *supra* note 16; Richard Wolf, 'The People's Justice': After Decade on Supreme Court, Sonia Sotomayor is Most Outspoken on Bench and off, USA TODAY (Aug. 12, 2019), <https://www.usatoday.com/story/news/politics/2019/08/08/justice-sonia-sotomayor-supreme-court-liberal-hispanic-decade-bench/1882245001> [<https://perma.cc/H5HT-V3JZ>]; Jazmine Ulloa, Sonia Sotomayor is the Lone Voice on Systemic Racism on the Most Conservative Supreme Court in Decades, BOS. GLOBE (June 28, 2020), <https://www.bostonglobe.com/2020/06/28/nation/her-daca-dissent-sonia-sotomayor-shows-shes-voice-one-systemic-racism-most-conservative-supreme-court-decades> [<https://perma.cc/QWC4-7SCB>] (describing how Justice Sotomayor's acknowledgement of the history and continued presence of racial animus and the individual persons behind each case informs her jurisprudence); Adam Liptak, *In Dissents, Sonia Sotomayor Takes On the Criminal Justice System*, N.Y. TIMES: SIDEBAR (July 4, 2016), <https://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html> [<https://perma.cc/SS77-SKB6>] (describing how Justice Sotomayor's understanding of the disparate impact of heightened police scrutiny and of the real-world experiences of communities of color affects her criminal procedure jurisprudence).

²⁵⁰ See generally Sara Kettler, *How Sonia Sotomayor Overcame Adversity to Become the United States' First Hispanic and Latina Justice*, BIOGRAPHY (Oct. 1, 2020), <https://www.biography.com/news/sonia-sotomayor-overcame-adversity-supreme-court-justice> [<https://perma.cc/LD2R-VFQF>] (detailing how Justice Sotomayor's experience with Type 1 diabetes and discrimination at Princeton and Yale Law School instilled in her, at a young age, a hardy optimism and headstrong perseverance).

²⁵¹ Wolf, *supra* note 249.

²⁵² 136 S. Ct. 2056, 2064 (2016) (holding that the evidence the officer seized as a part of his search incident to arrest was admissible "because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from [the defendant] incident to arrest").

²⁵³ See *id.* at 2061 ("Evidence is admissible when the connection between unconstitutional policy conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006))).

tion leads to the discovery of a valid arrest warrant.²⁵⁴ Ultimately, the Court held, as encapsulated in Justice Sotomayor's dissent, "that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights."²⁵⁵ In a mere six pages, Justice Thomas cited the appropriate cases, walked through a three-factor test, and dusted his hands of yet another criminalized person—dismissing the glaringly unconstitutional detention as an "isolated" incident.²⁵⁶ Justice Sotomayor vehemently disagreed, engaging with painful realities "in a voice that speaks not only to the legally trained, but also to the ordinary people who are most impacted by the Court's Fourth Amendment jurisprudence"²⁵⁷:

[M]any innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, [B]lack and [B]rown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. . . .

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.²⁵⁸

Instead of sterilizing the law, Justice Sotomayor engaged with the present-day realities of the common person that are frequently forgotten or ignored in the Supreme Court's jurisprudence. Sotomayor's

²⁵⁴ A Utah police officer staked out a local residence after receiving an anonymous tip claiming ongoing drug activity. *Id.* at 2059. After a week, the officer followed a man leaving the residence, unlawfully detained him in a parking lot, and asked for his identification. *Id.* at 2060. He then communicated this information to a police dispatcher, who informed the officer that the man had an outstanding arrest warrant for a traffic violation. *Id.* The officer arrested and searched him, finding drug paraphernalia. *Id.*

²⁵⁵ *Id.* at 2064 (Sotomayor, J., dissenting).

²⁵⁶ *See id.* at 2063 (majority opinion) ("Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house.").

²⁵⁷ Ronald Tyler, *Utah v. Strieff: A Bad Decision on Policing with a Gripping Dissent by Justice Sotomayor*, STAN. L. SCH. BLOGS (July 5, 2016), <https://law.stanford.edu/2016/07/05/utah-v-strieff-a-bad-decision-on-policing-with-a-gripping-dissent-by-justice-sotomayor/> [<https://perma.cc/PGF4-RMDL>].

²⁵⁸ *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting) (citations omitted).

approach is distinct and a critical tenet of what makes a movement judge.²⁵⁹

Beyond addressing present realities, Justice Sotomayor also refuses to accept a glossy rendition of the past. In *Terry v. United States*,²⁶⁰ the Court considered whether crack offenders who do not trigger a statutory mandatory minimum qualify for a sentence reduction under the First Step Act of 2018.²⁶¹ Justice Thomas, writing for the majority, answered with a resounding no.²⁶² While all nine agreed with the legal analysis, only Justice Sotomayor addressed Justice Thomas's "unnecessary, incomplete, and sanitized" history of the 100-to-1 crack cocaine ratio.²⁶³ In her words, "[m]ost egregiously, the Court barely references the ratio's *real-world impact* and disregards the fact that, 'as the *racial effects of mandatory minimums* and the crack/cocaine disparity became apparent, the [Congressional Black Caucus] came together in unanimous and increasingly vocal opposition to the law.'"²⁶⁴ As she did in *Strieff*, Sotomayor considered the real-world impact of the law within her concurrence. Given the Court's current makeup, Justice Sotomayor's espousal of expansive, humanistic interpretations of the law seems fated to remain outside the majority.²⁶⁵

²⁵⁹ Sotomayor dissented in a Supreme Court denial of certiorari for a case involving a law that allows Alabama judges to decide to impose the death penalty on a convicted individual, even in the face of a jury decision not to impose death. There, Sotomayor emphasized that this practice "casts a cloud of illegitimacy over the criminal justice system" by "permitting a single trial judge's view to displace that of a jury representing a cross-section of the community." *Woodward v. Alabama*, 571 U.S. 1045, 1050–51 (2013) (Sotomayor, J., dissenting) (order denying petition for writ of certiorari). Assigning particular importance to the role of the jury in representing the will of citizens, Sotomayor cited self-interested political gain as a motivating factor for judges who override the will of juries. *See id.* at 1050 ("What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? . . . Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.").

²⁶⁰ 141 S. Ct. 1858 (2021).

²⁶¹ *Id.* at 1860.

²⁶² *Id.*

²⁶³ *Id.* at 1864 n.1 (Sotomayor, J., concurring in part and concurring in the judgment); *see also* Greenhouse, *supra* note 16 ("While agreeing with Justice Thomas's analysis and bottom line, Justice Sotomayor refused to sign on to his version of the history of the crack-powder disparity, calling his account 'unnecessary, incomplete, and sanitized.'").

²⁶⁴ *Terry*, 141 S. Ct. at 1864 n.1 (Sotomayor, J., concurring in part and concurring in the judgment) (emphasis added).

²⁶⁵ *See* Ariane de Vogue, *Major 6-3 Rulings Foreshadow a Sharper Supreme Court Right Turn*, CNN (July 1, 2021), <https://www.cnn.com/2021/07/01/politics/supreme-court-6-3-conservative-liberal/index.html> [<https://perma.cc/353K-T9HU>] ("But Republicans and conservatives are finally getting the decisions they pined for as former President Donald Trump changed the face of the courts and liberals are preparing for a bloodbath.").

At times, conservative Justices reach positive outcomes via their apathetic legal method.²⁶⁶ When this happens, Justice Sotomayor joins in concurrence. In *Department of Homeland Security v. Regents of the University of California*,²⁶⁷ the Court considered whether the Department of Homeland Security's (DHS) rescission of Deferred Action for Children Arrivals (DACA) was unlawful. DACA was created to allow "certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal . . . [with eligibility] for work authorization and various federal benefits."²⁶⁸ Most recipients—known as "Dreamers"²⁶⁹—are born in Latin America.²⁷⁰ DACA clashed with then-President Trump's "overtly" racist, "anti-Mexican platform."²⁷¹ Chief Justice Roberts, writing for the majority, held that the rescission of the DACA program was arbitrary and capricious, but dismissed the respondents' arguments regarding the racial animus behind the rescission as "unilluminating," "remote in time," and "made in unrelated contexts."²⁷² Justice Sotomayor disagreed; citing Trump's own statements,²⁷³ she rejected the notion that anti-Brown racism and xenophobia did not motivate the decision to end the program.²⁷⁴ Once again, she served as a movement judge in her lonely recognition and criticism of racial and ethnic discrimination.

²⁶⁶ See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (holding that an employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person).

²⁶⁷ 140 S. Ct. 1891 (2020).

²⁶⁸ *Id.* at 1901.

²⁶⁹ See *What Is DACA and Who Are the DREAMers?*, ADL, <https://www.adl.org/education/resources/tools-and-strategies/table-talk/what-is-daca-and-who-are-the-dreamers> [<https://perma.cc/X8JA-9SS3>] ("The young people impacted by DACA and the DREAM Act are often referred to as 'Dreamers.' . . . [They] are young people who have grown up as Americans, identify as Americans, and may speak only English and have no memory of or connection with the country where they were born.").

²⁷⁰ Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RSCH. CTR. (Sept. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca> [<https://perma.cc/SSE2-KG63>].

²⁷¹ See Ulloa, *supra* note 249.

²⁷² *Regents*, 140 S. Ct. at 1915–16.

²⁷³ See *id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The *Batalla Vidal* complaints catalog then-candidate Trump's declarations that Mexican immigrants are 'people that have lots of problems,' 'the bad ones,' and 'criminals, drug dealers, and rapists.'").

²⁷⁴ *Id.*; see also Ulloa, *supra* note 249.

3. *Fourth Circuit Chief Judge Gregory's Fourth Amendment Jurisprudence Recognizes the Impact His Opinions Have on Marginalized Communities*

Beyond the national spotlight on the Supreme Court, several lower federal court judges and state judges exemplify the qualities of a movement judge. In Judge Gregory's Fourth Amendment jurisprudence, the perspectives of marginalized communities and the experience of the defendant are predominant. He decisively points out the racial undertones of the question before the court.²⁷⁵ Though the Supreme Court's Fourth Amendment jurisprudence is infamously colorblind, Judge Gregory's jurisprudence recognizes the racial aspect of the Fourth Circuit's cases and deploys the colorblind Supreme Court precedent to protect the rights of minorities.²⁷⁶ His opinions in three cases—*United States v. Black*,²⁷⁷ *United States v. Curry*,²⁷⁸ and *Leaders of a Beautiful Struggle v. Baltimore Police Department*²⁷⁹—provide clear examples.

In *Black*, police used the previous arrest of one man and the legal possession of a firearm by another to justify the frisk of five other men.²⁸⁰ A search of one of those men revealed an illegally concealed weapon, for which he was arrested.²⁸¹ Judge Gregory's majority opinion held that the stop violated Mr. Black's Fourth Amendment rights.²⁸² But Judge Gregory did more than merely uphold Mr. Black's constitutional rights. He rigorously scrutinized the government's arguments, rejected the government's framing of the facts, and placed the incident in its proper racial and factual context.²⁸³ He rejected the government's contention that another man's idling at a gas station or the arrest record of one of his compatriots had any bearing on whether Mr. Black was engaging in suspicious conduct.²⁸⁴ He also

²⁷⁵ See, e.g., *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) (“There’s a long history of [B]lack and [B]rown communities feeling unsafe in police presence.”).

²⁷⁶ See Daniel Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027, 1032 (2021).

²⁷⁷ 707 F.3d 531 (4th Cir. 2013).

²⁷⁸ 965 F.3d 313 (4th Cir. 2020) (en banc).

²⁷⁹ 2 F.4th 330 (4th Cir. 2021) (en banc).

²⁸⁰ See *Black*, 707 F.3d at 534–36.

²⁸¹ See *id.*

²⁸² See *id.* at 539 (concluding that the facts failed “to support the conclusion that [the officer] had reasonable suspicion to detain Black”).

²⁸³ See *id.* at 537–42; *id.* at 539 (“[T]he Government attempts to meet its *Terry* burden by patching together a set of innocent, suspicion-free facts, which cannot rationally be relied on to establish reasonable suspicion.”).

²⁸⁴ See *id.* at 539–40 (stating that the officer’s “suspicion that a lone driver at a gas pump who he did not observe drive into the gas station is engaged in drug trafficking borders on

rejected the officers' "Rule of Two"—the notion that finding one gun meant another was present—stating that it would be an “abdication” of his judicial duty to accept that “arbitrary and boundless rule . . . [as] a basis for reasonable suspicion of criminal activity.”²⁸⁵

Turning to the racial dimensions of the case, Judge Gregory refused to “give the judicial imprimatur” to a “dichotomy in the intrusion of constitutional protections.”²⁸⁶ He admonished that North Carolina’s laws “apply uniformly and without exception” throughout the entire state.²⁸⁷ That meant that everyone in North Carolina was allowed to carry a gun without raising suspicion—including Black people.²⁸⁸ Rejecting the contention that Mr. Black volunteering his ID had been suspiciously “overly cooperative,” he recognized that “this type of . . . justification for reasonable suspicion . . . places a defendant in a worse position than if he had simply refused to cooperate altogether.”²⁸⁹ Finally, he recognized that such a rule would require Black and Brown people to walk a tightrope between cooperation and disdain whenever they interact with police.²⁹⁰ By refusing to rubber-stamp the government’s conduct and highlighting the racial import of the case, Judge Gregory’s opinion in *Black* reads the Fourth Amendment in solidarity with marginalized communities.

His concurring opinion in *Curry* does the same by acknowledging the lived experience of the often-strained relationship between Black and Brown people and the police. In *Curry*, the Fourth Circuit, sitting en banc, held that officers could not base reasonable suspicion on predictive policing data²⁹¹ which identifies the “most likely locations, perpetrators, and victims of future crime.”²⁹² Judge J. Harvey Wilkinson dissented, expressing his view that there are “two Americas”²⁹³: the

absurd” and that another man’s arrest history “cannot be a logical basis for a reasonable, particularized suspicion as to Black”).

²⁸⁵ *Id.* at 540–41.

²⁸⁶ *Id.* at 540.

²⁸⁷ *Id.*

²⁸⁸ *See id.* (“[W]here a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.”).

²⁸⁹ *Id.* at 541.

²⁹⁰ *See id.* (“If police officers can justify unreasonable seizures on a citizen’s acquiescence, individuals would have no Fourth Amendment protections unless they interact with officers with the perfect amount of graceful disdain.”).

²⁹¹ *See United States v. Curry*, 965 F.3d 313, 325–26 (4th Cir. 2020) (requiring individualized suspicion for a *Terry* stop); *id.* at 331 (Gregory, C.J., concurring) (discussing “predictive policing”).

²⁹² Margo McGehee, *Predictive Policing Technology: Fourth Amendment and Public Policy Concerns*, U. CIN. L. REV. (Feb. 17, 2021), <https://uclawreview.org/2021/02/17/predictive-policing-technology-fourth-amendment-and-public-policy-concerns> [<https://perma.cc/GP3Q-BVML>].

²⁹³ *Curry*, 965 F.3d at 346 (Wilkinson, J., dissenting).

safe, affluent one where law enforcement can move without excessive judicial barriers, and the America of the “least fortunate,” where police are too restrained in their jobs to protect people from crime.²⁹⁴ In a separate concurrence, Judge Gregory responded to Judge Wilkinson’s paternalistic portrayal of historically underserved and over-policed communities. He agreed that there are two Americas but explained that the two are divided along racial lines.²⁹⁵ He contrasted Judge Wilkinson’s fear of under-policing with the already existing dangers of over-policing and discussed at length the “long history of [B]lack and [B]rown communities feeling unsafe in police presence.”²⁹⁶ He acknowledged that Black and Brown people feel insecure because police perceive them as dangerous “even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles”²⁹⁷ In arguing for the protection of *all* people’s Fourth Amendment rights, Judge Gregory’s concurrence advances an abolitionist constitutionalist interpretation.

In *Leaders of a Beautiful Struggle*, Judge Gregory wrote the majority opinion as well as a concurrence to his own opinion.²⁹⁸ The majority opinion granted a preliminary injunction to enjoin Baltimore’s aerial surveillance program, which, it held, likely violates the Fourth Amendment.²⁹⁹ Judge Gregory’s movement judging is illustrated in his concurrence. As in *Curry*, the concurrence responds to Judge Wilkinson’s dissent, though this time Judge Wilkinson’s dissent is the principal one.³⁰⁰ At the outset, Judge Gregory rejects the dissent’s premise that “[p]olicing ameliorates violence, and restraining police authority exacerbates it.”³⁰¹ He also announced his skepticism as to the dissent’s contention that this premise “genuinely respects and represents the humanity, dignity, and lived experience of those the dissent ventures to speak for,”³⁰² namely Baltimore’s “poor Black and [B]rown communities” and “the most vulnerable among us.”³⁰³ He disparaged the dissent for disregarding “the systems, relationships,

²⁹⁴ *See id.*

²⁹⁵ *See id.* at 331–32 (Gregory, C.J., concurring).

²⁹⁶ *Id.* at 332.

²⁹⁷ *Id.*

²⁹⁸ *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 2 F.4th 330, 333 (4th Cir. 2021) (en banc).

²⁹⁹ *See id.* at 333.

³⁰⁰ *Id.* at 348–51 (Gregory, C.J., concurring).

³⁰¹ *Id.* at 348.

³⁰² *Id.*

³⁰³ *Id.* at 365 (Wilkinson, J., dissenting).

and foundational problems that have perpetuated Baltimore's epidemic of violence," all of which grew out of segregation that "divided the city largely along the lines of color."³⁰⁴ More clearly than even in *Black* and *Curry*, Judge Gregory draws attention to the racial context of the case.³⁰⁵ Finally, he refuses to accept "that some neighborhoods in Baltimore are hopeless absent this aerial surveillance" and proclaimed that "Baltimoreans need not sacrifice their constitutional rights to obtain equal government protection."³⁰⁶

Judge Gregory's Fourth Amendment jurisprudence exemplifies the solidarity with social movements and centering of the experiences of marginalized communities characteristic of movement judging. Judges can only erode rights-restrictive, democracy-stifling precedent by pointing out its consequences in case after case. Whether in the majority or in the dissent, movement judges must do this.

4. *Judge Reeves's Opinion in Jamison v. McClendon Calls on the Supreme Court to Acknowledge the Human Cost of Its Qualified Immunity Doctrine*

When Judge Reeves's opinion in *Jamison v. McClendon*³⁰⁷ was published, it sparked national headlines.³⁰⁸ Not because the outcome was a break from precedent or because the facts were particularly egregious—though they were distressing—but because Judge Reeves opened the opinion with a list of nineteen Black people who had died at the hands of police and ended with a blistering critique of qualified immunity.³⁰⁹ Judge Reeves concluded at the outset that Supreme Court precedent required him to grant qualified immunity to the officer and dismiss the suit.³¹⁰ But he used the opinion, published in

³⁰⁴ *Id.* at 348–49 (Gregory, C.J., concurring).

³⁰⁵ *See id.* at 349 ("Segregation effectively plundered Baltimore's Black neighborhoods—transferring wealth, public resources, and investment to their white counterparts—and the consequences persist today.").

³⁰⁶ *Id.* at 350.

³⁰⁷ 476 F. Supp. 3d 386 (S.D. Miss. 2020).

³⁰⁸ *See, e.g.,* Justin Jouvenal, *Judge's Blistering Opinion Says Courts Have Placed Police Beyond Accountability*, WASH. POST (Aug. 6, 2020), <https://www.washingtonpost.com/crime-law/2020/08/06/judges-blistering-opinion-says-courts-have-placed-police-beyond-accountability> [<https://perma.cc/GEH2-BJJG>] ("In an opinion released Monday, Reeves wrote that the case was a miscarriage of justice, but that his hands were tied by a once-obscure legal doctrine that is coming under increasing fire as the nation reckons with how to hold police responsible for misdeeds: qualified immunity.").

³⁰⁹ *See Jamison*, 476 F. Supp. 3d at 390–91 (listing the nonviolent activities that led to police killing nineteen different Black people).

³¹⁰ *See id.* at 392 ("This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted.").

the midst of protests against police violence following the death of George Floyd, as a vehicle to give voice to the people's increasing calls to end qualified immunity.³¹¹ “[L]et us not be fooled by legal jargon,” he wrote, “Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine. As the Fourth Circuit concluded [in another case], ‘This has to stop.’”³¹²

Judge Reeves acknowledged police officers’ and the government’s interest in a robust qualified immunity doctrine, but argued that the doctrine had gone too far, and now serves to shield police officers from accountability for the killing and abuse of innocent civilians.³¹³ He provided a detailed account of the “‘origins’ of the relevant law,”³¹⁴ pointing out the racist roots of the qualified immunity doctrine,³¹⁵ along with poignant examples of the injustices it has wrought.³¹⁶ Judge Reeves concluded by comparing qualified immunity to “the mistaken doctrine of ‘separate but equal,’” and called on the Supreme Court to overrule its qualified immunity jurisprudence, just

³¹¹ See *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct> [<https://perma.cc/KT84-HT8R>] (finding that sixty-six percent of the public supports abolishing qualified immunity).

³¹² *Jamison*, 476 F. Supp. 3d at 392. The Fourth Circuit case that Judge Reeves quotes, *Estate of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020), was decided by a panel that included Judge Gregory. Though Judge Gregory did not write the opinion, he joined it in full. See *id.* at 663.

³¹³ See *Jamison*, 476 F. Supp. 3d at 392 (“Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability.”).

³¹⁴ *Id.* at 396.

³¹⁵ See *id.* at 402–03 (explaining that qualified immunity was first granted to officers who had arrested fifteen clergymen protesting “segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961”).

³¹⁶ See *id.* at 407 (including the case of Trent Taylor who was forced to spend “a total of six days in feces-covered cells[.] . . . ‘was not allowed clothing, and [was] forced to endure the cold temperatures with nothing but a suicide blanket’”). The Supreme Court vacated the Fifth Circuit’s grant of qualified immunity without hearing argument. See *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (“Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.”). The reversal, combined with a second shadow docket reversal of a Fifth Circuit qualified immunity case, this time in *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.), prompted speculation that the Supreme Court was starting to back-pedal its qualified immunity doctrine. See Anya Bidwell & Patrick Jaicomo, *Lower Courts Take Notice: The Supreme Court Is Rethinking Qualified Immunity*, USA TODAY (Mar. 2, 2021), <https://www.usatoday.com/story/opinion/2021/03/02/supreme-court-might-rethinking-qualified-immunity-column/4576549001> [<https://perma.cc/XNL9-CCDC>]. Judge Reeves also pointed out the injustice of the Fifth Circuit’s ruling in *McCoy*. See *Jamison*, 476 F. Supp. 3d at 406.

as it had overruled “separate but equal” in *Brown v. Board of Education*.³¹⁷ The opinion is a remarkable example of how movement judges can use their opinions to express solidarity with social movements, even if precedent mandates a ruling for the other side.

5. *Justice Anita Earls’s Concurrence Speaks Truth to Power After the North Carolina Supreme Court Dodges the Race Question at the Heart of State v. Copley*

Movement judges do not ignore difficult, politically-charged questions when they are squarely presented. In *State v. Copley*,³¹⁸ a white man was charged with first-degree murder for shooting Kourey Thomas, a Black man.³¹⁹ The defense argued that the defendant had acted in response to a reasonable fear and shot Mr. Thomas in self-defense.³²⁰ The prosecutor asked the jury to consider whether it believed that the defendant would have shot Mr. Thomas if Mr. Thomas had been white.³²¹ If not, he argued, the defendant’s fear was not reasonable; it was “just hatred.”³²² On review, the North Carolina Supreme Court dodged the question of whether the prosecutor’s remarks were improper, but upheld the guilty verdict because the defendant was not prejudiced by the comments, “given the context of the challenged argument, and the extensive evidence of defendant’s guilt.”³²³

Justice Anita Earls addressed the propriety of the statements head on. In her concurrence, she chastised the majority for assuming the statements were improper “when the propriety of the statement is the very heart of what matters to the administration of criminal justice and the jurisprudence of this State.”³²⁴ She concluded that the record suggested “that jurors potentially might have been swayed by their own conscious or unconscious racial biases instead of the evidence in the case.”³²⁵ Given those circumstances, “the prosecutor properly argued that it would not be reasonable for defendant to fear Kourey Thomas, the victim in the case, if that fear was based on the fact that

³¹⁷ *Jamison*, 476 F. Supp. 3d at 423 (“[T]he status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of ‘separate but equal,’ so too should it eliminate the doctrine of qualified immunity.” (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954))).

³¹⁸ 839 S.E.2d 726 (N.C. 2020).

³¹⁹ *Id.* at 727–28.

³²⁰ *Id.* at 728.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 731.

³²⁴ *Id.* at 731–32 (Earls, J., concurring).

³²⁵ *Id.* at 732.

Kourey Thomas was [B]lack.”³²⁶ Justice Earls explained when a prosecutor’s reference to race is permissible and when it is not, and provided a “two-part standard” based on prior precedent “for evaluating the propriety of a prosecutor’s statements referencing race.”³²⁷ Though she reaches the same outcome as the majority, Justice Earls’s opinion recognizes that injecting race into a case is not always improper and sometimes absolutely essential to reach a just outcome.³²⁸ In so doing, she expressly acknowledges the collateral consequences the reasoning of her opinion will have, as a movement judge should.

6. *Movement Judges Yet to Come?*

While President Biden’s nominations to the federal bench have included a number of potential movement judges, it is too early to tell whether this is progressive reform yielding useful results for abolition or a deliberate attempt to appoint movement judges—though likely the former. The process of appointing federal judges still retains many of the institutional habits that have produced the current judiciary.³²⁹ Still, Biden’s efforts to appoint judges from more diverse personal and professional backgrounds³³⁰ are resulting in the appointment of a number of likely and potential movement judges.

With the nomination of Ketanji Brown Jackson to the Supreme Court, the media is paying more attention than ever to the judicial philosophy of a Biden nominee.³³¹ Amidst the uncritical allusions to

³²⁶ *Id.*

³²⁷ *Id.* at 733.

³²⁸ *See id.* at 734 (“[T]he prosecutor’s references to race in his closing argument were non-derogatory . . . and . . . intended to ensure that the jury did not allow implicit stereotypes about the dangerousness of young [B]lack men to infect their determination of whether defendant established that he had a reasonable fear and acted lawfully in self-defense.”).

³²⁹ *Cf.* Rose Wagner, *Three Judicial Nominees Make It Through Blue-Slip Debacle and out of Committee*, COURTHOUSE NEWS SERV. (Feb. 10, 2022), <https://www.courthousenews.com/three-judicial-nominees-make-it-through-blue-slip-debacle-and-out-of-committee> [<https://perma.cc/EW5A-V8VJ>] (describing Senate backlash to President Biden’s decreased reliance on the extra-constitutional system the Senate developed to require home-state senator approval of judicial nominees).

³³⁰ *See* Adrian Blanco, *Biden, Who Pledged to Diversify the Supreme Court, Has Already Made Progress on Lower Courts*, WASH. POST (Jan. 27, 2022, 5:00 PM), <https://www.washingtonpost.com/politics/2022/01/27/federal-judge-diversity-biden/> [<https://perma.cc/5UC7-UFC9>] (“The president already has muscled through the highest number of federal judges in the first year of a presidency in four decades, with picks from a diverse range of racial, gender and professional backgrounds.”).

³³¹ *See, e.g.,* Camille Busette, *Why a Justice Ketanji Brown Jackson Will Make a Difference*, BROOKINGS (Feb. 25, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/02/25/why-a-justice-ketanji-brown-jackson-will-make-a-difference> [<https://perma.cc/7CJK-EEUP>] (“While her potential confirmation may not alter the balance of opinion on the . . .

Justice Harlan to praise the power of dissent, there is plenty of well-founded speculation that her judicial philosophy will simply not matter in the short term. Her previous jurisprudence is little guide in this—after all, Justice Sotomayor was widely considered a centrist.³³² But Judge Jackson’s background—both as a Black woman and as a public defender—gives at least some indication that she could be a movement judge on the Supreme Court.³³³

Looking even further forward, abolitionists must convince politicians to advance movement judges in the appointment process. That likely will require several changes. First, politicians active in the appointment process should actively seek to appoint judges who have been movement lawyers. The experience of advocating for liberationist social movements is probably the best indicator that a judge is likely to find such advocates’ arguments persuasive. Beyond that, judges should be screened during the interviews leading up to a nomination to discern their legal philosophies, particularly whether they are abolition constitutionalists. Beyond these obvious changes, though, progressive politicians need to break their habit of relying upon prestigious academic credentials³³⁴ as a shorthand for ability. If this habit is meant to shortcut the possibility of right wing attacks on a

Court in the short term, her professional experience . . . and her personal experience as a Black woman . . . will shape how she approaches cases before the court and how both . . . opinions will be framed and argued.”); Editorial Board, *Ketanji Brown Jackson Won’t Be Able to Change a Radical Court. Yet.*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/opinion/ke-tanji-brown-jackson-supreme-court.html> [<https://perma.cc/PSQ8-B3WY>] (discussing the likelihood that the conservative majority will continue its dominance in the short term, but pointing to the potential of a strong dissenter on the Court).

³³² See Joan Biskupic, *The Next President Could Tip High Court*, USA TODAY (Oct. 12, 2004, 7:55 PM), https://usatoday30.usatoday.com/news/politics/elections/nation/president/2004-09-29-election-court-cover_x.htm [<https://perma.cc/38CQ-GM4T>] (“Sotomayor . . . is known as a moderate jurist and could represent a bipartisan choice: She was tapped for a U.S. trial court seat by the first President Bush, then elevated to the appeals court by Clinton.”); *Who Will Replace Justice Souter?*, ABA J. (May 1, 2009, 3:23 AM), https://www.abajournal.com/news/article/who_will_replace_justice_souter [<https://perma.cc/FSA4-P428>] (“A political centrist, the Bronx-born Sotomayor has been regarded as a potential high court nominee by several presidents, both Republican and Democrat.”).

³³³ See Patricia Mazzei & Charlie Savage, *For Ketanji Brown Jackson, View of Criminal Justice Was Shaped by Family*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/01/30/us/politics/supreme-court-ke-tanji-brown-jackson.html> [<https://perma.cc/9KYA-S63B>] (discussing how Judge Jackson’s background—including her uncle’s life sentence on a cocaine charge and her work as a federal public defender—could shape her jurisprudence).

³³⁴ See Elena Mejia & Amelia Thomson-DeVeaux, *How Biden Is Reshaping the Courts*, FIFTYTHREEEIGHT (Dec. 7, 2021), <https://fivethirtyeight.com/features/how-biden-is-reshaping-the-courts> [<https://perma.cc/3WNM-UZ4X>] (“Biden’s appointees aren’t diverse on every metric, though. We found that his judges are more likely to have attended the country’s most prestigious universities and law schools than judges appointed by past presidents.”).

candidate's credentials, it has clearly failed to prevent bad faith criticism of Judge Jackson.³³⁵ Movement judges must put in significant work to shift the law to a more equitable state. It is only fair that we ask politicians to be as thorough in evaluating them, looking to career accomplishments and ability rather than decades-old gold stars on their resumes. We are presently in the midst of a shift in nominating philosophy for the federal bench. While that shift is likely to produce more movement judges, it alone does not mark a clear commitment to doing so. While there is significant cause for hope that this shift marks an improvement, a firm commitment to appoint movement judges in the abolitionist mold would be preferable.

C. *Abolition Constitutionalism: Why Movement Judges Matter*

The core philosophy of a movement judge is abolition constitutionalism. Abolition constitutionalism blends democratic elements of both originalism and progressive constitutionalism.³³⁶ It recognizes that—due to the compromises inherent to conventions and legislatures—all constitutional provisions were subject to some range of original public meanings.³³⁷ These all represent possible modern interpretations and can shift based on democratic principles; the interpretation of the Constitution is neither frozen by the dead hand of the past nor left entirely to the discretion of judges. By contrast, originalism's promise lies in its ability to consider the democratic processes of the past, but its great failing is its authoritarian tendency to treat the results of those processes as static to the point of suicide-pact constitutionalism. Progressive constitutionalism's promise lies in its responsiveness to the democratic goals of the present, but its great failing is its reliance on judicial authoritarianism to justify those goals by whatever means necessary. Abolition constitutionalism cares deeply about both the democratic processes of the past and the democratic goals of the present, seeking to actualize those present goals

³³⁵ See Chloe Simon & Madeleine Davison, *Tucker Carlson's Racist Attacks on Judge Ketanji Brown Jackson Are Only the Latest Examples of His White Supremacist Ideology*, MEDIA MATTERS (Mar. 3, 2022, 4:51 PM), <https://www.mediamatters.org/tucker-carlson/tucker-carlsons-racist-attacks-judge-ketanji-brown-jackson-are-only-latest-examples> [<https://perma.cc/Q247-BZ64>] (detailing a number of ill-founded criticisms Tucker Carlson leveled against the Harvard-educated Judge Jackson, including a demand to see her LSAT score).

³³⁶ See Bernard E. Harcourt, *The Critique and Praxis of Rights*, 92 U. COLO. L. REV. 975, 983 (2021) (looking to an originalism that considers the views of the Reconstruction Congress as a potential legal foundation for efforts to eliminate punitive excesses).

³³⁷ See Roberts, *supra* note 3, at 49–50 (“Deep disputes among antebellum abolitionists over the original Constitution’s stance on slavery presage the differences among contemporary abolitionists on the meaning and utility of constitutional law.”).

through the promises of the past.³³⁸ This Section will first outline some of the interpretations and consequences of abolition constitutionalism,³³⁹ then address some of the anti-democratic trends in contemporary case law which abolition constitutionalism could ameliorate.

1. *The Reconstruction Amendments: The Powerhouse of Abolition Constitutionalism*

Abolition constitutionalism's concern for the democratic processes that produced the Constitution is especially important when interpreting the Reconstruction Amendments. The Amendments had a great range of original interpretations, from those of their drafters and fellow abolitionists, to those of President Johnson and Southern Democrats, to those of newly freed Black Americans.³⁴⁰ The Supreme Court of the late nineteenth century largely adopted President Johnson's constrained interpretation of the Reconstruction Amendments, rendering them relatively toothless.³⁴¹ By contrast, congressional Republicans believed the amendments to enact several strong, overlapping protections.³⁴²

The Thirteenth Amendment abolishes not only slavery but also its badges and incidents—those legal and social stigma which were necessary to its maintenance and could aid in its return.³⁴³ This concept—and Congress's power to legislate to enforce emancipation—are broad enough to reach police and prison abolition, guarantee reproductive rights, and support reparations.³⁴⁴ The Fourteenth Amendment includes several strong protections, including what we now know as substantive due process, incorporation of the Bill of

³³⁸ See Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 8–10 (2021) (exploring the Equal Protection Clause's original understanding as a guarantee of *protection* in contrast to its modern anti-discrimination interpretation).

³³⁹ I address the historical background of the Reconstruction Amendments more fully in *The Antiracist Constitution*, 102 B.U. L. REV. 87, 130–41 (2022).

³⁴⁰ See, e.g., Roberts, *supra* note 3, at 65–70 (discussing contemporary and subsequent disagreement of the meaning of the Thirteenth Amendment's Punishment Clause).

³⁴¹ See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁴² See Hasbrouck, *supra* note 339, at 142–62 (discussing the ways in which protections against the badges and incidents of slavery, of the privileges or immunities of the law, of the equal protection of the laws, and of the due process of law interact, often protecting the same interest under multiple rights).

³⁴³ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”).

³⁴⁴ See Hasbrouck, *supra* note 339 at 133 (laying out the arguments for legislation protecting all of these interests under the Thirteenth Amendment's enforcement clause).

Rights and other fundamental rights, and an affirmative duty for governments to protect the people from violence and discrimination.³⁴⁵ The language of the Reconstruction Amendments' enforcement clauses was meant to invoke an extremely lenient standard of review familiar to the judiciary of the nineteenth century.³⁴⁶ This would have supported a broad range of color-conscious remedies that the modern Court decries.

These broad protections were meant to support the complete reconstruction of American society into an integrated democracy. Congress and—to a lesser degree—the courts were to have the power to bring about the political, civil, economic, and social equality necessary to fully realize the citizenship of formerly enslaved Black people. Reconstruction, in this sense, failed. Abolition constitutionalism envisions a restoration of the intended power of the Thirteenth, Fourteenth, and Fifteenth Amendments to allow the resumption and completion of the Reconstruction project. It is the role of movement judges to incorporate this project back into contemporary jurisprudence.

2. *Diagnosing the Anti-Democratic Trends of Modern Constitutional Law*

Recently, federal courts have issued a wide array of anti-democratic decisions across various bodies of law. Our judiciary suffocates zealous resistance by concerning itself with precedent instead of progress.³⁴⁷ Recent anti-democratic rulings in the areas of voting rights, qualified immunity, labor rights, and the availability of race-conscious remedies highlight the urgency of bringing movement judges onto the bench.

In *Brnovich v. Democratic National Committee*,³⁴⁸ Justice Alito effectively gutted the Voting Rights Act by endorsing the voter sup-

³⁴⁵ See *id.* at 137 (exploring the breadth of the Fourteenth Amendment's protections).

³⁴⁶ See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810 (2010) (arguing that Congress intended its enforcement of the Reconstruction Amendments to be limited only by a standard that evaluated the legitimacy of its ends, the appropriateness of its means, and whether the act was otherwise prohibited).

³⁴⁷ See Michael D. Shear, Stacy Cowley & Alan Rappeport, *Biden's Push for Equity in Government Hits Legal and Political Roadblocks*, N.Y. TIMES (June 26, 2021), <https://www.nytimes.com/2021/06/26/us/politics/biden-racial-equity.html> [<https://perma.cc/CFZ6-UVW2>] ("No part of Mr. Biden's agenda has been as ambitious as his attempt to embrace racial considerations when making decisions. It pushes against limits set by the Supreme Court, which say programs based on race must be 'narrowly tailored' to accomplish a 'compelling governmental interest.'").

³⁴⁸ 141 S. Ct. 2321 (2021).

pression strategy of death by a thousand cuts.³⁴⁹ White supremacist legislatures have demonstrated their ability to target their suppression efforts against Black voters with “surgical precision.”³⁵⁰ Just in the first half of 2021, state legislatures passed laws to restrict mail-in voting, impose voter ID requirements, purge voter rolls, and erect barriers to voter registration.³⁵¹ Movement judges could apply an abolition constitutionalist interpretation of the Fourteenth and Fifteenth Amendments to overturn these blatantly discriminatory laws. Movement judges’ refusal to artificially narrow their view of the law and facts would allow consideration of the full constellation of laws in a discriminatory regime rather than viewing each piece unto itself and concluding that each *law* independently does not cross the line.

*Keller v. Fleming*³⁵² is no aberration in the nightmare of bad Fourth Amendment and qualified immunity decisions.³⁵³ Police officers encountered a mentally infirm man walking in the road, transported him to the county line because they could not determine where his home was, and released him; that night, he was struck and killed by a car while walking back along the road.³⁵⁴ While the court did determine that Deputy Fleming violated Gerald Simpson’s Fourth Amendment rights by seizing him without any clear exception to the warrant requirement,³⁵⁵ it nonetheless found that this was not clearly established law.³⁵⁶ Even without rejecting the doctrine of qualified immunity, movement judges could reject its application in a case such

³⁴⁹ See Elie Mystal, *Bigots Have Finally Accomplished Their Goal of Gutting the Voting Rights Act*, NATION (July 2, 2021), <https://www.thenation.com/article/politics/voting-rights-arizona-court> [<https://perma.cc/A9AP-CDY6>] (“[One] percent of [Brown], [Black], and Native American voters cast votes in the wrong precinct (votes that can now be completely discarded in Arizona), while .5 percent of white voters did. Alito says that this disparity is too small to matter for the Voting Rights Act.”).

³⁵⁰ N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

³⁵¹ See *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> [<https://perma.cc/24D9-4MHW>] (cataloging widespread voter suppression efforts in state legislatures).

³⁵² 952 F.3d 216 (5th Cir. 2020).

³⁵³ See Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 77 (2016) (“Given the Court’s tendency to qualify its precedents and thereby covertly expand the qualified immunity defense, it would not be . . . surprising to find future § 1983 decisions citing *Heien* in referring to qualified immunity as a ‘forgiving’ defense and . . . dismissing a government actor’s misunderstanding of constitutional doctrine as merely ‘sloppy’ rather than ‘plainly incompetent.’”).

³⁵⁴ See *Keller*, 952 F.3d at 219–20 (describing the events leading to Gerald Simpson’s death).

³⁵⁵ See *id.* at 223–24.

³⁵⁶ See *id.* at 226 (“Deputy Fleming’s qualified immunity defense as to Plaintiffs’ Fourth Amendment claim prevails because Plaintiffs failed to prove that a reasonable officer like Fleming would have understood his actions violated clearly established law.”).

as this—just as Judge Dennis did in dissent.³⁵⁷ Of course, movement judges can—and do³⁵⁸—call the doctrine into question, and could eliminate it if they commanded or persuaded a majority on the Supreme Court.³⁵⁹

Workers' rights have suffered repeated defeats from the Roberts Court.³⁶⁰ In *Epic Systems Corp. v. Lewis*, the Court ignored the NLRB's understanding of the National Labor Relations Act as protecting collective worker action both in the workplace and the courtroom to instead enforce mandatory—and individual—arbitration clauses under the Federal Arbitration Act.³⁶¹ The Roberts Court's protection of arbitration under the Federal Arbitration Act takes on a quasi-constitutional character, bowling over even later, robust statutory regimes.³⁶² This pro-corporate jurisprudence is ripe for challenge by movement judges. The abolition constitutionalist conception of due process is broad enough to support a challenge to statutory regimes that amount to a denial of any process whatsoever in many cases.³⁶³

³⁵⁷ See *id.* at 228 (Dennis, J., dissenting) (“Accepting the facts that the district court found to be genuinely disputed, there is simply no legitimate government interest against which to balance the significant intrusion posed by Deputy Fleming’s decision to seize Simpson and dump him in the next jurisdiction without his valid consent.”).

³⁵⁸ See *Jamison v. McClendon*, 476 F. Supp. 3d 386, 419 (S.D. Miss. 2020) (calling upon the Supreme Court to relegate qualified immunity to the “dustbin of history”).

³⁵⁹ Qualified immunity is a doctrine capable of demonstrating the need for movement judges rather than merely progressive judges. “The overly deferential doctrine’s sources are not found in the notoriously conservative Courts of Chief Justice Burger or Chief Justice Rehnquist. Rather, Chief Justice Earl Warren penned the two opinions that spawned the doctrine.” Janet C. Hoeffel, *The Warren Court and the Birth of the Reasonably Unreasonable Police Officer*, 49 STETSON L. REV. 289, 312 (2020).

³⁶⁰ See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

³⁶¹ See *Epic Sys. Corp.*, 138 S. Ct. at 1619 (“This Court has never read a right to class actions into the NLRA—and for [seventy-five years] neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties’ agreements unlawful.”).

³⁶² See WHITEHOUSE, *supra* note 10, at 9 (“The Roberts Five’s pro-corporate policy preference has been particularly evident in aggressive judicial expansion of the Federal Arbitration Act of 1925 (FAA). Their decisions have made this an avenue for powerful and wealthy interests to systematically deny ordinary individuals, like employees and customers, access to juries of their peers when wronged.”); Paul R. Verkuil, *The Supreme Court’s Doublethink on Arbitration and Administration*, REGUL. REV. (Apr. 27, 2020), <https://www.theregreview.org/2020/04/27/verkuil-supreme-courts-doublethink-arbitration-administration> [<https://perma.cc/RTS6-NKVY>] (“*Epic Systems* stands for the proposition that the interests of the FAA and arbitration clauses are stronger than the administrative structure undergirding federal labor law.”).

³⁶³ See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 179 (2019) (“[M]any employment claims cannot feasibly be brought individually. Such claims might be too costly, particularly in relation to expected monetary relief; employees might not even

Finally, movement judges could apply Congress's intended standard of review to its power to enact race-conscious remedies under the Reconstruction Amendments. This is particularly relevant given the tendency of reactionary judges to overturn such programs on a theory of color-blind constitutionalism.³⁶⁴ Recently, the Biden Administration sought to correct an obvious discrepancy in the distribution of coronavirus pandemic relief and was promptly rebuffed by courts ruling that earmarking funds for Black farmers was discriminatory against white farmers.³⁶⁵ The irony of using the Equal Protection Clause to justify denying relief to Black farmers is especially bitter, and drives home the need for movement judges to apply abolition constitutionalist interpretations to redress historic harms.

CONCLUSION

"In a racially divided society majority rule is not a reliable instrument of democracy."

—Lani Guinier, 2020³⁶⁶

Movement judges have tremendous potential to reshape and reinforce our democracy. That democratic organization must extend beyond simply voting for representatives on election day if it is to meaningfully protect the rights of all Americans. Institutions that concentrate political, economic, or social power in the hands of the few are necessarily contrary to democracy. The exclusionary tendency belongs, rather, to oligarchy. That tendency is alive and well in America, seen in the pervasive laws advancing disparate benefits and burdens along white supremacist lines and the jurisprudence that upholds those laws.

Our Constitution contains an antidote for the oligarchic poison in American society: the Reconstruction Amendments. The Reconstruction Amendments were a massive undertaking to advance democracy. Understood in their abolitionist context, they contain powerful guarantees for all Americans, but especially for marginalized

realize they had been harmed or that the harm was unlawful; or [many] might hesitate to file due to fear of retaliation by their employer or others."').

³⁶⁴ See Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 5–6 (2013) (charting the rise of Harlan's dissent in *Plessy* as a bludgeon against race-conscious remedies beginning in the 1980s).

³⁶⁵ See Reiley, *supra* note 69 (describing an injunction blocking as discriminatory—a measure meant to redress the inequitable distribution of previous coronavirus debt relief to farmers by earmarking some federal aid for Black farmers).

³⁶⁶ Lani Guinier, *Second Proms and Second Primaries: The Limits of Majority Rule*, *BOS. REV.* (Mar. 11, 2020), <https://bostonreview.net/articles/lani-guinier-second-proms-and-second-primaries-limits-majority-rule> [<https://perma.cc/FBJ3-ZE3N>].

communities. Movement judges, acting in solidarity with those communities and movements advocating for their rights and interests, can apply the Reconstruction Amendments to advance those interests—and with them, the cause of democracy itself. Completing the Reconstruction project will require movement judges.

The Biden Administration's commitment to diversifying the federal bench—both in terms of personal and professional backgrounds—is an admirable beginning. It is likely that even without a deliberate effort to select movement judges, more will be appointed through this process than through that employed by recent administrations. But this is not enough to truly bring about substantive justice in the judiciary. The courts are full of former prosecutors and corporate attorneys, many of whom continue to operate in solidarity with their former colleagues and clients. We need a counterweight to this—judges willing to hear cases in solidarity with mass social movements and marginalized communities, ruling and writing along abolition constitutionalist lines of reasoning. We need movement judges.