The Roberts Court's Anti-Democracy Jurisprudence and the Reemergence of State Authoritarian Enclaves

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Constitutional democracy in the United States is under assault. From 2020-23, states across the nation feverishly enacted laws undermining the political process, infringing on civil liberties, and invidiously discriminating against marginalized groups. They enacted voter suppression laws, gerrymandered Congressional and state electoral districts, censored books promoting diversity and inclusion in education, and discriminated against racial minorities, LGBT, and women.

What has the Roberts Supreme Court done to stem the wave of anti-democracy legislation sweeping across the country? Not much. In fact, the Roberts Court has rendered key decisions that have been the catalyst for the *antithesis* of democracy-authoritarianism.

The crisis of constitutional and public legitimacy engulfing the Roberts Court in 2023 is due precisely to its anti-democracy jurisprudence. The legitimacy of the Supreme Court is inextricably intertwined with democracy. Legitimacy erodes if the Court issues rulings that stray too far from democratic principles. Yet, the Court has done exactly that. Worse, when presented with opportunities to change course, the Court rejected them and strayed even further *away* from democracy.

This Essay argues that the Roberts Court has been a pivotal institutional player in destabilizing constitutional democracy. It has enabled states to freely pursue agendas that are authoritarian in nature. And because authoritarianism is contrary to core principles of the Constitution, the Roberts Court's constitutional jurisprudence has no basis in the Constitution and must ultimately be rejected.

Instead of taking steps to block authoritarian legislation and promote a fair and open political process, the Court has issued rulings catalyzing and reinforcing the authoritarian impulses of the former Jim Crow states. The Roberts Court has engaged in judicial review reinforcing authoritarianism, thereby establishing a constitutional jurisprudence of anti-democracy.

This Essay proceeds in three parts. Part I will discuss the concept of authoritarianism and explain that Jim Crow states were authoritarian enclaves organized around the racist ideology of white supremacy. Part II will discuss a theory of judicial review premised on reinforcing democracy, and argue that the Warren Court's constitutional jurisprudence actually brought democracy into being in the former Jim Crow states. Put another way, the Warren Court was a key institutional player in democratizing Jim Crow authoritarian enclaves.

Part III will discuss the reemergence of state level authoritarianism in the late 2010s and early 2020s, and argue that the Roberts Court, through a series of anti-democracy decisions, inflamed the very authoritarian impulse that the Warren Court had sought to eliminate in the Jim Crow states.

Part I. Authoritarianism and State Authoritarian Enclaves in the United States

This Part will define and explain the concept of authoritarianism by contrasting it with democracy. It will then discuss Jim Crow segregation states as examples of authoritarian enclaves.

a. Authoritarianism

To define authoritarianism, it is useful to first define its opposite-democracy. Democracy is a form of government based on self-governance by a free and equal citizenry.[1] Self-governance is through representative government in which legislators and executive officers are elected through a fair, open, and competitive political process in which virtually all adult citizens have the right to vote. Civil liberties and equal citizenship are the other central features of democracy.

Authoritarianism lacks some or all of the central features of democracy. An authoritarian political system features (1) an unfair and restricted political process; (2) repressive laws restricting basic civil liberties such as freedom of speech and personal autonomy; (3)

[1] *See* James A. Gardner, Illiberalism and Authoritarianism in the United States, 70 American U. L. Rev. 829, 847 (2021). Gardner describes what I call democracy as liberalism.

inequality between citizens in the form of systematic discrimination against marginalized groups; and (4) a unifying purpose or ideology.[2]

The fourth element ties the other features of authoritarianism together, as the entire point of authoritarianism is to achieve some broad goal or purpose. Authoritarian political control, repression, and discrimination, in other words, are the *means* for realizing some purpose or goal.

The central project of an authoritarian regime can run from abstract and vague to highly elaborate and coherent. An abstract goal of an authoritarian regime may be to bring about "law and order." On the other end of the spectrum, the goal can be a specific system of thought, an ideology, which provides "some *ultimate* meaning"[3] and purpose for the ruling class or group. For example, Nazi Germany was defined by its central ideology, Aryan racial supremacy, which was a "full blown system of thought"[4] bent on establishing a "racist-eugenic utopia."[5]

The unifying ideology of an authoritarian regimes serves as the central rationale for the repression of civil liberties and discrimination against out-groups. As political theorist Hannah Arendt argues, antisemitism for the Nazis was not just religious bigotry or scapegoating for the economic problems of Nazi Germany. Rather, antisemitism was central to defining and giving meaning to Nazism itself.[6] Nazis were members of the superior Aryan race, while Jews were part of an inferior religious-race excluded from membership in the Nazi party. As the antithesis of the Aryan race, Jews represented an existential threat to Aryan racial supremacy and the Nazi's ultimate project of creating an Aryan utopia free of people they deemed inherently inferior. Hence, the purpose of systematically discriminating against Jews during Nazi Germany was to reinforce Nazi identity and ideology.

Authoritarianism, then, is not just an extreme form of conservatism. Rather, it is diametrically opposed to and an existential threat to democracy. Authoritarianism is not about representing the will and best interests of all citizens. Rather, it is about promoting an ideology, even if it means acting *against* the general welfare of the people. If

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[2] *See* Steven Levitsky and Lucan A. Way, The Rise of Competitive Authoritarianism, 13 Journal of Democracy 51, 53 (2002).
[3] Juan J. Linz, Totalitarian and Authoritarian, Regimes 70 (2000) (emphasis added).
[4] Id. at 15.
[5] Id. at 16.
[6] Hannah Arendt, The Origins of Totalitarianism 356 (1976).

people are in the way of achieving an ideological goal, then repression, discrimination, and even violence and terror are measures for neutralizing the threat.[7]

Taken to its extreme, authoritarianism becomes totalitarianism as in the case of Nazi Germany. For the Nazis, systemic discrimination against Jews transformed into a global campaign of genocide meant to eliminate a group whom the Nazis perceived to be the central obstacle to the realization of a global Aryan utopia.[8]

b. Jim Crow Segregation States as Authoritarian Enclaves

The Jim Crow former slave states are examples of authoritarianism in the United States. Political scientist Robert Mickey argues that from the late 1890s to the early 1970s, Jim Crow states operated as subnational "authoritarian enclaves."[9]

Jim Crow states had all four elements of authoritarianism. The white supremacist majority controlled the electoral process and rigged the system to ensure they attained and maintained political power, whether through racist primary systems or racial voter suppression laws. With their virtually unchecked political power, the white majority enact repressive laws severely curtailing basic civil liberties and racially discriminatory laws systematically segregating African America[10]ns, all in the service of white racial supremacy, an ideology based on the racial superiority of the white race and racial inferiority of the black race.

Thus, thinking of Jim Crow segregation as animated solely by irrational anti-black racism is missing a huge part of what was insidious about Jim Crow segregation. Jim Crow states were not just racist, but deeply authoritarian. The Warren Court understood this, and then took active steps to try to end authoritarianism root and branch.

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[7] *See* Id. at 6.
[8] Linz, *supra* note 3, at 15.
[9] Robert Mickey, Paths Out of Dixie: The Democratization of Authoritarian Enclaves in America's Deep South, 1944-1972, 33 (2015)

Part II. The U.S. Supreme Court and the Democratization of Jim Crow Authoritarian Enclaves

This Part will explain the theory of democracy reinforcing judicial review. There are two versions of it, one called representation reinforcement review, and one called democratization review. This Part argue that the Warren Court engaged in the more aggressive democratization review when it issued rulings to transform Jim Crow state authoritarian enclaves into democracies.

a. Democracy Reinforcing Judicial Review

The problem of judicial legitimacy is framed as one about the counter-majoritarian difficulty.[11] The premise is based on the assumption that laws enacted by the democratic majoritarian political process are presumptively legitimate, and therefore a judicial decision by unelected Justices invalidating such laws may be contrary to democracy.

As a response to the counter-majoritarian difficulty, influential constitutional law scholar John Hart Ely developed a theory of judicial review he called representation reinforcement theory.[12] For Ely, judicial intervention into the majoritarian political process is legitimate if it is necessary to fix a malfunctioning political process.[13] When the majoritarian political process is not working properly, then striking down laws enacted through that process is not inconsistent with democratic principles.

Ely's representation reinforcement theory, however, does not fully capture the Warren Court's constitutional jurisprudence and its comprehensive intervention into Jim Crow state political processes over the course of two decades. With respect to Jim Crow, the majoritarian political process was not democratic but *authoritarian*. Thus, judicial intervention wasn't about fixing a democratic majoritarian political process, it was about *bringing democracy into being*. And that is what is meant by democratization judicial review.

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[11] *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, 4 (1980).
[12] *See* Id. at 88.
[13] *See* Id. at 103.

b. The Warren Court and the Democratization of Jim Crow Authoritarian Enclaves

The Warren Court's constitutional jurisprudence in the 1950's and 1960's was singularly focused on democratizing Jim Crow state authoritarian enclaves. The Warren Court took a two-pronged approach to democratization judicial review. It engaged in comprehensive judicial intervention into state political processes, while exercising judicial *restraint* when reviewing Congressional legislation aimed at democratizing Jim Crow authoritarian enclaves.

1. Judicial Intervention into Authoritarian State Political Processes

As discussed in Part I, Jim Crow racial authoritarianism involved white state majorities with authoritarian control of the political process using their virtually unchecked political power to enact repressive and racially discriminatory laws to further their white supremacist ideology and agenda. The Warren Court tackled all four elements of authoritarianism to democratize Jim Crow states.

First, the Court's democratization project began in 1954 by addressing the key aspect of Jim Crow white supremacy, systematic racial discrimination and segregation of African Americans. In *Brown v. Board of Education*,[14] the Court held that racial segregation of public schools violated Fourteenth Amendment equal protection.[15] Of course, *Brown* did not spell the end of Jim Crow authoritarianism. A constitutional declaration that separate is inherently unequal did not instantly racially integrate schools and democratize Jim Crow states. Rather, *Brown* marked the first step in the desegregation process specifically, and the democratization process more broadly.

Second, the Court addressed the repressive laws that marked Jim Crow authoritarian enclaves. The Court did so through the Fourteenth Amendment doctrine of incorporation applying the Bill of Rights to the states through the Due Process Clause.[16]

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[14] Brown v. Bd. Of Educ. 347 U.S. 483 (1954).
[15] Id.
[16] *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (doctrine of incorporation).

The Court also struck down laws highly intrusive of personal autonomy of all citizens, whether white or non-white. In *McLaughlin v. Florida,* the Court held that laws banning interracial sexual relations were unconstitutional,[17] and in *Loving v. Virginia*, the Court held that laws banning interracial marriage violated both equal protection and the substantive due process fundamental right to marry.[18]

Third, the Court was instrumental in breaking up white supremacist control of the political process, and creating freer, more open elections. The Court in *Reynolds v. Sims* fixed the problem of malapportionment diluting the vote of African Americans in urban areas and giving whites more political representation and power than warranted given their population.[19] The Court's principle of one person, one vote under equal protection ended "the most important element"[20] handing whites in Jim Crow state enclaves disproportionate political power in the state legislatures.

The Court also struck down voter suppression measures. In *Harper v. Virginia*[21], the Court held that poll taxes in state elections violated the Fourteenth Amendment fundamental right to vote. Poll taxes, fees that a person had to pay in order to vote, had been powerful tools of racial voter suppression.[22]

Through simultaneously addressing the three key features of authoritarianism, the Court was ultimately seeking to purify Jim Crow states of their authoritarian ideology of white supremacy. It sought to create a new more democratic and inclusive political and social culture. As will be addressed in Part III, however, the Court did not fully succeed in eliminating that ideology, which meant it did not fully succeed in democratizing Jim Crow authoritarian enclaves.

2. Judicial Restraint and Congressional Legislation aimed at Democratizing Jim Crow Authoritarian Enclaves

While the Warren Court systematically intervened at the state level seeking to democratize Jim Crow authoritarian enclaves, it

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[17] McLaughlin v. Florida, 379 U.S. 184 (1964).
[18] Loving v. Virginia, 388 U.S. 1 (1967).
[19] Reynolds v. Sims, 377 U.S. 533 (1964).
[20] Mickey, supra note 9, at 53.
[21] Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
[22] Mickey, *supra* note 9, at 55-56.

simultaneously engaged in judicial restraint with respect to national civil rights legislation aimed at democratizing Jim Crow.

In two key Commerce Clause cases, *Heart of Atlanta Motel, Inc. v. United States*[23] and *Katzenbach v. McClung*,[24] the Court exercised judicial restraint and upheld Title II of the Civil Right Act prohibiting racial discrimination in places of public accommodations. Those two decisions paved the way for Congress to later enact the Civil Rights Act of 1964 prohibiting employment discrimination pursuant to the Commerce Clause.

The Warren Court exercised judicial restraint in upholding key provisions of the Voting Rights Act of 1965 under Congress' Fourteenth Amendment Section 5 enforcement power.[25] Section 5 empowers Congress to enact appropriate legislation to enforce Fourteenth Amendment rights in Section 1. The enforcement power has been understood to be remedial in scope and nature, not plenary. Congress is technically authorized to enact legislation only to enforce Fourteenth Amendment rights established by Court precedent.

However, the Warren Court in *Katzenbach v. Morgan*[26] construed the enforcement power broadly and upheld a provision of the Voting Rights Act that did not have explicit support in Court precedent. The Court expressly referred to the need to defer to Congressional discretion and judgment about the rights that needed to be protected to democratize authoritarian political processes.[27]

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[23] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
[24] Katzenbach v. McClung, 379 U.S. 294 (1964).
[25] 42 USCS § 1971.
[26] Katzenbach v. Morgan, 384 U.S. 641 (1966)
[27] *See* Id. at 651.

Part III. The Roberts Court and Anti-democracy Reinforcing Judicial Review

This Part turns to the Roberts Court's constitutional jurisprudence and argues that it is best described as anti-democracy reinforcing judicial review. This Part will first discuss how former Jim Crow authoritarian enclaves like Texas have been enacting white nationalist authoritarian legislation in the 2020s, then analyze three key Roberts Court decisions that have fueled state level authoritarianism.

a. The Re-emergence of Authoritarianism in the Former Jim Crow Authoritarian Enclaves

For Professor Mickey, Jim Crow authoritarian enclaves were ultimately and fully democratized by the Supreme Court and Congress. The "death knell" of Jim Crow authoritarian enclaves came with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[28]

Mickey, however, was premature in writing the obituaries of Jim Crow authoritarian enclaves. The Warren Court led democratization process did not completely purify the states of their authoritarian impulses. At some point in the 2010s, dormant impulses came to life, erupting in intensity. Moreover, instead of subsiding in the 2020s, authoritarianism intensified in the former Jim Crow states, and worse, has spread to other states.[29]

The state of Texas is illustrative. Texas was one of the eleven confederate states and one of the Jim Crow authoritarian enclaves. In the 2020s, Texas has, in many ways, returned to the racial authoritarianism that Mickey believed to have been extinguished by the 1970s. Texas in the 2010s and 2020s enacted a slew of repressive and discriminatory laws animated by white nationalism.[30] White nationalism is a racial ideology seeking to preserve the "traditional" American way of

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[28] *See* Mickey, *supra* note 9, at 260.

[29] *See* Francis Wilkinson, *OPINION: Republican states are racing toward authoritarianism,* Midland Daily News, May 4, 2023, https://www.ourmidland.com/opinion/voices/article/republican-states-racing-toward-authoritarianism-18078922.php.

[30] *See* Betsy Reed, *Partisan gerrymandering has empowered a hard-right turn in Texas*, The Guardian (September 5, 2021), https://www.theguardian.com/us-news/2021/sep/05/gerrymandering-empowered-hard-right-texas

life from cultural changes sought by historically marginalized groups such as people of color, immigrants, women, and LGBT.[31]

Thus, in the 2020s, Texas has banned critical race theory and diversity, equity, and inclusion programs in all levels of education;[32] engaged in discrimination against immigrants generally and undocumented Latino immigrants specifically;[33] and enacted discriminatory laws targeting trans persons specifically, and LGBT generally.[34]

And Texas is not alone. Many other red states, including most of the former Jim Crow authoritarian enclaves, are pursuing the same white nationalist agenda. Just as Jim Crow authoritarian enclaves pursued their white supremacist ideology and implemented it through repressive and discriminatory laws, current white nationalist state enclaves are eerily engaging in a similar project in a similar manner.

However, there is a key difference between white nationalism in 2023 and Jim Crow white supremacy. The difference may, at first, seem puzzling. In Texas, because of racial demographic change, non-Hispanic whites have gone from 52% of the state population in 2000[35] to 45% in 2010,[36] and 39.7% in 2020.[37] Hispanics/Latinos now are virtually tied with non-Hispanic whites in population, and will exceed them in the 2030 census. How, then, is white nationalism ascendant in

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[31] *See* Douglas S. Massey, The Bipartisan Origins of White Nationalism, 150 Daedalus 5 (2021).

[32] *See* Reed, *supra* note 30

[33] Human Rights Watch. *US: Extreme Anti-Immigrant Proposals in Texas, Hum. Rts. Watch,* October 6, 2023, https://www.hrw.org/news/2023/10/06/us-extreme-anti-immigrant-proposals-texas

[34] William Melhado and Alex Nguyen, *Texas lawmakers pursued dozens of bills affecting LGBTQ people this year. Here's what passed and what failed*, Tex. Trib., Updated JUNE 2, 2023, https://www.texastribune.org/2023/03/06/texas-legislature-lgbtq-bills/

[35] The Texas Politics Project. *Demographics of race and ethnicity in Texas, Tex. Pol. Project,* https://texaspolitics.utexas.edu/archive/html/part/features/0703_01/ethnic.html

[36] The Texas Almanac. *Texas Population: Still Growing and Increasingly Diverse,* Tex. Almanac, https://www.texasalmanac.com/articles/texas-population-still-growing

[37] Ross Ramsey. *Analysis: Texas' population has changed much faster than its political maps,* Texas Trib. Dec. 8, 2021, https://www.texastribune.org/2021/12/08/texas-redistricting-demographics-elections/

Texas when the electorate has become more racially diverse and whites are shrinking numerical minority?

The *how* question can be answered by asking *who*? Who has helped bring American democracy to a state of systemic dysfunction in 2023, particularly at the state level? The answer is the Roberts Court. Through several key decisions, the Roberts Court catalyzed the emergence and growth of white nationalist ideology in former Jim Crow authoritarian enclaves like Texas and Mississippi.

If we can accurately describe white nationalist legislation as a new variation of Jim Crow racial authoritarianism, then the Roberts Court's constitutional jurisprudence can appropriately be deemed *authoritarianism* reinforcing judicial review.

b. The Roberts Court's Authoritarianism Reinforcing Judicial Review

Three key anti-democracy decisions of the Roberts Court are *Shelby v. Holder* in 2013, *Rucho v. Common Cause* in 2019,[38] and *Dobbs v. Jackson Women's Health Organization* in 2022.[39]

1. *Shelby v. Holder*[40]

If we could identify a point in time when white nationalism truly started to take off, it arguably would be 2013, the year the Court decided *Shelby*. The key issue in *Shelby* dealt with the preclearance requirement and the coverage formula in the Voting Rights Act of 2006.[41]

Under the Voting Rights Act of 1965, only some, not all, states were to be subject to Section 5 federal preclearance requirements. Only states "covered" under a coverage formula in Section 4(b) were required to obtain federal approval before making changes to their election/voting laws, and before their electoral maps during redistricting are finalized.

The basis for subjecting a state to federal preclearance was a formula designed to identify states that had voting laws that suppressed the vote of African Americans and other racial minorities. The 1965 Act's coverage formula covered any state that in 1964 used voting tests

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[38] Rucho v. Common Cause, 139 S.Ct. 2484 (2019).
[39] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).
[40] Shelby County v. Holder, 570 U.S. 529 (2013).
[41] *See* Id. at 541-42.

or devices such as literacy tests to deny people the right to vote, and that had low voter registration or turnout in the 1964 presidential election.[42] Based on that formula, six states, all former confederate/Jim Crow states, were subject to preclearance. Those states were Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.[43]

Upon re-authorization of the Act in 1970 and 1975, Congress expanded the coverage formula incorporating date from the presidential elections of 1968 and 1972. As a result, three additional states, Alaska, Arizona, and Texas, along with some counties in several other states, were subject to federal preclearance.[44]

When the Voting Rights Act was reauthorized in 1982 and 2006, Congress made no changes to the coverage formula, and the same nine states subject to preclearance in 1975 were subject to preclearance in the 1982 and 2006 versions of the Act.[45] The Act was reauthorized in 2006 for 25 years by an overwhelming majority in both houses. In the House, the Act passed 390-33.[46] In the Senate, the Act passed by a unanimous vote of 98-0.[47] Republican President George W. Bush signed the Act into law with his full support.[48]

In *Shelby*, the Court, in a majority opinion written by Chief Justice Roberts, held that the coverage formula based on data from the 1960s and 1970s was unconstitutional, and freed the nine covered states from federal preclearance.[49] Roberts reasoned that it was irrational for Congress to rely on their past discrimination to subject the *Shelby* states in 2006 to federal preclearance until 2031.[50] For Roberts,

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[42] *See* Id. at 537.
[43] Id.
[44] Id. at 538.
[45] Id. at 538-39.
[46] *Final Votes For Roll Call 374, H.R. 9* (2006), https://clerk.house.gov/evs/2006/roll374.xml
[47] *See Roll Call Vote 109th Congress - 2nd Session H.R. 9* (109th Cong., 2006), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1092/vote_109_2_00212.htm
[48] *Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006,* The White House: President George W. Bush, https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html
[49] *See* Shelby. 570 U.S. at 557.
[50] See Id. at 556.

the Voting Rights Act had achieved its goal of eliminating racial discrimination in voting, and in 2006, the nine states were no longer a credible threat to systematically engage in voter suppression, and thus subjecting them to federal preclearance amounted merely to punishment for past discrimination.

In striking down the coverage formula, Roberts freed the *Shelby* states from federal preclearance, which meant two things. It meant that they did not need federal approval to make changes in their election laws *and* in drawing electoral maps for the redistricting process. In the immediate aftermath of *Shelby*, many of the nine states immediately took action to restrict access to voting. Texas, Georgia, and Arizona led the charge in closing hundreds of polling stations, many of them in districts with a sizable number of African American and Latino voters.[51]

2. *Rucho* and Political Gerrymandering

In 2019, the Roberts Court in *Rucho v. Common Cause*[52] issued a decision that, together with *Shelby*, set the stage for the rise of white nationalism in the 2020s. The Court held, in a 5-4 majority opinion written by Roberts, that political gerrymandering is a non-justiciable political question, and therefore federal courts have no jurisdiction to overturn politically gerrymandered electoral maps.[53]

Gerrymandering is the manipulation of electoral district lines to give a group an unfair advantage in winning elections over another group.[54] There are two kinds of gerrymandering that occur in redistricting. Political gerrymandering involves a political party manipulating electoral maps to give itself an unfair advantage over an opposing political party. Racial gerrymandering is the same process involving competing racial groups. While analytical distinct, in reality, political and racial gerrymandering can and have been accomplished simultaneously, as will be explained below.

How does gerrymandering give the group doing the gerrymandering unfair advantage? The North Carolina gerrymandered

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[51] The Leadership Conference on Civil and Human Rights: The Nation's Premier Civil & Human Rights Coalition. *Democracy Diverted: Polling Place Closures and the Right to Vote,* https://civilrights.org/democracy-diverted/

[52] Rucho v. Common Cause, 139 S.Ct. 2484 (2019)

[53] Id. at 2508.

[54] *See* Kevin Morris, Partisan Gerrymander Review After Rucho: Proof is in the Procedure, 105 Marq. L. Rev. 787, 790 (2022).

Congressional map at issue in *Rucho* is illustrative. In 2016, the Republican controlled North Carolina state legislature drew a gerrymandered map designed to elect ten Republican Congressional representatives and just three Democrats, even though North Carolina had a roughly even number of Democratic and Republican voters.[55] A fair map might have been drawn to elect 7 Republicans and 6 Democrats. Instead, North Carolina adopted the 10-3 gerrymandered map along party lines for the November 2016 elections.[56]

Through gerrymandering, not all votes are worth the same. In North Carolina, Democratic votes counted for less than Republican votes. Thus, gerrymandering results in vote dilution, disempowering the party whose votes count for less. But, more insidiously, gerrymandering also *enhances* the voting power of the party that does the gerrymandering.[57]

Gerrymandering is completely antithetical to democracy, a point that even Roberts concedes in his *Rucho* opinion.[58] Roberts admits, "Excessive partisanship in districting leads to results that reasonably seems unjust."[59] Roberts also asserts that gerrymandering violates core principles of democracy.[60] The entire purpose of gerrymandering is to disregard the principle of one person, one vote.[61] Yet, Roberts still proceeded to issue a ruling knowing full well that it would undermine the democratic political processes at both the federal and state levels.

The discourse over gerrymandering, however, tends to focus on Congressional maps, and as a result, one of the most pernicious consequences of gerrymandering is either underemphasized or ignored. Gerrymandering is particularly destructive of democracy at the *state* level, because it can give one political party *complete* control over the state political process.

Complete control over the political process means control over the electoral process and the legislative process. Control over the

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[55] Rucho, 139 S. Ct. at 2491.
[56] Id.
[57] Id.
[58] Rucho, 139 S. Ct. at 2506.
[59] Rucho, 139 S. Ct. at 2506.
[60] See Id.
[61] Id.

electoral process means being able to unilaterally dictate the rules by which elections occur. Through control of the electoral process, a political party can entrench and enhance their power by ensuring as much as possible that party candidates win elections and party incumbents win re-elections.

Through control of the electoral process, the party in control may then be able to take control of the legislative process. A party controls the legislative process when it gains a substantial majority of seats in both the state house and senate. The key for complete control is achieving supermajority status or close to it in both houses. A dual supermajority accomplishes two things-it empowers the supermajority to enact legislation without having to compromise or negotiate with the opposing party. Second, dual supermajorities ensure that the party in control can override the veto of a governor of an opposing party

Through gerrymandering and/or voter suppression, there are many states in which one political party has complete control of both the electoral and legislative processes, states such as Texas, Florida, and Mississippi. Complete control over the political process is a necessary predicate for authoritarian rule, but complete control by and of itself does not necessarily lead to authoritarianism. It is when the party in control enacts repressive and discriminatory laws to further an ideology that is the hallmark of authoritarianism. And that is exactly what many of the former Jim Crow authoritarian enclaves like Texas and Mississippi have been doing in the 2020s.

Shelby and *Rucho* together, then, explain how the continuously shrinking white *minority* in Texas solidified their authoritarian-like control over the political process in the 2020s.. *Shelby* freed Texas from having to get federal preclearance for their 2021 redistricting plan, and they drew a map even more gerrymandered than the gerrymandering 2013 maps. The 2021 map makes whites, who make up about 40% of Texas' population, the majority in 60% of state senate districts.[62] And because of *Rucho*, Democrats/people of color cannot file suit in federal court to challenge Texas' partisan gerrymandering.

The Roberts Court, through *Shelby* and *Rucho*, has nurtured the rise of white nationalist authoritarian minority rule in Texas, and has enabled other states with bare and shrinking white majorities, like Mississippi, Florida, and Georgia, to strengthen their grip on political

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[62] Liz Granderson. *Column: Texas gerrymandering is all about keeping a grip on white power*, L.A. Times, Dec. 8, 2021, https://www.latimes.com/opinion/story/2021-12-08/texas-gerrymandering-white-power-latino-voters

power. After *Shelby* and *Rucho*, the Roberts Court was not yet done with deconstructing democracy. In 2022, the Court in *Dobbs* gave the white nationalist authoritarian enclaves it helped to create the opportunity to enact repressive and discriminatory laws restricting the reproductive and bodily autonomy of women.[63]

3. Dobbs v. Jackson

In *Dobbs*, the central issue was whether the Court should overrule *Roe v. Wade* and *Planned Parenthood v. Casey*. In *Roe*, decided in 1973, the Court held that the right to terminate a pregnancy is a fundamental due process right of personal autonomy.

The *Dobbs* Court, in a majority opinion written by Justice Samuel Alito, overruled *Roe* and *Casey* and held that abortion is no longer a fundamental right protected by due process.[64] As a result, states could freely regulate and even ban abortion entirely with little to no constitutional restrictions.

The *Dobbs* decision involved a variation on the Court's choice between judicial intervention or judicial restraint. The Court had already intervened in *Roe* and placed permanent restrictions on the power of state political processes to ban abortion. The question was not about intervening or exercising restraint, but about whether to *end* an intervention into the political process.

Why did the Court end its judicial intervention? For Justice Alito, in addition to his belief that the right to abortion has no basis in the text of the Constitution, his other central claim was that *democracy* compelled the result.[65] The theme of democracy is prominent in Alito's opinion. He quotes Scalia's dissent in *Casey*: "The permissibility of abortion…are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[66] Alito then proclaims, "That is what the Constitution and the rule of law

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[63] Dobbs, 142 S.Ct. 2228 (2022).
[64] Id. at 2279.
[65] Id. at 2282.
[66] Id. at 2243.

demand."[67] In reiterating that the Court is returning the power to regulate abortions "to the people and their elected representatives,"[68]

Alito takes pains to emphasize that the Court is not taking sides on the abortion issue. Rather, the Court is simply letting democracy decide whether abortion is permitted or restricted. If women and pro-choice voters want abortion to be legal, then they just need to use their free speech and voting rights to protect abortion through the political process.

Alito even suggests that women have a realistic chance of getting abortion protection legislation enacted in states such as Mississippi.[69] He notes that women make up 51.5% of Mississippi's population, and that in the November, 2020 elections, women in Mississippi constituted 55.5% of the voters who voted.[70] "Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so."[71]

However, upon a close examination of Alito's democracy claim, the better argument is that *Dobbs* is a deeply *anti*-democracy decision, and worse, *Dobbs* is a clear example of *authoritarianism* reinforcing judicial review. How so? The key is that Alito falsely suggested that women who want to protect abortion rights have a realistic opportunity of doing so through the political process in a state like Mississippi. But that is patently untrue, because political processes in Mississippi are best described as authoritarian or authoritarian-like, not democratic, in nature. If that is the case, then obviously, turning the issue of abortion over to authoritarian-like political processes makes *Dobbs* a decision rooted in authoritarianism, not democracy.

The argument is based on three claims. The first claim is that states like Mississippi in 2023 are authoritarian-like state enclaves animated by a racial authoritarian ideology. The second claim is that the Court nurtured and helped bring into existence those authoritarian-like state enclaves through *Shelby* and *Rucho.* The third claim is that *Dobbs* then gifted those states with the freedom to enact repressive, discriminatory legislation on an issue of central concern to their authoritarian ideology, and they have been doing exactly that.

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[67] Id.
[68] Id. at 2234.
[69] Id. at 2279.
[70] Id. at 2277.
[71] Id.

i. The State of Mississippi as an Authoritarian-like Enclave

In 2022, the year *Dobbs* was decided, the Republican Party had achieved authoritarian control over the political process, with supermajorities in both houses. The GOP had 77 Republicans to 41 Democrats representatives in the House, and 36 Republicans to 16 Democrats in the senate. [72] Moreover, Republican supermajorities in Mississippi meant a *white* supermajority. All Republicans in both houses were white, and virtually all Democrats in both houses were African American.[73] The Mississippi GOP was able to achieve supermajorities in both houses even though the number of whites in Mississippi *decreased* from 58% of the overall population in 2010 to 56% in 2020.

Despite the white population decrease, in the 2023 November elections, the GOP actually *expanded* their supermajority in the state house by two seats, and now hold a 64% supermajority, 79-41.[74] In the state senate, the GOP maintained the same 69% supermajority of 36-16 that they held in 2022.[75]

How did the white Mississippi GOP gain and consolidate complete control over the political process in 2023? They did so with significant assistance from the Supreme Court in *Shelby* and *Rucho*.

ii. *Shelby*, *Rucho*, and the Re-emergence of Authoritarianism in Mississippi, 2011-2023

The origins of the Republican takeover of the Mississippi state political process began in 2011, when the Republicans took control of

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[72] Frank Corder. *Republicans pick up seats in Mississippi House, hold the line in state Senate*, Magnolia Trib. November 8, 2023. https://magnolia-tribune.com/2023/11/08/republicans-pick-up-seats-in-mississippi-house-hold-the-line-in-state-senate/

[73] Mississippi Free Press. *First Black Republican Elected To Mississippi House Since Reconstruction*, August 10, 2023. https://www.mississippifreepress.org/35419/first-black-republican-elected-to-mississippi-house-since-reconstruction

[74] Croder, *supra* note 73

[75] Id.

the state house[76] and senate.[77] The state house chamber flipped from 75 Democrats and 47 Republicans in 2007 to 64 Republicans and 58 Democrats in 2011.[78] The state senate chamber flipped from 28 Democrats and 24 Republicans to 31 Republicans and 21 Democrats.[79] With Republicans now in control of the redistricting process, in 2012, the state drew up a gerrymandered electoral map that was adopted along party line votes.[80] The gerrymandered maps would take effect in the 2015 state house and senate elections.

In 2012, the year before *Shelby* was decided, Mississippi voter turnout in the 2012 elections was relatively robust. 2012 voter turnout in Mississippi ranked 21st in the nation among all states and was 3.6% above the national average turnout.[81] Moreover, African American turnout in Mississippi was actually 10.6% *higher* than white turnout.[82]

After the Court decided *Shelby* in 2013, the shift to authoritarian rule in Mississippi started in earnest. Mississippi was one of the nine states subject to federal preclearance under the Voting Rights Act. From 2013 going forward, Mississippi was free to enact any changes it wanted with respect to its election and voting laws without needing federal approval. Mississippi immediately implemented a photo ID requirement for voting that had previously been blocked by the federal government.[83] The campaign of voter suppression had begun.

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[76] Ballotpedia. *Mississippi House of Representatives***,** https://ballotpedia.org/Mississippi_House_of_Representatives

[77] Ballotpedia. *Mississippi State Senate*, https://ballotpedia.org/Mississippi_State_Senate

[78] Ballotpedia. *Mississippi House of Representatives* https://ballotpedia.org/Mississippi_House_of_Representatives

[79] Ballotpedia. *Mississippi State Senate*, https://ballotpedia.org/Mississippi_State_Senate

[80] The Associated Press: News from the Mississippi Press, *Justice Department approves Mississippi Senate, House redistricting maps (updated),* Associated Press, September 14, 2012 https://blog.gulflive.com/mississippi-press-news/2012/09/justice_department_approves_mi.html

[81] New Hampshire Secretary of State. *Voter Turnout Ranking of States: 1996 - 2020 Presidential Elections, Based on Vote for Highest Office Divided by Voting Aae Population (VAP) AFTER National Voter Registration Act of 1993* https://www.sos.nh.gov/sites/g/files/ehbemt561/files/documents/2022-04/voter-turnout-charts-4-19-21.pdf

[82] Brennan Center for Justice. *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act* https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights, August 20, 2021

[83] Id.

In 2015, the Republicans increased their majorities in both the state house and senate. In the senate, the Republicans gained an additional seat to give them 32 senate seats to 20 for Democrats. In the House, the Republicans were able to gain a supermajority of seats by adding nine seats for a total of 73 seats to the Democrats' 49 seats.[84] In 2019, the Republicans expanded their supermajorities even further in both houses, particularly in the senate. The 2015 Republican senate advantage of 32-20 ballooned to 36-16 in 2019, a 69% supermajority.[85]

What could explain the great expansion of political power in both Mississippi state houses from 2011 to 2019? Two key factors were the 2012 gerrymandered maps and *Shelby* in 2013 freeing the Republican Party to use their power to enact voter suppression laws aimed at suppressing African American voter turnout. In the 2016 presidential election, three years after the state enacted a slew of voter suppression measures, Mississippi general voter turnout decreased dramatically from 2012. While turnout was 57.2% in the 2012 presidential elections, it dropped to 53.3% in 2016.[86] That significant drop was largely due to a significant drop in African American turnout. While African Americans still turned out at a higher rate than whites, the difference of 10% in 2012 dropped to a mere 1.4% in 2016, a 714% decrease.[87]

While some of that decrease may be attributed to the absence of President Obama on the presidential ticket in 2016, some of that decrease may also be attributed to voter suppression measures enacted

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[84] Ballotpedia. *Mississippi House of Representatives***,** https://ballotpedia.org/Mississippi_House_of_Representatives

[85]Ballotpedia. *Mississippi State Senate*, https://ballotpedia.org/Mississippi_State_Senate

[86] New Hampshire Secretary of State. *Voter Turnout Ranking of States: 1996 - 2020 Presidential Elections, Based on Vote for Highest Office Divided by Voting Aae Population (VAP) AFTER National Voter Registration Act of 1993* https://www.sos.nh.gov/sites/g/files/ehbemt561/files/documents/2022-04/voter-turnout-charts-4-19-21.pdf

[87] Brennan Center for Justice. *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights*, August 20, 2021

after Mississippi was freed from federal preclearance in *Shelby*.[88] In fact, in the 2004 presidential elections, African Americans turned out at a 6.6% higher rate than whites.[89] In short, voter suppression is likely a significant reason for low black voter turnout since 2012.

That brings us to 2023, the year in which the GOP expanded their supermajority grip on state political power despite losing white population from 2010 to 2020. How did they do it? Through politically gerrymandering with *Shelby's* and *Rucho's* blessing. In 2023 and the foreseeable future, the white GOP will continue to maintain their authoritarian control of the political process even as their population continues to dwindle.

iii. Repressive and Discriminatory Laws Restricting Women's Reproductive Autonomy Post-*Dobbs*

To argue that *Dobbs* is an authoritarianism reinforcing decision, it is not enough to demonstrate that the Mississippi state political process is under authoritarian control. It must also be demonstrated that states like Mississippi can and will use that authority to enact repressive and discriminatory abortion restrictions consistent with and/or to promote an authoritarian ideology. To reiterate, to be against abortion is not, by and of itself, an authoritarian or ideological position. The key is determining if abortion restrictions are discriminatory, repressive, and driven by ideology. Based on an assessment of abortion laws enacted after *Dobbs*, for many states, including Mississippi, the answer is yes.

First, abortion restrictions post-*Dobbs* are discriminatory against women, not just because they affect just women, but they reflect at best, indifference to the interests of a pregnant woman/person, and at worst, they reflect gender animus or misogyny/sexism. Post-*Dobbs*, sixteen states have effectively banned abortion at all stages of

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[88] New Hampshire Secretary of State. *Voter Turnout Ranking of States: 1996 - 2020 Presidential Elections, Based on Vote for Highest Office Divided by Voting Aae Population (VAP) AFTER National Voter Registration Act of 1993* https://www.sos.nh.gov/sites/g/files/ehbemt561/files/documents/2022-04/voter-turnout-charts-4-19-21.pdf

[89] Brennan Center for Justice. *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act* https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights, August 20, 2021

a pregnancy. Fourteen states categorically ban abortions, and two states permit abortion only in the first six weeks of a pregnancy.[90] Of those sixteen states, the vast majority are former confederate or Jim Crow states.[91] And six states of those states had been subject to federal preclearance under the Voting Rights Act before *Shelby*, including Mississippi.

Mississippi, in fact, has one of the most extreme abortion bans in the nation. It completely bans abortion except to save the pregnant woman/person's life, or in the case of rape.[92] There is no health exception. The only states with a more extreme ban are Arkansas, Oklahoma, and South Dakota, states with only a life exception.[93]

Mississippi's statute is indifferent at best, hostile at worst, to the health interests of women. The ban essentially bars a pregnant woman from receiving medical care she needs and forces her to suffer serious impairment to her health. Only women, not men, are subject to such kind of treatment by the state. It is unlikely that there is a similar statute in Mississippi that bars men from receiving necessary medical care and forces them to suffer from impairment of health.

Mississippi may respond by arguing that it is not discriminating against women, but just believes that the interest in fetal life outweighs any physical harm that a woman must suffer short of death. However, that response does not explain why Mississippi and many other states do not have a lethal fetal anomaly exception.[94] Only five of the sixteen states that have effectively banned abortion have a lethal fetal anomaly exception, which permits an abortion if the fetus would not ultimately survive at birth. What that means is that, in Mississippi and ten other states, a woman is forced to carry a pregnancy to term even when the

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[90] KFF: The independent source for health policy research, polling, and news. *State Health Facts, Women's Health, Abortion Policies, Abortion Gestational Limits and Exceptions*, KFF, as of November 2, 2023. https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D

[91] Id.

[92] Id.

[93] Id.

[94] Id.

life of the fetus is not at stake.[95] In such a case, there is no "pro-life" justification for prohibiting a pregnant woman/person from obtaining an abortion. Without one, the abortion ban is an arbitrary infliction of harm and better explained by sexism/misogyny rather than mere indifference.

In addition to being discriminatory, abortion restrictions post-*Dobbs* are repressive. Many states enforce their abortion ban through threat of criminal sanctions against doctors who perform abortions.[96] The threat of criminal sanctions is the reason why doctors have been refusing to perform abortions for medically necessary reasons even though the abortion statute in a state may have a health exception.[97] A lawsuit filed in Oklahoma alleges that two Oklahoma hospitals refused to perform a medically necessary abortion on a woman, telling her that they would perform the procedure only if her health condition was "actively crashing or on the verge of a heart attack."[98]

Finally, what explains the discriminatory and repressive abortion restrictions by states like Mississippi is racial ideology, which provides the final piece of the authoritarian puzzle. In the context of draconian abortion bans in authoritarian-like enclaves like Mississippi or Texas, "pro-life" is actually a means to ideological end. For white nationalism, controlling white women's reproductive autonomy is crucial to their project of increasing the white population in the United States to ensure continuing white political and cultural dominance in the face of increasing racial diversity and demands for equality and inclusion.[99] Specifically, white nationalists are obsessed about increasing the low birth rates among white women.[100] Abortion and reproductive autonomy, a right associated with liberal women who may prefer

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[95] Id.
[96] Nadine El-Bawab, *Women, doctors announce legal action against abortion bans in 3 states: The women allege they were denied abortions despite dangerous complications*, ABC News, September 12, 2023, https://abcnews.go.com/US/women-doctors-announce-legal-action-abortion-bans-3/story?id=103055654
[97] See Id.
[98] Id.
[99] *See* Anti-Defamation League, *Misogyny is a Powerful Undercurrent of the "Great Replacement" Conspiracy Theory* July 23, 2021, https://www.adl.org/resources/blog/misogyny-powerful-undercurrent-great-replacement-conspiracy-theory-0,
[100] *See* Id.

career over children, is a chief obstacle to the white nationalist goal of increasing the white population and preventing "white genocide."[101]

White nationalism and its focus on controlling women's reproductive autonomy has its roots in white racial supremacy under Jim Crow.[102] Jim Crow segregation states enacted its segregation laws with the goal of preventing whites and white women in particular from marrying and having children with non-whites. Bans on interracial sex and marriage were enacted and enforced as a measure to prevent the "mongrelization" of the white race. Mongrelization was the racist term for the production of mixed-race children. The segregationists feared that if interracial marriages became legal, over time, there would be so much interracial marriages that the nation would eventually become a nation of "mongrels" or "mixed-race" people.

In short, controlling reproductive autonomy of women was and is central to both authoritarian white supremacist and white nationalist ideologies. And a major reason that white supremacy has re-emerged as a powerful white nationalist political movement is the Roberts Court's anti-democracy judicial review, capped off in 2022 with *Dobbs*.

Conclusion

What is the path going forward? What can be done to restore democracy in America? Short term, the best shot for protecting rights and democratizing state authoritarian-like enclaves may lie with state courts and direct democracy mechanisms. Long term, it will be necessary to democratize the U.S. Supreme Court by electing presidents who will appoint Justices firmly committed to *democracy* reinforcement judicial review.[103]

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[101] *See* Reginald Oh, Fear of a Multiracial Planet: Loving's Children and the Genocide of the White Race, 86 Fordham L. Rev. 2761, 2769 (2018).

[102] *See generally* Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. Davis L. Rev. 1321 (2006).

[103] See Carolyn Shapiro, Democratic Federalism and the Supreme Court: Keynote Address at the 2023 Ira C. Rothgerber Conference 20 (paper on file with author).