



ARTICLE

Imperialism and Black Dissent

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Abstract. As U.S. imperialism expanded during the twentieth century, the modern national security state came into being and became a major force in the suppression of Black dissent. This Article reexamines the modern history of civil liberties law and policy and contends that Black Americans have historically had uneven access to the right to freedom of speech in the United States. Through archival research and legal analysis, I conduct four case studies that are representative of key trends in Black dissent after World War II: Black Communism, the Civil Rights Movement, the Black Power movement, and the Movement for Black Lives. These case studies illustrate how the modern national security state has affected the First Amendment right to freedom of speech and managed Black dissent in the United States, particularly when such speech is anti-imperialist or anticapitalist.

I argue that the modern national security state is one of the power structures undergirding free-speech jurisprudence. It operates in concert with free-speech colorblindness, a phenomenon I track in the final Part of this Article, to suppress domestic dissent by subordinated racial groups. The case studies suggest that the practical consequence of free-speech colorblindness is the narrowing of speech rights for Black dissenters and the overall containment of Black dissent.

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Introduction

“One who reads this record will have, I think, the abiding conviction that these people were denied a permit solely because their skin was not of the right color and their cause was not popular,” proclaimed Justice Douglas in his scathing dissent in *Walker v. City of Birmingham*.¹ In *Walker*, the Court found in favor of the City of Birmingham after Commissioner Eugene “Bull” Connor refused to give the Southern Christian Leadership Conference a permit to protest segregation laws on Easter weekend 1963.² Connor was an avid segregationist, best known for ordering attacks on Black children with police dogs and fire hoses during the Children’s Crusade marches to protest racial apartheid in Birmingham on May 3, 1963.³ On the day before the attacks, he had ordered the arrests of 900 Black children in what would later be remembered as one of the most violent episodes of the Civil Rights Movement.⁴

Walker v. City of Birmingham is often treated as a historical outlier in civil rights and civil liberties jurisprudence.⁵ According to the prevailing logic, the Warren Court largely protected the First Amendment rights to freedom of speech and association in order to promote racial equality⁶ and

1. 388 U.S. 307, 337 (1967) (Douglas, J., dissenting).

2. *Id.* at 317-18, 318 n.10, 321.

3. See Connor, *Theophilus Eugene “Bull,”* MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://perma.cc/KPS4-H5J7> (archived Nov. 21, 2022). The Martin Luther King, Jr. Research and Education Institute at Stanford University houses the King Papers Project and conducts a host of other educational activities, including completing the definitive, multivolume edition of Dr. King’s papers and publishing other books and research tools intended for both scholarly and general audiences. See *The King Institute*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://perma.cc/2SCB-SY5W> (archived Nov. 21, 2022).

4. Connor, *Theophilus Eugene “Bull,”* *supra* note 3.

5. The *Walker* decision resulted from a shift in civil rights and civil liberties jurisprudence that took place after the rise of the Black Power movement as fears of rebellion engulfed the nation. See Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J.F. 685, 697 (2018). “Perhaps in light of the changed tenor of racial justice protests . . . *Adderley* signals the end of the Court’s interest convergence with civil rights protesters.” *Id.* *Adderley* was decided in 1966. *Adderley v. Florida*, 385 U.S. 39, 39 (1966). By the time of the *Walker* decision in 1967, liberal calls for racial equality were replaced by demands that Black people respect the law. “Under cover of exhortation that the Negro exercise ‘respect for judicial process,’ the Court empties the Supremacy Clause of its primacy by elevating a state rule of judicial administration above the right of free expression guaranteed by the Federal Constitution.” *Walker*, 388 U.S. at 338 (Brennan, J., dissenting).

6. Hansford, *supra* note 5, at 694 n.38. Hansford argues that First Amendment scholars continue to follow the example of the book *The Negro and the First Amendment* by Harry Kalven, Jr., in asserting that the Warren Court expanded civil rights and civil liberties as a show of support for the Civil Rights Movement. *Id.* (citing Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1075 (2002)); see also HARRY KALVEN, *footnote continued on next page*

advance what legal scholars have called a “constitutional revolution.”⁷ Of course, Chief Justice Warren’s enthusiastic support of Japanese internment during his tenure as California Attorney General⁸ belies this narrative of constitutional veneration.⁹

Such normalized treatment of the First Amendment warrants reexamination. In this Article, I contend that Black Americans have historically had uneven access to the right to freedom of speech.¹⁰ I conduct

JR., *THE NEGRO AND THE FIRST AMENDMENT* 65-121 (1965) (discussing the Civil Rights Movement’s effect on the First Amendment).

7. Morton J. Horwitz, *The Annual John Randolph Tucker Lecture, The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993); see, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS*, at xi, 1 (2000); William F. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205, 206-15 (1970).

8. According to Eric K. Yamamoto et al.:

Although [Chief Justice] Warren later expressed regrets about the internment and his pivotal role, he nevertheless defended *Korematsu* as late as 1962, arguing that “[w]ar is, of course, a pathological condition for our Nation. Military judgments sometimes breed action that, in more stable times, would be regarded as abhorrent. . . . Judges cannot detach themselves from such judgments, although by hindsight, from the vantage point of more tranquil times, they might conclude that some actions advanced in the name of national survival had in fact overridden the strictures of due process.”

ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 157 (2001) (quoting Earl Warren, Lecture, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 191-92 (1962)); see also Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 128-31 (1998) (questioning why Warren’s support of Japanese internment is rarely discussed and how that affects historical and legal understandings of internment).

9. See generally, e.g., AZIZ RANA, *THE CONSTITUTIONAL BIND: WHY A BROKEN DOCUMENT RULES AMERICA* (forthcoming 2024) (exploring the rise of constitutional veneration in the twentieth century—especially against the backdrop of growing American global authority—and how veneration has influenced the boundaries of popular politics).

10. My historical methodology is informed by both a genealogical and an archaeological analysis of the law. I seek out legal and ideological discontinuities as moments of profound significance and rupture in the creation of power in the law. I do not reject the importance of patterns and continuities in history and the law, which is the central methodology used in much historical writing and is based on the historical method put forth by Hegel in a series of lectures at the University of Berlin in 1822, 1828, and 1830. See generally G.W.F. HEGEL, *LECTURES ON THE PHILOSOPHY OF HISTORY* (Ruben Alvarado trans., WordBridge Publ’g 2011) (1837) (describing the methodology). But the methodological pursuit of an overarching master narrative tends toward reinforcing the telling of history from the perspective of its victors, relying on key events and individuals that are reflected in public archives. Such histories function to marginalize or erase stories like the one I tell in this Article, instead reifying the narrative that the state seeks to advance about itself. Thus, this is neither an “eventist” history, nor a history of great cases and great men.

The role of genealogy is to record its history: the history of morals, ideals, and metaphysical concepts, the history of the concept of liberty or of the ascetic life; as they stand for the emergence of different interpretations, they must be made to appear as events on the stage of historical process.

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four case studies that are representative of key trends in Black dissent after World War II: Black Communism, the Civil Rights Movement, the Black Power movement, and the Movement for Black Lives.¹¹ Through archival research and legal analysis, I illustrate how U.S. imperialism has shaped both the First Amendment right to freedom of speech and the national security state, narrowing the contours of Black dissent in the United States.¹²

The dynamic relationship between state suppression of both Communist dissent and Black dissent has shaped the modern First Amendment in significant ways. While the state completely suppressed Communist dissent, it could not do the same with Black dissent, for then the world's nonwhite peoples, the great majority of the global population, would view the United States as a disingenuous critic of the Soviet Union.¹³ Rather, the state sought to discipline Black dissent, offering concessions on issues pertaining to segregation and voting rights while delimiting the economic-justice impulses that animated much of Black radical activism.

Such concessions led to significant shifts in constitutional jurisprudence. This Article tracks those shifts with regard to the First Amendment right to freedom of speech, which came to be a key force in the management of Black dissent during and after the Cold War. The case studies in this Article, when analyzed alongside one another, expose how the First Amendment facilitated the deportation of Black Communists and the bifurcation of the Civil Rights

MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139, 152 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977).

11. I began the research for this Article with the intention of writing about both Malcolm X and the Nation of Islam as well, but I found that many government materials on both have not been declassified, and as a result the state's archives are fraught with inconsistencies and insurmountable gaps. Marcus Garvey and the Universal Negro Improvement Association are also significant forces in U.S. history, but my study here and in the book project from which this law review article is drawn are limited to the Cold War era and after.

12. As Derrick Bell has noted:

Unfortunately, history shows that the courts are as likely to decline as to provide relief when blacks involved in protest activity seek judicial protection from white retaliation. Justices of the Supreme Court have been motivated less by their conceptions of First Amendment guarantees than by their sympathy with the underlying goals of protest activity. During the first half of the 1960s, when the civil rights movement sought the most basic civil rights and liberties, demonstrators were protected against the frequently violent challenges of white groups and white governments. But after 1965, weary of the tactics of the civil rights movement and ambivalent about its goals, the Court began to withdraw its support from protest demonstrations.

DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 10.3, at 601 (6th ed. 2008).

13. See, e.g., Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980); see also MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 12 (2000); Hansford, *supra* note 5, at 694.

Movement from Communism in the early years of the Cold War.¹⁴ This bifurcation disturbed the ideological synergy between the two movements and led to the simultaneous deradicalization of the Civil Rights Movement and marginalization of U.S. Communism. After the rise of the Civil Rights Movement and Black Power, the First Amendment then failed to protect the legitimate speech of those movements against the onslaught of the FBI and local police.¹⁵

But the First Amendment does not function in a historical or political vacuum. As the modern national security state evolved in response to U.S. imperialism and the rise of Communism, it too came to be a major force in the suppression of Black dissent, disciplining and undermining freedom of speech. I contend that the rise of U.S. imperialism and the modern national security ideology during World War II are key factors shaping Black dissenters' access to freedom of speech today. Black rebellion and dissent have been treated as matters of domestic security in the United States since the founding of the nation.¹⁶ In fact, the federal government was suppressing the activism of Black radicals as early as World War I. According to Theodore Kornweibel, Jr., federal agents were monitoring Black radicals during the early twentieth century purely because of their speech and activism.¹⁷ In 1919, Attorney General A. Mitchell Palmer "submitted to the Senate a lengthy report on the *Investigation Activities of the Department of Justice*," warning that "[p]ractically all of the radical organizations in this country have looked upon the Negroes as particularly fertile ground for the spreading of their doctrines. . . . [T]he Negro is 'seeing red.'"¹⁸ Notably, the modern political intelligence system took shape during this period and into World War II and, by the Cold War, had become a permanent establishment.¹⁹ Policy shifts proposed by Cold War-era strategists

14. See *infra* Part II.

15. See *infra* Parts II.C-.D.

16. Federal suppression of Black movements in the United States has a long history. Theodore Kornweibel, Jr., argues that:

From 1918 into the early twenties, any African Americans who spoke out forcefully for the race—editors, union organizers, civil rights advocates, radical political activists, and Pan-Africanists—were likely to be investigated by a network of federal intelligence agencies. The 'crime' which justified such surveillance was almost always the ideas they expressed.

THEODORE KORNWEIBEL, JR., "SEEING RED": FEDERAL CAMPAIGNS AGAINST BLACK MILITANCY, 1919-1925, at xii (1998); see also Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. This Act is an early iteration of security ideology designed to protect the so-called "property" of slaveowners by requiring that all escaped enslaved people, upon capture, be returned to slaveowners, irrespective of the location of their capture. See § 9, 9 Stat. at 465. The federal government was authorized to return escaped enslaved people as well. §§ 1, 6, 9 Stat. at 462-63.

17. See KORNWEIBEL, *supra* note 16, at xii.

18. *Id.* at xiv (quoting S. DOC. NO. 66-153, at 13, 162 (1919)).

19. *Id.* at xii.

like Ambassador George F. Kennan, Secretary of State Dean Acheson, and FBI Director J. Edgar Hoover led to a complete restructuring of the national security apparatus, which further enabled the repression of Black dissent and has come to impact domestic security policy as well.²⁰ Because domestic security in the United States necessarily involves the management and suppression of racialized rebellion and radical dissent, national security ideology and the First Amendment cannot be decoupled from one another.²¹

The rise of the modern national security state is coterminous with the global expansion of U.S. imperialism following World War II.²² During this era, three political developments shaped the ascendance of U.S. imperialism: the spread of Communism throughout the world,²³ the rise of anticolonialism in the “Third World,”²⁴ and the intensification of domestic racial and anticolonial rebellions.²⁵ As the United States sought to defeat Communism

20. See *infra* Part I. See generally KORNWEIBEL, *supra* note 16 (describing the federal government’s role in suppressing Black rebellion during the interwar period).

21. The starkest example of this may be the Trump Administration’s creation of a new domestic-terrorism program category called the “Black Identity Extremist.” See *infra* Part II.D.

22. I define imperialism as a relationship of power in which a ruling group or nation uses force, economic dependence, or mutual collaboration to exercise power over a subordinate group or nation. U.S. imperial domination is characterized by both economic and racial power. The United States exercises economic control over foreign territories through dollar diplomacy, unilateral coercive measures, resource extraction, and foreign aid. The law provides political and legal cover for the enforcement of U.S. imperialism, thereby reproducing racial logics as a mechanism for domestic and international control. See, e.g., Nina Farnia, *Imperialism in the Making of U.S. Law*, 96 ST. JOHN’S L. REV. 131, 135-40 (2022) (“Imperialism produces U.S. foreign policy, and foreign policy is the way in which imperialism is executed around the world.”).

23. See MICHAEL J. HOGAN, *A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945-1954*, at 1-22 (1998).

24. See ODD ARNE WESTAD, *THE GLOBAL COLD WAR: THIRD WORLD INTERVENTIONS AND THE MAKING OF OUR TIMES 1-7* (1st paperback ed. 2007) (centering the “Third World” as the most important battlefield in the Cold War, one that was not in fact “cold” but involved military interventions designed to suppress “Third World” socialism and national liberation movements).

25. On Black rebellions, see generally MALCOLM McLAUGHLIN, *THE LONG, HOT SUMMER OF 1967: URBAN REBELLION IN AMERICA*, at xiii, 43-61, 121-38 (2014) (describing 1967 as a pivotal year in modern urban rebellions in the United States, using archival research and previously classified documents describing the repression of urban Black communities by the police and the National Guard); and GERALD HORNE, *FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S* (1995) (offering the first comprehensive treatment of the 1965 Watts uprising and arguing that the events in Watts transformed both domestic and international politics for the United States). On indigenous rebellions, see generally KENT BLANSETT, *A JOURNEY TO FREEDOM: RICHARD OAKES, ALCATRAZ, AND THE RED POWER MOVEMENT* (2018) (describing takeovers by Native peoples of Alcatraz, Fort Lawton, and Pit River as transformative moments in the rise of Native rebellion); and ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’*

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globally, gain economic and political ground in the decolonizing world, and suppress domestic rebellions, it needed a unified political and military apparatus that could execute projects swiftly and decisively through intense collaboration and resource sharing.

I define the modern national security state as a bureaucratic, legal, and military apparatus that organizes the state's resources behind a permanent program of peacetime military preparedness.²⁶ What makes the national security state distinct from the state at war is that the national security state can operate at its peak both in peacetime and wartime.²⁷ To that end, it

HISTORY OF THE UNITED STATES (2014) (describing the rise of an Indian-led anticolonial movement to reclaim land stolen by the United States).

26. This Article does not conduct an analysis of the national security state or the legal apparatus that undergirds it. My focus here is on imperialism, Black dissent, and the First Amendment. For an analysis of the modern Supreme Court's most involved discussion of terrorism and the meaning of the term, see Wadie E. Said, Humanitarian Law Project *and the Supreme Court's Construction of Terrorism*, 2011 BYU L. REV. 1455. For a thorough analysis of the role of the Constitution in the making of the national security state, see generally Aziz Rana, Essay, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335 (2015). For a legal history of national security law and individual rights, see generally Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of Executive Power*, 8 N.Y.U. J.L. & LIBERTY 396 (2014). For a review of recent legal scholarship on race, identity, and the national security state, see generally Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015) (using New York City's broken windows initiative as a metaphor to describe the discriminatory nature of the federal government's community initiatives targeting the Muslim community); Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809 (2013) (identifying the discriminatory nature of the federal government's predictive radicalization initiatives); Sahar F. Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 B.U. L. REV. 1151 (2020) (arguing that the federal government's suppression and surveillance of Muslims are modeled after the policing of Black and Brown communities); Khaled A. Beydoun, Online Essay, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213 (2018) (examining how the assignment of the lone wolf designation by law enforcement leads to terrorist designations for Muslim actors but nonterrorist designations for white actors); Sahar F. Aziz, *The Authoritarianization of U.S. Counterterrorism*, 75 WASH. & LEE L. REV. 1573 (2018) (describing the increasingly authoritarian nature of the national security state); Sahar F. Aziz, *Losing the "War of Ideas": A Critique of Countering Violent Extremism Programs*, 52 TEX. INT'L L.J. 255, 257 (2017) (describing not just the discriminatory nature of the Countering Violent Extremism program, but also its inefficiency and ineffectiveness); Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011-2012) (highlighting how the government's counterterrorism programs violate the Constitution); Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477 (2014) (arguing that sentencing guidelines used against terrorism defendants are unconstitutional); Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019) (arguing that the law's differentiation between international terrorists and domestic terrorists leads to discriminatory results for Muslim defendants); and Shirin Sinnar, Essay, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016) (critiquing the reasonable suspicion standard as applied to defendants accused of terrorism).
27. HOGAN, *supra* note 23, at 23-24.

marshals civilian and military resources to strengthen peacetime military preparedness and unify it with systems of power and repression commonly used in wartime.²⁸ In the U.S. context, the national security state relies on racialized ideological notions that mark nonwhite peoples as permanent potential threats,²⁹ thereby justifying the exercise of racial power through partnerships across federal, state, and local law-enforcement agencies—and with foreign governments as well.

Ultimately, I argue that, as the national security state took shape during the Cold War, the First Amendment came to be structured by anticommunism, white supremacy, and U.S. imperialism—impacting a wide range of dissenters, from Communists and civil rights activists to those involved with the contemporary Movement for Black Lives.³⁰ The case studies below suggest

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28. NIKHIL PAL SINGH, *RACE AND AMERICA'S LONG WAR* 4-34 (2017). Singh argues that the national narrative posits peace as the opposite of war, when in fact the blending of peacetime and wartime is a reflection of the United States' race wars, which began when the land was originally settled. *Id.*
29. Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597-98 (2005) (reviewing MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004)); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575-85 (2002); Aziz Rana, *Against National Security Citizenship*, BOS. REV. (Feb. 7, 2018), <https://perma.cc/4TVQ-FT8B> (arguing that there remains a racial specter around Black politics, a fear of Black people as a “fifth column,” such that when Black dissent is explicitly opposed to the national security state, the response from the state is extreme).
30. Because the terminology of “national security” was not used until the twentieth century, historians commonly attribute the origins of the modern national security state to the Truman Administration and the passage of the National Security Act. Prior to that era, what we now call “national security” was described as government surveillance. *See* HOGAN, *supra* note 23, at 22-24; MELVYN P. LEFFLER, *A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR* 12-13 (1992); AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 1 (1999); DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* 1-9 (2008). Like other historians, my periodization of the modern national security state begins in the long Cold War era. But I would argue that aspects of the national security state date back to the original settlement of the continent, when settlers needed to preserve their property interests in the land over and against the indigenous nations originally located here, as well as their property interests in the Africans who had been enslaved. *See generally* MOON-HO JUNG, *MENACE TO EMPIRE: ANTICOLONIAL SOLIDARITIES AND THE TRANSPACIFIC ORIGINS OF THE US SECURITY STATE* (2022) (placing the origins of the national security state in the period from 1898 to World War I, resulting from the historical merging of the first Red Scare, anti-immigration xenophobia, and the U.S. wars in Asia and related attacks on Asians in the United States). Jung argues that the national security state was consolidated during World War II. *Id.* at 24-25; *see also* SINGH, *supra* note 28, at 9-34 (identifying the “inner war[s]” of settler colonialism and slavery, as well as their domestic afterlives, with the “outer war[s]” of U.S. colonialism and imperialism); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1744-45 (1993). For a different periodization of the national security state that still situates its origins in the twentieth century, see Andrew Preston, Lecture, *Monsters Everywhere: A*
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that government repression operates in conjunction with free-speech colorblindness, a phenomenon I track in the final Part of the Article, to narrow the speech rights of Black dissenters and ultimately contain Black dissent. In essence, the modern national security state is one of the power structures undergirding the First Amendment.

Collaboration across various law-enforcement agencies plays a key role in the suppression of domestic dissent. During the early stages of the Cold War and the Civil Rights Movement, both local and federal law-enforcement agencies were engaged in suppressing Black dissent.³¹ By the rise of the Black Power movement³² and the formal creation of the FBI's Counterintelligence Program, local and federal agencies had developed avenues of collaboration that became increasingly institutionalized. Once the Joint Terrorism Task Force was established in the 1980s, interagency collaboration came to be a mainstay in the domestic antiterrorism apparatus, as indicated by the Biden Administration's *National Strategy for Countering Domestic Terrorism*, announced in June 2021.³³ Notably, in each era, law-enforcement agencies characterized Black dissent as extremist or marginal.³⁴ This characterization was applied to each of the Black activist movements I evaluate, despite their different ideological tendencies and varying intensities in protest tactics.

Recently, several scholars have written about the relationship between Black dissent and the First Amendment—developing the previous ideas of renowned critical race theory scholar Derrick Bell, who argued that “the courts are as likely to decline as to provide relief when blacks involved in protest activity seek judicial protection from white retaliation.”³⁵ In *Back to the Future: Recentering the Political Outsider*, Cheryl Harris complicates the prevailing view that the Supreme Court was more responsive to the NAACP's First Amendment claims than to those of the Communist Party, thereby challenging the implicit narrative of bifurcation between Black dissent and Communist dissent, since many Black people were Communists and many Communists

Genealogy of National Security, 38 *DIPLOMATIC HIST.* 477, 479-80 (2014) (arguing that “[t]he legacy of Franklin Roosevelt looms large in the history of American foreign relations, but it was his use of fear to invent the modern doctrine of national security that is possibly its most consequential aspect. . . . [A] fusion of geographical and ideological security took place during the world crisis of the late 1930s and the world war that followed”).

31. *See infra* Part II.

32. *See infra* Part II.C.

33. NAT'L SEC. COUNCIL, EXEC. OFF. OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 24 (2021), <https://perma.cc/Z8BM-HQAQ>.

34. *See infra* Part III.

35. BELL, *supra* note 12, § 10.3, at 601.

were Black.³⁶ In *The First Amendment Freedom of Assembly as a Racial Project*, Justin Hansford argues that the First Amendment is “a racial project that redistributes the freedom of assembly to whites and away from Blacks,” and likely other racial groups as well.³⁷ Hansford shows how law enforcement continues to undermine the rights of Black dissenters both in the streets and through surveillance.³⁸ In *Blackness as Fighting Words*, Etienne Toussaint argues that the First Amendment’s treatment of Blackness reflects the unresolved racial tensions contained within First Amendment jurisprudence³⁹:

Black identity itself, or “Blackness”—whether articulated by the pure speech of racial justice activists who affirm Black humanity, or embodied by the symbolic speech of Black bodies assembled in collective dissent in the public square—has become “‘fighting’ words” in the consciousness of America, a type of public speech unprotected by the Constitution.⁴⁰

This Article builds on the contributions made by Bell, Harris, Hansford, and Toussaint by conducting a legal history of key Black dissenters and the mechanisms through which the state repressed their political speech. My focus is specifically on how the rise of U.S. imperialism and the national security state affected the First Amendment and Black dissent. Through archival and legal research, I evaluate the modern history of Black dissent to expose how U.S. imperialism and the national security state have shaped the parameters of the First Amendment right to freedom of speech for Black dissenters, a matter that imbricates the speech rights of all dissenters.

Much is at stake with respect to the historical terrain that I cover.⁴¹ In addition to taking the concerns and proposals of Black people seriously and

36. Cheryl I. Harris, *Back to the Future: Recentering the Political Outsider*, 118 COLUM. L. REV. ONLINE 153, 159-63 (2018). Harris notes that many of the differences between Black dissent and Communist dissent were largely perceived, presumably because both movements sought racial and economic justice in variegated forms. *Id.* It is noteworthy that the tactics of the Civil Rights Movement—disrupting the flow of labor and capital throughout the South—were much more radical than those of the Communists, so tactics alone fail to explain the difference. *Id.* Harris also shows how the demarcation between the NAACP and the Communist Party of the United States of America (CPUSA) in the Court’s decisions was in part the product of a strategic retreat away from economic justice by the NAACP and similar organizations. *Id.* Ultimately, she argues that U.S. foreign policy was the key factor that both caused the NAACP’s strategic retreat from principles of economic justice and facilitated the anti-apartheid concessions won by the NAACP and others during the Cold War. *Id.*

37. Hansford, *supra* note 5, at 709.

38. *Id.* at 691, 711.

39. Etienne C. Toussaint, Essay, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 127 (2020).

40. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

41. See *infra* Part II.D. The Biden Administration is continuing the prosecutions of over 350 activists arrested during the Black Lives Matter uprisings of summer 2020, prosecutions that were initiated by the Trump Administration. In June 2021, the
footnote continued on next page

seeking to end white supremacy and racial capitalism, especially following the massive global uprisings of summer 2020,⁴² I dispute the ideas that the First Amendment categorically protects speech and that, more often than not, we can rely on its tenets to safeguard the rights of dissenters.⁴³ My research reveals that U.S. imperialism has narrowed the First Amendment right to freedom of speech to suppress domestic dissent by subordinated racial groups, particularly anti-imperialist and anticapitalist dissent.⁴⁴

In essence, this Article is a legal history that unveils the violent past of the modern First Amendment. I advance three claims. In Part I, I track the rise of the national security state alongside state and federal laws targeting Communist political activity. In Part II, I focus on prosecutions and

National Lawyers Guild and ninety other civil rights organizations sent a petition to the White House demanding that the Administration drop the charges. See Letter from Nat'l Laws. Guild et al. to President Joseph Biden & Vice President Kamala Harris, <https://perma.cc/7T9W-L5X5> (archived Nov. 23, 2022).

42. Investigative journalists have uncovered an aggressive push by the Justice Department to prosecute Black Lives Matter protesters who would have otherwise been prosecuted by the states, and to detain them before trial—another unprecedented development in the prosecution of protesters. See Aaron Miguel Cantú, *Federal Prosecutors Engaged in Unprecedented Push to Jail Protesters Before Trial*, INTERCEPT (Oct. 30, 2020, 4:00 AM), <https://perma.cc/54R3-NT7P>. These prosecutions also involve excessive charges.

In some of the civil unrest cases we reviewed, federal judges expressed disbelief that prosecutors were trying to have protesters detained. One judge said he was “at a loss” for why prosecutors were trying to hold a protester in jail until trial. Even when judges were ready to release defendants, prosecutors kept seeking detention, appealing judges’ decisions in at least 18 cases. Prosecutors appealed the release of at least three defendants all the way to the U.S. Court of Appeals, a rare move, according to two former federal prosecutors and two former public defenders interviewed for this story.

Id.

43. In *The Free Speech Century*, Lee Bollinger argues that “over time the Court has come to see the dominant purpose of the constitutional right of freedom of speech and press as necessary to fulfill the prior commitment to live in a democracy,” and that the earliest opinions of Justices Brandeis and Holmes, and the Court’s decision in *New York Times v. Sullivan*, are reflections of the state’s commitment to freedom of speech and democracy. Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, in *THE FREE SPEECH CENTURY* 1, 6 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019). This is a widely held view that is perhaps best reflected by the American Civil Liberties Union and its policies on free speech, which have recently come under criticism. See David Cole, *Defending Speech We Hate*, ACLU (updated Feb. 2, 2022), <https://perma.cc/ZD8V-BEAP>. There is, of course, great debate among legal scholars regarding the societal costs and benefits of the modern First Amendment. See generally Symposium, *A First Amendment for All? Free Expression in an Age of Inequality*, 118 COLUM. L. REV. 1953 (2018).
44. In my forthcoming book, *Imperialism in the Making of U.S. Law*, I argue that U.S. imperialism during the Cold War has affected the domestic legal apparatus in a multitude of ways that are veiled by a cloak of legal domesticity. In addition to the First Amendment, I cover other areas of law, including evidence law, civil procedure, national security law, and immigration law. See NINA FARNIA, *IMPERIALISM IN THE MAKING OF U.S. LAW* (forthcoming 2025).

investigations of Black dissenters, revealing that, although the language of race is absent from much of First Amendment jurisprudence, white supremacy, capitalism, and imperialism are significant forces shaping Black dissenters' access to free-speech rights. In Part III, I excavate the doctrinal mechanisms through which racial power recedes from view in the colorblind First Amendment, a process that creates a multitude of absences and silences in legal scholarship. This Article relies on archival research conducted at the Schomburg Center for Research in Black Culture, the Harry S. Truman Presidential Library, and the FBI's online Freedom of Information Act Library, called the Vault.

I. U.S. Imperialism and the National Security State

The communist is thinking in terms of now, in your lifetime. Remember that within four decades communism, as a state power, has spread through roughly 40 per cent of the world's population and 25 per cent of the earth's surface. . . . The world communist movement is on the march, into Germany, the Balkans, the Middle East, stretching across the plains of Asia into China, Korea, and Indochina.

—J. Edgar Hoover⁴⁵

In *Legality and Legitimacy*, Carl Schmitt argues that legality is the primary and most successful justification for state coercion.⁴⁶ A Nazi legal theorist, Schmitt provides perhaps the most astute window into the law's powers, revealing that the law is not just coercive and need not always be.⁴⁷ Rather, the law is one of the primary tools used by the state to produce consent within the nation. According to Schmitt, the law both represents and reproduces social norms.⁴⁸ Once norms are codified into the law, they have acquired ultimate legitimacy.⁴⁹ Even if one may not agree with certain norms, one becomes subject to them once they are reinforced by the law. Similarly, French theorist Louis Althusser argues that the ideological process through which one becomes a subject of his own domination is called “interpellation.”⁵⁰ Althusser gives the example of a police officer shouting, “Hey, you there!” in public.⁵¹ Upon

45. J. EDGAR HOOVER, *MASTERS OF DECEIT: THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT* 4 (1958) (emphasis omitted).

46. CARL SCHMITT, *LEGALITY AND LEGITIMACY* 27-36 (Jeffrey Seitzer trans., Duke Univ. Press 2004) (1932).

47. *See id.* at 4, 10-11.

48. *Id.* at 4.

49. *Id.* at 3, 9-10.

50. LOUIS ALTHUSSER, *ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES* 261-66 (G.M. Goshgarian trans., Verso 2014) (1971).

51. *Id.* at 264.

hearing this exclamation, an individual will turn around, and “[b]y this mere 180-degree physical conversion, he becomes a *subject*.”⁵²

In this Part, I introduce a historical framework for analyzing the relationship between U.S. imperialism, national security, and the First Amendment. Through the national security state, U.S. imperialism reproduces racial and economic subjugation within the law. But in order to provide cover for that subjugation and acquire broad, majoritarian consent to it, U.S. imperialism also shapes the First Amendment. This happens through the creation of a specific form of moral panic that I call an imperial state of emergency, a world-historical phenomenon that I track across the case studies that follow.

A. The Imperial State of Emergency

In *Policing the Crisis: Mugging, the State, and Law and Order*, “moral panic” is defined as follows:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereo-typical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic is passed over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.⁵³

I apply this concept to my analysis of the law, uncovering the law’s role in manufacturing moral panics, especially in Supreme Court precedent, to justify dangerous changes to national security policy and First Amendment law.⁵⁴

During World War II, Walter Benjamin noted that the oppressed not only fell victim to the “state of emergency,” but also played a role in creating it:

The tradition of the oppressed teaches us that the “state of emergency” in which we live is not the exception but the rule. We must attain to a conception of

52. *Id.*

53. STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 16-17 (1978) (quoting STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* 9 (1972)).

54. *See infra* Part I.D.

history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency . . .⁵⁵

Each of the case studies below features a prolonged state of emergency. This reveals that the execution of imperialism and the expansion and consolidation of U.S. military and economic power have relied in part upon the fabrication of international emergencies. In judicial decisions, these emergencies function as pretexts for the making of new laws that repress dissent.⁵⁶ They are particularly evident in the language of the law.

In the Parts that follow, I apply this framework to my study of legal history. Like free-speech jurisprudence,⁵⁷ the modern national security state took shape during the twentieth century.⁵⁸ According to early Cold War political strategists, fighting the Cold War required the government to develop peacetime military and diplomatic initiatives that would enable the United States to defeat Communism on both the domestic and international fronts.⁵⁹ The modern national security state emerged from this context.

The management of domestic dissent was critical for the development of peacetime anticommunist initiatives, for Americans could not defeat Communism abroad if Communists wielded political and social influence at home.⁶⁰ Though the United States needed to quell political activity by domestic Communists, it also needed to represent itself to the world as a democratic nation that venerated the right to free speech.⁶¹ This meant that the

55. WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 255, 259 (Hannah Arendt ed., Harry Zohn trans., Harcourt, Brace & World, Inc. 1968) (1955); see also SINGH, *supra* note 28, at 18.

56. See *infra* Part I.D.

57. See Bollinger & Stone, *supra* note 43, at 9-10.

58. HOGAN, *supra* note 23, at 1; LEFFLER, *supra* note 30, at 10; STUART, *supra* note 30, at 2; see also JULIAN E. ZELIZER, ARSENAL OF DEMOCRACY: THE POLITICS OF NATIONAL SECURITY—FROM WORLD WAR II TO THE WAR ON TERRORISM 2 (2010); MELVYN P. LEFFLER, THE SPECTER OF COMMUNISM: THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1917-1953, at 29 (1994); Melvyn P. Leffler, *National Security and US Foreign Policy*, in ORIGINS OF THE COLD WAR: AN INTERNATIONAL HISTORY 15, 16 (Melvyn P. Leffler & David S. Painter eds., 1994).

59. HOGAN, *supra* note 23, at 14, 17-18.

60. See, e.g., Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 15 (1991); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States*, 2001 SUP. CT. REV. 375, 377. For older texts, see also WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 1-2 (Univ. of Ill. Press, 2d ed. 1994) (1963); and ROBERT K. MURRAY, RED SCARE: A STUDY OF NATIONAL HYSTERIA, 1919-1920, at 16-17 (McGraw-Hill Book Co., 1st McGraw-Hill paperback ed. 1964) (1955).

61. See Bell, *supra* note 13, at 524 (arguing that *Brown* “helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples” and noting that “this argument was advanced
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government needed to develop ways to manage speech without eliminating the right to free speech altogether. Otherwise, the United States could not effectively represent itself to the world as the democratic counterweight to Soviet Communism. Such management of speech required a delicate balancing act. On the one hand, dissent had to be suppressed. But on the other hand, the state needed to manufacture majoritarian consent to ensure the permanence of the new national security state. Moral panics and international emergencies came to be bellwethers of the expansion of the national security state.

Until World War I, immigration law had been the primary vehicle for the suppression of political dissenters.⁶² After World War I, state laws became the chief legal mechanism underlying the Red Scare.⁶³ But as national security ideology pervaded the halls of Congress and seized public opinion, the need for a clear federal policy to address Communist dissent arose.⁶⁴

Historian Michael J. Hogan defines the new national security ideology that emerged after World War II in this way:

Usually reduced to the notion of anticommunism or to the doctrine of containment, the new ideology also envisioned a prominent role for the United States in world affairs and included the conviction that national security in an age of total war required some elaboration of the state's authority to organize civilian and military resources behind a permanent program of peacetime military

by lawyers for both the NAACP and the federal government”); DUDZIAK, *supra* note 13, at 6, 12-13 (arguing that the Cold War facilitated key social reforms like desegregation while also hindering social progress in other ways); Hansford, *supra* note 5, at 693-94 (arguing that the First Amendment continues to be a racial project).

62. Congress reacted to the assassination of President William McKinley by an anarchist by enacting the Alien Immigration Act of 1903, which barred anarchists from entering the United States and permitted their deportation within three years of their arrival. Julia Rose Kraut, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOB. LEGAL STUD. 169, 180-81 (2012).

63. According to Michal Belknap, an acclaimed historian of Communism in the United States:

During the Red Scare, the national government had bloodied bolshevism with the deportation statutes, but in the 1920s and early 1930s—because the courts imposed stiffer standards of evidence and procedure on immigration officials, because the Bureau of Investigation stopped collecting information on dissident political activity, and because the percentage of native-born Americans in the [CPUSA] rose—this antiradical artillery lost much of its effectiveness. Criminal syndicalism [sic], criminal anarchy, sedition, and red flag laws enabled local prosecutors to harass Communists, but as each of these operated only within a single state, they posed no serious threat to a national organization, such as the CPUSA. Only a federal criminal statute, effective wherever Communists became active, could seriously endanger the [CPUSA].

MICHAEL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 15 (1977).

64. *Id.* at 17.

preparedness. . . [T]he national security ideology eventually became the basis for a plan of action in the early postwar period. . .⁶⁵

As Hogan describes, global political conditions, such as the rise of Communism and the Soviet Union's influence in Europe and Asia,⁶⁶ were significant forces in the development of the national security state. But a vision of a more powerful United States that could sit at the helm of world affairs also undergirded statemaking in the postwar era.⁶⁷ The language of total war is consistent throughout the key documents that shaped the new national security ideology.⁶⁸ Because a new era of total war had dawned on the United States, "the battle was not confined to the front lines but extended to the home front as well."⁶⁹ Old distinctions between civilian and military, citizen and soldier, and the home front and the front line needed to be obliterated in order to mobilize the nation for total war.⁷⁰ The case studies below reveal how, over time, the nation has been mobilized to support the repression of radical dissent.

In this Part, I apply my historical framework to analyze the development of national security ideology through both federal and state lawmaking that

65. HOGAN, *supra* note 23, at 23. Both race and the historical need to police and contain Black and indigenous populations are absent from Hogan's definition. In *Menace to Empire: Anticolonial Solidarities and the Transpacific Origins of the US Security State*, Moon-Ho Jung places the origins of the modern national security state in the period from 1898 to World War I, merging ideologies from the first Red Scare, the anti-immigration movement and the xenophobia that undergirded it, and the U.S. wars in Asia and on Asian Americans. According to Jung, these ideologies were consolidated during World War II into what we now know as the contemporary national security state. JUNG, *supra* note 30, at 17.

66. HOGAN, *supra* note 23, at 2-3; LEFFLER, *supra* note 30, at 9.

67. In *Rise to Globalism: American Foreign Policy Since 1938*, historians Stephen E. Ambrose and Douglas G. Brinkley argue that, after World War II, the United States moved away from neutrality and toward globalism, favoring "a policy of massive rearmament and collective security as a way to avoid another war." STEPHEN E. AMBROSE & DOUGLAS G. BRINKLEY, *RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938*, at xii (9th rev. ed. 2011). In 1939, the "United States had an army of 185,000 men with an annual budget of less than \$500 million." *Id.* at xi. Half a century later, "the United States had a huge standing Army, Air Force, and Navy," a Department of Defense budget of over \$300 billion, and "military alliances with fifty nations." *Id.* It had "used military force to intervene" in several countries, fighting "costly wars in Korea and Vietnam" while distributing "enormous quantities of arms to friendly governments around the world." *Id.* However, "despite all the money spent on armaments and no matter how far outward America extended her power, America's national security was constantly in jeopardy." *Id.*

68. HOGAN, *supra* note 23, at 12-13.

69. *Id.* at 12.

70. *Id.* at 13. Historian Greg Grandin argues that the merger of the home front and the front line in the mobilization of the nation for war was not a recent phenomenon, but rather an enduring characteristic of the United States. See GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* 64-66 (2019).

targeted Communist political activity. A parallel analysis of state and federal anticommunist laws reveals the similarities between the two and exposes how both systems of power work in concert to suppress Black dissent, which I turn to in Part II. I begin with the Smith Act of 1940, because its status as the first peacetime federal sedition act in U.S. history—used to prosecute both citizens and noncitizens—made it a critical tool for manufacturing consent to the making of the modern national security state.

B. The Smith Act of 1940

By the 1940s, the idea of Communism had become a notable force in U.S. political life, and the anticommunist movement was swift to respond.⁷¹ Congress established the Special Committee on Un-American Activities, later called HUAC, in 1938 to investigate “the extent, character and objects of un-American propaganda activities in the United States, [and] the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin.”⁷² The Alien Registration Act of 1940, commonly known as the Smith Act, was passed shortly thereafter.⁷³

71. For discussions of Communism in the United States, see generally MAURICE ISSERMAN, *WHICH SIDE WERE YOU ON? THE AMERICAN COMMUNIST PARTY DURING THE SECOND WORLD WAR* (1982) (arguing that the CPUSA was an organic North American organization that evolved over time); MAURICE ISSERMAN, *IF I HAD A HAMMER: THE DEATH OF THE OLD LEFT AND THE BIRTH OF THE NEW LEFT*, at xii-xiii (1987) (challenging the view that the New Left was a rejection of the Old Left and instead arguing that there were many continuities between the two); and PAUL BUHLE, *MARXISM IN THE UNITED STATES: A HISTORY OF THE AMERICAN LEFT* 13-15 (rev. and expanded 3d ed. 2013) (challenging the view that the Communist Party was a Soviet-front organization and instead arguing that it was an amalgam of various liberationist tendencies that were organic to North America, including utopian socialism, feminism, and abolitionism, and concluding that “[i]n its most organized, coherent dimension, Marxism in the United States has been a class manifestation of the National Question”). For discussions of anticommunism, see Michal R. Belknap, *Introduction: Political Trials in the American Past*, in *AMERICAN POLITICAL TRIALS* 3, 16 (Michal R. Belknap ed., 1981); Robert Justin Goldstein, *Preface* to *LITTLE ‘RED SCARES’: ANTI-COMMUNISM AND POLITICAL REPRESSION IN THE UNITED STATES, 1921-1946*, at xiii, xiv-xv (Robert Justin Goldstein ed., Routledge 2016) (2014) (conducting a historical analysis of the period between the two Red Scares, from 1921 to 1946); and NICK FISCHER, *SPIDER WEB: THE BIRTH OF AMERICAN ANTICOMMUNISM*, at xiv (2016) (describing how anticommunist propaganda infiltrated mainstream politics in the United States and facilitated the rise of the contemporary right).

72. Wiecek, *supra* note 60, at 398-99.

73. See Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. §§ 2385, 2387). The Act has been amended several times and parts of it currently read as follows:

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory . . . by force or violence, or by the assassination of any officer of any such government; or

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Most notably, the Smith Act was the first federal sedition act passed during peacetime in U.S. history, and it was used to prosecute those who allegedly advocated the violent overthrow of the government.⁷⁴ It enabled the domestic enforcement arm of Cold War repression by empowering the federal government to prosecute and criminalize dissenters who previously would have been prosecuted under state sedition laws.⁷⁵ The passage of the Smith Act was the result of several decades of anticommunist advocacy by those who sought a federal statute to criminalize and prosecute Communist speech, but it would not have been possible without the xenophobic and patriotic sentiments that were characteristic of the American public at the time.⁷⁶

Following the revival of the Communist Party of the United States of America (CPUSA) during the Great Depression, the House of Representatives created a special committee called the Fish Committee—named after Representative Hamilton Fish, Jr., of New York—to study domestic Communism.⁷⁷ This committee was distinct from HUAC; its charter was not to investigate Communists in the United States, but to study Communism itself.⁷⁸ The committee took testimony from a variety of different figures, from spokespeople for right-wing organizations to labor leaders like William Z. Foster, General Secretary of the CPUSA from 1945 to 1957.⁷⁹ Afterwards, it created several legislative proposals, including recommendations to outlaw the

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined under this title or imprisoned not more than twenty years, or both

18 U.S.C. § 2385.

74. Wiecek, *supra* note 60, at 402, 424.

75. See Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 652-53 (2006); see also ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 575-97 (1941); BELKNAP, *supra* note 63, at 10-11, 15-16.

76. *Dennis v. United States*, which I discuss later in this Article, applied the clear and present danger test to uphold the convictions of Communists under the Smith Act. See 341 U.S. 494, 495-97, 505 (1951).

77. BELKNAP, *supra* note 63, at 16.

78. *Id.* at 16-17.

79. *Id.* at 16; see also Kristina Fontes, *Notable Tauntonians: William Z. Foster, 'America's Lenin' Ran for President 3 Times*, TAUNTON DAILY GAZETTE (Nov. 11, 2022, 4:00 AM ET), <https://perma.cc/5ER4-SLHP>.

CPUSA and bar Communist educational materials from interstate commerce.⁸⁰ None of the bills produced by the Fish Committee were passed.⁸¹

In 1934, a similar committee was proposed by Congressman Samuel Dickstein to investigate “un-American activities.”⁸² The McCormack-Dickstein Committee submitted a report to the House of Representatives in 1935, calling for “legislative action to defend the rights and liberties of the American people.”⁸³ Such action would include “a statute making it a crime to advocate political or social change in a manner” that could incite the violent overthrow of the government.⁸⁴ The target of the report was the CPUSA.⁸⁵ Branches of the military, including the Army and the Navy, were the most enthusiastic supporters of these proposals.⁸⁶ But the proposals were not voted into law by the Seventy-Fifth Congress, whose members came into office following President Franklin D. Roosevelt’s landslide victory in 1936.⁸⁷

In the 1930s, during the rise of Nazism and Fascism, the Soviet Union called upon Communists around the world to enter into popular fronts and broad coalitions that would unite all those who stood against Fascism.⁸⁸ In nations like the United States, this meant that the CPUSA needed to shift some resources toward developing a larger organizational base among African-Americans, women, and immigrants.⁸⁹ Such efforts were successful,

80. BELKNAP, *supra* note 63, at 16.

81. *Id.*

82. *Id.* at 16-17.

83. *Id.* at 17.

84. *Id.*

85. *Id.*

86. *Id.* at 17-18.

87. *Id.* at 17-19.

88. ROBIN D.G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 119 (25th anniversary ed. 2015).

89. *See, e.g.*, GERALD HORNE, BLACK REVOLUTIONARY: WILLIAM PATTERSON AND THE GLOBALIZATION OF THE AFRICAN AMERICAN FREEDOM STRUGGLE 6, 9, 12-13 (2013) (examining the Civil Rights Movement’s disavowal of Black Communist leaders like William Patterson); GERALD HORNE, COMMUNIST FRONT? THE CIVIL RIGHTS CONGRESS, 1946-1956, at 14 (1988) (describing the history and interventions of the Civil Rights Congress); THEODORE DRAPER, AMERICAN COMMUNISM AND SOVIET RUSSIA: THE FORMATIVE PERIOD 316-56 (1960) (providing an authoritative history of the critical formative period of the American Communist Party); GERALD HORNE, BLACK AND RED: W.E.B. DU BOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963, at 1 (1986) (discussing how Du Bois’s political philosophies were influenced both by antiracism and Communism); GERALD HORNE, BLACK LIBERATION/RED SCARE: BEN DAVIS AND THE COMMUNIST PARTY 12 (1994) (providing a biography of Ben Davis, one of the Black leaders of the CPUSA) [hereinafter HORNE, BLACK LIBERATION/RED SCARE]; GERALD HORNE, RACE WOMAN: THE LIVES OF SHIRLEY GRAHAM DU BOIS 17-19, 28, 32 (2000) (presenting the international political impacts of Shirley Graham Du Bois and

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as there was a considerable surge in the number of members from these groups in the organization.⁹⁰ Anticommunist advocates used the increasingly noncitizen, nonwhite character of the CPUSA to characterize the organization as foreign—thus deploying racism, xenophobia, and nativism to undermine the spread of Communism among working people.⁹¹ This xenophobic fervor would culminate in the Japanese American internment of the 1940s, which is commonly understood as a result of the attacks on Pearl Harbor but actually follows a long history of anti-Asian and anti-Japanese racism in the United States.⁹²

arguing that, as a significant historical figure, she should no longer be viewed in the shadow of her husband, W.E.B. Du Bois); GERALD HORNE, *PAUL ROBESON: THE ARTIST AS REVOLUTIONARY 1-198* (2016) (providing a biography of Paul Robeson, an artist and Communist activist). Gerald Horne is the foremost historian of Black Communism in the United States. His body of scholarship over the decades has uncovered an influential history of Black Communist activism in the United States. For an excellent review of Horne's works and contributions to Black historiography, see generally Erik S. McDuffie, *Black and Red: Black Liberation, the Cold War, and the Horne Thesis*, 96 J. AFR. AM. HIST. 236 (2011) [hereinafter McDuffie, *Black and Red*]. For a focused history of Black Communism in Alabama, see generally KELLEY, *supra* note 88 (providing a history of Communist activism in the Black Liberation Movement in Alabama in the 1930s and 1940s). For a history of Black Communist women, see generally ERIK S. MCDUFFIE, *SOJOURNING FOR FREEDOM: BLACK WOMEN, AMERICAN COMMUNISM, AND THE MAKING OF BLACK LEFT FEMINISM* (2011) [hereinafter MCDUFFIE, *SOJOURNING FOR FREEDOM*] (highlighting the impact of Black women Communists in transforming U.S. left politics); Charisse Burden-Stelly, *Introduction to Claudia Jones: Foremother of World Revolution*, J. INTERSECTIONALITY, Summer 2019, at 1, 1-3 (describing Claudia Jones “[a]s a radical Black female subject who connected the ‘local struggles of Black people and women against racism and sexist oppression to international struggles against colonialism and imperialism,’” and noting that “Claudia Jones was a quintessential theorist of world revolution” (quoting DAVIES, *infra* note 151, at 60)). For a history of Communist women and the impact of Communism on the U.S. feminist movement, see generally KATE WEIGAND, *RED FEMINISM: AMERICAN COMMUNISM AND THE MAKING OF WOMEN'S LIBERATION* (2001) (tracing the development of a distinctive Communist strain of U.S. feminism).

90. See MCDUFFIE, *SOJOURNING FOR FREEDOM*, *supra* note 89, at 2-3 (“Black women community organizers, social workers, artists, domestic workers, teachers, and writers enlisted in the Old Left Communist Party because they saw it as a powerful movement with real and imagined links to the global political stage. Through the Party, they advanced black liberation, women’s rights, decolonization, economic justice, peace, and international solidarity.”).
91. BELKNAP, *supra* note 63, at 20-21 (“As a California congressman noted in July 1939, ‘the mood of this House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get [the repeal].’” (quoting AUGUST RAYMOND OGDEN, *THE DIES COMMITTEE: A STUDY OF THE SPECIAL HOUSE COMMITTEE FOR THE INVESTIGATION OF UN-AMERICAN ACTIVITIES 1938-1944*, at 43-47, 62, 78-85, 101, 113-14 (Cath. Univ. Press 1945))).
92. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 4-5, 15-26, 168-88 (2006) (describing anti-Asian racism in the United States and the role of the law in

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When the Smith Act was passed in 1940, it had little opposition, and the opposition that did exist was mostly based in New York City.⁹³ The *New York Times* called the Smith Act a culmination of “most of the anti-alien and anti-radical legislation offered in Congress in the last twenty years.”⁹⁴ Liberals who had aligned with the CPUSA against Fascism turned on their Communist and Socialist colleagues, expelling them from the ranks of their organizations.⁹⁵ According to historian Michal Belknap, “The Communist Party, although enduring legal harassment from its earliest days, had long evaded a confrontation with the type of federal criminal statute which could do it really serious harm. . . . The Communist Party would be the principal victim of that law, but not the only one.”⁹⁶ In effect, state-based repression of Communism and the consolidation of an anticommunist moral panic predisposed the nation to the creation of a national security apparatus and an ultimate prohibition on Communism.

C. The National Security Act of 1947

After World War II, more and more countries in Asia began flirting with socialism as a result of decolonization⁹⁷ and the rise of political movements supported by the Soviet Union and the People’s Republic of China.⁹⁸ On

perpetuating it). For a historical and legal analysis of anti-Asian crusades in California, see *id.* at 63-79; see also VICTOR BASCARA, MODEL-MINORITY IMPERIALISM, at xxiii-xxiv (2006). See generally YELLOW PERIL! AN ARCHIVE OF ANTI-ASIAN FEAR (John Kuo Wei Tchen & Dylan Yeats eds., 2014) (providing a brilliantly curated archive of primary sources that express anti-Asian racism through time).

93. BELKNAP, *supra* note 63, at 23.

94. *Id.* at 22 (quoting *Army, Navy Back Bill to Hit Aliens*, N.Y. TIMES, Apr. 13, 1939, at 9).

95. See Harris, *supra* note 36, at 162-63; BELKNAP, *supra* note 63, at 24.

96. BELKNAP, *supra* note 63, at 27.

97. VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE’S HISTORY OF THE THIRD WORLD, at xvii-xviii (2007) (describing the affinity that decolonizing and postcolonial “Third World” nations had for socialism as a way to ensure national control of wealth and resources after being ravaged by European empires); see also WESTAD, *supra* note 24, at 3; TIM HARPER, UNDERGROUND ASIA: GLOBAL REVOLUTIONARIES AND THE ASSAULT ON EMPIRE 346, 356-57 (2020) (arguing that the Bolshevik Revolution inspired Asian radicals to advance socialism throughout Asia).

98. WESTAD, *supra* note 24, at 6-7 (suggesting that the true legacy of the Cold War is located in the “Third World” or Global South, specifically in China, Iran, Ethiopia, Angola, Cuba, and other nations whose people sought to build new socialist societies following the Russian Revolution); see also HARPER, *supra* note 97, at xxvii-xxx. In *Rise to Globalism: American Foreign Policy Since 1938*, historians Stephen E. Ambrose and Douglas G. Brinkley argue that “[t]he United States of the Cold War period, like ancient Rome, was concerned with all political problems in the world. The loss of even one country to Communism, therefore, while not in itself a threat to American physical security, carried implications that officials in Washington found highly disturbing.” AMBROSE & BRINKLEY, *supra* note 67, at xiii-xiv; see also HOGAN, *supra* note 23, at 14.

February 22, 1946, George Kennan sent his infamous “long telegram” to the State Department outlining a detailed Soviet containment plan.⁹⁹ He believed that the Soviets sought to expand their influence by “weaken[ing] power and influence of Western Powers of [on] colonial backward, or dependent peoples.”¹⁰⁰ The main points of the telegram were “published under the pseudonym ‘X’ in the July 1947 issue of *Foreign Affairs*.”¹⁰¹ George Kennan’s proposal would become the backbone of U.S. Cold War strategy vis-à-vis the Soviet Union and the Third World more broadly.¹⁰²

On July 26, 1947, President Truman signed the National Security Act of 1947 into law.¹⁰³ The National Security Act reorganized the domestic security apparatus to enable better collaboration between the agencies responsible for executing U.S. foreign policy and domestic law enforcement.¹⁰⁴ It established the National Security Council and the Central Intelligence Agency, among other government bodies.¹⁰⁵ This institutionalization process also included the restructuring of existing agencies.¹⁰⁶ In essence, the United States was preparing the domestic sphere to more effectively fight an international war on both foreign and domestic soil. Such a war, even if “cold,” would have far-reaching implications for resistance movements in the United States, particularly with respect to their civil rights and free-speech rights.¹⁰⁷ On

99. HOGAN, *supra* note 23, at 10.

100. Nat’l Sec. Archive, The Charge in the Soviet Union (Kennan) to the Secretary of State (1946), <https://perma.cc/2DUR-6GA5> (second alteration in original). For the full text of the Long Telegram, see *id.*

101. HOGAN, *supra* note 23, at 10.

102. *Id.* Michael Hogan describes the importance of the telegram alongside the Truman Doctrine, NSC-68, and the Clifford-Elsey Report, the latter of which analyzed the “dangers raised by the Soviet Union’s military buildup, its alliances with local Communist parties in other countries, and its policy of ruthless aggrandizement in Europe, the eastern Mediterranean, and the Middle East.” *Id.* at 11-15.

103. Ch. 343, 61 Stat. 495 (codified as amended in scattered sections of the U.S. Code).

104. *Id.* § 101, 61 Stat. at 496-97.

105. STUART, *supra* note 30, at 1, 8; National Security Act of 1947 §§ 101-102, 61 Stat. at 496-97.

106. STUART, *supra* note 30, at 144-79.

107. See Bell, *supra* note 13, at 524-25 (“Paul Robeson . . . in 1949 declared: ‘It is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country [the Soviet Union] which in one generation has raised our people to the full human dignity of mankind.’ It is not impossible to imagine that fear of the spread of such sentiment influenced subsequent racial decisions made by the courts.” (alterations in original) (quoting Paul Robeson, speech at the World Peace Congress (Apr. 20, 1949), reprinted in ARNOLD H. LUBASCH, ROBESON: AN AMERICAN BALLAD 145-46 (2012))); DUDZIAK, *supra* note 13, at 79-80 (discussing a 1947 report issued by the President’s Committee on Civil Rights that “highlighted the foreign affairs consequences of race discrimination” and “argued that there were three reasons why civil rights abuses in the United States should be redressed: a moral reason—discrimination

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April 7, 1950, after Secretary of State Dean Acheson called for a comprehensive review of U.S. national security strategy, the Truman Administration issued NSC-68, a confidential document that called for “a massive build-up of both conventional and nuclear arms.”¹⁰⁸ Just a few months later, on June 25, President Truman ordered the U.S. military to enter the Korean War, continuing a long period of American military entanglement in Asia that persists to this day.¹⁰⁹

Although neither the Smith Act nor the National Security Act of 1947 mentions race, both Acts were foundational to the making of the modern national security state and its impact on Black dissent. The Smith Act represented the first legal apparatus of speech repression at the national level, while the National Security Act of 1947 institutionalized the collaboration of local, state, and federal agencies, which would ultimately enable the execution of national, and even international, speech repression.

D. The Second Red Scare

Although anticommunist legislation in the form of state-level criminal syndicalism laws plagued the nation during the 1920s and 1930s, some historians of the First Amendment have referred to the 1930s as a decade that “far surpass[e]d all prior decades in the number of Supreme Court decisions vindicating civil liberties.”¹¹⁰ This view results from a series of cases that indeed struck down some state-level anticommunism laws and protected free-speech rights, while ironically articulating and clarifying tests that would be used in later Supreme Court cases to narrow free-speech rights.¹¹¹ In this

was morally wrong; an economic reason—discrimination harmed the economy; and an international reason—discrimination damaged U.S. foreign relations”.

108. NSC-68, 1950, OFF. OF THE HISTORIAN, <https://perma.cc/PN6F-A4U3> (archived Nov. 24, 2022). NSC-68 was produced in 1950 by a subcommittee of the National Security Council. HOGAN, *supra* note 23, at 12. The subcommittee began working on the document after Communists came to power in China and the Soviet Union tested its first nuclear device. *Id.* The document painted the Soviet Union in an aggressive manner, calling “among other things, for a massive American rearmament. Perhaps more than any other document of the period, NSC-68 can claim to be the bible of American national security policy and the fullest statement to that point of the new ideology that guided American leaders.” *Id.*

109. *See generally* BRUCE CUMINGS, THE KOREAN WAR: A HISTORY (2010) (using newly declassified archives to uncover the long-term effects of the Korean War on Asia and U.S.-Asian relations); JUNG, *supra* note 30, at 190-96 (presenting an excellent history of U.S. imperialism in Asia, its effects on the national security state, and anti-imperialist challenges to both Japanese and U.S. empire).

110. Wallace Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 317 (1952).

111. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1082-84 (6th ed. 2019); *see, e.g.*, Burns v. United States, 274 U.S. 328, 330-31 (1927).

Subpart, I conduct a brief review of early cases involving state anti-syndicalism laws, followed by an in-depth analysis of the first federal prosecution of Communists after the passage of the Smith Act.¹¹² These state laws enabled the anticommunist moral panic that ultimately drove the making of the modern national security state.

1. State laws

In 1925, the Supreme Court in *Gitlow v. New York* upheld Benjamin Gitlow's conviction under a New York criminal anarchy statute for publishing the "Left Wing Manifesto."¹¹³ But the Court also decided that the First Amendment applied to the states through its incorporation by the Due Process Clause of the Fourteenth Amendment,¹¹⁴ a monumental decision that paved the way for later decisions that upheld free-speech rights.¹¹⁵ *Whitney v. California* is another notorious decision, which upheld California's criminal syndicalism laws after Anita Whitney was convicted of attending a meeting to organize a branch of the Communist Labor Party in Oakland, California.¹¹⁶

Both of these cases are characterized by deference to the state police power.¹¹⁷ In *Whitney*, for example, the Court determined that:

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that [criminal syndicalism] involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight.¹¹⁸

But ironically, following these decisions, in the late 1920s and 1930s the Supreme Court overturned several convictions under state criminal-syndicalism laws. In *Fiske v. Kansas*, the Supreme Court overturned Harold Fiske's conviction under the Kansas Criminal Syndicalism Act for distributing

112. Syndicalism is "the belief that factories, businesses, etc. should be owned and managed by all the people who work in them." *Syndicalism*, OXFORD LEARNER'S DICTIONARIES, <https://perma.cc/495G-RASA> (archived Nov. 24, 2022). In practice, it involves establishing worker cooperatives that retain control over their workplaces and profit from the fruits of their labor.

113. 268 U.S. 652, 655, 672 (1925).

114. *Id.* at 666.

115. See generally MARC LENDLER, *GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT* (2012) (describing the incorporation doctrine and *Gitlow's* impact on First Amendment jurisprudence during the Cold War).

116. 274 U.S. 357, 363-65, 372 (1927).

117. CHEMERINSKY, *supra* note 111, at 1082-84 ("The Court upheld the California law and Whitney's conviction under it. Again, the Court proclaimed the need for deference to the legislature."). For discussion of judicial deference to the legislature, or what Carl Schmitt described as the "legislative state," see CARL SCHMITT, *supra* note 46, at 17-26.

118. 274 U.S. at 371.

literature for a branch of the Industrial Workers of the World.¹¹⁹ The Court held that the state law violated the Due Process Clause of the Fourteenth Amendment, through which, following *Gitlow*, the First Amendment right to freedom of speech was applied to the states.¹²⁰ In *De Jonge v. Oregon*, the Court, which had become much more liberal after President Franklin D. Roosevelt's threat to pack it,¹²¹ overturned another conviction for holding a Communist Party meeting.¹²²

This embrace of civil liberties by the Supreme Court would not last. In 1948, the federal government arrested dozens of Communists, including Claudia Jones¹²³ and the defendants in *Dennis v. United States*.¹²⁴ *Dennis* thus marks a shift in the Court's treatment of anticommunism and freedom of speech following the surveillance and repression of the 1940s. *Dennis* was the first major federal conviction of Communists that reached the Supreme Court after the beginning of the Cold War and the resulting reorganization of the government, and it involved two Black Communists, Henry Winston and Benjamin Davis, Jr.¹²⁵

2. *Dennis v. United States*

In *Dennis v. United States*, eleven leaders of the CPUSA, including Black CPUSA leaders Henry Winston and Benjamin Davis, Jr., were convicted of violating the Smith Act.¹²⁶ The indictment alleged that these individuals had organized a group of people to teach and advocate for the forcible overthrow of the United States government.¹²⁷ The indictment focused quite a bit on Marxism-Leninism, claiming that the CPUSA organized schools and classes to study the basic principles of Marxism-Leninism, using a "popular front" approach that called for the forcible overthrow of the government.¹²⁸ The prosecution used as evidence texts that had been written by prominent

119. 274 U.S. 380, 381-82, 387 (1927).

120. *Id.* at 387; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

121. Daniel Block, *Packing the Court Might Work. Threatening to Pack It Did*, WASH. MONTHLY (Sept. 26, 2020), <https://perma.cc/XW42-D25V>.

122. 299 U.S. 353, 365-66 (1937).

123. *See infra* Part II.

124. 341 U.S. 494, 495-97 (1951).

125. HORNE, BLACK LIBERATION/RED SCARE, *supra* note 89, at 210-26.

126. *Dennis*, 341 U.S. at 495; *see also* BELKNAP, *supra* note 63, at 122; Denise Lynn, *Black Radicalism in the Face of Anticommunism*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (May 24, 2021), <https://perma.cc/8DRM-3T2M>.

127. *Dennis*, 341 U.S. at 497; Rohr, *supra* note 60, at 48.

128. *See* Rohr, *supra* note 60, at 48-49 (citing *United States v. Foster*, 9 F.R.D. 367, 374-75 (S.D.N.Y. 1949)).

Marxists decades—and in some cases a century—earlier, including *The Communist Manifesto* (1848), Lenin’s *The State and Revolution* (1917), and Stalin’s *Foundations of Leninism* (1924).¹²⁹ Like the later cases I study, there was no direct proof that the defendants posed an imminent threat to U.S. society, so the prosecution had to rely on literature that had little relevance to the immediate matters before the court.¹³⁰

In essence, the government argued that because the defendants read and taught such texts to others, they were advocating the forcible overthrow of the U.S. government.¹³¹ The Smith Act did not require the commission of an overt act; it was enough to establish association and intent.¹³² As such, the jury convicted the eleven defendants, and with one exception, each received a sentence of five years in prison and a \$10,000 fine.¹³³ The trial lasted over nine months and produced a record of 16,000 pages.¹³⁴ *Life* called it the “longest, most noisy, most controversial [trial] in U.S. history.”¹³⁵

The case ultimately reached the Supreme Court.¹³⁶ The Court elected not to consider the factual question of whether the defendants actually advocated for the overthrow of the government, “bas[ing] any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail.”¹³⁷ Rather, the Court focused on the legal

129. *Dennis*, 341 U.S. at 582 (Douglas, J., dissenting); Rohr, *supra* note 60, at 50 (citing Michal R. Belknap, *Cold War in the Courtroom: The Foley Square Communist Trial*, in *AMERICAN POLITICAL TRIALS*, *supra* note 71, at 233, 248).

130. Rohr, *supra* note 60, at 49 (citing Belknap, *supra* note 129, at 242-43).

131. *Id.* at 48-49.

If the Justice Department had possessed evidence that the CPUSA was plotting a revolt, it could have prosecuted the organization’s leaders for seditious conspiracy Indeed, even under the Smith Act, federal prosecutors did not have as strong a case as they might have wished Fortunately for [the government], the Smith Act did not require a prosecutor to establish actual advocacy of armed revolt but only that the defendants were guilty of creating a group to engage in such activity or of conspiring to advocate or organize. Unable to prove actual incitement, let alone revolutionary deeds or plots, the authorities attacked the Party with the conspiracy provisions of the Smith Act.

Id. at 50 (alterations in original) (quoting BELKNAP, *supra* note 63, at 80-81).

132. Alien Registration Act of 1940, ch. 439, § 2, 54 Stat. 670, 671 (codified as amended at 18 U.S.C. § 2385).

133. *Dennis*, 341 U.S. at 517 (Frankfurter, J., concurring in the judgment).

134. *Id.* at 497 (plurality opinion).

135. *Communist Trial Ends with 11 Guilty*, *LIFE*, Oct. 24, 1949, at 31, 34.

136. *Dennis*, 341 U.S. at 495-96.

137. *Id.* at 497. “The appeal in *Dennis* was argued before a panel of the Second Circuit Court of Appeals on June 21 and 22, 1950. The following day, North Korean troops invaded South Korea. On August 1, the court announced its decision affirming the convictions,” with the concurrence noting that “among the important evidence was . . . the close alliance with a foreign government.” Rohr, *supra* note 60, at 51-52. In the majority opinion, Judge Learned Hand stated that:

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question of whether sections 2 and 3 of the Smith Act violated the First Amendment.¹³⁸ The Court ultimately expanded the “clear and present danger” test originally articulated in *Schenck v. United States*—also a criminal prosecution of Marxism, though under the Espionage Act.¹³⁹ It held that the test does not involve not a question of fact, but rather one of law.¹⁴⁰ The Court also opined about the problems of the clear and present danger test as it was written in *Schenck*, and on the necessity of expanding it.¹⁴¹

In his article *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, Marc Rohr asks: “Why the reformulation?”¹⁴² What particular historical conditions necessitated the expansion of the clear and present danger test in that moment? According to Chief Justice Vinson, who authored the decision, the Court had not been confronted in prior decisions with a situation comparable to that in *Dennis*, which he characterized as “the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.”¹⁴³

We must not close our eyes to our position in the world at that time. . . . Any border fray, any diplomatic incident . . . such as the Berlin blockade . . . might prove a spark in the tinder-box, and lead to war. We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities.

Id. at 52 (alterations in original) (quoting *United States v. Dennis*, 183 F.2d 201, 213 (2d Cir. 1950)).

138. *Dennis*, 341 U.S. at 495-96.

139. 249 U.S. 47, 49-50, 52 (1919).

140. *See Dennis*, 341 U.S. at 515-16.

141. *Dennis*, 341 U.S. at 509-10. As the Court discussed:

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government “as speedily as circumstances would permit.” This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

Id.

142. Rohr, *supra* note 60, at 54.

143. *Dennis*, 341 U.S. at 510.

The crises to which Chief Justice Vinson alluded were many. In 1941, Japan attacked Pearl Harbor, as well as U.S. and British holdings in the Pacific—invading several countries throughout the region.¹⁴⁴ Four years later, the United States dropped atomic bombs on Hiroshima and Nagasaki. By 1951, the United States was deeply entrenched in the Korean War, seeking to limit Chinese and North Korean influence in the Asia-Pacific region.¹⁴⁵ These were unprecedented times for the United States, as the country faced problems at home and abroad. From revolutions to decolonization, much of the world was experiencing significant transformation. The Court feared that these transformations would eventually reach the United States.

It was within this international context of imperial emergency, of anticolonial and Communist rebellion, that the Supreme Court upheld the political repression of Communists. While there was no formal declaration of a state of emergency, in many respects, the United States was also undergoing an extended racial emergency during this time. Lynchings of Black people lined the landscape of the South,¹⁴⁶ apartheid plagued the whole nation, and rebellions and instability were unfolding both at home and abroad.¹⁴⁷ Only a few months after the *Dennis* decision, in December 1951, the Civil Rights Congress presented *We Charge Genocide: The Crime of Government Against the Negro People* to the United Nations.¹⁴⁸ The petition documented hundreds of lynching cases and other forms of state and vigilante violence against Black people to show a pattern of

144. For examples of invaded countries, see the award-winning book DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 4 (2019) (“On a single day, the Japanese attacked the U.S. territories of Hawai’i, the Philippines, Guam, Midway Island, and Wake Island. They also attacked the British colonies of Malaya, Singapore, and Hong Kong, and they invaded Thailand. It was a phenomenal success. Japan never conquered Hawai’i, but within months Guam, the Philippines, Wake, Malaya, Singapore, and Hong Kong all fell under its flag. Japan even seized the westernmost tip of Alaska, which it held for more than a year. Looking at the big picture, you start to wonder if ‘Pearl Harbor’—the name of one of the few targets Japan *didn’t* invade—is really the best shorthand for the events of that fateful day.”).

145. See 2 BRUCE CUMINGS, *THE ORIGINS OF THE KOREAN WAR: THE ROARING OF THE CATARACT 1947-1950*, at 745-56 (1990).

146. In fact, because lynchings harmed the international image of the United States, a shift away from this practice began in the 1950s. However, the police took the place of lynch mobs when it came to this kind of violence. See, e.g., HASAN KWAME JEFFRIES, *BLOODY LOWNDES: CIVIL RIGHTS AND BLACK POWER IN ALABAMA’S BLACK BELT* 34 (2009).

147. See generally HORNE, *supra* note 25 (describing the Watts uprising and its effects on both domestic and international politics).

148. CIVIL RIGHTS CONGRESS, *WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE* 57-192 (William L. Patterson ed., 4th ed. 1952); *Dec. 17, 1951: “We Charge Genocide” Petition Submitted to United Nations*, ZINN EDUC. PROJECT, <https://perma.cc/X9US-798M> (archived Nov. 25, 2022).

government complicity.¹⁴⁹ It was delivered to the United Nations by Paul Robeson and William Patterson. W.E.B. Du Bois was supposed to accompany Patterson to deliver the petition in Paris, but the State Department prevented him from leaving the United States.¹⁵⁰ Thus, the specter of Communism and anticolonial rebellion haunted the Court in *Dennis* and similar First Amendment cases, for the government viewed Communism and anticolonialism as political forces that could intensify the emergency at home.¹⁵¹

The question of managing Black dissent could not have been more important in that political moment. While the government opted to completely suppress Communist dissent, it treated Black dissent differently. The cases I evaluate in the next Part suggest that the United States sought to shape the parameters of Black dissent without eliminating it altogether. By using the anticommunist national security apparatus described above, the United States circumscribed the Socialist impulses present in Black dissent while rhetorically uplifting the anti-apartheid impulses. This allowed the United States to present itself to the world as a multiracial democracy without acting upon Black dissenters' demands for economic justice.

149. *Dec. 17, 1951: "We Charge Genocide" Petition Submitted to United Nations*, *supra* note 148.

150. *Id.*

151. See CAROLE BOYCE DAVIES, *LEFT OF KARL MARX: THE POLITICAL LIFE OF BLACK COMMUNIST CLAUDIA JONES* 195 (2008).

So, during and after the demise of the Communist Party, black and women's activism for civil rights was also deemed as against the state, often defined as communist, and similarly targeted and criminalized by the U.S. government. The immediate objective was the destruction of communism. But engaging in a broader ideological and national struggle, all ideas that did not advance dominant state ideology could be criminalized as anti-national and anti-U.S. In the process, those deemed as enemies of the state, defined then as members of the Communist Party USA, could be jailed or deported.

Id.

II. Shades of Blackness in the First Amendment

The forces I will expose are less visible than gunfire, class property, or political crusades. I want to argue that they are no less powerful.

—Michel-Rolph Trouillot¹⁵²

The story of twentieth-century Black rebellion in the United States is deeply politicized. The standard narrative pits the Civil Rights Movement of Dr. Martin Luther King, Jr., and Rosa Parks against the Communist resistance that preceded it and the Black Power formations that followed it.¹⁵³ The story goes that Black radicalism, when it existed, tended toward nationalism and never Communism or Socialism, and that Black dissenters were generally less interested in economic and social rights and focused instead on civil and political rights.¹⁵⁴ But history defies this narrative. In this Part, I cover four case studies that reflect key political and historical trends in Black dissent. I begin with the prosecution of Black Communist and feminist Claudia Jones, followed by analyses of *Walker v. City of Birmingham* and the FBI's repression of Black organizations in the 1960s and 1970s through the Counterintelligence Program. I end with the contemporary rise of the Movement for Black Lives, the recent policies issued by the Trump and Biden Administrations targeting domestic terrorism, and the 350 prosecutions of Black activists who rose up during the summer of 2020 following the murder of George Floyd.

Historian Jacquelyn Dowd Hall complicates the dominant narrative of Black dissent in the United States.¹⁵⁵ She argues that the Civil Rights

152. MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY, at xxiii, 27-28 (1995) (critiquing the failure of historians to acknowledge the Haitian Revolution and presenting a new historical methodology that uncovers archival and historical silences). The recent HBO docuseries, *Exterminate All the Brutes*, written and directed by Raoul Peck, was based in part on Trouillot's groundbreaking book. See EXTERMINATE ALL THE BRUTES (Raoul Peck dir., 2021); *Exterminate All the Brutes*, HBO, <https://perma.cc/GT3E-HNGW> (archived Nov. 25, 2022).

153. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1233-34, 1236 (2005); see CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955, at 5 (2003).

154. Dowd Hall, *supra* note 153, at 1253-54. See generally ANDERSON, *supra* note 153 (describing how Cold War politics and anticommunism led to the red-baiting of Black activists and the forced deradicalization of the Civil Rights Movement).

155. Dowd Hall, *supra* note 153, at 1234.

Centering on what Bayard Rustin in 1965 called the "classical" phase of the struggle, the dominant narrative chronicles a short civil rights movement that begins with the 1954 *Brown v. Board of Education* decision, proceeds through public protests, and culminates with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Then comes the decline. After a season of moral clarity, the country is beset by the Vietnam War, urban riots, and reaction against the excesses of the late 1960s and the 1970s, understood variously as student rebellion, black militancy, feminism, busing, affirmative action, or an overweening welfare state. A so-called white backlash sets the stage for the conservative interregnum that,

footnote continued on next page

Movement's meaning "has been distorted and reified by a New Right bent on reversing [the Movement's] gains."¹⁵⁶ Remembrance, she says, is also "a form of forgetting," and "the dominant narrative of the civil rights movement . . . distorts and suppresses as much as it reveals."¹⁵⁷ In the many remembrances of civil rights icons and the history of Black dissent in the United States, much is lost and forgotten. Dowd Hall seeks to resurrect that which is lost by presenting a more holistic, "more progressive, and truer story—the story of a 'long civil rights movement' that took root in the liberal and radical milieu of the late 1930s . . . and in the 1960s and 1970s inspired a 'movement of movements' that 'def[ies] any narrative of collapse.'"¹⁵⁸

The story that Dowd Hall tells is one that resists rigid periodization and rejects the valorization of great men with great speeches who singlehandedly brought about the passage of monumental reforms.¹⁵⁹ Her narrative begins in the 1930s and ends with the ongoing rise of the right, which she identifies as a backlash against what some have called the "Second Reconstruction."¹⁶⁰ The 1930s are important because they mark the development of a specifically Black

for good or ill, depending on one's ideological persuasion, marks the beginning of another story, the story that surrounds us now.

Id.

156. *Id.* at 1235. Dowd Hall's focus on the New Right is significant. While the dominant narrative has been largely mainstreamed, it has been driven by the right. Recent attacks on critical race theory, coupled with calls across the nation to remove the Civil Rights Movement from elementary and secondary school history curricula, are recent iterations of the New Right's ongoing campaign to rewrite history. See Timothy Bella, *Pa. School District Ends Ban on List of Books by or About People of Color After Student Backlash*, WASH. POST (Sept. 25, 2021, 8:30 AM EDT), <https://perma.cc/8AHK-LZWU>. For a website and research initiative tracking anti-critical race theory legislation across the United States, see *About the Project*, CRT FORWARD TRACKING PROJECT, <https://perma.cc/HK4R-ZAZC> (archived Nov. 25, 2022) ("The CRT Forward Tracking Project identifies, tracks, and analyzes local, state, and federal activity aimed at restricting the ability to speak truthfully about race, racism, and systemic racism through a campaign to reject Critical Race Theory (CRT).").
157. Dowd Hall, *supra* note 153, at 1233.
158. *Id.* at 1235 (second alteration in original) (emphasis omitted) (quoting Van Gosse, *A Movement of Movements: The Definition and Periodization of the New Left*, in *A COMPANION TO POST-1945 AMERICA* 277, 279, 282 (Jean-Christophe Agnew & Roy Rosenzweig eds., 2002)).
159. *Id.* at 1234-35.
160. *Id.* at 1235. For a definition of the "Second Reconstruction," see MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945-2006*, at 3 (Univ. Press of Miss., 3d ed. 2007) (1984) ("[T]he Second Reconstruction was a series of massive confrontations concerning the status of the African American and other national minorities (e.g., Indians, Mexican Americans, Puerto Ricans, Asians) in the nation's economic, social and political institutions.").

Communism in the United States,¹⁶¹ a grassroots political tendency across Black communities¹⁶² that was foundational to the Civil Rights Movement, the Black Power movement, and even the contemporary Movement for Black Lives.¹⁶³ Most importantly, Dowd Hall highlights the ideological continuities in the long Civil Rights Movement, specifically the demand for economic justice.¹⁶⁴ Despite differences in outward ideological orientation and tactics, each of the major modern Black movements that I cover here have demanded economic justice for Black people in the United States.¹⁶⁵

In *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, renowned legal scholar Kendall Thomas examines constitutional history from its “underside,” a method that centers the perspectives and positionality of those who are among the “un- or misrepresented human groups” as opposed to the voices of judges and the courts.¹⁶⁶ In this Part, I too examine constitutional history from its underside, exposing how the First Amendment and modern national security ideology have shaped the contours of Black dissent after World War II. In each case I evaluate, the dissenters were racialized as Black extremists or politically marginal. As a result, the state and the judiciary did not meaningfully engage with them as dissenters with legitimate proposals for change because they were too ideologically distinct from the status quo. In each case, the state constructed a specific moral panic of a Black threat to U.S. life, a panic that created a state of emergency.

Because of the different international political conditions surrounding each case, the treatment of each movement by the law is uneven. I argue that three factors explain the unevenness in the state’s treatment of Black dissenters. The first is the mechanism through which they were repressed. While their racialization as Black dissenters speaking for Black people and other subordinated communities is consistent through each case, the individuals targeted under the Smith Act were racialized differently than those targeted under later initiatives like the Counterintelligence Program.

161. See generally KELLEY, *supra* note 88 (describing the work of the Alabama Communist Party in the 1930s and 40s).

162. *Id.* (describing the Alabama Communist Party in the 1930s and 40s as being a truly grassroots political force made up of Black and white farmworkers, miners, and factory workers who challenged Alabama’s racist police state).

163. Gerald Horne’s body of work uncovers this history. See *supra* note 89.

164. See Dowd Hall, *supra* note 153, at 1245-47.

165. See *infra* Parts IIA-D.

166. Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2607 (1992) (quoting Edward W. Said, *Orientalism Reconsidered*, in LITERATURE, POLITICS AND THEORY: PAPERS FROM THE ESSEX CONFERENCE 1976-84, at 210, 212 (Francis Barker, Peter Hulme, Margaret Iversen & Diana Loxley eds., 1986)).

Specifically, both the government and the courts treated Smith Act defendants as foreign agents, misguided representatives of the Soviet Union. The second factor involves the content of the speech itself. Each of the movements and political tendencies that are representative of modern Black dissent demanded some form of economic justice for Black people specifically, in addition to what they demanded for other oppressed communities throughout the United States and even the empire. In this way, the movements all shared an anti-imperialist politic. At the historical point at which anti-imperialism and anticapitalism came to the forefront, the movements were increasingly criminalized, because the call for economic justice is the most threatening aspect of Black dissent from the perspective of the state, for it has the potential to completely upend the American status quo. The third significant factor is the broader international political context I describe above—the waves of Communist and anticolonial rebellion throughout the world.

It is for these reasons that the First Amendment, national security ideology, and the related Smith Act and National Security Act of 1947 came to be prominent forces in the suppression of Black dissent. They facilitated intelligence gathering and the surveillance of Black dissenters, in addition to collaboration between local, state, and federal law-enforcement officials. In the context of the early Cold War, for example, the state mobilized the discourse of anticommunism to suppress and deradicalize the Black liberation struggle, leading to blacklistings and purges within organizations, including the NAACP.¹⁶⁷

In response to these various emergencies, the state manufactured a moral panic that labeled both Black dissent and Communist dissent as threats to the safety and sanctity of American life. The state mobilized the outsider trope to bifurcate Black movements from Communist movements: Communists were “outsiders” driving the Civil Rights Movement.¹⁶⁸ During the rise of the Black Power movement, the legal apparatus used to suppress Communists operated in concert with policing and other tactics typically applied to Black dissenters. These tactics, along with extralegal means like assassinations, suppressed and

167. *Red-Baiting*, SNCC DIGIT. GATEWAY, <https://perma.cc/8X3D-ZDJC> (archived Nov. 25, 2022) (describing the wide net cast by the House Un-American Activities Committee and other anticommunist agencies in the U.S. government). For discussions of the concessions the Civil Rights Movement made with the federal government that undermined Socialism and Communism in the United States, see Harris, *supra* note 36, at 159-65; and ANDERSON, *supra* note 153, at 2-5.

168. Jacey Fortin, *The Long History of the 'Outside Agitator'*, N.Y. TIMES (updated June 9, 2020), <https://perma.cc/P9MC-XFEB>. See generally KELLEY, *supra* note 88 (describing how Black Communism had a foothold in the South during the Great Depression and was a critical part of the history of the emerging Civil Rights Movement).

then eliminated the Black Power movement.¹⁶⁹ Then, after the advent of the War on Terror, the state mobilized the discourse of domestic terrorism to suppress Black dissent—a project that is still underway.¹⁷⁰

A. Black Communism and the Case of Claudia Jones

The case study of Claudia Jones is perhaps one of the best examples of the state's suppression of Black radical dissent, because Jones was both a Black woman and a leader in the CPUSA. Claudia Jones was born in 1915 in Trinidad.¹⁷¹ She immigrated to New York City in 1924, at the age of nine.¹⁷² She joined the CPUSA and the Young Communist League in 1936, and by 1937 rose to the Executive Committee of the Young Communist League in Harlem.¹⁷³ Aggressive FBI surveillance of Jones began in 1942.¹⁷⁴ At that point, the FBI considered her to be one of the “ablest young communists in [the] United States.”¹⁷⁵

In the ensuing years, she continued to ascend the Party's ranks and developed a reputation as a prominent journalist, becoming editor in chief of the *Weekly Review*, editor of Negro Affairs for the *Daily Worker*, and an editor of *Spotlight*, the monthly journal of American Youth for Democracy.¹⁷⁶ In fact, according to the FBI, *Spotlight* began in 1943 with Jones as editor, and just one year later had a circulation of 20,000.¹⁷⁷ In 1945, Jones was elected to the

169. See JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* 5-9, 390 (2016) (arguing that the Black Panthers fell under the weight of suppression by the FBI and local law enforcement).

170. See, e.g., Alice Speri, *The FBI Spends a Lot of Time Spying on Black Americans*, INTERCEPT (Oct. 29, 2019, 7:07 AM), <https://perma.cc/386P-GLKM>; Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. FOR JUST. (June 26, 2020), <https://perma.cc/B8KU-RQAD>.

171. BOYCE DAVIES, *supra* note 151, at xxiii.

172. *Id.*

173. *Id.* at xxiv.

174. *Id.*; FBI File of Claudia Jones at 4, Claudia Jones Research Collection, Box 2(2) (on file with the Manuscripts, Archives and Rare Books Division, Schomburg Center for Research in Black Culture).

175. FBI File of Claudia Jones, *supra* note 174, at 16; BOYCE DAVIES, *supra* note 151, at xxiv. The statement was made in a discussion regarding both Jones and Philip Arrindell, so it could be referring to either individual. See FBI File of Claudia Jones, *supra* note 174, at 16. I believe, however, that in light of the FBI's focus on Jones and her subsequent deportation, that it was likely that the FBI viewed Jones to be a significant force in U.S. Communism.

176. BOYCE DAVIES, *supra* note 151, at xxiv; FBI File of Claudia Jones, *supra* note 174, at 60, 76.

177. FBI File of Claudia Jones, *supra* note 174, at 60.

National Committee of the Communist Party USA, and in 1947, she became secretary of the Women's Commission of the CPUSA.¹⁷⁸

Jones was arrested for the first time in 1948, the same year in which the defendants in *Dennis* were indicted under the Smith Act, which prohibited advocacy of the violent overthrow of the government and would effectively outlaw the CPUSA.¹⁷⁹ Charged under the 1918 Immigration Act, which authorized the deportation of political radicals, Jones was held at Ellis Island for one day until she was bailed out.¹⁸⁰ While out on bail, she toured forty-three states and worked with Black and working-class women to develop the Party's grassroots capacity at the local level.¹⁸¹ Jones's deportation hearing was postponed after it began because the government could not find witnesses willing to testify against her.¹⁸²

In 1950, Jones was arrested again.¹⁸³ The overt act which raised FBI concern was a speech she gave entitled "International Women's Day and the Struggle for Peace."¹⁸⁴ Jones was held in prison at Ellis Island for an additional two months under the McCarran Internal Security Act of 1950, which authorized the emergency detention of Communists, and she was served with a deportation order when she was released on bail.¹⁸⁵ She was then arrested a third time in June 1951 under the Smith Act, alongside Elizabeth Gurley Flynn and fifteen other Communists.¹⁸⁶ Jones was released on bail in July.¹⁸⁷

Claudia Jones's third and final arrest occurred just twenty-five days after the Supreme Court's *Dennis* decision came down.¹⁸⁸ She had been arrested under both the 1918 Immigration Act and the McCarran Act, after which she

178. BOYCE DAVIES, *supra* note 151, at xxiv.

179. *Id.* at xxiv; *see supra* Part I.B. The language of the arrest warrant includes First Amendment issues. *See* BOYCE DAVIES, *supra* note 151, at 150.

180. BOYCE DAVIES, *supra* note 151, at xxiv.

181. *Id.* at xxiv-xxv.

182. *Id.*

183. *Id.* at xxv.

184. *International Women's Day and the Struggle for Socialism*, SPRING MAG. (Mar. 8, 2021), <https://perma.cc/Y5GN-TX5A> (capitalization altered) (excerpting Jones's speech, which describes the relationship between capitalism, racism, and patriarchy, particularly as they manifest in times of war); BOYCE DAVIES, *supra* note 151, at 54.

185. BOYCE DAVIES, *supra* note 151, at xxv; Marc Patenaude, *The McCarran Internal Security Act, 1950-2005: Civil Liberties Versus National Security 3* (May 2006) (M.A. thesis, Louisiana State University), <https://perma.cc/U7EC-BC2A> (arguing that the McCarran Act was the legal and conceptual predecessor to modern national security legislation, including the Patriot Act).

186. BOYCE DAVIES, *supra* note 151, at xxv.

187. *Id.*

188. *Id.* at xxv, 150-51.

was only served with a deportation order.¹⁸⁹ But it was her conviction under the Smith Act that led to her imprisonment in 1953, during which she suffered heart failure.¹⁹⁰ She made the decision to self-exile shortly thereafter and left the United States in December of 1955.¹⁹¹

Jones's deportation was ordered on December 5, and she arrived in London on December 22, where she joined the Communist Party of Great Britain and worked with the Caribbean Labour Congress, the West Indian Forum, and the Committee on Racism and International Affairs.¹⁹² She visited the Soviet Union in 1962 as a guest of the editors of *Soviet Women*, and again in 1963 as a representative of Trinidad and Tobago at the World Congress of Women.¹⁹³ In 1964, she worked with the African National Congress to organize the boycott movement against South Africa and demand the release of Nelson Mandela.¹⁹⁴ That same year, she met both Martin Luther King, Jr., on his way to visit Oslo to receive the Nobel Peace Prize, and Mao Tse Tung, during a trip to China as a member of a Latin American delegation.¹⁹⁵ She died of heart failure later that year.¹⁹⁶

Unlike most of the defendants in *Dennis*, Jones was a Black woman and an immigrant—identities that rendered her both removable and expendable.¹⁹⁷ By the time *Dennis* came down, Jones did not need to be silenced by the First Amendment and its limitations. She had already been arrested twice and would soon be incarcerated and sent away.¹⁹⁸ According to Jones herself, in a letter she sent to the *Daily Worker* that was published on November 8, 1950:

189. *Id.* at xxiv-xxv.

190. *Id.* at xxv; *see also id.* at 107-08.

191. *Id.* at xxv, 142. Jones suffered heart failure and was hospitalized for three weeks at the end of her trial, and was later diagnosed with hypertensive cardiovascular disease. In between the conviction and her time in prison, she became the editor of *Negro Affairs Quarterly*, a Communist publication. On January 11, 1955, she was imprisoned at the Women's Penitentiary in Alderson, West Virginia. She was released on October 23 of the same year for health reasons, and her sentence was commuted for good behavior. She had a heart attack after her release, which doctors identified as resulting from her imprisonment. *Id.* at xxv.

192. *Id.* Although Jones was ordered to be deported, the government allowed her to shift her designation, so she opted for exile. *Id.* at 142.

193. *Id.* at xxvi.

194. *Id.*

195. *Id.* at xxvi-xxvii.

196. *Id.*

197. *See, e.g.,* Michael G. Hanchard, *The Color of Subversion: Racial Politics and Immigration Policy in the United States*, EPICENTER (Int'l Ctr. for Migration, Ethnicity & Citizenship, New York, N.Y.), Winter 1999, at 1, 1, 6-7 (identifying how "state monitoring of U.S. African-American movement and migration has been, from the outset, related to broader fears of racial and ideological subversion in national political culture").

198. *See* BOYCE DAVIES, *supra* note 151, at xxiv-xxv.

The majority of newspapers tell you, that we are here because we are awaiting deportation hearings. That is a foul lie. . . . Many of us have had no hearings or legal examinations of any kind. We have never been confronted with any evidence, or made familiar with any crime, alleged or charged against us. Nor have any of us been informed or charged with the slightest infraction of the terms of our release on bail. . . . Nevertheless the government has re-arrested us without due process of law, and seeks to assign us to a virtual life-long imprisonment on Ellis Island.¹⁹⁹

While many Communists, according to Jones, were imprisoned irrespective of racial identity or immigration status, she and her comrade Elizabeth Gurley Flynn—both incarcerated at Ellis Island—believed that the government’s treatment of racially subordinated Communists, especially immigrant Communists, differed from that of white Communists²⁰⁰:

All 17 [of the women] here are examples of devotion to the strugglers of the labor movement, in the fight for Negro rights, against discrimination and lynching, in the fight for democracy, in our efforts on behalf of the peace and security of the people. . . .

There is a Spanish-American, a Ukrainian-American, an Italian-American, a Greek-American, and Jewish Americans. Descendants of Haym Solomon and Guiseppe Garibaldi, and of the people of Simon Bolivar and La Pasionaria, Sam Martin, they are proud and honored descendants of these heroes and heroines.²⁰¹

Jones called the group of women imprisoned under the McCarran Act a “virtual United Nations.”²⁰² Elizabeth Gurley Flynn, in her book entitled *The Alderson Story: My Life as a Political Prisoner*, speaks of women that she and Jones knew who had been picked up upon their release from prison and “shipped to Cuba, Mexico, and other Latin American countries.”²⁰³

Jones’s FBI file contains thousands of documents produced from surveillance of her activities in Black and women’s spaces and organizations.²⁰⁴ The FBI was particularly interested in her journalistic contributions focusing on matters involving the Black liberation struggle and feminism.²⁰⁵ For

199. *Id.* at 201-02 (second alteration in original) (quoting Claudia Jones).

200. *See id.* at 148 (“As the Claudia Jones experience reveals, incarceration and deportation are the twin ways that the U.S. state has dealt with its ‘undesirables.’”).

201. *Id.* at 154 (quoting Claudia Jones). *See generally* MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1999) (describing how many Europeans were treated as racially inferior nonwhites prior to the Cold War).

202. BOYCE DAVIES, *supra* note 151, at 154 (quoting Claudia Jones).

203. *Id.* at 156 (quoting ELIZABETH GURLEY FLYNN, *THE ALDERSON STORY: MY LIFE AS A POLITICAL PRISONER* 117 (1963)).

204. *See* FBI File of Claudia Jones, *supra* note 174.

205. *See, e.g., id.* at 67.

example, one document from 1945 in Jones's FBI file states that she had recommended to the CPUSA:

[T]hat a Commission be set up to examine Communist work in the Negro field with the aim of making a specific appraisal and study of work in Negro communities, especially presenting an analysis of the status of the Negro people in the "Black Belt," in industry, in consumer, industrial and agricultural spheres, and in the trade unions.²⁰⁶

The Bureau was also interested in Jones's work leading discussions about new novels focused on Black life in the United States, particularly when they occurred in broader settings like the Queens County Educational Conference in Long Island City, where she began discussions on the "Negro Question."²⁰⁷ This was of particular interest to the FBI because it reflected Jones's ability to build cross-racial alliances between the Black and white working classes. For example, she initiated discussions about incidents like the Freeport murders—the 1946 murders of two brothers by white police officers that enraged the Black community and heightened social tensions in the highly segregated town of Freeport, Long Island.²⁰⁸

According to the FBI, following the Freeport murders, the CPUSA became active in the organized political activity that emerged in the local community, and Jones was central to that effort.²⁰⁹ She spoke at rallies and events throughout New York and addressed the issue of both police violence and international warmongering, challenging U.S. atrocities both at the domestic and global scales.²¹⁰ She was also "[o]ne of the leading figures" in a delegation of 150 people that marched on the New York State Capitol in Albany in protest of the murders.²¹¹

That U.S. Communists, often considered to be primarily of white American or European immigrant backgrounds, were increasingly working with Black communities and women appeared to be of particular concern to the FBI.²¹² This solidarity and coalition building was of great interest to the FBI, particularly because Jones sought to build solidarity with the white

206. *Id.*

207. *Id.* at 77-85.

208. See Denise Lynn, *Racial Fascism in the Postwar United States*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (July 22, 2021), <https://perma.cc/L456-CHL7>.

209. See *id.*

210. BOYCE DAVIES, *supra* note 151, at xxv; Claudia Jones, An End to the Neglect of the Problems of the Negro Woman! (1949), in *An End to the Neglect of the Problems of the Negro Woman! (1949)*, ABOLITION NOTES, <https://perma.cc/SBU4-3LB2> (archived Jan. 24, 2023).

211. FBI File of Claudia Jones, *supra* note 174, at 77-85.

212. See *id.*

working class while also challenging the racism of white workers.²¹³ In one document, the FBI notes:

[Jones] reportedly gave a long discussion on the inequality between negroes and whites and said that while the unity of the negroes and the whites in the picket lines must be witnessed, this could not be separated from post war violations against negro veterans as well as the [Fair Employment Practice Committee] filibuster in Congress. She stated, "We urge a strong fight against white chauvinism, which must be reflected in our press, theoretical organs, and above all, our struggle. We must [pursue] greater gains and greater victories."²¹⁴

It is notable that the agents repeatedly call Jones a "negress" or "negro" in the paperwork that they submitted.²¹⁵ Of course, this terminology is used as an identifying characteristic, but its consistent usage over years of surveillance highlights Jones's hypervisibility as a specifically Black Party member and activist. It was not just her identity that raised red flags for the FBI, but also her work as a Black woman Communist.²¹⁶ Her positionality as a Black person enabled her to work effectively with Black communities and create inroads that the CPUSA had always struggled with, especially in the North.²¹⁷ And because she was a working-class woman who had roles in industries that often relied on women workers, she was able to create inroads with women across race by using class as a vehicle for solidarity.²¹⁸

In targeting Claudia Jones, the government sought to discipline both her politics and her subjectivity as a Black feminist Communist.²¹⁹ Thus, Jones's disappearance from the U.S. body politic was a significant victory not just for the anticommunist cause, but also for the white-supremacist cause.²²⁰ Paul

213. *See id.*

214. *Id.* (quoting Claudia Jones).

215. *See generally id.* (using such slurs).

216. *See id.*

217. *See* McDuffie, *Black and Red*, *supra* note 89, at 237-38.

218. *See* Claudia Jones, *We Seek Full Equality for Women*, in *From the Archive: We Seek Full Equality for Women*, NEW FRAME (Aug. 29, 2019), <https://perma.cc/U6N2-6UJZ>.

219. BOYCE DAVIES, *supra* note 151, at 19, 139 (citing Richard O. Boyer, *Why 6 Negro Leaders Defend Claudia Jones*, DAILY WORKER (N.Y.), Feb. 25, 1952, at 5).

220. *See* BOYCE DAVIES, *supra* note 151, at 137.

In my view, the deportation of Claudia Jones in a sense effected the deporting of the radical Black female subject from U.S. political consciousness. By "radical Black female subject," I mean both this Black radical herself and the basic subject or topic of Black female radicalism within a range of political positions and academic histories. Claudia Jones's politics were radical because she was seemingly fearless in her ability to link decolonization struggles internally and externally, and to challenge U.S. racism, gender subordination, class exploitation, and imperialist aggression simultaneously. . . . In the end, then, combating the erasure and silencing of Claudia Jones means simultaneously relocating her in the multiple discourses that she articulated and to which she belonged. . . . But it is precisely in that space between the domestic and the international that someone

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Robeson, a widely loved Black musician, activist, and member of the CPUSA, was also of particular interest to the FBI at the time.²²¹

Had the United States not deported Claudia Jones, exiled Shirley Graham and W.E.B. Du Bois, or silenced other famed Black Marxists like Eslanda and Paul Robeson, there is no telling how much Socialism may have taken hold in the Black community, as it did in nations all over Asia, Africa, and Latin America.²²² While the government systematically targeted and deported Communist leaders from the United States, whether they were white or Black, it is clear that by repressing the activism of Black Marxists in particular, the government knew that it was effectively killing two birds with one stone—eliminating both anticapitalism and its intersections with the movements to end white supremacy and imperialism.

But this eradication of Black Marxism is not evident in studies of the First Amendment right to freedom of speech. In fact, acclaimed First Amendment scholar Harry Kalven, Jr., once said that “we may come to see the Negro as winning back for us the freedoms the Communists seemed to have lost for us.”²²³ Kalven’s mention of the freedoms won back was a reference to the Supreme Court victories of the late 1950s and 1960s that established the First Amendment right to freedom of association, the right of organizations to file lawsuits, and the expansion of freedom of the press.²²⁴ His mention of the freedoms that Communists lost is likely a veiled reference to the landmark decisions in *Dennis v. United States* and *Scales v. United States*.²²⁵ But as the next Subpart suggests, Kalven overstated the freedoms won, and misattributed the freedoms lost to the Communists.

like Claudia Jones, though she had spent the bulk of her life in African American communities in the United States, continuously disappears.

Id. at 2, 7, 12.

221. See BELKNAP, *supra* note 63, at 104, 106-07.

222. See generally BARBARA RANSBY, *ESLANDA: THE LARGE AND UNCONVENTIONAL LIFE OF MRS. PAUL ROBESON* (2013) (discussing the influence of Eslanda and Paul Robeson throughout Asia, Africa, and Latin America); Jone Johnson Lewis, *Biography of Shirley Graham Du Bois: Writer, Musical Composer, Civil Rights Activist*, THOUGHTCO. (updated Mar. 4, 2018), <https://perma.cc/CR78-PC5J> (discussing Shirley Graham’s and W.E.B. Du Bois’s exile).

223. KALVEN, *supra* note 6, at 6.

224. See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958); NAACP v. Button, 371 U.S. 415, 419-20, 428-29 (1963); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283-284 (1964); Hansford, *supra* note 5, at 691 (arguing that Black people and Black speech have had less associational protection than white people expressing white-supremacist speech).

225. See *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (finding that the First Amendment does not protect Communist speech or associational activity); see also Rohr, *supra* note 60, at 2. Similarly, in *Scales v. United States*, the Court upheld Scales’s conviction under the Smith Act, holding that the clause in the Smith Act prohibiting membership in the Communist Party was constitutional. See 367 U.S. 203, 205-06 (1961).

B. *Walker v. City of Birmingham*

*Walker v. City of Birmingham*²²⁶ reflects a historical shift in the Court's treatment of civil rights cases. For that reason, it is worthy of critical attention. The leaders of the Civil Rights Movement were aware of the special, subordinate status of Communists under the First Amendment.²²⁷ Civil rights leaders preempted similar allegations that they sought the violent overthrow of the U.S. government by deploying the principle of nonviolence as both a tactical approach and a rhetorical tool.²²⁸ The movement was incredibly effective at gaining broad support for its cause, and because of this it was able to not just attain passage of favorable reforms, but also demand compliance with civil rights laws.²²⁹ Rather than engage in direct confrontation with the state, the movement focused on disrupting the flows of labor and capital in the South, using sit-ins, boycotts, and demonstrations to interrupt business as usual.²³⁰

Derrick Bell notes that “[e]ven President John F. Kennedy admitted to civil rights leaders privately in June 1963 ‘that the demonstrations in the streets had brought results, they had made the executive branch act faster and were forcing Congress to entertain legislation which a few weeks before would have had no chance.’”²³¹ According to Bell, prior to 1965, the Supreme Court often sided with the Civil Rights Movement against frequently violent challenges by white-supremacist organizations and local governments.²³² But after 1965, the Court shifted gears and began to withdraw its support for the movement.²³³ Bell attributes this change to the Court's weariness of the Civil Rights Movement's tactics and its ambivalence regarding the movement's goals.²³⁴

226. 388 U.S. 307 (1967).

227. See Wiecek, *supra* note 60, at 377; Harris, *supra* note 36, at 161-63; ANDERSON, *supra* note 153, at 5-7; Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 548 (1963) (noting that the NAACP was avowedly anticommunist).

228. See ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE, at ix (1984). See generally CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995) (highlighting the grassroots nature of the movement and its tactically nimble approach to bringing about social transformation).

229. BELL, *supra* note 12, § 10.2, at 597 (“[W]ithout the drama and confrontation of direct action protest, the basic mandate of *Brown*, ending the ‘separate but equal’ doctrine of *Plessy v. Ferguson*, might never have been implemented. Certainly, there had been little voluntary compliance from 1954 until the sit-in era in the early 1960s.”).

230. See Dowd Hall, *supra* note 153, at 1235-36 (describing the various tactics used by the movement, their “coercive” effects, and their representation in the media).

231. BELL, *supra* note 12, § 10.2, at 598 (quoting ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 969-70 (1965)).

232. *Id.* § 10.3, at 601.

233. *Id.*

234. *Id.*

After the passage of the Civil Rights Act of 1964, it is possible that members of both the Court and the executive branch believed that they had done more than enough, but the language of Justice Brennan's dissent in *Walker v. City of Birmingham* suggests that members of the Court were particularly concerned about the rising tide of radicalism.²³⁵ Thus, Supreme Court precedent emerging out of impact litigation brought during the Civil Rights Movement reflects a great deal of internal unevenness and inconsistency.²³⁶

Walker v. City of Birmingham arose out of one of the most celebrated campaigns of the Civil Rights Movement and involved the arrest of notable movement leaders including Dr. Martin Luther King, Jr., and Ralph Abernathy.²³⁷ In April 1963, the Southern Christian Leadership Conference

235. *Walker v. City of Birmingham*, 388 U.S. 307, 349 (1967) (Brennan, J., dissenting). The Court seemed concerned about both the rise of Black Power and the anti-Vietnam War movement, both of which had taken over the streets of major urban centers. Thus, the source of this uneven treatment of cases is exogenous to the law itself; there were no significant changes to precedent that would have led the Court to shift its position and begin to rule against the movement. Quite the contrary, precedent increasingly favored the objectives of the Civil Rights Movement and broad racial reform. But the United States invaded Vietnam in 1965. Although the anti-war movement had emerged in late 1963, it was only after the massive deployment of troops in 1965 that streets and college campuses across both the North and the South were lined with protesters. The political landscape had shifted, and the nation was faced with great instability. See CHARLES DEBENEDETTI & CHARLES CHATFIELD, AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA 114 (1990) ("Our problem . . . is in America, not in Vietnam." (quoting Students for a Democratic Society National Secretary Clark Kissinger)). For an excellent history of the Vietnam War, see generally MARILYN B. YOUNG, THE VIETNAM WARS: 1945-1990 (1991).

236. *Edwards v. South Carolina*, 372 U.S. 229 (1963) and *Adderley v. Florida*, 385 U.S. 39 (1966), which both involved the right to protest on state property, reflect the internal inconsistency of the Court's decisions during the Civil Rights Movement. In *Edwards*, the Court found in favor of high school and college students charged with breach of the peace for protesting state segregation laws at the South Carolina State Capitol, reasoning that the students had been peaceful and had not engaged in any incitement to violence. See *Edwards*, 372 U.S. at 230, 237-38.

The petitioners in *Adderley* argued that their case was analogous to *Edwards*, but the Court disagreed, finding that the only similarity between the two cases was that the protesters sang hymns and danced. *Adderley*, 385 U.S. at 41-42. In *Adderley*, thirty-two protesters demonstrated at the county jail in Leon County, Florida, to protest the arrests of anti-segregation students the day before. According to the Court, the protesters blocked a driveway to the jail where the students were being held. The sheriff asked them to leave the jail grounds, but some students refused and were arrested. The Court held that state capitol grounds are open to the public, but county jails are not. *Adderley*, 385 U.S. at 40-41, 47 ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections . . .").

237. See *Critical Legal Readings of Walker v. Birmingham*, THE BRIDGE, <https://perma.cc/654S-4K87> (archived Nov. 27, 2022) (to locate, select "View the live page"). See generally *footnote continued on next page*

(SCLC) and the Alabama Christian Movement for Human Rights (ACMHR) launched a massive direct action campaign to “put[] pressure on Birmingham’s merchants during the Easter season, the second biggest shopping season of the year.”²³⁸ According to the leaders of the ACMHR, Fred Shuttlesworth and N.H. Smith, the campaign was “a moral witness to give our community a chance to survive.”²³⁹ Launched in the heart of U.S. racial apartheid, the campaign used boycotts, sit-ins, and demonstrations to protest police and white vigilante violence against Black people, as well as racial segregation in Birmingham.²⁴⁰

The campaign was launched on April 3, 1963, with a series of mass meetings, direct actions, lunch-counter sit-ins, marches on City Hall, and a boycott of downtown merchants.²⁴¹ The SCLC and ACMHR planned protests for Good Friday and Easter Sunday, April 12 and 14, in the heart of the city, including a “kneel-in” protest at a local church.²⁴² On or about April 3, Lola Hendricks, a member of the ACMHR, went to the police department to obtain a permit for the protest. She was referred to Commissioner Eugene “Bull” Connor, who immediately denied the permit: “No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail.”²⁴³ On April 5, following this interaction, Reverend Fred Shuttlesworth, one of the petitioners in *Walker* and a founder of the SCLC and ACMHR, sent a telegram to Connor requesting a permit and stating “that ‘the normal rules of picketing’ would be observed.”²⁴⁴ Connor responded on the same day stating that the entire City Commission would have to approve a permit, that he could not do so on his own, and that in any event “you and your people [should] not start any picketing on the streets in Birmingham.”²⁴⁵ The activists tried to show

MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* (Signet Classics 2000) (1963) (providing a firsthand account of the Birmingham Campaign from Dr. King himself).

238. See *Birmingham Campaign*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://perma.cc/MPN5-CMZA> (archived Nov. 27, 2022).

239. F.L. Shuttlesworth & N.H. Smith, Birmingham Manifesto (Apr. 3, 1963), in *TEACHING AM. HIST.*, <https://perma.cc/S6XQ-HZ5R> (archived Nov. 27, 2022); see also *Birmingham Campaign*, *supra* note 238.

240. For an excellent account of this, see MORRIS, *supra* note 228, at 1-16 (describing how the Civil Rights Movement sought to fracture what Morris calls the “tripartite system of racial domination”—the political class, the economic elites, and the white-supremacist organizations).

241. *Birmingham Campaign*, *supra* note 238.

242. See *Walker v. City of Birmingham*, 388 U.S. 307, 309 (1967); see also *Birmingham Campaign*, *supra* note 238; *Critical Legal Readings of Walker v. Birmingham*, *supra* note 237.

243. *Walker*, 388 U.S. at 335 (Douglas, J., dissenting) (quoting Birmingham Commissioner of Public Safety Eugene “Bull” Connor).

244. *Id.* at 335-36 (quoting SCLC and ACMHR founder Fred Shuttlesworth).

245. *Id.* at 336 (quoting Birmingham Commissioner of Public Safety Eugene “Bull” Connor).

that permits were generally “granted by the city clerk at the request of the traffic division,” but were cut off.²⁴⁶

On April 10, an Alabama circuit court judge issued a temporary injunction enjoining the organizations from organizing or participating in street parades and protests but did not notify the 133 people named in the injunction.²⁴⁷ The affidavits stated that demonstrations, parades, and pickets had been held during the week prior and were expected to continue. After receiving copies of the injunction, the petitioners in *Walker* held a press conference to announce that they would not obey the unlawful injunction, which they argued was a prior restraint on their speech.²⁴⁸ “We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process,” Martin Luther King, Jr., declared.²⁴⁹ The groups proceeded with the Good Friday and Easter Sunday demonstrations.²⁵⁰ King was arrested on Good Friday, April 12, and held in solitary confinement.²⁵¹ On the day of his arrest, eight clergy wrote a statement published in a local paper condemning the protests and the campaign, calling its strategy “unwise and untimely” and urging both white and Black citizenry “to observe the principles of law and order.”²⁵² King responded while he was in solitary confinement with the now famous “Letter from Birmingham Jail.”²⁵³

By the time *Walker* reached the Supreme Court in 1967, the national atmosphere had shifted considerably. The anti-Vietnam War movement had captured the spirit of much of the nation, a draft had been instituted to send young men off to war, and the Black Power movement was on the rise.²⁵⁴ The Court cited an outdated decision involving labor injunctions, *Howat v. Kansas*, to find in support of the City of Birmingham.²⁵⁵ Labor injunctions had been invalidated as unconstitutional prior restraints on speech, but the Court relied

246. *Id.*

247. *Id.* at 326-27, 330 (Warren, C.J., dissenting) (discussing that notice was not served until “various times on Thursday and on Good Friday”).

248. *Id.* at 309-10 (majority opinion).

249. *Birmingham Campaign*, *supra* note 238 (quoting Martin Luther King, Jr.).

250. *Id.*

251. *Id.*

252. See “Letter from Birmingham Jail,” MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (quoting *White Clergymen Urge Local Negroes to Withdraw from Demonstrations*, BIRMINGHAM NEWS (Apr. 13, 1963)), <https://perma.cc/QL4Y-QP55> (archived Nov. 27, 2022).

253. *Id.*

254. See generally BLOOM & MARTIN, *supra* note 169 (discussing the powerful influence of the Black Panther Party, and its historic rise and fall); *supra* note 235.

255. *Walker v. City of Birmingham*, 388 U.S. 307, 313-15 (1967) (citing *Howat v. Kansas*, 258 U.S. 181 (1922)).

on *Howat* nonetheless.²⁵⁶ The Court in *Walker* rejected the notion that the Constitution affords the same protections to ideas communicated through marching and picketing as those afforded to what it called “pure speech.”²⁵⁷

A series of dissents authored by Chief Justice Warren, Justice Douglas, and Justice Brennan forcefully argued that the actions of the City of Birmingham were clearly unconstitutional and motivated by race.²⁵⁸ The dissenting Justices alluded to the statements made by the eight clergy against the Birmingham Campaign, rejecting the patronizing notion that “the Negro exercise ‘respect for the judicial process’” by complying with a restraining order that even the majority found to be problematic.²⁵⁹ Justice Brennan argued that the Court was “let[ting] loose a devastatingly destructive weapon for infringement of freedoms,” balancing away the constitutional guarantee of free speech and denying “the right to speak at all.”²⁶⁰

On several occasions, the dissents nodded to discussions and concerns that gripped the nation at the time.²⁶¹ At the end of his dissent, Justice Brennan noted the rise of the Black Power slogan, and stated that:

256. *Id.* at 332-33 (Warren, C.J., dissenting). In his dissent in *Walker*, Chief Justice Warren distinguished *Howat* and *In re Green*, 369 U.S. 689 (1962), from one another, and then from *Walker*. Both *Howat* and *Green* were labor-union cases involving peaceful picketing, which the state sought to prohibit without a proper hearing. *Id.* at 333 (“In both [*Howat* and *Green*], the orders were of questionable legality, but in both cases they were reasonably necessary to enable the court or administrative tribunal to decide an underlying controversy of considerable importance before it at the time. This case involves an entirely different situation. The Alabama Circuit Court did not issue this temporary injunction to preserve existing conditions while it proceeded to decide some underlying dispute. There was no underlying dispute before it, and the court in practical effect merely added a judicial signature to a preexisting criminal ordinance.”).

257. *Id.* at 316 (quoting *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

258. “One who reads this record will have, I think, the abiding conviction that these people were denied a permit solely because their skin was not of the right color and their cause was not popular.” *Id.* at 337 (Douglas, J., dissenting).

259. *Id.* at 338 (Brennan, J., dissenting) (quoting *id.* at 321 (majority opinion)); see also *id.* at 316 (majority opinion) (“The generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions.” (citing *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Saia v. New York*, 334 U.S. 558 (1948); and *Kunz v. New York*, 340 U.S. 290 (1951))).

260. *Id.* at 349 (Brennan, J., dissenting).

261. From 1964 to 1968, urban Black communities in the United States rose up to protest poor social conditions, including a lack of access to jobs and resources, increasing police violence, and government repression. While historians, social scientists, and journalists commonly call these rebellions riots—denoting a lack of organization and political purpose—these actions occurred during the height of the Black freedom movement, and many communities revolted in ways that were simultaneously organized and spontaneous. In fact, more than 120 cities experienced major rebellions in the first nine months of 1967, creating great concern among federal, state, and local

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We cannot permit fears of “riots” and “civil disobedience” generated by slogans like “Black Power” to divert our attention from what is here at stake—not violence or the right of the State to control its streets and sidewalks, but the insulation from attack of *ex parte* orders and legislation upon which they are based even when patently impermissible prior restraints on the exercise of First Amendment rights, thus arming the state courts with the power to punish as a “contempt” what they otherwise could not punish at all.²⁶²

Walker was argued before the Supreme Court on March 13 and 14, 1967.²⁶³ On April 4, King delivered his now legendary speech, “Beyond Vietnam.” In the speech, he proclaimed that the Vietnam War was “the most pressing symptom of American colonialism worldwide,” and that the United States made “peaceful revolution impossible by refusing to give up the privileges and the pleasures that come from the immense profits of overseas investments.”²⁶⁴ Although King had publicly come out against the war as early as March 1965 and gave anti-war speeches prior to delivering “Beyond Vietnam,” it was this speech that garnered the most condemnation.²⁶⁵ Both the NAACP and noted political scientist Ralph Bunche came out against the speech, and an editorial published in the *Washington Post* titled *A Tragedy* said that King had “diminished his usefulness to his cause, to his country, and to his people.”²⁶⁶ The Supreme Court’s *Walker* decision came down two months later, on June 12, 1967.²⁶⁷

King and his colleagues launched the Poor People’s Campaign in November 1967.²⁶⁸ While King believed that “[d]esegregation and the right to vote were

authorities. See MCLAUGHLIN, *supra* note 25, at 7. For a historical accounting of the major events of the 1960s, see the sources cited in note 25 above.

Several state and federal commissions were formed to investigate the root cause of the upheaval. See, e.g., GOVERNOR’S COMM’N ON THE L.A. RIOTS, VIOLENCE IN THE CITY—AN END OR A BEGINNING? (1965); ROBERT SHELLOW, THE HARVEST OF AMERICAN RACISM: THE POLITICAL MEANING OF VIOLENCE IN THE SUMMER OF 1967, at 2-3 (2018); NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). The National Advisory Commission on Civil Disorders, or Kerner Commission, was established by President Johnson through Executive Order 11,365. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, *supra*, at v.

262. *Walker*, 388 U.S. at 349 (Brennan, J., dissenting).

263. *Id.* at 307 (majority opinion).

264. “Beyond Vietnam,” MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (quoting Martin Luther King, Jr., Beyond Vietnam (Apr. 4, 1967), in *Martin Luther King, Jr.: Beyond Vietnam—A Time to Break Silence*, AM. RHETORIC, <https://perma.cc/HR7N-6QL6> (archived Nov. 28, 2022)), <https://perma.cc/J9HH-A6G3> (archived Nov. 28, 2022).

265. *Id.*

266. *Id.* (quoting *A Tragedy*, WASH. POST, Apr. 6, 1967, at A20).

267. *Walker*, 388 U.S. at 307.

268. See *Poor People’s Campaign*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://perma.cc/7YDV-X5BP> (archived Nov. 28, 2022).

essential,” he knew that Black people and other people of color would never attain full citizenship without economic justice²⁶⁹: “This is a highly significant event . . . the beginning of a new co-operation, understanding, and a determination by poor people of all colors and backgrounds to assert and win their right to a decent life”²⁷⁰

This anti-imperialist and anticapitalist King is not the icon that the federal government celebrates on the National Mall every January. King’s anti-imperialism and anticapitalism, central to his trajectory as a leader of the Civil Rights Movement, has been silenced²⁷¹ and replaced by a younger King focused on anti-segregation laws and voting rights.²⁷² King was assassinated on April 4, 1968 in Memphis, Tennessee, where he went to organize a march in support of striking Black sanitation workers.²⁷³ The assassination occurred exactly one year to the day after he delivered “Beyond Vietnam.”

In many ways, King’s life and political trajectory reflect the arc of the Black Liberation Movement in the United States, and the *Walker* case marks a watershed moment in that historical arc. King and his colleagues fought for a wide range of economic, social, and political rights for Black people and nonwhite people globally, but ultimately the state granted only a narrow set of rights to Black people and other racially subordinated communities in the United States—while expanding its imperial footprint across the world. In the next Subpart, I address the state’s brutality against the Black Power movement and the First Amendment’s inability to protect radical, anticapitalist, anti-imperialist speech from the onslaught of state violence.

C. The Counterintelligence Program: Internal Security

Black radicals and other racially subordinated and indigenous peoples had been subject to state violence since the founding of the nation, but the 1950s marked a turning point in the development of the repressive state. The FBI, under the direction of J. Edgar Hoover, created the Counterintelligence Program, or COINTELPRO, in 1956.²⁷⁴ The Counterintelligence Program enabled extralegal surveillance of Communists despite the *Yates v. United States*

269. *Id.*

270. *Id.* (quoting Martin Luther King, Jr.) (noting that leaders of many communities throughout the United States, including indigenous people, Puerto Ricans, Mexicans, and poor whites pledged themselves to the campaign and joined the cause).

271. See, e.g., President Barack Obama, Remarks by the President at the Martin Luther King, Jr. Memorial Dedication (Oct. 16, 2011), <https://perma.cc/CM4H-DHNC>.

272. Dowd Hall, *supra* note 153, at 1234.

273. See *Assassination of Martin Luther King, Jr.*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://perma.cc/J9JS-X78N> (archived Nov. 28, 2022).

274. COINTELPRO, FBI, <https://perma.cc/9WQF-V7RG> (archived Jan. 24, 2023).

decision, which had made it difficult to continue those activities lawfully.²⁷⁵ On August 25, 1967, eight months before King's assassination, Hoover announced the formation of a new Counterintelligence Program initiative targeting both Black Power organizations and civil rights organizations.²⁷⁶ He sent a memo to the Agency directing offices in major cities throughout the country to establish "a control file . . . and to assign responsibility for following and coordinating this new counterintelligence program to an experienced and imaginative Special Agent well versed in investigations relating to black nationalist, hate-type organizations."²⁷⁷ Issued less than two months after the *Walker* decision, the memo outlined the purpose of the new program:

[T]o expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters . . . Intensified attention under this program should be afforded to the activities of such groups as the Student Nonviolent Coordinating Committee, the Southern Christian Leadership Conference, Revolutionary Action Movement, the Deacons for Defense and Justice, Congress of Racial Equality, and the Nation of Islam.²⁷⁸

The memo indicated that FBI offices should deploy a variety of means with the potential to disrupt the association and speech rights of the Black Liberation Movement's activists.²⁷⁹ Such tactics included using counterintelligence techniques to exploit the organizations and personal conflicts within their leadership, and enlisting the cooperation of local news media to disrupt, ridicule, or discredit the organizations.²⁸⁰ Notably, there was to be minimal monitoring of the program: "At this time the Bureau is setting up no requirement for status letters to be periodically submitted under this program. It will be incumbent upon you to insure the program is being afforded necessary and continuing attention and that no opportunities will be overlooked for counterintelligence action."²⁸¹

The stated goals of the program were directed and disruptive, intended to prevent any further growth of the Black Liberation Movement, with the

275. 354 U.S. 298, 324 (1957). In *Dennis v. United States*, the Court found that Communist speech was not protected by the First Amendment, so federal law enforcement was authorized to surveil Communists and suppress their speech. See 341 U.S. 494, 516-17 (1951). Such activity was lawful, until *Yates* essentially overturned *Dennis*. See BELKNAP, *supra* note 63, at 248-61.

276. Memorandum from FBI Dir., Counterintelligence Program Black Nationalist-Hate Groups Internal Security (Aug. 25, 1967), in FREEDOM OF INFORMATION AND PRIVACY ACTS SUBJECT:(COINTELPRO)BLACK EXTREMIST 1, 1-3 (n.d.), <https://perma.cc/R2CA-T4C4>.

277. *Id.* at 1. "No opportunity should be missed," according to Hoover. *Id.* at 2.

278. *Id.* at 1-2.

279. See *id.* at 2.

280. *Id.*

281. *Id.*

ultimate aim of destroying it. The first goal was to prevent united coalitions among various organizations in the movement.²⁸² A second goal was to prevent the rise of a leader who could unify the movement and “electrify these violence-prone elements,” and a third goal was to prevent the organizations from gaining public respect.²⁸³ Another goal was to prevent support for the movement among American youth.²⁸⁴

The FBI expanded the initiative in February 1968 from 23 to 41 regions in order to cover “the great majority” of Black radical activity in the United States.²⁸⁵ At that point, after the initial six months of the initiative, the FBI required field offices to send periodic progress letters.²⁸⁶

The Civil Rights Act of 1968, commonly known as the Fair Housing Act, was enacted in April 1968 and made housing discrimination unlawful.²⁸⁷ Although the Act focused on housing issues, Title X was dedicated to the federal prosecution of civil disobedience.²⁸⁸ Notably, the Chicago Eight were

282. Memorandum from FBI Dir., Counterintelligence Program Black Nationalist-Hate Groups Racial Intelligence (Mar. 4, 1968), in FREEDOM OF INFORMATION AND PRIVACY ACTS SUBJECT: (COINTELPRO) BLACK EXTREMIST, *supra* note 276, at 65, 67.

283. Memorandum from G.C. Moore to C. Sullivan, Subject: Counterintelligence Program Black Nationalist-Hate Groups Racial Intelligence 1 (Feb. 29, 1968), in FREEDOM OF INFORMATION AND PRIVACY ACTS SUBJECT: (COINTELPRO) BLACK EXTREMIST, *supra* note 276, at 64.

284. Memorandum from FBI Dir., *supra* note 282, at 68.

285. Memorandum from G.C. Moore to C. Sullivan, *supra* note 283, at 6 (noting the purpose of expanding the Counterintelligence Program nationally).

286. *Id.*

287. Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604) (prohibiting discrimination in the sale, rental, or financing of housing).

288. Civil Obedience Act of 1968, Pub. L. No. 90-284, tit. X, 82 Stat. 73, 90-91 (codified as amended at 18 U.S.C. §§ 231-233). Section 1002(a) states the following about “Civil disorders”:

(a)(1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function; or

(2) Whoever transports or manufactures for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder; or

(3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—
Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) Nothing contained in this section shall make unlawful any act of any law enforcement officer which is performed in the lawful performance of his official duties.

Id. § 231, 82 Stat. at 90-91.

prosecuted under Title X,²⁸⁹ and over 350 Black Lives Matter activists have been prosecuted by the federal government under Title X as well.²⁹⁰ Despite the passage of this Act, however, the FBI continued to deal with Black Power organizations through various extralegal means.²⁹¹

On May 14, 1969, the San Francisco field office of the FBI sent a letter to J. Edgar Hoover critiquing the Counterintelligence Program and raising concerns about both the overall strategy and the tactics used to disrupt the movement.²⁹² The letter argued that “[t]here seems to be little likelihood” that the Black Panther Party could overthrow the government by revolutionary means.²⁹³ It also stated that the Party’s weekly newsletter had a circulation of 45,000, and that the office was not in a position to disrupt the distribution of the newsletter, even though it had been instructed to do so.²⁹⁴ The letter raised concerns about attacking the Black Panther Party’s Breakfast for Children program, which was receiving humanitarian assistance from both Black and white organizations and churches around the country.²⁹⁵

To this last contention, Hoover responded by arguing that the San Francisco field office had “obviously missed the point.”²⁹⁶ One of the primary objectives of the Counterintelligence Program was to disrupt white and Black support of the Black Panther Party, especially among moderates, and for this reason, the newsletter and breakfast program were appropriate targets.²⁹⁷ According to Hoover, the goal of the breakfast program was not to provide humanitarian support for the Black community, but to “create an image of

289. The Chicago Eight were a group of activists charged with conspiracy and other crimes in connection with anti-Vietnam War protests organized at the 1968 Democratic National Convention in Chicago. For a critically acclaimed rendition of the prosecutions, see *THE TRIAL OF THE CHICAGO 7* (Aaron Sorkin dir., 2020).

290. Michael Loadenthal, *Tracking Federal and Non-federal Cases Related to Summer-Fall Protests, Riots, & Uprisings*, THE PROSECUTION PROJECT, <https://perma.cc/MHD9-DZ93> (last updated July 13, 2022) (tracking 367 federal cases); see also Conrad Wilson, *DOJ Uses Civil Rights-Era Law to Charge Protesters and Insurrectionists*, NPR (May 22, 2021, 7:01 AM ET), <https://perma.cc/B9RP-8R34>; *infra* Part II.D.

291. See Memorandum from FBI Dir., *supra* note 276, at 1-3. See generally BLOOM & MARTIN, *supra* note 169 (providing a comprehensive history of FBI suppression and repression of the Black Panther Party).

292. While I do not have a copy of this letter, I do have a copy of the response from Hoover, which references the original letter. See Letter from FBI Dir. to SAC, San Francisco (May 27, 1969), in WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* 144-45, 150 (1990).

293. *Id.* at 144.

294. *Id.*

295. *Id.* at 145.

296. *Id.*

297. *Id.* at 144-45.

civility,” to gain control of the Black community, and “to fill adolescent children with [the Black Panther Party’s] insidious poison.”²⁹⁸

One of the Black Panther Party’s most powerful projects was its newsletter, a political-education tool used by the Party to describe the co-constitutive relationship between white supremacy, capitalism, and imperialism.²⁹⁹ The newsletter had a massive circulation across the country and the world, and the FBI did everything in its power to suppress its distribution.³⁰⁰ Thus, it was not the utterance of the speech itself that concerned the FBI; it was the spread of that antiracist, anticapitalist, anti-imperialist speech throughout the nation.³⁰¹ This case study is distinct from the previous two because it is purely extrajudicial; that is, the targeting of the Panthers’ newsletter by the FBI was not adjudicated in the courts. Because existing precedent supported the suppression of radical political speech, however, it is not clear that the FBI’s campaign was extralegal, despite later complaints by the Church Committee, which was charged with investigating abuses by the FBI, CIA, and others.³⁰²

Hoover ended his response to the San Francisco field office by calling for a reevaluation of the Counterintelligence Program in San Francisco, including

298. *Id.* at 145.

299. Brian Glick, *Preface* to WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES*, at x, xv-xvi (1990).

300. WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES 159-61* (1990); *see also* Letter from FBI Dir. to SAC, San Francisco, *supra* note 292, at 144.

301. Glick, *supra* note 299, at xv-xvi.

302. Glick, *supra* note 299, at xiv.

That committee—known initially as the “Church Committee,” after its founding chair, Senator Frank Church (D., Idaho)—gained respect in the mid-1970s through detailed public documentation of FBI and CIA abuses. In truth, the committee never did play quite the heroic role claimed for it by liberal historians. Compromised from the outset, it allowed the agencies under investigation to turn over only sanitized versions of selected files and then to edit and censor the committee’s reports before publication. . . . Church and his successor as committee chair, Senator Birch Bayh (D., Indiana), eventually were driven from office.

Id. *See generally* KATHRYN S. OLMSTED, *CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI* (1996) (noting that little was done to hold the government accountable despite a willingness by both the media and Congress to press for reforms after *New York Times* reporter Seymour Hersh’s revelations regarding CIA activities).

[F]our months later, *New York Times* reporter Seymour Hersh disclosed that the government’s crimes went beyond Watergate. After months of persistent digging, Hersh had unearthed a new case of the imperial presidency’s abuse of secrecy and power: a “massive” domestic spying program by the Central Intelligence Agency (CIA). According to Hersh, the CIA had violated its charter and broken the law by launching a spying program of Orwellian dimensions against American dissidents during the Vietnam War.

Id. at 1-2.

the sufficiency of the assigned personnel: “Insure that you are utilizing the best personnel available in this program. Advise the Bureau of the results of your reevaluation by June 9, 1969.”³⁰³ Showing little patience for internal disagreement about the direction or future of the Counterintelligence Program, Hoover displayed no interest in compromise when it came to the question of Black dissent.³⁰⁴

Ultimately, the Black Panther Party dissolved under the weight of extreme government repression.³⁰⁵ This history suggests that the First Amendment not only facilitated the deportation of Claudia Jones³⁰⁶ and the bifurcation of the Civil Rights Movement from Communism and Socialism,³⁰⁷ but also failed to protect the legitimate speech of civil rights and Black Power organizations against the onslaught of the FBI.

D. The Movement for Black Lives

The Movement for Black Lives emerged long after the rise and fall of Black Power, but it reflects many of the same social, political, and economic goals that were characteristic of the movements that came before it. Like Black Communism, the Civil Rights Movement, and Black Power, the Movement for Black Lives has made anticapitalist and anti-imperialist demands on the U.S. government.

In 2013, the Malcolm X Grassroots Movement published a report entitled *Operation Ghetto Storm: 2012 Annual Report on the Extrajudicial Killings of 313 Black People by Police, Security Guards and Vigilantes*.³⁰⁸ After extensive research, the author of the report found that, in the last six months of 2012, one Black person was killed by police, security guards, or vigilantes in the United States

303. Letter from FBI Dir. to SAC, San Francisco, *supra* note 292, at 146.

304. *See generally* HOOVER, *supra* note 45 (sharing his views of Communism and the CPUSA, as well as the strategies that were necessary to destroy the growth of Communism in the United States). Not unlike his approach to Black dissent, Hoover left little room for engagement between the Civil Rights and Black Panther Party movements, society as a whole, and the U.S. government. *See* Kevin Gotham, *A Study in American Agitation: J. Edgar Hoover’s Symbolic Construction of the Communist Menace*, MID-AM. REV. SOCIO., Spring 1992, at 57, 57-70 (analyzing Hoover’s use of false agitation to manufacture consent for the repression and suppression of Communism in the United States).

305. BLOOM & MARTIN, *supra* note 169, at 3-4, 396-97.

306. *See supra* Part II.A.

307. *See supra* note 36 and accompanying text.

308. ARLENE EISEN, OPERATION GHETTO STORM: 2012 ANNUAL REPORT ON THE EXTRAJUDICIAL KILLINGS OF 313 BLACK PEOPLE BY POLICE, SECURITY GUARDS AND VIGILANTES (updated 2014), <https://perma.cc/EZY8-FFEK>.

every twenty-eight hours.³⁰⁹ In July 2013, the Black Lives Matter Movement emerged on social media after the acquittal of George Zimmerman, a neighborhood-watch coordinator in Florida who murdered seventeen-year-old Trayvon Martin.³¹⁰ In 2014, the movement gained international prominence following demonstrations against the police murders of Michael Brown in Ferguson, Missouri and Eric Garner in New York City.³¹¹ The Movement for Black Lives formed in 2015, and in the summer of 2016 it announced a visionary platform with specific demands to facilitate the end of white supremacy and capitalism in the United States, with calls to end U.S. imperialism as well.³¹²

The federal government was swift to respond, announcing the creation of a new domestic-terrorism-program category, called the Black Identity Extremist Program, followed by Operation Iron Fist and the National Strategy for Countering Domestic Terrorism.

1. Black identity extremists and Operation Iron Fist

In 2017, under the Trump Administration, the FBI created a new domestic terrorism program category called the “black identity extremist movement.”³¹³

309. Kali Akuno, *Preface to OPERATION GHETTO STORM: 2012 ANNUAL REPORT ON THE EXTRAJUDICIAL KILLINGS OF 313 BLACK PEOPLE BY POLICE, SECURITY GUARDS AND VIGILANTES*, *supra* note 308, at 3, 3.

310. See BARBARA RANSBY, *MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE TWENTY-FIRST CENTURY* 5-6 (2018); Yamiche Alcindor, *Trial Turns to Zimmerman’s Neighborhood-Watch Role*, USA TODAY (updated June 25, 2013, 11:21 PM ET), <https://perma.cc/LK64-8NWV> (to locate, select “View the live page”).

311. See RANSBY, *supra* note 310, at xi, 5-6; Eric Garner, *Michael Brown Cases Spark ‘Legitimate Concerns’ About US Policing—UN Experts*, UN NEWS (Dec. 5, 2014), <https://perma.cc/6U36-JVKL>.

312. See *Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://perma.cc/J4NM-NK3G> (archived Dec. 5, 2022).

The Movement for Black Lives (M4BL) launched the Vision for Black Lives, a comprehensive and visionary policy agenda for the post-Ferguson Black liberation movement, in August of 2016. The Vision, endorsed by over 50 Black-led organizations in the M4BL ecosystem and hundreds of allied organizations and individuals, has since inspired campaigns across the country to achieve its goals.

Id. Notably, the M4BL is distinct from “Black Lives Matter.” The M4BL is a grassroots organization of Black activists with a clear platform and specific demands. See *The Movement for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://perma.cc/S4UJ-XCGC> (archived Dec. 5, 2022).

313. German, *supra* note 170; see COUNTERTERRORISM DIV., FBI, *BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS* 3 (2017), <https://perma.cc/T38R-V2TK>. For law review articles evaluating the Black Identity Extremist designation, see, for example, Hansford, *supra* note 5, at 703-05; Aleena Aspervil, Comment, *If the Feds Watching: The FBI’s Use of a “Black Identity Extremist” Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection*, 62 HOW. L.J. 907, 928-29 (2019); Zahra N. Mian, Note, *“Black Identity Extremist” or Black*
footnote continued on next page

In an intelligence assessment produced by the FBI, the Agency determined that “Black Identity Extremist . . . perceptions of police brutality” against Black people spurred an increase in violence against law enforcement, especially following the 2014 police shooting of Michael Brown in Ferguson, Missouri.³¹⁴ The FBI assessment failed to mention the emergence of the Black Lives Matter Movement in 2013 or the police and vigilante violence described by the Malcolm X Grassroots Movement’s Report, instead characterizing the rise of Black activism as a matter of extremism. The FBI assessment cites six attacks on police officers over a three-year period, but the fact that the attacks were not related to one another or coordinated by a political organization or movement³¹⁵ belies the true purpose of the initiative—to place Black activist organizations under government surveillance and suppress Black dissent. Although the FBI later claimed that it had abandoned the Black Identity Extremist designation, the Agency developed Operation “Iron Fist” to target Black activist organizations through the deployment of undercover agents.³¹⁶ Experts maintain that the FBI continues to prioritize cases involving Black activists over those involving white nationalists.³¹⁷

Dissident?: How United States v. Daniels Illustrates FBI Criminalization of Black Dissent of Law Enforcement, from COINTELPRO to Black Lives Matter, 21 RUTGERS RACE & L. REV. 53, 66-68 (2020); and Khaair J. Morrison, *A Call to Expand Protections for Activists*, 3 HOW. HUM. & C.R. L. REV. 25, 26 (2019).

314. COUNTERTERRORISM DIV., *supra* note 313, at 2.

315. See COUNTERTERRORISM DIV., *supra* note 313, at 4. Rakem Balogun may have been the first activist to be monitored and arrested under the Black Identity Extremist program. Jacob Vaughn, *Dallas Activist May Be First Labeled ‘Black Identity Extremist’ by FBI*, DALL. OBSERVER (July 31, 2019, 4:00 AM), <https://perma.cc/HN3A-JY7Q>. Balogun was arrested and charged with one count of possession of a firearm by a prohibited person. *Id.* He was taken to a Dallas federal building for a bond hearing but never received one. *Id.* The government quickly moved for pretrial detention. At the detention hearing, an FBI agent testified about Balogun’s social media activity and what the government called “a history of assaultive behavior.” *Id.* In May 2018, all charges against him were dropped. *Id.*; see also Mian, *supra* note 313, at 88.

316. See Speri, *supra* note 170; German, *supra* note 170.

317. German, *supra* note 170. Michael German argues that most of the violence is actually coming from the police:

[T]he most apparent protest violence that falls within the FBI’s jurisdiction is not coming from BLM activists or antifa, but from police. North Carolina lawyer T Greg Doucette and mathematician Jason Miller have compiled a dataset of more than 500 incidents of police violence against protesters that have been captured on video by activists and journalists since George Floyd’s death.

Id. (citing Associated Press, *Bystander Video Leading to More Arrests of Abusive Police*, BANGOR DAILY NEWS (updated June 17, 2020), <https://perma.cc/MBV3-CJ23>).

2. *National Strategy for Countering Domestic Terrorism*

In January 2021, after the January 6 insurrection at the U.S. Capitol, the Biden Administration announced a new initiative to review how the federal government addresses the issue of domestic terrorism.³¹⁸ This effort produced two significant reports. The first was an assessment of the threat posed by domestic terrorism. Issued in March 2021, it found that “domestic violent extremists . . . are motivated by a range of ideologies and . . . pose an elevated threat to the Homeland in 2021.”³¹⁹ The second report outlined a broad new strategy to prevent domestic terrorism, proposing shifts in law-enforcement practice that would enable various agencies to collaborate more effectively and suggesting the need for additional legislative mechanisms to prevent domestic terror.³²⁰

In June 2021, the Biden Administration issued the second report, the *National Strategy for Countering Domestic Terrorism*, touting the effort as “America’s first government-wide national Strategy” to address domestic terrorism.³²¹ The document begins by briefly mentioning racially motivated shootings in Charleston, Pittsburgh, and El Paso, suggesting that the objective of the strategy is to neutralize white nationalism.³²² But in a section titled “Today’s Threat,” which defines who domestic terrorists actually are, the document outlines a complex mix of groups, including both white nationalists and “anti-government or anti-authority violent extremists . . . who violently oppose all forms of capitalism, corporate globalization, and governing institutions.”³²³ Thus, the domestic threat is multi-faceted and ideologically diverse; it is not limited to white nationalism.

Civil rights and civil liberties organizations promptly responded to the Biden Administration’s initiative with a letter organized by the Leadership Conference on Civil and Human Rights. The letter opposed any expansions of terrorism-related federal or state authority and was signed by 157 organizations including the NAACP, the ACLU, and the Brennan Center for Justice.³²⁴ The signatories argued that the Capitol insurrection and the rise of white nationalism

318. NAT’L SEC. COUNCIL, *supra* note 33, at 4-7.

319. *Id.* at 10.

320. *Id.* at 17, 25-26 (“[W]e must ask the question of whether legislative reforms could meaningfully and materially increase our ability to protect Americans from acts of domestic terrorism while simultaneously guarding against potential abuse of overreach.”).

321. *Id.* at 1, 7.

322. *See id.* at 2, 8.

323. *Id.* at 8.

324. Letter from Leadership Conf. on Civ. & Hum. Rts. et al. to Members of Cong. 1, 4, 6 (Jan. 19, 2021), <https://perma.cc/44B3-WHLJ>.

resulted from the failure of the federal government—the FBI in particular—to prioritize white nationalism as a serious problem, not from the absence of adequate legal tools to suppress the rise of hate.³²⁵ According to the coalition, new anti-terrorism laws would only further marginalize racially subordinated groups and dissenters through expanded racial profiling and surveillance, rather than address the problem of white nationalism.³²⁶

Legislation to counter domestic terrorism has been introduced by Democrats in both chambers of Congress,³²⁷ but the White House now asserts that such legislation may not be necessary: “New criminal laws, in particular, should be sought only after careful consideration of whether and how they are needed to assist the government in tackling complex, multifaceted challenges like the one posed by domestic terrorism and only while ensuring the protection of civil rights and civil liberties.”³²⁸ The *National Strategy for Countering Domestic Terrorism* seems to respond to the concerns raised in the coalition letter, insisting that any new mechanisms designed to address domestic terrorism would be “narrowly tailored”³²⁹ and “driven by the facts.”³³⁰ But the first government-wide effort to target domestic terrorism is underway, despite the efforts of legal advocates, and it appears to echo some elements of the Trump-era Operation “Iron Fist.”³³¹

3. The Joint Terrorism Task Forces and transnational aspects of domestic terror

Another familiar aspect of the *National Strategy for Countering Domestic Terrorism* is the centrality of the Joint Terrorism Task Forces (JTTF).³³² Even the document itself indicates that this dimension of the strategy harkens back to the use of JTTFs in the 1980s to facilitate information sharing among various domestic agencies and between U.S. law-enforcement agencies and

325. *Id.* at 2.

326. *Id.* at 1-2 (“We are concerned that a new federal domestic terrorism statute or list would adversely impact civil rights and—as our nation’s long and disturbing history of targeting Black Activists, Muslims, Arabs, and movements for social and racial justice has shown—this new authority could be used to expand racial profiling or be wielded to surveil and investigate communities of color and political opponents in the name of national security.”).

327. See Domestic Terrorism Prevention Act of 2022, H.R. 350, 117th Cong. (2022); Domestic Terrorism Prevention Act of 2021, S. 964, 117th Cong. (2021).

328. NAT’L SEC. COUNCIL, *supra* note 33, at 25.

329. *Id.* at 2-3.

330. *Id.* at 25-26.

331. Speri, *supra* note 170; German, *supra* note 170.

332. See NAT’L SEC. COUNCIL, *supra* note 33, at 5.

partners around the world.³³³ One of the key functions of the JTTFs is to facilitate information-gathering practices, communications, and surveillance both within U.S. borders and between the United States and its partner countries—thus addressing both domestic and international threats.³³⁴ Current prosecutions of Black Lives Matter activists reflect the usage of JTTFs. Journalists report that, after activists are taken into custody by local police, they are interrogated by FBI agents, not police officers, and then federal prosecutors fight to keep them in custody before trial.³³⁵

It is not yet clear exactly how the international dimension of this strategy implicates the Movement for Black Lives and related Black activist organizations. But the document examines whether foreign entities linked to domestic terrorism may be designated as Foreign Terrorist Organizations or Specially Designated Global Terrorists.³³⁶

What distinguishes the Biden Administration's approach from that of the Trump Administration is its deployment of race. While the Trump Administration's intelligence assessment on Black Identity Extremists focuses on Black activists, violence allegedly committed by Black movements, and so-called Black ideologies, the Biden Administration's domestic terrorism initiative mentions race only in the context of groups motivated by white supremacy—suggesting that the anti-terror initiative targets white supremacists but not others.³³⁷ The document describes anticapitalist and anarchist threats, but does not mention Black or other nonwhite movement organizations.³³⁸ I contend that the Biden Administration's colorblindness masks what appears to be a highly sophisticated domestic anti-terrorism apparatus that will impact a wide range of left and radical dissenters, particularly Black dissenters.

Although both Administrations claim that the 350 activists being prosecuted by the federal government under the Civil Obeyance Act of 1968 are violent radical leftists, journalists report that very few are affiliated with

333. *See id.*

334. *See Joint Terrorism Task Forces*, FBI, <https://perma.cc/CHG2-FND4> (archived Dec. 5, 2022) (describing the work of the JTTFs, including how they facilitate communications and decisionmaking between local law-enforcement agencies and the federal government); *see also Israel Legal Attaché Cary Gleicher Describes the FBI's Role Overseas*, FBI, <https://perma.cc/LRV3-8YE6> (archived Dec. 5, 2022).

335. *See, e.g., Cantú, supra note 42; Speri, supra note 170; Ryan Devereaux, Brooklyn Man Was Arrested for Curfew Violation. The FBI Interrogated Him About His Political Beliefs*, INTERCEPT (June 4, 2020, 2:48 PM), <https://perma.cc/RTU4-T6W8>.

336. NAT'L SEC. COUNCIL, *supra note 33*, at 17-18.

337. *See generally id.*; COUNTERTERRORISM DIV., *supra note 313*.

338. *Id.* at 8-9.

any organizations.³³⁹ According to a petition sent by the National Lawyers Guild to the White House in June 2021:

Many of the cases brought by former Attorney General William Barr, under the direction of President Donald J. Trump, amount to little more than prosecutorial overreach and are not a matter of protecting public safety. These prosecutions were intended to stifle dissent and protect white supremacy. Maintaining and advancing these prosecutions in federal court under your administration would amount to little more than perpetuating the racism that you repeatedly spoke out against on the campaign trail and during your confirmation hearings, respectively.³⁴⁰

From anticapitalism and economic justice to anti-imperialism and decolonization, Black dissenters in the United States have consistently called for radical transformation. These calls, however, have been met with government surveillance, criminalization, assassination, and exile. Both the calls for economic justice and their suppression are wholly absent from our historical interpretations of the First Amendment. In the next Part, I describe the utility to the law of this silence.

III. Silencing Black Dissent: The Colorblind Uses of the Past

[A]n overall sketch of world historical production through time suggests that professional historians alone do not set the narrative framework into which their stories fit. Most often, someone else has already entered the scene and set the cycle of silences.

—Michel-Rolph Trouillot³⁴¹

In *Silencing the Past*, anthropologist Michel-Rolph Trouillot excavates the role of power in the production of historical narratives.³⁴² His focus is the Haitian Revolution and its treatment by Western historians.³⁴³ Trouillot argues that the silencing of the revolution—its disappearance from the historical record—resulted from “uneven power in the production of sources, archives, and narratives.”³⁴⁴ The revolution was unthinkable at the time

339. Alanna Durkin Richer, Colleen Long & Michael Balsamo, *AP Finds Most Arrested in Protests Aren't Leftist Radicals*, AP NEWS (Oct. 20, 2020), <https://perma.cc/LK76-43QY>; see also Betsy Woodruff Swan, *Biden's Domestic Terrorism Strategy Concerns Advocates*, POLITICO (July 22, 2021, 8:00 AM EDT), <https://perma.cc/KAF8-Q36X>.

340. Letter from Nat'l Laws. Guild to President Joseph Biden and Vice President Kamala Harris, *supra* note 41.

341. TROUILLOT, *supra* note 152, at 26.

342. *Id.* (“Silences enter the process of historical production at four crucial moments: the moment of fact creation (the making of *sources*); the moment of fact assembly (the making of *archives*); the moment of fact retrieval (the making of *narratives*); and the moment of retrospective significance (the making of *history* in the final instance).”).

343. See generally *id.* (describing how power and silence operate in the historical record, often concealing the contributions and victories of the oppressed and subordinated).

344. *Id.* at 27.

because it was both victorious and Black—in a moment of widespread colonial violence and enslavement, it was a revolution that sought liberation against both systems of domination and won.³⁴⁵

Despite the grandeur of the Haitian Revolution, we know little about its historical development, the actions of its protagonists, and its aftermath. The archives are limited, and our historical memory is inadequate. Thus, according to Trouillot, the inchoate narrative of the Haitian Revolution reveals that “[p]ower does not enter the story once and for all, but at different times and from different angles. It precedes the narrative proper, contributes to its creation and to its interpretation.”³⁴⁶

Like history, colorblind jurisprudence is a form of narrative production, a site from which political power emerges to produce many silences. As Supreme Court Justices marshal historical arguments to justify their conclusions, they too participate in a form of narrative production that is contingent on and facilitating of certain types of silences. One such pronounced silence in the historical study of the Constitution is the absence of the role of racial power in the operation and application of the First Amendment right to freedom of speech.³⁴⁷ Despite the strength, influence, and visibility of Black dissent in the United States, silences reverberate throughout the law’s treatment of Black dissenters.

In this Part, I excavate the various moments in and angles through which racial power has been silenced in the study of the First Amendment right to freedom of speech. In many respects, legal silences masked as colorblind jurisprudence have become the antidote to Black speech and rebellion over and against the actual material transformations demanded by the Black activists I describe above. Racial power is hidden from view in the colorblind First Amendment, as is the materiality of the demands put forth by Black dissenters.³⁴⁸ Neil Gotanda describes these dynamics, arguing that “the United States Supreme Court’s use of color-blind constitutionalism—a collection of

345. *Id.* at 70-107.

346. *Id.* at 28-29.

347. In their call for a law-and-political-economy framework to address the deep inequities in American life, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman ask:

What would it mean to take power once more as a central unit of analysis in law? In the broadest sense, when we teach a canonical case or encounter a legal problem, we might ask quite simply, who has power here, who should have power, and why? . . . In selecting topics and framing questions, this reorientation would inquire into how *law creates, reproduces, and protects political-economic power*, for whom, and with what results.

Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1820 (2020).

348. *See supra* Part II.

legal themes functioning as a racial ideology—fosters white racial domination.”³⁴⁹ Thus, what appears in the place of racial power is an “equality principle” of content neutrality that reinforces the existing distribution of power between whites and Blacks, uplifting Nazi and Klan voices while silencing Black dissent. Here, I evaluate the uneven racialization of Black dissenters over time and historicize the First Amendment’s equality principle in the context of both Black-progressive and white-nationalist dissent. In essence, Black dissenters have been racialized differently by the state based on their ideology.

A. The Racialization of Black Dissent over Time

The racialization of Black dissent in the United States is not even or linear. It is one of the many silences in First Amendment jurisprudence. Black dissenters have been racialized in distinct ways that have to do with both the substance of their speech and the broad political conditions in which they operate.³⁵⁰ The ideological orientations of each of the protagonists of the case studies I describe above reflect international political trends. They differ in name, but substantively, their demands overlap—each individual or movement had economic objectives and sought material transformations in the distribution of power and resources.³⁵¹ Despite this similarity, in the early case studies, Black dissenters were racialized in part based on ideology, while in the later case studies the racialization of Black dissent hinged more on the dissenters’ Blackness than on their ideologies.³⁵² As the national security state emerged as an increasingly dominant force in U.S. political life, Black dissenters became more and more repressed by the state.

In the case of Claudia Jones, for example, there is narrative incoherence between how the FBI and the courts racialized her. While Jones’s FBI files indicate that she was hypervisible as a Black woman in the CPUSA,³⁵³ the court decision appeared to be more colorblind, focusing on her status as a Communist and an immigrant.³⁵⁴ The court records disaggregated Jones’s ideological commitments from her Blackness because the Smith Act emphasized Communism and immigration status, not race.³⁵⁵

349. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991).

350. *See supra* Part II.

351. *See supra* Part II.

352. *See supra* Parts II.C.-D.

353. *See* FBI File of Claudia Jones, *supra* note 174, at 77-85 (calling Jones a “negress”).

354. *See* BOYCE DAVIES, *supra* note 151, at 1, 6.

355. *See supra* note 73. Scholars have argued that Black people are treated as perpetual foreigners in the United States. *See* Rana, *supra* note 29 (arguing that the government views Black dissenters as a “fifth column”).

The Supreme Court's treatment of the Civil Rights Movement is also uneven. Before the passage of the Civil Rights Act of 1964, the Supreme Court often supported the objectives of the movement and ruled in its favor, but it did so less and less afterward.³⁵⁶ The tactics of the movement, however, were quite radical both before and after 1964, so tactics alone do not explain the difference in the Court's treatment of the movement.³⁵⁷ The movement continued to disrupt the flows of labor and capital through direct action, while rhetorically focusing on the tenets of nonviolence.³⁵⁸ It was only after the rise of Black Power and the anti-Vietnam War movement that courts felt threatened by such direct action, and patronizing demands that Black people respect the law began to emerge, as they did in *Walker*.³⁵⁹ In effect, the treatment of Black dissent during the Civil Rights Movement had less to do with the content of the speech or the demands made than with global political conditions.³⁶⁰

In the case studies of Jones and *Walker*, global Communism and decolonization were critical factors in judicial decisions. But while the court de-emphasized Jones's racial identity to render her conviction under the Smith Act, the Supreme Court in *Walker* relied on the Blackness of the litigants to claim that Black people needed to abide by the law. This latter approach continued through the late 1960s and 1970s. By the establishment of the FBI's Counterintelligence Program in 1967, the racial identity of Black dissenters had become a more prominent factor in their repression irrespective of differences in tactics or ideology. It is noteworthy that, in the document issued by J. Edgar Hoover announcing the creation of the program, Hoover stated that the regional offices should focus on civil rights organizations like the Student Nonviolent Coordinating Committee, the Southern Christian Leadership Conference, the Deacons for Defense and Justice, and the Congress of Racial Equality—indicating that the state viewed the Civil Rights Movement, in addition to the Black Power movement, as a threat.³⁶¹ The Black Power movement and associated organizations like the Black Panther Party only later became a center of focus; but despite the Panthers' claims to militancy, their early tactics were much more grassroots and less disruptive.³⁶²

356. BELL, *supra* note 12, § 10.3, at 601.

357. MORRIS, *supra* note 228 (describing the tactical sensitivity of the movement to the sociopolitical conditions of the time); *see* Dowd Hall, *supra* note 153, at 1235-36.

358. *See* Dowd Hall, *supra* note 153, at 1235-36.

359. *See supra* Part II.B.

360. *See* DUDZIAK, *supra* note 13, at 12; Bell, *supra* note 13, at 523-25.

361. *See* Memorandum from FBI Dir., *supra* note 276, at 2.

362. The Black Panther Party is remembered most for its militancy, largely because its members carried guns as a means of self-defense. Carrying guns was a radical act for Black people in that era and continues to be, because Black people live in a society that has sought since its inception to prevent them from defending themselves against state

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They were largely focused on building their grassroots base and developing the radical political consciousness of Black people. In fact, the FBI was most concerned by the Panther's newsletter and breakfast program, because both garnered global support from whites and Blacks.³⁶³

The Black Identity Extremist program and the more recent *National Strategy for Countering Domestic Terrorism* are both continuations of the FBI's Counterintelligence Program, and effectively criminalize much of Black speech as either extremist, marginal, or both.³⁶⁴ The key difference between the two is that the latter is colorblind and focuses on ideological orientation, whereas the former explicitly names race.³⁶⁵ Notably, neither addresses the rise of the Black Lives Matter movement in response to police and vigilante murders of Black people.³⁶⁶ In fact, the language of the domestic terrorism program completely isolates the development of the program from Black Lives

and vigilante violence. See generally ROXANNE DUNBAR-ORTIZ, *LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT* (2018) (exposing the white-supremacist and colonial history of the Second Amendment and the reverberations of this history in the present). But early FBI documents indicate that this was not the most concerning element of the party's work. Rather, it was the grassroots organizing, and the breadth and depth of the party's relationships throughout the world. See BLOOM & MARTIN, *supra* note 169, at 397-98. The Chicago chapter of the Black Panther Party was arguably the largest and most grassroots chapter, largely as a result of the community-organizing work done by its founder, Fred Hampton. Hampton was assassinated by the Chicago Police Department in his bed on December 4, 1969. JEFFREY HAAS, *THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER*, at ix, xix (rev. paperback ed. 2019).

363. Letter from FBI Dir. to SAC, San Francisco, *supra* note 292, at 144-45.

364. Letter from Leadership Conf. on Civ. & Hum. Rts. et al. to Members of Cong., *supra* note 324, at 1 (expressing deep concern about the Biden Administration's initiative to counter domestic terrorism and asserting that "a new federal domestic terrorism statute or list would adversely impact civil rights and—as our nation's long and disturbing history of targeting Black Activists, Muslims, Arabs, and movements for social and racial justice has shown—this new authority could be used to expand racial profiling or be wielded to surveil and investigate communities of color and political opponents in the name of national security").

365. As Crenshaw, Gotanda, Peller and Thomas note:

In the construction of "racism" as the irrational and backward bias of believing that someone's race is important, the American cultural mainstream neatly linked the black left to the white racist right: according to this quickly coalesced consensus, because race-consciousness characterized both white supremacists and black nationalists, it followed that both were racists. The resulting "center" of cultural common sense thus rested on the exclusion of virtually the entire domain of progressive thinking about race within colored communities.

Introduction to *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiv-xv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995). Compare *COUNTERTERRORISM DIV.*, *supra* note 313, with Press Release, White House, Fact Sheet: National Strategy for Countering Domestic Terrorism (June 15, 2021), <https://perma.cc/PFU9-223U>.

366. See generally NAT'L SEC. COUNCIL, *supra* note 33 (announcing the creation of the nation's first domestic counterterrorism initiative). See sources cited *supra* note 365.

Matter and the uprisings of summer 2020, focusing exclusively on the rise of white nationalism.³⁶⁷ If one were to review the document without knowledge of the historical context from which it emerged, there would be no way to know that Black Lives Matter even existed at the time. Still, despite the Biden Administration's efforts at colorblindness, civil rights organizations saw through the rhetoric and gleaned from history the potentially dangerous consequences that this program could have for Black dissent.³⁶⁸

In sum, the racialization of Black dissenters has shifted based on the tactics used by law-enforcement agencies and the federal government. While Claudia Jones's Blackness was still legible to the FBI, it alone was insufficient for prosecuting and deporting her under the Smith Act. By the 1960s and 1970s, Black dissenters came to be viewed as perpetual threats to the state irrespective of ideology; their Blackness was the most critical factor rendering their speech criminal.³⁶⁹ And yet, this period also marks the point at which colorblindness entered into First Amendment jurisprudence.³⁷⁰ That is, as the state became more repressive of Black speech, the law became increasingly colorblind.

What the case studies reveal is that the state views Black organization as a significant threat.³⁷¹ A stark example of this is J. Edgar Hoover's view of the Black Panther Party's newsletter.³⁷² His position was that the public should never see the newsletter.³⁷³ The FBI's disruption of the newsletter clearly violated the First Amendment, but the question never even reached the courts because the Panthers' speech was preempted through extralegal and extrajudicial means.³⁷⁴ Another more recent example is the Black Identity Extremist designation. Emerging during the modern height of Black organization, the designation renders as extremist Black demands for justice, irrespective of ideology.³⁷⁵

367. Press Release, White House, *supra* note 365 (“[T]he two most lethal elements of today’s domestic terrorism threat are (1) racially or ethnically motivated violent extremists who advocate for the superiority of the white race and (2) anti-government or anti-authority violent extremists, such as militia violent extremists.”).

368. Letter from Leadership Conf. on Civ. & Hum. Rts. et al. to Members of Cong., *supra* note 324, at 1.

369. *See* Rana, *supra* note 29 (arguing that the U.S. views Black dissenters as a perpetual threat working alongside or even for the global enemies of the United States).

370. *See infra* Part III.B.

371. *See generally* Toussaint, *supra* note 39 (describing the government’s targeting of Black speech and Black associational practices).

372. *See* Letter from FBI Dir. to SAC, San Francisco, *supra* note 292, at 144.

373. *See supra* Part II.C.

374. *See supra* Part II.C.

375. *See supra* Part II.D.

Central to this legal history of Black dissent is the “dialectic” between the movements and the national security state’s backlash against them—a dialectic that has shaped the First Amendment.³⁷⁶ Despite the unevenness in their racializations under First Amendment law, each of these movements has been criminalized by the law-enforcement apparatus. The force of the state did not suddenly appear in the late 1960s to suppress Black Power and retreat.³⁷⁷ But what makes the repression of the late 1960s distinct is the inter-agency coordination that occurred on local, state, federal, and international scales. While Black dissenters were subject to assassinations and exile long before the Cold War era, national security ideology transformed the treatment of Black dissent under the First Amendment. Soon after the cases I described above, white supremacy came to be a central focus of First Amendment jurisprudence. In the next Subpart, I address the relationship between white supremacy and freedom of speech.

B. The Curious Genealogy of Content Neutrality

In *Brandenburg v. Ohio*, a Ku Klux Klan leader was convicted under the Ohio Criminal Syndicalism Statute after organizing a Klan rally with firearms that was aired on local television, where he proclaimed, among other things, “I believe the [n*****] should be returned to Africa, the Jew returned to Israel.”³⁷⁸ He then challenged the constitutionality of the statute under the First and Fourteenth Amendments.³⁷⁹ An Ohio appellate court affirmed his conviction without issuing an opinion, and the Supreme Court of Ohio dismissed the appeal without an opinion as well. The U.S. Supreme Court granted certiorari in 1968—the same year that Congress passed the Civil Obedience Act, and the Act was used to prosecute the Chicago Eight—and in a short decision overturned the conviction of the Klansman and dispensed with the clear and present danger test, which had largely been applied to Communist dissenters, once and for all.³⁸⁰

Brandenburg was decided just one year after the assassination of King.³⁸¹ When the Supreme Court granted certiorari, the nation was in the throes of racial rebellions and anti-war protests, with dissenters seeking transformations in both domestic and foreign policy.³⁸² The weight of the

376. See Dowd Hall, *supra* note 153, at 1235.

377. See *id.*; KORNWEIBEL, *supra* note 16, at xi; BLOOM & MARTIN, *supra* note 169, at 390.

378. 395 U.S. 444, 445-47 (1969) (per curiam).

379. *Id.* at 445.

380. See *id.* at 448-49. The new standard that the Court applied was “incitement to imminent lawless action.” *Id.* at 449.

381. See *id.* at 444; *Assassination of Martin Luther King, Jr.*, *supra* note 273.

382. See generally *supra* note 25 and accompanying text.

national security state that I described in Part I, a total state designed to manage total war, was directed toward the many progressive rebellions and resistance movements in the United States at the time.³⁸³ The *Brandenburg* decision, upholding the speech rights of an avowed white supremacist, came down in this political climate.

Ten years later, the Supreme Court had to decide whether to grant certiorari in a similar case. In *Collin v. Smith*, the Nazi Party sought to organize a march through Skokie, Illinois, a Chicago suburb with a sizeable Jewish population—including thousands of Holocaust survivors.³⁸⁴ The Seventh Circuit protected the speech rights of the Nazi Party, using language that structurally upheld Nazi speech while attempting to disavow its ideology and tactics: “[O]ur task here is to decide whether the First Amendment protects the activity in which appellees wish to engage, not to render moral judgment on their views or tactics.”³⁸⁵ The Supreme Court denied certiorari.³⁸⁶

The *Brandenburg* and *Collin* decisions are reflective of what Kenneth Karst has called the equality principle of the First Amendment³⁸⁷:

Adherence to the principle of equal liberty of expression will have far-reaching implications even though absolute equality is a practical impossibility. The principle requires courts to start from the assumption that all speakers and all points of view are entitled to a hearing, and permits deviation from this basic assumption only upon a showing of substantial necessity.³⁸⁸

The Supreme Court first articulated the equality principle in *Police Department of the City of Chicago v. Mosley*, a decision that came down in the

383. See BLOOM & MARTIN, *supra* note 169, at 5-6, 14-15; see also Noam Chomsky, *Introduction to NELSON BLACKSTOCK, COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM* 11-14 (First Vintage Books ed. 1976) (1975).

384. 578 F.2d 1197, 1199 (7th Cir. 1978).

385. See *id.* at 1201.

386. *Smith v. Collin*, 439 U.S. 916, 916 (1978).

387. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 20-21 (1975). For a critique of the equality principle, see John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1103-06 (2005) (arguing that the distinction between content-based and content-neutral regulation does not represent an overarching principle that the government should be impartial towards speech). See also Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50-51 (2000) (describing “how the Court has erred in developing the principle of content neutrality” because of its narrow definition of viewpoint discrimination, the impact of “permissible purpose” in the treatment of content-based laws, and the application of the content-neutrality analysis to otherwise unprotected speech).

388. Karst, *supra* note 387, at 28. Karst extensively cites Harry Kalven, Jr., a noted First Amendment scholar who believed that the Civil Rights Movement won back the First Amendment freedoms lost by the Communists. See KALVEN, *supra* note 6, at 6.

intervening years between *Brandenburg* and *Collin*.³⁸⁹ In *Mosley*, a peaceful protester was carrying a sign protesting “black discrimination” near a Chicago school.³⁹⁰ The City of Chicago had recently passed an ordinance prohibiting picketing within 150 feet of a school during school hours, though it allowed “peaceful picketing of any school involved in a labor dispute.”³⁹¹

The Seventh Circuit invalidated the ordinance as an overly broad restriction of First Amendment rights.³⁹² The Supreme Court affirmed, developing the equality-principle analysis through the application of both equal protection and freedom of speech:

[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard.³⁹³

What is curious in *Brandenburg* and *Collin* is that the Supreme Court and the Seventh Circuit deployed equality as a principle to promote the speech rights of Klansmen and Nazis, because all speech—even speech that promotes the inherently unequal practices of apartheid or ethnic cleansing—should be viewed as equal under the law. Although the treatment of the First Amendment under equal protection initially appeared to be a promising development in free-speech jurisprudence, as Erwin Chemerinsky has argued, the “trend did not materialize.”³⁹⁴ Had this trend materialized, it may have preempted the content neutrality of the modern First Amendment. Instead, the colorblindness that emerged in equal-protection jurisprudence came to be applied to the First Amendment. For this reason, the other trend that Chemerinsky predicted, the appearance of content neutrality as a core principle of free-speech analysis,³⁹⁵ did emerge, and it has had uneven results.

For example, content neutrality, as initially articulated in *Mosley*, would require that the speech of Black Lives Matter protesters be addressed in public fora prior to the FBI’s designation of extremism. That is, the protests and demonstrations would continue without the threat of state or vigilante violence. But that has not happened; the national security state has intervened

389. See 408 U.S. 92, 96 (1972).

390. *Id.* at 93.

391. *Id.* at 92-93.

392. *Id.* at 94.

393. See *id.* at 96 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960)).

394. Chemerinsky, *supra* note 387, at 53.

395. *Id.*

to disrupt the speech of Black dissenters, and the First Amendment has failed to protect it. The assassinations, exiles, and imprisonment of Black dissenters were rarely addressed in any public fora, and the speech of Black dissenters was not given a hearing, despite what the Court came to articulate in *Mosley*. Given this history, the treatment of Black Lives Matter protesters today is unsurprising. Content neutrality has failed to uphold its own principle of equality, as initially articulated in *Mosley*. For at the very historical moment that Nazis were marching in the streets and advocating for the deaths of Blacks and Jews, Black dissenters were being repressed, suppressed, and eliminated. Thus, these decisions did nothing more than “track the substantive status quo distribution of power.”³⁹⁶

In *Weaponizing the First Amendment: An Equality Reading*, Catharine MacKinnon argues that as the principle of content neutrality entered into First Amendment jurisprudence in the 1970s, “[a]n inadequate approach to power, resulting in an incapacity to identify substantive inequality” resulted.³⁹⁷ This race-blind, gender-blind “equality” principle ultimately reinforces existing unequal social arrangements across race, class, and gender.³⁹⁸ As Catherine Fisk argues, “The First Amendment now seems less friend than foe of egalitarian values.”³⁹⁹ Perhaps there is no better recent example of this than the Lochnerization of the First Amendment, which has strengthened the power of employers and corporations over and against workers and consumers.⁴⁰⁰

The practical consequence of this trend in First Amendment jurisprudence is that the voices of the subordinated, the oppressed, and the exploited continue to be criminalized, suppressed, or relegated to the margins of society.⁴⁰¹ The

396. Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1238-39 (2020).

397. *Id.* at 1225. In *Imagining an Antisubordinating First Amendment*, Genevieve Lakier argues that the First Amendment’s shift toward the protection of the powerful results from the Court’s embrace of “a highly formal conception of the First Amendment equality guarantee”—what she defines as “formally equal treatment at the government’s hands.” She calls for a more substantive conception of expressive equality. Genevieve Lakier, Essay, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119-20 (2018).

398. See MacKinnon, *supra* note 396, at 1225.

399. Catherine L. Fisk, Essay, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2059 (2018).

400. See generally *id.* (describing the continued power of labor protests and the need to have robust First Amendment protections in place to safeguard against the suppression of unions and their speech, especially by employers).

401. In *A Progressive Labor Vision of the First Amendment: Past as Prologue*, Catherine Fisk argues that progressive change requires the robust exercise of speech and association rights, which has been largely foreclosed by the Lochnerization of the First Amendment, and, I would add, the principle of content neutrality. See Fisk, *supra* note 399, at 2075, 2093. It is no surprise, then, that critical race theory scholars have
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potential solutions to social inequity that these communities have to offer the law and society writ large are demarcated from the public sphere, and, as a result, are not adequately engaged with and questioned as meaningful solutions.

Claudia Jones, for example, was deported for speech that called for the equitable distribution of wealth across race, gender, and class. This speech was deemed a violent threat to the status quo.⁴⁰² Martin Luther King, Jr., whose Birmingham Campaign called for the end of apartheid, was imprisoned for his speech.⁴⁰³ Members of the Black Panther Party, whose Ten-Point Program similarly called for the redistribution of wealth and the end of segregation, were murdered, exiled, or imprisoned.⁴⁰⁴ And as of 2017, Black Lives Matter was considered an extremist organization by the FBI.⁴⁰⁵ In each instance, activists' calls for equity were met with the force of the state,⁴⁰⁶ which not only suppressed their speech but also chilled similar calls with the potential to improve social conditions for all residents of the United States, citizens and noncitizens alike. Of course, it is not just the content of Black dissenters' speech that poses a threat to the status quo. Their Blackness alone is a threat,⁴⁰⁷ that they dare to speak *as* Black people *for* Black people *and* all other subordinated peoples is the greatest threat to the status quo, one which must be suppressed at all costs.

highlighted for decades how white-supremacist speech is far more protected than race-conscious speech. *See generally* MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (describing the assaultive capacity of words, and the flaws in the First Amendment that enable and protect such assaultive speech). This analysis is consistent with the observations of practitioners, such as former FBI agent Michael German. *See* German, *supra* note 170.

402. *See supra* Part II.A.

403. *See supra* Part II.B.

404. Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 284-88 (2015) (describing the Panthers' "constitutional rejectionism," when they descended on Philadelphia in September 1970 to stage a "Revolutionary People's Constitutional Convention"). Fred Hampton, the founder of the Chicago chapter of the Black Panther Party, was not violent and had posed no threat of violence, but was murdered in his sleep by the Chicago Police Department through a COINTELPRO initiative. The biggest threat he posed, like Claudia Jones before him, was uniting people across race to challenge the inequities of American life. *See* HAAS, *supra* note 362, at ix. For analyses of why multiracial solidarity has always been a threat to the United States, see, for example, DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 13-14 (1991).

405. *See supra* Part II.D.

406. State power can often become violent. As German philosopher Max Weber explains in his lecture *Politics as a Vocation*, "a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

407. *See supra* note 39 and accompanying text.

Conclusion

Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.

—Lani Guinier & Gerald Torres⁴⁰⁸

Modern American society faces a significant increase in racial violence, and the right-wing Capitol insurrection of January 6, 2021, is a harbinger of growing social instability.⁴⁰⁹ Both the violence and the riots were a symptom of the problems facing the United States.⁴¹⁰ In short, there is a rising tide of white-supremacist violence and instability facing the nation.⁴¹¹ The law should be the product of society's goals, rather than a glass ceiling hindering society's progress. While the law cannot bring about immediate change, it should function to create the conditions for open engagement and change over the long term. A racially conscious First Amendment has the potential to protect the speech of Black dissenters and other subordinated peoples who seek to make the United States a more equitable and just nation.

Despite the violent weight of state repression and the geographic power of U.S. imperialism, Black anticapitalist and anti-imperialist dissent has persisted for centuries. Black people continue to demand collective liberation from the racial and economic injustices imposed on them by the mutually constitutive forces of white supremacy and capitalism. And while they do so from within

408. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (1st Harvard Univ. Press paperback ed. 2003).

409. See Ann Scott Tyson, Patrik Jonsson & Henry Gass, *Was Jan. 6 the End of an Era—or Start of a Dangerous New One?*, CHRISTIAN SCI. MONITOR (Jan. 27, 2021), <https://perma.cc/DBR2-BW3J>; Claudia Wallner, *Prospects for Far-Right Extremism in the US Following the Capitol Attack*, TRENDS RSCH. & ADVISORY (Mar. 24, 2021), <https://perma.cc/UM3P-4GLB>; Robert O'Harrow, Jr., Andrew Ba Tran & Derek Hawkins, *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://perma.cc/VD7A-KFWX>.

410. See Neil MacFarquhar, Jack Healy, Mike Baker & Serge F. Kovaleski, *Capitol Attack Could Fuel Extremist Recruitment for Years, Experts Warn*, N.Y. TIMES (updated Jan. 30, 2021), <https://perma.cc/RP9W-NXND>; Zack Stanton, *The Problem Isn't Just One Insurrection. It's Mass Radicalization*, POLITICO MAG. (Feb. 11, 2021, 6:06 PM EST), <https://perma.cc/LM5J-PHQH>. For a historicization of white racial violence and its contemporary effects, see generally DYLAN RODRÍGUEZ, *WHITE RECONSTRUCTION: DOMESTIC WARFARE AND THE LOGICS OF GENOCIDE* (2021).

411. As Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman note:

A concrete focus on what kinds of equality we want law to generate directs attention to questions such as: what do people need to achieve certain kinds of life, and what does it take to get those goods to them? Besides distribution, issues of public provision become essential concerns here, from health care to transport infrastructure. No such shift, however, will be complete without a political conception of the capable agent, and it is in the turn from antipolitics to democracy that any such normative reorientation finds its ultimate stakes.

Britton-Purdy et al., *supra* note 347, at 1827 (emphasis omitted).

different political formations, through different ideological orientations, and with different tactics, their demands have remained largely consistent over time.

There are many histories of this resistance left to tell. In writing this Article, I have sought to open up new avenues of inquiry into our study of the First Amendment, and into our study of Black history and Black dissent. But my objective, ultimately, is not just to interpret the law and the history that made it. Rather, my aim is to transform it.⁴¹²

412. “The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it.” Karl Marx, *Theses on Feuerbach*, in THE MARX-ENGELS READER 143, 145 (Robert C. Tucker ed., 2d ed. 1978).