

Conservatives Want the Antebellum Constitution Back

*The Fourteenth and Fifteenth
Amendments are in trouble.*

By [Adam Serwer](#)



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Last July, while on his way to his job as a security guard at a cannabis farm in California,

George Retes was tear-gassed, pepper-sprayed, and arrested by federal agents conducting an immigration raid. The agents ignored the license plate on Retes's car and the sticker on his windshield, both of which identified him as a U.S. Army veteran, and did not even bother to determine whether he was a citizen before strip-searching him and locking him up in a cell. Retes was detained overnight without any opportunity to call a lawyer or his family.

“No one deserves to be treated like this,” [Retes told this magazine](#) after his release. “To have no rights. It’s just crazy to think about—that they can just mask up and take someone off the street, no questions asked, and you’re just gone.”

[Read: A U.S. citizen detained by ICE for three days tells his story](#)

Retes is one of an estimated 170 American citizens who have been detained by federal immigration agents as part of President Donald

Trump's mass-deportation campaign, [according to ProPublica](#), which warns that the count is both incomplete and unofficial because the federal government is not documenting its own abuses of power. At least 20 of those citizens, ProPublica found, had been detained overnight and incommunicado—a violation of their constitutional rights. When questioned about these detentions, Trump-administration officials claimed that the citizens had assaulted federal agents—an assertion proved false in many cases by video evidence or an inability by the government to produce serious charges reflecting the accusations. ([One thrown sandwich](#) hardly counts.)

Across the country, federal agents are flagrantly and casually disregarding Americans' due-process rights. And they have been remarkably forthright about how they choose their victims. As Gregory Bovino, a top Border Patrol commander, told a [white reporter](#): Agents were arresting people based on “the particular

characteristics of an individual—how they look. How do they look compared to, say, you?”

In Memphis, Reggie Williams [told ProPublica](#) that he was instructed by federal agents to keep his ID on him going forward, as though Black residents of the city were emancipated slaves forced to carry freedom papers lest they be kidnapped and returned to bondage. Bovino said basically the same thing after [federal agents assaulted a Somali American citizen](#) and refused to free him for hours despite his offers to show them a photo of his passport on his phone: “One must carry immigration documents,” [Bovino posted on X](#). In Chicago, Maria Greeley was zip-tied by federal agents coming off a double shift at the bar where she worked. She had her passport and showed it to them, and still they detained her because, she said, she did not [“look like”](#) a Greeley.

This is racial profiling. And the Supreme Court has declined to stop it.

In September, an emergency docket decision effectively permitted this racial profiling by lifting a court order preventing it. “The Government sometimes makes brief investigative stops to check the immigration status of those who gather in locations where people are hired for day jobs,” Justice Brett Kavanaugh wrote in a lone concurrence. Although “apparent ethnicity alone” isn’t enough to detain someone, it can be a “relevant factor,” he continued. “Under this Court’s precedents, not to mention common sense, those circumstances taken together can constitute at least reasonable suspicion of illegal presence in the United States.”

What this means in practice is that if you are not white, you cannot go certain places without the risk of being kidnapped by federal agents. That is not “common sense”; it is the nullification of the Constitution’s guarantee of equal rights under the law.

This decision is only one of the ways that the Court, under Chief Justice John Roberts, has been chipping away at the parts of the Constitution dedicated to ensuring equal citizenship to all through rulings on voting rights, immigration, and equal protection. It has done this even as it insists—while striking down affirmative action and school-integration programs—that the Constitution is “colorblind.”

The Constitution of the Roberts Court is not color-blind. It is a Constitution [that permits discrimination](#) on the basis of race, but forbids alleviating discrimination on the basis of race. And over the next year, the Court will face more cases that could further erode both the Fourteenth and Fifteenth Amendments, pushing America back toward what some on the right believe is the true, Antebellum Constitution.

The Thirteenth, Fourteenth, and Fifteenth Amendments make up the Civil War and Reconstruction amendments. The

Thirteenth abolished slavery except as punishment for a crime, but America needed to do more to prevent the resurgence of the slave-owning South's caste-based society. The Fourteenth and Fifteenth Amendments enshrined in the Constitution principles of universal male suffrage, nondiscrimination, and nonracial (birthright) citizenship. Although imperfect—the vote for women was not included—they were a crucial first step toward ensuring that the rights conferred by American citizenship would remain inviolate no matter where you were, and no matter who you were.

[After the Reconstruction period](#) following the Civil War, the Supreme Court [essentially](#) [voided](#) the meaning of these amendments. The post-Reconstruction Court helped pave the way for Jim Crow, showering most of the rights reserved for the emancipated on corporations, allowing states to disenfranchise their Black populations through superficially “color-blind” means, and permitting racial discrimination by

both government entities and private actors. The amendments were resurrected during the civil-rights movement, but they are now under assault for a second time by both the Court and an executive branch that is distorting or refusing to enforce antidiscrimination laws about housing, voting, and employment.

A faction of conservatives has never stopped this campaign. As soon as the Reconstruction amendments were passed, people argued that they were illegitimate, a betrayal of the original document—a [“rape of the Constitution”](#) as the columnist Frank Meyer [wrote in 1964](#) about *Brown v. Board of Education* in *National Review*. In 1965, that magazine published a cover story arguing that the Voting Rights Act, by enforcing the Fifteenth Amendment, would effectively “repeal the Constitution to give the Negro the vote.” During the Reagan administration, a young attorney in the Justice Department named John Roberts [fought to weaken the law](#). Originalism,

the author [Madiba K. Dennie points out](#), is a convenient vehicle for this project because it prioritizes interpretations from historical periods where women and Black people were excluded from the political process.

In more recent years, the slain right-wing activist Charlie Kirk [complained](#) that the Fourteenth Amendment was a “Marxist revolutionary gateway” for everything the left wanted to push through. The more genteel conservative writer Christopher Caldwell argued that the entire post-civil-rights-movement Constitution was a “rival” to the “constitution of 1788, with all the traditional forms of jurisprudential legitimacy and centuries of American culture behind it.”

Roberts’s Court likes to invoke history and tradition, but some justices are perfectly happy to [ignore the express intent](#) of the Founders—such as the fundamental belief that the Constitution is meant to change—to further an ideological project. The Roberts Court’s

repeated [rewriting of the Constitution on Trump's behalf](#) reveals the antebellum Constitution they envision to be a fraud, a gauzy nostalgia based on the Founders' worst impulses as slavers and hypocrites. This is an attempt to turn the guarantees of the Civil War amendments back into what James Madison called "parchment barriers," their meaning perverted to ensure the protection of the strong instead of the weak.

Since 2007, when Roberts struck down a school-integration program while stating that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race," the right-wing majority has followed the philosophy that there's no discrimination if you pretend it isn't happening. Although the Fifteenth Amendment states clearly that the right to vote cannot be "denied or abridged" on the basis of "race, color, or previous condition of servitude," the Roberts Court has acted as

though the only true discrimination is against the right to discriminate.

In 2013, the Court effectively nullified a requirement in the 1965 Voting Rights Act that forced jurisdictions with a history of discrimination to “preclear” their voting-rule changes with the Justice Department. The majority ignored the express language of the Fifteenth Amendment in doing so, and Roberts relied on a doctrine that “all States enjoy equal sovereignty,” a phrase that exists nowhere in the Constitution but was [invoked by Chief Justice Roger Taney](#) in the infamous *Dred Scott* decision: Taney argued that letting Black people be citizens would violate the sovereignty of the slave states. Prohibiting states from passing discriminatory voting measures was a form of discrimination—against states, which matter, not against Black people, who don’t.

In the 2018 case [Abbott v. Perez](#), the Court approved election maps drawn by Texas’s Republican-controlled legislature that diluted

the voting power of the state's growing Black and Latino populations. In the majority opinion, Justice Samuel Alito criticized not the state but a lower court that had rejected the maps. The court, Alito wrote, had violated the "presumption of good faith" on the part of the legislature. The implication of that rebuke is that Texas's attempting to discriminate against Black and Latino voters wasn't wrong; noticing the attempt was wrong. The next year, in *Rucho v. Common Cause*, the Court concluded that partisan gerrymandering was a "political question" beyond the reach of the courts, paving the way for states to disenfranchise minority populations as a partisan act rather than a discriminatory one, as though the former cancels out the latter.

Trump is now urging emboldened Republican legislatures to gerrymander congressional districts much more in order to voter-proof the Republican majority in the House. His Justice Department sent [Texas a letter](#) saying that

some of its voting districts “constitute unconstitutional racial gerrymanders” that must now be “rectified.” What that meant, remarkably, was that the districts had been made too diverse. In short, they were not racially gerrymandered *enough*. When a [district-court](#) majority—including a Trump-appointed judge—blocked the maps for being “racially gerrymandered,” it pointed as evidence to the DOJ’s own letter and that department’s complaint that the districts were “coalition districts” or “majority-non-White districts in which no single racial group constituted a 50% majority.”

The Roberts Court then overturned that decision, arguing that the lower court was “upsetting the delicate federal-state balance in elections.” Not only did this repeat the Court’s earlier position that it’s wrong to notice discrimination but not wrong to engage in it, but the decision encourages states to draw

discriminatory maps and lie about their intent, knowing the justices have their back.

Later this term, the justices will decide in *Louisiana v. Callais* whether Section 2 of the Voting Rights Act allows the creation of majority-minority districts. Louisiana has taken the position that the creation of such districts—a requirement meant to prevent lawmakers from disenfranchising minorities by slicing up districts to render their votes meaningless—violates the Constitution because “all-race based redistricting is unconstitutional.” The irony is that what Republicans want is to do is precisely race-based redistricting. If they prevail, the Fifteenth Amendment, which was adopted to eliminate racial caste, will be employed to maintain it. The only way to reconcile the Court’s jurisprudence with the Reconstruction Amendments, the Harvard Law professor Guy-Uriel Charles told me, is if you “turn the purpose of the Reconstruction amendments on their heads.”

This disenfranchisement will have long-term consequences—and not only in the arms race to the bottom reflected in the Democratic-controlled states that have shown themselves to be willing to retaliate.

As Frederick Douglass declared in 1865, the ballot is a means of self-defense, not simply a right or responsibility: “Without this, his liberty is a mockery; without this, you might as well almost retain the old name of slavery for his condition; for in fact, if he is not the slave of the individual master, he is the slave of society.”

Americans of all races will suffer by this weakening of democracy. When lawmakers can entrench themselves in office regardless of public preference, they need not heed the will of the people.

The Fourteenth Amendment is under siege in other ways, too. Attacks on the rights of women (such as the right to not be forced to give birth by the state) and on trans people (who have been banned from serving in the military) also

violate the amendment's assurance of equal protection under the law. It is shockingly easy to find [right-wing commentators advocating](#) for the restriction of women's [right to vote](#) and to leave a [marriage](#), and even for employers' [discrimination against women](#) in the workplace.

[Read: Does Heritage support discrimination against women?](#)

In the White House, Trump has been undermining discrimination law by refusing to enforce it. The administration has [argued](#) that Trump holds the authority to ignore laws banning job discrimination on the basis of race, sex, religion, or national origin for federal employees, and has rolled back [enforcement of the Fair Housing Act](#). Aside from Trump's [ban](#) on transgender people in the military, Defense Secretary Pete Hegseth announced his intention to ignore reports of [discrimination or harassment](#).

Recently, the administration announced that it would not be investigating discrimination on the basis of “disparate impact,” in which discrimination can be proved through effect rather than intent alone. That can sound abstract, but here’s one example: The Trump administration [ended a requirement](#) that the state of Alabama provide Black residents with proper sanitation, calling it “illegal DEI.” *Not* flooding Black neighborhoods with raw sewage, according to the Trump administration, is racist.

The administration is also working to use laws that were meant to prevent discrimination to encourage it instead. Trump has weakened the Equal Employment Opportunity Commission’s [ability to fight race- and gender-based](#) discrimination in employment, instead directing it to threaten [companies that maintain diversity programs](#). This week, the EEOC chair [explicitly invited](#) “white males” to file discrimination claims. The civil-rights division of

the Justice Department has shut down [its voting-rights cases](#) while placing the department's support behind efforts to disenfranchise minority voters. Administration officials have threatened lawsuits against schools and businesses for "illegal DEI," giving those institutions a strong incentive to maintain an overwhelmingly white workforce so they don't get sued. In the meantime, the Department of Education has [reportedly almost entirely ceased investigations](#) of racist harassment of students. This legal hostility has extended to state censorship of any acknowledgment of race and gender discrimination—save for that against [white people](#) and [conservative Christians](#).

None of this is consistent with "equal protection of the laws." But it is consistent with the Antebellum Constitution's narrow definition of who "We the People" are.

A future administration could reverse those policies. But Trump's attack on birthright

citizenship is different. On the first day of his current term, Trump issued an executive order announcing that babies born in America to undocumented immigrants or people on temporary visas are not citizens. A lower court blocked the order, and later this term, the Supreme Court will hear the case. If the end of birthright citizenship is upheld, the country will be irrevocably altered. Even those whose citizenship is not in question might have to carry proof of citizenship at all times to avoid being kidnapped, detained, and possibly exiled by federal agents in the name of Kavanaugh's "common sense."

The birthright-citizenship clause was written into the Fourteenth Amendment specifically to overturn *Dred Scott's* conclusion that Black people could never be citizens. Then-Chief Justice Taney's rationale was simply that Black people were "not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore

claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”

Representative John Bingham of Ohio, dubbed the “Madison of the Fourteenth Amendment,” [declared that](#) there could be “no greater political atrocity” than denying birthright citizenship, because that would easily lead to a minority being subjected to “absolute despotism.” That the birthright-citizenship clause applies to everyone has been a subject of [near-total legal consensus](#) until Trump. There is no “originalist” case against birthright citizenship, but there is a partisan one.

Given the extreme nature of many of the conservative movement’s demands, the Roberts Court may not give into all of them, or at least not all at once. Some [legal experts are skeptical](#) that even this Court will allow Trump to nullify birthright citizenship by fiat. But the larger project of restoring the Antebellum Constitution will continue.

Before these amendments, the Antebellum Constitution contemplated the rights and freedom of white men, but no one else. It did not guarantee equal protection under the law. It did not protect the right to vote. It did not outlaw discrimination on the basis of race, gender, religion, or ethnicity. What it did was protect the right of some men to own other men as property, by definition an affront to the idea that “all men are created equal.”

When the 18th-century writer Samuel Johnson asked why “we hear the loudest yelps for liberty among the drivers of negroes,” he was identifying no mere contradiction, but liberty as it was imagined by men who owned other human beings as property. Slaveholders such as John Calhoun saw slavery as inseparable from their own freedom, and they worried that the false doctrine of abolitionism would eliminate that freedom away. “Already it has taken possession of the pulpit, of the schools, and, to a considerable extent, of the press; those great

instruments by which the mind of the rising generation will be formed,” Calhoun [said](#). (It seems the “woke mind virus” was telling lies about the great and benevolent institution of American slavery as far back as two centuries ago.)

Defending slavery, however, required invasive uses of power, such as banning antislavery literature and returning escaped Black people to bondage. Many white Americans in the 19th century began to understand that the “Slave Power” curtailed their freedoms as well. And this is what many people forget: Systems of domination rarely spread their blessings widely. The Redemption-era revocation of Black freedoms didn’t result in prosperity for white people writ large, but a Gilded Age in which the upper classes gained unfathomable wealth and economic crises left millions destitute. The nation may have held on to white supremacy, but it also got low wages, a threadbare welfare state, and a society dominated by the rich.

Everyone else was too divided by race and class to challenge them.

The blood of Confederate soldiers who would never own a slave watered southern fields because they saw slavery as the cornerstone of their social and economic order. The Populists failed to ameliorate the deprivation of the Gilded Age because white laborers who had more in common with their Black counterparts [chose the psychological wage](#) offered by Jim Crow over the literal wages that might be earned through brotherhood. The MAGA elite offers a similar fantasy today, though the number of Trump voters who will see a loved one deported or their paycheck dwindle will eclipse by orders of magnitude those who rub shoulders with donors in his new ballroom.

MAGA's ruling caste will not be as overtly racially circumscribed as in the past. But we can trace its contours in the Trump administration's policy decisions and legal victories, and the

Roberts Court's resurrection of the Antebellum Constitution. The path the justices are walking leads to Calhoun's paradise: an America where a class of stateless children can be denied education and medical care; where people of color must carry identification papers if they don't want to be harassed, detained, imprisoned, or worse; where workers can be subject to invidious discrimination without recourse; where the military points guns at the taxpayers who fund it; and where the official ideology of the state is vindicated by elections the ruling party cannot lose. It will be a society of the dominators and the dominated. But it will not be a democracy worthy of the name.

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