

11-22-2019

## Justice Scalia Got It Right, But for the Wrong Reasons: Scalia's Recognition of the Supreme Court's "Southern Exception" in U.S. Constitutional Jurisprudence and the Connection of "Southern Exceptionalism" to "American Exceptionalism"

James D. Wilets

*Nova Southeastern University College of Law*

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law and Society Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

James D. Wilets, *Justice Scalia Got It Right, But for the Wrong Reasons: Scalia's Recognition of the Supreme Court's "Southern Exception" in U.S. Constitutional Jurisprudence and the Connection of "Southern Exceptionalism" to "American Exceptionalism"*, 74 U. Miami L. Rev. 109 (2019)

Available at: <https://repository.law.miami.edu/umlr/vol74/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

**Justice Scalia Got It Right,  
But for the Wrong Reasons:  
Scalia’s Recognition of the Supreme  
Court’s “Southern Exception” in U.S.  
Constitutional Jurisprudence and the  
Connection of “Southern Exceptionalism”  
to “American Exceptionalism”**

JAMES D. WILETS\*

*The late Justice Scalia has repeatedly and sardonically  
noted that the Supreme Court has discounted the views of*

---

\* Professor of Law at Nova Southeastern University; M.A. in International Relations from Yale University in 1994; J.D. from Columbia Law School in 1987, and B.A. from the University of Washington in 1982. He teaches in the areas of International Law, Constitutional Law, Comparative Law, Human Rights, and European Union Law. While at Yale University, Professor Wilets prepared, at the request of the UN Secretary-General, the first two drafts of a proposal for reforming the human rights functions of the United Nations, which was subsequently incorporated into the U.N.’s Agenda for Peace. He worked as an attorney for the International Human Rights Law Group’s Rule of Law Project in Romania and led a joint mission to Liberia by the National Democratic Institute and the Carter Center during the Liberian Civil War. Professor Wilets worked in Paris on some of the first negotiations between Israelis and Palestinians for a two-state solution. Professor Wilets writes extensively on constitutional and international law issues.

I would like to thank Steven Saban and Samantha Schaum for their enormous assistance with this article. They were instrumental in editing and providing valuable insights into the issues this article raises. Steven J. Saban, J.D. Candidate, 2020, Nova Southeastern University, Shepard Broad College of Law; B.A. in Business Management, 2015, Florida Atlantic University. Samantha Schaum, J.D. Candidate, 2020, Nova Southeastern University, Shepard Broad College of Law; B.A. in English, B.A. in Communications, 2014, Florida State University.

I would also like to thank Matthew Glass for his considerable help. J.D., 2018, Nova Southeastern University, Shepard Broad College of Law; B.S. in Political Science and Social Science, 2010, Florida State University.

*Southern states in determining whether there is a consensus among the states with regards to a Constitutional norm. This Article has termed that Supreme Court position as “Southern Exception” and can be viewed as an effort by some Justices to address the unique social, economic, religious and cultural traditions in the South engendered by its unique and “exceptional” history. This Article will also explore how this “Southern Exception” affected American jurisprudence to the point of rendering it “exceptional” from much of the world’s jurisprudence, essentially turning the traditional use of the term “American Exceptionalism” on its head. This Article will also explore the connection between the hostility of Justice Scalia and some other Justices to this “Southern Exception” and their hostility to the use of international and comparative law in general, particularly when used as a means to circumvent the traditional requirement of a “national consensus” to establish a constitutional norm.*

INTRODUCTION .....	111
I. THE EMPIRICAL BASIS FOR APPLYING THE “SOUTHERN EXCEPTION” IN U.S. JURISPRUDENCE .....	117
A. <i>The Unique Racial Construct of Slavery and Apartheid in the United States</i> .....	117
B. <i>The Extension of This Unique Construction of Race to Religion</i> .....	121
II. THE RELATIONSHIP BETWEEN SOUTHERN EXCEPTIONALISM AND AMERICAN EXCEPTIONALISM .....	127
A. <i>The Southern Stranglehold over the National Body Politic and Its Cultural Influence in the North</i> .....	127
III. A COMPARATIVE VIEW: THE DEBATE OVER AMERICAN EXCEPTIONALISM.....	130
A. <i>Juvenile Executions</i> .....	131
B. <i>Gender Equality</i> .....	132
C. <i>LGBTQ+ Rights</i> .....	135
D. <i>Voting Rights</i> .....	138
CONCLUSION.....	141

## INTRODUCTION

The late Justice Scalia has noted that the Supreme Court has repeatedly discounted the position of former Confederate states in determining whether there is a consensus in the country for the adoption of a particular constitutional norm. This disregard of the normal manner by which the Supreme Court determines whether a consensus exists is termed within this Article the “Southern Exception.”<sup>1</sup> Scalia has argued that some Justices give the laws of the states of the former Confederacy less weight than the laws of other states when the Supreme Court is called upon to determine whether there is a national consensus on a given constitutional issue.<sup>2</sup> The Southern Exception in Supreme Court jurisprudence, as sardonically identified by Justice Scalia, can be viewed as an effort by some Justices to address the unique social, economic, religious, and cultural traditions in the South engendered by its “exceptional” history of racial discrimination.

Although this Article specifically focuses on Southern Exceptionalism, this Article will also argue that Southern Exceptionalism has contributed substantially to making the United States, *as a whole*, exceptional from its international peers. This “American Exceptionalism”<sup>3</sup> is a natural result of Southern Exceptionalism. As such, the American Exceptionalism discussed in this Article is essentially the opposite of the more common use of American Exceptionalism as a description of a morally *superior* United States.<sup>4</sup> It is a premise of the Article that for many of the same reasons, Southern Exceptionalism has rendered the South anomalous as compared to the rest of the country. As a major part of the United States, it has also rendered the United States as a whole out of sync with much of the democratic world in its approach to a wide variety of issues.

This Article will further discuss how this Southern Exceptionalism went well beyond legal issues explicitly dealing with race and

---

<sup>1</sup> See, e.g., James M. McPherson, *Antebellum Southern Exceptionalism: A New Look at an Old Question*, 50 CIV. WAR HIST. 418, 418–19 (2004).

<sup>2</sup> See *infra* Section III.A.

<sup>3</sup> For a more thorough discussion on the various attempts to define “American Exceptionalism,” see Ian Tyrrell, *American Exceptionalism, From Stalin with Love*, AEON (Oct. 10, 2016), <https://aeon.co/ideas/american-exceptionalism-from-stalin-with-love>.

<sup>4</sup> See *id.*

covered a broad panoply of issues ranging from juvenile executions to gender equality and LGBTQ+ rights. For example, in *United States v. Windsor*,<sup>5</sup> Justice Scalia noted in his dissent that “the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court’s scorn, see, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States.”<sup>6</sup> This Article will also explore the connection between the hostility of Justice Scalia and other Justices to this Southern Exception and their hostility to the use of international and comparative law, particularly when used as a means to circumvent the traditional requirement of a national consensus to establish a constitutional norm.<sup>7</sup> This hostility seems all the more remarkable when Justice Scalia claimed to be a proponent of original intent,<sup>8</sup> yet the Constitution and early American jurisprudence were much less hostile to international law than is the present Court. Indeed, originalists have been the jurists who have departed the farthest from the original constitutional view of international law.<sup>9</sup>

In determining whether a particular norm should be elevated to constitutional status, the Court has often, although not always, relied upon the existence of a consensus among the states.<sup>10</sup> It is when the Supreme Court has deviated from this consensus-based approach

---

<sup>5</sup> 570 U.S. 744 (2012).

<sup>6</sup> *Id.* at 795 (Scalia, J., dissenting).

<sup>7</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (“We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”).

<sup>8</sup> See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction.”).

<sup>9</sup> Compare U.S. CONST. art. VI, cl. 2 (“and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land”) and *Worcester v. Georgia*, 31 U.S. 515, 539 (1832) (citing the Supremacy Clause to strike down a Georgia law because it conflicted with a treaty between the United States and the sovereign Cherokee Nation), with *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting).

<sup>10</sup> See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 407–12 (1857).

that the Southern Exception has become most evident.<sup>11</sup> Justice Scalia alluded to this Southern Exception to condemn the Court's apparent devaluation of the Southern states in evaluating whether there is a consensus. Scalia's frustration was particularly evident in not only *United States v. Windsor*,<sup>12</sup> a landmark gay marriage case, but also in cases such as *Thompson v. Oklahoma*<sup>13</sup> and *Stanford v. Kentucky*,<sup>14</sup> both of which addressed the juvenile death penalty. In the death penalty cases, Justice Scalia decried the alleged substitution of consensus within the United States with foreign and international consensus and the simultaneous discounting of broad Southern support for the juvenile death penalty.<sup>15</sup>

This Article argues that Justice Scalia was factually correct as to the *existence* of a Southern Exception, but that he conveniently overlooked the roots of *why* such an exception exists. Scalia implied that it is borne of an irrational anti-Southern bias, whereas the reality is far more complex—there are historical and judicial reasons as to why the Court would apply this exception. The Confederate Exception is arguably a recognition that the 200 years of slavery and almost 100 years of apartheid in many parts of the United States did indeed render this country's legal jurisprudence exceptional.<sup>16</sup> Moreover, to the extent the South was exceptional, its weight in the body politic and Supreme Court rendered U.S. jurisprudence itself exceptional with respect to the rest of the world. For example, large parts of the United States practiced segregation at a time when apartheid was widely condemned in international law and by the great

---

<sup>11</sup> Obvious examples of this deviation are *Brown v. Board of Education*, 347 U.S. 483, 489–93 (1954), or *Loving v. Virginia*, 388 U.S. 1, 9–11 (1967), both decided at times when there was no clear national consensus on the respective issues of segregation and miscegenation laws.

<sup>12</sup> See *United States v. Windsor*, 570 U.S. 744, 795 (2012) (Scalia, J., dissenting).

<sup>13</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting).

<sup>14</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 370–73 (1989) (Scalia, J.), *abrogated by Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>15</sup> *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting); *Stanford*, 492 U.S. at 369 n.1 (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.”).

<sup>16</sup> See *infra* Section I.A.

majority of the world's countries.<sup>17</sup> With the Court's frequent efforts to adopt anti-civil rights positions,<sup>18</sup> the issue of *why* Justice Scalia and other conservative Justices were so protective of states' rights yet simultaneously hostile to international definitions of human rights norms and the expansion of civil rights on the domestic level is a much larger topic and would require speculating as to the mental state of those Justices. However, one can argue that those Justices' resentment of the Southern Exception and their hostility to international and comparative law are not mere happenstance.<sup>19</sup>

The divergence of values between the former Confederate states, Northern states, and other democracies becomes particularly evident in the interpretation of constitutional norms.<sup>20</sup> Presumably, the Court consciously—or subconsciously—acknowledged this exceptional history when evaluating which norms are emblematic of the practices of “civilized” nations.<sup>21</sup> As noted above, the Court has done so by its tendency to accord less value to the legal norms of Southern states when those states' norms conflict with a majority of the United States and the vast majority of the “civilized” world.

Southern Exceptionalism is all the more pronounced in the interpretation of constitutional provisions. The Constitution, providing the political structure of the country, enshrined the compromise between the Northern and Southern states over slavery at the country's inception.<sup>22</sup> Thus, much of the Constitution and its interpretation has been intertwined with the institution of slavery and the later

---

<sup>17</sup> Lennox S. Hinds, *The Gross Violations of Human Rights of the Apartheid Regime Under International Law*, 1 RUTGERS RACE & L. REV. 231, 310–11 (1999).

<sup>18</sup> *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393, 404–07 (1857).

<sup>19</sup> *See infra* Part III.

<sup>20</sup> *See Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986) (citing *Palko v. Connecticut*, 302 U.S. 319, 324–26 (1939)); *see also Moreover: The Cruel and Ever More Unusual Punishment*, ECONOMIST (May 13, 1999) <https://www.economist.com/moreover/1999/05/13/the-cruel-and-ever-more-unusual-punishment> (Eng.) (discussing the United States' deviation from the international consensus of large democracies on the death penalty).

<sup>21</sup> *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988).

<sup>22</sup> A few provisions within the Constitution are relevant, such as the “three-fifths compromise,” found in U.S. CONST. art. I, § 2, cl. 3. This provision guarantees each state a number of representatives, determined by the state's population size. *Id.* However, “other persons,” or slaves, within that population were counted as three-fifths of a whole person. *Id.* Southerners desired that the population count

systematic oppression of people of African descent.<sup>23</sup> Further, constitutional provisions—particularly the Bill of Rights—often contain broad and vague language and thus tend to be a particularly pronounced flash point for differences over whether there is a consensus among the states regarding constitutional rights.<sup>24</sup> For example, what kind of conduct constitutes “cruel and unusual punishment” and what *are* the norms of “civilized” nations in the context of the Eighth Amendment?<sup>25</sup> Some Justices felt it necessary to employ international and comparative norms specifically because many states,

---

include slaves as whole persons—in turn bolstering the number of Southern-state representatives. See Theodore R. Johnson, *We Used to Count Black Americans as 3/5 of a Person. For Reparations, Give Them 5/3 of a Vote.*, WASH. POST.: POSTEVERYTHING (Aug. 21, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/21/we-used-to-count-black-americans-as-35-of-a-person-instead-of-reparations-give-them-53-of-a-vote/>. Another provision found in Article I contains an express *limitation* on Congress’ ability to prohibit the importation of slaves prior to 1808. U.S. CONST. art. I, § 9. Finally, as an effort to resolve the extradition plight faced by slave states at the time, the drafters included the Fugitive Slaves Clause, requiring states to return escaped slaves, or “Person[s] held to Service or Labour,” to the state from which the slave escaped. U.S. CONST. art. IV, § 2, cl. 3. Without the inclusion of these provisions condoning slavery, many in the Northern states feared the South would elect to create a nation of their own, thereby dividing the nation into two. See *Dred Scott v. Sandford*, 60 U.S. 393, 507 (1857) (suggesting that the clauses relating to slavery likely “embody some compromise among the statesmen of that time”).

<sup>23</sup> See, e.g., *Dred Scott*, 60 U.S. at 450–52 (finding an act of Congress that restricted the institution of slavery was “not warranted by the Constitution” and therefore void). The *Dred Scott* decision is notable because the Court went through extraordinary lengths to twist factual reality to justify the institution of slavery. For example, Justice Taney claimed that, at the time of the Constitution’s inception, the opinion of the “civilized portion of the white race” was “fixed and universal” that people of African descent were an “inferior class of beings, who had been subjugated by the dominant race” and who “had no rights or privileges . . .” *Id.* at 404–07. However, reality shows, and Justice Taney later acknowledged, that his argument was ill-considered, as nations around the globe began to prohibit or limit the institution of slavery. See Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI.-KENT L. REV. 393, 423–24 (2007) (discussing the utter lack of support behind Taney’s assertion of a universally held view that blacks “were not part of the polity of any civilized state at the time of the Founding”).

<sup>24</sup> See *Trop v. Dulles*, 356 U.S. 86, 99–01 (1958).

<sup>25</sup> See *id.* at 99–104 (1958) (holding that the Eighth Amendment did not allow Congress to revoke petitioner’s citizenship as consequence for crime).



primarily former slave states, were so exceptional in the manner in which they interpreted these constitutional norms.<sup>26</sup>

For a concrete illustration of how this Confederate Exception affects American jurisprudence, one has only to look at some of the more recent opinions by Justice Kennedy. Although Justice Kennedy was a relatively conservative Justice, he nevertheless earned the ire of fellow conservatives by arguing that laws such as the juvenile death penalty<sup>27</sup> or laws against same-gender sexual activity<sup>28</sup> were unconstitutional because the United States was the only industrialized nation to have them. In the case of juvenile death penalties, the United States was for the most part alone among the world's nations.<sup>29</sup> Justice Scalia, in numerous bitter ripostes, argued that foreign and comparative law had no place in determining whether a consensus existed in America with regard to interpretation of a particular constitutional norm.<sup>30</sup> However, Justice Scalia qualified this argument by stating that international law may be useful in determining whether such a previously existing consensus was a coincidence or something more fundamental to all "civilized" societies and thus deserving of constitutional protection.<sup>31</sup>

---

<sup>26</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>27</sup> *Id.*; see also Linda Greenhouse, *Supreme Court, 5-4, Forbids Execution in Juvenile Crime*, N.Y. TIMES (Mar. 2, 2005), <https://www.nytimes.com/2005/03/02/politics/supreme-court-54-forbids-execution-in-juvenile-crime.html>.

<sup>28</sup> *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (relying on a decision from the European Court of Human Rights in reasoning that outlawing homosexuality is unconstitutional); see also Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES (June 27, 2003), <https://www.nytimes.com/2003/06/27/us/supreme-court-homosexual-rights-justices-6-3-legalize-gay-sexual-conduct.html>.

<sup>29</sup> *Roper*, 543 U.S. at 577 (2005) ("[I]t is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."). However, the United States was not *truly* alone, as juvenile executions have continued post-*Roper* in some countries, particularly Iran, but also Yemen, Saudi Arabia, Sudan, Pakistan, and the Democratic Republic of the Congo. See AMNESTY INT'L, EXECUTION OF JUVENILES SINCE 1990 AS OF DECEMBER 2018, at 1 (2018), <https://www.amnesty.org/download/Documents/act5095112018english.pdf>.

<sup>30</sup> See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.).

<sup>31</sup> See *id.* In *Stanford*, Scalia quoted his own dissenting opinion in *Thompson v. Oklahoma*: "The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not

Likely in response to Justice Scalia's arguments, Justice Kennedy changed tactics, arguing in *Roper v. Simmons*,<sup>32</sup> for example, that international and comparative norms were *helpful* but not dispositive in determining the meaning of such norms. Justice Scalia, utterly unconvinced, continued to deride such an approach, contending that Kennedy's argument was a run-around Southern states by implying a Southern Exception.<sup>33</sup>

## I. THE EMPIRICAL BASIS FOR APPLYING THE "SOUTHERN EXCEPTION" IN U.S. JURISPRUDENCE

### A. *The Unique Racial Construct of Slavery and Apartheid in the United States*

The history of American slavery and apartheid illustrates just how legally and normatively exceptional the Confederate states were from the rest of America and the world, including those countries from which the United States has received its legal traditions.

In 2006, the Trustees of Brown University published a report examining the Brown family's role in the slave trade (the "Brown Report").<sup>34</sup> The Brown Report provides, *inter alia*, a thorough examination of the racialized nature of American slavery,<sup>35</sup> which was noted to be exceptional even in comparison to other countries that

---

merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well." *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)). Scalia's analysis overlooks, for example, the glaring reality that there was no consensus in the United States regarding mixed-race marriages at the time *Loving v. Virginia* was handed down in 1967—indeed, an overwhelming majority of white Americans disapproved of interracial marriages in 1968. See Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP (Aug. 16, 2007), <http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx> (noting that seventy-five percent of white respondents disapproved of interracial marriages in 1968, while just seventeen percent approved).

<sup>32</sup> See *Roper*, 543 U.S. at 578.

<sup>33</sup> See *id.* at 609, 628.

<sup>34</sup> BROWN U. STEERING COMM. ON SLAVERY & JUST., *SLAVERY AND JUSTICE* 15–17 (2006), [http://brown.edu/Research/Slavery\\_Justice/documents/SlaveryAndJustice.pdf](http://brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf) [hereinafter *Brown Report*].

<sup>35</sup> *Id.* at 8.

had slavery.<sup>36</sup> The Brown Report went so far as to argue that the United States' system of slavery was *historically* unique in its racialized nature.<sup>37</sup> As noted by the Brown Report:

Few if any societies in history carried this logic further than the United States, where people of African descent came to be regarded as a distinct "race" of persons, fashioned by nature for hard labor.

....

If American slavery has any claims to being historically "peculiar," its peculiarity lay in its rigorous racialism, the systematic way in which racial ideas were used to demean and deny the humanity of people of even partial African descent. This historical legacy would make the process of incorporating the formerly enslaved as citizens far more problematic in the United States than in other New World slave societies.<sup>38</sup>

The racialized nature of American slavery could help explain why the United States was also historically unique in its racial attitudes *after* slavery. For example, Brazil's history of slavery lasted even longer than that of the United States, yet Brazil did not *legally* and systematically institutionalize racism after slavery to the extent that the United States did.<sup>39</sup> It is important to note that the Brown Report does not indicate that American slavery was distinctive in its cruelty.<sup>40</sup> For instance, slavery in other civilizations was sometimes based on religion, such as the traditional Christian justifications for

---

<sup>36</sup> *Id.*

<sup>37</sup> *See generally id.* (detailing the history of racialized slavery in the United States).

<sup>38</sup> *Id.*

<sup>39</sup> *See* HERBERT S. KLEIN, *AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN* 217–18, 223–24 (1st ed. 1986).

<sup>40</sup> *Brown Report*, *supra* note 34, at 7–8.

slavery<sup>41</sup> or the dictate in the Torah that Hebrews should not enslave other Hebrews.<sup>42</sup> Slavery was also a common result of conquest, punishment, or other *non*-explicitly racial criteria.<sup>43</sup> In the United States, however, these traditional justifications were ultimately superseded by a justification based on the alleged inferiority of the African “race.”<sup>44</sup> Thus, while numerous other civilizations *did* have slavery, the United States took the radical approach of basing slavery entirely on race, relegating people of African descent to a kind of subhuman status.<sup>45</sup> This view was explicitly endorsed by the Supreme Court in *Dred Scott*,<sup>46</sup> and continued to influence American

---

<sup>41</sup> See Noel Rae, *How Christian Slaveholders Used the Bible to Justify Slavery*, TIME (Feb. 23, 2018), <http://time.com/5171819/christianity-slavery-book-excerpt/> (highlighting slaveholders’—most of whom identified as Christian—two favorite texts from the Bible).

<sup>42</sup> James A. Diamond, *The Treatment of Non-Israelite Slaves: From Moses to Moses*, THE TORAH.COM (Apr. 19, 2016), <https://thetorah.com/the-treatment-of-non-israelite-slaves-from-moses-to-moses/> (stating that, initially, the differences between Hebrew slaves and non-Hebrew slaves were that the latter were “permanent acquisitions and never had to be freed.”).

<sup>43</sup> See KLEIN, *supra* note 39, at 1–4.

<sup>44</sup> See *Brown Report*, *supra* note 34, at 8. The Brown Report notes that, similar to much of the rest of the world, the American colonists initially relied on religion and culture as justifications for slavery. *Id.* These rationalizations were later replaced by an “explicit theory of race” by the time of the American Revolution. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857) (“they [persons of African descent] were at that time [of the founding] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race”). Much of the Court’s reasoning in *Dred Scott* was based on what it considered as the view of society during the Framers’ time—that society had relegated the existence of African slaves to that of being bought and sold, treated as mere chattel, and used for profit. *Dred Scott*, 60 U.S. at 407. The Court also references two clauses in the Constitution “which point directly and specifically to the negro race as a separate class of persons,” and specifically argues, in reference to the importation sanctions of 1808, that these sanctions were “unquestionably of persons of the race of [African descent], as the traffic in slaves in the United States had always been confined to [persons of African descent].” *Id.* at 411.

jurisprudence throughout the rest of the Nineteenth Century and beyond.<sup>47</sup> For instance, in the 1967 case *Loving v. Virginia*, the Supreme Court quoted the following portion of the 1959 trial court's opinion:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>48</sup>

The Brown Report summarizes empirical data demonstrating that the former slave states were indeed exceptional in their attitudes towards African Americans.<sup>49</sup> States continued to legally oppress individuals of African descent well after slavery's formal demise through apartheid and other laws designed to separate, exploit, and otherwise oppress African Americans.<sup>50</sup> American apartheid extended to basic functions of society, such as swimming pools, libraries, and transportation,<sup>51</sup> as well as to public schools,<sup>52</sup> marriage,<sup>53</sup> politics, and numerous other areas of societal activity.<sup>54</sup> It even criminalized non-public activities such as mixed-race playing of

---

<sup>47</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding—nearly forty years after *Dred Scott v. Sandford*—the notion that those of African descent are inferior).

<sup>48</sup> *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

<sup>49</sup> See *Brown Report*, *supra* note 34 at 67–68.

<sup>50</sup> See *Plessy*, 163 U.S. at 543 (1896) (announcing the separate but equal doctrine, the Court states that “[a] statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.”).

<sup>51</sup> See *Segregation in Public Places*, AM. PUB. MEDIA, <http://americanradio-works.publicradio.org/features/remembering/public.html> (last visited Apr. 3, 2019).

<sup>52</sup> See *Plessy*, 163 U.S. at 544–45.

<sup>53</sup> See *Loving*, 388 U.S. at 11 (striking down Virginia's miscegenation statutes).

<sup>54</sup> Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 92 (2008).

checkers or dominoes.<sup>55</sup> From the post-Civil War period until the early 1960s, systematic governmental discrimination permeated many American states—particularly the Southern states, which had practiced slavery—and relegated the United States to the unenviable status of being one of only a handful of countries with systematic segregation or apartheid.<sup>56</sup>

### B. *The Extension of This Unique Construction of Race to Religion*

It is difficult to understand the unique American manner of legal subjugation of African Americans without understanding the mutually reinforcing impacts of slavery and religion. The North American racialization of slavery is evidenced in the racist interpretations of Christianity that took root on American soil.<sup>57</sup> This discussion is essential because of the historically close connection between religion and law.<sup>58</sup> Religion provides a theological justification for the existing societal order, as is reflected in society's laws.<sup>59</sup>

---

<sup>55</sup> David Pilgrim, *What Was Jim Crow*, FERRIS ST. UNIV. JIM CROW MUSEUM OF RACIST MEMORABILIA, <http://www.ferris.edu/jimcrow/what.htm> (last visited Oct. 13, 2019).

<sup>56</sup> See Hinds, *supra* note 17 (detailing the United States' troubled history with racism and apartheid politics). From 1948–1994, South Africa maintained a system of apartheid that was analogous to that of the United States. *Id.* at 258, 316–17. Apartheid in South Africa was “a state system which organized the machinery of law, government and law enforcement to force the whole population into an exploitative economy, which excluded eighty percent of the population from control of the land and its resources, and maintained this control, without democratic participation and consent.” *Id.* at 249. See also Rupert Cornwell, *Ian Smith: Rhodesian Prime Minister Who Attempted to Prevent Black Rule by Declaring Independence from Britain*, INDEP. (Nov. 22, 2007, 1:00 AM), <http://www.independent.co.uk/news/obituaries/ian-smith-rhodesian-prime-minister-who-attempted-to-prevent-black-rule-by-declaring-independence-758993.html> (detailing Southern Rhodesia's (today called Zimbabwe) prime minister's efforts to prevent “black rule” in the mid-twentieth century).

<sup>57</sup> See Rae, *supra* note 41.

<sup>58</sup> See Aernout J. Nieuwenhuis, *State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks*, 10 INT'L J. OF CONST. L. 153, 153 (2012).

<sup>59</sup> See Rae, *supra* note 41. The Virginia Supreme Court has often connected religion and slavery, as demonstrated in its rationale for upholding miscegenation statutes that punished interracial marriages:

Indeed, the major Christian denominations in the United States split along each region's respective approach to slavery and apartheid.<sup>60</sup> As a general observation, those areas of the United States that practiced slavery and institutionalized apartheid are, for the most part, the same areas of the United States where Christian denominations that historically justified slavery and apartheid are predominant.<sup>61</sup> As Professor William Eskridge has observed, religion frequently conflates status, belief, and conduct.<sup>62</sup> Put another way, it can be argued that religion functions as a normative justification for pre-existing societal and economic conditions.<sup>63</sup> In the case of American slavery and apartheid, the need for religious justifications was all the more pressing because of the controversial nature of those institutions.

One example of this phenomenon can be witnessed in the historical position of the Southern Baptist Convention (the "SBC"),<sup>64</sup> which has traditionally been the largest Protestant denomination in the United States and traditionally dominant in the Southern states that practiced slavery and apartheid.<sup>65</sup> The SBC was created when the Baptists split into Northern and Southern Baptists, specifically

---

The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation *as the laws of God*, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world.

Naim v. Naim, 87 S.E.2d 749, 752 (Va. 1955) (emphasis added) (quoting Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 862 (Va. 1878)).

<sup>60</sup> See *infra* notes 64–69; *Brown Report*, *supra* note 34, at 8.

<sup>61</sup> James D. Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*, 21 DUKE J. OF COMP. & INT'L L. 631, 634 (2011).

<sup>62</sup> William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 666–68 (2011).

<sup>63</sup> See *id.*

<sup>64</sup> See Adeel Hassan, *Oldest Institution of Southern Baptist Convention Reveals Past Ties to Slavery*, N.Y. TIMES, (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/us/southern-baptist-slavery.html?searchResultPosition=1>.

<sup>65</sup> Wilets, *supra* note 61 at 656.

because of slavery, and the split continued due to the Southern Baptists' support of apartheid.<sup>66</sup> The Northern Baptists, who, as a whole, were anti-slavery and anti-segregation, formed the American Baptist Churches, USA.<sup>67</sup> The SBC itself issued an apology in 1995 on its involvement with slavery and racism on the 150th Anniversary of the SBC in Atlanta, Georgia.<sup>68</sup> In its apology, the SBC stated:

WHEREAS, Our relationship to African-Americans has been hindered from the beginning by the role that slavery played in the formation of the Southern Baptist Convention; and

WHEREAS, Many of our Southern Baptist forbears defended the right to own slaves, and either participated in, supported, or acquiesced in the particularly inhumane nature of American slavery; and

WHEREAS, In later years Southern Baptists failed, in many cases, to support, and in some cases opposed, legitimate initiatives to secure the civil rights of African-Americans; and

WHEREAS, Racism has led to discrimination, oppression, injustice, and violence, both in the Civil War and throughout the history of our nation; and

WHEREAS, Racism has divided the body of Christ and Southern Baptists in particular, and separated us from our African-American brothers and sisters; and

WHEREAS, Many of our congregations have intentionally and/or unintentionally excluded African-

---

<sup>66</sup> Hassan, *supra* note 64 (“The denomination began in 1845 when it split from Baptists in the North over slavery.”).

<sup>67</sup> See *What We Believe: Our History*, AM. BAPTIST CHURCHES USA, <https://www.abc-usa.org/what-we-believe/our-history/> (last visited Aug. 15, 2019).

<sup>68</sup> *Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention*, S. BAPTIST CONVENTION (1995), <http://www.sbc.net/resolutions/899/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention> (admitting to and apologizing for the Southern Baptist Convention’s intimate ties to American slavery).



Americans from worship, membership, and leadership; and

WHEREAS, Racism profoundly distorts our understanding of Christian morality, leading some Southern Baptists to believe that racial prejudice and discrimination are compatible with the Gospel . . . .<sup>69</sup>

The development of particular denominations on U.S. soil to rationalize slavery begs the question of why many other countries, which also had slavery, did not develop specific religions or religious tenets to justify their racist and social institutions.<sup>70</sup> It can be argued, as a historical matter, that many of the settlers to the United States viewed themselves as morally exceptional from the European societies from which they emigrated.<sup>71</sup>

While this sense of American Exceptionalism may permeate the American psyche, it does not fully explain the difference between the generally prevalent phenomenon of American Exceptionalism and the development of a particularly exceptional Southern approach to law, religion, and social norms.<sup>72</sup> Participants in slavery in the South had a particular onus to demonstrate that they too were morally exceptional and had to reconcile their enslavement of human beings with their professed religiosity and putative moral exceptionalism.<sup>73</sup> If one thinks of religion as “the law” and slavery as “the facts” of one’s behavior, then a way to conform one’s behavior to “the law” is to change the characterization of “the facts.” As Carl Sandburg famously stated: “If the law is against you, talk about the evidence. If the evidence is against you, talk about the law, and,

---

<sup>69</sup> *Id.*

<sup>70</sup> *See generally, e.g.,* HERBERT KLEIN, *SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA* 105–126 (1988) (comparing the instrumental role that Catholicism had in shaping Cuban slavery with instrumental role that slavery had in shaping Virginian Anglicanism).

<sup>71</sup> *See id.* at 122 (“Unlike the clergy of Cuba, the clergy of Virginia was unable to convince the planters that emancipation was a good act in the sight of God and was to be considered a common and accepted form of pious action.”); *see also* Joshua Zeitz, *How Trump is Making Us Rethink American Exceptionalism*, *POLITICO* (Jan. 7, 2018), <https://www.politico.com/magazine/story/2018/01/07/trump-american-exceptionalism-history-216253>.

<sup>72</sup> *See* McPherson, *supra* note 1, at 431–33.

<sup>73</sup> *Id.*

since you ask me, if the law and the evidence are both against you, then pound on the table and yell like hell.”<sup>74</sup> The Supreme Court demonstrated this very phenomenon when it stated in *Dred Scott v. Sandford* that even free individuals of African descent could not be United States citizens, even if citizens of a state, because they were not in fact “people” within the meaning of the Constitution, nor did any single person in the civilized world regard them as such.<sup>75</sup> Justice Taney’s language is stunning in the factual assumptions he made to reconcile his version of the law with the facts before him:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. *This opinion was at that time fixed and universal in the civilized portion of the white race.* It was regarded as an axiom in morals as well as in politics, which *no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.*<sup>76</sup>

What stands out in Justice Taney’s opinion is his factual statement that the opinion—white supremacy—“was at that time fixed and universal” for the Founders.<sup>77</sup> However, many educated people at the time of *Dred Scott* likely understood that people doubted the correctness of slavery even at the time the Constitution was written.

---

<sup>74</sup> CARL SANDBURG, *THE PEOPLE*, YES 69 (1936).

<sup>75</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).

<sup>76</sup> *Id.* at 407 (emphasis added).

<sup>77</sup> *Id.* (emphasis added).

Slavery was a divisive issue at the time of the Constitutional Convention.<sup>78</sup> It was such a contested concept that one of the few places the Constitution actually regulates the behavior of individuals is with respect to slavery, effectively forcing the federal government to enforce the institution,<sup>79</sup> even as the federal government was forbidden to interfere with any other kind of state violation of human rights.<sup>80</sup>

It should not be surprising that the Southern-based religions were able to change the very tenets of the religion to justify slavery, given that the Chief Justice of the Supreme Court could characterize slavery in a manner that he knew was incorrect and that many people throughout the country felt was incorrect.<sup>81</sup> Moreover, the Chief Justice likely knew that educated people understood that what he was saying was false.<sup>82</sup> What begs further exploration is why other contemporaneous slave societies felt no such need to conform their religions to their realities, even though the legal definitions of colonial empires such as Spain and Portugal and the Netherlands inherited their definitions of slavery through the Catholic Church.<sup>83</sup>

Indeed, at first the American colonies had no specific legal theory regarding slavery.<sup>84</sup> As documented by historian Edmund Morgan, the first Africans brought to the United States were indentured servants, not slaves, who intermarried with other white indentured

---

<sup>78</sup> See Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 426 (2001) (“Delegates from Connecticut and Massachusetts were especially afraid that if slavery were explicitly mentioned in the Constitution it would not be ratified in the North.”)

<sup>79</sup> See U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3.

<sup>80</sup> Not until the adoption of the Fourteenth Amendment in 1868 did the federal government gain this authority. See *id.* amend. XIV.

<sup>81</sup> See Sarah Goldberg, et al., *Dickinson and Slavery*, DICKINSON: HOUSE DIVIDED PROJECT, <http://housedivided.dickinson.edu/sites/slavery/people/roger-taney/> (last visited Sept. 2, 2019) (noting that Taney emancipated his own slaves prior to the *Dred Scott* decision, and his pro-slavery verdict was publicly disapproved of as the decision led to the election of Abraham Lincoln for president).

<sup>82</sup> See *id.*

<sup>83</sup> *Brown Report*, *supra* note 34, at 8.

<sup>84</sup> *Id.* at 8.

servants.<sup>85</sup> Morgan describes the transformation of free African indentured servants into slaves, largely to prevent the ever-growing free indentured servant population from overwhelming the plantation owners.<sup>86</sup> In effect, the transformation of Africans from indentured servants into slaves was a necessary prerequisite for the ultimate establishment of a successful republic, at least for the white population.<sup>87</sup> Thus, with the transformation of indentured servitude to slavery for Africans,<sup>88</sup> the American colonies, and later the United States, developed their own legal foundations for slavery.

Consistent with Morgan's documentation, the Brown Report observed that "the laws they fashioned, beginning in Virginia in the 1620s and continuing through the Civil War, were historically unprecedented in their complete denial of the legal personality of the enslaved. Slaves in North America were chattel, no different in law from horses, handlooms, or other pieces of disposable property."<sup>89</sup> This unique American moralistic view of slavery, buttressed by a deep racially influenced "religiosity," arguably helped the creation of the American system of apartheid even after the end of slavery.<sup>90</sup> This also helps explain why race has continued to play a dominant role in political and cultural discourse in the United States long after the abolishment of slavery and even after the termination of apartheid.

## II. THE RELATIONSHIP BETWEEN SOUTHERN EXCEPTIONALISM AND AMERICAN EXCEPTIONALISM

### A. *The Southern Stranglehold over the National Body Politic and Its Cultural Influence in the North*

Although this Article specifically focuses on Southern Exceptionalism, it is important to note that racial discrimination against

---

<sup>85</sup> EDMUND S. MORGAN, *AMERICAN SLAVERY-AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 154–57 (1976).

<sup>86</sup> *Id.* at 385–86; *Indentured Servants in the U.S.*, SOUTH FLORIDA PBS, <http://www.pbs.org/opb/historydetectives/feature/indentured-servants-in-the-us/> (last visited Aug. 15, 2019).

<sup>87</sup> MORGAN, *supra* note 85, at 386.

<sup>88</sup> SOUTH FLORIDA PBS, *supra* note 86; *see also* MORGAN, *supra* note 85 at 385–86.

<sup>89</sup> *Brown Report*, *supra* note 34 at 8.

<sup>90</sup> *See* KLEIN, *supra* note 70, at 122.

non-European ethnic groups was not limited to the South.<sup>91</sup> While this phenomenon would seem to undercut the premise of this Article, it instead demonstrates the close connection between Southern Exceptionalism and American Exceptionalism.

Northern political parties themselves frequently promulgated discriminatory laws.<sup>92</sup> Additionally, after the Civil War, the South was able to increase its political power as black individuals in the South counted as a full person for purposes of electoral apportionment, rather than three-fifths of a person, as slaves, under the original Constitution.<sup>93</sup> As blacks were gradually denied the franchise in the South, white representation in the Southern states in Congress dramatically expanded.<sup>94</sup> Southern states were granted credit in Congress and the Electoral College for their entire populations while those same states denied the franchise to their black citizens.<sup>95</sup>

In addition to the political influence of the South in the national body politic, racist attitudes and even legally discriminatory policies permeated well beyond the South.<sup>96</sup> This permeation should not be surprising given that the United States was still one country and cultural and racial attitudes could not be neatly confined to discrete regions. Not until the 1948 decision in *Shelley v. Kraemer* were restrictive covenants prohibiting the sale of homes to blacks forbidden.<sup>97</sup> Northerners were also keenly aware of the large African-American population in close geographical proximity, contributing to racial fears of Northern whites. One striking example of this is

---

<sup>91</sup> See, e.g., ROY BECK, *THE CASE AGAINST IMMIGRATION* 35–42 (1996) (arguing against immigration by looking at historical hostility to immigrants).

<sup>92</sup> See, e.g., DeNeen L. Brown, *When Portland Banned Blacks: Oregon's Shameful History as an 'All-White' State*, WASH. POST (June 7, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/?utm\\_term=.6b8c2b207f75](https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/?utm_term=.6b8c2b207f75).

<sup>93</sup> Compare U.S. CONST. art. I, § 2, cl. 3 with *id.* amend. XIV; see also Johnson, *supra* note 22.

<sup>94</sup> Johnson, *supra* note 22.

<sup>95</sup> *Id.*

<sup>96</sup> Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 245 (2006) (citing JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 62–67 (2000)).

<sup>97</sup> *Shelley v. Kraemer*, 334 U.S. 1, 21–23 (1948).

Oregon’s constitution, which originally forbade any black Americans from even residing in the state.<sup>98</sup> The stranglehold that primarily Southern racial attitudes had on the country as a whole is clearly shown in the federal policies of the period after the Civil War—the federal government actively participated in social and economic subordination of African Americans through the organization of federal programs and employment policies.<sup>99</sup>

One example of broad American Exceptionalism in a religious context is the Church of Jesus Christ of Latter-Day Saints (“LDS”), the adherents of which are sometimes incorrectly referred to as Mormons.<sup>100</sup> LDS has historically evidenced a strong racist theology.<sup>101</sup> LDS theologians have based this theology on the presumed inferiority of African Americans.<sup>102</sup> In his *Journal of Discourses*, Brigham Young explained the Mormon theology with respect to black Africans:

Shall I tell you the law of God in regard to the African Race? If the white man who belongs to the chosen seed mixes his blood with the seed of Cain, the penalty, under the law of God, is death on the spot. This will always be so.<sup>103</sup>

. . . .

You see some classes of the human family that are black, uncouth, uncomely, disagreeable and low in their habits, wild, and seemingly deprived of nearly

---

<sup>98</sup> OR. CONST. art. I, § 3 (repealed 1926); see also DeNeen, *supra* note 92.

<sup>99</sup> See generally FEAGIN, *supra* note 96, at 179–85 (discussing government social and economic programs and their effect on African Americans).

<sup>100</sup> See Amanda Casanova, *Mormons - 10 Things to Know About the Church of Latter Day Saints*, CHRISTIANITY.COM (May 21, 2018), <https://www.christianity.com/church/denominations/are-mormons-christians-10-things-to-know-about-the-church-of-latter-day-saints.html>.

<sup>101</sup> *Mormon Racism in Perspective: An Example for Possible Future Changes in Policy Relating to Women and Gays*, LDS-MORMON.COM, <http://www.lds-mormon.com/racism.shtml> (reproducing a speech by Elder Mark E. Peterson given at Convention of Teachers and of Religion on the College at Brigham Young University in 1954).

<sup>102</sup> *Id.*

<sup>103</sup> 7 BRIGHAM YOUNG, ET AL., JOURNAL OF DISCOURSES 290 (1854), <https://contentdm.lib.byu.edu/digital/collection/JournalOfDiscourses3/id/2854>.

all the blessings of the intelligence that is generally bestowed upon mankind. The first man that committed the odious crime of killing one of his brethren will be cursed the longest of any one of the children of Adam. Cain slew his brother. Cain might have been killed, and that would have put a termination to that line of human beings. This was not to be, and the Lord put a mark upon him, which is the flat nose and black skin. Trace mankind down to after the flood, and then another curse is pronounced upon the same race—that they should be the “servant of servants;” and they will be, until that curse is removed.<sup>104</sup>

In 1978, the LDS Church announced that God had removed the “curse of Cain” upon African Americans when God allegedly made a divine revelation to church head Spencer Kimball that blacks could become priests.<sup>105</sup>

The racism embedded in both the Southern strain of the Baptist faith<sup>106</sup> and the LDS Church,<sup>107</sup> both religions indigenous to the United States,<sup>108</sup> provides a broader context for understanding both the Southern and American forms of legal exceptionalism with respect to race.

### III. A COMPARATIVE VIEW: THE DEBATE OVER AMERICAN EXCEPTIONALISM

As discussed previously, Southern Exceptionalism has been part of the larger debate over American Exceptionalism. Often, it is Southern Exceptionalism that has an outsized role in relegating the United States to the dubious position of being an international outcast in relation to many of its international peers with respect to sev-

---

<sup>104</sup> 10 BRIGHAM YOUNG, ET AL., JOURNAL OF DISCOURSES 110 (1854), <https://contentdm.lib.byu.edu/digital/collection/JournalOfDiscourses3/id/4266>.

<sup>105</sup> Eskridge, *supra* note 62, at 681–85 (discussing Christian fundamentalists’ discriminatory views against gay people and comparing them to the Christian fundamentalists’ discriminatory views against racial minorities during colonial times).

<sup>106</sup> Hassan, *supra* note 64.

<sup>107</sup> *Mormon Racism in Perspective*, *supra* note 101.

<sup>108</sup> Casanova, *supra* note 100; Hassan, *supra* note 64;

eral contemporary social issues. On numerous occasions, the Southern states have held positions that are inconsistent with international norms. For example, in the years since the civil rights era, these states have persisted in limiting national progress on issues relating to juvenile executions, gender equality, LGBTQ+ rights, and voting rights. On all of these matters, the United States was until recently—or in some cases still remains—an international outlier.

#### A. *Juvenile Executions*

Nowhere has the United States been more exceptional in comparison to the rest of the “civilized” world than in the area of juvenile executions. At the time of the 2005 Supreme Court decision in *Roper v. Simmons*, which found juvenile executions violative of the Eighth Amendment,<sup>109</sup> the United States was among the very few countries in the world that still legally executed juveniles.<sup>110</sup> This timeframe is truly extraordinary when one considers the horrendous human rights record of some countries that banned the practice before the United States.<sup>111</sup>

The *Roper* case illustrates the tension between Justices Kennedy and Scalia. Justice Kennedy did not hesitate to use comparative law and international norms as factors in deciding cases,<sup>112</sup> while Justice Scalia vehemently argued against using international or comparative law to demonstrate a consensus on a topic.<sup>113</sup> However, Justice Scalia’s disdain for using international or comparative law in almost any capacity in American courts was evident years before the *Roper* decision.<sup>114</sup> This disdain seems to be correlated with his reaction to

---

<sup>109</sup> 543 U.S. 551, 578 (2005).

<sup>110</sup> See AMNESTY INT’L, *supra* note 29, at 1.

<sup>111</sup> Prior to *Roper*, countries such as Iran and Saudi Arabia had, at least publicly, denounced juvenile executions by ratifying the United Nations Convention on the Rights of the Child, while the United States still legally condoned the practice. See *id.* Iran and Saudi Arabia, two countries that abolished juvenile executions prior to the United States, have been cited for horrendous human rights violations. BRAD ADAMS ET AL., HUMAN RIGHTS WATCH, WORLD REPORT FOR 2004, at 460–66, 480–86, (2005), [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2005.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2005.pdf) (providing a detailed account of the human rights abuses of Iran and Saudi Arabia).

<sup>112</sup> See *Roper*, 543 U.S. at 575–77.

<sup>113</sup> See *id.* at 610–11.

<sup>114</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 868, n.4 (1988).



the Southern Exception.<sup>115</sup> While the South was out of step with the rest of the country, it was even more misaligned with the rest of the democratic, industrialized world.<sup>116</sup> After all, the South comprised a substantial portion of the United States population, but it comprised a much smaller portion of the industrialized world. If Justice Scalia and several other conservative Justices deeply resented the non-Southern portion of the United States imposing its views on the Southern states, they were even more resentful of the rest of the world doing the same. As started above, this Article does not purport to speculate as to the deeper reasons for these Justices' position *vis-à-vis* states' rights, but only to illustrate the patterns these reasons present.

For example, Justice Scalia took umbrage with Justice Stevens's opinion in *Thompson v. Oklahoma*, which held juvenile executions unconstitutional where the person in question was fifteen years old at the time of committing a capital offense.<sup>117</sup> While Stevens cited international and comparative law in support of the Court's definition of the "evolving standards of decency that mark the progress of a maturing society,"<sup>118</sup> Scalia vigorously dissented, writing against the use of comparative or international law as legitimate factors in determining whether a "consensus" existed on the issue.<sup>119</sup> Years later, Justice Scalia's objection to this procedure was even greater in *Roper v. Simmons* where he said, "[a]cknowledgment of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment—which is surely what it parades as today."<sup>120</sup>

## B. *Gender Equality*

The United States has found itself as an international outsider in yet another subject area—gender equality. Amongst its international peers, the United States ranked fifty-first in the World Economic

---

<sup>115</sup> *See id.*

<sup>116</sup> *See* AMNESTY INT'L, *supra* note 29, at 1.

<sup>117</sup> *Thompson*, 487 U.S. at 838.

<sup>118</sup> *Id.* at 821, 830–31.

<sup>119</sup> *Id.* at 868, n.4.

<sup>120</sup> *Id.* at 628.

Forum's 2018 Global Gender Gap report.<sup>121</sup> Further, the United States had a score of 0.72 out of 1.00, with 1.00 equaling complete parity between the sexes.<sup>122</sup> Between having the highest rate of maternal deaths compared to any other country in the developed world<sup>123</sup> or a lackluster number of women in high government positions,<sup>124</sup> *inter alia*, the United States ranks behind almost all other industrialized nations.

As in the case of juvenile executions, the Southern states accounted for much of this American Exceptionalism. When one looks closer at the statistics, there remains a chasm within the United States between the Southern states and the rest of the nation.<sup>125</sup> Although this proposition and the following discussion are sociological observations, and not strictly legal conclusions, they illustrate the connections between these sets of social, "hot-button" issues and the regional variation with respect to race. There is not an obvious reason why racism should be correlated with sexism, homophobia, executions of juveniles, or other traditionally conservative positions on social issues, but the correlation has been consistent with the legal positions of Justice Scalia and similarly-minded Justices. *Why* this correlation should exist is, once again, beyond the scope of this Article, and the answer most likely lies in the realm of psychology and sociology.

As an example of this correlation, a study comparing women throughout the country graded each state based on findings across six categories: political participation, employment and earnings, work and family, poverty and opportunity, health and wellbeing, and reproductive rights.<sup>126</sup> Overall, no Southern state received a grade

---

<sup>121</sup> WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2018, at 287 (2018), [http://www3.weforum.org/docs/WEF\\_GGGR\\_2018.pdf](http://www3.weforum.org/docs/WEF_GGGR_2018.pdf).

<sup>122</sup> *Id.*

<sup>123</sup> Nina Martin & Renee Montage, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 12, 2017, 10:28 AM), <http://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world>.

<sup>124</sup> WORLD ECONOMIC FORUM, *supra* note 121, at 287.

<sup>125</sup> JULIE ANDERSON ET AL., INST. FOR WOMEN'S POLICY RESEARCH, STATUS OF WOMEN IN THE SOUTH: 2016, at xxii–xxv (2016), <http://statusofwomensdata.org/wp-content/uploads/2016/06/SWSouth2.24-for-posting-online.pdf> (summarizing key findings of research on women living in the South).

<sup>126</sup> *Id.*

above a C-, and the majority of the Southern states received some version of a D grade.<sup>127</sup> Some of the worst discrepancies involved pay. It is estimated that in 2014, working women in the South earned on average \$6,392 less due to wage inequality among the sexes.<sup>128</sup> Collectively, working women in the South lose an estimated \$155.4 billion per year due to wage discrepancy between men and women.<sup>129</sup>

Besides the differences in pay gaps, the lack of paid family leave across the Southern states is another factor that makes the United States, as a whole, perform less favorably with respect to gender than its international counterparts. In the United States, not one Southern state requires paid leave to its employees<sup>130</sup> whereas several non-Southern states do.<sup>131</sup> Furthermore, when compared to forty-one other nations in a survey conducted by the Organization for Economic Development (“OECD”), the United States was the only country to not provide new parents with universal paid family leave.<sup>132</sup> This policy also has a disproportionate racial effect because four out of five black Southern mothers are the main breadwinners in their family.<sup>133</sup> One could speculate that the disproportionate racial effect is not irrelevant. Arguably, Southern state legislatures may have more readily accepted policies involving grossly disparate impacts by gender because the effects of those policies were most heavily experienced by the black population, which has, for most of this country’s history, been politically irrelevant.

---

<sup>127</sup> *Id.* at xxvi.

<sup>128</sup> *Id.* at 35–36.

<sup>129</sup> *Id.* at 36.

<sup>130</sup> *Id.* at 69.

<sup>131</sup> *Id.*; see also Rachel Blakely-Gray, *Paid Sick Leave Laws by State: The Chart, Map, and Accrual Info You Need*, PATRIOT SOFTWARE: PAYROLL BLOG (July 8, 2019), <https://www.patriotsoftware.com/payroll/training/blog/state-mandated-paid-sick-leave-laws/>.

<sup>132</sup> OECD FAMILY DATABASE, PF2.1 PARENTAL LEAVE SYSTEMS 2–3 (last updated Aug. 2019), [http://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf); see also Gretchen Livingston, *Among 41 Nations, U.S. is the Outlier When it Comes to Parental Leave*, PEW RES. CTR. (Sept. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/>.

<sup>133</sup> See ANDERSON, *supra* note 125, at 79.

### C. LGBTQ+ Rights

An issue that further illustrates the Southern Exception and the influence of the South on national policy in the United States at large has been the fight for decriminalization and equality for members of the LGBTQ+ community. Although the United States currently enjoys marriage equality,<sup>134</sup> the United States was otherwise very late to embrace civil rights for the LGBTQ+ community.<sup>135</sup> Until the *Lawrence v. Texas*<sup>136</sup> decision in 2003, the United States was the only industrialized nation criminalizing same-gender sexual relations.<sup>137</sup> In *Lawrence*, as in *Roper*,<sup>138</sup> Justice Kennedy used international and comparative law<sup>139</sup> to justify eliminating sodomy laws and to reject the reasoning of *Bowers v. Hardwick*,<sup>140</sup> the previous case which refused to find sodomy laws unconstitutional.<sup>141</sup> Justice Kennedy wrote that:

Where a case's foundations have sustained serious erosion, criticism from other sources is of greater significance. . . . [T]o the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of

---

<sup>134</sup> See David Masci et al., *Gay Marriage Around the World*, PEW RES. CTR. (May 7, 2019), <http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/>.

<sup>135</sup> See *id.*

<sup>136</sup> 539 U.S. 558 (2003).

<sup>137</sup> See Masci et al., *supra* note 134.

<sup>138</sup> See *supra* Section III.A.

<sup>139</sup> *Lawrence*, 539 U.S. at 576–77 (“Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct . . . [and] the right . . . has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”).

<sup>140</sup> 478 U.S. 186 (1986).

<sup>141</sup> See *id.* at 191–92, 195 (holding that the Fourteenth Amendment’s Due Process Clause did not confer a fundamental right on homosexuals to engage in acts of consensual sodomy, even where such conduct took place within the private confines of an individual’s home).

the protected right of homosexual adults to engage in intimate, consensual conduct.<sup>142</sup>

In doing so, he earned a bitter rebuke from Justice Scalia, who again argued that there was no consensus within the United States for finding sodomy laws unconstitutional.<sup>143</sup>

In 2015, following a rapid increase in public approval of homosexuality, the United States Supreme Court declared the right to marriage a fundamental right guaranteed to all citizens through the Equal Protection Clause of the Fourteenth Amendment in *Obergefell v. Hodges*.<sup>144</sup> While the United States undoubtedly deserves credit for legalizing gay marriage, it was by no means the first country to legalize same-sex marriage.<sup>145</sup> In 2015, at the time of the *Obergefell* decision, twenty-one other nations had already preserved this right.<sup>146</sup> From the American perspective, it is interesting to look how different the pace of reform occurred throughout the states. As early as 2003, around the same time the first countries began legalizing gay marriage, Massachusetts became the first state to allow gay marriage through the Massachusetts Supreme Court decision *Goodridge v. Department of Public Health*.<sup>147</sup> In fact, Massachusetts Chief Justice Margaret Marshall has noted the similarities in the attitudes towards race in her home country of South Africa and the attitudes towards same-sex marriage of many Americans.<sup>148</sup> In this sense, the Massachusetts opinion's acknowledgement of changing attitudes towards same-sex marriage mirrored the Supreme Court jurisprudence's treatment of Southern Exceptionalism and the attitudes of non-Southern states as discussed *supra*.

---

<sup>142</sup> *Lawrence*, 539 U.S. at 560.

<sup>143</sup> *Id.* at 598 (Scalia, J., dissenting).

<sup>144</sup> 135 S. Ct. 2584, 2607–08 (2015).

<sup>145</sup> Masci et al., *supra* note 134 (in 2000, the Netherlands was the first country in the world to legalize gay marriage).

<sup>146</sup> See Masci et al., *supra* note 134.

<sup>147</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>148</sup> Jesse Wegman, *Why Massachusetts Led the Way on Same-Sex Marriage*, N.Y. TIMES (Apr. 27, 2015), <https://www.nytimes.com/2015/04/27/opinion/why-massachusetts-led-the-way-on-same-sex-marriage.html> (“Ms. Marshall grew up in South Africa, where as a white university student she became deeply involved in the growing anti-apartheid movement . . . As a result, she had what she calls a ‘very textured’ understanding of race and the law.”).

In 2008, Connecticut followed suit,<sup>149</sup> with Iowa<sup>150</sup> and Vermont<sup>151</sup> joining the ranks in 2009 and New Hampshire<sup>152</sup> in 2010. During this period and the years that followed, many other non-Southern states, European countries, and Western Hemisphere countries legalized same-sex marriage as well.<sup>153</sup>

However, as recently as 2013, before *Obergefell* forced gay marriage on the Southern states,<sup>154</sup> not only did every Southern state restrict gay marriage—except for West Virginia—they placed an outright state constitutional ban on the practice.<sup>155</sup> By 2014, thirty-five states had legalized gay marriage with the South being the predominant region in opposition.<sup>156</sup>

Even though gay marriage enjoys the support of a majority of Americans, it does not enjoy the same level of support in the South.<sup>157</sup> As was the case with previous opposition to racial equality, Southern Christians, especially Southern Baptists, were particularly opposed to marriage equality.<sup>158</sup> If not for the Supreme Court

---

<sup>149</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008).

<sup>150</sup> *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

<sup>151</sup> VT. STAT. ANN. tit. 15, § 8 (2009).

<sup>152</sup> N.H. REV. STAT. ANN. § 457:1-a (2010).

<sup>153</sup> Claire Felter & Danielle Renwick, *Same-Sex Marriage: Global Comparisons*, COUNCIL ON FOREIGN REL. (June 27, 2019), <https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons>; see also *State-by-State History of Banning and Legalizing Gay Marriage, 1994–2015*, PROCON.ORG (Feb. 16, 2016, 1:44 PM), <https://gaymarriage.procon.org/view.resource.php?resourceID=004857>.

<sup>154</sup> See Felter & Renwick, *supra* note 153.

<sup>155</sup> See Harry J. Enten, *Same Sex Marriage and the South*, GUARDIAN (July 1, 2013, 12:59 PM), <https://www.theguardian.com/commentisfree/2013/jul/01/same-sex-marriage-south>.

<sup>156</sup> Michael Muskal, *Year in Review: Gay Marriage Dynamic in U.S. Shifted Dramatically in 2014*, L.A. TIMES (Dec. 28, 2015, 7:00 AM), <http://www.latimes.com/nation/la-na-year-ahead-gay-marriage-20141228-story.html>.

<sup>157</sup> See *Attitudes on Gay Marriage*, PEW RES. CTR. (May 14, 2019), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>; Michael Lipka, *Gay Marriage Arrives in the South, Where the Public is Less Enthused*, PEW RES. CTR. (Oct. 15, 2014), <http://www.pewresearch.org/fact-tank/2014/10/15/gay-marriage-arrives-in-the-south-where-the-public-is-less-enthused/>.

<sup>158</sup> *Compare Resolution On Racial Reconciliation*, *supra* note 68 with *On Same-Sex Marriage*, S. BAPTIST CONVENTION (2003), <http://www.sbc.net/resolutions/1128>; see also Niraj Chokshi, *The Religious States of America, in 22 Maps*,

taking action, thereby enshrining marriage equality as a fundamental right, it is unlikely that gay marriage would have been legalized anytime soon in the Southern states.<sup>159</sup>

#### D. *Voting Rights*

The issue of voting rights is central to the discussion of how a Southern Exception has impacted American jurisprudence. The enactment of the Voting Rights Act of 1965<sup>160</sup> was a milestone in achieving legal and political equality of all Americans.<sup>161</sup> This legislation finally provided protection to African Americans in the South who had been kept from voting through numerous means including intimidation, threats, physical violence, literacy tests, and poll taxes.<sup>162</sup>

Nevertheless, the Supreme Court overturned portions of the Voting Rights Act in the 2013 decision *Shelby County v. Holder*, opening the door for states and local jurisdictions to create impediments for minority voting.<sup>163</sup> This ruling invalidated Section 4(b) of the Voting Rights Act,<sup>164</sup> eliminating the preclearance requirement for areas of the country that were deemed by Congress to have engaged in discriminatory practices with respect to voting.<sup>165</sup> In a sense, Section 4(b) was the legislative equivalent of the Southern Exception, as it subjected historically discriminatory regions of the country—

---

WASH. POST: GOVBEAT (Feb. 26, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/02/26/the-religious-states-of-america-in-22-maps/>.

<sup>159</sup> See Lipka, *supra* note 157.

<sup>160</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. §§ 10101 et seq. (2019)).

<sup>161</sup> See generally Louis Menand, *The Color of Law: Voting Rights and the Southern Way of Life*, NEW YORKER (July 1, 2013), <https://www.newyorker.com/magazine/2013/07/08/the-color-of-law> (referring to the Voting Rights Act of 1965 as the “greatest legislative achievement” of the civil rights movement).

<sup>162</sup> See Voting Rights Act of 1965, §§ 10101 et seq.; see also Menand, *supra* note 161.

<sup>163</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013).

<sup>164</sup> *Id.* at 557. *Shelby County* challenged sections 4(b) and 5 of the Voting Rights Act. *Id.* at 540. Section 4(b) provided the “coverage formula” which mainly singled out Southern states. *Id.* at 538. Section 5 required jurisdictions covered by 4(b) to seek federal approval before enacting laws related to voting. *Id.* at 534–35.

<sup>165</sup> *Id.* at 535.

often Southern states—to a preclearance requirement before changing their voting laws, while the remainder of the country was free from such a requirement.<sup>166</sup>

At the core of the majority opinion in *Shelby* is a rebuke of the Voting Rights Act’s implied Southern Exception. Writing for the majority, Chief Justice Roberts summarized his main justification for overturning parts of the Voting Rights Act, stating that “[t]here is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”<sup>167</sup> Nevertheless, as the dissent noted, one of the core reasons voting patterns have changed for the better in the South is because of the continued enforcement of the Voting Rights Act itself.<sup>168</sup>

The dissent’s perspective on the Southern states appears to be somewhat validated by events since *Shelby*. For example, as of 2016, thirty-two states have voter-ID laws designed to make voting more difficult.<sup>169</sup> In 2014, just one year after the *Shelby* decision, North Carolina passed the worst voter suppression law in the country, shortening access to early voting by a week, passing stringent new voter-ID laws, eliminating same-day registration and pre-registration for sixteen- and seventeen-year-olds, and ending out-of-precinct voting for statewide races.<sup>170</sup> All of these measures had the

---

<sup>166</sup> *Id.* (“[Section] 4 of the Act applied that requirement only to some States— an equally dramatic departure from the principle that all States enjoy equal sovereignty.”).

<sup>167</sup> *Id.* 535. Chief Justice Roberts went on to explain that “Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent.” *Id.*; see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201, 203–04 (2009).

<sup>168</sup> *Id.* at 560 (Ginsburg, J., dissenting); see Andrew Cohen, *After 50 Years, the Voting Rights Act’s Biggest Threat: The Supreme Court*, ATLANTIC (Feb. 22, 2013), <https://www.theatlantic.com/national/archive/2013/02/after-50-years-the-voting-rights-acts-biggest-threat-the-supreme-court/273257/>.

<sup>169</sup> See Jasmine C. Lee, *How States Moved Toward Stricter Voter ID Laws*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html>.

<sup>170</sup> *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016) (striking down North Carolina’s voter ID laws for “discriminatory intent”); see also Penda D. Hair & Nat’l Journal, *One Year After Shelby Decision, States Have Moved to Restrict Voter Access*, ATLANTIC (July 7, 2014),



effect of decreasing minority voter turnout and eliminating many of the strides made when Section 4(b) was in effect.<sup>171</sup> For example, nearly 70% of all African Americans who voted in 2012 used early voting.<sup>172</sup>

Yet, it was not just North Carolina that began to roll back voter protections shortly after the *Shelby* decision. Alabama,<sup>173</sup> Texas,<sup>174</sup> Virginia,<sup>175</sup> and Mississippi<sup>176</sup> also immediately passed voter suppression laws in the first year after *Shelby*. Notably, all of the aforementioned states were previously covered under Section 4(b) of the Voting Rights Act,<sup>177</sup> although some other Republican-controlled non-Southern states have passed similar measures.<sup>178</sup> Generally speaking, states with a history of discriminating against African-

---

<https://www.theatlantic.com/politics/archive/2014/07/one-year-after-shelby-decision-states-have-moved-to-restrict-voter-access/431106/>.

<sup>171</sup> See N.C. State Conference of NAACP, 831 F.3d at 214 (“the new provisions target African Americans with almost surgical precision”).

<sup>172</sup> Lee, *supra* note 169.

<sup>173</sup> See ALA. CODE § 17-9-30 (2019). The voter identification requirement went into effect in 2014. *Id.*

<sup>174</sup> See TEX. ELECTION CODE ANN. § 63.0101 (West 2018). The law passed a facial challenge in 2014. *Veasey v. Perry*, 135 S. Ct. 9, 9–10 (2014) (mem.). In a two-sentence, unsigned opinion, the Court allowed the voter identification law to go into effect despite “virtually unchallenged evidence that [it] bears more heavily on minority voters.” *Id.* at 11 (Ginsburg, J., dissenting) (alterations and internal citations omitted). The Texas legislature has since revised the law. *Veasey v. Abbott*, 888 F.3d 792, 797 (5th Cir. 2018).

<sup>175</sup> See VA. CODE ANN. § 24.2-643 (2019). The voter identification requirement went into effect on July 1, 2014. *Id.*

<sup>176</sup> See Miss. Code Ann. § 23-15-563 (2018). Until *Shelby*, the law was not put into effect.

<sup>177</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 538, 540 (2013); see also Lee, *supra* note 169.

<sup>178</sup> See, e.g., OHIO REV. CODE ANN. § 3503.19 (West 2013). In 2018, the Supreme Court upheld the Ohio law. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841 (2018); see also Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities, Journalist Says*, NPR (Oct. 23, 2018, 2:04 PM), <https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says> (reporting Republican strategies to tighten access to ballots in states like Ohio, Kansas, and North Dakota, which have all passed voting laws since *Shelby* that have an adverse effect on minority voters).

American voting rights are the same states currently passing discriminatory voter suppression laws.<sup>179</sup>

In fairness, if Justice Roberts and Justice Scalia deserve criticism for being unwilling to consider issues within their given social context, Justice Kennedy's decision to side with the majority in this case seems very perplexing.<sup>180</sup> Looking at Justice Kennedy's prior views in favor of using international law as a legitimate factor to be considered in the United States legal system,<sup>181</sup> it seems incongruous that Justice Kennedy did not consider the social conditions that originally necessitated the Voting Rights Act of 1965. While Justice Kennedy has been willing to consider local social conditions and comparative law in decisions concerning issues such as gender rights, LGBTQ+ rights, and juvenile executions, he has been more hesitant to determine that social issues such as voting rights and redistricting—with a known history of racial bias—are worthy of allowing for a Southern Exception.<sup>182</sup> Perhaps Justice Kennedy simply exhibited the same blind spot with respect to race that gave rise to Southern and American Exceptionalism in the first place.

#### CONCLUSION

Justice Scalia's recognition of a Southern Exception in Supreme Court jurisprudence reflects the understanding by some Supreme Court Justices of the truly extraordinary political, cultural, and legal history of the Southern United States, and by extension, of the United States itself. The deference of a significant block of Justices to the legal policies created by hundreds of years of racial oppression is reflected not only in these Justices' defense of historical Southern Exceptionalism from the legal norms of most the United States, but also in their hostility to international and comparative law in general, and specifically those norms that contravene Southern Exceptionalism.

---

<sup>179</sup> See Hair & Nat'l Journal, *supra* note 170.

<sup>180</sup> See *Shelby Cty. v. Holder*, 570 U.S. 529, 532 (2013).

<sup>181</sup> See *supra* Parts III.A–B.

<sup>182</sup> See *Shelby Cty.*, 570 U.S. at 556–57; see also Joan Biskupic, *Justice Kennedy's Evolution on Race*, CNN (Aug. 6, 2016, 8:10 AM), <http://www.cnn.com/2016/08/06/politics/anthony-kennedy-scotus-race-voting/index.html> (discussing Chief Justice Roberts's justification for the *Shelby* decision and Justice Kennedy's decision to join the majority opinion).

Particularly significant for the thesis of this Article is that one of the most prominent proponents of such an exception, at least in certain cases, was Justice Kennedy—a conservative Justice who could not be accused of pursuing any kind of partisan agenda. Rather, he recognized that the legal norms encompassed by Southern Exceptionalism were incompatible with the evolving norms of industrialized societies.