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KEYNOTE: GOING FORWARD AFTER *GRANTS PASS*

JOSEPH W. MEAD*

ABSTRACT

In this keynote, I explain the decision—and the stakes—of City of Grants Pass v. Johnson. In Grants Pass, the Supreme Court held that the Eighth Amendment’s Cruel and Unusual Punishments Clause posed no barrier to cities making it a crime for their homeless residents to sleep outdoors with as little as a blanket, even when those residents have no other option. Grants Pass, Oregon undertook an aggressive campaign to drive unhoused residents out of the city through punitive ordinances that criminalized unavoidable human conduct, such as sleeping with a blanket. The plaintiffs challenged the narrowest version of these laws: a prohibition on sleeping outside

* Special Litigation Counsel, Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center. This Article is based on the keynote address I gave at the *William & Mary Law Review* Symposium. I was part of the team that represented the plaintiffs in the Supreme Court in *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024). The views expressed here are my own and do not necessarily reflect the views of ICAP, our clients, or cocounsel. I am grateful to Shelby Calambokidis, Kelsi Corkran, Walter Fonseca, Ed Johnson, Michael Pollack, and Anne Wiley for helpful feedback, and to the editors of the *William & Mary Law Review* for their thoughtful edits and engagement which significantly improved this piece.

when no shelter exists. Yet the Court reframed the case as being about “public camping” and complex public policy choices about homelessness, rather than what was truly at stake: Do some of the most vulnerable residents of our communities have even the most basic right to exist?

The Court’s discussion of encampments (not at issue in the case) and its reliance on speculative complaints lodged by the City’s amici (unsupported by the record) contributed to a majority opinion that failed to fully engage with the arguments—and the humanity—at stake. The result was a holding that draws an artificially formal line between conduct and status, allowing governments to criminalize people’s existence and evade the Cruel and Unusual Punishments Clause’s ban on status-based punishment by targeting their essential, unavoidable acts of living.

Although the decision closed one constitutional pathway for protecting people experiencing homelessness, the Court acknowledged that other constitutional rights play an important role. I mention a few of these alternative doctrines—Excessive Fines, Due Process, Vagueness, the First and Fourth Amendments, disability rights, state constitutional law—which remain fertile grounds for challenging the criminalization of homelessness.

The Court has failed to acknowledge the basic rights of citizenship for marginalized groups before, but the Court’s failures are never the final word. Courts cannot alter the fundamental truth that human rights endure.

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INTRODUCTION

The Supreme Court's decision in *Grants Pass v. Johnson*, which allowed a city to criminalize sleeping,¹ was a bad decision by historical perspectives, but it was neither the first nor the last chapter in the fight for basic rights for people surviving without housing.

When I say historically bad, I place it in the company of *Korematsu v. United States*,² *Buck v. Bell*,³ and *Plessy v. Ferguson*⁴—decisions that are so poorly and callously reasoned, with such devastating effect on vulnerable people, that they are discussed with moral condemnation and shame by the generations that follow. Decisions that discredit the Court's aspiration to mete out “[e]qual [j]ustice [u]nder [l]aw.”⁵

I realize that is quite a claim, and it is not one I make lightly. Perhaps you read the opinion and thought it was justifiable. If so, I will argue, that is because the majority opinion went to dishonest lengths to obfuscate the facts, the law, and the arguments. Indeed, it is quite telling that neither the majority opinion nor the City ever honestly grappled with the facts of the case: A city made it a crime to sleep with a blanket.⁶ The holding says that it is not cruel and unusual for a city to punish a person who sleeps in their city.⁷

Sleeping is something probably every person who reads these words did last night, and will probably do tonight. That is part of being human, it is not a crime.

If forced to consider the uniquely cruel features of the City's law, the narrow position the homeless plaintiffs advanced to the Supreme Court, and the distortions made by the majority opinion, I hope you will see why I believe that the decision has earned superlative criticism. The Court was asked to recognize the rights—and the humanity—of people in a politically unpopular group. It chose to disregard both.

1. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2226 (2024).

2. 323 U.S. 214, 223 (1944).

3. 274 U.S. 200, 207 (1927).

4. 163 U.S. 537, 552 (1896).

5. Jess Dickinson, *Justice for All: It's Not the Truth*, 32 MISS. COLL. L. REV. 1, 5 (2013).

6. See *Grants Pass*, 144 S. Ct. at 2235 (Sotomayor, J., dissenting).

7. See *id.* at 2235-36.

I. GRANTS PASS

Let us start with a visit to Grants Pass, Oregon. Residents of Grants Pass once bragged that it was “the last town in Oregon that maintained a Sundown Law.”⁸ And there is little evidence to suggest it is a particularly welcoming city today.

Consider how the City treats its longtime residents who lose their homes. Among the City’s several hundred homeless residents are people like Debra Blake: a sixty-one-year-old who became disabled, lost her job, and then her home. She is described as “motherly,” “selfless,” and “a force to be reckoned with.”⁹ She was convicted of sleeping in a park.¹⁰ She owes the City more than \$5,000 in unpaid fines and was forced to sleep outside city limits in an unsafe place, far away from food and services.¹¹

Grants Pass desperately wants people like Debra Blake gone from city limits. Do not believe its messaging about needing another tool in its toolkit. A tool implies an effort to help; Grants Pass wants weapons that it can use to drive certain residents from the community. At a City Council meeting, one councilor explained that the goal was to “make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road.”¹² For example, the City bought homeless people bus tickets out of town, but they “returned to Grants Pass with a request from the other location to not send them there.”¹³ The City “contemplated denying basic services such as ‘food, clothing, bedding, hygiene, and those types of things.’”¹⁴ Indeed, while the case was before the Supreme

8. *Grants Pass*, HIST. & SOC. JUST.: SUNDOWN TOWNS, <https://justice.tougaloo.edu/sundowntown/grants-pass-or/> [<https://perma.cc/VH4D-FNVZ>].

9. Tracy Rosenthal, *The New Sundown Towns*, NEW REPUBLIC (Apr. 30, 2024), <https://newrepublic.com/article/181036/new-sundown-towns-grants-pass-v-johnson> [<https://perma.cc/ZVH8-5DGM>].

10. See Joint Appendix at 41-42, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175). Ms. Blake was also cited for being “in or near” a city park, charged with trespassing, and upon her release from jail, ordered to “have no contact with All Grants Pass Parks.” *Id.* at 41.

11. See *id.* at 182.

12. *Id.* at 114.

13. *Id.* at 113-14.

14. *Grants Pass*, 144 S. Ct. at 2235 (Sotomayor, J., dissenting) (quoting Joint Appendix, *supra* note 10, at 121).

Court, the City Council passed a law restricting the ability of nonprofit social service providers to provide aid to homeless residents.¹⁵

As part of its general attempt to make life even more miserable for homeless people, the City deployed several ordinances that criminalized sleeping in various ways. The main law before the Supreme Court made it a crime to “occupy” any “place where bedding, sleeping bag, or other material used for bedding purposes” are “placed, established, or maintained for the purpose of maintaining a temporary place to live.”¹⁶

Let us unpack this a bit. First, the law is not about camping at all, at least not as generally understood. It literally prohibits occupying space¹⁷—something that all humans do constantly by virtue of having corporeal bodies. Second, “bedding” includes something as innocuous as a blanket.¹⁸ Thus, this is not, and never was, a case about tents. Third, being homeless was baked into the definition of who is covered by the law. Only those people who occupy a space with a blanket “for the purpose of maintaining a temporary place to live” are criminalized.¹⁹ A person with a home who lays a blanket on the ground for a picnic will be safe from enforcement; they are not maintaining a place to live.²⁰ A person without a home who merely sits on a blanket, in contrast, can be

15. Jane Vaughan, *Grants Pass City Council Votes to Regulate Groups Helping Homeless People on Public Property*, OPB (Mar. 11, 2024, at 13:20 ET), <https://www.opb.org/article/2024/03/11/grants-pass-oregon-non-profit-organizations-charitable-work/> [<https://perma.cc/3PZB-QXBB>].

16. Joint Appendix, *supra* note 10, at 47-48 (quoting GRANTS PASS, OR. MUN. CODE §§ 5.61.010, 5.61.030 (2023)).

17. *See id.*

18. *Id.* at 47 (quoting MUN. CODE § 5.61.010); *see Grants Pass*, 144 S. Ct. at 2235 (Sotomayor, J., dissenting).

19. Joint Appendix, *supra* note 10, at 47 (quoting MUN. CODE § 5.61.010).

20. As Justice Douglas noted, this is how vagrancy laws have always worked:

I have known judges and lawyers who, afflicted with insomnia, have wandered the streets at night. John Muir, who walked a thousand miles from Kentucky to Florida and who recorded his venture in a book, was certainly a vagrant in the pure sense of the word. As a youth I knew the casual laborers of the Pacific West; I rode “the rods” with them, shared their meals under railroad bridges, and slept with them in the open air. I came to know that the “consumers of injustice” are not the sleepless judges and lawyers but the wanderers who have no prestige of class or family.

William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 4 (1960).

punished under the ordinance. And that is exactly how the ordinance worked in practice: The police only enforced the law against homeless people.²¹ These laws were aggressively deployed to harass, drive away, and punish Grants Pass's homeless residents.

Compare this background with how the Supreme Court, in its opening paragraph, described the City's antihomeless campaign: "Recently, [the City] adopted various policies aimed at 'protecting the rights, dignity[,] and private property of the homeless.'"²² I suggest that if a lawyer made that statement in a brief, they would lose all credibility with the court.²³

II. THE LAWSUIT

Debra Blake and two other plaintiffs filed their lawsuit as a putative class action in 2018.²⁴ They raised a number of constitutional claims, including under the Eighth Amendment's Cruel and Unusual Punishments Clause and Excessive Fines Clause, and Fourteenth Amendment substantive due process.²⁵ The case was exceptionally well-litigated by Ed Johnson of the Oregon Law Center and Walter Fonseca at the Oregon Justice Resource Center.²⁶

The Eighth Amendment cruel and unusual punishments theory was straightforward. As the Ninth Circuit had previously recognized,²⁷ a city violated the Eighth Amendment when it inflicted punishment on a person for sleeping outside if there was no available shelter that person could access.²⁸

21. See Appellees' Supplemental Excerpt of Record at SER 082, SER 098, *Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 WL 4209227 (D. Or. July 22, 2020) (Nos. 20-35752, 20-35881) (excerpting depositions of Deputy Chief Jim Hamilton and Officer Jason McGinnis), *aff'd sub nom.* *Johnson v. City of Grants Pass*, 72 F.4th 868, *rev'd* 144 S. Ct. 2202.

22. *Grants Pass*, 144 S. Ct. at 2208 (second alteration in original).

23. See Risa Goluboff & Richard Schragger, *Grants Pass and the Vagrancy Revolution Revisited*, 2024 SUP. CT. REV. 191, 233 ("It is not a charitable opinion, and it probably fails the candor test.").

24. *Grants Pass*, 144 S. Ct. at 2213-14, 2214 n.2.

25. See *Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 WL 4209227, at *5, *10, *14 (D. Or. July 22, 2020), *aff'd sub nom.*, *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), *rev'd* 144 S. Ct. 2202 (2024).

26. See *Grants Pass*, 144 S. Ct. at 2207.

27. See *Martin v. City of Boise*, 920 F.3d 584, 618 (9th Cir. 2019).

28. The Ninth Circuit described the test for involuntarily homelessness as follows:

Persons are involuntarily homeless if they do not "have access to adequate

Debra Blake won her case on both cruel and unusual punishments and excessive fines grounds, and she obtained a permanent injunction against the City's laws.²⁹ But while the case was on appeal, she passed away.³⁰ Having a client pass away is an all-too-common fact of life for lawyers representing people without shelter. These cases take years and years. The lawsuit against Grants Pass took six years. And life without shelter is hard—physically and emotionally.³¹ Homeless people die decades earlier than their peers, as the average life expectancy is just a touch above fifty years.³²

There were many reasons for the Court to pass on this case.³³ There was no circuit split.³⁴ Grants Pass's ordinance had also been invalidated by new state legislation,³⁵ as well as under excessive

temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free." However, someone who has the financial means to obtain shelter, or someone who is staying in an emergency shelter is not involuntarily homeless.

Johnson, 72 F.4th at 875 n.2 (quoting *Martin*, 920 F.3d at 617 n.8).

29. *Blake*, 2020 WL 4209227, at *9-11, *13; see also *Johnson*, 72 F.4th at 880 ("[T]he district court issued a judgment which included a permanent injunction."), *rev'd*, 144 S. Ct. 2202.

30. *Grants Pass*, 144 S. Ct. at 2214 n.2.

31. See generally NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, HOMELESSNESS & HEALTH: WHAT'S THE CONNECTION? (2019), <https://nhchc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf> [<https://perma.cc/S5VY-VERY>] (explaining the physical challenges of homelessness); Deborah K. Padgett, *Homelessness, Housing Instability and Mental Health: Making the Connections*, 44 BJPSYCH BULL. 197 (2020) (explaining the emotional and mental health challenges of homelessness).

32. See Katherine A. Koh, *Invisible Deaths—Mortality Among People Experiencing Homelessness*, 391 NEJM 1868, 1868 (2024).

33. See Meghan J. Ryan, *The Miserly Message of Grants Pass*, 22 OHIO ST. J. CRIM. L. 173, 180-81 (2025) ("But it was something of an odd case on which the Court would ask for full briefing, hear oral arguments, and issue a merits opinion.").

34. See *id.*; see also SUP. CT. R. 10(a). In fact, conservative lion Judge Wilkinson argued that when a law sought to "punish persons merely for their need to eat or sleep, which are essential bodily functions," the Eighth Amendment applied as "simply a variation of *Robinson's* command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *Manning v. Caldwell ex rel. City of Roanoke*, 930 F.3d 264, 290 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting) (citing *Robinson v. California*, 370 U.S. 660 (1962)); see also Erica Orden, *Conservative Judge Blasts Trump Administration's 'Shocking' Conduct in Abrego Garcia Case*, POLITICO (Apr. 17, 2025, at 20:20 ET), <https://www.politico.com/news/2025/04/17/abrego-garcia-appeal-wilkinson-00298063> [<https://perma.cc/5HNR-2Q9S>] (describing Judge Wilkinson as "one of the nation's most prominent conservative appellate judges").

35. The fundamental holding of the Ninth Circuit was codified by the Oregon legislature. OR. REV. STAT. § 195.530 (2023) (limiting cities' power to regulate "sitting, lying, sleeping, or

finer grounds that the City did not even bother to challenge.³⁶ Yet the Court agreed to hear the case.³⁷ Famously, the Court did not set forth its reasons for granting or denying certiorari.³⁸ However, the subsequent majority opinion repeatedly referenced the role of amici briefs in the decision.³⁹ This sends a clear message to future litigants on amici strategy—quantity not quality—a concern I revisit below.

III. PLAINTIFFS' POSITION

The Plaintiffs' argument before the Court was exceedingly narrow: All the City could not do was simply make it a crime to sleep, with a blanket, anywhere outside in the city if the person lacks any alternative place to go.⁴⁰ Plaintiffs “d[id] not challenge the City’s ‘restrictions on the use of tents or other camping gear,’ ‘encampment clearances,’ ‘time and place restrictions on sleeping outside,’ or ‘the imposition of fines or jail time on homeless people who decline accessible shelter options.’”⁴¹

First, this is not, and never was, a case about encampments.⁴² It

keeping warm and dry outdoors on public property that is open to the public” by people experiencing homelessness).

36. *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2023) (“The City presents no meaningful argument on appeal regarding the excessive fines issue.”).

37. *City of Grants Pass v. Johnson*, 144 S. Ct. 679, 679 (2024).

38. See Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 926-27 (2022) (acknowledging the view that “there is a ‘shroud of intense secrecy surrounding the Court,’ one that encompasses ‘the significant discretion Justices exercise over which cases they hear,’ both in general and as to the certiorari process specifically” (first quoting Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 103 (2009); and then citing Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 17 (2011))).

39. See *Grants Pass*, 144 S. Ct. at 2214 n.3.

40. See Joint Appendix, *supra* note 10, at 51.

41. *Grants Pass*, 144 S. Ct. at 2239 (Sotomayor, J., dissenting) (quoting Brief for Respondents at 18, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

42. Consider, for example, an exchange at oral argument:

Justice Kagan: --a campsite suggests something different to people. It suggests a tent. It suggests a conglomeration of people. You know, tent camps, if you will. But your ordinance does not just prohibit that. Your ordinance prohibits a single person who is homeless, so does not have another place to sleep, that’s a status, I don’t have another place to sleep, a single person sleeping instead in public with a blanket. That’s what I understand your statute to do. Is that not what your statute does?...

is curious, therefore, that the Court thought it was useful to spend the first few pages cataloging complaints that people have made about encampments.⁴³ Everyone in the litigation agreed that the City could ban tents,⁴⁴ and while the injunction was in place, the City continued to shut down encampments. Everyone agreed the City could prohibit people from sleeping near one another.⁴⁵ Everyone agreed that the City could impose time, place, and manner restrictions prohibiting sleeping in certain areas.⁴⁶ Whether such restrictions are wise or not, they were not part of the litigation, which was focused on sleeping, not camping.

Second, the rule adopted by the lower courts was limited to people who had no shelter available to them.⁴⁷ If a person had access to shelter within the City, the City could enforce its laws.⁴⁸ If there was a religious shelter available that compelled participation in religious services, the individual had no Eighth Amendment claim (although there could be a First Amendment issue).⁴⁹ The problem is that “[t]here are no homeless shelters in Grants Pass.”⁵⁰ There is nowhere for people to go.⁵¹

[Grants Pass’s Attorney]: ... sleeping in public is considered conduct.

Transcript of Oral Argument at 19-20, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

43. See *Grants Pass*, 144 S. Ct. at 2208-10.

44. *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 n.34 (9th Cir. 2023), *rev’d*, 144 S. Ct. 2202.

45. See *Grants Pass*, 144 S. Ct. at 2238 (Sotomayor, J., dissenting).

46. *Id.*

47. See *Johnson*, 72 F.4th at 894.

48. See *id.* at 894 & n.33 (first citing *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019); then citing *Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019); then citing *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019); then citing *Gomes v. County of Kauai*, 481 F. Supp. 3d 1104, 1109 (D. Haw. 2020); then citing *Miralle v. City of Oakland*, No. 18-cv-06823, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018); and then citing *Le Van Hung v. Schaaf*, No. 19-cv-01436, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019)).

49. *Id.* at 877 (citing *Martin*, 920 F.3d at 609-10).

50. *Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 WL 4209227, at *3 (D. Or. July 22, 2020), *aff’d sub nom.*, *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), *rev’d*, 144 S. Ct. 2202 (2024).

51. Lack of access to housing is the principal cause of homelessness nationwide. *A Shortage of Affordable Housing*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/a-shortage-of-affordable-housing/> [<https://perma.cc/4XW2-JR3L>]. This is also true in Grants Pass. See *Blake*, 2020 WL 4209227, at *2 (“City Manager Aaron Cubic confirmed in his deposition that Grants Pass has a vacancy rate of 1% and that ‘essentially means that there’s no vacancy.’” (quoting Declaration of Edward Johnson in Support of Plaintiffs’ Motion for Summary Judgment, exhibit 1 (Excerpts from the Deposition of Aaron Cubic) at 49, *Blake*, No. 18-cv-01823, 2020 WL 4209227)). Kelly Wessels, the Chief Operating Officer of the

Now I do not mean to suggest that it is good or effective policy for cities to take away tents from freezing people or to force people into congregate shelters that may not be right for them.⁵² I highlight this to emphasize just how narrow the claim was before the Court: that a city cannot make it a crime to sleep if a person has nowhere else to go.⁵³ That was it.

IV. COURT DECISION

Even this modest claim was too big of an ask.⁵⁴ On June 28, 2024, the Supreme Court issued its ruling, dividing 6-3.⁵⁵ There is much that could be said about the decision, but I will highlight just a few points here.

First, the Court went to great lengths to obscure how radical its holding is. As my colleague Shelby Calambokidis and I discuss in more detail elsewhere in this Issue, a law making it a crime to sleep is an outlier, a remarkable departure from centuries of U.S. history.⁵⁶ By repeatedly describing the issue as whether someone has a right to “public camping,” the Court ignored that this was a case just about sleeping with a blanket.⁵⁷

Community Action Agency that serves Grants Pass, testified that “Grants Pass’ stock of affordable housing has dwindled to almost zero. Landlords routinely require an applicant to [have an income that is] three times the monthly rent. Rental units that cost less than \$1,000/month are virtually unheard of in Grants Pass.” Declaration of Kelly Wessels in Support of Plaintiffs’ Reply on Their Motion for Certification of a Class ¶ 7, *Blake*, No. 18-cv-01823, 2020 WL 4209227.

52. See Goluboff & Schragger, *supra* note 23, at 228 (discussing the negative consequences of these policies).

53. Statement of Interest of the United States at 11, *Bell v. City of Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014) (No. 09-cv-00540) (“It should be uncontroversial that punishing conduct that is a ‘universal and unavoidable consequence[] of being human’ violates the Eighth Amendment.” (alteration in original) (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006))), *aff’d in part, rev’d in part sub nom.*, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

54. Goluboff & Schragger, *supra* note 23, at 233 (“But rejection of that narrow kind of right seems unduly harsh, even for a Court that has shown little compassion for the vulnerable.”).

55. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2207 (2024).

56. See generally Joseph Mead & Shelby Calambokidis, *Unacceptable in Any Era: The Unusual and Unconstitutional Effort to Criminalize Sleeping While Homeless*, 67 WM. & MARY L. REV. 1029 (2026) (contextualizing *Grants Pass* within the legal history of homelessness and vagrancy).

57. *Grants Pass*, 144 S. Ct. at 2218, 2220-21.

The Court's bottom line holding is that so long as a city can say it is regulating "conduct," there is no barrier to what it can do under the Cruel and Unusual Punishments Clause.⁵⁸ If it can prohibit people who sleep, why not other things that everyone does? People who blink? Breathe?⁵⁹ Why not occupying a place in public, to get even closer to the actual language used in the City's ordinance? Neither the City nor the Court offered any limit to who governments can criminalize, as long as they tie it to something called "conduct"—even when such conduct is an inherent and unavoidable part of being a living human.⁶⁰ This is an extreme holding, and it should be recognized as such.⁶¹

Put differently, the Court created "one weird trick"⁶² to avoid *Robinson* and the Eighth Amendment's command: simply reformulate the status offense using conduct language. Perhaps the very law in *Robinson* could have been upheld if, instead of criminalizing the "status" of being "addicted to the use of narcotics," the state had instead criminalized having needle marks on one's arms—the proof on which *Robinson* was convicted.⁶³ Or perhaps the state could have accomplished the same goal in *Robinson* by instead criminalizing "being an addict and breathing."⁶⁴ To bring it back to this case, there is no "meaningful difference between a law that says being homeless

58. See Ben A. McJunkin, *Grants Pass and the Pathology of the Criminal Law*, 102 WASH. U. L. REV. 1583, 1586 (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)); see also *Manning v. Caldwell*, 930 F.3d 264, 286-91 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting).

59. "The majority countenances the criminalization of status as long as the City tacks on an essential bodily function—blinking, sleeping, eating, or breathing. That is just another way to ban the person." *Grants Pass*, 144 S. Ct. at 2236 (Sotomayor, J., dissenting).

60. See *id.*; Statement of Interest of the United States, *supra* note 53, at 11.

61. See, e.g., Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, Hum. Rts. Council, ¶¶ 44, 72, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018).

62. The "one weird trick" language refers to advertisements that seek to lure the reader into clicking on a link by suggesting there is an easy workaround that will readily solve some problem. See Alex Kaufman, *Prepare to Be Shocked! What Happens When You Actually Click on One of Those "One Weird Trick" Ads?*, SLATE (July 30, 2013, at 15:00 ET), <https://slate.com/business/2013/07/how-one-weird-trick-conquered-the-internet-what-happens-when-you-click-on-those-omnipresent-ads.html> [<https://perma.cc/Z7XE-WFD8>].

63. See *Robinson*, 370 U.S. at 660-62 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1961)).

64. *Grants Pass*, 144 S. Ct. at 2236 (Sotomayor, J., dissenting).

is punishable and a law that says being homeless while breathing or sleeping or blinking is punishable.”⁶⁵

Second, *Grants Pass* is a case study in the misuse of amici briefs. Rather than wrestle with the facts and law as they were in the record, the majority opinion went out of its way to hide what was before the Court by using untested claims made by amici.⁶⁶ The reader should go through and count the number of factual assertions that the Court makes with reference only to an argument or statement from an amici brief.

Amici briefs are not evidence.⁶⁷ Many of them contained assertions that never would have survived adversarial testing.⁶⁸ In my view, some of the amici supporting the City were works of fiction that violated the lawyer’s duty of candor to the court.⁶⁹ Yet the majority opinion carefully combed the amici briefs, finding the statements that supported the narrative and the opinion it sought to establish, and treating these untested assertions as presumptively true.

Third, the Court repeatedly emphasized that these are difficult policy matters.⁷⁰ No doubt, homelessness is a complex problem. But that hardly means *any* solution, no matter how cruel, no matter how dismissive of rights, no matter how irrational or hateful or harmful, should be on the table. Recognizing one narrow constitutional right “does not call into question all the other tools that a city has to deal with homelessness.”⁷¹

Consider a moment at oral argument. The lawyer for the City was asked whether the City could simply execute all of the homeless people.⁷² She hesitated until Justice Gorsuch spoke up to suggest

65. Transcript of Oral Argument, *supra* note 42, at 132.

66. *See, e.g., Grants Pass*, 144 S. Ct. at 2208-10 (citing to fifteen different amicus briefs).

67. *See generally* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) (arguing that amicus briefs can be unreliable).

68. *See* David DeMatteo & Kellie Wiltsie, *When Amicus Curiae Briefs Are Inimicus Curiae Briefs: Amicus Curiae Briefs and the Bypassing of Admissibility Standards*, 72 AM. U. L. REV. 1871, 1908-09 (2023).

69. *See* MODEL RULES OF PRO. CONDUCT R. 3.3 (A.B.A. 2024).

70. *See, e.g., Grants Pass*, 144 S. Ct. at 2207-08 (“Many cities across the American West face a homelessness crisis. The causes are varied and complex, the appropriate public policy responses perhaps no less so.”).

71. *See id.* at 2238 (Sotomayor, J., dissenting).

72. Transcript of Oral Argument, *supra* note 42, at 30 (“[S]uppose the City decided that it was going to execute homeless people. I mean, very extreme, I know, but it would solve the

she should concede that executions would be unconstitutional.⁷³ That was a startling moment in its own right.

But the fact that some Justices seemed to view summary executions as off the table demonstrated that there must, of course, be *some* limitation on how cities respond to homelessness.⁷⁴ The majority opinion, however, declines to acknowledge any such limit.⁷⁵

The Constitution does not permit the federal courts to micromanage state and local governments in making hard policy calls, but it *does* set forth a set of basic, judicially enforceable protections that policymakers must follow. And it is *most* important to enforce these protections when policymakers target a politically unpopular group. Serving as a check on legislative excesses is the reason why the Bill of Rights—including the Eighth Amendment—exists.⁷⁶

The Court nevertheless proclaimed that the Constitution “does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this

problems that you’re talking about.... Do we have an Eighth Amendment issue in that circumstance?”).

73. *Id.* at 31 (“Why -- why not just yes to that?”).

74. Or perhaps not. A few months ago, the mayor of a California city proposed giving every homeless person unlimited amounts of “free fentanyl,” presumably in the hopes that they would overdose, exclaiming: “I have no sympathy for them. I have no mercy for them.” Leo Stallworth, *Lancaster Mayor Defends Controversial Comments on Giving the Homeless Free Fentanyl*, ABC7 (Apr. 23, 2025), <https://abc7.com/post/lancaster-mayor-rex-parris-defends-controversial-comments-giving-homeless-free-fentanyl/16227283/> [<https://perma.cc/NRM7-ZYAX>] (quoting Lancaster, California, Mayor R. Rex Parris).

75. Goluboff & Schragger, *supra* note 23, at 224 (noting the decision “explicitly eschew[s] possible constitutional constraints” on the City’s ability to use criminal law against homeless people).

76. As Professor Ryan recently noted:

During the congressional session at which the Eighth Amendment was proposed, Governor Randolph from Virginia questioned whether the Eighth Amendment was truly necessary because one “must presume corruption in the House of Representatives, Senate, and President, before we can suppose that ... cruel punishments [can be] inflicted.” He explained that, “[b]efore these cruel punishments can be inflicted, laws must be passed, and judges must judge contrary to justice.” This sentiment did not carry the day, as others recognized that sometimes individuals can be overwhelmed by the pressing nature of modern problems. And sometimes legislatures need to be reminded, through the limits of the Constitution, about the importance of every individual’s rights.

Ryan, *supra* note 33, at 186 (footnote omitted) (alterations and omissions in original) (quoting 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 468 (2d ed. 1881)).

Nation's homelessness policy.⁷⁷ That, of course, was never the argument: It was simply a question of whether the Constitution provides even the most basic protection to people without shelter.⁷⁸ Recognizing a slim constitutional right to not be outlawed for sleeping does not meaningfully reduce the range of tools (and weapons) available to cities.⁷⁹ The majority opinion worked to hide that point, casting it as a policy disagreement, rather than a case simply asking the federal judiciary to protect a class of people's fundamental right to simply *exist*.⁸⁰

Casting this as a policy dispute is especially silly when, as here, the City's policy approach is laughably ineffective at actually helping homeless people. The City posited that the laws are needed to deter people from sleeping outside.⁸¹ What total and utter foolishness.⁸² In addition to being gratuitously harmful, does anyone truly believe that the reason someone who, by definition, lacks access to shelter, sleeps outdoors just because the law allows it?⁸³

77. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2226 (2024).

78. *Id.* at 2240 (Sotomayor, J., dissenting) ("This sleight of hand allows the majority to abdicate its responsibility to answer the first (legal) question by declining to answer the second (policy) one.").

79. See Recent Case, *Eighth Amendment—Criminalization of Homelessness—Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public.*—*Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), 133 HARV. L. REV. 699, 703-05 (2019). As counsel for the City argued elsewhere: "Importantly, the *Martin* decision does not stand in the way of local governments taking concrete and meaningful steps to restore safe, clean public spaces to their cities, while at the same time protecting the rights of all citizens." Billy Cole, Theane Evangelis & Bradley J. Hamburger, *Breaking the Legal Paralysis: Combatting California's Homelessness Crisis After Martin v. City of Boise*, 39 CAL. REAL PROP. J., no. 2, 2021, at 35, 40. But see Petition for a Writ of Certiorari at 30, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175) ("*Martin* has 'paralyz[ed]' local communities from addressing the pressing issue of homelessness." (alteration in original) (quoting *Johnson v. City of Grants Pass*, 72 F.4th 868, 925 (O'Scannlain, J., statement respecting the denial of rehearing en banc)), reprinted in Petition for a Writ of Certiorari app. A, at 117a, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175)).

80. See *Grants Pass*, 144 S. Ct. at 2207-08 (classifying the case as a policy issue).

81. Transcript of Oral Argument, *supra* note 42, at 51-53.

82. Goluboff & Schragger, *supra* note 23, at 233 ("But to pretend that ordinances that threaten and often deliver criminal punishment—both fines and jail time—somehow 'help' individual homeless people or are effective tools in getting people the shelter that they desire is not credible.").

83. See Laurie Hauber, *Criminalization of the Unhoused: A Case Study of Alternatives to a Punitive System*, 31 GEO. J. ON POVERTY L. & POL'Y 199, 204 (2024) ("[T]o the extent laws are intended to deter 'illegal behavior,' anti-homelessness laws enforced against people for trying to survive do not serve as motivation to avoid or modify behavior. People have no other

A mountain of empirical evidence confirms what logic dictates: Criminalizing people for being homeless does not reduce homelessness.⁸⁴ There is no reason to believe that it would work. It does not work.

The bottom line is that the Court was asked to recognize the most basic constitutional right for a class of politically unpopular people. As it did in *Buck v. Bell*, as it did in *Korematsu v. United States*, as it did in other historically shameful decisions, it carved out the most vulnerable people from an important constitutional right.⁸⁵

choice but to commit these violations given the lack of accessible options.”); KRISTIN O’BRASSILL-KULFAN, VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC 157 (2019) (“In 1851, the Board of Inspectors of the Philadelphia County Prison, in their annual report to the Pennsylvania legislature, posed a question central to the policing of vagrancy: ‘Why put a man in a cell because he has no home?’ The inspectors made a case for policy change, arguing that the current laws governing vagrancy neither deterred crime nor aided the indigent transients incarcerated for vagrancy, who, they asserted, ‘deserve the designation of unfortunate rather than of criminal.’”).

84. *E.g.*, Hannah Lebovits & Andrew Sullivan, *Do Criminalization Policies Impact Local Homelessness?*, 54 POL. STUD. J. (forthcoming 2026) (manuscript at 2), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/psj.70056> [<https://perma.cc/M9A3-LBZV>] (“[P]assage of a criminalization ordinance does not statistically relate to a decrease in homelessness in the years following the ordinance”); Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 132-34 (2020); Jeff Olivet, *Collaborate, Don’t Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), <https://www.usich.gov/news-events/news/collaborate-don-t-criminalize-how-communities-can-effectively-and-humanely-address> [<https://perma.cc/SS7X-T2LT>] (“These policies are ineffective, expensive, and actually worsen the tragedy of homelessness.”); Margot Kushel & Tiana Moore, *TOWARD A NEW UNDERSTANDING: THE CALIFORNIA STATEWIDE STUDY OF PEOPLE EXPERIENCING HOMELESSNESS* 87 (2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf [<https://perma.cc/YN2B-B8K5>] (“Criminal justice responses to survival behaviors, such as sleeping or living in public spaces are associated with ... prolongation of homelessness.”).

85. *See* Goluboff & Schragger, *supra* note 23, at 193 (“The question of the constitutional status of the vagrant, which shaped post-war American constitutional rights, is reduced to a local policy problem, detached from the wider constitutional canon.”). *See generally* *Buck v. Bell*, 274 U.S. 200 (1927) (upholding a statute providing for the sterilization of inmates afflicted with hereditary insanity or imbecility); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding laws making it illegal for American citizens of Japanese descent to enter certain geographic areas solely because of their race).

V. GOING FORWARD

The *Grants Pass* decision will cause a great deal of harm, but I want to make it clear that the effort is not over. Indeed, the majority and dissent promise more litigation in the days to come.⁸⁶ They got that part right. As this Issue demonstrates, there are many significant challenges to criminalizing homelessness.⁸⁷ To name just a few: the Excessive Fines Clause,⁸⁸ Procedural Due Process,⁸⁹ the Void-for-Vagueness Doctrine,⁹⁰ the Dormant Commerce Clause,⁹¹ the First Amendment,⁹² the Fourth Amendment,⁹³ the Americans

86. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2224 (2024) (“[M]any substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless.”); *id.* at 2243 (Sotomayor, J., dissenting) (“It is quite possible, indeed likely, that these and similar ordinances will face more days in court.”).

87. Criminalization of homelessness can also violate international law. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Rep. of the United States of America, ¶19, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

88. *See, e.g.*, *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2023), *rev’d*, 144 S. Ct. 2202; Brief of Amicus Curiae Fines and Fees Justice Center in Support of Plaintiffs-Appellees and for Affirmance at 3-21, *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) (Nos. 20-35752 & 20-35881), *amended by* 72 F.4th 888 (2023), *rev’d*, 144 S. Ct. 2202. *See generally* Siobhan Allen, *The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness*, 55 COLUM. J.L. & SOC. PROBS. 499 (2022) (describing constitutional issues surrounding the use of fines to regulate homelessness).

89. For example, seizing, and typically destroying, a homeless person’s few possessions during an encampment sweep has frequently run afoul of procedural due process requirements. *See, e.g.*, *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031-33 (9th Cir. 2012).

90. This has long been a basis for challenging vagrancy laws. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 160-62 (1972); P. Michael Lahan, Comment, *Trends in the Law of Vagrancy*, 1 CONN. L. REV. 350, 362-68 (1968); Douglas, *supra* note 20, at 7-8.

91. *See Potter v. City of Lacey*, 46 F.4th 787, 796 & nn.4-6 (9th Cir. 2022) (Bennett, J., dissenting) (collecting cases).

92. Antipanhaling laws are routinely struck down under the First Amendment. *E.g.*, *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1209 (10th Cir. 2021); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1078 (10th Cir. 2020); *Rodgers v. Bryant*, 942 F.3d 451, 457 (8th Cir. 2019); *Norton v. City of Springfield*, 806 F.3d 411, 411-13 (7th Cir. 2015); *Cutting v. City of Portland*, 802 F.3d 79, 92-93 (1st Cir. 2015); *Reynolds v. Middleton*, 779 F.3d 222, 231-32 (4th Cir. 2015); *Speet v. Schuette*, 726 F.3d 867, 880 (6th Cir. 2013); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555, 558-59 (4th Cir. 2013); ACLU of Nevada v. City of Las Vegas, 466 F.3d 784, 797 (9th Cir. 2006); *Loper v. New York City Police Dep’t*, 999 F.2d 699, 706 (2d Cir. 1993); *Mass. Coal. for the Homeless v. City of Fall River*, 158 N.E.3d 856, 867 (Mass. 2020); *Champion v. Commonwealth*, 520 S.W.3d 331, 333 (Ky. 2017); *City of Lakewood v. Willis*, 375 P.3d 1056, 1057 (Wash. 2016). *See generally* Joseph Mead, *The First Amendment Protection of Charitable Speech*, 76 OHIO ST. L.J. FURTHERMORE 57 (2015) (examining seven

with Disabilities Act,⁹⁴ state constitutional law, and state statutory law.⁹⁵ It simply cannot be that the Constitution allows the government to make it a crime for a person without housing or access to any shelter to simply exist.⁹⁶

And the fight is happening already. Let us return to Grants Pass. Recall that state law prohibits unreasonable restrictions on sleeping.⁹⁷ Well, Grants Pass was sued again—and a state court preliminarily enjoined Grants Pass’s antisleeping law.⁹⁸ A year after the name “Grants Pass” became one for the history books as a synonym for “animus against homeless residents,” Grants Pass still could not enforce the full suite of its antihomeless laws.⁹⁹ This is not over.

VI. INTELLECTUAL DEBT

The team representing the respondents worked tirelessly for months under the stewardship of my colleague, Kelsi Brown

common arguments used to justify restrictions placed on charitable solicitations); Joseph W. Mead, *Local Regulation of Charitable Solicitation*, 5 J. PUB. & NONPROFIT AFFS. 178 (2019) (explaining that all of America’s largest cities have restrictions on charitable solicitation).

93. See T. Leigh Anenson, Comment, *Another Casualty of the War ... Vagrancy Laws Target the Fourth Amendment*, 26 AKRON L. REV. 493, 512-20 (1993).

94. See DISABILITY RTS. EDUC. & DEF. FUND, LEGAL ADVOCACY FOR UNHOUSED PEOPLE WITH DISABILITIES: A TOOLKIT TO CHALLENGE CALIFORNIA LAWS CRIMINALIZING HOMELESSNESS 9-10 (2025), https://dredf.org/wp-content/uploads/2025/01/DREDF-Legal-Advocacy-for-Unhoused-People-with-Disabilities_January-2025_AccessPass-2.pdf [<https://perma.cc/SY2U-VDMB>].

95. Most states have an analogue to the Eighth Amendment, Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 120 (2018), which have independent force and need not be interpreted in the same way as the federal version. JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16 (2018). Challenges under state analogues to the Eighth Amendment are already underway. See Feet Forward et al. v. City of Boulder et al., ACLU COLO., <https://www.alcu-co.org/cases/feet-forward-et-al-v-city-boulder-et-al/> [<https://perma.cc/4MD4-S2NS>].

96. I am grateful to Kirsten Anderson for articulating this point.

97. See OR. REV. STAT. § 195.530(2) (2023).

98. See Order on Plaintiffs’ Motion for Temporary Restraining Order and Rule to Show Cause for Why a Preliminary Injunction Should Not Issue at 1-2, Disability Rts. Or. v. City of Grants Pass, No. 25-cv-05989 (Or. Cir. Ct. dismissed Aug. 15, 2025).

99. Jane Vaughan, *After Supreme Court Ruling, Grants Pass Still Can’t Remove a Homeless Encampment*, NPR (June 30, 2025, at 04:19 ET), <https://www.npr.org/2025/06/30/nx-s1-5435764/after-supreme-court-ruling-grants-pass-still-cant-remove-a-homeless-encampment> [<https://perma.cc/E3CR-ZPBL>].

Corkran. I could not be prouder of the immense talent and thoughtfulness of the team.

But I recognize that we stood on the shoulders of giants, and I want to acknowledge the tremendous intellectual debt we owe to so many, such as others included in this Symposium. This Symposium has brought together many of the giants in the field, whose work has inspired me personally and professionally; whose work provided a robust intellectual basis for a proposition that once upon a time was self-evident.

We studied Professor Sara Rankin's individual scholarship as well as that which she conducted with her students.¹⁰⁰ The National Homelessness Law Center, which has been fighting these battles for decades, offered tremendous intellectual support.¹⁰¹ The American Civil Liberties Union challenges laws violating homeless people's constitutional rights all over the country, setting many of the precedents that we use.¹⁰² And I could go on and on. We read your work. We drew on your work. And we will continue to work with you in the days ahead.

CONCLUDING NOTES

Although, in my opinion, we had law, logic, precedent, and history on our side at every turn, we did not prevail before our audience. And in this moment, when the basic fundamental principles of our Constitution and the rule of law seem to be under constant attack, it seems easy to despair. Our country now debates the very existence, the right to live, of so many of our neighbors. It might seem

100. *E.g.*, Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559 (2021); Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016); JAVIER ORTIZ & MATTHEW DICK, HOMELESS RTS. ADVOC. PROJECT, THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS (Sara Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=hrap> [<https://perma.cc/3WX6-2ESJ>]. *See generally Homeless Rights Advocacy Project*, SEATTLE UNIV. SCH. OF L.: CTR. FOR C.R. & CRITICAL JUST., <https://law.seattleu.edu/centers-and-institutes/center-for-civil-rights-and-critical-justice/homeless-rights-advocacy-project/> [<https://perma.cc/WYG6-LG6N>] (homepage for the Homeless Rights Advocacy Project).

101. *E.g.*, NAT'L HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT (2021), <https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf> [<https://perma.cc/78RK-NEZM>].

102. *E.g.*, *Jones v. City of Los Angeles*, 444 F.3d 1118, 1120 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

that, rather than shoring them up, the march of time erodes the basic fundamental constitutional rights of so many.¹⁰³

In 1857, after decades of people's efforts to combat the evil of slavery in the United States, the Supreme Court decided *Dred Scott*, reinterpreting the Constitution to deny citizenship to all Black Americans.¹⁰⁴ Place yourself in that moment. What hope could there be?

One of America's greatest geniuses, Frederick Douglass, offered this perspective:

We are now told, in tones of lofty exultation, that the day is lost—all lost—and that we might as well give up the struggle. The highest authority has spoken. The voice of the Supreme Court has gone out over the troubled waves of the National Conscience, saying peace, be still....

You will readily ask me how I am affected by this devilish decision—this judicial incarnation of wolfishness? My answer is, ... my hopes were never brighter than now. I have no fear that the National Conscience will be put to sleep by such an open, glaring, and scandalous tissue of lies as that decision is The Supreme Court of the United States is not the only power in this world.... [The Court] can do many things, but [it] cannot perform impossibilities. [It] cannot bale out the ocean, annihilate the firm old earth, or pluck the silvery star of liberty from our Northern sky. [It] may decide, and decide again [But it] cannot change the essential nature of things—making evil good, and good evil.¹⁰⁵

No it cannot. As the discussion in the following pages demonstrates, this Symposium brought together the best, most brilliant, and most engaged, minds on this topic. As you read the following pages, I hope you read them with the light of this enduring star: The rights of citizenship, of humanity, can be temporarily overlooked or denied by courts and by legislatures, but they can never be annulled.

103. As Justice Scalia suggested, societies do not necessarily evolve; they may "rot." See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40-41 (1997).

104. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

105. Frederick Douglass, Speech on the *Dred Scott* Decision (May 14, 1857).