CIVIL RIGHTS CATCH-22S

Jonathan P. Feingold†

Civil rights advocates have long viewed litigation as a vital path to social change. In many ways, it is. But in key respects that remain underexplored in legal scholarship, even successful litigation can hinder remedial projects. This perverse effect stems from civil rights doctrines that incentivize litigants (or their attorneys) to foreground community plight—such as academic underachievement or overincarceration. Rational plaintiffs, responding in kind, deploy legal narratives that tend to track racial stereotypes and regressive theories of inequality. When this occurs, even successful lawsuits can harden the structural and behavioral forces that produce and perpetuate racial inequality.

I refer to this dynamic as a "civil rights catch-22." To concretize this phenomenon and its effects, I explore recent right-to-education lawsuits featuring low-income students of color. The cases reveal how doctrine can drive plaintiffs to portray themselves and their communities through a lens of poverty and illiteracy. Even if strategic from a litigation perspective, the proliferation of such narratives can entrench disparities across educational domains.

For decades, critical race theorists have revealed how the law "constructs" race. This Article builds on that canon but shifts the lens to litigation itself. For those committed to meaningful racial reform, better understanding this dynamic is essential—particularly given the emancipatory role that civil rights litigation is understood to fulfill.

---

† Associate Professor of Law, Boston University School of Law. Jonathan Feingold holds a B.A. from Vassar College and a J.D. from UCLA School of Law. Many thanks to Derek Black, Rachel Godsil, Jerry Kang, David Simson, Anna Faircloth Feingold, and participants at the Baltimore School of Law Faculty Workshop, Boston University School of Law Faculty Workshop, BC Law Junior Faculty Roundtable, and Laura Gómez's Advanced Critical Race Theory Seminar. A special thanks to participants in the Boston Area Junior Faculty Roundtable, who saw the project for what it was but pushed it to be more. Thanks for research assistance from Carissa Carson, Sean Hickey, Robert Gipson, Amanda Joffe, and Colby Trace. My gratitude, as well, for the superb editing from *Cardozo Law Review*. All mistakes are my own.

TABLE OF CONTENTS

INTRODUCTION

In May 2020, self-identified African-American and Latino students from some of Detroit's worst public schools obtained a landmark settlement in *Gary B. v. Whitmer*.[1] The outcome warranted celebration.

---

[1] *See* Press Release, The Off. of Governor Gretchen Whitmer, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020) [hereinafter Whitmer Press Release], https://www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b—literacy-case [https://perma.cc/PM9E-GDWV]; Class Action Complaint at 17–20, Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018), *aff'd in part, rev'd in part sub nom.* Gary B. v. Whitmer, 957 F.3d

For school-financing litigants, wins have been elusive since the Supreme Court rejected a constitutional right to education half a century ago.[2] One would be forgiven, therefore, for lauding *Gary B.* as a long-awaited pathway to equality for the students, their community, and education advocates beyond.

In this Article, I caution against such a unitary reading. On the one hand, *Gary B.* was a historic win. Following decades of disinvestment and mismanagement of Detroit's public schools,[3] the students deserved nothing less than a full vindication of their right to education. At the same time, *Gary B.* and lawsuits like it pose an often-unseen threat to near- and long-term projects of racial justice.[4] School-financing lawsuits—even when they succeed—can calcify behavioral and structural forces that drive inequality across educational domains.

This perverse outcome results from what I term a "civil rights catch-22," which proceeds as follows.[5] First, certain civil rights doctrines incentivize, if not require, plaintiffs to foreground individual or group-based deficits.[6] Rational plaintiffs and their attorneys respond

---

616 (6th Cir.), *vacated, reh'g en banc granted mem.*, 958 F.3d 1216 (6th Cir. 2020) (No. 16-CV-13292). The settlement provided, inter alia, $280,000 for the named plaintiffs, $2.72 million for Detroit public schools, and a commitment to seek at least $94.4 million for literacy-related programs and initiatives. Whitmer Press Release, *supra*. Prior to the settlement, a Sixth Circuit panel had revived the plaintiffs' Fourteenth Amendment adequacy claims. *See Gary B.*, 957 F.3d at 621.

2 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that the Fourteenth Amendment does not guarantee a general right to education). In this Article, to manage scope, I focus on federal adequacy challenges. Litigants have enjoyed greater, albeit mixed, success bringing similar claims arising under state constitutions. *See* Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 192 (2016).

3 *See* JOHN GROVER & YVETTE VAN DER VELDE, LOVELAND TECHS., A SCHOOL DISTRICT IN CRISIS: DETROIT'S PUBLIC SCHOOLS 1842–2015 (2016).

4 The civil rights catch-22 I describe herein is distinct from, yet related to, other concerns presented by civil rights litigation. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (describing litigation tensions).

5 There is, arguably, a second layer to the civil rights catch-22. The first layer, and my focus herein, concerns how certain legal doctrines incentivize plaintiffs to emphasize community deficits. But legal doctrine is also responsible, in part, for many of the conditions that produced and continue to perpetuate pervasive racial disparities. *Gary B.* is illustrative. School-financing doctrine incentivized the plaintiffs to deploy a narrative of poverty and illiteracy. But school-financing doctrine, among other sociolegal forces, also facilitated the decades of public and private disinvestment and mismanagement that relegated a racialized community to a crumbling and underresourced educational environment.

6 In this Article, for purposes of scope, I focus on federal school-financing doctrine. *See infra* Part III. That said, it is worth noting that multiple other bodies of law reward litigants for

in kind—often through statistics and anecdotes that highlight community underachievement, vulnerability, and plight.[7] In effect, plaintiffs craft legal stories that tend to track—and thereby activate and reinforce—pernicious racial stereotypes and dominant narratives about racial inequality.[8] In other words, the very narratives that anchor and propel civil rights lawsuits can threaten near- and long-term projects of antiracist reform.[9]

Gary B. offers an illustrative example. Among other claims, the *Gary B.* plaintiffs argued that Michigan had violated their constitutional right to education.[10] To prevail, the plaintiffs had to prove that they were deprived of a "minimally adequate education."[11] Cognizant of this high burden,[12] the Detroit students alleged that their state had denied them access to "foundational literacy"—that is, the basic ability to read and write.[13] To amplify this core theory, the plaintiffs marshalled a litany of

employing deficit frames. Two notable examples include asylum claims and right-to-counsel claims. *See* U.N. HIGH COMM'R FOR REFUGEES & INT'L DET. COAL., IDENTIFYING AND ADDRESSING VULNERABILITY: A TOOL FOR ASYLUM AND MIGRATION SYSTEMS (2016) (asylum claims); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 30 (1981) (right-to-counsel claim).

7 This Article surfaces an ongoing debate about the proper role of civil rights attorneys vis-à-vis their clients. This debate includes questions about who is empowered to frame legal narratives. *See generally* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992). Although beyond the scope of this Article, such dynamics deserve mention—particularly given the race and class divides that often separate civil rights attorneys from the communities they serve.

8 *See infra* Part II. Several articles have noted that evidence of racial inequality can produce perverse effects. *See, e.g.*, Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1463 (2018) ("One study reveals that if white people are cued that a particular policy has a disparate impact on black people, it makes white support for the policy go up."); Jack Glaser, Karin D. Martin & Kimberly B. Kahn, *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants*, 39 LAW & HUM. BEHAV. 539, 541 (2015) ("In another study, arguments that the death penalty discriminates against Blacks actually increased support for the death penalty among Whites." (emphasis omitted)); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1510 (2016) ("Hetey and . . . Eberhardt have demonstrated that individuals who viewed images or heard information about a prison population with a higher proportion of blacks in it were subsequently more afraid of crime, which in turn predicted greater support for more aggressive law enforcement practices."). This is the first Article, however, that bridges the social science to civil rights litigation itself.

9 *See infra* Part II; *see also* Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949 (2014) (observing that white support for punitive policies increased after exposure to more severe racial disparities).

10 *See* Gary B. v. Whitmer, 957 F.3d 616, 628 (6th Cir.), *vacated*, *reh'g en banc granted mem.*, 958 F.3d 1216 (6th Cir. 2020).

11 *Id.* at 644 (first quoting Papasan v. Allain, 478 U.S. 265, 285 (1986); and then citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973)); *see also infra* Section III.B.1.

12 No plaintiff before the Supreme Court has met this burden. *See infra* Section III.A.

13 *See Gary B.*, 957 F.3d at 620–21.

statistics documenting their community's academic impoverishment and underachievement—in absolute terms and relative to whiter and wealthier communities.[14]

The plaintiffs, in short, framed themselves and their community through a narrative of poverty and illiteracy. This portrayal reflects what others have termed a "deficit frame"—that is, storytelling that foregrounds and emphasizes what a group lacks (or is perceived to lack).[15] Often, as in *Gary B.*, deficit frames track salient racial stereotypes and related narratives about racial inequality.

Given doctrinal demands, presenting an image of poor and uneducated Black and brown students makes sense. But deficit framing is not attributable to legal burdens alone. The narrative that travels through *Gary B.* also reflects a trend among many on the Left to discursively center racial inequality and racialized vulnerabilities.[16] This push arises, in part, from the common instinct that "bombarding the public with images and statistics documenting the plight of minorities will motivate people to fight inequality."[17]

Yet herein surfaces the danger—that is, the *catch* of our catch-22.[18] Rather than galvanize support for remedial policies, deficit framing risks doing just the opposite.[19] As social psychologists Rebecca Hetey and Jennifer Eberhardt recently explained, "[E]xposure to extreme racial disparities may make the public less, not more, responsive to attempts to lessen the severity of policies that help maintain those disparities—even when people agree that such policies are too

---

14 *See id.* at 661.

15 *See* ALEXIS MCGILL JOHNSON & RACHEL GODSIL, EXECS.' ALL. FOR BOYS & MEN OF COLOR, HIS STORY: SHIFTING NARRATIVES FOR BOYS AND MEN OF COLOR 24 (2018), https://perception.org/wp-content/uploads/2018/12/HisStory-Narrative-Toolkit.pdf [https://perma.cc/32EM-9T5K] (defining "[d]eficit frames" as narratives that "highlight racial disparities and gaps . . . that impact life outcomes such as education and health").

16 *See* Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI. 473, 477 (2019) ("Critics of the carceral state marshal racial disparity statistics as a persuasive tactic, but research from social psychologists suggests that the invocation of extreme racial disparity might diminish white support for reform.").

17 Hetey & Eberhardt, *supra* note 9, at 1952; *see also* JOHNSON & GODSIL, *supra* note 15, at 24 (identifying a widespread assumption that more information about racial inequality "will trigger moral urgency to change the conditions that contribute to those disparities").

18 I use the term "catch-22" as a loose metaphor that strays, admittedly, from Joseph Heller's use of the term in the novel *Catch-22*.

19 *See infra* Part II; *see also* Allison L. Skinner-Dorkenoo et al., *Highlighting COVID-19 Racial Disparities Can Reduce Support for Safety Precautions Among White U.S. Residents*, 301 SOC. SCI. & MED. 1 (2022) (finding that as individuals learned more about Covid-19's racially disparate impact, they became less fearful of Covid-19 and less supportive of safety precautions to prevent spread).

punitive."[20] In other words, rather than pave a road to antiracist reform, deficit frames can calcify the conditions that drive disparities and necessitate litigation in the first place.[21]

The concept of a civil rights catch-22 builds on scholarship that implicates civil rights litigation within broader processes of racial formation.[22] For decades, critical race theorists have illuminated the co-constitutive relationship between law and race; each is responsible, in part, for constructing the other.[23] Existing scholarship often identifies Supreme Court jurisprudence and positive law as the primary vehicles through which the law "constructs" race.[24] Here, I turn the lens to civil rights litigation and the narratives deployed therein.[25] Doing so illuminates an underexamined and underappreciated litigation risk: the potential for litigants to employ narratives that reinforce racial biases and related theories of inequality—and, thereby, legitimate and fortify the status quo litigants seek to change.[26]

---

20 Hetey & Eberhardt, *supra* note 9, at 1952; *see also* Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183, 183 (2018) [hereinafter Hetey & Eberhardt, *Numbers Don't Speak for Themselves*] ("Ironically, exposure to extreme disparities can cause people to become more, not less, supportive of the very policies that create those disparities."); Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1001 (2007) (observing that white support for the death penalty increases after learning that it discriminates against Blacks). The above studies, which I explore in Part II, involved criminal justice policies. For multiple reasons, the observed backlash is unlikely to be limited to this singular domain. *See infra* Section II.B (discussing how deficit frames can activate and reinforce pernicious presumptions of Black and brown intellectual inferiority in the domain of education).

21 *See infra* Section II.B.

22 *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994).

23 *See* David Simson, Comment, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 527 n.100 (2014) ("A corollary of the idea of law as both a social and a legal construction is that the relationship between law and race is not unidirectional but rather coconstitutive."); Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 488 (2010) (identifying "an emerging genre of sociolegal scholarship that explores how law and race construct each other in an ongoing, dialectic process that ultimately reproduces and transforms racial inequality").

24 *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (rev. ed. 2006).

25 This is not to suggest that Supreme Court jurisprudence is irrelevant to the civil rights catch-22 I explore herein. To the contrary, legal doctrine enables and entrenches inequitable conditions on the ground and shapes *how* litigants talk about that racial inequality. *See infra* Sections III.A–III.B.

26 *See infra* Part II.

In Part I, to lay an analytical and empirical foundation, I introduce the concept of framing and explore alternative ways litigants could frame racial inequality—what I term "racial inequality frames." In Part II, I draw on emerging social science that suggests frames that emphasize perceived minority deficits can stifle projects of racial reform. In Part III, to concretize the catch-22, I bridge the social science to recent school-financing litigation. These cases illustrate how legal doctrine can incentivize plaintiffs to employ deficit frames and related narratives that track and reinforce anti-Black biases. In Part IV, to chart a path forward, I explore how plaintiffs might mitigate the dangers deficit frames present. To do so, I explore how litigants in a recent right-to-education lawsuit flipped a common script by juxtaposing student assets against institutional deficiencies.

Before proceeding, two points deserve emphasis. First, I am not suggesting that deficit frames and their concomitant risks counsel against civil rights litigation. Stakeholders on the ground are far better positioned to identify potent sites of resistance to racialized power and hierarchy. At times, that resistance will include litigation. Nonetheless, litigants, their attorneys, and their allies should recognize that well-intended and legally strategic narratives can bear unintended consequences.

Second, I am not advocating for a "colorblind" or "post-racial" discourse that elides the stratifying and subordinating power of race, racism, and racial power. Avoiding racism and its centrality within American society is unlikely to lessen its force or facilitate its undoing. Moreover, the question is not *whether* to talk about race and racial inequality. Rather, the question is *how* to do so. Deficit frames comprise one form of racial discourse. My call, accordingly, is to mind the social science and employ communication practices best positioned to disrupt dominant racial narratives and galvanize support for antiracist reform.

I. FRAMING INEQUALITY

A. *Framing Basics*

Plaintiffs are storytellers.[27] Effective storytelling requires thoughtful framing—a concept that captures how a speaker

[27] As noted above, a critical question that transcends the scope of this Article is whether the lawyer-client relationship empowers plaintiffs to craft the narratives deployed in litigation meant to vindicate their rights. *See supra* note 7.

communicates, organizes, and packages information.[28] Framing can be understood as a process of selection and salience.[29] Selection concerns the facts, values, and metaphors a communicator highlights and foregrounds—as well as those minimized or left unsaid.[30] Selection leads to salience. Once highlighted, a "piece of information [becomes] more noticeable, meaningful, or memorable."[31] As a result, alternative frames can "radically" alter how an audience perceives "[t]he character, causes, and consequences of" a given subject, policy, or phenomenon.[32]

One can disaggregate framing into choices that concern (a) the presentation of facts and (b) the use of narrative. Here, I refer to these framing elements as *fact framing* and *narrative framing*.[33]

---

28 There is an ongoing debate regarding framing's proper definition and scope. *See* Michael A. Cacciatore, Dietram A. Scheufele & Shanto Iyengar, *The End of Framing as We Know It . . . and the Future of Media Effects*, 19 MASS COMMC'N & SOC'Y 7, 8 (2016) ("The communication literature is rife with different conceptualizations of frames and framing."); Thomas J. Leeper & Rune Slothuus, *How the News Media Persuades: Framing Effects and Beyond*, *in* THE OXFORD HANDBOOK OF ELECTORAL PERSUASION 151, 153 (Elizabeth Suhay, Bernard Grofman & Alexander H. Trechsel eds., 2020) ("At the core of debates about media effects lies one of the most important, but most confused, concepts in the social sciences: framing. This concept is used in different ways across disciplines, and recent scholars have gone so far as to argue that the concept should be abandoned as its meaning is lost in a confusion of alternative definition." (citations omitted)). For purposes of this Article, my use of the term follows Nat Kendall-Taylor and Sean Gibbons, who describe framing as "what we choose to say and how we choose to say it." Nat Kendall-Taylor & Sean Gibbons, *Framing for Social Change*, STAN. SOC. INNOVATION REV. (Apr. 17, 2018), https://ssir.org/articles/entry/framing_for_social_change [https://perma.cc/RC8U-Y5R9].

29 *See* MOIRA O'NEIL, ADAM SIMON, ABIGAIL HAYDON & NAT KENDALL-TAYLOR, FRAMEWORKS INST., THE MEDIA NARRATIVE OF ENVIRONMENTAL HEALTH 9 (2012), https://www.frameworksinstitute.org/wp-content/uploads/2020/03/Media_Narratives_Environmental_Health.pdf [https://perma.cc/QF7D-4XSB] ("Framing deals with the presentation and selection of perceptual cues that make stories meaningful . . . ." (emphasis omitted)); Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMMC'N 51, 54 (1993) ("[F]rames select and call attention to particular aspects of the reality described, which logically means that frames simultaneously direct attention away from other aspects.").

30 *See* Entman, *supra* note 29, at 52.

31 *Id.* at 53; *see also* PAUL M. SNIDERMAN, RICHARD A. BRODY & PHILIP E. TETLOCK, REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY 52 (1st paperback ed. 1993) ("The effect of framing is to prime values differentially, establishing the salience of the one or the other.").

32 Murray Edelman, *Contestable Categories and Public Opinion*, 10 POL. COMMC'N 231, 232 (1993); *see also* Thomas E. Nelson, Rosalee A. Clawson & Zoe M. Oxley, *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567, 567–68 (1997) ("By framing social and political issues in specific ways, news organizations declare the underlying causes and likely consequences of a problem and establish criteria for evaluating potential remedies for the problem.").

33 This description is not exhaustive. *See* Kendall-Taylor & Gibbons, *supra* note 28 ("Frames [also] include other elements, such as tone, numbers and statistics, solutions, and visuals.").

Fact framing, as I use the term, captures whether and how a communicator presents information about a topic.[34] Imagine a reporter tasked with a story on teenagers and truancy. The reporter might choose to include attendance statistics. This decision does not dictate *how* she presents the data. The reporter could present daily attendance in the affirmative (e.g., eighty-five percent present) or the negative (e.g., fifteen percent absent). The options depict the same empirical reality, but each employs a distinct valence. The negative valence highlights truancy; the positive valence highlights attendance.

Even if seemingly minor, these subtle shifts matter.[35] Attributes presented through a positive valence (e.g., eighty-five percent attendance) tend to elicit a more favorable evaluation than those presented through a negative valence (e.g., fifteen percent absence).[36] A set of studies involving athletic and academic performance is illustrative.[37] In both studies, participants received information about an athlete's or student's prior performance.[38] Participants in the positive condition were told the percentage of shots made or questions answered correctly.[39] Participants in the negative condition were told the percentage of shots missed or questions answered incorrectly.[40]

The framing choices mattered. Participants in the positive conditions rated the prior academic and basketball performance more

---

34 I intend for fact framing to include attribute-framing effects. *See* Irwin P. Levin, Gary J. Gaeth, Judy Schreiber & Marco Lauriola, *A New Look at Framing Effects: Distribution of Effect Sizes, Individual Differences, and Independence of Types of Effects*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 411, 412–13 (2002).

35 *See id.* at 416–28 (presenting research on attribute-framing effects).

36 The magnitude of any framing effect depends on the salience of the manipulation—a function of, inter alia, attribute labels (e.g., "percentage-*lean*" versus "percentage-*fat*") and "peoples' existing representations of [the chosen] attribute labels." David J. Hardisty, Eric J. Johnson & Elke U. Weber, *A Dirty Word or a Dirty World? Attribute Framing, Political Affiliation, and Query Theory*, 21 PSYCH. SCI. 86, 86, 91 (2010) ("Attribute framing has been a well-established phenomenon in policy discourse and a frequently exploited one in political practice."); *see also* Irwin P. Levin, Sandra L. Schneider & Gary J. Gaeth, *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 149, 160–64 (1998).

37 Levin, Schneider & Gaeth, *supra* note 36, at 159 (describing attribute-framing study involving athletic performance); Irwin P. Levin, Richard D. Johnson, Craig P. Russo & Patricia J. Deldin, *Framing Effects in Judgment Tasks with Varying Amounts of Information*, 36 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 362, 370–71 (1985) (describing student-evaluation study).

38 Levin, Schneider & Gaeth, *supra* note 36, at 159; Levin, Johnson, Russo & Deldin, *supra* note 37, at 366.

39 *See* sources cited *supra* note 38.

40 *See* sources cited *supra* note 38.

favorably than did those in the negative conditions.[41] To explain these effects, the studies' coauthors theorized that "positive labels tend to evoke positive associations while negative labels tend to evoke negative associations."[42]

Narrative framing, in contrast, captures a communicator's use of narratives to describe a given issue or topic.[43] Narratives comprise generalizable and recognizable stories that explain and rationalize the world around us.[44] Through repeated use, certain narratives attain dominance within our cultural fabric and public discourse.[45] These *dominant* narratives, in turn, propagate and calcify "meanings about social issues [that] circulate and become part of the public's everyday and dominant understandings of those issues."[46] Once a narrative becomes ingrained within public discourse—that is, once it becomes *dominant*—it functions as a conceptual filter that influences how the public perceives and interprets related topics or phenomena. Dominant narratives, in short, are often unseen and yet affect "how [people] understand the world around them."[47]

Psychological anthropologist Nat Kendall-Taylor describes this phenomenon with respect to adolescence:

> [I]f we are exposed over and over again to messages replete with the idea that adolescents are dangerous risk takers who must be protected from themselves, we develop deep and solid associations between "young people" and "risk and danger." Over time and with

41 *See* sources cited *supra* note 37.

42 Levin, Gaeth, Schreiber & Lauriola, *supra* note 34, at 413.

43 Narrative framing can occur through word choices that activate distinct social narratives. *See* Hardisty, Johnson & Weber, *supra* note 36, at 87–88 (observing different reactions to the same policy described as a "tax" or "carbon offset"); Nelson, Clawson & Oxley, *supra* note 32, at 570–74 (observing different reactions to the same event described through a "public order" or "free speech" frame).

44 There exist "rich and varied literatures on narrative, complete with controversies surrounding definitions and analytic approaches." O'NEIL, SIMON, HAYDON & KENDALL-TAYLOR, *supra* note 29, at 9–10 (describing narrative as a communicative form that "makes information meaningful through recognizable, continually reiterated, and culturally specific representational forms"). For present purposes, I draw on Professors Lewis and Sandra Hinchman, who define "narratives (stories) . . . as discourses with a clear sequential order that connect events in a meaningful way for a definite audience, and thus offer insights about the world and/or people's experiences of it." Lewis P. Hinchman & Sandra K. Hinchman, *Introduction* to MEMORY, IDENTITY, COMMUNITY: THE IDEA OF NARRATIVE IN THE HUMAN SCIENCES, at xiii, xvi (Lewis P. Hinchman & Sandra K. Hinchman eds., 2001).

45 *See* O'NEIL, SIMON, HAYDON & KENDALL-TAYLOR, *supra* note 29, at 10.

46 *Id.*; *see also* JOHNSON & GODSIL, *supra* note 15, at 11 ("Dominant narratives inform how a majority of people in society perceive and interact with one another.").

47 O'NEIL, SIMON, HAYDON & KENDALL-TAYLOR, *supra* note 29, at 10.

> repetition, these associations strengthen to the point that when we see or hear about an adolescent, we feel uncomfortable or threatened.[48]

We can return to our hypothetical reporter. In the United States, we often view adolescence through a negative frame that portrays "young people as dangerous threats and adolescence as an unfortunate time of life."[49] Given its dominance, this narrative is positioned to shape how readers interpret and respond to the reporter's story even if the narrative is not explicitly invoked. The reporter is not, however, beholden to this narrative. She could, for example, embrace a more positive frame that characterizes youth as "a time of opportunity when lifelong skills and relationships are built and passions spark and ignite."[50]

These choices matter. As Kendall-Taylor explains, the narratives we employ inform "how we see and think about young people," and, accordingly, "how we as a society choose to support them and their development."[51] When negative frames dominate, we are more likely to attribute adolescence as the cause of teens' behavior and identify paternalistic interventions as a sensible response.[52] If, instead, we view adolescence and teenagers through a prism of not-yet-realized opportunity and potential, we may instead see "[s]caffolded support, agency, and empowerment" as key ingredients to a healthy and productive youth.[53] Moreover, rather than viewing teenagers as a problem to be fixed, we might instead ask how we can design institutions to best support them.[54] In short, the way we portray adolescence influences how "we understand and choose to support young people."[55]

These lessons translate to other settings—including conversations about race and racial inequality. To illuminate how, I now turn to the focus of this Article: *racial inequality* frames.

---

48 Nat Kendall-Taylor, Commentary, *Shifting the Frame to Change How We See Young People*, 66 J. ADOLESCENT HEALTH 137, 138 (2020).

49 *Id.* at 137.

50 *Id.*

51 *Id.*

52 *Cf.* Nelson, Clawson & Oxley, *supra* note 32, at 568 ("Poverty, for example, may be framed in a way that emphasizes the responsibility of the poor themselves for their disadvantaged status or in a way that suggests social, economic, or political forces are to blame.").

53 Kendall-Taylor, *supra* note 48, at 137.

54 *See id.* at 137–38.

55 *Id.* at 138.

B. *Competing Racial Inequality Frames*

Many on the front lines of racial justice feel a palpable urgency to foreground race and racial inequality within public discourse.[56] This desire is understandable and holds strategic appeal.

To begin, it counters appeals to "post-racialism" and "colorblindness," racial ideologies that enjoy cultural and doctrinal prominence.[57] Colorblindness and post-racialism reduce race to an otherwise irrelevant physical attribute and relegate racism (for the most part) to an ignoble past.[58] In so doing, these racial frames invite the conclusion that contemporary inequities are due to minority deficits (e.g., cultural pathologies) or the aberrant bad actor (e.g., "bad apple" cops). In other words, post-racialism and colorblindness comprise racial frames that legitimate the status quo.

Recent calls to foreground race and racism within public discourse, in turn, represent a response to these narratives. But beyond countering the logics of post-racialism and colorblindness, many advocates believe that increasing public awareness of racial inequality is a prerequisite to antiracist reform. Consider the following hypothetical.

Imagine a coalition of law students and community stakeholders want to repeal a state law responsible for heightened incarceration rates in their state. Further assume that the law has disproportionately impacted Black and Latinx communities. How should the coalition proceed? Conventional wisdom might call for a public-awareness campaign that draws attention to accelerating incarceration rates and their disparate impact.[59]

---

56 *See* Eric Deggans, *Four Lessons from the Media's Conflicted Coverage of Race*, NPR CODE SWITCH (Dec. 6, 2014, 11:38 AM), https://www.npr.org/sections/codeswitch/2014/12/06/368713550/four-lessons-from-the-medias-conflicted-coverage-of-race [https://perma.cc/52BY-8NUV]; Victor Rogers, *Can We Talk About Race—and Racism? Yes.*, GA. TECH NEWS CTR. (June 30, 2020), https://news.gatech.edu/news/2020/06/30/ca-we-talk-about-race-and-racism-yes [https://perma.cc/9BVP-H9WV]. For a nuanced perspective critical of the Trump administration's use of deficit frames, see Sean Collins, *The Trump Administration Blames Covid-19 Black Mortality Rates on Poor Health. It Should Blame Its Policies.*, VOX (Apr. 8, 2020, 4:26 PM), https://www.vox.com/policy-and-politics/2020/4/8/21213383/coronavirus-black-americans-trump-administration-high-covid-19-death-rate [https://perma.cc/8WJU-8VGW].

57 *See* Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2509 (2019) (describing colorblindness and post-racialism as "two leading accounts of race in constitutional cases").

58 *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1599 (2009) (describing colorblindness and post-racialism).

59 This tracks common criminal justice campaigns. *See, e.g.*, *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/2WYR-6W6L]; SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS

The thinking proceeds as follows: First, without exposing racial disparities, we lack critical information about the law's impact necessary to devise effective remedies.[60] Second, many assume that if only (white) voters knew about a policy's racially disparate impact, they would realize its unfairness and support reform.

Makes sense? Not so fast. As noted above, emerging research suggests that rather than motivate public support for reform (particularly among whites), exposure to extreme racial disparities can entrench support for the policies that drive inequality.[61] The social science, in short, cautions that well-intended racial discourse can trigger backlash that calcifies and obscures the forces that drive disparities.

For many, the risk of backlash begs the following question: If exposure to evidence of racial inequality can harden support for regressive policies, do we strike racial disparities from our public discourse?[62] For multiple reasons, the answer is a resounding *no*. To begin, erasing race and racism from our national conversations reproduces many of the problems inherent in colorblindness and post-racialism. Moreover, as I detail below, the question is not *whether* to discuss racial inequality, but rather *how* to discuss racial inequality.[63] To

---

SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 9 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [https://perma.cc/WB7K-JUUQ] ("In 2010, 8% of all adults in the United States had a felony conviction on their record. Among African-American men, the rate was one in three (33%)." (footnote omitted)).

60 *Cf.* Alejandra Vasquez, *The Urgency of Intersectionality: Kimberlé Crenshaw Speaks at TEDWomen 2016*, TED BLOG (Oct. 27, 2016, 5:52 PM), https://blog.ted.com/the-urgency-of-intersectionality-kimberle-crenshaw-speaks-at-tedwomen-2016 [https://perma.cc/M537-RZAX] ("When you can't see a problem, you can't solve it." (quoting Kimberlé Crenshaw, Address at TEDWomen 2016 (Oct. 27, 2016))).

61 *See infra* Section II.A.

62 *See, e.g.*, James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 997 (2010) (reviewing PAUL BUTLER, A HIP-HOP THEORY OF JUSTICE (2009)) ("If the goal is to persuade Americans to care about mass incarceration, does it make sense to frame arguments around how the policy harms racial minorities?").

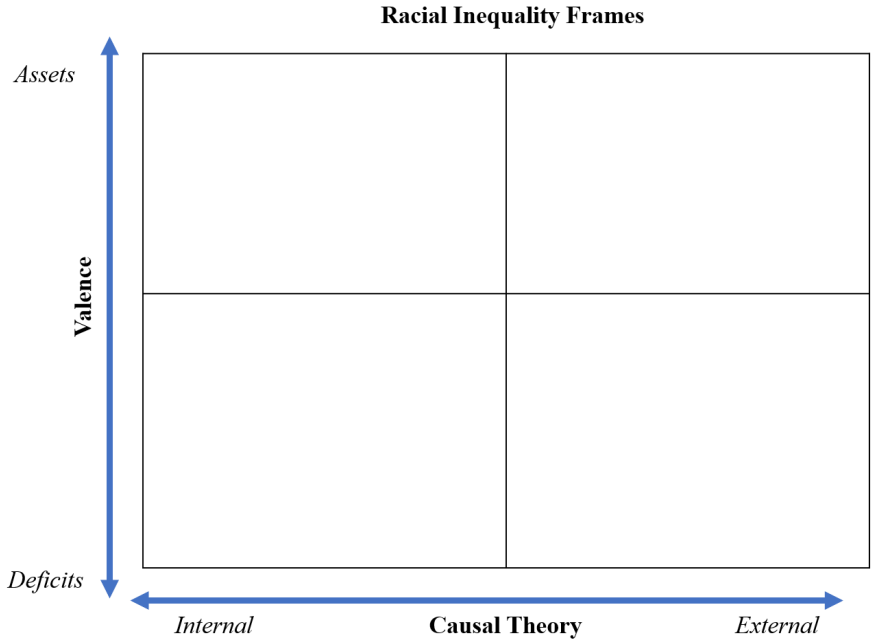
63 Even when we focus on this latter question of how, the answer will often depend on the reason(s) why a speaker is discussing racial inequality and the audience(s) to whom they are speaking. Moreover, discussions of racial inequality will often benefit from intersectional frames that highlight the relationship between racism, sexism, and homophobia, among other axes of oppression. *See* Jonathan P. Feingold, *"All (Poor) Lives Matter": How Class-Not-Race Logic Reinscribes Race and Class Privilege*, U. CHI. L. REV. ONLINE, Oct. 30, 2020, at *47; Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J.F. 108 (2019).

reframe, one question confronting racial justice advocates is: How should we frame racial inequality?[64]

To guide this inquiry, I offer a provisional framework to conceptualize competing racial inequality frames (racial frames). This framework—depicted in the graphic below—distinguishes between racial frames as a function of their respective: (1) valence and (2) causal theory of inequality.[65] I focus on these framing elements for two principal reasons. First, frames falling in our bottom left quadrant—that is, frames with a negative valence and internal theories of inequality—are most likely to stifle progressive racial reform. Second, leading voices on the Right and the Left often employ frames with these precise elements.

64 As noted in the preceding footnote, whether a particular frame is appropriate in a given context turns, in part, on the speaker's goal(s) and the audience(s) to whom they speak. For this reason, I am not suggesting that there exists a singular, best way to discuss race, racism, and racial inequality. As with most things, context matters. That said, a more nuanced understanding of racial frames—and the respective costs and benefits of competing frames—can only further movement for racial justice.

65 This framework is not without limits. A more comprehensive framework would, for example, benefit from a third axis that considers competing theories of discrimination (e.g., structural versus individual). One factor that mitigates this omission is the significant overlap between causal theories of inequality and competing theories of discrimination. *See* Carbado, *supra* note 8, at 1485, 1508–10.



The vertical axis, titled "Valence," captures whether a racial frame presents a group in a negative or positive light. On one end of the spectrum (visually, the bottom) lie "deficit frames"—that is, narratives that emphasize a group's perceived shortcomings, vulnerabilities, or plight. On the other end of the spectrum (visually, the top) lie "asset frames." As the name suggests, asset frames emphasize positive attributes—such as a group's resilience, achievements, or potential.

Deficit frames and asset frames risk flattening a group's heterogeneity, dynamism, and complexity; the flattening just occurs in opposing directions. In practice, deficit frames are far more common within public discourse.[66] One might expect this from the Right, which has mobilized at-times-violent rhetoric that reduces communities of

66 *See* JOHNSON & GODSIL, *supra* note 15, at 24 ("Thus far, the dominant narrative about boys and men of color has utilized a deficit frame. The stories we hear are consistently about their inadequacies, underachievement, and plight."); *see also* AXEL AUBRUN, MICHELE EMANATIAN & JOSEPH GRADY, FRAMEWORKS INST., SIX HARMFUL PATTERNS IN NEWSPAPER PRESENTATIONS OF RACE 5 (2005), https://www.frameworksinstitute.org/wp-content/uploads/2020/03/cognitive_media_analysis-2.pdf [https://perma.cc/U64G-DA44] ("The 'problems orientation' of Minority coverage, i.e. the relentless focus on dysfunction (crime, unemployment, poverty, etc.), distances Whites from Minority concerns and negatively impacts Minorities themselves. Even positive articles, especially about African-Americans, focus on hardships overcome.").

color to racialized caricatures.[67] But the Right is far from alone. The mainstream media, for example, has long portrayed racial minorities through distorted, demeaning, and dehumanizing imagery.[68] A recent apology from *The Kansas City Star* is illustrative: "Reporters were frequently sickened by what they found—decades of coverage that depicted Black Kansas Citians as criminals living in a crime-laden world. They felt shame at what was missing: the achievements, aspirations and milestones of an entire population routinely overlooked, as if Black people were invisible."[69]

Deficit frames also pervade academia. "Mismatch theory" offers a conspicuous example. The theory posits that race-conscious university admissions harm Black students by placing them at institutions above their academic pedigree.[70] One could characterize mismatch as a double deficit frame; the theory deploys empirical "evidence"[71] of racial achievement gaps to buttress an explicit narrative of Black intellectual inferiority.[72]

Mismatch theory has enjoyed notable traction within legal and lay discourse.[73] This traction derives, in part, from mismatch's convergence with dominant narratives that attribute racial achievement gaps to

---

67 President Trump, for example, routinely disparaged communities of color. *See* Nicquel Terry Ellis, *"Stand Back and Stand By": Rhetoric Some Call Racist Has Marked Trump's Entire Presidency*, USA TODAY (Oct. 13, 2020, 3:46 PM), https://www.usatoday.com/story/news/politics/elections/2020/10/13/hate-speech-common-theme-trumps-presidency/5873238002 [https://perma.cc/S5VR-BZ7Q].

68 Media outlets have begun to publicly account for this behavior. *See, e.g.*, Editorial, *An Examination of The Times' Failures on Race, Our Apology and a Path Forward*, L.A. TIMES (Sept. 27, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-apology-racism [https://perma.cc/D7VW-KG3P].

69 Mike Fannin, *The Truth in Black and White: An Apology from The Kansas City Star*, KAN. CITY STAR (Dec. 22, 2020, 3:50 PM), https://www.kansascity.com/news/local/article247928045.html (last visited Mar. 12, 2022).

70 *See* Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 176–77 (2016) (outlining mismatch theory).

71 Mismatch and its proponents have encountered sustained critique for decades. For a recent rebuke, see Sherod Thaxton, *How Not to Lie About Affirmative Action*, 67 UCLA L. REV. 834 (2020).

72 *See* Carbado, Turetsky & Purdie-Vaughns, *supra* note 70, at 177.

73 *See* Jonathan P. Feingold & Evelyn R. Carter, Online Essay, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1709 (2018) (explaining that lay theories tethered to deficient-student frames "gain greater traction in public discourse, the national media, and the Supreme Court than do countervailing theories that explain academic achievement gaps as the product of environmental contingencies that uniquely burden students of color—even if predicated on decades of social science").

minority deficits.[74] Mismatch theory, in other words, "implicitly relies on longstanding 'reasonable doubt' about black intellectual competence and capacity."[75] But mismatch theory does more than benefit from pervasive stereotypes and narratives; it also reinforces them.[76] To this end, Professor Devon Carbado and colleagues have observed that "the theory of mismatch is another way of writing intellectual deficiency and inability into race—and more specifically, blackness."[77] The theory, in turn, naturalizes the association between affirmative action and "preferential treatment," and it masks the race and class advantages (enjoyed by wealthy white students) that affirmative action is often designed to combat.[78]

Given the foregoing, it is no surprise that mismatch theory has received considerable critique from scholars on the Left. What might be a surprise, therefore, is the degree to which mismatch theory shares conceptual pillars with racial frames common to the Left.[79] Consider traditional liberal defenses of affirmative action. For decades, a core of affirmative-action advocates has justified such policies as "racial preferences" necessary to promote racial diversity on campus.[80] This "preference framing," consistent with mismatch, implies that race-conscious admissions benefit less-deserving Black applicants at the

---

74 *See* Carbado, Turetsky & Purdie-Vaughns, *supra* note 70, at 177 & n.9.

75 *Id.* at 177.

76 *Id.* at 177 n.9 ("[Mismatch] theory helps to legitimize and further entrench a pernicious racial stereotype about African Americans.").

77 *Id.* at 177.

78 *See* Feingold, *supra* note 63, at *48–50.

79 Consider also calls for "trigger warnings" and "safe spaces," concepts common across equity-and-inclusion work. I am sympathetic to the concerns that drive such calls. *See* Jonathan P. Feingold, *Diversity Drift*, 9 WAKE FOREST L. REV. ONLINE 14, 17–19 (2019). Nonetheless, this language has the potential to cast groups outside the mainstream (racial or otherwise) as weak and in need of institutional protection. The language, in other words, can obscure substantive critiques of institutional culture and racial power. *Cf.* Kimberlé Williams Crenshaw, Lead Article, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1270–73 (2011) (discussing misrecognition of student concerns at Harvard Law School). At least one institution has reframed "trigger warnings" as a "heads-up for better teaching" and "safe spaces" as "[s]afe [s]paces + [b]rave [s]paces." OFF. OF EQUITY, DIVERSITY & INCLUSION, UCLA, FREE SPEECH ON CAMPUS: THE BASICS, THE MYTHS, THE CHALLENGES 11–12 (2017), https://ucla.app.box.com/v/free-speech-on-campus (last visited Apr. 22, 2022).

80 *See* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 29–33 (1994); Carbado, Turetsky & Purdie-Vaughns, *supra* note 70, at 188 ("Both conservatives and liberals regularly refer to affirmative action as a thumb on the scale and both conceptualize the policy as a preference. . . . [W]hereas liberals believe that the costs of affirmative action are outweighed by the benefits (including diversity), conservatives perceive the costs of the policy (including 'reverse discrimination') to be too high.").

expense of their "more qualified" white counterparts. In other words, even though the ultimate position vis-à-vis affirmative action varies, scholars on the Left and Right often talk about affirmative action in terms that presume minority deficits.

Similar framing elements often accompany education-reform campaigns. Such projects, designed to uplift communities of color, tend to moor racial performance gaps to narratives of underachievement and plight.[81] As I discuss in greater detail below,[82] these frames track, and are prone to activate and reinforce, dominant narratives of "damaged" Black and brown students defined by their "shortcomings" and "insurmountable" obstacles.[83]

Moving to the horizontal axis of our racial inequality frames, the relevant inquiry concerns the frame's causal theory of inequality. Causal theories tend to fall into one of two categories: *internal* explanations and *external* explanations.[84]

Internal explanations attribute disparities to individual or group-based traits. Examples include theories that attribute Black overincarceration to criminal predisposition, or Black academic underperformance to cultural deviance. As these examples reflect, internal theories tend to blame individuals and groups for the negative outcomes they endure.

External explanations, in contrast, attribute inequality to situational or environmental factors. Examples include theories that attribute Black overincarceration to policies and practices that increase Black precarity to state violence, or Black underperformance to hostile learning environments.[85]

---

81 *See* JOHNSON & GODSIL, *supra* note 15, at 24 ("[A]dvocates for boys and men of color often lead with disparities—such as the education 'achievement gap' or the over-incarceration of Black men—as a way to call attention to a problem and galvanize others to take action. Emphasizing negative outcomes, however, often has the unintended consequence of reinforcing the dominant narrative . . . .").

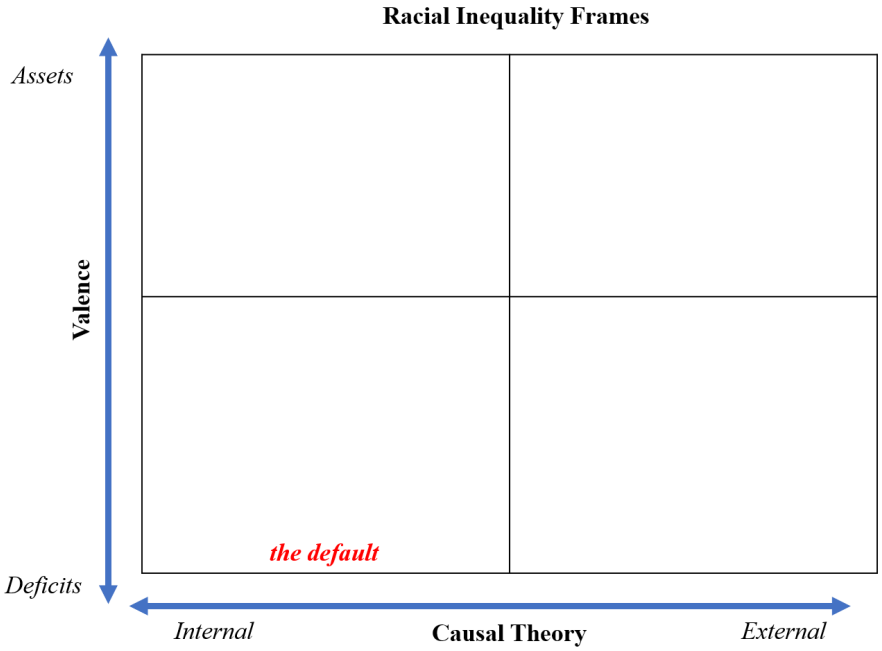
82 *See infra* Section III.C.2 (discussing potential consequences of racialized deficit frames).

83 *See* Luke Charles Harris, Response, *Beyond the Best Black: The Making of a Critical Race Theorist at Yale Law School*, 43 CONN. L. REV. 1379, 1403 (2011) ("The focus of our concern would shift from a story about damaged individuals to a story about damaged institutions. . . ."); JOHNSON & GODSIL, *supra* note 15, at 24 ("Those who intend to support boys and men of color are likely to not think that they are using a 'deficit approach,' but instead see themselves as identifying the disparities in outcomes that they assume will trigger moral urgency to change the conditions that contribute to those disparities.").

84 In many respects, the internal-external divide tracks individual-structural theories of discrimination. There are, however, meaningful distinctions. For example, individual theories of discrimination often focus on individual perpetrators—a theory of inequality that arguably falls closer to an external than an internal theory of inequality.

85 *See, e.g.*, Carbado, *supra* note 8, at 1483–87.

Internal and external theories of inequality travel through public discourse. Nonetheless, internal theories of inequality tend to enjoy outsized influence over the public's perception of racial disparities. And often, internal causal theories trade on perceived group-based deficits. In other words, and as depicted below, the weight of public discourse tends to fall into the bottom left quadrant—where deficit frames and internal theories of inequality meet.



This convergence makes sense. Many of the racial stereotypes that animate deficit frames also fuel internal theories of inequality. Moreover, the overlay creates a potential feedback loop: internal theories of inequality invite deficit frames (and vice versa), which in turn reify the stereotypes that anchor internal theories of inequality. To better appreciate this dynamic, I now turn to emerging social science that surfaces the dangers of deficit framing.

II. DEFICIT FRAME DANGERS[86]

Deficit frames flatten the inherent depth, complexity, and heterogeneity of any group. In the context of racial inequality, this

86 For a deeper dive into unintended consequences that can flow from deficit frames, see Jonathan P. Feingold, *Deficit Frame Dangers*, 37 GA. ST. U. L. REV. 1235 (2021).

flattening risks more than projecting an incomplete picture; it risks projecting an incomplete picture that tracks and reifies socially salient stereotypes. Two troubling consequences follow: (1) a *backlash* problem and (2) a *misdiagnosis* problem. As to the former, exposure to deficit frames can—particularly among whites—fortify support for regressive policies that drive existing inequality. As to the latter, deficit frames can activate and reinforce internal causal theories of inequality—theories that, in effect, blame subordinated groups for their subordinate status. Policy prescriptions, in turn, tend to privilege interventions designed to fix "damaged" individuals or communities. This focus, in turn, inoculates environmental forces—that often drive inequality—from meaningful critique.[87]

A. *A Cautionary Tale: Backlash and Misdiagnosis*

Racial justice campaigns often emphasize racial disparities. I understand the appeal. Many assume that their neighbors would support progressive reform if only they understood our laws', practices', and policies' racially disparate impacts.[88]

The trouble is, two recent studies from Professors Rebecca Hetey and Jennifer Eberhardt offer a sobering tale.[89] Rather than galvanize support for reform, exposing whites "to a world with extreme racial stratification increase[d] their support for the policies that help to maintain that stratification."[90]

In their first study, Hetey and Eberhart tested whether exposure to racial disparities in California's prison population would influence support for the state's three-strikes law.[91] The study proceeded as follows. First, participants viewed a forty-second video in which eighty actual mug shots flashed across the screen.[92] The researchers created two conditions to portray racial disparities as more or less severe.[93] In

---

87 *Cf.* Feingold & Carter, *supra* note 73, at 1706 ("[S]tereotypes frequently form the substantive content that undergirds cognitive biases and heuristics and their influence on how we see the world. . . . [J]ust as societal forces (such as media portrayals and common discourse) determine what we 'know' as the prototypical fruit, societal forces also impact what we 'know' about the prototypical criminal, student, or surgeon." (footnote omitted)).

88 *See* Hetey & Eberhardt, *Numbers Don't Speak for Themselves*, *supra* note 20, at 183.

89 Hetey & Eberhardt, *supra* note 9.

90 *Id.* at 1950. Hetey and Eberhardt limited their studies to white participants. *Id.* at 1950–51; *see also Skinner-Dorkenoo*, *supra* note 19.

91 *Id.* at 1950. Under the law, a third offense of shoplifting could result in a life sentence. *Id.*

92 *Id.*

93 *Id.*

the "less-Black" condition, 25% of the mug shots were Black inmates.[94] In the "more-Black" condition, 45% of the mug shots were Black inmates.[95]

After viewing the video, participants were informed about California's three-strikes law and an open petition to amend it. Participants were then asked to rate the three-strikes law on a scale of one (not punitive enough) to seven (too punitive). Last, after the study putatively ended, participants were invited to sign the petition.[96]

Under conventional wisdom, support for reform would be highest in the more-Black condition—which exposed participants to more extreme racial disparities.[97] The opposite occurred. Whereas over half of participants in the less-Black condition signed the petition, that number dropped to less than 28% in the more-Black condition.[98] This effect remained regardless of views on the law's punitiveness.[99] In other words, as the racial disparity increased, participants were less willing to change a law even when they saw it as overly harsh.[100]

In a companion study, Hetey and Eberhardt explored whether exposure to more severe racial disparities would increase New Yorkers' support for the city's stop-and-frisk policy.[101] As in the California study, participants received demographic information about New York's inmate population. In the less-Black condition, participants read that the state's prison population was 40.3% Black.[102] In the more-Black condition, participants read that the prison population was 60.3% Black.[103] All participants learned that a judge had recently found the stop-and-frisk policy to be unconstitutional, and that the city was appealing her decision.[104] Participants then answered a series of questions about the stop-and-frisk policy and crime more broadly.[105]

---

94 *Id.* This number approximated the percentage of Black inmates in the state's total prison population. *Id.*

95 *Id.* This number approximated the percentage of Black inmates incarcerated pursuant to California's three-strikes law. *Id.*

96 *Id.* The experimenter told each participant that if they chose to sign the petition, she would forward their signature to California's Attorney General to ensure it was counted. *Id.*

97 *See id.* at 1952.

98 *Id.* at 1950–51.

99 *Id.* at 1951.

100 *Id.*

101 *Id.*

102 *Id.* This number approximated the percentage of Black inmates in the United States. *Id.*

103 *Id.* This number corresponded to the percentage of Black inmates within New York City correctional facilities. *Id.*

104 *Id.*

105 *Id.*

To conclude the study, participants were informed of several petitions to end the controversial policy. Participants were shown a sample petition and asked the following question: "If you had been approached by someone and asked to sign a petition like the one you just read, would you have signed it?"[106] Participants could answer "yes" or "no," at which point the activity ended.[107]

As in the first study, exposure to greater disparities decreased support for reform. Whereas 33% of participants in the less-Black condition would have signed the petition, this number declined to 12% in the more-Black condition.[108] This effect was significant and remained regardless of how punitive participants viewed the stop-and-frisk policy.[109]

Before addressing the mechanisms driving this behavior, one related data point is instructive.[110] In 2007, political scientists Mark Peffley and Jon Hurwitz explored whether exposure to racial disparities would affect support for the death penalty.[111] To investigate, the researchers divided a group of white Americans into three groups.[112] Participants in the first group, the *baseline* condition, were asked to rate their support for the death penalty without receiving any additional information.[113] Participants in the second group, the *racial* condition, were asked the same question but were also told that the death penalty was unfair because "most of the people who are executed are African Americans."[114] Those in the third group, the *innocent* condition, were again asked the same question but instead told that the "[death] penalty is unfair because too many innocent people are being executed."[115]

Consistent with Hetey and Eberhardt's findings, support for the death penalty increased when white participants learned about its

---

106 *Id.*

107 *Id.*

108 *Id.* at 1952.

109 *Id.*

110 Peffley & Hurwitz, *supra* note 20.

111 *Id.* at 999. Unlike Hetey and Eberhardt, Peffley and Hurwitz included Black participants. *Id.* Unlike white participants, exposure to anti-Black bias did not increase support for the death penalty among Black participants. *Id.* at 1001–02. For purposes of this Article, I focus on Peffley and Hurwitz's findings vis-à-vis white participants. I do so not to privilege the perspectives and behavior of white participants—though I acknowledge that risk. Rather, I do so because white Americans often exert outsized influence on the policies that govern most domains of public and private life. Moreover, white liberals and progressives often deploy deficit frames when talking to other whites. The backlash observed in these studies exposes the perverse effects that can result.

112 *Id.* at 999.

113 *Id.*

114 *Id.*

115 *Id.*

racially disparate impact.[116] Whereas 65% of those in the baseline condition supported the death penalty, that number increased to 77% in the racial condition.[117] Notably, exposure to the racial disparity also increased the *strength* of support for the death penalty. Whereas 36% of whites strongly favored the death penalty in the baseline condition, this number jumped to 52% in the racial condition.[118]

Hetey and Eberhardt recognize the apparent dilemma: "Perhaps motivating the public to work toward an equal society requires something more than the evidence of inequality itself."[119] The studies, in short, reveal the potential perverse consequences that can flow from exposure to severe racial disparities—particularly among whites. That said, the foregoing research should not be read as counseling against any discussion of racial inequality. Rather, it surfaces that *how* we talk about race can matter as much as *whether* we talk about race. One key variable, to which I now turn, concerns how racial frames interact with latent biases and dominant narratives of racial inequality.

B. *The Source of Backlash*

1. Latent Racial Biases

Participants in the foregoing studies were exposed to racial disparities but received no information about the cause of those disparities. The data's import, in turn, lay in the eyes of the beholder. For many participants, the disparities appear to have triggered anti-Black stereotypes and internal causal theories of crime. In other words, even though the evidence of inequality was unaccompanied by additional information, it did not enter a conceptual void. Rather, it arose against a backdrop of latent racial narratives that attribute Black overrepresentation in prison and death row to individual shortcomings and cultural deficiencies.[120]

---

116 *See id.* at 1001.

117 *Id.* at 1002 tbl.1.

118 *Id.*

119 Hetey & Eberhardt, *supra* note 9, at 1952.

120 *See* Hetey & Eberhardt, *Numbers Don't Speak for Themselves*, *supra* note 20, at 184–85 ("An alternative interpretation is that members of particular racial groups must be doing something—namely committing crime—to capture the attention of police and be imprisoned at higher rates. . . . Evidence of racial disparities in the criminal justice system, then, may activate implicit stereotypical associations linking Blackness with crime, violence, threat, and aggression.").

Consider the New York study. Relative to participants in the less-Black condition, those in the more-Black condition exhibited greater concern about crime.[121] That heightened concern, in turn, decreased support for the petition to end stop-and-frisk.[122] Recall that the only information that differed across conditions was the demographic composition of New York's prison population. Fear of crime—and support for a controversial policy—increased when participants believed New York's incarcerated population was blacker.

To explain this effect, Hetey and Eberhardt invoke the phenomenon of racial priming.[123] Priming refers to the cognitive process in which exposure to racial cues—including stereotypic stimuli[124]—activates stereotypes about that group.[125] Often, priming occurs automatically and beyond our conscious awareness.[126] Once activated, this cognitive process "increases the likelihood that the knowledge contained in the stereotype will be used in subsequent judgments."[127] In other words, when an individual encounters racial cues that activate racial stereotypes, those stereotypes tend to influence

---

121 Hetey & Eberhardt, *supra* note 9, at 1952.

122 *Id.* ("[T]he effect of exposure to racial disparities in incarceration on petition signing was driven, in part, by crime concern.").

123 *See* Hetey & Eberhardt, *Numbers Don't Speak for Themselves*, *supra* note 20, at 185 ("Fear and stereotypic associations also contribute. Indeed, we found that when Whites were exposed to a 'Blacker' prison population, they became significantly more fearful of crime, which, in turn, increased their support of punitive crime policies. Evidence of racial disparities in the criminal justice system, then, may activate implicit stereotypical associations linking Blackness with crime, violence, threat, and aggression." (citation omitted)). Priming can occur through exposure to characteristics associated with a social category. For example, a story about crime can trigger racial stereotypes associated with blackness—even when race is not explicitly referenced. *See* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878 (2004).

124 This would include, for example, racially disparate arrest statistics that—even if problematic for multiple reasons—link blackness with criminality. *See* Srividya Ramasubramanian, *Television Viewing, Racial Attitudes, and Policy Preferences: Exploring the Role of Social Identity and Intergroup Emotions in Influencing Support for Affirmative Action*, 77 COMMC'N MONOGRAPHS 102, 106 (2010) ("Because of the chronic accessibility of racial stereotypes, even subtle racial cues in the media are sufficient to activate racial attitudes that influence decision making without requiring conscious effort.").

125 *See* Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 879 (2015) ("Priming seeks to assess whether and to what degree exposure to a concept or object (e.g., a black face) automatically activates stereotypes (e.g., 'black people are hostile') or shapes stereotype-congruent responses to race-neutral prompts (e.g., rating an ambiguous shove as more aggressive).").

126 *See id.* at 878–79.

127 Travis L. Dixon, *Psychological Reactions to Crime News Portrayals of Black Criminals: Understanding the Moderating Roles of Prior News Viewing and Stereotype Endorsement*, 73 COMMC'N MONOGRAPHS 162, 166 (2006).

what the individual notices and how they interpret subsequently encountered information.[128]

Given the tight conceptual nexus between blackness and criminality,[129] priming helps to explain why a blacker prison population increased fears of crime.[130] Specifically, "[e]vidence of racial disparities in the criminal justice system" is likely to "trigger[] the stereotype that Blacks are criminals and criminals are Black."[131] In the abstract, one would expect the stereotype—now primed—to influence how participants understand and respond to information about racial inequality. In practice, this script appears to have transpired: exposure to extreme racial disparities (in a criminal context) activated pervasive anti-Black stereotypes and associated narratives that attribute mass incarceration to internal factors—e.g., a predisposition to criminality.[132]

To visualize this dynamic, we can translate the "more-Black" and "less-Black" conditions onto our racial inequality quadrants. Both conditions constitute what I have termed *thin* deficit frames—that is, racial discourse that emphasizes empirical evidence of inequality but lacks an explicit causal theory. Here, that evidence is limited to a single data point: prison population demographics. Both conditions highlighted the overrepresentation (to differing degrees) of Black inmates. Accordingly, both fall on the deficits side of our vertical axis—with the "more-Black" condition falling farther down the line.

Neither condition included an express theory of causation. Participant behavior, however, revealed that exposure to more extreme racial disparities rendered more salient the association between blackness and criminality—and by extension, internal causal theories of Black criminality. This dynamic is depicted below. And, as the

---

128 *See* Galen V. Bodenhausen & Kurt Hugenberg, *Attention, Perception, and Social Cognition*, *in* SOCIAL COGNITION: THE BASIS OF HUMAN INTERACTION 1, 3 (Fritz Strack & Jens Förster eds., 2009) ("[N]ot all stimuli in the perceptual field receive equal attention; instead, some stimuli are selected for relatively intense scrutiny, making them more likely to reach the threshold of awareness, while others are processed only superficially, receiving little of our precious attention." (citation omitted)).

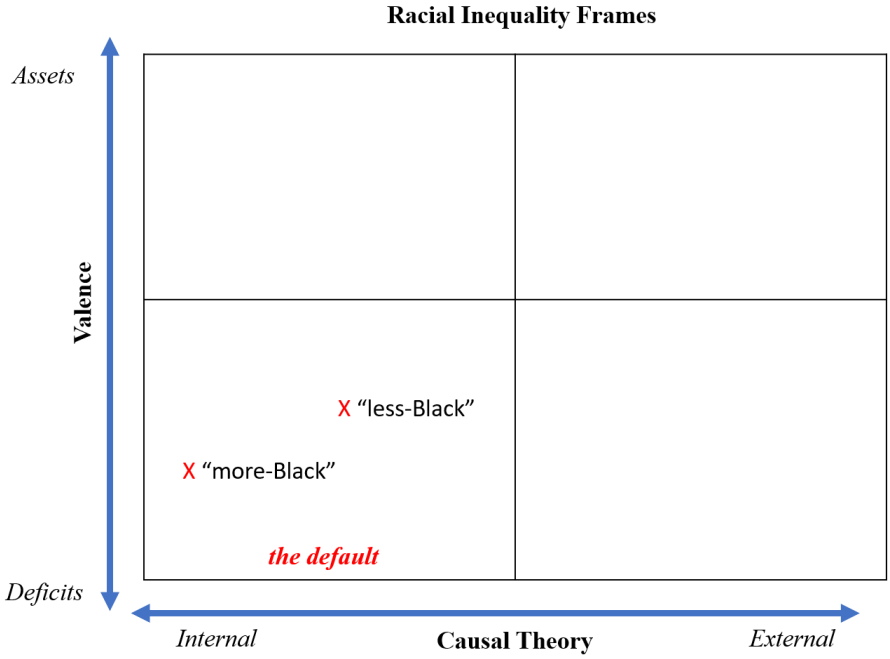
129 The contemporary force of this anti-Black stereotype is inseparable from a history of state-sponsored antiblackness. *See* CalvinJohn Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350 (2016).

130 *See* Dixon, *supra* note 127, at 167 ("Previous research suggests that crime news featuring more African Americans than Whites could lead to the activation and use of a 'Black criminal' stereotype.").

131 Hetey & Eberhardt, *Numbers Don't Speak for Themselves*, *supra* note 20, at 185.

132 *See id.* at 184 ("By focusing on group traits [e.g., overincarceration], the possibility that structural bias is at play in creating disparities falls out of view.").

foregoing scholarship cautions, the more a racial frame emphasizes deficits and internal causal theories, the more likely backlash follows.



Peffley and Hurwitz observed a similar relationship between exposure to empirical evidence of inequality, causal theories, and support for progressive reform.[133] Specifically, white participants were more likely to support the death penalty if they attributed crime to internal factors such as "criminal disposition[]."[134] This effect only arose, however, in the race condition—where participants were told that the death penalty is unfair because "most of the people who are executed are African Americans."[135] Even in this condition, causal theories of Black overincarceration appeared to inform support (or lack thereof) for the death penalty. As participants embraced more external causal theories, their support for the death penalty waned.[136]

---

133 Prior research had found that internal causal theories of crime and poverty increased support for punitive policies and reduced support for antipoverty programs. *See* Peffley & Hurwitz, *supra* note 20, at 999.

134 *Id.* at 1004 (finding that whites "who feel that black arrest rates are more attributable to the criminal dispositions of blacks are substantially more likely to support the death penalty than those who attribute blame to a biased justice system").

135 *Id.* at 999, 1005–06 ("Many whites begin with the belief that the reason blacks are punished is because they deserve it, not because the system is racially biased against them.").

136 *See id.* at 1005.

This effect suggests that a single statement linking race and the death penalty could activate latent anti-Black stereotypes and dominant narratives about Black criminality.[137] The effect was significant. Whereas only twenty-eight percent of participants with external theories of crime strongly favored the death penalty, that number jumped to sixty-four percent for participants with internal theories of crime.[138]

The link between stereotypes and causal theories of crime tracks decades of research on stereotyping. Stereotypes are more than a set of discrete (and often contestable) descriptors.[139] The constellation of stereotypes about a given category cohere to construct a "group essence" through which all group members are viewed.[140] Thus, when we perceive someone to be a member of a racial outgroup, "characteristics that are associated with the . . . group as a whole can be inductively applied to this person."[141]

Social psychologists Galen Bodenhausen and Andrew Todd explain that "the hallmark of stereotyping is the tendency to regard group members as fundamentally interchangeable and equivalent in terms of their basic characteristics, which are simply the characteristics that have come to be associated with the group as a whole."[142] Group members, in effect, are rendered interchangeable and reduced to stereotypical traits. As a result, stereotypes can inform how we view members of racialized groups even when an individual's actual circumstances or characteristics deviate from the relevant stereotype.[143]

---

137 *See id.* at 1001 ("In the race condition, however, such causal beliefs are, doubtless, activated by the question itself and should, therefore, become strong determinants of whites' attitudes toward the death penalty.").

138 *Id.* at 1005; *see also* Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 570–71 (2000).

139 *See* Galen V. Bodenhausen & Andrew R. Todd, *Social Cognition*, 1 WIREs COGNITIVE SCI. 160, 164 (2010) (explaining that "stereotypes do not consist merely of lists of features possessed by a group").

140 *Id.*

141 *Id.*; *see also id.* at 165 ("[S]tereotypes can bias attention and perception in a number of ways."); Bodenhausen & Hugenberg, *supra* note 128, at 10 ("After a target is assigned to a particular category, such as a racial group, general attitudes toward that group create expectancies of positive or negative characteristics that can bias perception of the target's behavior.").

142 Bodenhausen & Todd, *supra* note 139, at 164. Translated to the education domain, this helps to explain why Black and Latinx students routinely confront presumptions of intellectual inferiority even when their individual accolades—from trajectory (e.g., growing up in a middle-class community) to accomplishments (e.g., attending an elite university)—contradict those very presumptions.

143 *See* Asad Rahim, *Race as Unintellectual*, 68 UCLA L. REV. 632, 660–63 (2021).

Relatedly, stereotypes undergird causal theories that explain the relationship between various traits associated with a group.[144] On this point, Bodenhausen and Todd explain that "a group may be thought of as economically disadvantaged and poorly educated *because* its members are lazy or lacking in intelligence."[145] In other words, stereotypes *describe* groups and *explain* the relationship between perceived group traits and a group's relative status within society.[146] Often, racial stereotypes rationalize the status quo by conceptually undergirding internal causal theories of inequality. This dynamic, in turn, can influence attitudes toward competing policy proposals. This also tracks the dynamic we saw at play in the Hetey and Eberhardt studies. When participants encountered extreme racial disparities, those disparities appear to have activated latent anti-Black stereotypes—including causal theories that explain and rationalize the disparities themselves. And support for a status quo responsible for those disparities—at least among whites—grew.

The studies reveal how exposure to racial inequality can provoke immediate attitudinal and behavioral responses. This tight temporal nexus between exposure and behavior is unlikely to reflect, precisely, how racial frames embedded in litigation influence public perception and behavior. Still, the studies reveal two critical insights that translate to civil rights litigation. *First*, latent racial biases influence how the public interprets and responds to evidence of racial inequality. *Second*, deficit frames can activate and entrench those same biases.[147] Accordingly, even in the absence of immediate backlash, exposure to racial frames that emphasize minority deficits can calcify a set of racial meanings that tend to legitimize existing inequality—including

144 *See* Bodenhausen & Todd, *supra* note 139, at 164.

145 *Id.* One can read this sentence, which does not reference race, and know immediately which group the authors reference. This reflects the force and pervasiveness of anti-Black stereotypes.

146 *See also* Bodenhausen & Hugenberg, *supra* note 128, at 11–12; TRAVIS L. DIXON, A DANGEROUS DISTORTION OF OUR FAMILIES: REPRESENTATIONS OF FAMILIES, BY RACE, IN NEWS AND OPINION MEDIA 19 (2017), https://colorofchange.org/wp-content/uploads/2019/05/COC-FS-Families-Representation-Report_Full_121217.pdf [https://perma.cc/58VQ-RVWZ] ("[Racialized] images helped create a stereotype of poor people who are Black as part of the [undeserving] poor (i.e., those who take advantage of the system) versus the deserving poor (i.e., those who have no choice but to utilize government assistance but only as a temporary measure).").

147 *See* JOHNSON & GODSIL, *supra* note 15, at 124 (arguing that calls for reform can have "the unintended consequence of reinforcing the dominant narrative by inadvertently characterizing boys and men of color as problematic or failing to achieve their potential").

racialized expectations about who will succeed, who is a threat, and who belongs.[148]

2. Alternative Explanations (Also Implicate Racial Biases)

Some might wonder whether factors other than latent racial stereotypes better explain the backlash outlined above. To address this question, I explore multiple alternative theories below. This review reveals that even alternative theories implicate the racial priming and stereotyping phenomena discussed above.

To begin, white backlash could be the product of racial prejudice—whether it be explicit anti-Black animus or racially selective indifference.[149] Assuming the latter—a more benign form of prejudice—the theory proceeds as follows: if a punitive policy has negative consequences, but Blacks bear the brunt of that burden, whites will be more comfortable with the status quo and less motivated toward reform (than they would be if the burden fell evenly across all groups or disproportionately on whites).[150]

A selective-indifference theory has intuitive appeal. There are myriad examples in which a person's support for a policy turns on the policy's perceived effect on a salient in-group.[151] This translates to contexts in which regressive policies disparately burden communities of color. Still, selective indifference feels insufficient to explain enhanced support for policies that participants viewed as punitive. Support for reform would have placed, at most, a marginal burden on the participants (e.g., signing a petition). In other words, why not take such a minimal step—even if the benefit accrues to a racial out-group?

One explanation is that participants viewed the status quo as detrimental to Blacks *and* beneficial to whites. In other words, beyond

---

148 *See* Feingold & Carter, *supra* note 73, at 1708–09. *See generally* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 514–15 (2010) (reviewing the literature).

149 *See generally* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 11 n.56 (1996) (discussing selective indifference and other forms of racial prejudice).

150 *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976) (discussing "racially selective sympathy and indifference").

151 Selective-indifference theories emerged to explain the Trump administration's failure to aggressively address Covid-19 in the face of evidence that the virus was disproportionately harming communities of color. *See* Brent Orrell, *The Not-So-Soft Bigotry of COVID-19 Indifference*, BULWARK (Sept. 15, 2020), https://www.thebulwark.com/the-not-so-soft-bigotry-of-covid-indifference (last visited Apr. 27, 2022).

indifference to out-group suffering, participants perceived an in-group benefit. The benefit, presumably, is less crime and more safety. Ultimately, this cost-benefit analysis trades on the racial stereotypes discussed above.[152] Specifically, the logic that whites benefit relies on the presumption that Blacks are overincarcerated *because* they are predisposed to crime—that is, because they are perceived as threats to whites.

Further, consider the "ultimate attribution error"[153]—a well-studied cognitive bias that leads humans to "view negative attributes of outgroups as stable, fixed, and dispositional."[154] With in-groups, in contrast, negative attributes "are viewed as malleable, contingent, and a result of environment or bad luck."[155] In the presence of positive attributes, the reverse occurs.[156]

It is easy to see how the ultimate attribution error aligns with and amplifies racial stereotypes and internal theories of racial inequality.[157] Foreshadowing the next Part of this Article, consider racial discourse that highlights the underrepresentation and underperformance of Black and brown students in historically white institutions. For racial out-groups, the ultimate attribution error invites a causal theory that attributes negative outcomes to student deficiencies. And, importantly, this heuristic does not exist in a cultural void. To the contrary, it operates against a backdrop defined by racialized presumptions

---

152 *See supra* Section II.B.1 (discussing conceptual nexus between blackness and criminality).

153 *See generally* Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCH. BULL. 461 (1979). "The ultimate attribution error is a group-based version of a more general attributional bias. When applied on an individual basis, it is known as the actor-observer bias." Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 424 n.39 (2006).

154 Kang & Lane, *supra* note 148, at 516 (describing how "motivations to justify the self and the groups we belong to slant how we use or fail to use base-rate information"); *see also* Eric Luis Uhlmann, Victoria L. Brescoll & David Pizarro, *The Motivated Use and Neglect of Base Rates*, 30 BEHAV. & BRAIN SCIS. 284 (2007).

155 Kang & Lane, *supra* note 148, at 516; *see also* Jason A. Okonofua, Gregory M. Walton & Jennifer L. Eberhardt, *A Vicious Cycle: A Social-Psychological Account of Extreme Racial Disparities in School Discipline*, 11 PERSPS. ON PSYCH. SCI. 381, 384 (2016) ("[A]ssociations can alter . . . attributions about misbehavior and result in harsher punishment decisions."); *id.* (describing findings from separate study where "teachers were more likely to label a misbehaving Black middle school student as a troublemaker than they were a misbehaving White middle school student").

156 Kang & Lane, *supra* note 148, at 516.

157 *See* Feingold & Carter, *supra* note 73, at 1706–07.

concerning intelligence and academic competence.[158] In other words, the ultimate attribution error can further propel the feedback loop between deficit frames, racial stereotypes, and internal theories of inequality—a recursive process likely to harden support for institutional arrangements that produce racially disparate academic outcomes.[159]

As I detail below, school-financing litigants risk fueling this precise dynamic. Particularly in the context of federal litigation, doctrine incentivizes plaintiffs to mobilize deficit frames that emphasize academic underachievement within communities of color. This legal storytelling, albeit responsive to doctrine, can trigger and reproduce stereotype-laden narratives that (a) *describe* Black and brown students as academically inferior; (b) *attribute* racial achievement gaps to the presumptive academic inferiority of Black and brown students; and (c) *prescribe* remedies designed to "fix" presumptively deficient students rather than remedy pervasive institutional deficiencies.

III. THE CATCH-22

As noted above, the civil rights catch-22 proceeds as follows: First, certain legal doctrines incentivize (if not require) plaintiffs to emphasize community deficits. Second, rational plaintiffs and their lawyers respond in kind. In so doing, plaintiffs tend to deploy legal narratives that track, and are thereby likely to activate and reinforce, racial frames that legitimize the status quo. Accordingly, even when plaintiffs prevail, the litigation can hinder short- and long-term reform efforts. To concretize this dynamic, I now turn to federal school-financing doctrine.

---

158 *See* Carbado, Turetsky & Purdie-Vaughns, *supra* note 70, at 177 ("[Pernicious narratives of] Black intellectual inferiority ha[ve] long been an important part of the social transcript of American life. Indeed, perhaps the only thing easier in the United States, racially speaking, than questioning black intellectual ability is associating African Americans with crime.").

159 *See* Dixon, *supra* note 127, at 183 ("The effects of stereotyping appear most potent with regard to judgments regarding social policies.").

A. *Doctrine Demands Deficits*

In the United States, a student's access to educational resources is often inseparable from race and class.[160] For communities burdened by unequal or inadequate school funding, litigation offers one tool for reform.[161] Such lawsuits often take one of two forms: equity challenges and adequacy challenges.[162] Neither offers reliable avenues for relief—particularly for claims arising under federal law.[163]

In equity cases, often brought under the Fourteenth Amendment's Equal Protection Clause, plaintiffs challenge unequal resource allocation—e.g., per-pupil spending.[164] Even when funding disparities have a racially disparate impact, those disparities are largely immune from constitutional scrutiny.[165] Rather, prevailing doctrine often requires plaintiffs to prove discriminatory intent—a near-impossible standard to meet.[166]

Adequacy challenges, rather than comparing funding across districts, focus on the substantive quality (or lack thereof) of education

---

160 It is important not to overstate the overlap between race and class, nor the degree to which racial segregation predicts school quality. To begin, residential segregation is more likely to track race than it does class. *See* Reynolds Farley, Charlotte Steeh, Maria Krysan, Tara Jackson & Keith Reeves, *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOCIO. 750, 751 (1994) ("If residential segregation were a matter of income, rich blacks would live with rich whites and poor blacks with poor whites. This does not happen."). Moreover, standard metrics for measuring school "quality"—i.e., test scores—often do little more than reproduce school demographics. *See* JACK SCHNEIDER, ASHLEY J. CAREY, PETER PIAZZA & RACHEL S. WHITE, SCHOOL INTEGRATION IN MASSACHUSETTS: RACIAL DIVERSITY AND STATE ACCOUNTABILITY 20–22 (2020), https://cecr.ed.psu.edu/sites/default/files/Demography_Report_FINAL_7.24.20.pdf [https://perma.cc/FY7N-DZNF] (questioning the presumption that residential segregation predicts school quality).

161 *See, e.g.*, Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1660 (2007) (noting that litigation is one available option).

162 Elements of equity and adequacy challenges are often present in the same case. *See id.* at 1668 ("Adequacy contentions sometimes include equity arguments just as equity arguments often include adequacy arguments.").

163 Plaintiffs have found greater success with similar claims arising under state law. *See* Wilson, *supra* note 2, at 191–92.

164 *See id.* at 203–05.

165 *See* Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 626 (2011) ("While it is now illegal to deny children equal educational opportunities because of their race, it is perfectly legal to provide disparate education opportunities to children based on where they live." (footnote omitted)).

166 *See* Washington v. Davis, 426 U.S. 229, 238–41 (1976).

within a school or district.[167] Such cases, often tethered to the Fourteenth Amendment's Due Process Clause, trade on the theory that the Constitution obligates each state to ensure "some meaningful level of education is offered in the schools."[168] Adequacy challenges suffered a major setback in *San Antonio Independent School District v. Rodriguez*,[169] a seminal school-financing case in which Mexican-American students argued that Texas's school-financing scheme deprived them of a right to education.[170] A five-Justice majority rejected the claim that the Constitution guarantees a general right to education.[171]

As others have detailed, this holding effectively "foreclosed federal challenges to long-standing educational opportunity gaps."[172] Nonetheless, recent federal litigation has revealed that *Rodriguez* might not have closed the door on federal adequacy challenges.[173] In *Gary B.*, for example, the plaintiffs marshalled language from *Rodriguez* and subsequent Supreme Court decisions to argue that the Constitution guarantees "some identifiable quantum of education"[174]—even if it does not guarantee a general right to education.

This includes *Papasan v. Allain*,[175] in which the Supreme Court explained that "[a]s *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions *whether a minimally adequate education is a fundamental right* and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[176] In other words, even absent a "broad,

167 *See* Wilson, *supra* note 2, at 205.

168 *Cf.* Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1206 (2011) (describing the difference between equity and advocacy challenges in the context of state constitutional claims).

169 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

170 *See id.* at 4–5, 29.

171 *See id.* at 35.

172 Kimberly Jenkins Robinson, *Introduction. The Essential Questions Regarding a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 1 (Kimberly Jenkins Robinson ed., 2019); *see also* Robinson, *supra* note 161, at 1667 ("[School financing] cases quickly met a roadblock to federal constitutional claims in *Rodriguez* when the Supreme Court rejected an argument that education is a fundamental constitutional right.").

173 *See infra* Section III.B.

174 *Rodriguez*, 411 U.S. at 36–37.

175 Papasan v. Allain, 478 U.S. 265 (1986).

176 *Id.* at 285 (emphasis added).

general right to education,"[177] the Constitution may still obligate states to provide a minimum standard of education.[178]

Whether such an obligation exists remains unanswered, in part, because no plaintiff has alleged facts sufficient to establish that they were denied "a minimally adequate education"[179]—at least not facts sufficient to persuade five sitting Justices. In *Rodriguez*, for example, the Court acknowledged that Texas's funding scheme produced severe disparities across the state's poorest and richest districts.[180] Nonetheless, the majority emphasized that neither those disparities nor other alleged facts established that Texas had deprived the students a basic minimum education:

> [W]e have no indication that the present levels of educational expenditures in Texas provide an education that falls short. . . . [I]n the present case . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[181]

The *Papasan* plaintiffs—who included school officials and children from twenty-three Mississippi counties—met a similar fate. Among other claims, the plaintiffs argued that they were "denied the economic benefits of public school lands granted by" the federal government to Mississippi over a century prior.[182] This claim was predicated in part on funding disparities that flowed from the state's conduct vis-à-vis the subject lands. According to the plaintiffs, absent court intervention, their children would "continue to receive a substandard education."[183] As in *Rodriguez*, the Supreme Court majority concluded that the plaintiffs failed to allege facts sufficient to

---

177 Gary B. v. Whitmer, 957 F.3d 616, 644 (6th Cir.) (first citing *Rodriguez*, 411 U.S. at 33–39; and then citing Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000)), *vacated*, *reh'g en banc granted mem.*, 958 F.3d 1216 (6th Cir. 2020).

178 *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 956 (2016) ("Despite the passage of more than forty years, there is still no definitive answer to the question left undecided by *Rodriguez*: is there a federal constitutional right to 'some identifiable quantum of education'? *Rodriguez*'s successors—*Plyler*, *Papasan*, and *Kadrmas*—failed to settle the matter . . . ." (footnote omitted)).

179 *See Papasan*, 478 U.S. at 285–86; *Rodriguez*, 411 U.S. at 37; *see also Gary B.*, 957 F.3d at 642 ("While the Supreme Court has repeatedly discussed this issue, it has never decided it, and the question of whether such a right exists remains open today.").

180 *See Rodriguez*, 411 U.S. at 8–15.

181 *Id.* at 36–37.

182 *Papasan*, 478 U.S. at 268.

183 Reply Brief for Petitioners at 18, *Papasan*, 478 U.S. 265 (No. 85-499), 1985 WL 669401, at *18.

prove that Mississippi had denied them a minimally adequate education:

> The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education.[184]

In so doing, *Papasan* reaffirmed *Rodriguez*'s central holding and left open the possibility that the Constitution guarantees a minimally adequate education. This possibility offers a pinhole-sized opening for adequacy challenges today. Still, the burden is hard to overstate. A plaintiff must first establish, as a matter of law, that the Fourteenth Amendment guarantees a basic minimum education.[185] Then, the plaintiff must marshal enough evidence to establish that she has, in fact, been "deprived of a minimally adequate education"[186]—a burden no prior plaintiff has met.

For the rational litigant (and her attorney), this backdrop cautions against a complaint that suggests even a pretense of education. A party would not want to lose because educational conditions were bad, but not *so* bad that a fact finder could conclude that constitutional baselines were met.[187] To avoid such a fate, strategic plaintiffs might portray their community through a prism of poverty and illiteracy—a landscape void of academic possibility. In other words, and drawing on the racial inequality quadrants introduced above,[188] legal doctrine incentivizes plaintiffs to employ deficit frames.

This script has played out across multiple recent lawsuits, two of which I discuss below. The narratives animating these lawsuits are far from identical. But they converge in two key respects. First, they seek to navigate the pinhole left open following *Rodriguez*. Second, to meet this high evidentiary burden, the plaintiffs employ metaphors, statistics, and anecdotes to portray poor, illiterate students of color incapable of

---

184 *Papasan*, 478 U.S. at 286.

185 *See, e.g.*, Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir.), *vacated*, *reh'g en banc granted mem.*, 958 F.3d 1216 (6th Cir. 2020).

186 *Id.* at 647–48 (quoting *Papasan*, 478 U.S. at 286).

187 District Judge William Smith, who presided over *A.C. v. Raimondo*, expressed a similar point when he rejected plaintiffs' adequacy claims in that litigation: "But . . . just how bad did an education have to be to trigger a constitutional violation? Education advocates thought they found the answer to that question, and a test case, in Detroit." A.C. v. Raimondo, 494 F. Supp. 3d 170, 189 (D.R.I. 2020), *aff'd sub nom.* A.C. v. McKee, 23 F.4th 37 (1st Cir. 2022).

188 *See supra* Section I.B (employing 2x2 grid to categorize competing racial inequality frames).

becoming full citizens.[189] As a result, this well-intended litigation engages in racial storytelling that reifies pernicious biases about the intellectual inferiority of Black and brown students.[190]

B. *The Deficit Frame Cases*

Before exploring the deficit frame cases, two preliminary comments are warranted.

First, my goal is to surface unintended consequences that can flow from well-meaning lawsuits and the narratives they employ. I am neither denying nor suggesting anyone ignore the disturbing conditions and inequities that trigger cases like *Gary B.*[191] Nor am I suggesting we can realize a more equitable educational landscape without naming and centering the forces that produce and sustain racial (and class-based) inequities.[192] But even accepting that racial reform requires that we[193] talk about racial inequality does not answer *how* we talk about racial inequality. That question—*how* to talk about racial inequality—is my focus herein.[194]

Second, school-financing doctrine impedes educational equality on multiple levels. In this Article, I focus on the link between doctrine and deficit frames—that is, how legal doctrine incentivizes plaintiffs and their attorneys to employ racial frames prone to calcify conditions that produce inequality. But school-financing doctrine is also responsible, in part, for the conditions that necessitate school-financing

---

189 *See, e.g.*, *A.C.*, 494 F. Supp. 3d at 194–96.

190 *See* Okonofua, Walton & Eberhardt, *supra* note 155, at 384 ("Blacks are commonly stereotyped as unintelligent, lazy, hostile, and dangerous.").

191 *See* Robinson, *supra* note 161, at 1656 ("More than fifty years and a host of educational reform efforts have passed since *Brown v. Board of Education*, and yet children in poor and disproportionately minority communities still receive vastly unequal educational opportunities."); Wilson, *supra* note 165, at 647–48 ("[S]chools that are segregated by race are also typically segregated by poverty as well. . . . [A] significant number of students who attend predominantly poor and minority schools receive lesser access to adequate educational resources and have lower academic achievement than their white and more affluent peers."); Thomas Kleven, *Federalizing Public Education*, 55 VILL. L. REV. 369, 394 (2010) ("[P]ublic education in the United States is significantly segregated along class and race lines.").

192 Ian Haney López, for example, urges a progressive discourse that fuses race and class concerns. *See* IAN HANEY LÓPEZ, MERGE LEFT: FUSING RACE AND CLASS, WINNING ELECTIONS, AND SAVING AMERICA (2019).

193 In this instance, I use the term "we" to encompass a broad spectrum of stakeholders committed to a more racially just society.

194 As I note elsewhere, there is not a single answer to *how* one should talk about race. That answer is necessarily contingent and informed by variables ranging from speaker and audience to context and purpose. *See supra* notes 63–64 and accompanying text.

litigation in the first place.[195] As others have detailed, the Supreme Court has (a) legally immunized de facto segregation;[196] (b) limited a municipality's power to mitigate the negative effects of segregation;[197] and (c) privileged the principle of "localism."[198] In essence, the Supreme Court has constitutionalized unequal access to education.[199] And in so doing, the Court has commodified whiteness itself.[200]

---

195 School-financing doctrine—and the Supreme Court's equality jurisprudence more broadly—incentivizes and insulates behaviors and conditions that stratify society along race and class lines. *See* Wilson, *supra* note 165, at 628 ("Doctrinally, the . . . federal judiciary is situated such that it cannot adequately address issues of racial and economic inequality in schools."). Other factors include structural forces ranging from discriminatory lending policies to school-funding schemes. *See id.* at 650 ("[T]he FHA's racially discriminatory lending practices and the proliferation of federally subsidized highways served to relegate minorities to decaying urban cities while helping to populate suburban enclaves with white citizens."); Kleven, *supra* note 191, at 392 ("A second, and greater, factor contributing to unequal educational opportunity is the structure of public education.").

196 *See* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 209–10 (2016) ("[R]acially segregated neighborhood schools now operate with the imprimatur of the law . . . . [T]hey are accepted as an inevitable reality that cannot be changed absent extraordinary measures."); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004) ("[T]he Supreme Court, and the lower federal courts, have done nothing to advance desegregation of schools or to equalize expenditures for education."); Robinson, *supra* note 161, at 1660–67 (describing the federal judiciary's failure to realize effective school-desegregation plans).

197 *See* Milliken v. Bradley, 418 U.S. 717 (1974) (prohibiting efforts to equalize educational opportunity through interdistrict desegregation plans unless there was proof of discrimination across the subject districts); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down race-conscious student assignment plan).

198 *See* Wilson, *supra* note 165, at 628 ("Time and again, the federal judiciary has deferred to local school officials in their school financing schemes and student assignment plans, even when the decisions of these local officials have adverse impacts on educational opportunities for poor and minority students." (footnotes omitted)); *id.* at 636 ("Since its 1955 decision in [*Brown II*], the Supreme Court has consistently expressed a doctrinal preference for principles of localism at the expense of the constitutional rights of minority and poor students." (footnote omitted)); LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 399 (2019) ("[T]he Court defeated desegregation efforts on two fronts: first, by allowing local communities to geographically restrict attendance in local schools; and second, by allowing those same communities to sequester educational money locally.").

199 *See* Wilson, *supra* note 165, at 644–45 ("Because students for the most part attend schools in close proximity to the neighborhoods in which they live, the true ramifications of the Court's embrace of localism can only be understood within the larger context of residential housing segregation and the federal, state, and local laws that perpetuate such segregation.").

200 The law, in other words, invites white communities to invoke public and private means to police racial and physical boundaries—both of which fuel hypersegregation and educational inequities across the country. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); K-Sue Park, *How Did Redlining Make Money?*, JUST MONEY (Sept. 25, 2020), https://justmoney.org/k-sue-park-how-did-redlining-make-money [https://perma.cc/SB3N-E3RA] ("Redlining indeed institutionalized segregation's monetary value, transforming the landscapes of housing and racial relations in America.").

I now turn to Detroit, the site of *Gary B. v. Whitmer* and a city long impacted by this jurisprudential backdrop.

1. *Gary B. v. Whitmer*

Gary B. v. Whitmer targeted some of Detroit's most underresourced public schools. In a moment, I turn to the plaintiffs' case. But to contextualize the litigation, it is helpful to understand how decades of structural (including legal) and behavioral forces created the conditions that underlay this lawsuit.[201]

Like many American cities, Detroit experienced staggering demographic shifts through much of the twentieth century. Relevant causes range from economic restructuring to white flight (among other forms of white resistance to desegregation).[202] Between 1950 and 1990, Detroit's white population fell by 86%, while its Black residents rose from 16% to 76% of the city's population.[203] In the decade following the 1968 Fair Housing Act, Detroit lost 74% of its white students.[204] And between 1980 and 1995, the percentage of white students in Detroit public schools further declined from 14% to 6.2%.[205] Many of the resulting racially homogenous (read: white) suburbs and suburban school districts continue to this day.[206]

In short, Detroit in 2022 is inseparable from the anti-Black bias and white flight that defined much of the last half century.[207] The city's overall population decline, alongside the loss of white residents (and their tax dollars) to the suburbs, drained Detroit's tax base and the

---

201 For a more comprehensive review, which is beyond the scope of this Article, see GROVER & VAN DER VELDE, *supra* note 3 (providing historical overview of public schools in Detroit).

202 *See* Thomas J. Sugrue, *Expert Report of Thomas J. Sugrue*, 5 MICH. J. RACE & L. 261, 270 (1999) (explaining that Blacks "bore the brunt of the effects of economic restructuring that began . . . in the early 1950s as Michigan's urban job base began to erode when firms moved to white suburban and rural areas"); *id.* at 291 (describing "a successful campaign to recall the four white school board members who supported the [desegregation] plan"). Beyond white flight, whites engaged in racialized violence, political action, and other concerted efforts to maintain racially exclusionary neighborhoods and schools. *See id.* at 277–85 (summarizing history of anti-Black and anti-Latinx violence and discrimination in Detroit).

203 Farley, Steeh, Krysan, Jackson & Reeves, *supra* note 160, at 754.

204 *See* Sugrue, *supra* note 202, at 291.

205 *Id.*

206 *See id.*

207 *See id.* at 280 ("[Whites' commitment to racial exclusion] "was vividly demonstrated in the early 1940s, when a developer of a subdivision for whites in northwest Detroit secured government-backed loans on the condition . . . that a wall be constructed to separate the two neighborhoods.").

public resources it supports—including public education.[208] This exodus has not ceased. Over the past twenty years, a confluence of local forces has exacerbated Detroit's budgetary challenges and management failures.[209]

This history—albeit abbreviated—leads to *Gary B. v. Whitmer*, a 2016 lawsuit that featured Black and Latinx students from "several of Detroit's worst-performing public schools."[210] Among other claims, the students alleged that Michigan violated their constitutional right to a basic minimum education.[211] More specifically, the plaintiffs alleged that "not even the pretense of education [took] place" in their "slum-like" schools—and as a result, they were denied "a chance at foundational literacy."[212] Drawing on facts and narratives that emphasized racial achievement gaps, deteriorating academic facilities, and widespread community disinvestment, the plaintiffs portrayed themselves and their community through a lens of poverty and illiteracy.[213] Translated to our racial inequality frames, the dominant racial discourse that surrounded *Gary B.* falls into our bottom-left quadrant.

208 *See* GROVER & VAN DER VELDE, *supra* note 3 (noting that from a peak of nearly 300,000 students in 1966, Detroit public schools had just 47,000 students in 2016).

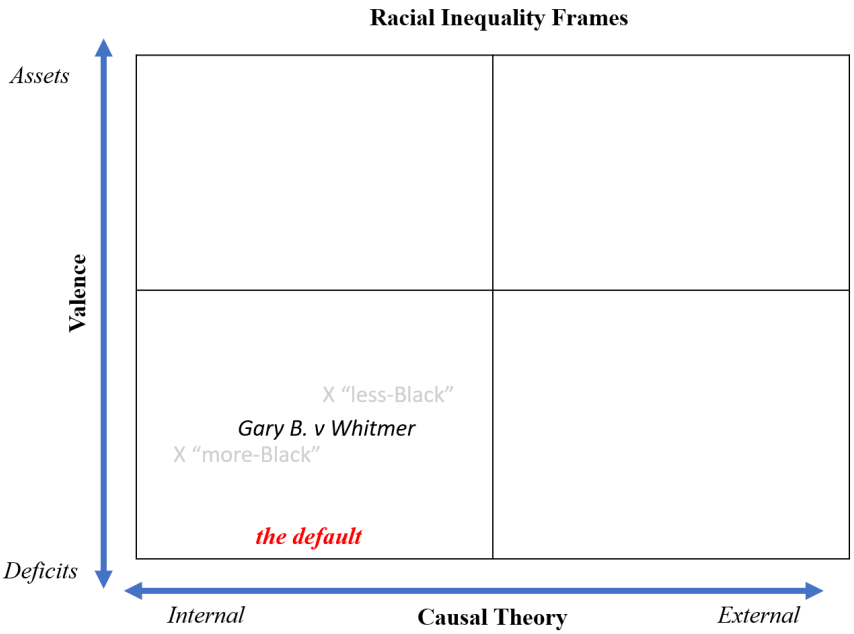
209 These forces include continued enrollment decline, the rise of charter schools, abandoned city property, hundreds of school closures, and the appointment of multiple emergency managers. *See id.* (reviewing enrollment decline and school closures); Jennifer Chambers, *Student Exodus Saps Detroit School Finances*, DETROIT NEWS (Mar. 30, 2015, 10:20 AM), https://www.detroitnews.com/story/news/education/2015/03/30/student-exodus-saps-detroit-school-finances/70652450 [https://perma.cc/ZK7B-5DXF].

210 Gary B. v. Whitmer, 957 F.3d 616, 620 (6th Cir.), *vacated*, *reh'g en banc granted mem.*, 958 F.3d 1216 (6th Cir. 2020). Plaintiffs' schools served more than ninety-five percent children of color and primarily low-income students. *Id.* at 637.

211 *Id.* at 621.

212 *Id.* at 621, 624.

213 *See id.* at 624–28.



This deficit framing came to define lay and legal perceptions of the case.[214] The Sixth Circuit, for example, foregrounded the plaintiffs' "core" claim "that the conditions in their schools are so bad—due to the absence of qualified teachers, crumbling facilities, and insufficient materials—that those schools fail to provide access to literacy."[215] Beyond formal court documents, this illiteracy/poverty framing extended to the litigants' more public-facing communications.[216] This included the plaintiffs' website, which bore the title "Right to Literacy Detroit."[217] Beyond this broad framing, the homepage included a

214 *See, e.g.*, Carole Levine, *Michigan Settles Court Case and Agrees to Reinvest in Detroit Public Schools*, NONPROFIT Q. (May 19, 2020), https://nonprofitquarterly.org/michigan-settles-court-case-and-agrees-to-reinvest-in-detroit-public-schools [https://perma.cc/Q7HB-B4SV] ("The suit alleges that many of the graduates emerging from both public and charter schools in Detroit had limited literacy skills due to a system 'functionally incapable of delivering access to literacy.'").

215 *Gary B.*, 957 F.3d at 624.

216 *See, e.g.*, Christopher Peak & Emily Hanford, *In* Gary B. v. Snyder, *a Federal Court Rules Giving Children a Chance at Literacy Is a Constitutional Right*, HECHINGER REP. (Apr. 30, 2020), https://hechingerreport.org/in-gary-b-v-snyder-a-federal-court-rules-giving-children-a-chance-at-literacy-is-a-constitutional-right [https://perma.cc/6LWY-N9TU] ("This lawsuit is designed to show that there are particular pockets, where we would say it's not just that the kids are not becoming literate; it's that they don't have the opportunity to become literate . . . .").

217 RIGHT TO LITERACY DETROIT, https://www.detroit-accesstoliteracy.org [https://perma.cc/5AB3-CBQJ].

drawing of three Black children alongside the prominent text: "GARY B. v. SNYDER is a civil rights lawsuit asserting that Michigan is denying Detroit students their *fundamental right* to LITERACY."[218]

From a legal and moral standpoint, this narrative—a story highlighting the plight of illiterate students of color—holds intuitive appeal. It also proved effective as a litigation strategy. As noted above, the plaintiffs secured a substantial settlement.[219] And even before the settlement, a Sixth Circuit panel had revived the plaintiffs' adequacy claim.[220]

On the law, the panel held that the Constitution guarantees a basic minimum education and that foundational literacy is encompassed therein.[221] Drawing on *Rodriguez*, the panel grounded this conclusion in the relationship between education and democracy. Specifically, the panel reasoned that "without the literacy provided by a basic minimum education, it is *impossible to participate in our democracy*."[222] In certain respects, this connection is just right. As Derek Black and others remind us, multiracial democracy requires equal access to public education and the ballot box.[223] But the framing also carries risks. At its core, the message—from the litigants and the court—suggests that Detroit's Black and brown students are destined to illiteracy, and thereby rendered unable to participate in, or contribute to, American society. This narrative, albeit marshalled to advance racial equality, echoes blatantly racist calls to restrict Black voting following the Civil War.[224]

Moving to the facts, the panel found that the students plausibly pled their adequacy claim.[225] Given the plaintiffs' allegations—and

---

218 *Id.*

219 *See* Whitmer Press Release, *supra* note 1.

220 *Gary B.*, 957 F.3d at 621. Following the settlement, while the case was pending to be reheard en banc, the panel opinion was vacated. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (mem.).

221 *See Gary B.*, 957 F.3d at 659–60.

222 *Id.* at 642 (emphasis added).

223 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY (2020).

224 *See, e.g.*, NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 43–44 (Illini Books ed. 1990) ("'If every negro in Mississippi was a graduate of Harvard, and had been elected class orator, . . . ' the *Clarion-Ledger* affirmed, 'he would not be as well fitted to exercise the rights of suffrage as the Anglo-Saxon farm laborer.'" (alteration in original)).

225 *See Gary B.*, 957 F.3d at 660–61.

assuming a right to a minimum education—this conclusion would appear hard to avoid.[226] The *Gary B.* plaintiffs offered a dire account of their "schools" and the conditions therein.[227] Consider the following overview:

> "Plaintiffs sit in classrooms where not even the pretense of education takes place, in schools that are functionally incapable of delivering access to literacy." Because of this, Plaintiffs attend "schools in name only, characterized by slum-like conditions and lacking the most basic educational opportunities that children elsewhere in Michigan and throughout the nation take for granted. [T]hey wholly lack the capacity to deliver basic access to literacy, functionally delivering no education at all. The schools Plaintiffs attend, and attended, are not truly schools by any traditional definition or understanding of the role public schools play in affording access to literacy."[228]

The plaintiffs also marshalled striking factual allegations. These included a litany of statistics that illustrated the inadequacy of the students' education—in absolute and relative terms. The following allegations are illustrative:

- Across the plaintiffs' schools, "proficiency rates . . . hover near zero in nearly all subject areas."[229]
- In one of the plaintiffs' elementary schools, "only 4.2% of students scored proficient or above on . . . Michigan's 2015–16 English assessment test, compared with 46.0% of third-grade students statewide."[230]

---

226 Even in dismissing the plaintiffs' complaint, the district court recognized the appalling conditions they challenged. *See* Gary B. v. Snyder, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018) ("The conditions and outcomes of Plaintiffs' schools, as alleged, are nothing short of devastating. When a child who could be taught to read goes untaught, the child suffers a lasting injury—and so does society. But the Court is faced with a discrete question: does the Due Process Clause demand that a State affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy? Based on the foregoing analysis, the answer to the question is no."), *aff'd in part*, *rev'd in part sub nom.* Gary B. v. Whitmer, 957 F.3d 616 (6th Cir.), *vacated*, *reh'g en banc granted mem.*, 958 F.3d 1216 (6th Cir. 2020).

227 The plaintiffs placed quotation marks around the word "school"—presumably to emphasize the schools' failure to serve their basic purpose as sites of learning. *See* Brief of Appellants at 20–21, *Gary B.*, 957 F.3d 616 (Nos. 18-1855/18-1871), 2018 WL 6044766, at *20–21 ("Plaintiffs' 'schools' contain classrooms that have no teachers . . . . By compelling Plaintiffs to attend these 'schools' each day . . . Defendants have violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.").

228 *Gary B.*, 957 F.3d at 624 (alteration in original) (citations omitted).

229 *Id.* at 627.

230 Class Action Complaint, *supra* note 1, at 5.

- Across the plaintiffs' high schools, between 2% to 13% of eleventh-grade students were proficient in English, compared with nearly 50% of eleventh-grade students statewide.[231]
- Across their high schools, "every eleventh grader has 0% proficiency in at least Math, Science, or Social Studies."[232]
- Between 0% to 4% of eleventh graders in the plaintiffs' schools were proficient in Math, Science, and Social Studies, respectively,[233] as compared to between 28% to 44% of students statewide.[234]
- At Osborn MST, only 1.9% of eleventh graders were proficient in English in the 2014–15 school year, as compared to 49% of students statewide.[235]

The plaintiffs thickened this statistical account by cataloging their schools' "'deplorable' and 'devastating'" conditions, which they disaggregated across three categories: (1) lack of qualified teachers;[236] (2) a "dearth of instructional materials";[237] and (3) unsanitary and dangerous physical conditions.[238]

Overall, the plaintiffs' claims are striking. They reveal an educational wasteland—likely unrecognizable to most Americans.

---

231 *Id.* at 65 fig.6.

232 Brief of Appellants, *supra* note 227, at 12.

233 Class Action Complaint, *supra* note 1, at 65 fig.6.

234 *Id.*

235 Brief of Appellants, *supra* note 227, at 47.

236 *Id.* at 7–8 ("[S]cience classes . . . were taught by a paraprofessional who acknowledged that she did not understand the material and could not lead experiments. . . . [S]eventh- and eighth-grade math [classes] were taught for about a month by an eighth-grade student, with a paraprofessional sitting in the room to assist with classroom management. . . . [A]pproximately 30–40% of teachers were uncertificated, while many classes, like Science and Health, were taught by uncertificated long-term substitutes—and high school students are repeatedly shown movies like *Kung Fu Panda* and *Frozen* during scheduled class time.").

237 *Id.* at 9 ("Not one of Plaintiffs' schools has textbooks for students to bring home, making it difficult for teachers to assign meaningful homework or, in many instances, any homework at all. . . . [A] history class had five textbooks for 28 students and the economics class had 25 textbooks for 118 students for the 2016–17 school year. . . . Teachers regularly tape up old, dilapidated copies, seek donations of books online, and spend thousands of dollars of their own monies (as much as one-sixth of their salary) to purchase books.").

238 Class Action Complaint, *supra* note 1, at 85 ("All of Plaintiffs' schools that are currently operating have been infested by vermin. Students and teachers have frequently encountered mice, mice droppings, rats, bedbugs, and/or cockroaches."); *id.* at 91 ("The water fountains, toilets, urinals, sinks, and locker room showers at Osborn are frequently out of order, and the bathrooms are frequently out of toilet paper and soap."); Brief of Appellants, *supra* note 227, at 10 ("[C]lassrooms regularly reach as high as 90 degrees in the summer-adjacent months, even 110 degrees in one school, and students and teachers have fainted, thrown up, and developed heat rashes as a result. . . .").

Given this factual backdrop and doctrinal hurdles, why not mobilize a corresponding narrative that emphasizes racialized poverty and illiteracy?[239] After all, the plaintiffs ultimately secured a legal victory and robust settlement. The danger, of course, is that even with a litigation win, this narrative could harden the very forces that produce such unequal and inadequate conditions in the first place.[240] Even if tethered to a deeply troubling reality, this frame—that effectively defines Black and brown students as "illiterate," impoverished, future wards of the state—tracks pernicious anti-Black stereotypes.[241] In short, by promulgating this narrative, the litigation risks reifying those very stereotypes—which themselves presume and rationalize racial disparities across educational domains.[242]

In Part IV, I explore how the *Gary B.* plaintiffs could have reduced these risks without obscuring or otherwise eliding the educational injustice they endured. Before doing so, however, I turn to *A.C. v. Raimondo*, a separate adequacy challenge based in Rhode Island. Although distinct from *Gary B.*, *A.C.* offers another example of doctrinal demands driving legal narratives that emphasize student deficits.

2. *A.C. v. Raimondo*

In 2018, a putative class of Rhode Island public school students sued their state for failing to provide a basic minimum education.[243] As in *Gary B.*, the *A.C.* plaintiffs targeted the narrow window left open by *Rodriguez*.[244] Yet unlike the *Gary B.* plaintiffs, who alleged a lack of access to basic literacy, the *A.C.* plaintiffs argued that Rhode Island

---

239 *See supra* Section III.A (outlining school-financing doctrine).

240 *See supra* Part II (exploring risks associated with deficit framing).

241 *See generally* Feingold, *supra* note 86 (outlining how deficit framing could reap negative consequences in K–12 and university settings).

242 Given how stereotyping functions, it matters little that this case involved such extreme conditions. *See* Peak & Hanford, *supra* note 216 ("Gary B. v. Snyder was 'surgically precise' in seeking remedies for kids in 'the worst of the worst schools.'").

243 A.C. v. Raimondo, 494 F. Supp. 3d 170, 174 (D.R.I. 2020), *aff'd sub nom.* A.C. v. McKee, 23 F.4th 37 (1st Cir. 2022). On October 13, 2020, the district court dismissed plaintiffs' federal adequacy claim. *See id.* at 192–93 (distinguishing *A.C.* from *Gary B.*).

244 Plaintiffs' Memorandum in Opposition to the Joint Motion to Dismiss at 1, 6, 13, *A.C.*, 494 F. Supp. 3d 170 (No. 18-cv-645) [hereinafter Plaintiffs' Memorandum] ("[T]he state defendants have not adopted sufficient policies and standards to ensure that the full 'quantum' of education necessary for civic preparation in the 21st century is being made available to all students in Rhode Island . . . ." (emphasis omitted)).

failed to provide a civics education necessary "to be capable citizens" able "to participate effectively" in a democracy.[245]

From this point of departure, the plaintiffs presented a story of *incapable and unprepared* students.[246] Consider the complaint, which characterized the putative class as follows:

> [T]he . . . defendants have *failed to provide* . . . students in the state of Rhode Island an education that is *adequate to prepare them to function productively as civic participants* capable of voting, serving on a jury, understanding economic, social and political systems sufficiently to make informed choices, and to participate effectively in civic activities.[247]

This passage captures the plaintiffs' core theory: Rhode Island has deprived them of "the basic knowledge, skills, experiences, and values they *need to function productively as civic participants* . . . . and . . . '*contribute . . . to the progress of our nation*.'"[248]

This narrative transcends the plaintiffs' briefing. It also animates their public communications—including the content and messaging on their website. As one example, during the trial, the website's homepage expressed the same message conveyed by the above block quote.[249] The website's "About" page, in turn, adds texture to this narrative by foregrounding the following statement and quote (from a class member):

> [The putative class is] being denied the opportunity for an adequate education to prepare them to be capable citizens.
>
> "I have attended the public schools in Rhode Island for my entire life and have not been exposed to how to engage sufficiently in critical

---

245 *See, e.g.*, Class Action Complaint at 2–4, *A.C.*, 494 F. Supp. 3d 170 (No. 18-cv-645); *see also* Plaintiffs' Memorandum, *supra* note 244, at 23 ("Whatever the specific elements of the 'quantum of education' that the Court may determine after trial, plaintiffs submit that it will include much more than the basic literacy skills that are the focus of the claims in *Gary B. v. Snyder*. . . .").

246 *See* Class Action Complaint, *supra* note 245, at 34 (advancing narrative that tethers "inadequate educational opportunities" to students "ill-prepared to function effectively in our society"); Plaintiffs' Memorandum, *supra* note 244, at 19 (arguing that class members are denied "an education that is adequate to prepare them to function productively as civic participants, even though such an education is being provided to other students in the state").

247 Class Action Complaint, *supra* note 245, at 3–4 (emphasis added); *see also id.* at 5–6 ("[D]efendants . . . failed to provide [the class] with adequate opportunities to develop the civic knowledge, skills, experiences and values they need to function productively as civic participants.").

248 Plaintiffs' Memorandum, *supra* note 244, at 27 (third alteration in original) (emphasis added) (quoting Plyler v. Doe, 457 U.S. 202, 223 (1982)).

249 *See* COOK (A.C.) V. MCKEE, http://www.cookvmckee.info [https://perma.cc/6XU2-T9KF].

> thinking or even the basics of how to participate in democratic institutions."[250]

In essence, the plaintiffs characterize class members as the damaged byproducts of a dysfunctional educational system—a system that renders students unable to perform core functions in a constitutional democracy. To advance this narrative, the plaintiffs offer a series of factual allegations that detail the class members' alleged plight—in absolute terms and relative to students from whiter and wealthier schools. The plaintiffs cite, for example, a lack of physical resources in their classrooms,[251] a lack of quality teachers,[252] and the general inadequacy of their curriculum.[253]

Much of the foregoing resembles *Gary B.* One notable departure is that race and racial inequality are less explicit in the *A.C.* plaintiffs' narrative. In *Gary B.*, the plaintiffs made racial inequality central to their legal claims.[254] The *A.C.* plaintiffs, in contrast, deploy a narrative that renders race less salient to their story.[255]

This is not to say that race is absent from *A.C.* On the one hand, the plaintiffs define the class in race-neutral terms. At the same time, they situate Black and Latinx students as the face of the litigation—that

---

250 *About*, COOK (A.C.) V. MCKEE, http://www.cookvmckee.info/about [https://perma.cc/5EX9-KAFL].

251 Class Action Complaint, *supra* note 245, at 27 ("The plaintiffs attend schools that have out-of-date computers in inadequate numbers to sufficiently provide access to critical educational opportunities . . . . Few of the schools that plaintiffs have attended have the necessary databases for appropriate research necessary for civic preparedness.").

252 *Id.* at 26 ("[T]he vast majority of teachers . . . have not been trained in civics in general, and, specifically, have received no training or inadequate training in how to facilitate meaningful conversations on controversial issues . . . ."); *id.* at 27 ("[M]ost teachers in Rhode Island have had no training in teaching media literacy skills and [few schools have] sufficient skilled library media specialists . . . .").

253 *Id.* at 28 ("[S]tudents in [plaintiffs' schools] . . . receive no instruction in how to conduct [online] research effectively . . . , how to determine the sources of information . . . , and whether such information is accurate or misleading.").

254 This resulted from the plaintiffs' express framing and the backdrop of Detroit—a city associated with its majority-Black population. *See, e.g.*, Brief of Appellants, *supra* note 227, at 3 ("These schools, which serve almost exclusively low-income *children of color*, are schools 'in name only'—buildings that warehouse children instead of educating them." (emphasis added)); Terrell Jermaine Starr, *Detroit: Why The D Is the Blackest City of All Time*, ROOT (Feb. 26, 2019, 9:00 AM), https://www.theroot.com/detroit-why-the-d-is-the-blackest-city-of-all-time-1832881152 [https://perma.cc/ACG2-MDLK].

255 *See* Plaintiffs' Memorandum, *supra* note 244, at 36 ("The present plaintiffs might be described . . . as a 'large, diverse and amorphous class unified only by the common factor of residence in districts that happen to [provide substantially less adequate civic preparation] than other districts.'" (second alteration in original) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))).

is, the primary victims of Rhode Island's educational shortcomings who graduate unable to "contribute . . . to the progress of our nation."[256]

For example, even as the plaintiffs decry Rhode Island's public education in universalist terms, they highlight the disproportionate impact on low-income Black and Latinx students.[257] To buttress these general allegations, the plaintiffs cite several racial achievement gaps. The following examples are illustrative:

- "For the 2015–[2016] school year, only 24% of Latino students met 3rd grade expectations in reading, compared with 49% of white students, and 28% of Latino students met 3rd grade expectations in math, compared to 53% of white students."[258]
- "[O]nly 22% of African American and Latino students and 23% of low-income students achieved proficient scores on [statewide English] exams, compared with 49% of White students."[259]
- "For 2017, Rhode Island's Latino students ranked 49th out of the 49 states for which data was available."[260]
- The plaintiffs provide nationwide statistics on the "'civic empowerment gap' for many African-American and Latino students and for many students from low-income families."[261]
- "[O]n the 2014 NAEP 8th Grade test in civics, while 32% of white eighth graders performed at or above the proficient level, only 9% of black students and 12% of Latino students did the same."[262]

The plaintiffs also highlight the plight of English Language Learners (ELLs):

> Many students in Rhode Island, and especially those attending schools in low-income areas, and many [ELLs], *do not develop*

256 *Id.* at 27 (alteration in original) (quoting Plyler v. Doe, 457 U.S. 202, 223 (1982)). As I've noted throughout, I am not contesting that race impacts a student's ability to access well-resourced sites of learning in Rhode Island. Race matters. But that reality does not determine how one can or should describe this reality or the students it impacts.

257 *See* Class Action Complaint, *supra* note 245, at 31 ("Because of resource deficiencies in schools in low-income areas, there has been an increasing gap in recent years between the experiential and extracurricular opportunities available to students in affluent communities and those from low-income households, many of whom are African-American, Latino or come from low-income areas."); *id.* at 36 ("The lack of meaningful educational opportunities for Latino students in Rhode [Island] is a direct cause of grossly unacceptable academic outcomes for these students.").

258 *Id.* at 36.

259 *Id.* at 25.

260 *Id.* at 37.

261 *Id.* at 13.

262 *Id.*

> *adequate basic verbal skills* and *do not develop critical analytic abilities* because of the poor quality of basic instruction and of instruction in bi-lingual and English as a Second Language (ESL) instruction . . . .[263]

The plaintiffs add that ELLs "fail to properly develop their English language skills to a level necessary for them to read and converse in the English language and . . . vote with full knowledge of relevant political issues and . . . *function effectively as civic participants*."[264]

Two aspects of the ELL framing deserve mention. First, although ELL is not formally a race-specific category (that is, it is not expressly limited to Latinxs), the category is not race-less. To begin, the plaintiffs note seventy-five percent of ELLs are Latinx.[265] Moreover, English has long been conceptually tethered to whiteness and weaponized as a tool of racial subordination—particularly, though not solely, vis-à-vis Latinxs.[266] In other words, the category ELL—whatever its formal definition—is likely understood in racial terms.

Second, the plaintiffs characterize English literacy as a prerequisite for civic participation and, by extension, position ELLs as unable to engage in core democratic functions. One could dispute the accuracy of this claim.[267] But even if one accepts the claim's descriptive accuracy, one could still critique the frame. Here, the plaintiffs suggest that ELLs are unable to participate effectively in American democracy because they lack English proficiency. In other words, the plaintiffs employ a standard deficit frame linked to an internal causal theory of inequality.

Consider an alternative frame. Rather than emphasize the ELLs' lack of English proficiency, the plaintiffs could have highlighted systemic design flaws—e.g., ways that community governance renders sites of civic engagement inaccessible to non-English speakers.[268] This

---

263 *Id.* at 25 (emphasis added).

264 *Id.* at 37 (emphasis added).

265 *Id.*

266 *See* LAURA E. GÓMEZ, INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM 112–16 (2020) (describing English-only movements designed to subordinate Mexican-Americans and other Latinx communities).

267 Non-English speakers participate in a broad range of civic endeavors across the country. One of many examples is Union de Vecinos, a Boyle Heights–based community organization led by multiple individuals for whom Spanish remains a primary language. *See* Pea Nunez, *Solo el Pueblo Salva al Pueblo*, YOUTUBE (June 2, 2021), https://www.youtube.com/watch?v=EV5Z2OyBpYQ (last visited Apr. 25, 2022).

268 One could analogize to debates that attribute inaccessible public spaces to a person's disability, as opposed to structural design choices that privilege able-bodied individuals. *See generally* Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26 (2020).

alternative frame does not deny that English language skills matter. But it pivots from a narrative of perceived minority deficits to structural or institutional failures. As a result, this alternative framing is less likely to reinforce notions of racialized inferiority (associated with certain non-English languages) and more likely to invite structural remedies (that focus on reforming deficient systems, not remedying deficient individuals).

Given the availability of alternative frames, why did the plaintiffs hew toward a deficit frame and internal theory of inequality? One explanation is doctrine. As in *Gary B.*, the *A.C.* plaintiffs had to prove that their state deprived them a basic minimum education. This legal hurdle, in turn, behooved the plaintiffs to trace civic engagement problems to student shortcomings (the consequence of an inadequate education), not a political ecosystem that excludes otherwise effective and essential civic participants.

Through their briefing, the plaintiffs reinforced this deficit frame by comparing the class members to "high-achieving" schools that provide "their students an education *sufficient to prepare them for capable citizenship* in accordance with the requirements of the Constitution."[269] In other words, the plaintiffs juxtaposed class members (who are framed as *in*capable citizens) with students from better-resourced schools (who are framed as *capable* citizens). As with the class profile, these comparisons are racially embodied, even if facially race neutral. The plaintiffs noted, for example, that one of the "high-achieving" schools is over ninety-five percent white.[270]

As I note throughout, I do not fault the plaintiffs for identifying and challenging sites of racial inequality. My concern, rather, is that the plaintiffs employ racial frames that risk reinforcing the social forces that create that inequality in the first place. Consider, for example, how the race-laden comparison of "good schools" and "bad schools" could entrench anti-Black bias. For many Americans, (a) the prototypical poor and undereducated student is Black; and (b) the prototypical Black

---

269 Class Action Complaint, *supra* note 245, at 37 (emphasis added); *see also* Plaintiffs' Memorandum, *supra* note 244, at 33 ("[S]tudents attending schools in . . . affluent Rhode Island school districts are being provided an education that is preparing them well for civic participation, in stark contrast to the inadequate civic preparation that the individual plaintiffs and class they represent are receiving.").

270 Class Action Complaint, *supra* note 245, at 38 ("North Kingstown High School in the affluent North Kingstown school district provides their 1400 students, only 1% of whom are African American and 3% of whom are Latino, meaningful opportunities for an education that prepares them to function productively as civic participants.").

student is poor and undereducated.[271] This contrasts with (a) the prototypical middle-class and well-educated student, who is viewed as white; and (b) the prototypical white student, who is viewed as middle class and well educated. The plaintiffs' own narrative tracks this story—but it further suggests that some (that is, white students) are capable citizens and others (that is, Black students) are not. In other words, by juxtaposing white wealth and privilege against Black and brown poverty and underachievement, the plaintiffs reinforce dominant racialized narratives about who has, and who lacks, academic competence—not to mention the capacity for self-governance.[272]

Notably, the plaintiffs' narrative strays from their own data. For example, by emphasizing racial disparities, the plaintiffs obscure the large numbers of white Rhode Island students who underachieve—per plaintiffs' own metrics.[273] The plaintiffs, in turn, flatten Black and brown students to the educational shortcomings of some while decoupling academic underachievement and whiteness—even though significant numbers of Rhode Island's white students academically underperform.[274] In other words, the plaintiffs' well-intended narrative betrays aspects of the data and reifies pervasive racialized presumptions about intellectual ability.[275]

---

271 *Cf.* Maria Krysan, Reynolds Farley & Mick P. Couper, *In the Eye of the Beholder: Racial Beliefs and Residential Segregation*, 5 DU BOIS REV. 5, 19 (2008) ("Many Whites in racially divided metropolises, such as Chicago and Detroit, have, we presume, an image of Black neighborhoods as problem areas with lower-cost homes, poorly performing schools, and considerable risks of being robbed or assaulted. Perhaps unconsciously, Whites borrow from their perceptions of what they think a typical African American area is and negatively rank a neighborhood shown in a video when they see Blacks on the block.").

272 *See* Feingold & Carter, *supra* note 73, at 1707–08 (discussing how racial stereotypes and cognitive heuristics reinforce racialized presumptions of academic incompetence).

273 *See, e.g.*, *supra* notes 258–59, 262 and accompanying text.

274 *Cf.* Carbado, Turetsky & Purdie-Vaughns, *supra* note 70, at 177 ("Whites, on the other hand, largely escape the mismatch critique. . . . The assumption seems to be that, unlike African American beneficiaries of affirmative action, white working-class beneficiaries will not be in over their head.").

275 Moreover, the image of disengaged students contrasts with the students involved with *A.C.* As detailed in a *Boston Globe* article and captured in a conversation with Trevor Noah, the lawsuit energized and inspired students. *See* Allie Reed, *14 Students Sued Rhode Island over Civics Education. Now, They're More Politically Engaged than Ever*, BOS. GLOBE (Nov. 11, 2020, 1:49 PM), https://www.bostonglobe.com/2020/11/11/metro/14-students-sued-ri-over-civics-education-now-theyre-more-politically-engaged-than-ever [https://perma.cc/5G52-6LL7] ("'I am part of the change that I want to see,' Sok said. 'I hope that the state of education improves, and that everyone has the same opportunities.' The dismissal of their case [is] not the end of the road for the plaintiffs, they said. . . . 'We're not giving up anytime soon,' Sok said. 'Everyone is still fighting.'"); *The Daily Show with Trevor Noah* (Comedy Central television broadcast June 25, 2019).

Even if one accepts that deficit frames can produce unintended consequences, a key question emerges: In the ecosystem that is public discourse, could narratives arising out of civil rights litigation actually produce backlash, facilitate misdiagnoses, or otherwise compromise projects of racial justice? In other words, is there actual cause for concern? The short answer, to which I now turn, is yes.

C. *Why It Matters: Race Making Through Racial Storytelling*

Decades of research reveal the prevalence of racial biases and their influence over human judgment and decision-making.[276] In recent years, lay and academic audiences have shown growing interest in the causal link between racial biases (implicit biases, in particular) and racial inequality. Comparably less attention has been paid to the source of racial biases. Below, I locate civil rights litigation as one potential source.

Broadly speaking, racial biases arise from direct and vicarious experiences with individuals from racial groups.[277] Direct experiences involve "actual experiences with people of other races" that are unmediated "by a third party such as the mass media."[278] Vicarious experiences, in contrast, refer to "imagined experiences—both fictional and nonfictional—that are mediated through stories told by parents, teachers, friends, and increasingly by the electronic mass media."[279]

The United States remains a hypersegregated society. As a result, most people in this country—whites in particular—lack meaningful

---

276 *See* Bodenhausen & Hugenberg, *supra* note 128, at 11 ("In general, social attitudes and expectancies can exert many noteworthy effects on what people perceive and how they perceive it."); Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 532 (2019) ("[H]umans possess systemic and pervasive biases—often in the form of attitudes and stereotypes—about social categories like race, gender, and age."); Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 629–33 (2015) (discussing competing meta-analyses of implicit bias).

277 *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166 (2000) ("From youth, we infuse racial categories with meanings based on 'experiences' with people mapped to these [racial] categories."); Ramasubramanian, *supra* note 124, at 103 ("Media messages, along with numerous other factors such as family and friends, play a crucial role in forming and maintaining social stereotypes."). Racial categories are themselves socially constructed—in that they do not preexist the cultures within which they arise. *See* Kang, *supra*, at 1146–47 (describing racial category as one component of the "social construction" of race).

278 Kang, *supra* note 277, at 1166–67.

279 *Id.* at 1166.

direct contact with racial out-groups.[280] This backdrop means vicarious experiences play an outsized role in forming, circulating, and entrenching racial biases.[281] In practice, popular culture—a principal driver of vicarious experiences—comprises the primary medium through which most white Americans interact with, and "learn" about, communities of color.[282] In other words, traditional mass media, local news, and social media constitute potent conduits of racial biases.[283]

It should be no surprise, therefore, that dominant cultural narratives—including racial stereotypes and theories of inequality—produce, and are produced by, the racialized content and imagery embedded across media platforms.[284] Given the inextricable link that binds public discourse, racial biases, and contemporary inequities,[285] activists on the Left have rightly criticized the mainstream media and political Right for trafficking in racialized caricatures.[286] Yet, as outlined above,[287] the Left also often employs reductive narratives. These include

---

280 *See* Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 25, 26–27 (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing hypersegregation); SCHNEIDER, CAREY, PIAZZA & WHITE, *supra* note 160, at 4 (identifying hypersegregation across Massachusetts's public K–12 schools); Sugrue, *supra* note 202, at 265 ("[F]ew Americans of different racial and ethnic backgrounds interact in a meaningful way on a daily basis.").

281 *See* Feingold & Carter, *supra* note 73, at 1706 ("[S]tereotypes, particularly as they operate across social groups, are often the product of vicarious experiences—that is, 'simulated engagements with racial others provided through various forms of the media or narrated by parents and our peers.'" (footnote omitted)).

282 *See* ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 49 (2000).

283 *See* Ramasubramanian, *supra* note 124, at 103–07 (arguing that portrayals of race on television can produce or reinforce biased perceptions about racialized groups and shape theories that explain the subordinate status of certain racialized groups).

284 *See* Kang & Lane, *supra* note 148, at 515 ("Indeed, recent findings have provided further evidence that television can be seen as transmitting something like Trojan horse viruses that exacerbate implicit biases against racial minorities.").

285 *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1553–54 (2005) (analogizing local news media to Trojan horse computer viruses that covertly infect viewers with implicit racial biases); *see also* Shanto Iyengar, *Framing Responsibility for Political Issues: The Case of Poverty*, 12 POL. BEHAV. 19, 21 (1990).

286 *See, e.g.*, RACHEL D. GODSIL, BENJAMIN F. GONZALEZ & EMILY BALCETIS, PERCEPTION INST., FINAL EVALUATION OF *HALAL IN THE FAMILY*: MEASURING EFFECTS ON IMPLICIT AND EXPLICIT ANTI-MUSLIM BIAS 7 (2015) ("[P]opular culture has tended to underrepresent, marginalize, and make caricatures of members of different racial and ethnic groups, who tend to be depicted within several formulaic tropes rather than as fully developed, unique characters." (citation omitted)); Press Release, Color of Change, Civil Rights Group Demands that Fox Drop *Cops* After 25 Years of Exploiting Negative Racial Stereotypes, https://colorofchange.org/press_release/civil-rights-group-demands-fox-drop-cops-after-25 [https://perma.cc/LE2U-ATNN].

287 *See supra* Section I.B.

deficit frames that flatten group identity by foregrounding and emphasizing what a community is perceived to lack. The danger, as noted throughout, is that these racial frames—even if deployed in the name of equality—will entrench the same narratives deployed to legitimate inequality.

Yet, even if one accepts that deficit frames present this precise risk, one might still question the *relative* impact of deficit frames *deployed in the context of civil rights litigation*. This is an important question. Given the volume of racial discourse that populates popular culture, and the biases already embedded therein, is there reason to believe that deficit frames deployed in the context of litigation move the needle? And, even if they do, might the benefits outweigh the costs?

As for the latter question, the short answer is that litigation and strategic racial discourse need not exist as "either/or" propositions. This answer invites us to reframe the question: How can litigants avoid—or at least mitigate—deficit framing in the context of civil rights litigation? I explore this question in earnest in Part IV. But first, to conclude Part III, I offer three reasons why stakeholders ought to avoid deficit framing—even in civil rights litigation.

1. Unidentified Alternatives

Even if precise measurements are elusive, civil rights litigation generates a small fraction of the racial discourse in our information ecosystem. One might, accordingly, presume that deficit frames deployed during litigation have little impact on existing racial biases and dominant theories of inequality. Even accepting the above, it can be easy to understate the impact of deficit framing.

Specifically, to effectively gauge impact, one must identify the proper counterfactual. To some, the choice might appear as follows: (a) civil rights litigation *with* deficit frames or (b) civil rights litigation *without* deficit frames (or, for that matter, no civil rights litigation).

This is not, however, the only possible counterfactual—nor, would I argue, the appropriate one. The question need not be *whether* to discuss racial inequality (or *whether* to engage in civil rights litigation). Rather, the question ought to be *how* to discuss racial inequality (or *how* to engage in civil rights litigation).

Having reframed the question, an alternative inquiry emerges as follows: (a) civil rights litigation *with deficit frames* or (b) civil rights litigation *with asset frames* (or another form of racial discourse that disrupts dominant racial narratives). The original formulation treats the potential impact of deficit framing as a matter of subtraction—that

is, the effect of removing deficit frames from the status quo. Here, in contrast, impact turns on subtraction *and* addition—that is, replacing deficit frames with counterframes that challenge the status quo. Understood in this way, civil rights litigation transforms from a site of discursive risk (due to deficit frames) to a site of discursive resistance. That change, even if impossible to quantify, surely matters.

2. Audience Matters

Another relevant variable is audience. We would not expect school-financing litigation, and the narratives emanating therefrom, to have an equal impact on all members of society. Just as high-volume television viewers are most affected by racial representations embedded in local news,[288] individuals interested in school-financing litigation are likely most affected by this information source. This would include educators, a category I employ to capture teachers, administrators, and other relevant stakeholders. Yet, unlike most high-volume television viewers (who lack a direct ability to influence national or local policies), educators enjoy a unique ability to impact—for better or worse—racial equality across educational settings.[289]

To appreciate this dynamic, consider the following hypothetical. Imagine a prototypical historically white-serving university. The institution boasts a cohort of dedicated and well-meaning teachers, administrative staff, and senior leaders. Nonetheless, it experiences a period of intense student protest. Following a semester of unrest, the university appoints a committee with two mandates: (1) identify sites of racial inequality within the school and (2) prescribe responsive remedies.

Just as the committee gets underway, national attention turns to two high-profile school-financing lawsuits—which I will respectively call "Case *A*" and "Case *B*." Half of the task force happens to follow Case *A*; the other half follows Case *B*. Among other similarities, both lawsuits

---

288 DIXON, *supra* note 146, at 51 ("In general, news and opinion consumers would come to see a false world populated with Black family dysfunction, poverty, welfare dependence, criminal behavior and absentee fathers.").

289 Jordan G. Starck, Travis Riddle, Stacey Sinclair & Natasha Warikoo, *Teachers Are People Too: Examining the Racial Bias of Teachers Compared to Other American Adults*, 49 EDUC. RESEARCHER 273, 273–74 (2020). In a 2020 survey, over thirty percent of responding teachers indicated the belief that Black parents value education less than white parents. Holly Kurtz, *Educators Support Black Lives Matter, but Still Want Police in Schools, Survey Shows*, EDUC. WEEK (June 25, 2020), https://www.edweek.org/leadership/educators-support-black-lives-matter-but-still-want-police-in-schools-survey-shows/2020/06 [https://perma.cc/739U-8D9G].

include adequacy challenges and feature students of color from low-income communities. But the cases diverge in one key respect. Whereas the Case *A* plaintiffs employ a deficit frame that emphasizes student underachievement and plight, the Case *B* litigants employ an asset frame that portrays a resilient community of students who achieve more with less.

It is not difficult to see how the competing frames might shape how committee members view racial inequality at their own school. Moreover, the lawsuits do not exist in a cultural vacuum. To the contrary, they arise against a societal backdrop marked by pervasive racialized expectations regarding who belongs at, who is expected to succeed in, and who is presumptively unqualified to attend institutions of higher education.[290] Case *A* tracks and reinforces these expectations. As a result, committee members who follow Case *A* are more likely to (a) expect that Black and brown students will be underrepresented in their university; (b) expect racial achievement gaps at the university; and (c) attribute any underrepresentation and/or achievement gaps to minority deficiencies (e.g., a perceived lack of training, preparation, or "merit").[291] From these conclusions, the committee members are more likely to view individual-level remedial programming (e.g., skills-based training) as the best way to reduce perceived achievement gaps.[292]

In contrast, consider how the other committee members approach their task. Informed by the racial frame that animated Case *B*, these committee members are less likely to embrace racial narratives that presume Black or brown academic incompetence.[293] The alternative frame, in turn, can shift expectations about, and interpretations of, any observed racial disparities. Rather than attribute disparate outcomes to student shortcomings, committee members may be quicker to ask whether environmental forces—e.g., fraught measures of merit, disparate treatment, or institutional culture—lock out or unevenly

---

290 *See* Feingold & Carter, *supra* note 73, at 1707–08 (introducing concept of "elite student paradigm" to outline and unpack how racial stereotypes and cognitive heuristics interact to produce racial lay theories that "render[] black students perpetual outsiders to the elite institution").

291 Any observed evidence of inequality is likely to reinforce preexisting racial narratives that assume minority deficiencies and institutional neutrality.

292 *Cf.* Okonofua, Walton & Eberhardt, *supra* note 155, at 385 ("Like teachers, Black students are exposed to negative stereotypes that impugn the intellectual ability of their group and that label them as out of control, violent, or dangerous.").

293 *See generally* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) (compilation of essays capturing the experience of female academics of color).

burden otherwise talented and motivated students from negatively stereotyped racial groups.

My point is not that institutional deficiencies explain all racial gaps all the time. But all too often, educational institutions fail to consider how environmental forces often compromise the basic goal of an equal learning environment.[294] Accordingly, when institutions presume student deficits and overlook institutional shortcomings, they invite a vicious feedback loop: (a) unequal learning environments produce, or exacerbate, achievement gaps that (b) reinforce racialized presumptions of belonging and competence, while (c) insulating the institution from meaningful critique.[295]

3. Litigation Shapes Social Meaning

There is at least one additional reason to take seriously the potential impact of deficit frames that arise in civil rights litigation. Civil rights lawyering can shape dominant "social meanings"[296] that structure how individuals, institutions, and society understand the underlying project of racial justice. With respect to school-financing doctrine, one could argue that the Supreme Court has erected a doctrinal regime that pushes litigants—and, by extension, the broader public—to think about educational justice in terms of racial-minority deficits.

To appreciate this dynamic, it may help to explore other doctrinal sites within the Supreme Court's education and equality jurisprudence. First, consider *Regents of the University of California v. Bakke*,[297] in which Justice Powell constitutionally tethered affirmative action to student-body diversity.[298] Prior to *Bakke*, affirmative action was widely viewed as a tool to remedy Jim Crow—that is, a necessary, if insufficient, tool to overcome the vestiges of legalized racial exclusion

---

294 *Cf.* Rosalee A. Clawson & Rakuya Trice, *Poverty as We Know It: Media Portrayals of the Poor*, 64 PUB. OP. Q. 53, 61 (2000) ("Thus, if attitudes on poverty-related issues are driven by inaccurate and stereotypical portrayals of the poor, then the policies favored by the public (and political elites) may not adequately address the true problems of poverty.").

295 *Cf.* Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. PA. J.L. & SOC. CHANGE 351 (2021) (comparing overwhelming success of HBCUs in successfully training and educating Black students to consistent failure of predominately white institutions).

296 *See* Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1483 (2020).

297 438 U.S. 265 (1978).

298 Professor Asad Rahim characterizes Justice Powell's *Bakke* opinion as "the quintessential example of the power of legal doctrine to change public discourse and institutional logic." Rahim, *supra* note 296, at 1483.

and subordination.[299] Justice Powell's *Bakke* opinion changed everything.

With limited exception,[300] Justice Powell embraced student-body diversity as the sole interest that could justify race-conscious admissions.[301] According to Professor Asad Rahim, this pivot "severed racial inclusion from the goal of remediation and the hope of equality."[302] The impact was swift, seismic, and enduring. Rahim explains that Powell's turn to diversity "helped to fundamentally reshape our society's understanding of the proper aims of affirmative action and, arguably, racial integration more generally."[303] The consequences transcend university admissions plans. From classrooms to boardrooms to presidential cabinets,[304] "diversity" has become a hegemonic—if often nebulous—concept through which Americans approach and frame questions of racial equality and inclusion.[305]

Diversity, albeit perpetually underdefined, has become the dominant frame through which we think about racial inclusion.[306] The consequences transcend semantics and terminology. When individuals or institutions view affirmative action through the lens of diversity, normative commitments can be reduced to a question of proportional representation. Lost, in turn, is a commitment to interrogate institutional arrangements that reproduce accumulated race and class privilege. Racial disparities, when present, are viewed as the unfortunate

---

299 *See id.* at 1483–84. To be sure, racial justice was never the sole motivation behind affirmative action. But, unlike today, affirmative action was conceptually linked to a societal project of desegregation animated by demands for racial equality.

300 Justice Powell did not foreclose the possibility that a university could, consistent with the Constitution, employ race-conscious admissions to remedy its own discrimination. *See Bakke*, 438 U.S. at 307 ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."). Moreover, Justice Powell noted that race-conscious admissions would confer "no 'preference' at all" if employed to correct a racial bias in student assessment. *See id.* at 306 n.43 ("To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all.").

301 *See* Rahim, *supra* note 296, at 1425–26.

302 *Id.* at 1483.

303 *Id.*

304 *See, e.g.*, Ally Mutnick & Laura Barrón-López, *New DCCC Chair Draws Diversity Warning from Colleagues as He Names Top Staffer*, POLITICO (Dec. 22, 2020, 5:32 PM), https://www.politico.com/news/2020/12/22/new-dccc-chair-diversity-warning-top-staffer-449803 [https://perma.cc/4Q2A-QUBV].

305 *See* Feingold, *supra* note 79, at 14 ("Institutions often seek 'diversity' without first having done the work to define, precisely, why they want diversity, or to identify, concretely, what sorts of diversity will get them there.").

306 *See* ELLEN BERREY, THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE 6–9 (2015).

consequence of neutral market forces and selection processes that formally attend to race are maligned as "racial preferences."[307] In short, Justice Powell triggered a nationwide turn toward a conception of diversity that decouples race from racism—a conceptual shift that continues to constrain how we view affirmative action and antiracist projects more broadly.[308]

Bakke is not the only example of civil rights litigation leading to Supreme Court jurisprudence that shapes public discourse and institutional logics on a matter of racial equality. Another example is *Brown v. Board of Education*, which remains the Supreme Court's most celebrated decision. This praise often elevates the *Brown* Court's rejection of American apartheid. In certain respects, *Brown* deserves praise for denouncing Jim Crow—a system the Court had explicitly endorsed in *Plessy v. Ferguson*.

But, as others have cautioned, common celebration of *Brown* overlooks how the Supreme Court (a) misdiagnosed segregation as the source (as opposed to as symptom) of white supremacy and (b) reified racial hierarchy in the United States. As one example, *Brown* and its animating rationale identified integration as the proper remedy for the racial harm of segregation.[309] In the abstract, this makes sense and hardly appears objectionable. But, in practice (and public imagination), calls for integration often carried a presumptive preference for whiteness (and white schools) over blackness (and Black schools).[310] Moreover, the turn to integration came at the expense of alternative remedial visions—e.g., an emphasis on equal resources (for Black schools) over inclusion (in white schools).[311]

---

307 *See* Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 709–10, 734 (2019).

308 *See* Feingold, *supra* note 79, at 15 ("Justice Powell divorced diversity from the anti-racist projects that only decades earlier had fueled the dismantling of state-sanctioned exclusion and subordination across sectors of American life.").

309 This is reflected, for instance, in *Brown II*, when the Supreme Court reiterated that racial integration (into white schools) was the proper remedy for racial exclusion (from white schools). *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (directing district courts to take actions "necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases").

310 *See* Isaac Unah & Catherine M. Blalock, *The Twilight of* Brown*: Empirical Analysis of Resegregation and Voluntary Adoption of School Integration Policies Across the United States*, 30 U. FLA. J.L. & PUB. POL'Y 227, 229–30 (2020).

311 *See* Derrick A. Bell, *Dissenting*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185, 187 (Jack M. Balkin ed., 1st paperback ed. 2002) ("In their determination to strike down state-mandated segregation, the petitioners [in *Brown*] ignore the admonishment of W. E.

This logic bore material and symbolic consequences.[312] To begin, the one-directional (that is, Black to white) current of integration, alongside anti-Black racism, decimated vibrant Black educational communities and educators.[313] Moreover, by any measure, integration is a failed project. Notwithstanding a period of meaningful gains, schools are as segregated as ever, and race and class remain strong predictors of school quality.[314]

Symbolically, by embracing a one-directional model of desegregation, *Brown* reified the common-sense notion that white schools (and white teachers and white students) are superior to Black schools (and Black teachers and Black students). This history, and the narratives it reinforced, remain lodged in our cultural fabric. Nearly seventy years after *Brown*, white Americans continue to prefer whiter schools and whiter neighborhoods—even when presented with objectively indistinguishable alternatives.[315]

Ultimately, *Bakke* and *Brown* are imperfect analogies for the school-financing doctrine that governs contemporary adequacy challenges. Nonetheless, these cases reveal how civil rights litigation and the law it produces can shape how we think about, talk about, and seek to remedy racial inequality in the United States. In *Bakke*, Justice Powell catalyzed a turn to diversity (and away from racial justice) that continues to influence public discourse and consciousness on matters of racial inclusion and representation. In *Brown*, the Supreme Court conflated access to white space with racial justice. This integrationist vision of racial justice, and the implicit racial hierarchy on which it rests,

---

B. DuBois . . . . 'Negro children need neither segregated schools nor mixed schools. What they need is education.'"); Derrick A. Bell, Jr., *Waiting on the Promise of* Brown, 39 LAW & CONTEMP. PROBS. 341, 343–46 (1975).

312 Racialized power over spatial territory propels (a) the racialized misallocation of resources and (b) the production of racial meaning. *Cf.* DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 1–2 (1st papercover ed. 2008) (disaggregating concept of racial "stratification" into material (e.g., income or wealth) and symbolic (e.g., prestige or social standing) dimensions).

313 *See* James E. Haney, *The Effects of the* Brown *Decision on Black Educators*, 47 J. NEGRO EDUC. 88, 90 (1978) ("In North Carolina, 128 out of 131 white school superintendents believed that it would be 'impracticable to use Negro teachers' in schools under their jurisdiction.").

314 *See* Unah & Blalock, *supra* note 310, at 242, 244. One should be careful not to overstate the overlap between race and class. In the United States, residential segregation is more likely to track race than it does class. *See* Farley, Steeh, Krysan, Jackson & Reeves, *supra* note 160, at 751 ("If residential segregation were a matter of income, rich blacks would live with rich whites and poor blacks with poor whites. This does not happen.").

315 *See, e.g.*, Krysan, Farley & Couper, *supra* note 271, at 18–20; Courtney M. Bonam, Hilary B. Bergsieker & Jennifer L. Eberhardt, *Polluting Black Space*, 145 J. EXPERIMENTAL PSYCH. 1561, 1561–63 (2016).

continues to shape dominant conceptions of educational equality in America.

It may be that school-financing doctrine never attains the cultural resonance or impact of a *Brown* or *Bakke*. Nonetheless, prevailing doctrine pushes litigants—and by extension, the public—to think about educational justice in terms of student deficits, a frame that is neither inevitable nor most conducive to realizing a fairer and more equal educational landscape. For advocates, this backdrop poses a question: How can stakeholders avoid problematic racial frames without giving up school-financing litigation? In the next and final Part, I offer some provisional thinking on a way out of this civil rights catch-22.

IV. A WAY OUT?

Framing matters. That much is clear. And racial frames that emphasize community deficits appear prone to hinder short- and long-term projects of racial reform—even when mobilized in the context of civil rights litigation. What, then, are we to do? Given the unintended consequences that can follow even successful litigation, how should communities, attorneys, and students balance the potential benefits and risks of litigation?

Below, I offer provisional thoughts on one way forward. Here, I focus on litigants' autonomy to determine *how* they frame racial inequality—even under doctrinal constraints. To be clear, my focus on litigant behavior (per the racial stories they tell) should not be viewed as *the* fix to the catch-22 outlined herein. A more comprehensive and structural response would also center Supreme Court jurisprudence—the source of our catch-22—and consider how doctrinal changes might mitigate the bind plaintiffs and their attorneys face.

Nonetheless, I focus on litigants for two primary reasons: First, nothing precludes civil rights plaintiffs and their attorneys from mobilizing alternative racial frames. Constraints will always exist—whether they be doctrinal or simply competing visions among stakeholders. But, as I discuss below, doctrine is not determinative—particularly when it comes to public-facing communications that need not satisfy discrete legal elements.

Second, there are examples of successful litigation in which plaintiffs highlight racial inequality without reverting to deficit frames. One example from the domain of education, to which I now turn, is *Smith v. Regents of the University of California*. *Smith* is noteworthy because the plaintiffs employed a racial narrative that juxtaposed student talent, resilience, and potential against a backdrop of biased

tests and institutional deficiencies. For multiple reasons, the underlying claims in *Smith* rendered doctrine less restrictive than would be the case in adequacy challenges like *Gary B.* or *A.C.* Nonetheless, *Smith* offers one route to reframing racial inequality.

A. Smith v. Regents

In 2019, a coalition of students and organizations sued the University of California Regents (UC) for using the SAT and ACT within its admissions process.[316] The plaintiffs self-identify as "students and organizations that are committed to college access for underrepresented minority students and students with disabilities."[317] Given *A.C.* and *Gary B.*, one might expect the *Smith* plaintiffs to emphasize the students' underachievement and academic deficits. In fact, the *Smith* plaintiffs do just the opposite—and in so doing, they resist dominant narratives that portray Black and brown students as unprepared for the rigors of higher education.[318]

From the complaint's opening paragraphs, the *Smith* plaintiffs center the students' individual worth and merit. Their message is clear and consistent: institutional failures and biased tests (that confer unearned race and class preferences on wealthy and white students) unfairly disadvantage talented and accomplished young people of color.[319] To the extent deficits exist in this story, they lie with the UC

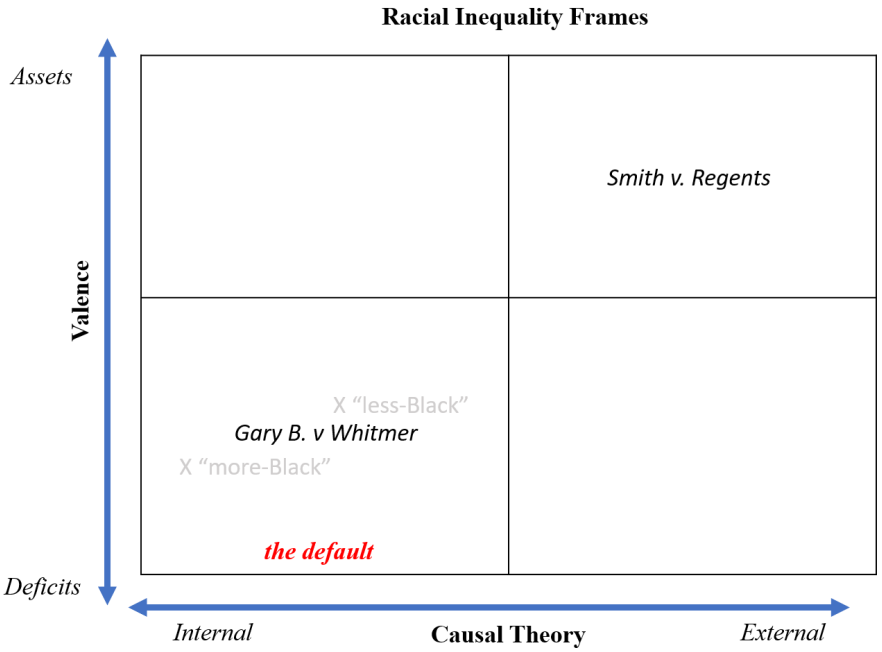
316 Complaint for Declaratory and Injunctive Relief, Smith v. Regents of the Univ. of Cal., No. RG19046222 (Cal. Super. Ct. Dec. 10, 2019) [hereinafter Complaint].

317 *Id.* at 8.

318 *See id.* at 4 ("[T]he UC admissions process . . . creates formidable barriers to access to public higher education for deserving students from low-income families, students from historically underrepresented racial and ethnic groups, and students with disabilities."); *id.* at 99 ("Defendants' own data . . . shows the continued reliance on the SAT and ACT tests to be a substantial factor in *excluding these deserving Plaintiffs from their rightful college opportunities* and all the benefits that flow therefrom." (emphasis added)).

319 *See id.* at 8 ("Student plaintiffs are four talented and accomplished young people whose ability to access public higher education has been hindered by UC's SAT or ACT score requirement."); *id.* at 6 ("UC psychometricians have found that up to 12 percent of items are biased against Black students, and up to 10 percent of items are biased against Latinx students."); *id.* at 24 ("[W]hereas students with inflated scores were 'disproportionately male, affluent, white or Asian, and with highly educated parents,' students with scores that were markedly lower than their high school grades would predict were 'disproportionately female, black or Latin[x], low-income, and first-generation.'" (second alteration in original)); *id.* at 26 ("In other words, students' socioeconomic characteristics—rather than their individual merit—predict almost 40 percent of the variation in their SAT and ACT scores."); *id.* at 87 ("[T]he statewide admissions index . . . provides a wealth and race bonus to White and affluent students . . . .").

system and the tests it relies upon.[320] The plaintiffs specifically critique the SAT and ACT as "prox[ies] for students' wealth and accumulated advantage."[321] UC's use of such tests, in turn, corrupts even the pretense of meritocracy by "systematically and unlawfully den[ying] talented and qualified students with less accumulated advantage a fair opportunity to pursue higher education at the UC."[322]



Returning to our racial inequality frames, *Smith* represents our first encounter with a narrative that falls in the upper-right quadrant—that is, a narrative that emphasizes student assets and attributes unequal outcomes to external forces (e.g., institutional deficiencies). *Smith* offers a useful reference point, in part, because the plaintiffs neither elide nor diminish how race shapes institutional access. To the contrary, the plaintiffs center race within their analysis and critique. Nonetheless, they flip a common script. Whereas dominant narratives present damaged and deficient students, the plaintiffs portray a broken

320 *See id.* at 24 ("[T]he College Board itself has demonstrated that the SAT treats students with less accumulated advantage unfairly.").

321 *Id.* at 25.

322 *Id.* at 4; *see also id.* at 3 ("[The] SAT and ACT . . . are demonstrably discriminatory against the State's least privileged students . . . ."); *id.* at 3–4 (arguing that UC does not meet its "obligation to provide equal access to all qualified students"); *id.* at 27 ("UC is knowingly using a metric that weighs in favor of more affluent students relative to students with less accumulated advantage.").

institution as the story's chief antagonist. In this sense, the plaintiffs contrast their assets with the university's deficits.

Moreover, the plaintiffs do not ignore evidence—including statistics—of racial inequality.[323] Given the lawsuit's aim, it would be hard to imagine a complaint that omitted racial gaps in test performance or admissions rates. One might wonder, accordingly, whether exposure to the litigation—and, specifically, statistics of racial inequality—could trigger the backlash discussed throughout. For multiple reasons, the plaintiffs take measures that should mitigate that risk.

First, the plaintiffs do not allow the facts to "speak for themselves."[324] Recall that in the studies outlined above,[325] evidence of inequality was presented alone. As a result, participants were left to draw their own conclusion—often leading to internal causal theories. Here, in contrast, the plaintiffs complement the data with an explicit causal story that explains, in express detail, the provenance and relevance of any observed racial disparities. Specifically, the plaintiffs trace racial disparities, both in test performance and admission rates, to fraught exams and institutional reliance thereon—not to unmotivated, unprepared, or incapable students. In so doing, the plaintiffs resist the often unspoken but powerful presumption that disparities track actual gaps in preparation and potential.[326]

Second, the plaintiffs decouple the related association that links elite universities and whiteness.[327] As one example, the plaintiffs indict UC's current admissions regime as "granting a wealth and race bonus to affluent and White students."[328] This framing calls attention to unearned race and class advantages that UC, through its admissions process, extends to white and wealthy students. Relatedly, the plaintiffs expose how reductive and unmindful presumptions about Asian

---

323 *See id.* at 6 ("The highly discriminatory nature of the SAT and ACT has resulted in starkly disparate student outcomes. . . . [A]mong students taking the SAT in California, 45 percent of White students scored 1200 or above, compared to only nine percent of Black students and 12 percent of Latinx students. Only one percent of Black students and two percent of Latinx students scored in the top score bracket, compared to 12 percent of White students." (footnote omitted)).

324 *See* Hetey & Eberhardt, *Numbers Don't Speak for Themselves*, *supra* note 20.

325 *See supra* Section II.A.

326 *See* Complaint, *supra* note 316, at 83–84 (faulting UC for relying on deficient tests that "displace[] high-performing . . . underrepresented minority applicants from the top tiers of the UC applicant pool").

327 *See* Feingold & Carter, *supra* note 73, at 1707–09 (describing "elite student paradigm" whereby white students are presumed to belong on elite university campuses).

328 Complaint, *supra* note 316, at 75.

success mask meaningful differences across Asian ethnicities.[329] In so doing, the plaintiffs resist model-minority myths that, beyond distorting the Asian American experience, attribute Black or brown underperformance and underrepresentation to inferior cultural values.[330]

Third, the racial disparities presented in *Smith* are subordinate to other facts and a consistent narrative that foregrounds the plaintiffs' noteworthy achievements and accolades. As a result, this evidence of inequality—as a proxy for community deficits—is rendered less salient than in *Gary B.* or *A.C.* The statistics, in turn, are less prone to activate and reinforce racial stereotypes and related narratives that rationalize the status quo.

In total, *Smith* offers a roadmap for litigants to discuss race and racial inequality without inviting the pitfalls that follow deficit frames.[331] At the same time, context matters. Not all legal challenges will be as inviting to the type of racial framing that animated *Smith*. That said, *Smith* still offers a road map to guide racial discourse across civil rights domains. Below, to conclude, I explore how the *Gary B.* and *A.C.* plaintiffs might have reframed their disputes to better model the emphasis on assets and institutional deficiencies that animates *Smith*.[332]

---

329 *See id.* at 85 ("Korean and Taiwanese applicants had acceptance rates of 19.18 percent and 18.40 percent, respectively, as compared to acceptance rates of 12.35 percent for Filipinx applicants and 9.55 percent for Hmong applicants.").

330 Racialized narratives that rationalize the underrepresentation of Black and brown students are enmeshed in, and inseparable from, narratives that attribute the perceived overrepresentation of Asian students to hard work and industriousness. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 244 n.42 (2022) ("The model minority stereotype has deep roots in U.S. history and has long been used to juxtapose Asian Americans and Black Americans.").

331 The racial discourse in *Smith* tracks recommendations from Professors Hetey and Eberhardt. *See* Hetey & Eberhardt, *Numbers Don't Speak for Themselves*, *supra* note 20, at 185–86; *see also* Phia Shante Salter, Representations of Black History as Intentional Worlds of Oppression and Liberation 45 (Sept. 22, 2010) (Ph.D. dissertation, University of Kansas) (KU ScholarWorks) (observing that support for antiracist policies increased when information included historical representations that highlighted barriers); Iyengar, *supra* note 285, at 21–23 (observing that whether a newscast employed episodic framing or thematic framing affected causal attributions for issues such as poverty and unemployment, which, in turn, shaped intergroup attitudes and policy preferences).

332 I am not advancing the positive claim that the *Gary B.* and *A.C.* plaintiffs *should have* reframed their disputes in the ways I discuss below. That question involves multiple considerations that transcend this Article. My more modest goal is to outline alternative narratives that could mitigate the dangers inherent in deficit frames.

B. *Reframing* Gary B. *and* A.C.

Smith offers an imperfect model for reframing the racial discourse that defined *Gary B.* and *A.C.* Among other differences, *Smith* did not involve an adequacy challenge. The plaintiffs, accordingly, did not confront the doctrinal hurdles present in *Gary B.* and *A.C.* Moreover, *Smith* involved university admissions, a context distinct from the K–12 educational setting relevant to school-financing litigation. These distinctions are real. But they should not be overstated. *Smith* remains a useful model for re-imagining how one might recast stories of racial inequality in the K–12 inadequate-funding context.

Above all, doctrine is relevant but not determinative. This is true, in part, because judges (or juries) are never the sole audience a plaintiff can address. Beyond courts, the public often comprises a distinct and critical audience—particularly when litigation confronts a matter of broad public concern. School-financing litigation, as with civil rights litigation more broadly, falls into this category. And, unlike courts, the public is far less concerned with a party's ability to satisfy discrete legal elements.[333] To the contrary, doctrinal requirements that rightly constrain arguments in the court of law are far less relevant when one pivots to the court of public opinion.

One example of this maneuvering has occurred in *Students for Fair Admissions, Inc. v. President of Harvard College* (*SFFA*), ongoing litigation concerning Harvard's race-conscious admissions policy. The *SFFA* plaintiffs have advanced two distinct legal claims: (1) the claim that Harvard intentionally discriminates against Asian applicants; and (2) a more generic claim challenging the legality of Harvard's affirmative-action policy.[334] As a matter of fact and law, these claims exist independent of each other. It would be hard to know this, however, based on the plaintiffs' characterization of the case. Across their public-facing communications (and, to a lesser extent, their legal briefing), Students for Fair Admissions (SFFA) has blurred any meaningful distinction between their two claims. More specifically, SFFA has

---

333 I am not suggesting that parties can make inconsistent statements to courts and the public without consequence. But as a matter of storytelling, litigants often employ different registers, with different points of emphasis and inflection, when engaging different audiences. Moreover, when speaking to the public, doctrine is far less relevant to how a party frames a given controversy.

334 *See* Complaint at 101–18, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176). Counts II through VI effectively challenge Harvard's use of affirmative action. *See id.* at 104–18. Count I, in contrast, alleges that Harvard intentionally discriminates against Asians. *See id.* at 101–04.

constructed the narrative that affirmative action is the source of anti-Asian bias—a portrayal that suggests Harvard's admissions policy pits Black and brown students against their Asian American counterparts.[335]

The foregoing frame is inconsistent with SFFA's formal allegations, which recognize that white applicants are the primary beneficiaries of any anti-Asian bias.[336] And yet, since the litigation's inception, the "affirmative action-as-culprit" framing has dominated public perception of the case. From SFFA's perspective, this is a win in itself; it furthers SFFA's broader objective to politically malign and legally compromise the case for affirmative action—and race-conscious remedies writ large. As I explain elsewhere, "[b]y positioning [Asian Americans] as affirmative action's victim[s], SFFA can weaken the normative appeal and doctrinal security of an already fragile set of policies."[337]

SFFA offers several lessons. First, it is a reminder that legal doctrine, even if relevant, does not dictate the racial narrative a plaintiff employs. Second, SFFA's communication strategy reveals how a party's public-facing discourse, when intentional, consistent, and sustained, can shape public understanding about a case in ways that diverge from the arguments written in a party's legal brief. Third, and perhaps most important, it is a reminder that meaningful civil rights reform, even if mandated through the court of law, rarely occurs without corresponding support in the court of public opinion. To this end, litigation's impact on public perception and public consciousness can be as significant as the court ruling itself.

CONCLUSION

My goal has been to illuminate an underexamined predicament facing civil rights litigants. As described throughout, certain doctrinal regimes incentivize plaintiffs to emphasize community deficits that track pervasive racial stereotypes and regressive theories of inequality. Even if strategic in the context of litigation, racialized deficit frames can harden many of the conditions that necessitate litigation in the first place. As a result, even successful litigation can calcify structural forces and individual behaviors that produce and sustain racial inequities across educational domains.

---

335 *See* Feingold, *supra* note 307, at 709–10.

336 *See id.*

337 *Id.* at 718–19.

By highlighting these risks, my intent is not to stifle litigation strategies nor to question how local communities mobilize against an unjust status quo. Nonetheless, it behooves litigants, their allies, and the civil rights community to appreciate the potential for deficit framing to hinder ambitious projects of antiracist reform.[338] For those committed to discussing racial inequality in ways most likely to facilitate such efforts, *Smith* offers a provisional roadmap. Moreover, as noted above, litigants are not the only actors implicated in this doctrinal bind. Others, including judges and legislators, should consider reform when civil rights doctrines drive racial discourse prone to compromise the pursuit of racial justice.[339]

If nothing else, the catch-22 outlined herein should inform ongoing debates about the benefits and limitations of civil rights litigation. In all hopes, this Article offers a new point of entry into a long-standing conversation.

---

338 *See* Bryan Adamson, *"Thugs," "Crooks," and "Rebellious Negroes": Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 189, 191–92 (2016).

339 *Cf.* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 NOTRE DAME L. REV. 521, 541 (2018) ("Framing effects thus have significant implications for the development of law.").