"THAT LITTLE GIRL WAS ME": KAMALA HARRIS AND THE CIVIL WHITES OF 1964 AND BEYOND

Maureen Johnson†

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† Maureen Johnson is an Assistant Clinical Professor at the University of Connecticut School of Law. She thanks her peers at U. Conn., in particular, Professors Rachel Timm and Ashley Armstrong and Librarian Maryanne Daly-Doran. Professor Johnson also thanks Professor Sha-Shana Crichton and numerous others, including Professors Sue Chesler, Susie Salmon, and Sonya Bonneau, who provided feedback at the 2022 ALWD Scholar's Forum.

INTRODUCTION

"[T]hat little girl was me." With five words, then-Senator Kamala Harris sent shockwaves across the stage at the first round of the 2020 Democratic Presidential Debates. Harris told the story of a five-year-old Black girl bussed into a white school in Berkeley, California. Harris put a name to the face: her own.[1] No doubt, this was a watershed moment in America's struggle with racism. Harris called out a fellow candidate, former Vice President Joseph Biden, for aligning with two well-known segregationists in the 1970s to oppose nationwide mandated bussing. Biden had a chance to disavow his past conduct but had not quite done so.[2] In an instant, Harris became a formidable candidate. One year later, Biden and Harris were sworn in as President and Vice President of the United States.[3]

Vice President Harris's demand for accountability provides a frame to examine the evolving intersection of social and legal rhetoric

1 The Fix Staff, *Transcript: Night 2 of the First Democratic Debate*, WASH. POST (June 28, 2019, 12:23 AM), https://www.washingtonpost.com/politics/2019/06/28/transcript-night-first-democratic-debate/?noredirect=on&utm_term=.52f1cd53cf61 [https://perma.cc/7AQX-VRL3].

2 Shira Tarlo, *Biden Won't Apologize After Booker and Harris Rebuke His Remarks About Working with Segregationists*, SALON (June 20, 2019, 10:46 AM), https://www.salon.com/2019/06/20/biden-wont-apologize-after-booker-and-harris-rebuke-his-remarks-about-working-with-segregationists [https://perma.cc/C772-66EM].

3 Just prior to the debate, Biden was seen as a "fragile" candidate, while Harris was viewed as having a "big chance to build political momentum." Shane Goldmacher, *What We Learned from the 2020 Democratic Debates*, N.Y. TIMES (June 28, 2019), https://www.nytimes.com/2019/06/28/us/politics/democratic-debates-presidential.html [https://perma.cc/E9WL-KS2H].

pertaining to racism in America, beginning with the passage of the Civil Rights Act of 1964. The better moniker might be: the Civil *Whites* Act of 1964. It was pushed through Congress by white men with white sensibilities.[4] But at least these were *civil* whites, as compared to those *non*-civil whites lining the edges of formerly white-only schoolyards with protest signs while shouting and spitting at children of color. Many did not even view themselves as racist; instead, they saw themselves as simply lamenting federal intrusion upon local government, all the while aligning themselves with known white supremacists and the Ku Klux Klan.

An iconic photo captures this hard-to-reconcile dichotomy. Two white children—a little boy and a little girl—sit in the back of an old-school 1950s Chevy peering out from a rolled down window.[5] The boy—perhaps only five years old—dons full Klan regalia, including a white cone perched on the crown of his very young head. A placard propped just underneath carries a divisive message: "Southern Whites are the Negroes' Best Friends but NO INTEGRATION."[6] If the Klan was Black America's best friend, who exactly was the enemy?

In the 1970s and beyond, even civil whites roared with laughter at bigoted caricatures like Archie Bunker of *All in the Family*, all the while ignoring the impact of insults hurled by real-life Archie Bunkers at real-life girls like Harris. And it was not just words. Entitled perpetrators shrugged off beatings, rapes, and even murders, often with the tacit approval of silent whites.[7] Was it okay to bump elbows with white supremacists so long as you did not join in their cross burning? Was it okay to laugh at blatant racist content on a prime-time sitcom so long as you did not write the script? Was it okay to look the other way when a person of color was beaten so long as the blows landed were from fists other than your own? Complacency equals complicity.

This Article posits that accountability for past racial misdeeds paves the way for a seismic shift in how racism and antiracism is viewed in America. In the past, these constructs were viewed through a white-

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4 Per a Brookings Institute compilation, in the 88th Congress in 1963, there were no Black senators (out of 100) and a mere 4 Black representatives (out of 435). There were 2 women senators, 2 Asian American senators, and 1 Hispanic American senator. In the House of Representatives, there were 12 women, 1 Asian American, and 3 Hispanic American representatives. All others were presumed to be white males. *Demographics of Members of Congress*, BROOKINGS INST. 1, 49–56 (2017), https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch1_full.pdf [https://perma.cc/74EM-BFPX].

5 Mark Keierleber, *Critical Race Theory and the New 'Massive Resistance'*, THE74 (Aug. 18, 2021), https://www.the74million.org/article/critical-race-theory-massive-resistance-brown-v-board [https://perma.cc/RPP5-3UFQ].

6 *Id.*

7 *See* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 151 (2020) (examining racial terror, noting all that is needed from the dominant caste is their "silent complicity").

centered lens, both in the Supreme Court and in the populace. They should instead be viewed through the lens of those who know it best: people of color.[8] A showdown is on the horizon. The Supreme Court granted certiorari in two cases involving equitable race-conscious admissions policies, at one private university (Harvard University) and one public (University of North Carolina) (jointly, the Admissions Cases).[9] If intermediate scrutiny is applied, the policies easily stand. Arguably, *Dobbs v. Jackson Women's Health Organization* opens the door to do just that.

More particularly, *Dobbs* dodged an equal protection challenge by cursorily declaring that a Mississippi anti-abortion statute did not involve "invidious[]" discrimination.[10] While that presumption certainly can be disputed,[11] the underlying legal principle was that the Constitution must be interpreted in accordance with then-existing intent.[12] Notably, while the Fourteenth Amendment was intended to prohibit *invidious* race-conscious measures (e.g., laws prohibiting Black people from voting), the Fourteenth Amendment was *never* intended to prohibit *equitable* measures designed to redress racial disparities. In fact, the Fourteenth Amendment was drafted, at least in part, to ensure Congress had constitutional power to enact race-conscious measures *solely* benefiting Black people.[13] Such measures may not have been called "affirmative action" back in the 1860s, but that is exactly what they were. Per *Dobbs*, if they were constitutionally permissible then, they are constitutionally permissible now.[14]

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8 *See* MARC LAMONT HILL & TODD BREWSTER, SEEN & UNSEEN: TECHNOLOGY, SOCIAL MEDIA, AND THE FIGHT FOR RACIAL JUSTICE 1–5 (2022) (noting that technology and social media are shifting the narrative away from a white perspective, thereby providing "a more realistic, unfiltered picture of Black life").

9 Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 142 S. Ct. 895 (2022) (originally consolidated with Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022)). By order dated July 22, 2022, one court date prior to the due date for the respondent's merit briefs, the Supreme Court issued an order separating the cases. *Students for Fair Admissions, Inc.*, 142 S. Ct. 895 (No. 20-1199), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1199.html [https://perma.cc/HYR4-X768].

10 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022).

11 Three dissenting Justices saw a denial of equal protection. As noted by Justice Breyer, joined by Justices Sotomayor and Kagan, "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens." *Id.* at 2318 (Breyer, J., dissenting).

12 *Id.* at 2245–47 (majority opinion).

13 *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); discussion *infra* Section II.A.

14 *See Dobbs*, 142 S. Ct. at 2242–43 (emphasizing then-existing intent and finding no right to abortion under the Due Process Clause because, *inter alia*, "when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy").

The National Association for the Advancement of Colored People (NAACP) convincingly briefed the argument for intermediate scrutiny decades ago in the early affirmative action cases.[15] These arguments were amplified by Justice Thurgood Marshall—the first and then-*only* Black Justice on the Supreme Court.[16] They did not stick at the time, but only because of white-centered social rhetoric adopted by a white-centered Supreme Court dead set on protecting white privilege. But these arguments land perfectly under modern-day antiracist mores. Similar to the hindsight illogic of the "separate but equal" doctrine in *Plessy v. Ferguson*,[17] future generations will wonder how the Supreme Court ever could have held that *invidious* legislation (e.g., Jim Crow laws) was the constitutional equivalent of *equitable* measures aimed at promoting diversity and alleviating racial disparities.[18]

"That little girl *was* me." Part I looks to the past by examining the backdrop surrounding both the passage of the Civil Rights Act of 1964 and the subsequent fish-gutting of affirmative action by the judiciary. Cries of "reverse discrimination" led the Supreme Court to turn the Act on its head, protecting so-called "innocent" whites from suffering detriment. And civil whites saw nothing wrong with that. Many wanted to stop out-and-out violence against Black people, especially Black *children*, and it certainly was fair for Black people to have an equal *opportunity* to compete for jobs and apply for housing, but was that not enough? The Supreme Court went along. By the end of the 1980s, all that was left of affirmative action was the ability of colleges and universities to narrowly *consider* race to promote diversity.

"That little girl *is* me." Part II tells a different tale. Vice President Harris reflects an evolved majoritarian America set to reject white-centered frames that facilitate, if not outright coddle, racism. The summer of George Floyd proved that on both a national and international stage. Just as Harris called out Biden, movements such as Black Lives Matter (BLM) and #MeToo demanded accountability for both present and past misdeeds. "Cancel culture" yelled the right, "let bygones be bygones." But is ignoring past misdeeds not a *present* misdeed? And is there not an obvious answer as to whether conduct viewed as racist and wrong under modern norms was racist and wrong back in the day? Slavery itself is an

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15 *See* Brief Amicus Curiae for the NAACP Legal Defense & Educational Fund, Inc. at 4, 11–27, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998), 1988 WL 1023105; discussion *infra* Section II.C.1; *see also* Schnapper, *supra* note 13.

16 For an excellent discussion of Justice Marshall's legacy, penned from the perspective of a law student who later became the Chief Judge for the Third Circuit, see A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 60 (1991).

17 *See* Plessy v. Ferguson, 163 U.S. 537, 546–52 (1896).

18 *See J.A. Croson Co.*, 488 U.S. at 494.

example, as is Jim Crow. Just because white-centered America may not have realized a racist act was wrong at the time does not make a racist act *not* wrong. Civil whites—as well as the Supreme Court—could acknowledge past wrongs with the simple words: a better version of me (us) would have seen that.

With that frame in mind, Part II pairs current social rhetoric with the legal rhetoric advanced by Justice Marshall and the NAACP in early affirmative action cases. Against a modern backdrop, these dormant arguments make perfect sense. As noted above, the Fourteenth Amendment was passed in part for the *exact purpose* of ensuring Congress had the constitutional power to enact legislation *solely* benefitting Black people. That establishes a critical constitutional distinction between *invidious* and *equitable* race-conscious measures designed to redress racial disparities. The Fourteenth Amendment *prohibits* the former and *permits* the latter.

"That little girl *will be* me." Part III looks to the future. The legacy of each generation is its impact on the next. Powerful Black female role models like Vice President Harris and Supreme Court Justice Jackson should be the norm, rather than the exception. The groundwork has already been laid by antiracist scholars like Ibram X. Kendi and Isabel Wilkerson, who explain caste and antiracism in simple, easy-to-understand terms. You are either part of the problem or part of the solution.[19] Linguistically, "antiracism" could be the new "affirmative action." And it has broad support in a growing slice of white America willing to atone for past racial misdeeds, specifically including complacency. That entails, *inter alia*, civil whites calling out other civil whites and lifting the veil of oblivion that log-jams racial equality.[20]

Returning to the impact of *Dobbs*, Part III analyzes three potential outcomes in the Admissions Cases, as well as workarounds if the Supreme Court again stands in the way of racial equality by (illogically) barring consideration of race to counter racial underrepresentation. Conventional reading of the tea leaves suggests affirmative action will be pushed further down the constitutional trash bin. But conventional wisdom spelled doom when *Obergefell v. Hodges* was filed. There too, solid legal arguments supporting marriage equality existed for decades; they just fell on deaf ears until changing social mores demanded

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19 *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 13, 17–23 (2019); *see also* WILKERSON, *supra* note 7, at 382–88.

20 *See, e.g.*, ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 1–14 (2018); *see also infra* Section III.A.2.

otherwise.[21] The legal arguments and rhetorical gems penned by Justice Marshall and the NAACP similarly deserve their due. They could—and should—be the blueprint for recognizing the plain-as-day constitutional distinction between equitable and invidious race-conscious measures.[22]

I. "THAT LITTLE GIRL WAS ME": CIVIL WHITE OBLIVION AND SUPREME COURT DECISIONS GUTTING EQUITABLE RACE-CONSCIOUS MEASURES

Baby boomers have seen a lot. Those born at the outer edge of 1964, like Harris, may have been plunked down in front of an old-school television watching the evening news when President Lyndon B. Johnson famously declared: "[W]e shall overcome."[23] Given the onslaught of civil rights legislation in the mid to late 1960s, surely this generation of Black people was comfortably removed from the ugly bigotry shouldered by their ascendents. As boomers entered their teens and twenties, white and Black people danced together on syndicated national television shows like *American Bandstand*.[24] From Sidney Poitier to Flip Wilson to Denzel

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21 *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (finding constitutional right to same-sex marriage under the Due Process Clause); *see also* Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 415–434 (2016) (discussing initial concerns among gay rights activists).

22 Recognizing this distinction may be critically important to defending other privacy rights on equal protection grounds. For example, renewed state bans on same-sex marriage would constitute *invidious* discrimination and therefore be subject to heightened scrutiny under the United States Constitution. Even under "rational basis" review, laws fueled by animus toward LGBTQ+ are unconstitutional. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))). Moreover, as explained by Justice Gorsuch in *Bostock v. Clayton County*, discrimination against LGBTQ+ necessarily constitutes discrimination based on sex, thereby triggering at least intermediate scrutiny on that basis alone. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1738–39, 1754 (2020).

23 Lyndon B. Johnson, We Shall Overcome (Mar. 15, 1965), https://voicesofdemocracy.umd.edu/johnson-we-shall-overcome-speech-text [https://perma.cc/NM4F-2EZC].

24 *American Bandstand*'s impact on popular culture is not without controversy. It originated as a whites-only dance show from Philadelphia in 1952, going national in 1957. Although it eventually became segregated, there is a strong argument that the show's coddling of white-centered norms detrimentally affected the Civil Rights movement. For example, when Black performers or dancers were featured on the show, they played to a segregated white audience until production moved to Hollywood in 1964. Jack Doyle, *"American Bandstand" (1956–2007)*, POP HIST. DIG (Mar. 25, 2008) (citing MATTHEW F. DELMONT, THE NICEST KIDS IN TOWN: AMERICAN BANDSTAND, ROCK 'N' ROLL, AND THE STRUGGLE FOR CIVIL RIGHTS IN 1950S PHILADELPHIA (2012)), https://pophistorydig.com/topics/tag/american-bandstand-integration [https://perma.cc/8DV9-4JPQ].

Washington,[25] whites embraced Black actors on the silver screen. Clarence Thomas took his seat as the second Black United States Supreme Court Justice. Racism was a thing of the past. Poof. All gone. That is how most whites saw it, and every Black success story proved that, from George Jefferson[26] to Muhammad Ali to The Artist Formerly Known as Prince.[27] But that is *not* how racism was seen or felt by people of color.[28]

One reason racism remains so entrenched in modern-day America is that it is so firmly entrenched worldwide. People of color have been feared, loathed, and exploited for thousands of years. Dominant white people kept Black people at bay by creating and facilitating de facto and de jure barriers to equality. Similar means were used to tamp down other marginalized groups, such as women, LGBTQ+, and anyone else who did not neatly fit into the white-male-Protestant-heterosexual mold.[29]

But let us start at the beginning. America may not have been the first to embrace slavery, but it took slavery to a whole new level. As put by historian Ariela J. Gross, "[f]or the first time in history, one category of

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25 Flip Wilson was heralded as "TV's First Black Superstar" by *Time* in 1972. *TV's First Black Superstar*, TIME, Jan. 31, 1972, https://web.archive.org/web/20071015042518/http://www.time.com/time/covers/0,16641,19720131,00.html [https://perma.cc/9AD4-MXFP]. Sidney Poitier and Denzel Washington each were recipients of the coveted "Best Actor" Oscar award from the American Academy of Motion Picture Arts and Sciences. *Black Oscar Winners*, IMDB (May 19, 2021), https://www.imdb.com/list/ls500201040 [https://perma.cc/G7W2-6R2Y]; *see also Black Best Actors*, OSCARS, https://www.oscars.org/search/site/black%20best%20actors [https://perma.cc/H5JM-QBK6].

26 This was reflected in the theme song for *The Jeffersons*, the first Black primetime sitcom, which was a spin-off from *All in the Family*. George and Louise Jefferson—considered the Black equivalent of former neighbors Archie and Edith Bunker—literally were "movin[g] on up" from their blue-collar neighborhood in Queens into an upper-Manhattan "deluxe apartment in the sky." Having worked hard, they "finally got a piece of the pie," namely, a maid and countless other upper-class accoutrements seemingly far out of reach to the real-life Archie Bunkers left behind. JA'NET DUBOIS, MOVIN' ON UP (1975).

27 *See generally* CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997). In discussing 1970s social rhetoric, these authors note:

> Ironically, the relatively small number of Blacks who achieved success was offered as proof that racism no longer existed. If most whites believed that race was no longer a factor in Black unemployment and poverty, it was only a small step to the belief that Blacks at the bottom were there because of their own shortcomings.

Id. at 46.

28 In 1997, Lawrence and Matsuda used the term "The Big Lie" to refer to the claim that continued racism was *de minimis*, meaning the "small number of practicing racists" were merely "social outlaws in a society committed to racial equality, outlaws subject to strong antidiscrimination laws as well as social sanction." *Id.* at 67–70. That term has a very different meaning in 2022: the false claim that the 2020 election was "stolen." Brendan Williams, *Blocking the Ballot Box: The Republican War on Voting Rights*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 389, 404–08 (2022).

29 *See* discussions *infra* Sections I.A.2, III.A.1 (regarding assimilation and the need for solidarity).

humanity was ruled out of the 'human race' and into a separate subgroup that was to remain enslaved for generations in perpetuity."[30]

A. *The World's Original Sin: Slavery and White Dominance Since the Beginning of Time*

One of the first stories in the Bible is the Genesis account of the Garden of Eden. Adam and Eve were created by a benevolent God and blessed with all things good. God issued but one directive: do not eat from the Tree of Life, set in the middle of the Garden. Satan, disguised as a serpent, convinced Eve that if she ate the forbidden fruit she truly would be like God. And the serpent was right, at least in part. When the pair disobeyed God's order, they lost their innocence. They could see both good and evil and were immediately shamed.[31] Hence, by this original sin, humanity was cursed by both its vulnerability and peculiar attraction to evil.[32]

Slavery oft has been called America's "original sin." Yet human predilection to greed and self-interest existed well before slavery did. Dominance is power. Slaves long have been the spoils of war. So common is this trope that it is even reflected in children's stories, such as *The Lion King*, albeit in muted tones.[33] Kendi speaks of this in terms of "Human Hierarchy," an almost instinctive desire to stand at the top of the pecking order.[34] Tried and true tricks both fuel racism and blind less-extreme whites to racism's very existence. These tricks include rationalization, desensitization, and assimilation, with an overarching intent and effect to pit minorities against each other.

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30 WILKERSON, *supra* note 7, at 45 (quoting ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 23 (2008)).

31 *See Genesis* 3:1–24 (King James).

32 *See* Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1272–82 (1995) (discussing religious tropes, such as the "original sin" in the context of agrarian law and slavery and noting that "[t]he racially disparate impact of wage regulation in agriculture endures to this day").

33 Nico Carter, *The Slave Fugitive and Tropes of Children's Stories*, MUSIC MOVIES & HOOPS (June 23, 2021), https://musicmoviesandhoops.com/the-slave-fugitive-and-tropes-of-childrens-stories [https://perma.cc/7NQK-A8A9].

34 *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 15–21 (2017).

1. From Aristotle to Colonial America to Jim Crow: The Long and Sordid History of Desensitizing and Rationalizing Racism

If history tells us anything, enslavers—even those painted as benevolent in glorified media images—had to be racist to buy and sell shackled human beings extracted from another land. Enslavers were desensitized to the notion that Black people deserved to be treated with respect and dignity. The same applies to the eighteen-year-old killer who stormed into a Tops grocery store in Buffalo to murder as many Black people as possible.[35] Numerous scholars document how humans *rationalize* dominance over others by believing in their own superiority.[36] That rationalization is as old as slavery itself.

The writings of Aristotle, though ironically given rise to modern democracy, demonstrate Aristotle's belief that "ancient Greeks were superior to all non-Greeks." Even in the 300s BCE, the idea that dark-skinned humans were inferior already had taken hold. Aristotle "concocted a climate theory to justify [light-skinned] superiority, [theorizing] that extreme hot or cold climates produced intellectually, physically, and morally inferior people who were ugly and lacked the capacity for freedom and self-government."[37] And there even were racial slurs. "Aristotle labeled Africans 'burnt faces,'" driven by "sensation" rather than intellect.[38] Kendi reflects some of the earliest rationales for white supremacy and white privilege:

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35 The massacre was referenced in *New York State Rifle & Pistol Ass'n v. Bruen*. 142 S. Ct. 2111, 2165 (2022) (Breyer, J., dissenting) (citing Aidan Joly, Joanna Slater, Devlin Barrett & Arelis R. Hernández, *10 Killed in Racially Motivated Shooting at Buffalo Grocery Store*, WASH. POST (May 15, 2022, 4:37 AM), https://www.washingtonpost.com/nation/2022/05/14/buffalo-shooting-grocery-store-tops [https://perma.cc/B8XU-4WL4]). In charging documents that included hate crimes, the United States Department of Justice noted that the killer accidently shot a white male employee in the leg. Upon realizing he was white, the killer said "sorry" and then resumed firing at Black people. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Accused Tops Shooter Charged with Federal Hate Crimes and Using a Firearm to Commit Murder (June 15, 2022), https://www.justice.gov/opa/pr/accused-tops-shooter-charged-federal-hate-crimes-and-using-firearm-commit-murder [https://perma.cc/C32G-HK2R].

36 In 1962, James Baldwin discussed this in terms of Nazism, noting the effect on both the perpetrator and victim: "*Whoever debases others is debasing himself.*" James Baldwin, *Down at the Cross: Letter from a Region in My Mind*, NEW YORKER, Nov. 9, 1962, *reprinted in* JAMES BALDWIN, THE FIRE NEXT TIME 83, 91 (Vintage Books 1993).

37 KENDI, *supra* note 34, at 17.

38 *Id.*

> Aristotle situated the Greeks, in their supreme, intermediate climate, as the *most beautifully endowed superior rulers and enslavers of the world. "Humanity is divided into two: the masters and the slaves; or, if one prefers it, the Greeks and the Barbarians, those who have the right to command; and those who are born to obey*," Aristotle said. For him, *the enslaved peoples were "by nature incapable of reasoning and live a life of pure sensation*, like certain tribes on the borders of the civilized world, or like people who are diseased through the onset of illness like epilepsy or madness."[39]

Other civilizations and institutions bought into this perceived superiority and beauty of fair people. Romans adopted Aristotle's climate theory. Christian theologians believed in a "three-tiered hierarchy of slave relations—heavenly master (top), earthly master (middle), enslaved (bottom)."[40] Ultimately, Anglican countries, and then American colonies, permitted the capture and export of slaves for sale on the free market.[41] Slaves made economic sense, as did purchasing a calf or steed. As bluntly put by Kendi, the passing down of racist beliefs from England to the colonies was viewed as "natural and normal and holy."[42]

Wilkerson also chronicles the history of rationalizing slavery, including its introduction to white America in August 1619. More particularly, slavery began when a slave ship docked at Point Comfort, located in what is known today as the Commonwealth of Virginia.[43] A little more than twenty slaves were purchased by the Governor and the "Cape Marchant."[44] At the time, slave trade included both white Europeans, who were deemed indentured servants and could earn their freedom, and Africans, who were relegated to "lifetime enslavement."[45]

Landing at the lowest level of caste initially turned on religious beliefs. That is why Christian Europeans escaped lifetime enslavement and Black people did not.[46] That rationalization was put to the test when Black people started to convert and claim entitlement to the rights afforded Christians, thereby threatening the colonists' monetary interests. In response, religious hierarchy quickly was dropped for a new proxy: skin color.[47] In a way, these early colonists were just owning up to what likely drove the distinction in the first place, namely, the historical

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39 *Id.* (emphasis added).

40 *Id.*

41 *Id.* at 17–22.

42 *Id.*

43 WILKERSON, *supra* note 7, at 40–47.

44 *Id.*; *see* THE 1619 PROJECT: A NEW ORIGIN STORY 2 (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021); Claudia Rankine, *The White Lion*, *in id.* at 3–4 .

45 WILKERSON, *supra* note 7, at 41.

46 *Id.*

47 *Id.* at 42.

othering of Black people.[48] Skin color—described by Wilkerson as an "inadvertent birthmark" over the entire body—made it easy to demarcate between indentured servants and slaves:

> In the eyes of the European colonists and to the Africans' tragic disadvantage, they happened to bear *an inadvertent birthmark over their entire bodies that should have been nothing more than a neutral variation in human appearance*, but which made them stand out from the English and Irish indentured servants. *The Europeans could and did escape from their masters and blend into the general white population that was hardening into a single caste*. . . .
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> . . . .
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> *This left Africans firmly at the bottom*, and, by the late 1600s, *Africans were not merely slaves; they were hostages subjected to unspeakable tortures that their captors documented without remorse*.[49]

Debasement of slaves was rationalized by a maze of falsehoods, including at its core that Africans were intellectually inferior, a falsehood buttressed by a criminal ban on teaching slaves how to read and write.[50] Although slaves worked fifteen or eighteen hours a day, even under protective laws,[51] slaves were deemed lazy and therefore deserving of floggings and other cruel punishments.[52] Colonists projected their own depravity and immorality onto female slaves, justifying both rape and forced pregnancy. Enslavers often had the legal right to do anything they wished to the bodies of slaves, including taking their life. And slaves were answerable not just to their owner, but to all whites whose path they crossed. In sum, whites convinced themselves that slaves could not think for themselves, so whites had to do that for them.[53] Ultimately, "[s]lavery so perverted the balance of power that it made the degradation of the subordinate caste seem normal and righteous." Black people were to be feared, and therefore needed to be kept at bay, if only for their own good.[54]

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48 *See id.*

49 *Id.* at 42–43 (emphasis added).

50 *Id.* at 48.

51 *Id.* at 46, 51.

52 *Id.* at 48.

53 *Id.* at 51.

54 *Id.* at 46–47.

2. Assimilation: How Dominant Whites Conditionally Enlist Others to Bolster Ranks and Pit Minorities Against Each Other

March 3, 1913: Women suffragists marched toward the Capital arm-in-arm, led by the likes of activists Susan B. Anthony, Lucy Burns, and others. Delegations from California to New York proudly waved United States flags and carried banners touting their unified hope "for the right of those who submit to authority to have a voice in their government." Championing equality, that message is heralded as a pioneering moment in American feminism.[55] But for pink "pussy" hats and iPhones, the women's suffrage marches of the 1910s were just like the women's marches following the 2016 presidential election. Or were they…

That was not the only difference between the marches. In the 1920s, *white* women took their place with their male counterparts at polling booths, but *Black* women were left disenfranchised in a number of southern states.[56] Once the Nineteenth Amendment was ratified, there was little momentum to challenge the southern carveouts keeping Black women from the ballet box. "Oh well," it could have been said. "We got ours."[57]

In perspective, boomers were born into a world where many Black women—but not Black men—lacked the constitutional right to vote. White or Black, the traditional male-dominated hierarchy was not quite willing to deem women its equal. Well into the 1970s, even liberal states restricted married women from holding or controlling property in their own name.[58] Women needed to be kept in place; what better way to do

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55 Alan Taylor, *Photos: The Battle for Women's Suffrage in the U.S.*, ATLANTIC (June 5, 2019), https://www.theatlantic.com/photo/2019/06/the-battle-for-womens-suffrage-in-photos/591103 [https://perma.cc/V54N-5TQD]. Burns and others were arrested in some of the more violent protests. *Id.*; *see also* Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2624 (2021) (stating that women fighting for suffrage were "jailed, treated inhumanely, ridiculed in the press, demeaned by ministers and leaders, and reviled by other women").

56 Thomas, *supra* note 55, at 2647 ("The Nineteenth Amendment, however, did not in fact enfranchise all women or guarantee the right to vote. Many women remained excluded by their race." (footnote omitted)). In some states, Black women were disenfranchised until the Voting Rights Act of 1965. *Id.*

57 MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 175 (2020) ("[T]oo many African American women [were] rebuffed, rejected, and written out of the revolution that the Nineteenth Amendment promised."). Jones extensively examines the tension between Black and white women, noting the "prospect of Black women participating [in a national parade] unsettled the organizers." *Id.* at 184. *See generally id.* at 149–202.

58 Jo Carrillo, *The M Word: From Partial Coverture to Skills-Based Fiduciary Duties in Marriage*, 22 HASTINGS WOMEN'S L.J. 257, 257–58 (2011) ("Before 1975, a husband in the state of California

that than to leap-frog men from the ranks of lower castes nearer to that shiny caste at the top? Again, selection turned on physical similarities and the ability to blend in. Fifty shades of white.

When whiteness is viewed as a construct of caste, the unifying factor always has been that all shades of whites rank higher than non-whites.[59] Some variations did not originally get an invitation to the dance but were elevated to traditional English "whiteness" when doing so became politically advantageous. For example, Irish, Polish, and Italian immigrants were low on the caste system when they stepped off boats at Ellis Island.[60] Their accents and physical features were distinguishable from white American archetypes. But even from the get-go, they were deemed superior to Black Americans simply because of the relative whiteness of their skin.[61] Ultimately, they would be fully embraced by more dominant whites so long as they properly assimilated into American culture (i.e., once they blended into that white sauce melting pot that remained off limits to people of color).[62] The invitation to step up to a higher rung of caste is so enticing that past slights of caste are not only forgiven but repeated against others.[63] In modern parlance, some opt to switch sides and hate down.

Assimilation comes with a price: your soul. More particularly, assimilation requires doing unto others what was done unto you.[64] While the Irish immigrants of the 1920s fielded ethnic slurs and outright discrimination, they too accepted the invitation to step up a rung when their number was called.[65] A pivotal point came no later than 1960 when

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had complete legal management over community (marital) property by virtue of his gender alone.").

59 *See* EDDIE S. GLAUDE JR., BEGIN AGAIN: JAMES BALDWIN'S AMERICA AND ITS URGENT LESSONS FOR OUR OWN 7 (2020) (discussing the "lie" and noting that "in America white lives have always mattered more than the lives of others," which feeds into false assumptions and a "value gap").

60 KENDI, *supra* note 34, at 372; ASHLEY JARDINA, WHITE IDENTITY POLITICS 273 (2019). Kendi discusses a hierarchy within a hierarchy, a "ladder of ethnic racism," whereby assimilationists like Nathan Glazer deemed certain minorities better than others. Yet, per Glazer, all were superior to Black people. KENDI, *supra* note 34, at 372–73.

61 *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 20–24, 189 (1992) (discussing 1989 *Time Magazine* interview of Toni Morrison recounting how new immigrant children learned that their whiteness gave them hierarchy).

62 *See* JARDINA, *supra* note 60, at 273–74, 279–80 ("[I]mmigrant groups have not merely been assimilated into American culture; they have also been woven into the nation's racial hierarchy. . . . [thereby] subsumed under the umbrella of whiteness." (citations omitted)).

63 *See* WILKERSON, *supra* note 7, at 49–53, 125–28.

64 *See id.* at 151 (discussing that the hierarchy of caste incentivized newly elevated members "to prove their superiority by joining in or acquiescing to cruelties against their fellow humans").

65 *Id.* at 50 ("[E]ach fresh infusion of immigrants had to enter into a silent, unspoken pact of separating and distancing themselves from the established lowest caste.").

John F. Kennedy was elected as the first Irish American president.[66] While Kennedy would fight for people of color,[67] many Irish immigrants looked the other way. The more enticing path for some Irish boomers was to believe in their (false) superiority.[68]

3. Blinders: How Racists Convince Themselves They Are Not Racists

Jackie Robinson, Sammy Davis, Jr., and the Black neighbor down the road. Whites have a long history of convincing themselves that if they embrace a Black celebrity or friend, they cannot possibly be racist. Especially given changing demographics, modern whites continue to seek alliances to retain dominance, including extending invitations for certain Black people to join their ranks, albeit *certain* Black people. A recent example is Larry Elder, a conservative Black radio commentator, who emerged as the Republican front runner in the 2021 effort to recall California Governor Gavin Newsom.[69] Elder sparked headlines by raising the argument that reparations should be paid to *enslavers*.[70] His anointment as the Republican gubernatorial nominee feeds a particularly specious form of rationalization. While Elder was soundly defeated, over three and a half million Californians voted for him.[71] Whites who did so likely viewed this as absolute proof they were *not* racist; they pulled the lever for a Black candidate, albeit a Black candidate who called for reparations for enslavers.[72] For these whites, only the most outrageous

66 Patricia I. Folan Sebben, Note, *U.S. Immigration Law, Irish Immigration and Diversity: Cead Mile Failte (A Thousand Times Welcome)?*, 6 GEO. IMMIGR. L.J. 745, 755 (1992).

67 Ron Heller, *Connecting Some Dots: The Legal History of the Civil Rights Movement and Theatre as a Tool for Social Justice*, 25 HAW. BAR J. 4, 12 (2021).

68 WILKERSON, *supra* note 7, at 50 ("Hostility toward the lowest caste became part of the initiation rite into citizenship in America."); *see also* BELL, supra note 61, at 188 (citing Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1338–81 (1988)) (noting that even poor whites embrace "identify[ing] with . . . the 'dominant circle' of well-to-do whites, particularly those who attribute social problems to [B]lacks").

69 TheGrio Staff, *Larry Elder Argues Slave Owners Are 'Owed Reparations' During Appearance on Candace Owens' Show*, GRIO (Sept. 5, 2021), https://thegrio.com/2021/09/05/larry-elder-candace-owens-reparations [https://perma.cc/J9BN-JYRH].

70 Elder pointed out that the United Kingdom had paid reparations to enslavers upon ending slavery. *Id.*

71 The results were 61.9% in favor of Newsom and against the recall. *California Recall Election Results*, N.Y. TIMES (Oct. 15, 2021), https://www.nytimes.com/interactive/2021/09/14/us/elections/results-california-recall.html [https://perma.cc/3M7A-SK2G].

72 *See* JENNIFER L. PIERCE, RACING FOR INNOCENCE: WHITENESS, GENDER, AND THE BACKLASH AGAINST AFFIRMATIVE ACTION 11 (2012). Pierce discussed "ambivalent racism," which

acts constitute racism. A fortiori, these "innocent" whites refuse to accept any blame for their role in the perpetuation of racism.[73] As discussed in Section I.C, that goes to the very heart of the Supreme Court's gutting of affirmative action in the 1970s–1980s.

B. *The Passage of the Civil Whites Act of 1964: Why Well-Intentioned Civil Rights Legislation (Again) Falls Short*

In Derrick Bell's 1992 prophetic text *Faces at the Bottom of the Well*, Bell describes a conversation with a Black limousine driver, Jesse B. Semple, about the benefits—or lack thereof—of the Civil Rights Act.[74] By that time, Supreme Court decisions had all but driven a stake through affirmative action.[75] This was no surprise to Semple. The same thing happened before. Legislation passed after the Civil War included broad promises that whites took back once reality set in. As put by Semple:

> "*From the Emancipation Proclamation on, the Man [has] been handing us a bunch of bogus freedom checks he never intends to honor.* He makes you work, plead, and pray for them, and then when he has you either groveling or threatening to tear his damn head off, he lets you have them as though they were some kind of special gift. As a matter of fact, regardless of how great the need is, he only gives *you* when it will do *him* the most good!
>
> And before you can cash them in, . . . *the Man has called the bank and stopped payment or otherwise made them useless*—except, of course, as symbols."[76]

It would be simple—no pun intended—to blame the shortcomings of the interpretation of the Civil Rights Act only on the Justices who voted for restrictive decisions gutting affirmative action. But it took much more

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"conceptualize[s] the feelings, thoughts, and practices of an individual who is simultaneously racist and not racist." *Id.* The thrust of Pierce's argument is that in past eras (e.g., the 1970s and 1980s), the daily lives of many whites who perceived themselves as not racist were strikingly different than the liberalism they preached. *See, e.g.*, *id.* at 6. This specifically included "elite" whites who advocated for civil rights but surrounded themselves, both socially and in work settings, with whites. Pierce asks: "How is it that recipients of white privilege come to deny the role they play in reproducing racial inequality?" *Id.* at 6.

73 *See* Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1252, 1254–55, 1290–92 (2021) (recognizing a "very narrow definition of racism" encompassing "only these most egregious, overt contexts"—e.g., when there is "clear proof of racial bias by a particularly bad actor" (quoting Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 815 (2011))).

74 BELL, *supra* note 61, at 20–24.

75 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

76 *Id.* at 19 (first and fourth emphasis added) (quoting statements by Jesse B. Semple).

than that. The proverbial "Man" Semple refers to is the collective power of both the Supreme Court *and* majoritarian America. Scholars have long noted the Supreme Court has a "tacit deal" with the American public not to stray too far from the majoritarian view.[77] Therefore, the fault for continued racism falls squarely at the feet of those who *either* advocated for out-and-out racist views *or* facilitated those views through complacency and acceptance of widespread derogatory racial narratives.[78]

Two steps forward; one-and-a-half steps back. The 1960s civil rights legislation put an end to certain blatantly discriminatory practices. True. But the helping hand civil whites believed they were extending to people of color was slapped away by whites hell-bent on maintaining caste. Replicating *Plessy v. Ferguson*, the populace demanded—and ultimately received—a convoluted interpretation of the Fourteenth Amendment that enshrined white privilege.

1. "Positive Measures" and "Affirmative Action": JFK, LBJ, and the Laudable Goals Behind the Civil Rights Act of 1964

Power to implement affirmative action first arrived in Executive Order No. 10925, which was signed by President Kennedy on March 8, 1961, less than two months into his presidency.[79] Public discourse over *Brown v. Board of Education* was widening the divide between civil whites and their decidedly uncivil counterparts. Kennedy's Executive Order not only put an exclamation mark on *Brown*, but it officially called for affirmative action to redress the ever-lingering effects of both slavery and Jim Crow. More particularly, the Executive Order recommended use of

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77 BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 3–4 (2009); *see also id.* at 382. Justice Kagan echoed that thought following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*. *See* Chloe Folmar, *Kagan Warns That Supreme Court Legitimacy at Risk if It Strays Too Far from Public Sentiment*, HILL (July 22, 2022, 8:10 AM), https://thehill.com/regulation/court-battles/3570209-kagan-warns-that-supreme-court-legitimacy-at-risk-if-it-strays-too-far-from-public-sentiment [https://perma.cc/2UAS-6AHC]. *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (rejecting impact of public opinion on judicial decision making).

78 *See* LAWRENCE & MATSUDA, *supra* note 28, at 56–57 ("Ultimately, how we will reconcile the American ideal of equality with the continuing legacy of our nation's history of inequality will be determined not by nine men and women who sit on the Supreme Court, but by all of us. Through the politics of street demonstrations, teach-ins, community meetings, and dinner conversations with friends and family, we must all decide what actions best respond to the reality of inequality and the need to heal the wounds of our racism, sexism, and homophobia.").

79 Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—The Untold Story Behind* Fisher v. University of Texas, 62 BUFF. L. REV. 237, 246–47, 246 n.51 (2014); *see* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

"positive measures for the elimination of any discrimination, *direct or indirect*, which now exists."[80] Those measures expressly included both affirmative action and "remedial action if, in [the Committee's] judgment, such action [was] necessary *or appropriate*" to eradicate the continued effects of racism.[81]

When Lyndon B. Johnson took the presidential reins following Kennedy's assassination, Johnson stayed true to the promises the pair had made during the 1960 campaign. Like Kennedy, Johnson knew the key to passing civil rights legislation was not just convincing Congress; the electorate also had to be persuaded.[82] Rhetoric took aim at both the necessity and justification for affirmative action. This included Johnson's 1965 Executive Order No. 11246, which adopted the rhetoric of Kennedy's order and contained what some scholars later dubbed the "classical definition of affirmative action."[83] Notably, it incorporated language much like Kendi's modern-day definition of antiracism: "[a]ffirmative action occurs whenever people go out of their way (take positive action) to increase the likelihood of true equality for individuals of differing categories."[84]

That rhetoric tracks Dr. Martin Luther King, Jr.'s words in his 1964 book, *Why We Can't Wait*.[85] Dr. King longed for the day when Black people had equality under the law, but he rejected the notion that passage of another civil rights act would automatically achieve that result.[86] More particularly, Dr. King knew equality of opportunity required more than

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80 Exec. Order No. 10,925, 26 Fed. Reg. at 1977 (emphasis added) (establishing the "President's Committee on Equal Employment Opportunity").

81 *Id.* at 1977–78 (emphasis added).

82 *See Voting Rights Act of 1965*, STAN. UNIV.: THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (Aug. 6, 1965), https://kinginstitute.stanford.edu/encyclopedia/voting-rights-act-1965 [https://perma.cc/SSW6-GWYV] (discussing temporal proximity and connection between the launch of the Southern Christian Leadership Conference (SCLC) and the brutal attack on Black civil rights activists in Selma, Alabama on March 7, 1965); *see also* David Kaiser, *Why You Should Care That* Selma *Gets LBJ Wrong*, TIME (Jan. 9, 2015, 7:00 AM), https://time.com/3658593/selma-lbj-history [https://perma.cc/SCU7-A4HB] (discussing the historical context behind the movie, *Selma*, specifically including Johnson's political strategy in rolling out civil rights legislation, including the Civil Rights Act of 1965).

83 PIERCE, *supra* note 72, at 4 (crediting Faye Crosby and Diana Cordova); *see* Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

84 PIERCE, *supra* note 72, at 4 (quoting Faye J. Crosby & Diana I. Cordova, *Words Worth of Wisdom: Toward an Understanding of Affirmative Action*, 52 J. SOC. ISSUES 33 (1996)); *cf.* KENDI, *supra* note 19, at 13, 17–23.

85 *See* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 130–32 (1964). In a chapter entitled "Black and White Together," Dr. King discussed the outpouring of unity following the Birmingham sit-ins and riots. *Id.* at 85–99. Dr. King ended that chapter noting that "once on a summer day, a dream came true. The city of Birmingham discovered a conscience." *Id.* at 99.

86 *See* Cass R. Sunstein, *Casuistry*, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 318–19 (Robert Post & Michael Rogin eds., 1998).

just a prohibition on racial discrimination. It would take "positive measures" to provide people of color with a fighting chance:

> On the surface, . . . [granting Blacks equality under the law] appears reasonable, but it is not realistic. *For it is obvious that if a man is entered at the starting line of a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.*[87]

Johnson echoed that rhetoric in a 1966 speech at Howard University, a historically Black college:

> *You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, "You are free to compete with all others,"* and still justly believe that you have been completely fair.
>
> Thus, *it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates.*
>
> This is the next and more profound state of the battle for civil rights. *We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory but equality as a fact and equality as a result.*[88]

The common-sense rhetoric of Dr. King and Johnson did not exist in a vacuum. America had a front-row seat to the hurdles facing Black people, including being murdered by out-of-control racists. Civil whites understood race-conscious measures were needed to undo the debilitative effects of both slavery and Jim Crow. That begged the question: were civil whites up for the task?

2. Why the Act Passed: Backlash to the Backlash of *Brown v. Board of Education*

Historians uniformly agree that the Civil Rights Act of 1964 was passed in part because whites of the 1960s were appalled by the brutal backlash against Black people following *Brown v. Board of Education*. The same counter-reaction occurred after the last major emergence of the Klan in the 1920s.[89] One difference in the late 1950s and 1960s was that

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87 *Id.* at 319 (emphasis added) (quoting KING, *supra* note 85, at 134–35).

88 LAWRENCE & MATSUDA, *supra* note 27, at 24.

89 *See* Maureen Johnson, *Separate but (Un)Equal: Why Institutionalized Anti-Racism Is the Answer to the Never-Ending Cycle of* Plessy v. Ferguson, 52 U. RICH. L. REV. 327, 353–63 (2018). While the Klan initially was aligned with Southern Democrats battling against African Americans and white Republicans, the tables ultimately were turned. Today, the Klan is viewed as having taken

these images went beyond single-shot photographs or newsreels at movie theaters. They appeared on television sets in the homes of everyday Americans as they sat in their living rooms and ate dinner.[90] Put simply, these images could not be missed. Just as witnessing the George Floyd murder "woke" many whites in 2020, readily available moving images of angry whites spewing epithets at little girls like Harris motivated civil whites to do *something*.[91]

Notably, the video images on primetime national television included clear exhibits of government-sanctioned violence against people of color, one of the key steps leading to desensitization.[92] Police turned high-pressure firehoses on Black teenage girls and pummeled Black men with nightsticks while snapping German Shepherds finished the deed.[93] Blood was spilt on the Pettus Bridge when law enforcement hurriedly swore in civilian deputies, many of whom were Klan members.[94] All of this was narrated by news anchors like Walter Cronkite, the "Most Trusted Man in America," as well as David Brinkley and Chet Huntley.[95] If these trusted white prime-time anchors said it was so—and they had the celluloid to prove it—civil whites *knew* it was so. Legitimacy flowed not

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up residence under the Republican tent. *See* Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L.L. REV. 285, 295–303 (2018) (discussing prior alliance of the Klan with Southern Democrats); Mychael Schnell & Emily Brooks, *House GOP Leaders Say White Nationalism Accusations Are All Politics*, HILL (May 16, 2022, 8:21 PM), https://thehill.com/homenews/house/3490663-house-gop-leaders-say-white-nationalism-accusations-part-of-a-political-game [https://perma.cc/J8KC-NS89] (discussing claims that Republican Party is encouraging rhetoric advancing violence and white supremacy).

90 PIERCE, *supra* note 72, at 60.

91 *See id.*; *see also* HILL & BREWSTER, *supra* note 8, at 3–6, 11–26.

92 *See* Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 675–76 (2017) (detailing step-by-step desensitization in Nazi Germany). Jewel also discusses desensitization through mass media in the context of police violence of Black men. *Id.* at 684–91. Wilkerson also discusses "dehumanization," making comparisons to Nazi Germany. WILKERSON, *supra* note 7, at 141–64. The playbook is simple but drastic in effect: "Dehumanize the group, and you have completed the work of dehumanizing any single person within it." *Id.* at 141.

93 Robin Walker Sterling, *Through a Glass, Darkly: Systemic Racism, Affirmative Action, and Disproportionate Minority Contact*, 120 MICH. L. REV. 451, 478–79 (2021).

94 *See, e.g.*, KENDI, *supra* note 34, at 390; *see also id.* at 374–75 (discussing televised images of segregationist police chief "Bull" Conner's atrocities on May 3, 1963).

95 Nicholas W. Allard, *Sweet Are the Uses of Adversity*, 52 U. TOL. L. REV. 197, 204 & n.13 (2021) (discussing the three-network mainstay of "reverentially regarded" news anchors, specifically including Cronkrite, the "Most Trusted Man in America"); Suzanne R. Chauvin, Book Review, HOUS. LAW., Mar./Apr. 2013, at 46 (reviewing CORYDON B. DUNHAM, GOVERNMENT CONTROL OF NEWS: A CONSTITUTIONAL CHALLENGE (2011)) ("[W]e often forget the days before the 24-hour news cycle, when major news stories came through only three networks, and we trusted Walter Cronkite, Chet Huntley and David Brinkley to present accurate, unbiased news.").

just from the horrific images but also from objectivity and unanimity of presentation by major networks.[96]

The final vote to pass the Civil Rights Act took place on June 19, 1964, following a fifty-four-day Senate filibuster.[97] Both the Senate and the House of Representatives were comprised almost entirely of white men. As documented by the Brookings Institute, there were *no* people of color in the Senate and only a handful of white women.[98] Still, at the time of passage, the Act received solid public support, albeit with "sizable opposition from southern representatives," such as Senator Strom Thurmond.[99] That honeymoon was doomed from the beginning. Proving Bell's analogy, civil whites showed up to put out the fire but left in a hurry while the embers were still simmering, basking in the glow that they had saved the day.

3. Backlash to the Backlash to the Backlash: White Resistance to Race-Conscious Measures to End Racism

The Civil Rights Act of 1964 barred Jim Crow in public accommodations of all sorts, including swimming pools and recreational facilities.[100] In the 1970s, town leaders in Stonewall, Mississippi, had an

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96 Cronkite anchored the CBS Evening News from 1962–1981 and was widely viewed as a serious-minded journalist with a tagline of: "And that's the way it is." John H. Fuson, Comment, *Protecting the Press from Privacy*, 148 U. PA. L. REV. 629, 629–30, 629 n.1 (1999); *id.* at 629 n.2 (first citing DOUG JAMES, WALTER CRONKITE: HIS LIFE AND TIMES 25 (1991); and then citing MICHAEL EMERY & EDWIN EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 493–96 (8th ed., 1996)). Brinkley and Huntley had a folksier approach, ending their show with: "Goodnight, Chet. Goodnight, David." *Goodnight, Chet. Goodnight, David, and Goodnight for NBC News*, INTERVIEWS (July 31, 2015), https://interviews.televisionacademy.com/news/goodnight-chet-goodnight-david-and-goodnight-for-nbc-news [https://perma.cc/5WAM-4U4A]. That tag resonated with earlier radio and television shows (e.g., *Say Goodnight, Gracie*) and served as a precursor to the standard ending in the television show *Little House on the Prairie*: "Goodnight, John-Boy." *See generally* CHERYL BLYTHE & SUSAN SACKETT, SAY GOODNIGHT, GRACIE!: THE STORY OF GEORGE BURNS & GRACIE ALLEN (rev. 2016); Katie Maloney, *'The Waltons': 'Goodnight' Routine on Show Was Based on Real Activity from Creator's Childhood*, ENTERTAINMENT (Feb. 22, 2021, 1:18 PM), https://outsider.com/entertainment/the-waltons-goodnight-routine-show-based-real-activity-from-creators-childhood [https://perma.cc/EK6J-UXN4]. For an interesting take on the major network's coverage of *Bakke*, see Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 31 (1993) (discussing, *inter alia*, "reverse discrimination").

97 Trina Jones, *Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law*, 6 ALA. C.R. & C.L.L. REV. 45, 46 (2014); *The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/civil_rights/civil_rights.htm [https://perma.cc/CWK8-FXCX].

98 *See* BROOKINGS INST., *supra* note 4, at 49–56.

99 Jones, *supra* note 97, at 46–47.

100 *Id.* at 47; *see also* VICTORIA W. WOLCOTT, RACE, RIOTS, AND ROLLER COASTERS: THE STRUGGLE OVER SEGREGATED RECREATION IN AMERICA, 160–69, 232 (2012).

answer to court-ordered integration: they filled in their pool with dirt.[101] The city was a hold-out, but not an outlier. Numerous municipalities either privatized such facilities or shuttered their doors. And they did so with the approval of the Supreme Court.[102] The government-sanctioned message was clear: many white people were disgusted at the thought of intermingling with Black people. Whether it be in a public swimming pool, baseball diamond, or funhouse, these whites were willing to forego that activity altogether absent segregation. If white America was not even willing to share a public watering hole with their Black brethren, did affirmative action ever stand a chance?

Segregationists needed to articulate an *arguable* legitimate basis to exclude Black people (i.e., we are not racist, but…). One such argument was that integration would "disrupt public order."[103] Another was that local communities did not want to be told what to do by the federal government.[104] Of course, that was the same argument Biden advanced regarding government-mandated bussing, both in the 1970s and at the 2020 presidential debate.[105] And it was the same argument advanced by southern states wanting to maintain slavery in the Civil War Era.

Whites balked even louder over the notion of not only *sharing* resources but *giving up* bankable commodities, such as a decided edge in landing jobs and college admissions.[106] Municipalities began to document the rather egregious disparities pertaining to minority representation and establish remedial goals.[107] To their credit, these civil whites took

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101 WOLCOTT, *supra* note 100, at 160–69, 232. Decades later, two real estate developers unearthed the Stonewall pool, and it was opened to the public in 2007. *See* WILKERSON, *supra* note 7, at 117–21, 236 (relaying gut-wrenching accounts of Black people being harassed and even murdered for swimming into "white water" and noting that some municipalities "poured concrete into their whites-only pools so that nobody could swim, rather than sharing the water with [B]lack people"). For additional coverage and contemporaneous photos, see Niraj Chokshi, *Racism at American Pools Isn't New: A Look at a Long History*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html (last visited Nov. 21, 2022).

102 *See generally* Randall Kennedy, *Reconsidering* Palmer v Thompson, 2018 SUP. CT. REV. 179 (2018); Palmer v. Thompson, 403 U.S. 217 (1971).

103 Kennedy, *supra* note 102.

104 *Id.* at 183 (noting a local mayor "declar[ed] that neither agitators nor President Kennedy will change the determination of Jackson to retain segregation" (quoting *Palmer*, 403 U.S. at 250 (White, J., dissenting))).

105 *See* Tarlo, *supra* note 2; Edith Honan, *'That Little Girl Was Me': Kamala Harris, Joe Biden Spar Over Desegregation at Democratic Debate*, ABC NEWS (June 27, 2019, 11:16 PM), https://abcnews.go.com/Politics/girl-senator-harris-vice-president-biden-spar-desegregation/story?id=64007842 [https://perma.cc/Z5XP-QPNP].

106 This sentiment gave rise to the challenges in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (college admissions), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (construction contracts).

107 *See* discussion *infra* Section I.C.3.

seriously the need to take affirmative steps to end racism. Similarly, civil whites heading up educational institutions adopted remedial goals to increase minority representation, all soundly premised on data demonstrating bare opportunity was not enough to ensure minorities were given a fair share.[108]

But institutions are beholden to the constituents they serve. In the critical court of public opinion, the case for affirmative action was swimming upstream against a tirade of hostile forces. And that hostility trickled up to the Supreme Court. Whites that whined the most were against color-blindness. To them, segregation was justified. Other whites were more "tolerant," but they turned away from the early rhetoric that equal opportunity was meaningless if the playing field was not leveled.[109] Others felt the pinch of what they viewed as a zero-sum impact on white privilege, albeit *undeserved* white privilege.[110]

When viewed more broadly, the zeitgeist of this era included a very large "whoa" once whites realized the impact of *not* having as much of an advantage. Sure, affirmative steps might be fine when those steps were taken *elsewhere*, but many whites did not want to be left out in the musical chairs of equitable distribution. A "color-blind" Constitution was the compromise, especially given that it seemed linguistically consistent with both the Fourteenth Amendment and Dr. King's own words, albeit taken out of context. Ironically, the demand for a "color-blind" Constitution is exactly what turned Dr. King's proverbial dream into a Supreme Court nightmare, at least in the 1970s and 1980s.

C. *The Intersection of Legal and Social Rhetoric: The Twin (Irrational) Pillars Ushering in the Demise of Affirmative Action*

"Which came first, the chicken or the egg?" It is difficult to imagine a chicken not hatched from a chicken egg, yet equally hard to imagine a chicken egg not produced by a chicken. When the riddle was posed to Luna Lovegood at Hogwarts Academy, her answer was simple: "A circle has no beginning."[111] Put differently, a circular cause and effect is so

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108 *See generally* Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 TUL. L. REV. 1 (2021).

109 While "tolerance" may have been the buzz word in the 90s, Wilkerson alludes to the negative linguistic implications. It is not enough to be "tolerant." Simply stated by Wilkerson, you "tolerate mosquitoes." WILKERSON, *supra* note 7, at 387.

110 JARDINA, *supra* note 60, at 262 (examining different rationales for white resistance to racial equality).

111 For a humorous take on this, see Melissa Breyer, *Finally Answered! Which Came First, the Chicken or the Egg?*, TREEHUGGER, https://www.treehugger.com/finally-answered-which-came-first-the-chicken-or-the-egg-4864321 [https://perma.cc/KCG7-6PR8] (Mar. 18, 2022).

intertwined that one begets the other. That certainly has been true of the interrelation of social and legal rhetoric. No doubt, Supreme Court decisions have a pronounced impact on society at large. And despite vociferous cries to the contrary by the turnstile of the revered nine, scholars recognize social rhetoric certainly can impact Supreme Court decisions.

Scholar Barry Friedman examined this phenomenon, not in terms of judicial activism, but in candid recognition that there is a fourth check-and-balance on the exercise of constitutional powers, namely, the American people. Whether purposeful or not, many high-profile Supreme Court decisions reflect a testing-the-waters process Friedman describes as "judicial decision—popular response—judicial re-decision."[112] Prime examples are *Roe v. Wade* and the marriage equality cases.[113] That process also occurred in the affirmative action cases.[114]

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112 FRIEDMAN, *supra* note 77, at 382.

113 *See id.*; Johnson, *supra* note 21, at 413–14.

114 It is interesting to consider how *Dobbs* lands in Friedman's "judicial decision—popular response—judicial re-decision" model. A draft of the majority opinion, authored by Justice Alito, was leaked on May 2, 2022—two months prior to the final ruling. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/2G26-GYEA]; *Summary and Analysis of Leaked* Jackson Women's Health Organization v. Dobbs *Opinion*, NAT'L WOMEN'S L. CTR. (May 10, 2022), https://nwlc.org/resource/summary-and-analysis-of-leaked-jackson-womens-health-organization-v-dobbs-opinion [https://perma.cc/8T2Y-H3VX]. The mystery may never be solved, but it could be hypothesized that it was intended to gauge public appetite for an even more conservative ruling (e.g., majority adoption of Justice Thomas' concurrence suggesting the end to federal substantive due process rights, including contraception and same-sex marriage). *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300–04 (2022) (Thomas, J., concurring). A more straight-forward application of the Friedman model might be that the final opinion is the floater, meaning it is intended to lay a foundation for a broader rule of law. Justice Alito repeatedly characterized fetuses as fetal "human beings" and discussed "prenatal life," alluding to a future debate over prenatal rights of an unborn fetus. *See Dobbs*, 142 S. Ct. at 2252 ("[C]riminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law . . . ."); *see also id.* at 2261 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."). At oral argument, Justice Alito candidly asked whether "the rights of personhood begin at conception," later adding that "the fetus has an interest in having a life, and that doesn't change, does it, from the point before viability to the point after viability?" Transcript of Oral Argument at 32, 65–66, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392). If a majority of states outlaw abortion, the "re-decision" could be a ruling banning abortion nationwide (e.g., by declaring fetal "human beings" a suspect class). Months after *Dobbs* was handed down, another scandal emerged when Justice Alito was accused of leaking the opinion in an earlier case that permitted corporations to refuse to shoulder healthcare costs for certain contraception measures, such as morning-after pills. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html (last visited Nov. 21, 2022). Justice Alito denied these reports. Josh Gerstein, *Justice*

More particularly, in the very early cases interpreting the Civil Rights Act of 1964, the Supreme Court at least acknowledged the need to go beyond mere opportunity to achieve equality.[115] Minorities were boxed out of certain workplaces or even entire industries because of generational racism (e.g., if Joe Bigot was the decision maker, contracts and subcontracts would go to white-owned businesses, essentially giving whites a perpetual monopoly).[116] Upon proof of such discrimination, courts were empowered to issue equitable race-conscious decrees aimed at ending discriminatory practices.

The broader squabble picked up steam when entities—both private and public—voluntarily took steps to increase minority representation (e.g., in college admissions or as governmental set-asides to ensure minorities received at least some of their fair share of construction contracts). With rare exceptions and narrower windows, the Supreme Court ultimately shut down any kind of program detrimentally impacting whites, at least in terms of set-asides.[117] Even in the Admissions Cases, "goals" were theoretically permitted; "quotas" were not.[118]

Two main pillars emerged to justify shutting down affirmative action, both reflecting white-centered popular sentiment. First, "innocent" whites should never be forced to bear the burden of past discriminatory acts by others. Second, not only was affirmative action unnecessary, but it was actually harmful and stigmatizing. Following the playbook, minorities were pitted against each other.[119] Where public entities sought to provide relief for both Black people and other oppressed minorities, race-conscious measures were *over*inclusive. But if they *did not* provide relief for other oppressed minorities—or for similarly situated whites—they were *under*inclusive.

Whatever deference the Supreme Court initially afforded "remedial" or "benign" legislation was soundly put to rest in 1989. The majority opinion in *City of Richmond v. J.A. Croson Co.* equated equitable measures with invidious discrimination, subjecting both to strict scrutiny.[120] As evidenced by three key cases discussed below, that ended two decades of gradual diminution of deference to the remedial goals of the Civil Rights Act of 1964. Minority plaintiffs who could prove they

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Alito Denies Allegation of a Leak in 2014 Case About Access to Birth Control, YAHOO!NEWS (Nov. 20, 2022, 12:07 AM), https://news.yahoo.com/justice-alito-denies-allegation-leak-050742931.html?fr=sycsrp_catchall [https://perma.cc/S32F-BNQK].

115 *See* Sterling, *supra* note 93, at 488 & nn.263–67.

116 *See* discussion *supra* Sections I.C.2–I.C.3 (discussing *Fullilove* and *Croson*).

117 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

118 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288–89 (1978).

119 *See, e.g.*, *id.* at 298; *J.A. Croson Co.*, 488 U.S. at 493–94.

120 *See J.A. Croson Co.*, 488 U.S. at 494–95.

suffered a specific *personalized* harm *directly traceable* to prior discrimination by a *specific governmental entity* could be given redress. The rest be damned.

1. 1978: *Regents of the University of California v. Bakke*

Bakke was one of the first cases changing course regarding the standards applicable to affirmative action. *Bakke* involved a challenge to a "goal"-based admissions policy at the Medical School of the University of California at Davis (U.C. Davis).[121] Yet, in the very first line of the majority opinion, Justice Powell framed the program more as a quota "designed to assure the admission of a specified number of students from certain minority groups."[122] This squarely raised the issue of whether a public university could implement race-conscious measures to make a dent in the near all-white composition of its student body.[123]

In some ways, Justice Powell split the difference. Writing alone, Powell sided with conservatives to find that the U.C. Davis policy was indeed "unlawful," requiring Bakke's admission to the medical school.[124] But Powell also sided with the liberal wing to reverse the lower court's bright-line ban of *ever* considering an applicant's race. More particularly, Powell, with Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens concurring in part, affirmed the lower court's finding that the policy was an "unlawful" quota.[125] A different lineup—Justices Brennan, White, Marshall, and Blackmun—concurred in part to *reverse* the lower court's premise that race could *never* be considered.[126] Professor Alan Dershowitz called the split decision "an act of judicial statesmanship."[127]

In terms of the underlying facts, the Regents previously employed a dual-track admissions program, one of which—dubbed a "special admissions program"—kept slots open for "economically and/or

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121 *Bakke*, 438 U.S. at 269–71, 288.

122 *Id.* at 269–70.

123 *See id.* at 272 (noting that upon opening in 1971, "the first class contained three Asians but no [B]lacks, no Mexican-Americans, and no American Indians").

124 *Id.* at 271, 319–20.

125 *Id.*; *id.* at 408–21 (Stevens, J., concurring in part and dissenting in part).

126 *Id.* at 272 (majority opinion); *id.* at 324–25, 374–76 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

127 Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From* Regents v. Bakke *to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 468 (2005) (quoting Linda Greenhouse, *Bell Hails Decision*, N.Y. TIMES, June 29, 1978, at A1). Synnott presents an excellent discussion of then-existing precedent regarding admission challenges, including discussing the briefing.

educationally disadvantaged" applicants.[128] That changed in 1974. Applicants were asked "whether they wished to be considered as members of a 'minority group,' . . . [meaning] 'Blacks,' 'Chicanos,' 'Asians,' and 'American Indians.'"[129] Bakke was a "white male" passed over twice for admission, once in 1973 and again in 1974.[130] Bakke argued that while his scores were too low to get him admitted under the general program, they were sufficient under the "special admissions program" had that been open to him.[131]

This played into an emerging "dominant narrative": affirmative action did to whites what previously was done to Black people in the Jim Crow era.[132] More particularly, "affirmative action" was reframed in popular culture as "reverse discrimination."[133] This resonated with the historically recurring theme of "white victimization" and the demand that no white ever suffer detriment as a result of a benefit afforded minorities.[134] Tracking that sentiment, Justice Powell found there was "a measure of inequity in forcing *innocent* persons in [Bakke's] position to bear the burdens of redressing grievances not of their making."[135] Powell echoed this theme four times, thrice expressly using the term "innocent" even though Bakke certainly never made any evidentiary showing of his innocence.[136]

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128 *Bakke*, 438 U.S. at 272–74.

129 *Id.* at 274.

130 *Id.* at 276.

131 *Id.* at 276–77, 277 n.7.

132 John Cocchi Day, Comment, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CALIF. L. REV. 59, 121–22 (2001) (noting public perception that affirmative action "exacts tremendous hardship upon innocent non-minorities"). In discussing the "dominant narrative" of the time, Day further notes the irony that "while the federal judiciary routinely finds affirmative action plans to exact only a minor, diffused effect on passed-over white employees, there is widespread public perception that affirmative action programs disproportionately place sizeable demands on whites." *Id.* at 123, 125 (footnote omitted); *see also id.* at 119 n.217 ("Many cases find no substantial harm to third party rights in the hiring context.").

133 Philip L. Fetzer, '*Reverse Discrimination*': *The Political Use of Language*, 12 NAT'L BLACK L.J. 212, 213–16 (1993) (tracing the origin of the term "reverse discrimination" and its conflation with affirmative action).

134 *See id.*; *see also* Schnapper, *supra* note 13, at 756–57.

135 *Bakke*, 438 U.S. at 298 (emphasis added). Justice Powell also argued that if all whites who suffered prior discrimination were given preferential treatment, "the only 'majority' left would be a new *minority* of white Anglo-Saxon Protestants." *Id.* at 296 (emphasis added).

136 *See id.* at 298, 307–08 (expressing references to "innocent" whites); *id.* at 298 ("Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."); *see also* Sterling, *supra* note 93, at 500–01 (discussing, *inter alia*, *Bakke* and the "innocence narrative" (quoting Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 481–89 (2014))).

Still, Justice Powell acknowledged governmental entities *could* pass remedial legislation based on appropriate findings. Citing a handful of lower court decisions, Powell noted that race-conscious preferences were upheld when there was a tailored, industry-specific remedy to rectify past discrimination.[137] The problem, per Powell, was that the Regents simply did not satisfy that requirement.[138]

The message was clear: if universities dared to consider race in admissions, they better be discreet and not openly step on the toes of a white male. Because of the logical appeal of "reverse *discrimination*," whites—even civil whites—largely were fine with putting race off limits in terms of consideration for jobs, schools, or anything else for that matter.[139] While it easily could be argued that whites just did not want to give up their considerable privilege, it also could be argued that many were too oblivious to even see that.

Bakke set up that "decision—re-decision" testing-the-waters framework that Friedman discusses.[140] Ironically, Justice Powell's "act of judicial statesmanship"[141] to provide at least somewhat of a victory for affirmative action might have actually *hurt* that cause. Had the Supreme Court flatly held that *no* race-conscious measures ever could be taken to remedy past effects of racism, *no matter what*, that could have caused a backlash. All was not lost. Or was it?

2. 1980: *Fullilove v. Klutznick*

Fullilove raised a purely facial challenge to an amendment to the Public Works Employment Act of 1977 (PWEA), as applied to the City of New York.[142] The amendment pertained to a "minority business enterprise" (MBE) provision requiring any state or locality receiving

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137 *See Bakke*, 438 U.S. at 301 ("The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference.").

138 *Id.* at 300–02, 305. Justice Powell made one more legal point that at least one prominent scholar argued could save the day for affirmative action. *See* Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1117–18 (2019). Justice Powell posited that if "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." *Bakke*, 438 U.S. at 306 n.43. Per Justice Powell, that could better provide a "fair appraisal of each individual's . . . promise," yet it would not explain a "fixed number[] of seats." *Id.*

139 *Cf.* Fetzer, *supra* note 133, at 212–16 (emphasis added) (tracing the origin of the term "reverse discrimination" and its conflation with affirmative action).

140 *See* FRIEDMAN, *supra* note 77, at 382.

141 Synnott, *supra* note 127, at 468 (quoting Greenhouse, *supra* note 127).

142 Fullilove v. Klutznick, 448 U.S. 448, 453 (1980).

federal funds for construction work to set aside ten percent of the contracts for minority-owned businesses.[143] There was "abundant evidence" supporting congressional findings of longstanding racial inequities in the construction industry.[144] In another horribly fractured opinion, the Supreme Court upheld the MBE provision, albeit with enough caveats and disclaimers to line the streets of Manhattan. The lead opinion was authored by Chief Justice Burger, joined only by Justices White and Powell.

The MBE provision passed both houses of Congress only after a last-minute edit substantially rolled back the impact of the mandated quota by adding an "administrative waiver" if the state or local entity deemed compliance "infeasible"[145] (i.e., you do not have to if you really do not want to). That key edit was highlighted in the very first sentence of Justice Burger's lead opinion and echoed throughout the remainder.[146] There were also repeated reminders that the challenge was purely "facial" and a different result might well be reached in a particular case. Justice Burger emphasized that a minority business could only exceed other bids if the need to do so could be "attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination."[147] But how exactly would that ever be proven? Justice Burger's lead opinion essentially guaranteed minority businesses a ten percent set-aside *if* their bid was less, or at least no greater than, a nonminority business. Now there's a leg up!

Even more fundamental, Justice Burger's lead opinion hammered home the "innocent" whites rhetoric seen in *Bakke*, adding *ipse dixit* that the Supreme Court was entitled to "assume that the complaining parties are innocent of any discriminatory conduct."[148] But, like Justice Powell in *Bakke*, Justice Burger threw a bone—with at least some meat on it—acknowledging that Congress might well have concluded that even "innocent" whites likely benefitted from past discrimination against minorities.[149]

Justice Burger's lead opinion touched upon another pillar of the case against affirmative action: whether such measures really were necessary.

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143 *Id.* at 453–54.

144 *Id.* at 463, 475–78.

145 *Id.* at 460, 462, 464.

146 *Id.* at 453–54, 460–63. The administrative waiver is also mentioned in Justice Powell's concurrence. *Id.* at 514 (Powell, J., concurring).

147 *Id.* at 470–71 (majority opinion).

148 *Id.* at 484–85. The "innocent" whites rhetoric made three additional appearances in Justice Powell's concurrence. *Id.* at 514–15 (Powell, J., concurring).

149 *Id.* at 485 (majority opinion) (noting that "some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities").

He also floated the notion that preferences could be unconstitutional if they preferred certain minorities over others. Echoing arguments made in the Reconstruction Era, if even a single person who needed assistance was overlooked, let that assistance be denied to everyone.[150] Opponents further argued that the MBE provision was *over*inclusive in that racial preferences "bestow[ed] a benefit on businesses identified by racial or ethnic criteria which cannot be justified . . . as a remedy for the present effects of identified prior discrimination."[151] If help was going to be given to Black people, let it at least be limited to those Black people who were the *most* disadvantaged.[152] Not only would this pit people of color against each other, but it would make the most vulnerable grovel to ensure they get a benefit that might be denied to less vulnerable members.

Ultimately, no test for assessing the constitutionality of remedial legislation came out of the lead opinion in *Fullilove*. In the very last paragraph, Justice Burger metaphorically threw his hands in the air: "This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*," a reference to the lead opinion written by Justice Powell.[153] Still, in his concurring opinion in *Fullilove*, Justice Powell pushed his three-part inquiry: (i) whether Congress was "competent" to make findings of past discrimination; (ii) whether sufficient findings were made demonstrating unlawful discrimination against the aggrieved parties; and (iii) whether the remedy was a "permissible means for redressing *identifiable past discrimination*."[154] Per Powell, this required "strict judicial scrutiny" for *any* racial classification, including equitable legislation intended to benefit, as opposed to subrogate, minorities.[155]

After *Fullilove*, affirmative action in the form of set-asides may still have been alive, but it was on life support, hanging on by the thin thread that remedial legislation enacted *by Congress* theoretically could withstand constitutional scrutiny. But that proved to be short-lived. As emphatically made clear in *Croson*, discrimination against whites was off limits, whether benign or invidious, and regardless of whether such discrimination was meted out by a private actor, a state or local government, or even Congress itself.[156]

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150 *See id.* at 485.

151 *Id.* at 486.

152 *See id.*

153 *Id.* at 492.

154 *Id.* at 499 (Powell, J., concurring) (emphasis added).

155 *See id.* at 507.

156 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

3. 1989: *City of Richmond v. J.A. Croson Co.*

At issue in *Croson* was whether a local municipality that made findings of past discrimination in the construction industry could enact remedial legislation like the set-aside MBE provision in *Fullilove*.[157] In the near decade since *Fullilove*, 28% of the lower courts utilizing Justice Powell's test approved such plans, at least in part.[158] Justice O'Connor authored the *Croson* opinion, which this time included a solid five-four majority, albeit still fractured into numerous separate concurrences.

Just as Congress made findings of general discrimination in the construction industry in *Fullilove*,[159] the City of Richmond made findings as to such discrimination within its boundaries.[160] Yet in neither *Fullilove* nor *Croson* were there any findings that the government entity *itself* had discriminated. That did not seem to matter in *Fullilove*, but it mattered in *Croson*. In Justice O'Connor's words, "[t]here was no direct evidence of race discrimination *on the part of the city* . . . or any evidence that the *city's* prime contractors had discriminated against minority-owned subcontractors."[161] Citing *Wygant v. Jackson Board of Education*, an intervening plurality decision,[162] remedial legislation generally only could survive scrutiny if the findings of a local entity concerned "prior discrimination *by the governmental unit involved*."[163] The *Croson* Court distinguished *Fullilove* on the ground that the MBE provision was passed by Congress, which had a "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."[164] Wait, Congress can do that on a national level, but a state or municipality can't do that on their own turf?

To Justice O'Connor's credit, she acknowledged a city *could* take "affirmative steps" to remedy past discrimination "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."[165] Still, while such circumstances certainly could at least be *inferred* from the City's findings, the majority flatly struck the City's plan as unconstitutional.[166]

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157 *Id.* at 476–77.

158 Day, *supra* note 132, at 66 n.25, 67.

159 *See Fullilove*, 448 U.S. at 463, 475–78.

160 *See J.A. Croson Co.*, 488 U.S. at 479–80.

161 *Id.* at 480 (emphasis added).

162 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

163 *J.A. Croson Co.*, 488 U.S. at 492 (emphasis added) (quoting *Wygant*, 476 U.S. at 274).

164 *Id.* at 489–90.

165 *Id.* at 492.

166 *Id.* at 510–11.

Croson again played themes of white victimization, and pitting minorities against each other, through claims of over- and under-inclusiveness. This time it was more blatant. Why should Black people "share" a remedial benefit with "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons"?[167] Per Justice O'Connor, that warranted suspicion: "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that *perhaps the city's purpose was not in fact to remedy past discrimination*."[168] Citing Justice Stevens' dissent in *Fullilove*, Justice O'Connor further bemoaned the idea that "almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members" could demand preferential treatment.[169]

Justice O'Connor also made the case that strict scrutiny was necessary because "there [was] simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[170] This set up an extended passage trotting out another Reconstruction Era relic: stigma. Quoting Justice Powell in *Bakke*, Justice O'Connor reasoned that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."[171]

Another almost startling passage plainly stoked the fear of what could happen to white people if Black people came into power. Per Justice O'Connor, even if it was presumed that reduced scrutiny should apply to remedial legislation, "heightened scrutiny would still be appropriate in the circumstances of this case."[172] This was because Black people controlled the council, by a margin of 5-4.[173] But there was a glaring omission: *whether* the vote came down along racial lines. The answer was in the City's brief[174] and Justice Marshall's dissent. The measure passed by a 6-2 margin, with one abstention, meaning at least *one* vote came

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167 *Id.* at 506.

168 *Id.* (emphasis added).

169 *Id.* at 511 (quoting Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)).

170 *Id.* at 493.

171 *Id.* at 494 (alteration omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

172 *Id.* at 495.

173 *Id.* at 495–96.

174 *See* Brief of Appellant City of Richmond at 6–7, *J.A. Croson Co.*, 488 U.S. 469 (No. 87-998), 1988 WL 1025698.

from a white council member.[175] Still, Justice O'Connor squarely put to rest any notion of distinguishing between remedial and invidious legislation: "We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is *not* dependent on the race of those burdened or benefited by a particular classification."[176]

Did the reasoning set forth in white-centered Supreme Court opinions impact the populace, or was it the populace that influenced the Supreme Court? While the legal and social rhetoric that dealt the demise of affirmative action may not have given white America pause in the 1970s and 1980s, such rhetoric does *not* land so neatly under evolved sensibilities.

II. "THAT LITTLE GIRL *IS* ME": A MODERN-DAY CALL FOR ANTIRACISM AND ACCOUNTABILITY

The first round of the 2020 Democratic Party Presidential Debates was held in Miami, Florida, and included twenty candidates, split over two nights.[177] Harris appeared alongside the two main frontrunners: Senator Bernie Sanders and former Vice President Joe Biden.[178] Just before the debate, Biden faced scrutiny over remarks he made about his efforts in the 1970s to work in tandem with two known congressional segregationists, Mississippi Senator James O. Eastland and Georgia Senator Herman E. Talmadge.[179] Biden also worked with Senator Jesse Helms, another known segregationist representing North Carolina. Together with Helms, Biden introduced a "sweeping antibusing measure" in 1975, along with other bills and amendments in 1976, 1977, and 1982, all aimed at protecting the ability of states and local municipalities to thwart federally mandated school integration. Yet Biden also supported

175 *J.A. Croson Co.*, 488 U.S. at 481; *id.* at 555 (Marshall, J., dissenting) ("Of the four white councilmembers, one voted for the measure and another abstained.").

176 *Id.* at 494 (majority opinion) (second emphasis added).

177 Goldmacher, *supra* note 3.

178 *See* Jonathan Martin & Alexander Burns, *Biden Comes Under Attack from All Sides in Democratic Debate*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/democratic-debate-recap.html?register=email&auth=register-email [https://perma.cc/2KXX-H8G8].

179 Linda Qiu & Thomas Kaplan, *Biden Opposed Busing Despite Other Civil Rights Advocacy*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/politics/joe-biden-james-eastland.html?module=inline (last visited Nov. 21, 2022).

numerous other civil rights bills and enjoyed wide support in the Black community.[180]

Both Harris and New York Senator Cory Booker, another Black Democratic candidate, called for Biden to apologize and retract his favorable comments about segregationists. Biden refused to budge.[181] When Harris and Biden took their places on stage at the debate, it was inevitable the subject would come up. In classic rhetorical form, Harris made Biden view his past conduct from a different perspective, her own:

> HARRIS: . . . .
>
> Growing up, my sister and I had to deal with the neighbor who told us her parents couldn't play with us because she—because we were [B]lack. And I will say also that—that, in this campaign, we have also heard—and I'm going to now direct this at Vice President Biden, I do not believe you are a racist, and I agree with you when you commit yourself to the importance of finding common ground.
>
> But I also believe, and it's personal[,] . . . it was hurtful to hear you talk about the reputations of two United States senators who built their reputations and career on the segregation of race in this country. And it was not only [talk], but you also worked with them to oppose busing.
>
> And, you know, *there was a little girl in California who was part of the second class to integrate her public schools, and she was bussed to school every day. And that little girl was me*.[182]

Biden was noticeably stunned but *still* refused to back down. Deflecting blame from his own actions, Biden argued it was the local school district that was responsible for maintaining segregated schools. Harris shot back. That was exactly the point: the bills Biden pushed sought to circumvent *Brown v. Board of Education* by *allowing* states and municipalities to continue segregation.[183] Harris gave Biden one last chance to own up to a past wrong, albeit under modern sensibilities:

> HARRIS: But, Vice President Biden, do you agree *today—do you agree today* that you were wrong to oppose bussing in America *then*? . . .

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180 *Id.*; *see also* Steve Inskeep, *Biden Vows to Ease Racial Divisions. Here's His Record*, NPR (Oct. 14, 2020, 4:05 PM), https://www.npr.org/2020/10/14/920385802/biden-vows-to-ease-racial-divisions-heres-his-record [https://perma.cc/9CPB-DZBU] (discussing Biden's controversial historical positions but noting long-standing support from civil rights leaders).

181 Tarlo, *supra* note 2.

182 The Fix Staff, *supra* note 1 (emphasis added).

183 *Id.*

> BIDEN: I did not oppose bussing in America. What I opposed is bussing ordered by the Department of Education. That's what I opposed.[184]

In the broader narrative, Harris was a modern-day Black woman calling out the civil whites of the 1960s and beyond. To the world, she reflects America's shifting norms toward both racial and gender equality. Changing the future means acknowledging the past and making amends, not pretending past misdeeds either did not happen or were justified. If Harris can call out Biden for past misdeeds, so too can collective America call out the Supreme Court for its past missteps, specifically including ignoring the constitutional distinction between equitable and invidious race-conscious measures.

A. *Myth-Busting: Making the Case for the Constitutionality of Equitable Race-Conscious Measures*

"[E]qual protection of the laws."[185] These vexingly simple words have meant something different constitutionally across generations, all resonating with the white-centered zeitgeist of the time. Following the Civil War, equality for Black people meant little more than not being enslaved. In the Jim Crow era, it meant segregation was fine so long as it was "separate but equal." Following passage of the Civil Rights Act of 1964, it meant Black people were treated in a color-blind manner, although that operated to protect *whites* against affirmative steps to end racial disparities. If reexamined under modern sensibilities, what exactly would "equal protection under the law" mean today?[186]

An average layperson might think all race-conscious measures—cast as "reverse discrimination"—are constitutionally impermissible. But that simply is not so. The NAACP dispelled that myth long ago in a stellar compilation of the legislative history of both the Fourteenth Amendment and several contemporaneously passed equitable race-conscious

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184 *Id.* (emphasis added).

185 U.S. CONST. amend. XIV, § 1.

186 *See, e.g.*, Sterling, *supra* note 93. Sterling notes "two competing ways of understanding the constitutional guarantee of equal protection: as announcing an antisubordination principle, on the one hand, or imposing merely an anticlassification principle on the other." *Id.* at 493. The former counters governmental oppression of minorities; the latter skips that analysis to instead "prioritize[] a 'commitment to protect individuals against all forms of racial classification, including "benign" or "reverse" discrimination.'" *Id.* (quoting Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1473 (2004)).

measures intended to *solely* benefit Black people.[187] As aforementioned, although the term "affirmative action" had not been coined, that is exactly what these measures were. In fact, the Supreme Court admitted as much in numerous cases, specifically including *Bakke*, *Fullilove*, and *Croson*.[188] It is not the *Constitution* that prohibits equitable race-conscious measures; rather it is the Supreme Court's unnecessary blunting of efforts designed to achieve racial equality.

Framed in language a modern-day layperson can understand: if equitable race-conscious measures were constitutionally permissible when the Fourteenth Amendment was enacted, why on God's green earth would such measures not be permissible today?

1. The NAACP's Careful Compilation of Both the History of the Fourteenth Amendment and Contemporaneous Race-Conscious Legislation Solely Benefitting Black People

"Take my brief, please." These four words encapsulate what every practitioner dreams of as a judge drafts their tentative ruling. Prior to e-filing, judicial clerks sometimes would call the offices of the attorney who drafted the prevailing brief and ask for a floppy disc so they could literally cut and paste.[189] There often is near verbatim overlap in theme and legal

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187 *See, e.g.*, Brief Amicus Curiae for the NAACP Legal Defense & Educational Fund, Inc. at 4, 11–28, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998), 1988 WL 1023105; *see also* Schnapper, *supra* note 13.

188 *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 479 (1980). Chief Justice Burger's lead opinion, noting a language barrier that "'effectively foreclosed' non-English-speaking Chinese pupils from . . . educational opportunities," required the school district to take "affirmative steps to rectify the language deficiency." *Id.* (quoting Lau v. Nichols, 414 U.S. 563, 566, 568 (1974)). Notably, Chief Justice Burger recognized there was no suggestion this was a result of "any discrimination, purposeful or otherwise, or from other unlawful acts." *Id.* In other words, "affirmative steps" were required *solely* because of the detrimental impact on non-English-speaking students. *See id.* Quoting a desegregation case, Chief Justice Burger further noted that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.* at 482 (alteration in original) (quoting N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971)); *see also id.* at 508 (Powell, J., concurring) ("As this Court has recognized, the implementation of any affirmative remedy for redress of racial discrimination is likely to affect persons differently depending upon their race."); *accord J.A. Croson Co.*, 488 U.S. at 487–88 (discussing *Fullilove* and noting broad congressional power to pass race-conscious remedial legislation); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 336 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) ("[N]o decision of this Court has ever adopted the proposition that the Constitution must be colorblind.").

189 This was relayed to the author under confidence by a former appellate court clerk. Of course, given the readability of PDFs, that is no longer necessary. A court clerk can easily cut and paste from a party's brief, evidenced by sometimes actually incorporating typographical errors. The author personally has observed that result.

arguments, both in the majority and dissenting opinions.[190] In Supreme Court cases, this honor typically falls upon those who draft the merit briefs for the lead litigants. But sometimes a through line is instead traceable to a formidable amicus brief. That holds true for the briefs filed by the NAACP in the 1970s–1980s.

An NAACP attorney, Eric Schnapper, laid out the NAACP's arguments regarding the constitutionality of race-conscious measures in a 1985 law review article.[191] Following the end of the Civil War, Congress passed legislation purposefully designed to assist former slaves.[192] Some argued assistance should also be given to "white refugees," referring to destitute whites.[193] Toward this end, Congress created the Freedmen's Bureau, which drew its power through a series of annual bills passed from 1864–1872.[194] Congress granted the Freedmen's Bureau broad discretion to decide whether to limit assistance solely to Black people.[195] By and large, and with congressional approval, the Freedmen's Bureau chose to *only* provide benefits to Black people.[196] As explained by Schnapper, "the 1865 Act did not require that freedmen and [white] refugees be treated in the same manner."[197] Rather, "[o]nce in operation the Bureau undertook all the remedial activity contemplated by the earlier bill and generally provided that assistance *to [B]lacks alone*."[198] Congress also simultaneously enacted legislation regarding educational benefits designated by Congress to be provided *exclusively* to Black people.[199]

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190 *See* Johnson, *supra* note 21, at 413–58 (comparing verbiage in powerful introductions to verbiage in subsequent court opinions).

191 *See generally* Schnapper, *supra* note 13. No doubt, these attorneys were inspired by Charles Hamilton Houston, the first general counsel of the NAACP credited for "[k]ill[ing] Jim Crow." *Charles Hamilton Houston*, NAACP, https://naacp.org/find-resources/history-explained/civil-rights-leaders/charles-hamilton-houston [https://perma.cc/SD3G-7T86]; *see also* Brett Milano, *The Man Who Killed Jim Crow: The Legacy of Charles Hamilton Houston*, HARV. L. TODAY (Sept. 5, 2019), https://today.law.harvard.edu/the-man-who-killed-jim-crow-the-legacy-of-charles-hamilton-houston [https://perma.cc/W7HL-9Z7Y].

192 Schnapper, *supra* note 13, at 754–56.

193 *Id.* at 760 & n.30.

194 *Id.* at 754–83.

195 *Id.* at 760–61, 760 n.30.

196 *Id.* at 761. Distributions were set forth in an annual report submitted to Congress by General Howard. *Id.* at 761–63. Notably, "General Howard's [1866] report establishe[d] the fact that the present bureau gave most of its aid exclusively to the negro freedmen." *Id.* at 763 (quoting CONG. GLOBE, 39th Cong., 1st Sess. app. at 78 (1866) (statement of Rep. Chanler)).

197 *Id.* at 761.

198 *Id.* (emphasis added).

199 *Id.* at 765–66.

President Abraham Lincoln readily signed these bills, which were a natural outgrowth of his 1863 proclamation ending slavery.[200] Yet there was backlash. And on April 14, 1865, a curveball hit the mix. Lincoln was assassinated as he sat in the presidential box at Ford's Theater.[201] That curveball ultimately gave rise both to the passage of the Fourteenth Amendment and to indisputable proof that the Constitution certainly permits *equitable* race-conscious measures.[202]

2. The Passage of the Fourteenth Amendment: Insulating Remedial Race-Conscious Legislation Against Constitutional Challenge

Checkmate. The existence of contemporaneous equitable race-conscious legislation certainly presents a compelling argument that the words "equal protection under the law" could not possibly have been intended to prohibit such measures. But the NAACP's briefing of the historical context did not stop there. While President Lincoln signed the earlier Freedmen's Bureau bills, later bills hit a dead end upon crossing the desk of President Andrew Johnson.[203] By then, opposition to providing assistance to Black people was more pronounced.[204] A minority of Congress contended there was no constitutional authority for remedial legislation. Johnson pounced on that argument and unexpectedly vetoed the 1866 Freedmen's Bureau bill.[205] That move outraged many

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200 *Id.* at 760–69. *See generally The Emancipation Proclamation*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation#:~:text=President%20Abraham%20Lincoln%20issued%20the,and%20henceforward%20shall%20be%20free.%22 [https://perma.cc/W9N2-WCNC].

201 Robert Aitken & Marilyn Aitken, *The Long, Strange Case of Dr. Samuel Mudd: The Assassination of Abraham Lincoln*, 31 LITIG. 51 (2005).

202 *See discussion infra* Section II.A.2. For an excellent discussion of the role former President Andrew Johnson may have inadvertently played, see ADAM SERWER, THE CRUELTY IS THE POINT, WHY TRUMP'S AMERICA ENDURES 316–22 (2022). Paradoxical as it may seem, "Black leaders were conscious that Johnson's racism had, rather than weakening the cause of [B]lack suffrage, reaffirmed its necessity." *Id.* at 321; *see also* JON MEACHAM, AND THERE WAS LIGHT: ABRAHAM LINCOLN AND THE AMERICAN STRUGGLE 415–16 (2022) (discussing the aftermath of Lincoln's assassination and noting "[a]fter the briefest period of hope . . . Andrew Johnson[] proved disastrous" and that "[p]rospects . . . for an effective Freedmen's Bureau faded after Ford's Theatre").

203 Johnson has been described as a "racist bent on undermining emancipation" who "spent the summer signaling to southern whites that they could build a new white supremacy that looked much like the one African Americans had fought to end." Jennifer M. Smith & Elliot O. Jackson, *Historically Black Colleges & Universities: A Model for American Education*, 14 FLA. A&M U. L. REV. 103, 187 n.291 (2021) (quoting EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 407 (2016)).

204 Schnapper, *supra* note 13, at 762–72.

205 *Id.* at 768–69, 769 n.88.

progressive Republican leaders, widening a fissure that ultimately would turn the "Party of Lincoln"—a party *advancing* civil rights for former slaves—to a party *opposing* civil rights.[206] Still, enough Republicans jumped on the presidential bandwagon, thwarting an override of Johnson's veto.[207]

From thence, the Fourteenth Amendment was born. More particularly, Congress passed the Fourteenth Amendment for the *exact* purpose of ensuring Congress *had* constitutional authority to enact race-conscious legislation to assist Black people.[208] While Congress failed to override President Johnson's first veto, it rallied to override *two* subsequent vetoes of similar bills, both of which were premised in part on Johnson's objections regarding congressional power and remedial race-conscious legislation, characterized as "operat[ing] in favor of the colored and against the white race."[209] The second override was to a beefed-up Freedmen's Bureau bill that "contained four race-conscious provisions not included in the earlier [bill]" that Johnson vetoed.[210] Because Johnson and others contended that Congress lacked constitutional authority to enact such legislation, Congress endeavored to permanently fix any such lack of power through the passage of the Fourteenth Amendment.[211] This directly related to Johnson's constitutional objection and veto, which had been applauded by Southerners seeking to end remedial race-conscious measures. As explained by Schnapper:

> Congressman Bingham, the sponsor of the draft [Fourteenth A]mendment, placed in the record a newspaper article describing the "rejoicing by the people of the South" at news that "the President had vetoed the Freedmen's Bureau bill." When opponents objected that

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206 Mark Grose, *What Happened to the Party of Lincoln?*, MSN (Nov. 27, 2021), https://www.msn.com/en-us/news/politics/what-happened-to-the-party-of-lincoln/ar-AARcDtQ [https://perma.cc/T2BE-8UPB] (discussing how segregationist "Dixiecrats," including "racists Strom Thurmond and Jesse Helms," flocked to the Republican Party in the 1960s following the passage of the Civil Rights Act of 1964).

207 *Id.* at 770–71. Politician and scholar Stacey Abrams also discusses congressional override of Johnson's vetoes as well as the need for the Civil Rights Act of 1866. STACEY ABRAMS, OUR TIME IS NOW 31–32 (2020). Abrams noted President Andrew Johnson was the Act's "fiercest opponent." Localities used various tricks to continue to enslave Black Americans, including vagrancy laws and the ability to sentence Black people to involuntary servitude. As put by Abrams: "A Black man waiting on a street corner to meet his wife could be arrested and jailed for nothing more than standing still." *Id.*

208 Schnapper, *supra* note 13, at 784–88.

209 *Id.* at 771–75 (quoting Andrew Johnson, Veto Messages, *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3596, 3611 (1914)).

210 *Id.* at 771–73 ("In sum, although weakened in other respects, the new bill provided special aid and protection for [B]lacks substantially more explicit than the vetoed [1866] bill or the 1865 Freedmen's Bureau Act.").

211 *Id.* at 784–85.

> the article was irrelevant to the debate on the proposed amendment, the Speaker ruled that it was pertinent:
>
> "This constitutional amendment proposes to give Congress 'power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.' And if the Chair is correctly informed by the remarks of the gentleman from Ohio as to what this extract is, *it relates to the veto by the President of a bill passed by Congress in regard to the rights of certain persons*, and if that is the case, *it may be within the province of Congress to pass a constitutional amendment to secure those rights and the rights of others generally*, and therefore, as a part of the remarks of the gentlemen from Ohio, this is certainly in order."
>
> In other words, *the Speaker viewed the Freedmen's Bureau bill as an example of federal legislation securing equal protection, precisely the sort of legislation for which the [F]ourteenth [A]mendment would provide clear constitutional authority.* Congress, or at least the Speaker of the House, *regarded the race-concious [sic] assistance programs of the Freedmen's Bureau as furthering rather than violating the principle of equal protection*.[212]

Moreover, even those opposing affirmative action do not seriously dispute that race-conscious remedial measures are constitutionally permissible. The dispute in the 1970s–1980s was whether equitable race-conscious measures should be deemed constitutionally equivalent to invidious measures,[213] such as Jim Crow laws. Based on the history of the race-conscious measures of the 1860s, and the contemporaneous passage of the Fourteenth Amendment, only the latter should face strict scrutiny.

3. A Familiar Tune: Opponents Contended Race-Conscious Measures Were Unnecessary or Even Harmful and Unfairly Burdened Whites

"Welcome to Groundhog Day." That is how Justice Scalia began his concurrence in *Glossip v. Gross*, a death penalty case.[214] His point was that the same arguments kept being made over and over.[215] That can be said

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212 *Id.* at 786–87 (emphasis added) (footnotes omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1092 (1866)).

213 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 487–88 (1989) (discussing *Fullilove* and noting broad congressional power to pass race-conscious remedial legislation).

214 Glossip v. Gross, 576 U.S. 863, 893 (2015) (Scalia, J., concurring).

215 In the movie *Groundhog Day*, the lead character wakes up every morning, destined to repeat the day before. *See* Deborah Denno, *Symposium: "Groundhog Day" Indeed*, SCOTUSBLOG (June

ten-fold about arguments against equitable race-conscious measures. More particularly, Schnapper noted that arguments against providing assistance to Black people in the post-Civil War period bore an "uncanny resemblance" to those advanced against affirmative action following the end of Jim Crow. Aggrieved white people felt they were being passed over in favor of Black people.[216] This was especially so amongst whites of lesser economic means. Black people were cast as "marked objects of special legislation, to the detriment of the unfortunate whites."[217] Translation: God forbid taxes paid by whites went to help former slaves.[218]

Even in the direct aftermath of the Civil War, whites argued that "any unique problems of [B]lacks had already been resolved."[219] As posited by Senator McDougall, a known white supremacist, there was "no reason to treat freedmen better than the '[t]housands of white boys in the North . . . the poor boys of our own race and people.'"[220] Similarly, Congressman Taylor argued the legislation operated to "not [just] have the freedmen equal before the law, but superior."[221] Others argued the legislation would incur "oppression upon the white people" and would "actually harm [B]lack either by increasing their dependence or by provoking white resentment."[222] Those arguments failed in the 1860s. And while they continue to exist today, they are irreconcilable with majoritarian views embracing antiracism.

B. *Empathy Begets Empathy: The Radically Changed Social Backdrop in the 2000s–2020s*

By the early 2000s, pride in individual diversity was on a roll. Rather than hating down, minorities were loving across. The assimilation model of old—assimilating into white America—was being replaced by assimilation into a *diverse* America. Everyone belonged so long as they were accepting of everyone else. Once minorities came together to

30, 2015, 2:31 PM), https://www.scotusblog.com/2015/06/symposium-groundhog-day-indeed [https://perma.cc/YF69-9PWR].

216 Schnapper, *supra* note 13, at 763.

217 *Id.* at 756–57 (quoting H.R. REP. NO. 2, 38th Cong., 1st Sess. 2–4 (1864)).

218 *See id.*

219 *Id.* at 774 (describing President Andrew Johnson's statements regarding H.R. 613). *See generally* H.R. 613, 39th Cong. (1866).

220 *Id.* at 767 (alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 393 (1866) (statement of Sen. McDougall)).

221 *Id.* at 764 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 544 (1866) (statement of Rep. Taylor)).

222 *Id.* at 764–65 (footnote omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 69–70, 402 (1866) (statements of Sen. Davis, Sen. McDougall, and Rep. Rousseau)).

challenge present-day misdeeds, it was inevitable that *past* misdeeds would come under scrutiny. For some, specifically including perpetrators, the knee-jerk response was to brush past conduct under the table because that was just how things were done. Boys will be boys. Racism is not racism unless you are a member of the Klan. These hollow excuses may have worked before, but something in the collective consciousness of America said "enough." Perpetrators of egregious past conduct faced jail time. Others faced losing their livelihoods and legacies.

Rhetoric is more than just words; it encompasses the images, the visceral reactions, and the collective consciousness of a nation. Its power derives from what we see, what we feel, and what we believe is true. This is the backdrop by which America will continue to debate antiracism, specifically including equitable race-conscious measures. No doubt, the summer of George Floyd was a tipping point. Societal and institutional racism was to blame. But so was complacency. Credit must be given to the steady chip-by-chip efforts of Black civil rights scholars, including Kimberlé Crenshaw and others, who championed intersectionality in the 1980s. Their work concretely changed the ways minorities viewed *each other*. In words spoken by many in varying form: none of us are free until all of us are free.[223]

1. Black Feminism and the Origins of Intersectionality

"R-E-S-P-E-C-T." Music legend Aretha Franklin belted out the hit tune in 1967, demanding respect for Black women. The message was empowering and universal. Ultimately, it became a timeless anthem not just for Black women, but for countless marginalized groups, including the LGBTQ+ community.[224]

Alliances between minorities constitute powerful coalitions, strong both in numbers and in their mutual commitment to respect each other's

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223 Kendi quotes Dr. King's famous "Letter from a Birmingham Jail": "injustice anywhere is a threat to justice everywhere." KENDI, *supra* note 34, at 374 n.17 (quoting Martin Luther King, Jr., *"Letter from a Birmingham Jail [King, Jr.]"*, AFR. STUD. CTR.—UNIV. OF PA. (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [https://perma.cc/V78M-ULSA]).

224 *See* DeNeen L. Brown, *How Aretha Franklin's 'Respect' Became an Anthem for Civil Rights and Feminism*, WASH. POST (Aug. 16, 2018, 10:05 AM), https://www.washingtonpost.com/news/retropolis/wp/2018/08/14/how-aretha-franklins-respect-became-an-anthem-for-civil-rights-and-feminism [https://perma.cc/P8FG-BGGG]; Taylor Henderson, *Aretha Franklin's Biopic* Respect *Opens with a Purposely Queer Moment*, PRIDE (Aug. 10, 2021, 5:13 PM), https://www.pride.com/movies/2021/8/10/aretha-franklins-biopic-respect-opens-purposely-queer-moment [https://perma.cc/5JY5-ENRS].

humanity.[225] But it was not always like that. Amid the civil rights legislation of the 1960s, minorities largely were viewed from a "single-axis" frame.[226] Black people were Black people and women were women, each facing distinct hurdles. In the 1980s, Black feminist scholars like Crenshaw pushed back. They spoke the simple truth that Black women—sharing two markers for subrogation—were more marginalized than both white females and Black males.[227]

Crenshaw coined the term "intersectionality" to examine the particular burden of Black women within the greater feminist movement. The "sum" of two multipliers is greater than the separate components standing alone.[228] In 1984, Black feminist scholar bell hooks called out white feminists for failing to truly include Black voices. It was all about the white women. While many were sympathetic to Black people, that sympathy was reserved only for those that fit into their view as to which Black people were truly oppressed.[229] They could not see how *educated* Black women suffered any greater discrimination than educated white women. As explained by hooks:

> Frequently, college-educated [B]lack women (even those from poor and working class backgrounds) were dismissed as mere imitators. *Our presence in movement activities did not count, as white women were convinced that "real" blackness meant speaking the patois of poor [B]lack people*, being uneducated, streetwise, and a variety of other stereotypes. *If we dared to criticize the movement or to assume responsibility for reshaping feminist ideas and introducing new ideas, our voices were tuned out, dismissed, silenced. We could be heard only if our statements echoed the sentiments of the dominant discourse.*[230]

Crenshaw's work regarding intersectionality has since been widely accepted and applied beyond Black feminist theory, leading to a broader

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225 Stacey Abrams speaks of this as the "New American Majority," namely, the "coalition of people of color, young people, and moderate to progressive whites." ABRAMS, *supra* note 207, at 8–12.

226 Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989)); *see also* Trust Kupupika, *Shaping Our Freedom Dreams: Reclaiming Intersectionality Through Black Feminist Legal Theory*, 107 VA. L. REV. ONLINE 27, 34 (2021) (citing Crenshaw, *supra* note 226, at 140).

227 Crenshaw, *supra* note 226, at 140.

228 *See* Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1811 (2021) ("[T]he intersectional experience is greater than the sum of racism and sexism." (quoting Crenshaw, *supra* note 226, at 140)); *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

229 BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 11–12 (1984).

230 *Id.* (emphasis added).

vernacular understanding of the term. Once a tribe had the back of one of the more marginalized among their own—e.g., a poverty-stricken transgender Black female—tribes naturally began supporting intersecting tribes.[231] Arguably, this led to a universal ideal that *no one* should be marginalized based on one (or more) immutable or irrelevant characteristics.[232] Over time, that had a profound effect on alliances among minorities. Emerging scholar Trust Kupupika argues that the term must be honored for its "Black feminist roots" to be effective in producing change.[233] Kupupika is correct. The empathy exhibited by Black feminists of the 1980s served as a model creating a much different melting pot, embracing diversity not just among different minorities but amid minorities.

2. The Hashtag Era: BLM, the #MeToo Movement, and the Raw Power of Visual Narrative

One reason Kamala Harris' retort packed such a powerful punch on that presidential debate stage was that it resonated with a much larger issue dogging America: how to grapple with racist or sexist conduct that occurred years or even decades ago that was not perceived as particularly racist or sexist at the time. Harris called Biden out in the exact manner that the BLM and #MeToo movements call for accountability.[234] Norms change, but the flip of the switch from public acceptance to public vilification had never been so swift. It was no longer okay to just say it was okay at the time. And this was not a one-off problem haunting Biden. Presumably, a large swath of Americans easily could be styled a villain, albeit under modern standards.

As noted by scholar Jamillah Bowman Williams, social media affords hashtag movements extraordinary potential to form alliances and

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231 *See, e.g.*, Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1457–58 (2021) (discussing intersectionality in neighborhood policing disparities); *see also* Barbara Smith, *Combahee River Collective*, *in* FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA, 1619–2019, at 343 (Ibram X. Kendi & Keisha N. Blain eds., 2021) ("Almost half a century ago we could not have known that in the twenty-first century, the paradigm-shifting Black Lives Matter movement would arise and use Black feminist analysis to address injustices not primarily rooted in gender or sexuality.").

232 *See generally* Cooper, *supra* note 231, at 1457–58; Smith, *supra* note 231, at 343; Kupupika, *supra* note 226, at 29–30.

233 Kupupika, *supra* note 226, at 29–30 (noting that Crenshaw "pointed out the constant misapplication of intersectionality").

234 *See supra* notes 181–184 and accompanying text; Williams, *supra* note 228, at 1832–33. Williams notes the phrase "Me Too" was originally coined by Black activist Tarana Burke in 2006, encouraging women of color who were victims of sexual abuse to share their stories. *Id.* at 1833.

reach a widespread audience.[235] With the advent of the internet, narratives did not have to be greenlit by a Hollywood producer or an executive at Simon & Shuster. Widespread dissemination was possible through Facebook and similar platforms.[236] It became amazingly easy to see the humanity of individuals a world away. The stories were raw—told by real people experiencing real pain. Such narratives fit hand-in-glove with a growing antibullying sentiment. In short, bullies were being bullied.

In Adam Serwer's book, *The Cruelty Is the Point*, Serwer discusses the power of video images in exposing the truth of mistreatment of Black people.[237] Serwer lists ten Black men and women whose deaths at the hands of police went viral.[238] Serwer makes a comparison to other points in history where realism moved the populace to act:

> Just as Southern dispatches and congressional testimony about the outrages against the emancipated radicalized the white North with a recognition of how the horrors of racism shaped [B]lack life in America, [so too has] the *proliferation of videos from cellphones and body cameras . . . provided a vivid picture of the casual and often fatal abuse of [B]lack Americans . . . .*[239]

Black people may not have been stunned, but civil whites certainly were. As explained by Patrisse Cullors, one of the BLM cofounders:

> "*There's a large swath of white people who I think thought [B]lack people were being hyperbolic about police humiliation and harassment* . . . . We started seeing more and more people share videos

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235 *Id.* at 1798, 1835 (recognizing broad potential, specifically including the #MeToo movement). Note, though, that Williams also argues that the #MeToo movement fell short of its potential when the focus shifted to become "mainstream, more elite, and overwhelmingly white." *Id.* at 1835–36. More particularly, "[w]omen of color participated in the online conversation at very low rates, whereas white women ages twenty-five to fifty were vastly overrepresented." *Id.* at 1835 & n.211 (citing Sepideh Modrek & Bozhidar Chakalov, *The #MeToo Movement in the United States: Text Analysis of Early Twitter Conversations*, 21 J. MED. INTERNET RSCH. 1, 12 (2019)). By contrast, while the BLM movement initially focused on Black males, that movement ultimately embraced women of color by calling out police for the murders of Breonna Taylor and Atatiana Jefferson, amongst others. That led to another hashtag: #SayHerName. *See* Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2027 & n.29 (2017) (discussing focus on Black men); *see also* Toni Jaramilla, *BLM: Uprisings to Reform*, 44 L.A. LAW. 28, 30 (2021) (discussing, *inter alia*, Taylor and Jefferson).

236 One Instagram example presents narratives based on the life of Olaudah Equiano, a freed slave. *See* Olaudah Equiano (@equiano.stories), INSTAGRAM, https://www.instagram.com/equiano.stories (last visited Aug. 29, 2022).

237 *See* SERWER, *supra* note 202, at 324 ("[V]ideos dramatically shifted public opinion about racism and American policing.").

238 *Id.* at 322–23.

239 *Id.* at 323 (emphasis added).

> of white people calling the cops on [B]lack people and using the cops as their weapon against the [B]lack community. *Those kinds of viral videos—that weren't just about [B]lack death but [B]lack people's everyday experience with policing—have shaped a new ideology.* What are the police really here for? Who are they truly protecting?"[240]

Serwer further argues:

> A majority of Americans have accepted the diagnosis of Black Lives Matter activists, ... [reflecting] an expression of approval for the movement's most basic demand: that the police stop killing [B]lack people. This request is so reasonable that only those committed to white supremacy regard it as outrageous.[241]

In terms of rhetoric, it's all about framing. On May 25, 2020, that frame was about to become crystal clear.

3. The Summer of George Floyd

The summer of George Floyd was cataclysmic. As of March 13, 2020, a world-wide lockdown was in place to combat the spread of COVID-19.[242] Then-candidate Biden received the support of Black civil rights leader Representative Jim Clyburn but a few weeks prior.[243] That support pushed Biden to front-runner status days before the COVID-19 pandemic pulled the plug on traditional in-person campaigning. Clyburn urged Biden to pick a woman of color as his running mate. Biden picked Harris, marking the first time a Black woman was on a major presidential ticket.[244] The momentum swing was undeniable. Historians may well

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240 *Id.* (emphasis added) (relaying words to Serwer by Cullors).

241 *Id.* at 326. Serwer further notes that a "majorit[y] of Americans support reforms such as requiring the use of body cameras, banning choke holds, mandating a national police-misconduct database, and curtailing qualified immunity . . . ." *Id.*

242 Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020); *see* David Robinson, David McKay Wilson, Nancy Cutler, Ashley Biviano & Matt Steecker, *Why George Floyd's Death, COVID-19 Inequality Sparked Protests: 'We're Witnessing History'*, USA TODAY (June 6, 2020, 6:00 AM), https://www.usatoday.com/story/news/nation/2020/06/06/george-floyd-death-covid-19-racial-inequality-sparked-protests/3156595001 [https://perma.cc/6J6N-SAZZ] (discussing the correlation between the death of George Floyd, the protests, and COVID-19).

243 Eric Bradner & Paul LeBlanc, *South Carolina Rep. Jim Clyburn Endorses Joe Biden Ahead of Primary*, CNN (Feb. 26, 2020, 6:17 PM), https://www.cnn.com/2020/02/26/politics/jim-clyburn-endorses-joe-biden/index.html [https://perma.cc/88HB-UCYB]. To rile support amongst the Black community, Clyburn famously said: "I know Joe. We know Joe. But most importantly, Joe knows us." *Id.*

244 Caroline Kelly, *Rep. Jim Clyburn Says He Urged Biden to Choose a Black Woman as His Running Mate*, CNN (Nov. 7, 2020, 5:25 PM), https://www.cnn.com/2020/11/07/politics/clyburn-biden-black-woman-running-mate-cnntv/index.html [https://perma.cc/G2GR-WDKK]; *see also*

point to the convergence of events in the summer of George Floyd as one of the turning points in white-centered oblivion. The pivotal day was May 25, 2020, when George Floyd's life was taken.[245] In classic rhetorical terms, it was a day like any other, until it was not.

The summer of George Floyd was not just the summer of George Floyd. It was the summer of the countless other Black men and women needlessly and callously killed by police.[246] While Floyd's murder would be characterized as violence by a rogue police officer, the world knew better. Even when there was concrete proof—such as a video recording—America long had held its collective breath to see if the perpetrator would be held accountable.[247] That truism made clear that the problem was not just a rogue cop; it was the entire system of policing, and it needed to change. Getting rid of a single bad actor was not going to solve the larger problem. Floyd's murder—and all of the other murders—happened because victims were failed not just by those directly involved, but by white-centered America at large.

Despite the pandemic, the outrage over Floyd's murder spilled onto the streets across the globe. In far more numbers than ever before, non-Black people stood shoulder-to-shoulder with Black people, demanding change.[248] Yet true to form, the appetite of civil whites to demand truly transformative change waned once the fire was put out. When Derek Chauvin, the police officer who took Floyd's life, was convicted on all counts, many civil whites resumed their white-centered lives basking in

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Holly Bailey, *The End of Campaigning as We Knew It*, WASH. POST (Oct. 31, 2020), https://www.washingtonpost.com/graphics/2020/politics/pandemic-campaign-trump-biden [https://perma.cc/5TZA-XCCY].

245 Leslie Alexander & Michelle Alexander, *Fear*, *in* THE 1619 PROJECT, *supra* note 44, at 98–100.

246 *See id.* at 98–102 (noting the many causes that fueled the protests following Floyd's murder).

247 The 1991 beating of Rodney King is a quintessential example where police officers were caught on tape mercilessly beating a Black man but ultimately acquitted of criminal charges in state court, albeit ultimately convicted in federal court. *See* Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER J. 67, 67, 69 (1993). An earlier example of a look-the-other-way pertains to the lynching of Emmett Till in 1955. ERSULA J. ORE, LYNCHING: VIOLENCE, RHETORIC, AND AMERICAN IDENTITY 73–83 (2019). Emmett, who was only fourteen years old, *id.* at 78, purportedly had "whistled at and groped" a twenty-one-year-old white female store clerk. *Id.* at 74. Despite overwhelming evidence of guilt, a jury acquitted the two white men who savagely murdered Emmett. One year later, the two men not only admitted to the murder but justified their actions as necessary to set "an example" of Emmett so that "everybody can know how me and my folks stand." In the murderers' own words: "Well, what else could we do?" *Id.* at 77. Ore provides an excellent discussion of the white-centered civic rhetoric at play, including the notion that whites were "innocent" if all they were doing was keeping Black people in their perceived place.

248 Sterling, *supra* note 93, at 457 ("Floyd's death led to a dramatic increase in white participation in protests against police brutality."); *see also* Nikole Hannah-Jones, *Justice*, *in* THE 1619 PROJECT, *supra* note 44, at 454–56.

the false belief that the worst was over. Really? There was insurmountable evidence of Chauvin's guilt, including not just the horrific video, but testimony by numerous white police officers attesting that Chauvin had crossed the line, *by a mile*. Yet, going in, it was still anyone's guess as to whether the American legal system would hold Chauvin accountable.[249] And when that finally happened, a sizable share of *un*civil whites decried the conviction.[250]

Still, at least for a moment, "woke" America embraced antiracism.[251] Floyd's murder touched a nerve not only in terms of the injustice to Floyd, but to the injustice of so many other atrocities. While the term "wokeness" is criticized, linguistically, it was spot on. It reflected the end—at least for some—of extended civil white oblivion to just how badly minorities were treated and just how far society protects racists from the legal consequences of even truly horrific acts.[252]

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249 For an excellent portrayal of the angst surrounding the Derek Chauvin trial and conviction, see Zoe Christen Jones, Tyler Kendall & Cassidy McDonald, *What Derek Chauvin's Guilty Verdict Means for the Future of Policing*, CBS NEWS (Apr. 24, 2021, 7:11 AM), https://www.cbsnews.com/news/derek-chauvin-guilty-verdict-policing-future [https://perma.cc/9DYW-DGBE]. Jones, Kendall, and McDonald describe the uncertainty of the verdict, despite compelling testimony by police officers who broke the code of silence by testifying against one of their own. Yet Jones reported that some questioned whether that served to offer up Chauvin as a "sacrificial lamb to assuage the demands of the public," thereby deflecting scrutiny of the profession at large. *Id.* (quoting Alexis Hoag, former civil rights lawyer and lecturer at Columbia Law).

250 A photograph of some Proud Boys, including leader Enrique Tarrio, adopted the linguistic-twist slogan: "CHAUVINist," demonstrating support for both Chauvin (Floyd's killer) and chauvinism, the belief in superiority of a dominant group. Russell Contreras & Astrid Galván, *The Rise of White Nationalist Hispanics*, AXIOS (Mar. 12, 2022), https://www.axios.com/2022/03/10/rise-white-nationalist-hispanics-latinos [https://perma.cc/HA5C-N9TZ].

251 Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 823 (2021) ("Although Blacks and Whites continue to report divergent views about the connections between race, racism, and policing in our society, the percentage differences between the views of Blacks and [w]hites have meaningfully decreased since the brutal slaying of George Floyd."). However, the arguable transitory nature—at least for some—is evidenced by a school board in Virginia that removed the names of Confederate generals from schools directly following Floyd's murder but reversed course in May 2022. Brittany Bernstein, *Virginia School District Considers Bringing Back Confederate School Names After 2020 Changes*, YAHOO! NEWS (May 19, 2022), https://news.yahoo.com/virginia-school-district-considers-bringing222131960.html?fr=sycsrp_catchall [https://perma.cc/ZN4J-NJ76].

252 *See* PRRI Staff, *Summer Unrest over Racial Injustice Moves the Country, but Not Republicans or White Evangelicals*, PRRI (Aug. 21, 2020), https://www.prri.org/research/racial-justice-2020-george-floyd [https://perma.cc/76BX-984P]. As noted by the Public Religious Religion Institute (PRRI), "[m]ore than four in ten (42%) Americans [said] that recent killings of Black men are isolated incidents, compared to a majority (56%) who [said] such killings are part of a broader pattern of how police treat Black Americans." These numbers reflect a slight increase from October 2018, "when 45% of Americans said police killings are isolated incidents and 53% said they are indicative of a broader pattern." Attitudes have *strongly* shifted from October 2015, "when a majority (53%) of Americans said police killings of Black men are isolated incidents and [only] 44% said [they] are part of a broader pattern." *Id.*

Were the stars aligned in the summer of 2020 for a clear or even super-majority of America to embrace antiracism?[253] Probably. Historians might well conclude Floyd's murder was one of the key factors driving the Biden/Harris victory. Historians also may ponder what might have happened had Biden rode that momentum in the early days of his presidency by pushing voting rights and police reform—issues critically important to the Black community—instead of Biden's "Build Back Better" infrastructure plan that appealed more to traditional white-centered norms.[254]

If the stars were aligned once, they will realign again. And when they do, "woke" America easily will see what oblivious civil whites could not see when the early affirmative action decisions were handed down in the 1970s–1980s. *Of course*, there should be a different constitutional standard for invidious race-conscious measures (e.g., Jim Crow laws) and equitable measures intended to counter racism.

C. *Nailing the WRGO of the Affirmative Action Cases: Justice Marshall's Powerful Concurrences and Dissents Amplifying Stellar Briefing by the NAACP*

Every Supreme Court term ends with a handful of key decisions grabbing headlines. Reporters stand at the ready to quickly digest the majority opinion and convey the results to the American public. Short shrift is given to dissents and concurrences. No doubt, the most powerful dissents are those that never really see the light of day, meaning they change the minds of fellow Justices. But even if that does not happen, powerful dissents can send a powerful, timeless message, especially when

253 At this point, Justice Ruth Bader Ginsburg had not yet passed. Therefore, affirmative action was presumably only down 5-4.

254 As pitched by the White House Administration: "[F]or too long, the economy has worked great for those at the top, while working families get squeezed. President Biden promised to rebuild the backbone of the country–the middle class–so that this time everyone comes along." *The Build Back Better Framework: President Biden's Plan to Rebuild the Middle Class*, WH.GOV, https://www.whitehouse.gov/build-back-better [https://perma.cc/E4AU-VB8F]. In response, a Brookings Institute article posited: "While the Build Back Better plan is ambitious in scope, does it redress many of the racial equity issues that he campaigned on? In other words, what does BBB mean for Black, Indigenous, Latino, and Asian communities?" Kristen Broady et al., *What Does the Build Back Better Framework Mean for BIPOC Communities?*, BROOKINGS (Nov. 5, 2021), https://www.brookings.edu/blog/how-we-rise/2021/11/05/what-does-the-build-back-better-framework-mean-for-bipoc-communities [https://perma.cc/GEN2-LSGB].

they ring true on a guttural level. Some rhetoricians refer to this as "nailing the WRGO," an acronym for: "what's really going on."[255]

The sheer array and depth of the dissents in the early affirmative action cases signal that the 5-4 cases really could have gone the other way.[256] Ultimately, what needed to be toppled were those twin, white-centered pillars: civil whites were "innocent" and racism no longer existed. Justice Marshall and the NAACP plainly called out these hypocrisies in a manner that resonates soundly with modern sensibilities. As examined in Section III.B, that foretells at least the possibility that the Admissions Cases could reset precedent in favor of affirmative action and antiracism.

1. The Still Before the Storm: The Briefing in *Bakke*

Justice Powell laid out his lead opinion in *Bakke* in near lock-step fashion with the brief filed for the respondent (Bakke). Ironically, Bakke arguably got a little help from the drafters of the brief for the petitioners (Regents). That brief was drafted by a high-profile legal team that included Archibald Cox, who earned national recognition as a prosecutor in the Watergate scandal.[257] While the Regents' brief argued the admissions program set a "goal" rather than a "quota," the brief included certain concessions undermining affirmative action. For example, a major point-heading apologetically conceded: "A State's Use of Racial Criteria, Even for a Remedial Purpose, Is Undeniably a Cause for Concern."[258] Let's just throw the Regents under the bus! That was followed by a discussion of *Loving v. Virginia*, the 1967 landmark case

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255 This author developed the acronym "WRGO." It is a critical component of "Kairos," as it cuts to the core of framing and persuasion. *See generally* Linda L. Berger, *Creating Kairos at the Supreme Court:* Shelby County, Citizens United, Hobby Lobby*, and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147, 149–57 (2015) (discussing Kairos, understood as presenting the perfect argument, at just the right time and in just the right manner); Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 LEGAL COMMC'N & RHETORIC: JALWD 27, 55 (2021). Discussing Kairos, Robbins notes a "story must be told at a moment in time when the audience is ready to receive it." *Id.* Put differently, the power to persuade "always depends on the audience's receptivity." *Id.*

256 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528–61 (1989) (Marshall, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324–79 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part); *see also* discussion *infra* Sections II.C.1, II.C.3.

257 Harold Jackson, *Archibald Cox*, GUARDIAN (May 30, 2004, 8:59 PM), https://www.theguardian.com/news/2004/may/31/guardianobituaries.usa [https://perma.cc/4R35-Y7SA] (discussing the Watergate scandal, including the "Saturday Night Massacre" and Cox's role as a civil rights lawyer).

258 Brief for Petitioner at 44, *Bakke*, 438 U.S. 265 (No. 87-998), 1977 WL 187977.

striking bans on interracial marriages. The Regents' brief distinguished *Loving* with the following qualifier: "Plainly not presented here is the stigmatic harm to minorities inflicted by 'measures designed to maintain White Supremacy.'"[259] The stronger approach would have been to recognize that while the *Loving* battle had been won, there was an onslaught of other battles that also needed to be won to ensure "equal protection under the law" to people of color.[260]

By contrast, the NAACP brief led with the history of the Fourteenth Amendment, which solidly supports the argument that the Constitution at least *permits*, if not mandates, remedial legislation, without subjecting such efforts to the same type of strict scrutiny imposed on invidious legislation.[261] It obviously would turn the Fourteenth Amendment on its head to suggest it could be used to protect *whites* from losing privilege. Using a classic sword-and-shield frame, the NAACP argued:

> While we recognize the obvious fact that the benefits of equal protection and due process are the just due of all Americans of every race or color, we flatly assert that *it is an outright perversion of the original intent of that sacred document to hold that, as a matter of law, it must now be altered from a shield for the protection of [B]lack people seeking entry into the mainstream of American life, into a sword for use in cutting off their legitimate hopes and aspirations to become professionals also, and not merely hewers of wood and drawers of water for a white society*.[262]

The NAACP further emphasized that a trial court fashioning a decree for civil rights violations "has not merely the power but the *duty*

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259 *Id.* at 48 (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967)).

260 Directly following the discussion of *Loving*, the Regents' brief addressed alleged stigma to *bypassed whites*. The drafters glibly argued: "[i]f it can be viewed as demeaning or degrading to [not] be accepted for admission to a medical school in today's world, the prospective 'victim' can simply choose not to apply." *Id.* at 49. From a white-centered view, that frame played directly into white victimization. Notably, even though Bakke was rejected twice, Justice Powell's lead opinion took great pains to paint a positive picture of Bakke. *See*, *e.g.*, *Bakke*, 438 U.S. at 276–77.

261 Brief of the NAACP as Amicus Curiae at 19–21, 25–31, Regents of Univ. of Cal. v. Bakke, 429 U.S. 953 (No. 76-811), 1976 WL 178773 [hereinafter Brief of the NAACP].

262 *Id.* at 21. Erwin Chemerinsky discusses early Supreme Court cases, such as the since-overturned *Slaughter-House Cases* of 1873, that narrowly construed the Fourteenth Amendment to *only* protect the "freedom of the slave race." ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 30–34 (2014) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873)). While Chemerinsky rightfully faults the Supreme Court for not extending protections to other groups (e.g., women), the plain fact remains that the Supreme Court understood in 1873—relatively shortly after the ratification of the Fourteenth Amendment—that the Amendment was intended to protect Black, not white, people. *See id.* at 32–33. From a purely originalist view, this further supports the argument that there is no constitutional prohibition against *equitable*, as opposed to *invidious*, race-conscious measures. The same reasoning would apply to the subsequent expansion of the interpretation of the Equal Protection Clause to other minorities. Equitable measures are constitutionally distinct from invidious.

to render a decree which will *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[263] This was so regardless of whether prior discrimination was "purposeful" or if discrimination "simply occurred unintended."[264] It followed that state actors, like the Regents, had at least the right to *voluntarily* correct racial disparities *before* such state actors got hauled into court. Put simply, once an entity identifies a clear and undue racial disparity, the entity should have the right to take affirmative steps to correct that disparity and preempt subsequent misconduct and/or litigation.[265] As soundly argued:

> *[T]he Regents of the University of California made an emperical [sic] determination that the Davis Medical School would remain a white enclave unless racial or ethnic factors were taken into account in the admissions process.* Its past conduct in 1968 and 1969 may not have resulted in a violation of the Fourteenth Amendment as articulated in *Washington v. Davis*, but once realizing the ethnic impact and lack of utility of the selection criteria, its continued use of those criteria may well have met the standards articulated. In any event *it is not necessary for the Medical school to have engaged in unconstitutional conduct before it is permitted to take steps to prevent such conduct from occurring in the future.*[266]

Justice Brennan penned a fifty-five-page concurrence and dissent, joined by Justices Marshall, White, and Blackmun.[267] Drawing much more from the NAACP brief than from the Regents' brief, Brennan began with the fundamental legal point that the Civil Rights Act was coextensive with the Fourteenth Amendment.[268] It was beyond dispute that Congress could and did authorize "preferential treatment of racial minorities as a means of remedying past societal discrimination."[269] In fact, directly echoing the NAACP's brief, prior precedent mandated that "under certain circumstances the remedial use of racial criteria [was] not only permissible but [was] constitutionally required to eradicate constitutional violations."[270]

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263 Brief of the NAACP, *supra* note 261, at 22 (emphasis added) (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

264 *Id.* at 30–31 (citing Lau v. Nichols, 414 U.S. 563, 568 (1974)) ("Discrimination is barred which has that *effect* even though no purposeful design is present . . . ." (emphasis added)).

265 *Id.* at 24.

266 *Id.* (emphasis added) (citation omitted).

267 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324–79 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

268 *See id.* at 326–28.

269 *Id.* at 328.

270 *Id.* at 337.

Citing the very case cited by the NAACP, Brennan found it made no sense to require an entity to "await a judicial adjudication" to remedy the effects of past discrimination.[271] This was consistent with the applicable federal regulations, which expressly provided that "[e]ven in the absence of such prior discrimination, a recipient . . . may take affirmative action to overcome the effects of . . . limiting participation" by a minority.[272] In short, there was no reason—other than bowing to shifting public opinion—for the Supreme Court to deviate from a long line of legal authorities recognizing that *remedial* legislation is constitutionally permissible and should not be unduly hindered by judicial intervention.[273]

But the most eloquent concurrence/dissent was that penned by Justice Marshall. From the onset, Justice Marshall hammered home the sword-and-shield metaphor set forth in the NAACP's brief highlighting the hypocrisy of using the Fourteenth Amendment to the detriment of Black people.[274] In all, Marshall spent nearly two pages proving up the legislative history of the Fourteenth Amendment and the simultaneously passed Freedmen's Bureau bills that specifically included race-conscious remedial measures.[275] This included detailing how Congress purposefully overrode Johnson's vetoes and discussing the intent behind the ratification of the Fourteenth Amendment.[276] As put by Marshall, to hold that the Fourteenth Amendment barred state action to remedy the present effects of past discrimination "would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve."[277]

Justice Marshall also laid out page upon page of the tortured history of slavery and Jim Crow in a vivid and captivating narrative that began with a reminder of exactly what enslaved Africans went through upon arriving in America. This included atrocities visited upon Black people and the concordant taint on white enslavers and complacent facilitators, both then and beyond. In Justice Marshall's words:

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271 *Id.* (citing N.C. State Bd. of Educ. v. Swann, 402 U.S. 43 (1971)).

272 *Id.* at 344–45 (quoting 45 C.F.R. § 80.3(b)(6)(ii) (1977)).

273 *See id.* at 353, 355.

274 *Id.* at 387–88 (Marshall, J., separate opinion) (noting how the Constitution was used to uphold laws detrimentally affecting Black people, but now was being used as a barrier to remedy the effects of that "legacy of discrimination").

275 *Id.* at 396–98.

276 *Id.*

277 *Id.* at 398.

> *Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.*
>
> . . . .
>
> The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. *But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.*[278]

Even to this day, Justice Marshall's words nailed the WRGO, specifically including his reference to systematic "actions and *in*actions."[279] Complacency equals complicity. Antiracism requires "affirmative steps" unless and until racial disparities are finally eradicated.[280]

2. Hanging by a Thread: The Briefing in *Fullilove*

Fullilove dealt with that MBE provision granting certain conditional "set asides" to minorities under the PWEA. The respondent was, among others, the City of New York.[281] While the City ultimately prevailed, the City's brief rested on a concession that would doom future affirmative action cases brought by any litigant other than the federal government. More particularly, in the very first sentence of the "Summary of

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278 *Id.* at 387–88, 390 (emphasis added) (footnote omitted) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873)).

279 *Id.* at 390 (emphasis added).

280 *See id.* at 399 n.12.

281 Fullilove v. Klutznick, 448 U.S. 448, 453–55 (1980).

Argument," the City argued the reason it should prevail was because the law was passed by Congress, rather than "some other body or officer."[282]

The City's sole other argument was that the MBE provision survived strict scrutiny because of Congress' concrete findings of industry discrimination and because the remedy was sufficiently limited to "meet any objection that it unnecessarily burden[ed] others."[283] But there, too, the City's brief impliedly conceded only *Congress* could be excused from making *specific* factual findings of past discrimination. More particularly, the City argued that "*Congress* is not required to make the sort of finding that a *court or other body or officer* would have to make before ordering a remedy of this type."[284] But wait, there's more. In the very first paragraph of their legal argument, the drafters flatly declared the City itself *never* would enact an affirmative action program. As argued:

> The most compelling criticism directed at the MBE set aside is that it accords an economic preference based on race. *Indeed, quotas and set asides on a purely ethnic basis are foreign to the expressed policy of the City of New York. . . . [I]t is our opinion that the City does not have the legal authority to take such action, nor would there be any basis for requiring the City to do so based upon the City's record in this area.*[285]

By contrast, the NAACP's brief came out swinging *in favor* of affirmative action, not as an exception, but as a general rule. This was based on the "unique obligation" of Congress to identify and remedy "badges and incidents of slavery."[286] Rather than playing into the notion that race-conscious measures always are odious, the NAACP characterized affirmative steps as necessary and appropriate when Black representation is lagging. Citing Justice Brennan's concurrence/dissent in *Bakke*, the NAACP argued that the "[g]overnment may take race into account when it acts *not to demean or insult any racial groups but to remedy disadvantages cast on minorit[ies] by past prejudice*," which is especially proper when there are findings by a "competent" government entity, whether that be judicial, legislative, or administrative.[287] The NAACP also reiterated the long history of permissible race-conscious

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282 Brief for Respondents the City of New York, the New York City Board of Higher Education, and the New York City Health and Hospitals Corp. at 4, *Fullilove*, 448 U.S. 448 (No. 78-1007), 1979 WL 199314.

283 *Id.* at 5.

284 *Id.* at 5–6.

285 *Id.* at 7–8 (emphasis added).

286 Brief of the NAACP and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as Amici Curiae at 13–14, *Fullilove*, 448 U.S. 448 (No. 78-1007), 1979 WL 199328.

287 *Id.* at 6 (emphasis added) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 325 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part)).

measures, including the Black-only aid under the Freedmen's Bureau bills.[288]

Justice Marshall championed these themes in his concurrence, joined by Justices Brennan and Blackmun. Legislation based on racial classifications "drawn on the presumption that one race is inferior to another or . . . [that] put[s] the weight of government behind racial hatred and separati[on]" were pegged as "invalid without more."[289] But such legislation is constitutionally distinct from legislation enacted not to stigmatize, but to instead "remedy[] the present effects of past racial discrimination."[290] Referencing his *Bakke* concurrence/dissent, Justice Marshall nailed the WRGO of the glaring differences between benign and invidious legislation, as well as the insurmountability of strict scrutiny. As explained:

> We recognized [in *Bakke*], however, that these principles outlawing the irrelevant or pernicious use of race *were inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination*. Such classifications may disadvantage some whites, but *whites as a class lack the* "'*traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process*.'" Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional "strict scrutiny"—*scrutiny that is strict in theory, but fatal in fact*.[291]

Justice Marshall then embraced the fundamental theme of the NAACP's brief, namely, that affirmative steps are necessary and justified when historical discrimination creates a barrier to minority representation. No specialized proof of harm visited upon a specific minority litigant should be required given it was "indisputable that Congress' articulated purpose for enacting the set-aside provision was to remedy the present effects of past racial discrimination." Put differently,

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288 *Id.* at 13–20.

289 *Fullilove*, 448 U.S. at 518 (Marshall, J., concurring) (quoting *Bakke*, 438 U.S. at 357–58 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part)).

290 *Id.*

291 *Id.* at 518–19 (emphasis added) (footnote omitted) (citations omitted) (first quoting *Bakke*, 438 U.S. at 357 (Marshall, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part); and then quoting *id.* at 362).

it was enough that Congress was acting to "break down the barriers" for impacted minorities.[292]

Justice Marshall drove home his point that long-standing white monopolies were never going to end without governmental intervention. Quoting Justice Blackmun, Justice Marshall argued that this *required* race-conscious measures. As eloquently set forth in Justice Marshall's close:

> As my Brother BLACKMUN observed in *Bakke*: "*In order to get beyond racism, we must first take account of race*. There is no other way."
>
> Congress recognized these realities when it enacted the minority set-aside provision at issue in this case. *Today, by upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric.* I applaud this result. Accordingly, I concur in the judgment of the Court.[293]

Of course, Justice Marshall only was applauding the *result*. He fervently advocated for recognizing the plain and simple constitutional distinction between remedial and invidious race-conscious measures.

3. A Valiant Last Stand: The Briefing in *Croson*

Croson may have been the death knell for affirmative action—at least in terms of set-asides—but it was not due to any lackluster attempt on the part of the appellant, the City of Richmond. The lawyers who drafted this brief did a valiant job fighting not only for the set-aside at issue, but also for affirmative action in general. Still, the writing was on the wall. In *Wygant*, a plurality of the Supreme Court found strict scrutiny should apply even where a *government entity* was acting to *redress* the present-day effects of past discrimination.[294] But *Wygant* was easily distinguishable. It involved a one-off race-conscious layoff plan by a schoolboard. By contrast, the set-aside plan in *Croson* was specifically based on the PWEA federal set-aside plan approved in *Fullilove*.

The underlying facts of *Croson* could hardly be better. Although Black people comprised 50% of the population, less than 1%—effectively

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292 *Id.* at 520–21.

293 *Id.* at 522 (emphasis added) (citation omitted) (quoting *Bakke*, 438 U.S. at 407 (Blackmun, J., separate opinion)).

294 *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986).

zero—of public contracts went to minority-owned businesses.[295] Relying on *Fullilove*, the trial court found for Richmond, and the Fourth Circuit *initially* affirmed.[296] After *Wygant* came down, the Fourth Circuit reversed, interpreting *Wygant* to foreclose redress absent a finding that the *City itself* engaged in the prior discrimination.[297] But was that really a proper prerequisite, especially where—as was the case in *Croson*—it was *undisputed* that gross racial disparities stemmed from past discrimination? As nicely framed front and center in Richmond's brief:

> Racial inequality remains a scourge of our society. Cities, states, and the federal government each have a crucial role to play in the effort to rid our country of racial discrimination and its continuing effects.
>
> *Richmond*, like other cities, *has accepted that responsibility*. In 1983, in response to *clear evidence that racial discrimination in its local construction industry had resulted in a nearly all-white industry, and consequently a distribution of public construction contracts only to businesses owned by whites*, Richmond enacted the Minority Business Utilization Plan.[298]

Throughout its brief, Richmond hammered home that "[i]n 1983, one-half of the population of Richmond was minority, primarily [B]lack." Yet in the "five years prior to 1983, two-thirds of one percent—practically none—of the City's $124 million in construction contracts was awarded to minority-owned businesses."[299] The trial court relied on substantial evidence marshalled by the City Council, including testimony by the former mayor that the gross disparity was a "direct consequence of pervasive racial discrimination in Richmond's local construction industry," which effectively foreclosed minorities from any meaningful opportunity to compete for Richmond's public works contracts. That included almost wholescale boxing minorities out of local trade associations.[300] Another hammer-home was that that *no one*—not even the respondent, J.A. Croson—*disputed* that discrimination was widespread and pervasive. Nor was there any reason to doubt that point, given the generally accepted congressional findings that such discrimination was pervasive nationwide.[301] As argued in Richmond's brief:

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295 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 479–80 (1989).

296 *See* J.A. Croson v. City of Richmond, 779 F.2d 181, 182 (4th Cir. 1985).

297 *See* J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989); *J.A. Croson Co.*, 488 U.S. at 476–86.

298 Brief of Appellant City of Richmond at 17, *J.A. Croson Co.*, 488 U.S. 469 (No. 87-998), 1988 WL 1025698 (emphasis added).

299 *Id.* at 20.

300 *Id.* at 20–23.

301 *Id.* at 22–23 (noting that the trial court provided "ample evidence").

> Like the negligible minority participation in the City's construction contracts, *the near absence of minority members in these trade organizations is a manifestation of pervasive racial discrimination in Richmond's local construction industry*. Moreover, because membership in these organizations represents a significant economic opportunity, these figures dramatically underscore the continuing effects of that discrimination.
>
> At the City Council hearing, there was knowledgeable testimony, *including the testimony of a former Richmond mayor*, that discrimination in Richmond's construction industry in fact was widespread. Moreover, while the merits of the ordinance were vigorously debated, *no one denied that pervasive discrimination had occurred*. It simply was *beyond dispute that discrimination had denied minorities significant participation in the local construction industry, and therefore in Richmond's public construction contracts as well.*[302]

Richmond further argued a municipality should not be forced to be a "passive participant" in discrimination, an argument even Justice O'Connor could not dismiss, at least in theory.[303] More particularly, Richmond argued that "by continuing to award construction contracts to a pool of contractors from which minorities had been practically excluded, [the City] in effect had become a passive participant in a system based on discrimination, and was helping to perpetuate that system."[304] Consequently, "the City faced the likely prospect of continuing indefinitely to distribute its taxpayers' dollars to a pool of construction contractors from which minorities had been effectively excluded."[305] Referring to *Fullilove*, Richmond argued: "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination on its own public works program, but a city government does not."[306]

The NAACP's brief complemented Richmond's brief, again tackling that fundamental question of whether race-conscious measures are constitutionally permissible. The NAACP spent *seventeen pages* painstakingly proving Congress considered—and *rejected*—arguments

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302 *Id.* (emphasis added) (footnotes omitted).

303 *Id.* at 31–32; *see supra* Section I.C.3.

304 Brief of Appellant City of Richmond, *supra* note 298, at 31.

305 *Id.*

306 *Id.* at 32. Notably, Richmond's set-asides did not even require that contracts be given to minority businesses; rather, the set-asides were for subcontracts, which would have integrated minorities into the industry and created a path toward being able to compete in the future. The burden arguably was *de minimis*. And as with the federal program approved in *Fullilove*, waivers were available if no qualified minority subcontractor could be found. *See id.* at 7–9.

that race-conscious measures were impermissible.[307] In fact, as discussed in Section II.A.2, that was an *exact reason* why the Fourteenth Amendment was passed.[308] The NAACP's brief ended by echoing Richmond's argument that it made no sense to allow the federal government to redress present-day effects of past discrimination but prohibit state and local governments from doing the same.[309]

Justice Marshall's dissent was a tour-de-force, shuttling between eloquent but brutal criticism of the majority opinion and setting forth prophetic gems nailing the pernicious impact on present and future generations. Joined by Justices Brennan and Blackmun, Justice Marshall started off with a bang: "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst."[310] The irony was that the Supreme Court was standing in its way.[311] The gloves fully were off by the third paragraph:

> *[T]oday's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence.* Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. *This is the harsh reality of the majority's decision, but it is not the Constitution's command.*[312]

Not missing any argument set forth in Richmond's brief, Marshall laid out the extensive evidence setting forth the City Council's finding of pervasive discrimination. That included the statistical evidence of the gross disparity between contracts awarded to minorities and the minority population (0.67% (less than 1%) as compared to 50%), the wholescale lockout of minorities to local trade associations, and the first-hand accounts of Richmond's civic leaders, including the former mayor. There also were the national findings by Congress when it passed the PWEA.[313]

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307 *See* Brief Amicus Curiae for the NAACP Legal Defense & Educational Fund, Inc. at 4, 11–28, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998), 1988 WL 1023105.

308 *See* Schnapper, *supra* note 13, at 784–88.

309 Brief Amicus Curiae for the NAACP Legal Defense & Educational Fund, Inc., *supra* note 307, at 39–40.

310 *J.A. Croson Co.*, 488 U.S. at 528 (Marshall, J., dissenting).

311 The last sentence of the first paragraph highlighted this hypocrisy: "Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove*." *Id.* (citation omitted).

312 *Id.* at 529–30 (emphasis added).

313 *Id.* at 530–35, 540–44.

Justice Marshall referred to this as a "rich trove of evidence," both nationally and locally, that discrimination had "seriously impaired the competitive position of businesses owned or controlled by members of minority groups."[314] In fact, as was hammered home in Richmond's brief and acknowledged by the trial court, "*not a single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread*."[315]

Justice Marshall also addressed the other theme presented by Richmond. Not only did Richmond have a compelling interest to eradicate the present-day effects of past racism, but Richmond had the "prospective [interest] of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination."[316] That raised the "danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations."[317] Marshall elaborated upon Richmond's argument in language that may well prove timeless:

> *When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its* imprimatur *on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it*, while denying important economic benefits to those entities which, *but for* prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination—an interest which this Court has repeatedly deemed compelling. The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, *the tighter the deadhand grip of prior discrimination becomes on the present and future.*[318]

Justice Marshall again pounded his gavel in favor of themes long advanced by the NAACP, including the history of contemporaneous race-conscious remedial measures and the need to distinguish between invidious and benign legislation. Justice Marshall also faulted the majority for its plainly incorrect assumption that racism no longer existed

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314 *Id.* at 530.

315 *Id.* at 534–35, 540 (emphasis added).

316 *Id.* at 537.

317 *Id.*

318 *Id.* at 538 (emphasis added) (citations omitted).

in the 1980s.[319] As eloquently stated in the closing paragraphs of Justice Marshall's thirty-three-page dissent:

> The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. *The battle against pernicious racial discrimination or its effects is nowhere near won*. I must dissent.[320]

Justice Marshall's words could not have better prophesized the current and continued state of racism in America. His words ring true both today and yesterday. The open question is whether his words will turn the tide tomorrow.

III. "THAT LITTLE GIRL *WILL BE* ME": THE LEGACY OF EACH GENERATION IS ITS IMPACT ON THE NEXT

The hurdle facing equitable race-conscious measures has never been the Constitution; the hurdle has been the Supreme Court and two words that cannot be found anywhere in the text of the Constitution: strict scrutiny. As the framers of the Fourteenth Amendment recognized, "equal protection under the law" will never exist until racial disparities no longer exist.[321] If America is going to change tomorrow, America needs

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319 *See generally id.* at 528–61.

320 *Id.* at 561 (emphasis added) (citation omitted) (quoting Fullilove v. Klutznick, 448 U.S. 448, 463 (1980)).

321 Justice Jackson expressed support for this argument at the Supreme Court's oral argument in *Merrill v. Milligan*, a case involving the Voting Rights Act. Transcript of Oral Argument at 57–60, Merrill v. Milligan, No. 21-1086, 2022 WL 3580300 (Aug. 22, 2022). More particularly, Justice Jackson looked to the legislative history of the Fourteenth Amendment, noting that rather than establishing a prohibition on race-conscious measures, it was intended to ensure equality for the "freedmen." *Id.* at 59–60. That appears to be a reference to the Freedmen's Bureau Act bills. *See* discussion *supra* Section II.A.2. Justice Jackson also pointed to the legislative history of the Civil Rights Act of 1866, noting: "I don't think that the historical record establishes that the founders believed that race neutrality or race blindness was required . . . ." *Id.* at 58. This discourse included a recognition that the Fourteenth Amendment "was drafted to give a foundational—a constitutional foundation for a piece of legislation that was designed to make people who had less opportunity and less rights equal to white citizens." *Id.* at 59. In Justice Jackson's mind, that created constitutional authority for race-conscious remedies, which in turn supported the constitutionality of the race-conscious measures in the Voting Rights Act. *Id.* at 60 ("[T]he record shows that the

to change today. The Supreme Court's resolution of the Admissions Cases could be a groundbreaking chapter in the greater narrative forming the zeitgeist of our time. Or it could be a mere footnote.

Accountability. Harris calling out Biden underscores the long-term impact of racial misdeeds. Antibusing legislation was a deliberate affront to the mandate of *Brown* to integrate white-only schools. Biden supported that cause. In doing so, he furthered the work of segregationists.[322] Consider the practical impact not just on Harris, but on millions of others who walked in her shoes. Consider also the not-so-subtle message sent to millions of white children who greeted "that little girl" in classrooms across America. No doubt, many of those children parroted, in both word and tenor, the hateful rhetoric spewed by the very segregationists Biden befriended. Yet complacent civil whites only saw the wrongdoing of the segregationists themselves.

Imagine if Biden had fielded Harris' softball and acknowledged the simple truism that what is recognized as wrong today was *of course* wrong yesterday. A better version of Biden (or white America) would have seen that. Imagine also if a half-century ago, Supreme Court cases shutting down affirmative action had gone the other way. In theory, racial disparities would no longer exist. Going back even further, imagine how different society would be today had *Plessy* prohibited, instead of licensed, Jim Crow.[323] Civil whites have promised, but failed to deliver, "equal protection of the law" ever since the Fourteenth Amendment was ratified. To break that cycle, civil whites need to stand up—and then step aside—for civil rights.

A. *Acknowledging the Problem: Racial Disparities Continue to Exist and Are Not Going Away on Their Own*

White America—including iteration after iteration of the Supreme Court—has stuck its head in the sand, albeit at a different beach and in a different manner. The first step in ensuring "equal protection of the law" to people of color is acknowledging that both racism and racial disparities

reason why the Fourteenth Amendment was enacted was to give a constitutional foundation for that kind of effort, for the Civil Rights Act of 1866, which was doing what the Section 2 is doing here.").

322 *See* discussion *supra* notes 177–184 and accompanying text.

323 Justice Marshall specifically posed the question of how different our world might be if *Plessy* had been decided differently back in 1896. Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., separate opinion).

exist, and neither are going to magically disappear.[324] In 1978, Justice Marshall laid out a number of then-existing proven disparities. Black children had a life expectancy five years less than white children. The infant mortality rate was nearly double.[325] Unemployment rates similarly were lopsided. And "[a]lthough [Blacks] represent[ed] 11.5% of the population, they [were] only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors."[326] While these percentages have incrementally increased over the last fifty years, that largely is because of diversity policies like those at issue in *Bakke* and in the present-day Admissions Cases.[327]

Equitable race-conscious admissions policies have not eradicated racial underrepresentation in higher education, but they have made a dent. Rhetoricians might argue that the path to truly transformative change is to flip the script. Civil whites can recognize the enabling role they play in *in*equality. At some point, majoritarian views advancing antiracism will not only wake the populace, but also the Supreme Court.

1. Antiracism and Solidarity: Rejecting the Call to Pit Minorities Against Each Other

"I have a dream."[328] These words famously were spoken by Dr. Martin Luther King, Jr. They also were invoked by Ukraine President Volodymyr Zelensky in his address to a joint session of Congress just

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324 For a discussion of racial disparities in the criminal system, see Sterling, *supra* note 93, at 459, 480–85. *See also* Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 632–33 (2021) (discussing the "uncontroverted results of prosecutorial adversarialism: Blackness is punished").

325 *Bakke*, 438 U.S. at 395–96 (Marshall, J., separate opinion).

326 *Id.* (footnote omitted).

327 *See Study Suggests Holistic Admissions Policies Increase Medical School Diversity*, U.C. DAVIS HEALTH (Aug. 6, 2021) https://health.ucdavis.edu/news/headlines/study-suggests-holistic-admissions-policies-increase-medical-school-diversity/2021/08 [https://perma.cc/66BM-KYAL]; *see also* Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After* Fisher, 45 SETON HALL L. REV. 761, 778 (2015) (implicitly acknowledging improving numbers based upon holistic admissions policies but arguing against putting a limit on diversity admissions).

328 Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963) (transcript available at *Read Martin Luther King Jr.'s 'I Have a Dream' Speech in Its Entirety*, NPR (Jan. 14, 2022, 1:53 PM), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety [https://perma.cc/TNP8-EY4D]).

twenty days after Russia invaded Ukraine.[329] To the rest of the world, it illustrated that the face of America—America's brightest angel—is a Black civil rights leader. American presidents may come and go, but the image of America thrives worldwide through the civil rights struggles that transformed the 1960s. An argument could be made that Zelensky culturally misappropriated Dr. King's words. The point is that Zelensky's plea to the American people did not reference a face etched onto Mount Rushmore, but a face that *should have* graced that national monument had history taken a different course. But for Dr. King's assassination at the Lorraine Motel on April 4, 1968,[330] Dr. King certainly may have been the first Black American president. Imagine how different today's world would be had that happened yesterday.

A central tenet of Dr. King's vision is human kindness, standing up in the face of tyranny not just for oneself but for each other.[331] Modern scholars agree with Dr. King's vision of solidarity. Wilkerson argues that ending racism turns on ending caste for all, elsewise it will just "shape-shift" into a different alignment that still values the humanity of one group over another, for the sole purpose of maintaining hierarchy of the dominant caste. Dominant whites repeatedly redefine "whiteness" to bolster numbers and maintain hierarchy.[332] But the flip of that coin is that America could instead model the path to truly shedding caste. As posited by Wilkerson:

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329 Volodymyr Zelensky, President, Speech to Congress (Mar. 16, 2022) (annotated transcript available at Catie Edmondson, *Annotated Transcript: Zelensky's Speech to Congress*, N.Y. TIMES (Mar. 16, 2022), https://www.nytimes.com/2022/03/16/us/politics/transcript-zelensky-speech.html) (last visited Nov. 21, 2022).

330 *Assassination of Martin Luther King, Jr.*, STAN. UNIV.: MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/assassination-martin-luther-king-jr [https://perma.cc/NX9U-MUQD].

331 Similarly, Zelensky spoke of a new world order (U-24, United for Peace) that stands in solidarity and respects the humanity of all world citizens. *Id.*

332 WILKERSON, *supra* note 7, at 382–88.

> *Will the United States adhere to its belief in majority rule if the majority does not look as it has throughout history?* This will be the chance for America either to further entrench its inequalities or to choose to lead the world as the exceptional nation that we have proclaimed ourselves to be.
>
> *Without an enlightened recognition of the price we all pay for a caste system, the hierarchy will likely shape-shift as it has in the past to ensure that the structure remains intact.* The definition of whiteness could well expand to confer honorary whiteness to those on the border—the lightest-skinned people of Asian or Latino descent or biracial people with a white parent, for instance—to increase the ranks of the dominant caste.
>
> The devasting truth is that, without the intervention of humanitarian impulses, *a reconstituted caste system could divide those at the bottom and those in the middle, pick off those closest to white and thus isolate the darkest Americans even further, lock them ever more tightly to the bottom rung.*[333]

Wilkerson goes on to imagine a future that comports with Dr. King's dream that every individual "be judged [not] by the color of their skin but by the content of their character," but Wilkerson does so in a race-conscious manner.[334] Again, her view turns on minorities standing together, relishing differences rather than assimilating into a caste-based white hierarchy. As eloquently put by Wilkerson:

> *In a world without caste,* instead of a false swagger over our own tribe or family or ascribed community, we would look upon *all* of humanity with wonderment: the lithe beauty of an Ethiopian runner, the bravery of a Swedish girl determined to save the planet, the physics-defying aerobatics of an African-American Olympian, the brilliance of a composer of Puerto Rican descent who can rap the history of the founding of America at 144 words a minute—all of these feats should fill us with astonishment at what the species is capable of and gratitude to be alive for this.
>
> *In a world without caste, being male or female, light or dark, immigrant or native-born, would have no bearing on what anyone was perceived as being capable of. In a world without caste, we would all be invested in the well-being of others in our species if only for our own survival, and recognize that we are in need of one another more than we have been led to believe.* We would join forces with indigenous people around the world raising the alarm as fires rage and glaciers melt. We

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333 *Id.* at 382 (emphasis added).

334 King, *supra* note 328; *see also* WILKERSON, *supra* note 7, at 388.

> would see that, when others suffer, the collective human body is set back from the progression of our species.
>
> *A world without caste would set everyone free.*[335]

Other scholars similarly reject assimilation, echoing Wilkerson's concerns that "honorary whiteness" will morph to create a new dominant caste.[336] Kendi recognizes the need and natural progression to stand together. As put by Kendi, #BlackLivesMatters was a "rallying cry, a declaration of love, from the minds and hearts of three Black women—two of whom are queer." As such, "[i]t was an announcement to all that in order to be *truly* antiracist, we must also oppose *all* injustices, such as sexism, homophobia, colorism, and classism, that work alongside racism to harm so many Black lives."[337]

2. Whites Calling Out Whites: Equality Begins at Birth

Two mothers, infants in arms, race toward the last lifeboat on the Titanic. One mother is Black, the other white. The two women arrive at the exact same moment. To their horror, only one seat is left. The ship's captain explains the situation, and then gives a nod to the white woman. She knows the only reason she and her child are offered the last seat is that they are white. Does she decline and instead suggest they toss a coin? Does she suggest both babies be seated in the boat and the two mothers stay behind? If the captain says no—it is one mother and one child—what does she do?

Equality begins at birth. Or it doesn't. In a 1989 essay entitled "White Privilege: Unpacking the Invisible Knapsack," Peggy McIntosh reframed racism and its silent partner-in-crime: white privilege.[338] As McIntosh made clear, each depends on the other and each contributes to white dominance, yet that connection often is unseen. As McIntosh explained:

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335 WILKERSON, *supra* note 7, at 388 (emphasis added).

336 *Id.* at 121*; see, e.g.*, JARDINA, *supra* note 60, at 273–74 (discussing the "Myth of a White Minority" and the broadening definition of those identifying as white); *accord* WILKERSON, *supra* note 7, at 19.

337 This simple explanation is set forth in a children's version of Kendi's *Stamped*. JASON REYNOLDS & IBRAM X. KENDI, STAMPED (FOR KIDS): RACISM, ANTIRACISM, AND YOU 127, 174 (2021).

338 *See* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, NAT'L SEED PROJECT 1 (1989), https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf [https://perma.cc/3CXQ-L6CH]; *see also* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999).

> *As a white person, I realized I had been taught about racism as something that puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.*
>
> I think whites are carefully taught not to recognize white privilege, as males are taught not to recognize male privilege. So I have begun in an untutored way to ask what it is like to have white privilege. I have come to see white privilege as an *invisible package of unearned assets that I can count on cashing in each day*, but about which I was "meant" to remain oblivious. *White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.*[339]

McIntosh then lists twenty-six different everyday instances by which whites take their privilege for granted, often oblivious to its racist underpinnings. These everyday instances include the ease by which whites navigate society, such as renting a home, obtaining credit, or even shopping in a grocery store without fear of being profiled as a shoplifter.[340] Put simply, whites do not face scrutiny simply because of the color of their skin. Instead, whites *escape* scrutiny for that very reason. In McIntosh's words: "Whiteness protected me from many kinds of hostility, distress and violence, which I was being subtly trained to visit, in turn, upon people of color."[341] Force and effect. Every advantage afforded whites results from a disadvantage borne by people of color.

More recently, other whites, such as Robin DiAngelo, have called out oblivious whites who spout white male rage, including the false belief that they are victims of reverse discrimination.[342] DiAngelo also laments self-indulgent "white women's tears." Referencing Black scholar Stacey Patton, DiAngelo explains:

> *Whether intended or not, when a white woman cries over some aspect of racism, all the attention immediately goes to her, demanding time, energy, and attention from everyone in the room when they should be focused on ameliorating racism. While she is given attention, the people of color are yet again abandoned and/or blamed.* As Stacey Patton, an assistant professor of multimedia journalism at Morgan State University's School of Global Journalism and Communication, states

339 McIntosh, *supra* note 338, at 1 (emphasis added). McIntosh also writes: "I was taught to see racism only in individual acts of meanness, not in invisible systems conferring dominance on my group." *Id.*

340 *Id.* at 2.

341 *Id.* at 3.

342 *See* DIANGELO, *supra* note 20, at 12, 134–35.

> in her critique of white women's tears, *"then comes the waiting for us to comfort and reassure them that they're not bad people."*[343]

DiAngelo further points to an enduring problem plaguing white activism: good-hearted whites want to do something; they just do not know what to do.[344] While no single civil white can change the world on their own, *each* civil white can change their own world by embracing antiracism through both personal reflection and education as to what the Black experience is, has been, and will be in the future.[345] Wilkerson discusses "[r]adical empathy," which includes "putting in the work to educate oneself and to listen with a humble heart to understand another's experience from their perspective, not as we imagine we would feel."[346] Ultimately, if racism and antiracism are to be understood by civil whites, it will need to be through the perspective of people of color.

3. Linguistics: Is "Antiracism" the New "Affirmative Action"?

"What's in a name?" In a 2013 poll, CNBC asked respondents whether they opposed either Obamacare or the Affordable Care Act (ACA). Forty-six percent opposed Obamacare, while only thirty-seven percent opposed the ACA.[347] Of course, Obamacare and the ACA are the same, a nationwide health plan implemented by the Obama Administration. As explained by pollsters, "putting Obama in the name raise[d] the positives and the negatives."[348] It also demonstrated the importance of loaded words and framing.[349]

"Affirmative action" long has had a bad name. In 2013, 67% of those polled were against the term, which had come to be associated with the

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343 *Id.* at 134 (emphasis added) (quoting Stacey Patton, *White Women, Please Don't Expect Me to Wipe Away Your Tears*, DAME (Dec. 15, 2014), https://www.damemagazine.com/2014/12/15/white-women-please-I-expect-me-wipe-away-your-tears [https://perma.cc/C5KB-3SKM]); *see also id.* at 89–122.

344 *See id.* at 7–14 (discussing "white[s'] frame of reference" and consequent difficulty to even talk about racism).

345 *See* WILKERSON, *supra* note 7, at 380 ("The caste system in America is four hundred years old and will not be dismantled by a single law or any one person, no matter how powerful.").

346 *Id.* at 386.

347 Steve Liesman, *What's in a Name? Lots When It Comes to Obamacare/ACA*, CNBC (Sept. 27, 2013, 6:54 AM), https://www.cnbc.com/2013/09/26/whats-in-a-name-lots-when-it-comes-to-obamacareaca.html [https://perma.cc/PL3B-LJ8X].

348 *Id.*

349 *See id.*

term "reverse discrimination."[350] It is one of those phrases where the meaning cannot truly be derived from the words themselves.[351] Taken apart, "affirmative" and "action" have been described as "two of the more benign words in the English language."[352] They could refer to any type of affirmative action, such as applying for a car loan or sweeping dirt from a doorstep. Yet "taken together, they're incendiary."[353] By contrast, "reverse discrimination" can be understood in and of itself. And to a layperson, the term smacks of unconstitutionality. Based on rhetorical use of that term, even liberal California twice passed voter initiatives that outright banned "affirmative action."[354] Yet, if those same California voters were asked if they were against racism, i.e., if they were *antiracist*, the results likely would be flipped.[355]

"Antiracism" not only is easy to understand, but it also presents to a layperson as constitutionally sound. Is antiracism not exactly what the Fourteenth Amendment is all about? Scholar Meera E. Deo recently examined the significance of moving toward antiracist frames. Specifically in the context of higher education admissions, Deo discusses how in the past "advocates were steadfastly focused on promoting *racial diversity* to advance racial justice."[356] Indeed, racial diversity was the narrow lifeline for affirmative action left open in *Bakke*.[357] Antiracism goes beyond that. As Deo notes, "[t]he push for antiracism itself reflects

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350 Alice Robb, *How Two Inoffensive Words Became the Most Inflammatory Phrase in English: The Affirmative Action Story*, NEW REPUBLIC (Apr. 25, 2014), https://newrepublic.com/article/117508/affirmative-action-story-catchphrase [https://perma.cc/J8PJ-2QYV]; *see* Paul Burstein, *Affirmative Action, Jobs, and American Democracy: What Has Happened to the Quest for Equal Opportunity?*, 26 L. & SOC'Y REV. 901, 904 (1992) ("[S]ince the mid-1980s, . . . affirmative action has come to be presented as linked to reverse discrimination.").

351 Robb, *supra* note 350.

352 *Id.*

353 *Id.* Other nations have used different variations, such as "employment equity" (Canada and South Africa) and "positive discrimination" (United Kingdom). *Id.*

354 *See* Conor Friedersdorf, *Why California Rejected Racial Preferences, Again*, ATLANTIC (Nov. 10, 2020), https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049 [https://perma.cc/7UHF-MLK2].

355 In 2001, Day cited polls whereby 50% of students were *against* "affirmative action," yet 70% paradoxically supported giving "special consideration" to race in admissions. Day, *supra* note 132, at 121 (quoting Tamara Henry, *Freshmen Back Admissions for Race, Not Affirmative Action*, USA TODAY, Jan. 8, 1996, at 1A). Day further recognized the loaded nature of the term "affirmative action": "It is ironic that just as we have begun to see firm evidence of affirmative action's success in opening this nation's schools and businesses to minorities, affirmative action itself has become something of a political pariah." *Id.* (footnote omitted).

356 Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 122 (2021) (emphasis added).

357 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272 (1978).

an update in both language and priorities, signaling a shift from protecting diversity to promoting broader action-oriented change."[358]

Kendi's definition of antiracism may be the simplest. In Kendi's words: "One either allows racial inequities to persevere, as a racist, or confronts racial inequities, as an antiracist."[359] As noted above, you are either part of the problem or part of the solution.[360] Kendi's definition begs the question: is antiracism—taking active steps to stop racism—linguistically the same as affirmative action—taking affirmative steps to remedy the effects of racism? If so, embracing antiracism necessarily requires supporting equitable race-conscious measures to stop racism.[361]

It is more than just semantics. In a poll released by the Southern Poverty Law Center in 2020, seven out of ten adults supported "anti-racist education" to combat hate and extremism.[362] To put that in perspective, seven years prior, two-thirds of America (67%) *opposed* affirmative action;[363] now, a substantial majority of Americans—those embracing antiracism (70%)—likely *support* affirmative action, albeit under a different name. Some just do not realize that yet.

B. *Recognizing the Distinction Between Invidious and Equitable Race-Conscious Measures: Will the Supreme Court Finally Get It Right in the Admissions Cases?*

Harvard finds itself at the center of the affirmative action debate. Again. In *Bakke*, the Harvard diversity plan was discussed with approval in Justice Powell's lead opinion.[364] Nearly a half-century later, Harvard's

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358 Deo, *supra* note 356, at 122 (emphasis omitted); *see also* Sterling, *supra* note 93, at 457–58. Dean Sterling discusses two alternative ways to view affirmative action. While it typically is understood as heightening minority representation, Sterling argues that it also should be seen as referring to the affirmative steps taken to favor whites, e.g., "diverting them from the criminal legal system." *Id.*

359 KENDI, *supra* note 19, at 9.

360 *See id.* at 17–23.

361 *Cf.* WILKERSON, *supra* note 7, at 386 ("Our times call for being pro-African-American, pro-woman, pro-Latino, pro-Asian, pro-indigenous, pro-humanity in all its manifestations.").

362 *New SPLC Polls Finds Overwhelming Support for Anti-Racism Education*, S. POVERTY L. CTR. (Sept. 17, 2020), https://www.splcenter.org/presscenter/new-splc-polls-finds-overwhelming-support-anti-racism-education [https://perma.cc/LKW2-G2GN]. *But see* Stella Rouse & Shibley Telhami, *Poll Reveals White Americans See an Increase in Discrimination Against Other White People and Less Against Other Racial Groups*, CONVERSATION (July 1, 2022, 8:16 AM), https://theconversation.com/poll-reveals-white-americans-see-an-increase-in-discrimination-against-other-white-people-and-less-against-other-racial-groups-185278 [https://perma.cc/47KJ-3ZF4] (discussing "empathy gap" in polling as demonstrating that certain demographics of white Americans believe whites have been more discriminated against in recent times than other groups).

363 Robb, *supra* note 350.

364 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–17 (1978).

plan has been challenged by the Students for Fair Admissions, Inc. (SFFA). The challenge does not assert that whites have been passed over in favor of diverse applicants, as argued in *Bakke*.[365] Rather, SFFA claims Asian Americans have been discriminated against in favor of others, specifically including white applicants.[366] This is because there is an overabundance of qualified Asian American students as compared to whites and underrepresented other groups. In granting certiorari, the Supreme Court plucked a similar case directly from a federal district court.[367] That case was filed against the University of North Carolina (UNC), a public university.[368] Presumably, the Supreme Court intends for its eventual ruling to indisputably apply to *both* public and private entities.

Even a "glass two-thirds full" optimist would be nervous over the Admissions Cases heading to a 6-3 conservative-leaning Court.[369] In *Grutter v. Bollinger*, Justice O'Connor floated a twenty-five-year sunset date for race-conscious criteria in college admissions—*and that was nearly twenty-five years ago*![370] Yet there is a potential crack in the bell, as evidenced by the majority opinion in *Dobbs* summarily dismissing an equal protection challenge because of a presumed lack of "invidious[]" animus.[371] Arguably, that resurrects the debate over whether equitable race-conscious measures should be subjected to the same heightened scrutiny as those that are invidious. Put simply, if a university can favor

365 *See id.* at 272–81.

366 Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 163 (1st Cir. 2020).

367 For a discussion of this procedural quirk and the rise in granting certiorari before judgment, see Steve Vladeck, *The Rise of Certiorari Before Judgment*, SCOTUSBLOG (Jan. 25, 2022, 5:44 PM), https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment [https://perma.cc/3CFP-5YP8].

368 Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 606 (M.D.N.C. 2021) (noting the plaintiffs' argument that Asian-American students needed a score of "29" on standardized tests to be recruited whereas underrepresented minorities needed only as low as a "26" under UNC's holistic admissions policies), *cert. granted*, 142 S. Ct. 896 (2022); *see also Students for Fair Admissions, Inc.*, 980 F.3d at 163 (alleging "discriminat[ion] against Asian American applicants in favor of white applicants"), *cert. granted*, 142 S. Ct. 895 (2022).

369 *See* Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 852 (2022) (discussing the Admissions Cases and a "fear that we will see the end of affirmative action" by the vote of six Justices). In his prior work, Chemerinsky discussed how the Supreme Court was a foe of racial equality, noting "the Court did nothing to advance racial equality for almost ninety years after the Civil War and instead used its power and influence to limit the protections of the post-Civil War amendments." CHEMERINSKY, *supra* note 262, at 30.

370 Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

371 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022). Of course, an argument could be made that it is "invidious" to incarcerate a woman who has an abortion, for example, yet impose no consequences on the male responsible for impregnation. *See generally* WILKERSON, *supra* note 7.

rural applicants over urban applicants when that demographic is underrepresented, why should racial demographics not be taken into account when those demographics are disproportionally skewed? Preference is not based on the bare demographic; preference turns on *underrepresentation* of any given demographic.

There are at least three possible outcomes for the Admissions Cases. The Supreme Court could keep *Bakke* and its progeny alive and permit universities to *consider* race to ensure diversity. That could depend on holding that equitable race-conscious measures should only be subjected to intermediate scrutiny. Or the Supreme Court could do what everyone thinks it will and hold that race-conscious admissions policies are always unconstitutional. The third outcome is to kick the can down the road—e.g., by holding that SFFA lacks standing or by remanding the case to the lower courts for additional fact-finding.

1. Outcome One: Recognizing the Constitutional Distinction Between Equitable and Invidious Race-Conscious Measures

Even a dog knows the difference between being kicked and stumbled over.[372] Many criminal law professors have used this simple line to explain mens rea, an actor's state of mind. Yet in *Croson*, the majority of Justices said it was impossible to tell the difference between measures intended to help or harm underrepresented minorities. Benign and invidious race-conscious measures were lumped together, *both* subjected to scrutiny that was "strict in theory, but fatal in fact."[373] Does anyone doubt Harvard's and UNC's diversity-based admissions policies are intended to *help*, not hurt, underrepresented minorities?

The *Bakke* Court expressly discussed the then-existing Harvard admissions program, contrasting that to the policy employed by the Regents of the University of California.[374] Harvard sought a diverse student body through consideration of a *multitude* of perspectives, including both geographics and race. That was done *after* an initial pool of qualified applicants was identified, without regard to race. Harvard did *not* treat individuals differently based on a particular demographic. Rather, individuals of all demographics were treated equally in terms of underrepresentation. As explained by Justice Powell in his lead opinion:

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372 Susan McCloskey, *Making the Language of the Law Intelligible and Memorable*, 71 N.Y. ST. BAR J. 47, 51 (1999) (attributing quote to Oliver Wendell Holmes).

373 Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).

374 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–18 (1978).

An illuminating example is found in the Harvard College program:

"In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. *Harvard College now recruits not only Californians or Louisianans but also [B]lacks and Chicanos and other minority students*. . . .

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, *the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a [B]lack student can usually bring something that a white person cannot offer*. . . .

"In Harvard College admissions the Committee has not set target-quotas for the number of [B]lacks, or of *musicians, football players, physicists or Californians* to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of [B]lack students] does not mean that the Committee sets a minimum number of [B]lacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants *who are not only 'admissible' academically* but have other strong qualities, the Committee, *with a number of criteria in mind*, pays some attention to distribution among *many types* and *categories* of students."

In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. . . . Indeed, *the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.*

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his *combined* qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. *His qualifications would have been*

> *weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.*[375]

No doubt, universities currently can consider a broad spectrum of factors, including not only typical diversity markers, such as race, gender, and socioeconomics but also whether an applicant harkens from the cornfields of the Midwest or the high rises of an urban metropolis. Why should consideration of any factor be prohibited so long as it is not a ruse hiding invidious intent? The ill sought to be cured is the lack of meaningful representation in the student body. Each applicant is treated exactly the same; if and when their demographic is underrepresented, they gain an advantage. Moreover, as noted in *Bakke*, over- or underrepresentation is not fixed in time.[376] Indeed, the gravamen of the Admissions Cases is that Asian Americans currently are disadvantaged by *over*representation in the qualified applicant pool.[377] But that does not change the fact that had whites—or midwestern farmers—been *over*represented, they similarly would have been disadvantaged. The inquiry ultimately turns not on race, per se, but on over- or underrepresentation.

Consider that "farm boy from Idaho" referenced in *Bakke*.[378] How can it be that individuals who fall under this demographic have their unique attributes considered—if their demographic is underrepresented—but people of color who are underrepresented are denied that same consideration? Framed differently, if every other imaginable characteristic can be considered in terms of underrepresentation, is it not discrimination *based on race* to prohibit consideration of racial underrepresentation? Permitting consideration of racial *underrepresentation* ensures not only a diverse student body but that every applicant is treated equally under the law.[379]

Constitutionality lies in the plain-as-day distinction between equitable race-conscious measures—which certainly describes Harvard's policy as examined in *Bakke*—and *invidious* discrimination (e.g., Jim Crow laws). That is where *Dobbs* comes into play. The majority opinion

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375 *Id.* (third alteration in original) (emphasis added) (footnote omitted) (citations omitted) (quoting Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae at 2–3, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007).

376 *See id.* at 284; *id.* at 317–18 ("Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.").

377 *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

378 *Id.* at 323.

379 In perspective, a university could theoretically seek astrological diversity and impose outright quotas (e.g., for underrepresented Capricorns) but be foreclosed from addressing racial underrepresentation.

rejected the notion that a ban against abortions raised an equal protection issue, impacting women differently than men, because the intended goal of preventing abortion "does not constitute 'invidiously discriminatory animus' against women."[380] That shouts loud and clear a very easy-to-understand truism: a measure intended to *harm* an underrepresented group is different in kind than a measure intended to *help* that same group.

Once the constitutional distinction between equitable and invidious measures is recognized, *Dobbs* imposes no bar to public or private equitable race-conscious measures, especially in college admissions. The core principle of *Dobbs* is that if no constitutional right is in play, regulation is left to the states. More particularly, Justice Alito emphasized how "[t]he Constitution makes no reference to abortion."[381] While the Fourteenth Amendment addresses race, and certainly prohibits *invidious* discrimination, it *does not* prohibit *equitable* race-conscious legislation for measures that help rather than hinder racial equality.[382] Indeed, as discussed in Section II.A.2, the Fourteenth Amendment was passed for the *exact purpose* of *permitting race-conscious remedial measures*, such as the Freedmen's Bureau bills, which included provisions *solely* assisting Black people.[383] By contrast, the Fourteenth Amendment was intended to

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380 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993)).

381 *Id.* at 2242. This theme began in the second paragraph of the opinion and repeated throughout. *See, e.g.*, *id.* at 2240, 2242–43, 2246–49.

382 *See* Schnapper, *supra* note 13, at 784–88; *see also* discussion *supra* Section II.A.

383 As noted *supra* note 321, Justice Jackson supported this principle in the oral arguments in *Merrill v. Milligan*, involving the Voting Rights Act. Transcript of Oral Argument at 57–60, Merrill v. Milligan, No. 21-1086, 2022 WL 3580300 (Aug. 22, 2022). In the oral arguments for *Students for Fair Admissions, Inc.*, Justice Jackson squarely raised an equal protection argument. Transcript of Oral Argument at 63–69, 112–16, Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 2809 (2022) (No. 21-707). Justice Jackson began by recognizing how holistic admissions programs allow applicants to "tell us about yourself," meaning "people can put all sorts of things" on this form, including their religious and geographic background. *Id.* at 114; *see also id.* at 34 (noting that applicants disclosing their racial identity are saying "race matters to me"); *id.* at 63–65. Justice Jackson then argued it would be constitutionally impermissible to allow applicants to self-identify as to a host of characteristics when conveying their uniqueness, but *not* permit applicants to self-identify their race. *Id.* at 114–15. As put by Justice Jackson when speaking of racial identity:

> Given a holistic review process like that, is there a risk of treating people differently by *not* allowing some applicants to talk about that aspect of their identity? . . . [W]e're entertaining a rule in which *some people can say the things they want about who they are and have that valued in the system, but other people are not going to be able to because they won't be able to reveal that they are Latino or African American* . . . .

Id. (emphasis added). Justice Jackson also posed a hypothetical of a white applicant who might write in their personal statement that they would be a fifth-generation UNC graduate because their ancestors attended UNC "since before the Civil War." *Id.* at 64–66. A Black applicant writes that

prohibit invidious legislation passed for illegitimate purposes, such as racial animus.[384] Given there is *no* constitutional protection against *equitable* race-conscious measures, *Dobbs* requires that decision be left to the states.[385]

2. Outcome Two: Race Can *Never* Be Considered in University Admissions Policies

There is a clear blueprint for overruling *Bakke* and its progeny. As noted above, Justice O'Connor wrote in her 2003 majority opinion in *Grutter v. Bollinger* that "race-conscious admissions policies must be limited in time." And she gave an expected time limit: "[the Court] expect[s] that *25 years from now*, the use of racial preferences will no longer be necessary . . . ."[386] Two later affirmative action cases—*Fisher v. University of Texas at Austin* (*Fisher I*) in 2013 and *Fisher v. University of*

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their ancestors also hale from North Carolina "since before the Civil War." But that applicant tells a different tale, namely that their ancestors were slaves and thus not permitted to attend UNC. *Id.* The applicant then explains the pride they would take in being the first African American in their family to graduate from UNC. That applicant would not be able to tell their story because it necessarily is "bound up with his race and with the race of his ancestors." *Id.* at 66. In scrutinizing SFFA's position, Justice Jackson then pointed to what would appear to be a clear equal protection violation:

> So I want to know, based on how your rule would likely play out in scenarios like that, why excluding consideration of race in a situation in which the person is not saying that his race is something that has impacted him in a negative way, he just wants to have it honored, just like the other person had their personal background family story honored, *why is telling him no not an equal protection violation*?

Id. (emphasis added). Justice Jackson added that "because it relates to race, precisely because it relates to race, I think you might have an equal protection problem in saying that he can't get credit for that when someone else can." *Id.* at 67–68. Justice Jackson may be trying to win over Justice Gorsuch, who appeared willing to rule in favor of SFFA, but on Title VI grounds. More particularly, Justice Gorsuch, a textualist, could find that the plain text of Title VI prohibits any consideration of race. *Id.* at 54 (discussing the text of Title VI and noting that "[i]n *Bakke*, Justice Stevens argued that, whatever the Fourteenth Amendment may allow, Title VI does not permit the use of race"). Of course, per Justice Jackson's point, if an interpretation of Title VI *violates* the Equal Protection Clause, that interpretation could not be enforced. *See id.* at 63–69, 112–16.

384 *See* discussion *supra* Section II.A.2.

385 *See Dobbs*, 142 S. Ct. at 2264–65. Arguably, admissions policies have little to no direct impact beyond the confines of state borders, furthering the argument that states should be able to permit use of equitable race-conscious measures.

386 Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (emphasis added). Justice Thomas concurred in the majority opinion but *only* to that single line. *Id.* at 378 (Thomas, J., concurring in part and dissenting in part) ("I join the last sentence of Part III of the opinion of the Court.").

Texas at Austin (*Fisher II*) in 2016[387]—arguably axed remedial justifications for racial preferences.[388] This would scuttle any argument that race-conscious measures were warranted due to Harvard's or UNC's complicity in the legacies of slavery.[389] Professor Lauren Cyr recently noted that the rhetoric and reasoning in even the *majority* opinion in *Fisher II* "revived right-wing challenges to affirmative action," specifically including appeals to "reverse discrimination" and "reverse racism."[390]

Added to this mix is Chief Justice Roberts' famous quip: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[391] That line is sure to earn a curtsy in any opinion flatly banning use of race in admissions criteria, as is Justice Thomas' adamant "color-blind" rhetoric in *Grutter*.[392] *Dobbs* could be distinguished on the grounds that the Constitution makes no mention of abortion rights, but there are *references* to race, just like there are references to the "right to keep and bear arms," which was how *New York State Rifle & Pistol Ass'n v. Bruen* was distinguished.[393] If there is enough moxie, a conservative majority might simply ignore the well-reasoned arguments regarding the

387 For an excellent discussion of *Fisher v. University of Texas at Austin* (*Fisher I*), 570 U.S. 297 (2013), and *Fisher v. University of Texas at Austin* (*Fisher II*), 579 U.S. 365 (2016), which both involved a "Top Ten Percent Plan" used by the University of Texas, see Kimberly Jenkins Robinson, Fisher*'s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 189–205 (2016).

388 *See* Elizabeth B. Meers, *Reflections on* Fisher v. University of Texas II *and Campus Protests over Racial Inequality*, 120 DICK. L. REV. 945, 950–51, 202–03 (2016) (recognizing it is "unclear" whether a university could itself find that its own racial misdeeds justify remedial measures); *see also* Sterling, *supra* note 93, at 487 (noting Supreme Court's rejection of "remedial rationale" in affirmative action cases).

389 *See* discussion *infra* Section III.C.2 (regarding Harvard's acknowledgement of past complicity).

390 Lauren Cyr, *Literature Review: Interdisciplinary Findings on Diversity and Inclusion*, *in* DIVERSITY AND INCLUSION IN HIGHER EDUCATION AND SOCIETAL CONTEXTS: INTERNATIONAL AND INTERDISCIPLINARY APPROACHES 17, 23 (Sunhee Kim Gertz, Betsy Huang & Lauren Cyr eds., 2018).

391 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion). Ronald Turner presents a counter to this argument in his 2015 article. *See* Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race . . ."*, 11 STAN. J. C.R. & C.L. 45, 46–47 (2015). Justice Sotomayor wrote in her dissent in *Schuette v. Coalition to Defend Affirmative Action*: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting). A simpler rhetorical flip might be: the race to stop (invidious) discrimination on the basis of race is to stop racism.

392 *See* Grutter v. Bollinger, 539 U.S. 306, 377–78 (2003) (Thomas, J., dissenting) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Characterizing the majority opinion as an "imposition of a 25-year time limit" for race-conscious policies, Justice Thomas referred to a "color-blind" Constitution and noted that "we must wait another 25 years to see this principal of equality vindicated." *Id.* (quoting *Plessy*, 163 U.S. at 537 (Harlan, J., dissenting)).

393 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2117 (2022) (regarding a challenge under the Second Amendment to the U.S. Constitution).

history of the Fourteenth Amendment and the distinction between equitable and invidious race-conscious measures.

3. Outcome Three: Kicking the Can Down the Road

During Justice Jackson's confirmation hearings, Justice Jackson announced she would recuse herself from consideration of the Admissions Cases due to her Harvard ties.[394] The Supreme Court subsequently separated the cases, thus permitting Justice Jackson to weigh in on the UNC case.[395] Only eight Justices will hear the Harvard case. Still, given that Harvard prevailed in the lower court, that ruling would stand in a 4-4 tie. Thus, in either case, a solid five Justice majority is needed to overturn the lower court decisions. That presumably would include three Justices—Chief Justice Roberts and Justices Thomas and Alito—who already unambiguously opposed any use of race-conscious measures in prior dissents—and at least two of the other remaining Justices, three of whom lean conservatively.[396] Will the populace accept that?

Supreme Court history is replete with instances where certiorari has been granted but a true resolution of the merits has been postponed. *Brown* was delayed a year in order to garner a unanimous decision.[397] Standing issues commonly have been used to push the can down the road. Such an argument could apply here. Harvard challenged SFFA's standing, but both the appellate court and the trial court found that SFFA had satisfied the applicable standard.[398]

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394 Kimberly Strawbridge Robinson, *Jackson Vows to Recuse from Harvard Race-Based Admissions Case*, BLOOMBERG L. (Mar. 23, 2022, 4:22 PM), https://news.bloomberglaw.com/business-and-practice/jackson-says-shed-recuse-from-harvard-affirmative-action-case [https://perma.cc/BW3N-E49M].

395 Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (July 22, 2022, 6:43 PM), https://www.scotusblog.com/2022/07/court-will-hear-affirmative-action-challenges-separately-allowing-jackson-to-participate-in-unc-case [https://perma.cc/28QZ-YM9F].

396 Justice Thomas dissented in *Grutter*. *Grutter*, 539 U.S. at 349. Chief Justice Roberts and Justices Thomas and Alito dissented in *Fisher II*. Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365, 389 (2016). Two of these Justices, Justices Thomas and Alito, have been dubbed as two of the most conservative Justices of all time. Marcus Hawkins, *Top 5 Conservative Supreme Court Justices*, THOUGHTCO., https://www.thoughtco.com/top-conservative-supreme-court-justices-3303395 [https://perma.cc/UT26-M56P] (Aug. 19, 2019); *see also* Brianne J. Gorod, *John Roberts and Constitutional Law*, 38 CARDOZO L. REV. 551, 552–53 (2016) (noting Roberts is both "conservative" and deeply concerned about the "institutional legitimacy of the Court").

397 CHEMERINSKY, *supra* note 262, at 38–41, 124; Johnson, *supra* note 23, at 403–04.

398 Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 179 (1st Cir. 2020).

Polls showing greater support for antiracism, coupled with the generally acceptable practice that universities can take race into consideration, suggest that another decision tossing longstanding liberal-leaning precedent would further diminish the perceived legitimacy of the Supreme Court. If the Supreme Court were to punt, that could fend off another backlash. And from a historical perspective, Justice O'Connor did say twenty-*five* years, not twenty…[399]

C. *Surviving the Admissions Cases: A Glimmer of Hope for Future Generations*

"Pizza Heaven," pipes a salesclerk, "can I take your order?" The customer yearns for something more than a traditional cheese pie. They begin to utter "mushrooms, bell peppers, and olives," but they are stopped mid-sentence by the salesclerk: "I'm sorry, you can't select toppings by name. Is there a topping-*neutral* manner of describing what you would like?" As a practical matter, this is absurd. But it is the same type of absurdity many universities face when they try to order up a diverse student body. Everyone knows what schools are doing: a purposeful end-run around Supreme Court precedent, albeit to accomplish a very important and necessary goal. In *Fisher I*, Justice Ginsburg even said as much.[400]

Efforts to increase diversity will survive the Admissions Cases, no matter the outcome. Moreover, universities and law schools are uniquely positioned to lead by example and change minds. The social and legal rhetoric is already there, lying dormant in the timeless concurrences and dissents drafted by Justice Marshall. This Part ends by championing his prophetic dissent in *Bakke*, where he held the Supreme Court accountable not just for standing in the way of racial equality in the affirmative action cases, but throughout Supreme Court history. Oh, how nice it would be to order a pepperoni pizza by its name…

1. Interim Workarounds: Efforts Increasing Diversity That Do Not Expressly Consider Race

"Persevere." That was the advice Justice Jackson shared at her confirmation hearings when asked what advice she would give to those

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399 *Grutter*, 539 U.S. at 343.

400 *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting) ("[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious.").

who might follow in her footsteps.[401] As an undergraduate freshman, Justice Jackson recalled walking through Harvard Yard, daunted by the sheer lack of Black representation in the student body. Sensing her concern, an unidentified Black woman whispered that one word of assurance. And persevere she did. Jackson went on to graduate from Harvard Law School, ultimately being sworn in as the first Black female Supreme Court Justice. She took the seat of retiring Justice Breyer, for whom she had clerked following her graduation from Harvard Law School.[402] In her remarks at a White House reception, flanked by both Harris and Biden, Justice Jackson acknowledged the impact that her ascension to the bench will have on little girls of the future. More particularly, Justice Jackson shared that she had been flooded by thousands of supportive notes and cards, including those from children, which she deemed "especially meaningful because, more than anything, they speak directly to the hope and promise of America."[403]

Despite her heralded career, right-wing agitators demanded that Justice Jackson release her Law School Admissions Test (LSAT) records, speculating that she was a "beneficiary" of affirmative action. There is no reason to suggest Justice Jackson's credentials were less than even a single one of her peers. Indeed, her subsequent career trajectory—which is the true measure of an attorney's worth—suggests just the opposite.[404] But there *is* every reason to believe the educational experience of *every one of*

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401 Megan Sauer, *Ketanji Brown Jackson's 1-Word Advice for Young People: 'Persevere'*, CNBC: MAKE IT (Apr. 11, 2022, 11:21 AM), https://www.cnbc.com/2022/04/07/ketanji-brown-jacksons-1-word-advice-for-young-people-persevere.html [https://perma.cc/TG2P-BCM8].

402 *Id.*; *see* Joe Biden, President, Kamala Harris, Vice President & Ketanji Brown Jackson, Judge, Remarks by President Biden, Vice President Harris, and Judge Ketanji Brown Jackson on the Senate's Historic, Bipartisan Confirmation of Judge Jackson to Be an Associate Justice of the Supreme Court (Apr. 8, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/08/remarks-by-president-biden-vice-president-harris-and-judge-ketanji-brown-jackson-on-the-senates-historic-bipartisan-confirmation-of-judge-jackson-to-be-an-associate-justice-of-the-supreme-court [https://perma.cc/JJ57-KBUR].

403 Biden, Harris & Jackson, *supra* note 402. Recognizing that it took "232 years and 115 prior appointments for a Black woman to be selected to serve on the Supreme Court," Justice Jackson further stated, "our children are telling me that they see now, more than ever, that, here in America, anything is possible." *Id.*

404 Conservative cable-news commentator Tucker Carlson faced considerable rebuke for calling for Justice Jackson's LSAT scores following her nomination. Josephine Harvey, *Tucker Carlson Called Out After 'Racist' Attack on Ketanji Brown Jackson*, HUFFINGTON POST (Mar. 2, 2022, 10:54 PM), https://www.huffpost.com/entry/tucker-carlson-ketanji-brown-jackson_n_6220259de4b030a2f53846f7 [https://perma.cc/E8D8-BGCP]. Sentator Roger Wicker decried Jackson as being the "beneficiary" of affirmative action and argued that Biden's selection of her as a nominee constituted discrimination." Yelena Dzhanova & Katie Balevic, *A GOP Senator Said Biden's Next Supreme Court Pick Will Be a 'Beneficiary' of Affirmative Action*, YAHOO! NEWS (Jan. 29, 2022), https://news.yahoo.com/gop-senator-said-bidens-next-145101928.html?fr=sycsrp_catchall [https://perma.cc/H8Q6-JX7B].

her peers was enhanced by her presence and the presence of every other student of color.

Studies uniformly prove that diversity enhances the educational experience not just for minorities, but for all students, as well as faculty and staff.[405] Accordingly, schools naturally should and do aim for diversity.[406] While it certainly is easier if racial identity is known, other race-neutral methods can accomplish this goal.[407] For example, given the racial disparities in wealth and income, economic diversity often begets racial diversity. A higher percentage of students of lower economic means likely translates to a higher percentage of minority students.[408] To stay in the constitutional clear, universities can award merit boosts based on overcoming "structural inequality."[409] Put simply, whether Black or white, excelling in school is tougher for a student who faces economic hurdles (e.g., food insecurity) than for a pampered student of higher economic means. And intersectionality matters. *Black* students suffering economic hurdles likely have a more challenging path than similarly situated *white* students; the same holds true for *affluent* Black students when compared to their white counterparts.[410]

Other markers peripherally enhancing racial diversity include identifying students who are first generation in terms of completing high school or college; whether a student comes from public or private schools, in particular, low-performing public schools; and whether graduation was timely with a standard diploma. Schools also look to bilingual households, whether and to what extent students worked through high school and college, and whether an immediate family member has been incarcerated.[411] Further, schools can court communities with considerable minority representation. Still, the safer constitutional

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405 *See, e.g.*, Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 331–32 (2022) (demonstrating the positive impact of diversity in student-run law reviews).

406 *See generally* Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 TUL. L. REV. 1 (2021).

407 Eboni S. Nelson, Ronald Pitner & Carla D. Pratt, *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2189–90, 2214–17 (2017). These authors note that "[c]onsidering applicants' races in admissions decisions has been pivotal to [diversity recruitment] efforts." *Id.* at 2190.

408 *Id.* at 2214.

409 *Id.* at 2196.

410 *See id.* at 2214–15 (discussing critiques that affirmative action only helps affluent minorities); *id.* at 2221–22 (discussing intersectionality).

411 *See id.* at 2218–21, 2218 n.182, 2220 n.183. Schools also could elicit student views on the "importance of diversity in the classroom." *Id.* at 2218 n.182. *But see id.* at 2222 (noting that "race-blind admissions" could be thwarted if students could "proffer answers that they think the law school would value").

ground would be to target communities of lower socioeconomic means in a race-neutral manner.[412]

Obviously, universities should not have to face these hurdles. The more straight-forward approach would be to directly consider race as a factor in admissions. The same can and should be said about employment and entrepreneurial opportunities.[413]

2. The Unique Role of Law Schools and Universities in Advancing Antiracism

Every year, the American Association of Law Schools holds a special conference to welcome new law professors to academia. In recent years, newbies gather at the Mayflower Hotel in Washington, D.C., dressed to impress and eager to begin their careers. Three focal points pertain to their new profession: teaching, scholarship, and service. It is not just about grading exams or giving a brilliant lecture illustrating the rule against perpetuities. Nor is it just about penning a drop-jaw law review article that racks up thousands of hits on HeinOnline. It is about service: making the world a little bit better than it was before.

A fundamental part of service is affirmatively advancing antiracism. Some law schools and universities are rising to the occasion, not just actively trying to recruit students of color, but also helping those students thrive.[414] This includes recognizing and addressing not only racial disparities, but the significant degree by which students of color fail to feel a sense of belonging, as compared to their white counterparts. Part of the problem is that law schools often present as "white spaces," as evidenced by white iconography, such as rows upon rows of portraits of successful white alumni and jurists.[415] Indeed, portraits of the various iterations of the Supreme Court reflect a long-standing judicial "white space." Universities can lead by example in a different way: undergoing a reckoning with their own role in racism in America. That includes not

412 *Id.* at 2189–90, 2196, 2233.

413 Friedman notes that one of the most powerful amici briefs in *Grutter* was filed by "sixty-five Fortune 500 companies." FRIEDMAN, *supra* note 77, at 362.

414 *See generally* BETTINA L. LOVE, WE WANT TO DO MORE THAN SURVIVE: ABOLITIONIST TEACHING AND THE PURSUIT OF EDUCATIONAL FREEDOM (2019) (discussing flaws in education practices at all levels).

415 Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 21–28, 31 (2021). Professor Capers cited a recent study finding that while only 9% of white students "felt uncomfortable being themselves on campus," that percentage nearly tripled to 25% for Black students and 18% percent for Latinx students. *Id.* at 24–25. Capers views the whiteness of law schools as having four components: "demographics," "architecture," "what is taught," and "how it is taught." *Id.* at 21–41, 45.

just overt acts of racism, but complicity in the legacies of slavery, including complacency. For example, Harvard issued a 134-page report—and ponied up $100 million—to both reckon with Harvard's past connections with slavery and redress the lingering effects.[416]

Law schools and universities are also creating expanded curriculum directly targeting antiracism.[417] Some of that curriculum holds a mirror up to white America, demanding that whites acknowledge their privilege and concordant role in contributing to ongoing racism.[418] Other schools forge the path by creating mandatory year-long first-year antiracism education.[419] These are the types of *affirmative steps* that change the lives

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416 Keith Reed, *Harvard's $100 Million, 134-Page Mea Culpa for Slavery*, ROOT (Apr. 27, 2022, 5:13 PM), https://www.theroot.com/harvards-100-million-134-page-mea-culpa-for-slavery-1848850302 [https://perma.cc/8JDD-L3NQ]. Harvard is not alone. Section 1 of the Harvard report discusses a "consortium of more than 80 institutions of higher education, called Universities Studying Slavery [(USS)]," which meets annually and is based at the University of Virginia. PRESIDENTIAL COMM. ON HARVARD & THE LEGACY OF SLAVERY, HARVARD & THE LEGACY OF SLAVERY 5 (2022), https://radcliffe-harvard-edu-prod.s3.amazonaws.com/43444f4b-d5f6-4d71-963d-e667b548a58d/HLS-whole-report_FINAL_2022-09-14FINAL-ua2.pdf [https://perma.cc/7GCL-ETYG]. "USS hosts semi-annual free and public conferences." President's Comm'n on Slavery and the Univ., *Universities Studying Slavery: Fall 2022 (Sept. 28–Oct. 1) USS Conference*, UNIV. OF VA., https://slavery.virginia.edu/universities-studying-slavery [https://perma.cc/7LBY-BZ2K]. A similar mea culpa was made by Marta Kauffman, co-creator of the hit 1990s sitcom *Friends*. Kauffman donated $4,000,000 to her alma mater, Brandeis University, creating an endowed professorship in the school's African American studies department. Commenting on the lack of diversity in the series, Kauffman noted: "It's painful looking at yourself in the mirror. I'm embarrassed that I didn't know better 25 years ago." Elise Brisco, *'Friends' Co-Creator Marta Kauffman on Show's Lack of Diversity, $4M Donation: 'I'm Embarrassed'*, USA TODAY (July 5, 2022), https://www.usatoday.com/story/entertainment/tv/2022/07/01/friends-co-creator-marta-kauffman-sitcom-diversity-lack-donation/7789432001 [https://perma.cc/F947-W2SK].

417 The University of Connecticut offers an "anti-Black racism" course for both students and faculty. Mike Enright, *Anti-Black Racism Course Offered for Second-Straight Semester*, UCONN TODAY (Jan. 27, 2021), https://today.uconn.edu/2021/01/anti-black-racism-course-offered-for-second-straight-semester [https://perma.cc/38UA-84ZM]; *see also* Capers, *supra* note 415, at 31–32 (noting efforts but commenting that the problem is not simply the absence of race in the classroom but that "whiteness of the curriculum goes unsaid and unremarked upon"). Capers goes on to discuss several ways to "not just reimagine the law school, but to *radically* reimagine it." *Id.* at 45. *See generally id.* at 41–57.

418 For example, the University of Massachusetts encourages whites to recognize their "complicity in white supremacy." *See White Allies Against Racism: How to Be a Co-Conspirators for Racial Justice*, UNIV. OF MASS. AMHERST, https://www.umass.edu/diversity/events/white-co-conspirators-cohort-information-session [https://perma.cc/7XNQ-FHBG].

419 *See* Amy C. Gaudion, *Exploring Race and Racism in the Law School Curriculum: An Administrator's View on Adopting an Antiracist Curriculum*, 23 RUTGERS RACE & L. REV. (forthcoming 2022) (manuscript at 33–34) (discussing curriculum at Penn State Dickinson Law). For programs addressing elementary and high schools, see LOVE, *supra* note 414, at 110–15 (discussing, *inter alia*, "freedom dreaming"). Love also highlights the distinction between an "ally," which can be performative, and a "coconspirator," who actively furthers antiracism: "[a] coconspirator functions as a verb, not a noun." *Id.* at 117–18.

not only of present day law students, but of those that follow in their footsteps generations from now.

3. The Long Game: Justice Marshall's Legacy of Holding the Supreme Court Accountable for Repeatedly Standing in the Way of Racial Equality

January 25, 1993. Justice Marshall passed of heart failure at Bethesda Naval Medical Center.[420] His death came only two years after his retirement from the Supreme Court. A *New York Times* obituary haled him as the "Great Dissenter," a "storyteller," and a visionary, both as a civil rights lawyer and as a Supreme Court Justice.[421] The *New York Times* quoted a tribute penned by a former law clerk that captured Justice Marshall's ability to truly see the present and envision a better future:

> "To do what he did required a heroic imagination" . . . .
>
> . . . "He grew up in a ruthlessly discriminatory world—a world in which segregation of the races was pervasive and taken for granted, where lynching was common, where the [B]lack man's inherent inferiority was proclaimed widely and wantonly. *Thurgood Marshall had the capacity to imagine a radically different world, the imaginative capacity to believe that such a world was possible, the strength to sustain that image in the mind's eye and the heart's longing, and the courage and ability to make that imagined world real.*"[422]

As discussed above, Justice Marshall eloquently nailed the WRGO of the affirmative action cases in a manner understandable to both lawyer and layperson. His arguments ring true both legally and in terms of larger social narratives, especially when viewed from a real-world perspective. Justice Brennan, a friend who joined Justice Marshall in many of his dissents, recognized the "deeper purpose" of Justice Marshall's storytelling: "Justice Marshall recognized that the stories made us—his colleagues—confront walks of life we had never known."[423] That is why it is inevitable that Marshall's truisms ultimately will win the day.

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420 But for his failing health, Justice Marshall would have sworn in Vice President Al Gore at inauguration ceremonies earlier that week. Linda Greenhouse, *Thurgood Marshall, Civil Rights Hero, Dies at 84*, N.Y. TIMES, Jan. 25, 1993, at A1.

421 *Id.*

422 *Id.* (emphasis added) (quoting Paul Gewirtz, *Thurgood Marshall*, 101 YALE L.J. 13, 13 (1991)). In his article, Gewirtz further noted that while Justice Marshall's dissents solidly appealed to America's "historic ideals[,] . . . they were also appeals to the future—at least implicitly a beacon to some later day when the Court might change and perhaps follow the alternative path laid out by today's dissent." Gewirtz, *supra* note 422, at 17.

423 Greenhouse, *supra* note 420 (quoting statements by Justice Brennan).

Justice Marshall knew America needs to reckon with its complicit past in denying equal protection of the law to people of color. That meant calling out the Supreme Court, past and present, for strained judicial interpretations that furthered, rather than hindered, racism. In his dissent in *Bakke*, Marshall referenced the Freedmen's Bureau and other entities that—for a brief time—raised the boats of freed slaves. That came to an end not at the hand of Congress, but at the hand of the Supreme Court.[424] As explained with vivid force:

> Reconstruction came to a close, and, *with the assistance of this Court*, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: *"By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights."*
>
> *The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections.* Then in the notorious *Civil Rights Cases*, *the Court strangled Congress' efforts to use its power to promote racial equality*. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." . . . As Mr. Justice Harlan noted in dissent, however, *the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . .—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more*."[425]

Justice Marshall saved some of his most crushing words for the Supreme Court's decision in *Plessy*, which gave the thumbs-up to nationwide Jim Crow.[426] The lone dissent was by Justice Harlan, who saw the "bankruptcy" of the Supreme Court's reasoning that separate but equal accommodations did not constitute racial discrimination against Black people. Justice Harlan nailed that WRGO—well over one hundred years ago—and saw the devastating consequences on Black Americans. As passionately described by Justice Marshall:

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424 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 390–91 (1978) (Marshall, J., separate opinion) (emphasis added).

425 *Id.* at 391–92 (alteration in original) (emphasis added) (citations omitted) (first quoting C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 139 (3d ed. 1974); then quoting The Civil Rights Cases, 109 U.S. 3, 11 (1883); and then quoting *id.* at 61).

426 *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896). Notably, Marshall successfully argued *Brown* in front of the Supreme Court as a practitioner prior to his ascension to the bench in 1967. Greenhouse, *supra* note 420; *see also* Higginbotham, *supra* note 16.

> Mr. Justice Harlan's dissenting opinion recognized the *bankruptcy* of the Court's reasoning. He noted that *the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens*." . . .
>
> *The fears of Mr. Justice Harlan were soon to be realized.* In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. *The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms.*[427]

Justice Marshall, like Justice Harlan, saw the bigger picture. The impact was not just on the litigants before the Court (e.g., Bakke and the Regents), but upon generations of Black Americans who would be denied their due of equality under the law. In a prophetic Harlan-esque close:

> *I fear that we have come full circle.* After the Civil War our Government started several "affirmative action" programs. *This Court in the* Civil Rights Cases *and* Plessy v. Ferguson *destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts.* Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, *we have this Court again stepping in*, this time to stop affirmative-action programs of the type used by the University of California.[428]

Justice Marshall may have passed in 1993, but his "heroic imagination" lives on. So do his words. Whether now or later, there will be a racial reckoning at the Supreme Court, likely following an even greater reckoning in the general populace.

CONCLUSION

History is clearer in hindsight. Justice Harlan's dissent in *Plessy* easily rang true in a post-*Brown* world, even though it barely drew a yawn when first read over a century ago.[429] The same will hold true for the eloquent and prophetic passages penned by Justice Marshall. They may not have captured the zeitgeist of their time, but they captured the zeitgeist of a better future. A better version of America will accept the stunningly simple notion that equitable race-conscious measures are

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427 *Bakke*, 438 U.S. at 391–93 (Marshall, J., separate opinion) (emphasis added) (citations omitted) (quoting *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting)).

428 *Id.* at 402 (emphasis added) (emphasis omitted).

429 *See* Johnson, *supra* note 89, at 335–38, 338 n.54 (noting that the decision was met with "apathy" by the press).

constitutionally permissible and, arguably, mandated. That principle is soundly supported by both common sense and the plain language and legislative history surrounding the ratification of the Fourteenth Amendment. Nor can it any longer be ignored that while affirmative action—or lack thereof—may impact specific individuals (e.g., the litigants in a particular case), the more profound impact is on the children of tomorrow and the souls of the past.

As the debate regarding antiracism and affirmative action continues, may that debate give great weight to the arguments advanced by Justice Marshall and the NAACP, specifically including looking at racial *in*equality from the perspective of people of color. The Admissions Cases present the perfect opportunity for the Supreme Court to begin its retreat from the egregiously wrong decisions of the past unabashedly protecting white privilege. Institutions of higher education need to fervently push for racial diversity. And states must be permitted to at least *allow* colleges and universities to consider race as one criterion used to admit a diverse student body reflective of a multiplicity of demographics. May future little girls—and boys—wonder how the Supreme Court ever could have ruled differently.