"TODAY, THE CONSTITUTION PREVAILS": A HISTORY AND LEGACY OF CONSTITUTIONAL RACISM

Zamir Ben-Dan†

TABLE OF CONTENTS

† Assistant Law Professor, Beasley School of Law at Temple University. I am grateful to Jaya Ramji-Nogales and Craig Green for their comments on this piece.

INTRODUCTION

In a decision that surprised almost no one, the United States Supreme Court struck down the affirmative action programs at Harvard College and the University of North Carolina.[1] The majority opinion recounted a jurisprudential history that started with the Fourteenth Amendment, jumped to *Plessy v. Ferguson*,[2] and lingered on the progeny of *Brown v. Board of Education*.[3] The opinion hailed *Brown* as the ultimate triumph, the case that spelled the beginning of the end of racism in America.[4] It declared that the purpose of the Equal Protection Clause is to eliminate "all governmentally imposed discrimination based on race."[5] In his concurrence, right-wing jurist Clarence Thomas proudly boasted: "Today, . . . the Constitution prevails."[6]

1 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

2 Plessy v. Ferguson, 163 U.S. 537 (1896).

3 *Students for Fair Admissions*, 600 U.S. at 203–04; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

4 *Students for Fair Admissions*, 600 U.S. at 203–04.

5 *Id.* at 206 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

6 *Id.* at 232 (Thomas, J., concurring).

The "prevailing" federal Constitution makes no mention of African Americans. Prior to the Thirteenth Amendment's ratification, it made no reference to slavery either. However, the Constitution is a document that has exalted white supremacy from its founding to the present. Implicit racism—racism that is derived from the intended interpretation of facially race-neutral language[7]—is a truly American brand of racism. Ian Haney López's book *Dog Whistle Politics* dates the origins of coded racism to the 1960s, with George Wallace and Barry Goldwater as the first dog whistlers.[8] Katie R. Eyer has pointed out that facially race-neutral opposition to racial justice and equality existed during the *Plessy* era and prevailed in the North as well as the South.[9] In truth, however, coded racism has its roots in the nation's founding document; the federal Constitution itself is a living example of coded racism.

This Article argues that the federal Constitution has substantively, structurally, and interpretively tolerated a baseline level of racism. Substantively and structurally, the Constitution sanctions anti-Black racism without mentioning race. Interpretively, the Supreme Court's antebellum jurisprudence, particularly the *Dred Scott* decision, somewhat departs from the Constitution's racial spirit; it is explicit in its anti-Blackness. However, its postbellum jurisprudence returns to that spirit of colorblind racism, entrenching racial subjugation through race-neutral language. To be clear, overt racial animus featured prominently in American life and law for most of America's history.[10] However, the Fourteenth Amendment prohibited state governments from treating persons or groups unequally based on race; and even the Supreme Court of the Old Jim Crow Era, bad as it was, mainly stuck to that command.[11] What the Court did instead was provide a racism guidebook for white society to follow. The Court invalidated state-sanctioned racism when it was glaringly obvious, but it also left the white public constitutionally unrestrained, permitted state passivity in face of private anti-Black racism, and sanctioned coded racism at the state level. In sum, the Reconstruction Era birthed the blueprint for *constitutional racism*, erecting architecture that has endured to this day.

---

7 *See* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 13–22 (2014).

8 *Id.*

9 Katie R. Eyer, *The New Jim Crow is the Old Jim Crow*, 128 YALE L.J. 1002, 1032–41 (2019).

10 *See id.*

11 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (statute requiring the exclusion of Blacks from juries violated the Fourteenth Amendment); Neal v. Delaware, 103 U.S. 370 (1880) (Fourteenth Amendment violation present where state concedes to excluding Black people from juries).

Students for Fair Admissions is the Supreme Court's most recent homage to America's legacy of constitutional racism. It purveys racism while pretending not to; it purports to denounce the very thing it promotes. What the Court calls "racial discrimination" translates to any explicit mentions of race.[12] The Court does not mind—and has *never* minded—state-sponsored racial subjugation insofar as the state does not obviously identify race as the motive for the governmental action in question. By transmogrifying express invocations of race into "racial discrimination," the Court mirrors the spirit of the Constitution, issuing lofty pronouncements in favor of freedom for all, while implicitly endorsing the continued government-sanctioned oppression of African Americans. This transmogrification also serves a second purpose: because meaningfully addressing the effects of racial subjugation necessarily requires race-conscious remedies,[13] the Court preserves white supremacy by killing those remedies under the guise of eliminating racial discrimination.

A plethora of Articles denouncing the latest affirmative action decision are sure to come. Past affirmative action and other race-related equal protection decisions have generated much legal scholarship defending race-conscious remedial measures and chastising the Court for its obduracy.[14] They point out fallacies in the Court's logic and dispel the myth of colorblindness.[15] They call out the hypocrisies of originalist

12 *See* HANEY LÓPEZ, *supra* note 8, at 134.

13 *See* Ian F. Haney Lopez, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 810 (2011) ("Civil rights lawyers dropped their demands for colorblindness and began to stress the necessity of race-conscious remedies to achieve integration and substantive equality, winning support from the Court in a series of decisions spanning the late 1960s and early 1970s . . . Thurgood Marshall himself had recognized that while colorblindness posed a radical demand as a right to be immediately free from all Jim Crow oppressions, colorblindness as a remedy promised tepid change, for it required only an end to explicitly segregationist laws, not actual remediation of the harms wrought by racial oppression.").

14 *See, e.g.*, Kimberly J. Freedman, *Parents Involved in Community Schools v. Seattle School District No. 1: A Return to a Separate and Unequal Society?*, 63 U. MIAMI L. REV. 685 (2009); Koteles Alexander, *Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367, 370 (1995) ("In each instance where the Court could have articulated the underlying foundation of its colorblind principle, it failed to: (i) properly scrutinize the political and legal history of racial classifications in this country; (ii) comprehend the sociological depth of racism in this country and its economic implications; and (iii) develop an equal protection methodology that would place affirmative action in its proper remedial context. The Court's failure to address and understand these issues resulted in an equal protection methodology that not only distorts the proper application of strict scrutiny, but, more dangerously, illustrates how race and racial politics in 1995 still override principled reason.").

15 *See, e.g.*, Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211 (2010); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Action*, 51 U. MIAMI L. REV. 191, 194–95 (1997).

judges who abandon any pretenses of originalism when it comes to interpreting the Fourteenth Amendment.[16] They conclude that negative affirmative action decisions were wrongly decided.[17] They argue for and imagine a more robust Equal Protection Clause and jurisprudence that accounts for history and helps the Black struggle for justice.[18] The author fully accepts the racial justice thrust behind these arguments.

Nonetheless, this Article perversely affirms Justice Thomas' declaration in *Students for Fair Admissions* that "[t]oday . . . the Constitution prevails."[19] Far from being a feat worthy of celebration, however, the Constitution prevailed in that it once again sanctioned coded racism while formally blocking efforts to undo oppression. The Constitution prevailed in that it empowered racist politicians across the country to oppose racial justice not only with renewed vigor, but with a vocabulary that allows them to shamelessly cast themselves as proponents of racial equality. The Constitution prevailed, to be blunt, in that it scored yet another victory against a 235-year adversary: racial justice and equity. Race-conscious remedies are unconstitutional because the order of the nation's founding document has been, remains, and will likely forever be, the preservation of white supremacy.

This Article borrows from Derrick Bell's theory of racial realism: the idea that full racial equality for African Americans is unattainable in the United States.[20] This Article modifies that theory to call for a "constitutional realism" with respect to racial justice; it calls for recognizing that the federal constitution has always been and will remain

16 *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 133–34 (2005) ("Astonishingly, the Court's most enthusiastic fundamentalists, Justices Scalia and Thomas, have voted to strike down affirmative action programs without devoting so much as a sentence to the original understanding of the Equal Protection Clause. Both justices usually pay a great deal of attention to history, particularly when they are voting to invalidate the actions of other branches of government. But on affirmative action their judgments do not depend on history at all.").

17 *See, e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 502 (2003) ("My own view is that disparate impact is a proper standard for much of antidiscrimination law. I also disagree with significant parts of the Rehnquist Court's equal protection theory: I believe, for example, that Adarand was wrongly decided."); Powell, *supra* note 15, at 232–33 ("Both Croson and Adarand were wrongly decided because the Court misconstrued Section 1 of the Fourteenth Amendment as a limitation on both state and federal remedial power . . . Section 1 is merely a constitutional edict against state discrimination, it is not a proscription against a state's voluntary adoption of remedial measures designed to eradicate racial caste.").

18 *See, e.g.*, Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 681–98 (2003).

19 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 232 (2023) (Thomas, J., concurring).

20 Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–74 (1992).

the fundamental legal barrier to righting America's past and present racial wrongs. If racial equity will ever be achieved in America, the Constitution will not be the vehicle by which it happens. This Article is also the next progression from Ruth Colker's recent piece *The White Supremacist Constitution*, an Article that accurately casts the nation's founding document as a proponent of white supremacy.[21] However, this Article is narrower in scope, focusing on African Americans. At the same time, it also offers a more comprehensive examination of the juridical relationship between the Constitution and race, discussing important foundational cases omitted from Colker's otherwise brilliant exposition.[22]

This Article proceeds in four parts. Part I defines "coded racism," drawing from the work of Ian Haney López and Eduardo Bonilla-Silva. Part II examines the original federal Constitution, contrasting its fancy vernacular with the intentions behind it. While numerous scholars have recognized the original Constitution's condonement of chattel slavery, no casting of the Constitution as a dog whistle document exists. Yet, the original constitution is a coded racism template flavored with anti-Blackness. As to African Americans, it features no race-specific language and no references to slavery. Nonetheless, Congress and the Supreme Court understood its intended meaning as a white supremacist document.

Part III explains the components of the constitutional racism blueprint the Supreme Court designed during the Reconstruction Era. It examines the cultivation and maintenance of the architecture of constitutional racism from post-Reconstruction to the present. It explores the blueprint's modifications as well as its consistency over time across various Court spans. Considering the Constitution's anti-Black nature, the focus here will be on anti-Black racism; this is particularly appropriate given how the Supreme Court weaponized other racial groups to kill affirmative action.

Part IV situates *Students for Fair Admissions* into the American history of constitutional racism. The majority opinion follows the framework of the Constitution; its rhetoric is grandiloquent, but it deliberately promotes racial inequality. The longstanding opposition to affirmative action has always struck this same tone.[23] Part IV also examines the responses of the decision's proponents both before and after

21 Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651 (2022).

22 For example, Colker does not mention *United States v. Reese*, 92 U.S. 214 (1876), or *United States v. Cruikshank*, 92 U.S. 542 (1876), two major Supreme Court cases that killed whatever was left of Reconstruction and narrowed the Fourteenth and Fifteenth Amendments to what they are today. It is this omission that leads her to inaccurately assert that the Court "initially interpreted the Fourteenth Amendment consistently with an abolitionist agenda." *See supra* note 21, at 672.

23 HANEY LÓPEZ, *supra* note 8, at 134.

the decision; *Students for Fair Admissions* was barely off the presses before right-wing politicians began weaponizing it against existing racial justice efforts. Finally, Part IV sums up what this decision confirms with a bold assessment: the federal Constitution is the enemy of racial justice, and equity advocates should look elsewhere for solutions.

I. DEFINING CODED RACISM

In response to a reporter's question in 1981, the year after Ronald Reagan was first elected president, Republican political strategist Lee Atwater offered the following response:

> You start out in 1954 by saying, "N-----, n-----, n-----". By 1968, you can't say "n-----"—that hurts you. Backfires. So you say stuff like forced busing, states' rights and all that stuff. You're getting so abstract now [that] you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is [that] blacks get hurt worse than whites. And subconsciously maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around saying, "We want to cut this", is much more abstract than even the busing thing, and a hell of a lot more abstract than "N-----, n-----". So, any way you look at it, race is coming on the back burner.[24]

The above answer aptly captures the use of what Ian Haney López calls "dog whistles." In political discourse, utilizing a dog whistle "means speaking in code to a target audience."[25] Dog whistle politics focus on the use of racial appeals through facially race-neutral language.[26] In other words, dog whistle politics center on the use of coded racism and the transmission of racist ideas and platforms without the overtly racist rhetoric.

Atwater mentioned two dog whistle examples: forced busing and states' rights. Haney López described the phrase "forced busing" as "an increasingly potent euphemism for the system of transporting students across the boundaries of segregated neighborhoods in order to integrate

---

24 *See* Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, NATION (Nov. 13, 2012), https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy [http://perma.cc/XV3V-VBTH] (audio available at http://s3.amazonaws.com/thenation/audio/mp3/Full_Audio/LeeAtwaterEdited Full.mp3 [http://perma.cc/2BQC-KWWG]).

25 HANEY LÓPEZ, *supra* note 8, at 4.

26 *Id.*

schools."[27] On its face, the phrase "forced busing" seems racially innocuous. However, busing was a judicially-approved tool for effecting the integration of previously segregated public schools.[28] Further, "forced busing" was the characterization invoked by opponents of integration.[29] Thus, "forced busing" is a dog whistle; it is coded racism used to oppose school desegregation without resort to overtly racist rhetoric.[30] The context behind its use becomes important in unmasking the intentions of those who invoke the phrase.

Atwater's second dog whistle example, "states' rights," is far older than the first; Haney López described it as "a paper-thin abstraction from the days before the Civil War when it had meant to right of Southern states to continue slavery."[31] Like "forced busing," the phrase "states' rights," on its face and without context, is not racially offensive. However, the push for racial equality during the Civil Rights Movement, especially in the South, came at the hands of an active federal government (after sustained activism by African Americans, of course). Thus, the invocation of "states' rights" by ardent segregationists George Wallace and Barry Goldwater consequently served "as a rejoinder to the demand for integration."[32] Haney López observed that the "states' rights" euphemism "was enough of a fig leaf to allow persons queasy about black equality to oppose integration without having to admit, to others and perhaps even to themselves, their racial attitudes."[33]

Atwater's quote illustrates the value of making racism coded. On the one hand, the societal interest in advantaging whites at the expense of Black people is a staple of Americanism: it predates the republic. On the other hand, openly promoting white supremacy in an environment that professes to eschew it delegitimizes racial hierarchy proponents and harms their goals. Speaking in code permits declarants to promote racism while maintaining legitimacy; they can claim to favor racial equality while advocating for policies that encourage the exact opposite. Haney López expounded: "The new racial politics presents itself as steadfastly opposed to racism and ever ready to condemn those who publicly utter racial profanity. *We fiercely oppose racism and stand prepared to repudiate*

27 *Id.* at 23.

28 *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

29 As vice president, Richard Nixon opposed the Civil Rights Movement. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 41 (rev. ed. 2012). When he was on the campaign trail one month before being elected president in 1968, he decried "forced busing." HANEY LÓPEZ, *supra* note 8, at 23.

30 HANEY LÓPEZ, *supra* note 8, at 23.

31 *Id.* at 16.

32 *Id.* at 16–17, 19–20.

33 *Id.* at 16.

anyone who dares utter the n-word."[34] Coded racism also creates a newfound indignance, empowering modern racists not only to deny charges of bigotry but to assail their accusers as opportunistic race-baiters.

The key takeaway regarding coded racism is that context matters. Without context, Richard Nixon's calls for law and order might seem genuine and non-racist. However, when one considers that southern segregationists consistently vilified civil rights activists as lawbreakers,[35] then Nixon's "law and order" battle cry becomes a little suspect. When one adds in the fact that the same critics *never* called out white citizens that killed, assaulted, or committed crimes against civil rights activists, then the racism of Nixon's "law and order" battle cry becomes apparent. When one further examines Nixon's record, including how his "War on Drugs" declaration was a façade for persecuting Black people,[36] the racism becomes obvious. Thus, examining context is required to decode and unmask coded racism.

For purposes of this Article, "coded racism" and "colorblind racism" will be used interchangeably. Eduardo Bonilla-Silva popularized the term "colorblind racism" to describe the same concept: the perpetuation of white supremacy in a manner that "defies facile racial readings."[37] Like Haney López with his theory of dog whistle politics, Bonilla-Silva points to the late 1960s as the timeframe when colorblind racism became widespread.[38] However, as the next part demonstrates, colorblind racism first began with the drafting and ratification of the federal Constitution.

II. CODED RACISM AND THE CONSTITUTION

The original Constitution and the Bill of Rights make no mention of Black people or chattel slavery. However, context matters: at the time of the founding, chattel slavery was a central institution amongst the

34 *Id.* at 3.

35 ALEXANDER, *supra* note 29, at 40–41.

36 John Ehrlichman, Assistant to the President of Domestic Affairs under Richard Nixon, admitted the clandestine reason for the War on Drugs: "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities." Dan Baum, *Legalize It All*, HARPER'S MAG., Apr. 2016, https://harpers.org/archive/2016/04/legalize-it-all [http://perma.cc/V6VF-K3YH].

37 EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2–3 (4th ed. 2013).

38 *See id.* at 25–72.

colonies for over one hundred years. Thus, Paul Finkelman correctly concluded that the original Constitution "was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans and their antislavery white allies."[39] This Part will first demonstrate the presence of coded racism in the text and structure of the nation's founding document. It will then demonstrate how, despite the Constitution's race-neutral language, the federal government understood it to sanction anti-Black racial hierarchy.

A. *Coded Racism and the Text of the Constitution*

The Constitutional Convention in Philadelphia featured repeated clashes between northern and southern delegates on the issue of chattel slavery.[40] Ultimately, the South was successful in ensuring that their peculiar institution would be in constitutional safeguard.[41] However, in an effort to appease northern delegates, the South declined to insist on the words "slave" and "negro" being included in the Constitution.[42] Nor did the Constitution include the word "white"; but as Nancy Leong aptly noted, "[a] document created at a time of uninterrupted white supremacy did not need to explicitly mention white people."[43] Put another way, the racial context made clear that "the people" consisted of white folk.

Article I, Section 2, Clause 3 of the Constitution reads, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons."[44] This clause makes no mention of race or slavery. However, it does mention that "free persons" be included in the determination. By logical implication, "all other persons" refers to those who are not free. Moreover, "free persons" included individuals "bound to Service for a Term of Years," like any white indentured servants still existing at that

39 Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 424 (1999).

40 *Id.* at 433–70.

41 *Id.* at 432–33.

42 *Id.* at 427–28.

43 Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1423 (2021).

44 U.S. CONST. art. I, § 2, cl. 3.

time.[45] Chattel slaves in 1789 were not bound to service for a term of years; slave codes bound them to lifetime bondage.

The Three-Fifths Clause, therefore, represents coded racism in the nation's founding document: without expressly saying so, its command is that enslaved Black people were partial humans for purposes of legislative representation. This clause, however, went beyond just Congress. Determinations regarding congressional representation affected the composition of the electoral college.[46] Finkelman also noted that the constitutional prohibition against capitation or other direct taxes on the states included exceptions that required adherence to the Three-Fifths Clause.[47] This constitutional embodiment of coded racism influenced congressional representation and presidential election; and because presidents pick judges for the Supreme Court,[48] the Three-Fifths Clause impacted the high court's makeup as well.

Chattel slavery provided a major motivation for related provisions regarding arming white people and suppressing rebellions. Article I, Section 8, Clause 15 empowers Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions."[49] Article IV, Section 4 commands that the federal government "shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence."[50] Finally, the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[51] References to slavery and race are absent; but, as Carol Anderson noted, the only useful function colonial militias served was to put down slave rebellions.[52] Further, the occurrences and ever-present fears of slave rebellions worried Southern states.[53] Hence, while chattel slavery may not have been the only consideration for these provisions, the Constitution ensured federal government commitment to have slave states squash the rebellions of enslaved Black persons; and it did so using code.

45 *See* Bartholomew Sparrow & Shannon Bow O'Brien, *Pulling Punches: Charles Beard, The Propertyless, and the Founding of the United States*, 29 CONST. COMMENT. 409, 420 (2014); Sanford Levinson, *"Who Counts?" "Sez Who?,"* 58 ST. LOUIS U. L.J. 937, 940 (2014).

46 *See* U.S. CONST. art. II, § 2, cl. 2.

47 *See* Finkelman, *supra* note 39, at 428–29; *see also* U.S. CONST. art. I, § 9, cl. 4.

48 U.S. CONST. art. II, § 2, cl. 2.

49 *Id.* art. I, § 8, cl. 15.

50 *Id.* art. IV, § 4.

51 *Id.* amend. II.

52 CAROL ANDERSON, THE SECOND 33–34 (2021).

53 *Id.* at 27–33.

Article I, Section 9, Clause 1 of the Constitution provides that, "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."[54] Again, this provision makes no mention of race or slavery. However, it speaks of the "importation of such persons as any of the States now existing shall think proper to admit." While some states brought in European immigrants to labor as indentured servants, there was a general understanding amongst convention delegates that this phrasing referred to people of African ancestry for purposes of perpetual servitude.[55] Using race-neutral language, this provision permitted the states' unimpeded involvement in the slave trade for an additional two decades after the ratification of the Constitution.

The Constitution was used to protect the proceeds from chattel slavery as well. Article I, Section 9, Clause 5 of the Constitution prohibited federal taxation of "Articles exported from any state."[56] Thanks to slave labor, the Southern states exported a lot of crops; and this provision ensured that the federal government could not interfere with chattel slavery via burdensome taxation. Article I, Section 10, Clause 2 prohibited states from taxing the imports and exports of other states, subject to certain exceptions.[57] This clause ensured that free states could not interfere with chattel slavery via burdensome taxation. Neither provision invokes race or slavery, but both provisions protected against any attempts at economic interference with slavery.

Perhaps no provision exemplifies the original Constitution's pro-slavery lean more than the Fugitive Slave Clause. Article IV, Section 2, Clause 3 reads as follows: "No person held to Service or Labour in one States, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[58] Once again, this provision features no explicit references to race or slavery. Instead, it speaks of enslaved Black people as persons "held to service or labor in one state"; aside from those duly convicted of a crime, it was Black people held in service or labor in a state. The language "in consequence of any law or regulation therein" refers to the laws of free states in the North, where

54 U.S. CONST. art. I, § 9, cl. 1.

55 *See* Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 785–87 (1996).

56 U.S. CONST. art. I, § 9, cl. 5.

57 *Id.* art. I, § 10, cl. 2.

58 *Id.* art. IV, § 2, cl. 3.

chattel slavery was being phased out and would eventually cease to exist. The language "the party to whom such service or labor may be due" is none other than the slaveholder or his agent.

Thus, the Fugitive Slave Clause represents yet another example of coded racism in the original Constitution.[59] Without any direct references to race or slavery, it commands that enslaved Black persons who escape bondage be returned to bondage when the slave master or his agent arrive to the escapee's state of refuge and claims his "property."[60] An enslaved Black person who entered a free state was not consequently set free; and the federal Constitution imposed a duty upon states, free or otherwise, to surrender that person to his or her "rightful owner." This clause, in effect, gave white slaveholders the constitutional right to own slaves—using race-neutral language. Moreover, Susan V. Koski and Kathleen Bantley pointed out the eagerness to which this clause of the Constitution was enforced as compared to the Extradition Clause, which demanded the return of fugitives that fled from justice; while the former was immediately put into effect, the latter went unenforced until the 1980s.[61]

B. *Coded Racism and the Structure of the Constitution*

The original Constitution substantively utilized race-neutral language to protect chattel slavery and ultimately exalt white supremacy. The protections were also structural. Finkelman observed that "[b]ecause the Constitution created a government of limited powers, Congress lacked the power to interfere in the domestic institutions of the states."[62] Article V of the Constitution worked in an additional structural safeguard. It deemed changes to the founding document valid "when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof."[63] Like every other provision, this part of the Constitution was silent as to race and made no explicit mention of slavery. However, because Southern states easily made up far more than twenty-five percent of all states, this part guaranteed—at least for the moment—that any attempts to constitutionally abolish slavery would never succeed. This part also forbade amendments to the 1808

59 U.S. Const. art. IV, § 2, cl. 3.

60 *Id.*

61 *See* Susan V. Koski & Kathleen Bantley, *Dog Whistle Politics: The Trump Administration's Influence on Hate Crimes*, 44 SETON HALL LEGIS. J. 39, 41–42 (2020).

62 Finkelman, *supra* note 39, at 432.

63 U.S. CONST. art. V.

Clause, ensuring that the timeframe for America's participation in the slave trade would remain untouched.[64]

That the original Constitution was a pro-slavery document that employed race neutralism is further evidenced by comparison to the Confederacy's constitution,[65] ratified in March 1861. The main difference between the two documents is that the Confederate constitution is not facially race-neutral; it uses the word "negro" thrice and derivatives of the word "slavery" ten times.[66] There are also a few provisions that emphasize the guarding of the South's peculiar institution.[67] However, the Confederate constitution also contained a three-fifths clause and a fugitive slave clause;[68] and because the importation of chattel slaves was outlawed in 1808, the Confederate constitution simply banned further importation.[69] Thus, the changes made are more cosmetic than substantive; minus the few overtly racist references contained in the Confederate constitution, both documents essentially read the same.

C. *Despite the Code, the Federal Branches Understood the Constitution to Sanction Chattel Slavery and Anti-Black Racial Hierarchy*

Congressional action before the Civil War reflected a legislative understanding that the Constitution was, despite the race neutralism in its language, designed to promote white supremacy. Statutes regarding citizenship and militia service limited eligibility to white people.[70] Pursuant to the "Fugitive Slave Clause," Congress enacted two fugitive slave statutes.[71] Pursuant to the 1808 Clause, Congress forbore from ending the slave trade until 1808, although they took steps along the way to bring it about.[72] Interestingly, Congress' most pro-slavery acts, like the fugitive slave laws, were race-neutral, containing no reference to race or

64 *Id.*

65 CONFED. CONST. of 1861.

66 *Id.* art. I., § 2, cl. 3; § 9, cl. 1, 2 & 4; art. IV, §§ 2–3.

67 *See, e.g.*, *id.* art. I, § 9, cl. 4. "No bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed." The provision of the original Constitution on which this clause is based is Article I, Section 9, Clause 3, which reads: "No Bill of attainder or ex post facto law shall be passed."

68 *Id.* art. I, § 2, cl. 3; art. IV, § 2, cl. 3.

69 *Id.* art. I, § 9, cl. 1.

70 Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795); Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1795).

71 Act of Feb. 12, 1793, ch. 7, 1 Stat. 302. (1793); Act of Sept. 18, 1850, ch. X, 9 Stat. 462 (1850).

72 *See* Slave Trade Act of 1794, 1 Stat. 347 (1794); Act of May 10, 1800, 2 Stat. 70 (1800); Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803); Act of Mar. 2, 1807, 2 Stat. 429 (1807).

slavery; meanwhile, anti-slavery laws, like the 1807 statute ending American participation in the slave trade,[73] were quite race-explicit, using the words "negro" and "slavery" to make clear how the law should be applied. What this illustrates is how coded racism operates: the statutes that promoted racial subjugation needed not be verbally explicit as to race or condition, because those enforcing the law understood how they were meant to apply.

The United States Supreme Court's antebellum opinions reflected a judicial understanding that the federal Constitution, despite its facially race-neutral language, was a vehicle for racial subjugation. Since *Marbury v. Madison*,[74] the Court has assumed primary responsibility in interpreting the nation's founding document.[75] In rendering its interpretations, the Court declared time and again with no touch of discreetness that America was intended to be a white supremacist, slaveholding nation.[76] The Court's *Dred Scott* decision, which reflected the views that white America collectively had of African Americans,[77] could not make the Constitution's relationship with Black America any clearer: African Americans "had no rights which the white man was bound to respect . . . ."[78] Before the Civil War, the Court was relatively uncensored in its racism and endorsement of chattel slavery.[79] After the Civil War, the Court's race-related jurisprudence began to reflect the Constitution's racial spirit, utilizing race neutralism while implicitly championing continued racial subjugation.

Thus, long before Richard Nixon's Southern strategy, and long before race neutralism became a feature of the Supreme Court's Old Jim Crow jurisprudence, the original Constitution exemplified dog whistle racism. It uses language that is only harmless when divorced from context; the real (and intended) meaning behind those words is the deliberate production of racial harm. This is constitutional racism; this is

73 Act Prohibiting Importation of Slaves, ch. 22 § 38 Stat. 426 (1807). Section 1 prohibits Americans from bringing to the country or its territories "any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour."

74 Marbury v. Madison, 5 U.S. 137 (1803).

75 *See id.* at 177; *see also* Brian Kulp, *Counteracting Marbury: Using the Exceptions Clause to Overrule Supreme Court Precedent*, 43 HARV. J.L. & PUB. POL'Y 279, 279–80 (2020).

76 *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. 539 (1842) (holding that state statute forbidding the return of runaway slaves violated the Constitution); Jones v. Van Zandt, 46 U.S. 215 (1847) (upholding the 1793 Fugitive Slave Law); Dred Scott v. Sanford, 60 U.S. 393, 407 (1857) (enslaved party) (holding African Americans were not U.S. citizens and therefore had no right to sue in federal court), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

77 *See* Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 280–85 (1997).

78 *See Dred Scott*, 60 U.S. at 407.

79 *See id.*

the minimal level of racism the Constitution has always allowed for. The Supreme Court crystallized constitutional racism during Reconstruction.

III. CONSTITUTIONAL RACISM: FROM RECONSTRUCTION TO THE PRESENT

In the first five years after the Civil War, bounds on overtly racist government conduct were added to the Constitution. Slavery was mostly banned;[80] African Americans became citizens who could not be civilly discriminated against by states;[81] and race-based suffrage discrimination was banned.[82] Other than that, the nation's founding document remained the same as it was before the war. Thus, the key to sustaining racial hierarchy and oppression after the end of chattel slavery lay in the federal and state governments channeling the racial spirit of the federal Constitution and embracing coded racism. The Supreme Court created the constitutional blueprint for government actors at all levels during the Reconstruction Era. The enduring blueprint components are: (1) the federal Constitution has no bearing on racial subjugation by private parties insofar as the subjugation is not literal enslavement; (2) the federal Constitution permits governmental racial discrimination as long as no proof of a racially discriminatory purpose is glaringly obvious; and (3) the federal Constitution despises overt references to race in government actions that treat racial groups differently. The second and third tenets are related, but merit separate development and discussion in this Article.

This Part examines the creation and development of these blueprint components in Reconstruction, Old Jim Crow, the Civil Rights Era, and the Post-Civil Rights Era. Adherence to these components has ensured and continues to ensure the endurance of constitutional racism. By logical implication, adherence to these three tenets of constitutional racism demanded—and continues to demand—a deflating of the Reconstruction Amendments, the most race-conscious portions of the postbellum Constitution.[83]

This Part focuses primarily on the Supreme Court's jurisprudence, since it is the federal branch self-tasked with deciphering constitutional meaning. History has aptly demonstrated, however, that constitutional construction was never solely the province of the Court. The white populace, indoctrinated in the same atmosphere of racial superiority that

80 U.S. CONST. amend. XIII.

81 *Id.* amend. XIV, § 1.

82 *Id.* amend. XV.

83 The Thirteenth Amendment was the first constitutional provision to use the word "slavery," while the Fifteenth Amendment was the first constitutional provision to make any mention of "race, color, or previous condition of servitude" in the anti-Black context.

the nation's founding document was birthed in, has always given practical meaning to the Constitution through adherence to racist government policies or via backlash against antiracist government initiatives. State governments, especially in the former Confederacy, acted the same way, enforcing racist federal government endeavors and ignoring antiracist ones. It should therefore be understood that the Court's jurisprudence both produces and is a product of the white supremacy the Constitution was created to maintain.

A. *Constitutional Racism—Reconstruction*

The biggest cause of Reconstruction's failure was a white populace unwilling to accept any notion of racial equality. Between white civilian violence and a white electorate vigorously opposed to Black citizenship rights, Reconstruction was on life support by 1876.[84] That year, the Supreme Court put two massive nails in the coffin of the era's racial equality experiment. The first nail was *United States v. Reese*,[85] and the second was *United States v. Cruikshank*.[86] These two cases birthed the doctrines that gave rise to the constitutional racism blueprint components. This Section discusses each case in turn.

1. *United States v. Reese*

In *Reese*, the Court struck down a key provision of the Enforcement Act of 1870, finding that it exceeded Congress' power under the Fifteenth Amendment.[87] The case stemmed out of a criminal prosecution of two white election officials that refused to allow a Black man to vote.[88] Given the massive efforts by white Southerners to keep Black people away from the polls,[89] it seems rather intuitive why the African American man was refused the vote by two white men. Yet, the Court held that the statute in question lacked sufficient language that limited its reach to situations where the right to vote was being abridged based on race. More specifically, despite saying "race, color, or previous condition of

84 *See* Zamir Ben-Dan & Rigodis Appling, *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, 73 RUTGERS U. L. REV. 1373, 1402–03 (2021).

85 United States v. Reese, 92 U.S. 214 (1875).

86 United States v. Cruikshank, 92 U.S. 542 (1875).

87 *Reese*, 92 U.S. at 218–20.

88 *Id.* at 215.

89 *See* Caren E. Short, *"Phantom Constituents": A Voting Rights Act Challenge to Prison-Based Gerrymandering*, 53 HOW. L.J. 899, 905 (2010).

servitude" in the first two provisions at issue, the Court found that the statute's use of "aforesaid" did not appropriately modify the statute.[90]

This decision promotes constitutional racism. By declaring that the Fifteenth Amendment did "not confer the right of suffrage upon any one,"[91] the Court gave state governments, many of which were sitting on their hands in face of heavy white supremacist carnage against Black people who were trying to vote, the authority to determine which citizens within their jurisdictions can vote. And by interpreting the amendment to only prohibit states "from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude,"[92] the Court subtly directed states as to how to constitutionally deprive African Americans of the right to vote: find a race-neutral solution that accomplishes the same result as overt racial subjugation.[93] Here, the second and third tenets of constitutional racism were born; the Court signals that overt racial discrimination would violate the law, but discrimination that is not overtly racial would not.

2. *United States v. Cruikshank*

Cruikshank, the second nail in the coffin, arose out of the 1873 Colfax Massacre in Colfax, Louisiana.[94] Three out of the over one hundred white people involved in the slaughter of Black militiamen were prosecuted and convicted for violating Section 6 of the Enforcement Act

90 *Reese*, 92 U.S. at 216–18. The first two sections of the statute in question require administration of voting laws "without distinction of race, color, or previous condition of servitude." *See* Enforcement Act of 1870, §§ 1–2, ch. 114, 16 Stat. 140-146 (1870). Had the Court read "aforesaid" in § 3 to mean the prohibition of distinctions based on race, the Court likely would have had no basis to invalidate the third section of the act. *See id.* § 3 ("That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform *the* act required to be done as aforesaid shall, if it failed to be carried into execution by reason of *the wrongful act or omission aforesaid* of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act . . . ." (emphasis added)).

91 *Id.* at 217–18.

92 *Id.*

93 *See* Jacquelyn L. Bridgeman, *Seeing the Old Lady: A New Perspective on the Age Old Problems of Discrimination, Inequality, and Subordination*, 27 B.C. THIRD WORLD L.J. 263, 299 (2007).

94 *April 13, 1873: Colfax Massacre*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/colfax-massacre [https://perma.cc/WJ7J-5BGJ] (last visited Aug. 2, 2024); *see also* Bernice Bouie Donald, *When the Rule of Law Breaks Down: Implications of the 1866 Memphis Massacre for the Passage of the Fourteenth Amendment*, 98 B.U. L. REV. 1607, 1659–60 (2018).

of 1870.[95] The Court affirmed the full dismissal of their indictments and ultimately invalidated Section 6. The Court first held, contrary to the intentions of the Fourteenth Amendment's framers, that the rights listed in the First and Second Amendments only constrict federal powers and have no effect on state power.[96] In race-neutral fashion, this holding ensured that the constitutional rights of African Americans—theoretically having been acquired when they were made citizens by the Fourteenth Amendment—remained as illusive to them after chattel slavery's demise as it was to them before.

The Court recognized the state action doctrine for the first time in *Cruikshank*, holding that the Fourteenth Amendment did not permit the federal government to punish private parties for depriving other citizens of their constitutional rights.[97] With this holding, the Court birthed the first tenet of constitutional racism; the Court impliedly announced to the white citizenry that it would readily tolerate racialized violence to the extreme as long as the purveyors were not government officials. The Court's reference to the state's "very highest duty" to "protect all persons within their boundaries"[98] was pure smoke and mirrors; it was no secret that state governments in 1876 were completely derelict in their "very highest duty" to protect Black people from the violence of white Southerners.[99] The Court knew the vicious reality it was confining African Americans to in erecting the state action principle. Its veneration of state power was a reaffirmation of the Constitution's federalism principles, birthed out of a principal desire to prevent federal government action against racialized chattel slavery; and its invocation once again became a bulwark against federal attempts to interfere with the continued racial subjugation of Black people.

As another first, the Court introduced an iteration of what would become its "intent rule" for establishing racial discrimination.[100] There could be no doubt that the white massacre of Black militiamen, including many who had surrendered and posed no threat, was racially motivated. Yet, the Court found two counts on the indictment to be legally insufficient because there was "no allegation that this was done *because*

95 United States v. Cruikshank, 92 U.S. 542, 560–61 (1875) (Clifford, J., dissenting).

96 *Id.* at 550–53.

97 *Id.* at 553–54.

98 *Id.* at 553.

99 During congressional debates on the Ku Klux Klan Act of 1871, proponents of the legislation echoed each other in describing the carnage of white supremacist gangs committed with the silent complicity and/or active participation of state governments. For a discussion of these debates, see Ben-Dan & Appling, *supra* note 84, at 1394–1402.

100 *Cruikshank*, 92 U.S. at 554–55; *see* James Gray Pope, *Snubbed Landmark: Why U.S. v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388–89 (2014).

of the race or color of the persons conspired against."[101] Put another way, that African Americans are being disparately (or entirely) impacted by conduct, and because racist whites are the purveyors of that conduct, does not establish actionable racial discrimination. The intent rule lies at the heart of the second tenet of constitutional racism: state-sanctioned racial discrimination is permissible if the state does not make the racial motivation glaringly obvious. It also exemplifies the third tenet of constitutional racism: where state action is so abominable that it meets the Court's high standard for establishing discriminatory intent, the Constitution renders that action impermissible.

With its decisions in *Reese* and *Cruikshank*, the Supreme Court set forth the constitutional racism blueprint for government officials across the nation to follow. Like the federal Constitution, the language of these two cases is devoid of explicit racism. The messaging behind these cases, however, was racially coded like the original Constitution; and white Americans both inside and outside of government would understand the code quite well. White Americans unleashed unprecedented terror on African Americans in the decades after Reconstruction; and state government officials adopted facially race-neutral laws and policies that disadvantaged Black Americans in practice. Only those laws and policies that were both race-explicit and facially discriminatory were struck down. The Court, meanwhile, would refine and modify the blueprint during the Old Jim Crow Era through narrow constructions of the three amendments.

B. *Constitutional Racism—Old Jim Crow*

Reconstruction may have been the birthplace of Supreme Court-sanctioned constitutional racism, but the Old Jim Crow Era was where it fully developed. The federal Constitution and the postbellum jurisprudence interpreting it were facially race-neutral; they featured neither open pronouncements of white superiority nor explicit endorsements of racial subjugation. However, just as the Constitution impliedly purveyed racism, so too would the Court's precedents after slavery. The three components of the constitutional racism blueprint would be fully cultivated during the late nineteenth and early-to-mid twentieth centuries.

1. Tenet One: The Federal Constitution's Inapplicability to Private

101 *Cruikshank*, 92 U.S. at 554 (emphasis added).

Purveyors of Racial Subjugation and Violence Outside of Chattel Slavery

During Old Jim Crow, the collective action of white civilians became the primary means of enforcing racial hierarchy. The federal government was estopped in *Cruikshank* from holding white citizens accountable for crimes against African Americans, and state governments all over the country (but primarily in the South) were either powerless or uninterested in enforcing its own laws and protecting the African Americans within their own borders. White civilians were free to act with impunity; and, unlike state officials, they were under no constitutional mandate to hide the racist motivations behind their actions. The facially race-neutral Constitution, and the facially race-neutral postbellum decisions interpreting the Constitution, brought about some of the worst atrocities in American history.

Lynchings, for example, were the frequent results of white civilians mobbing together in response to Black transgressions of the white supremacist social order, irrespective of whether or not said transgressions were crimes.[102] Reasons for lynching Black people ranged from allegedly assaulting a white woman to talking too much about lynchings.[103] Between the late nineteenth and early twentieth centuries, lynchings featured shocking levels of sadism; Black victims were tortured for the pleasure of crowds that numbered from the hundreds to the tens of thousands.[104] Many lynchings were treated like sporting events: they were announced in advance; there were school and work accommodations made so employees and students could attend; special transportation services were arranged to bring people from other parts of the state to the locus of lynching; and lynch mob members memorialized their participation with photographs and "souvenirs," i.e., remnants of the lynching victim's body.[105] Mary Louise Wood observed that lynchings had "tremendous symbolic power"; they symbolized white purity and superiority as well as Black criminality and helplessness.[106]

102 *See* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 811 (2005).

103 *See, e.g.*, *Newspaper Articles on the Sam Hose Lynching*, GA. HIST. SOC'Y (June 22, 2018), https://tps.ghslearn.com/newspaper-article-on-the-sam-hose-lynching; *On This Day—April 27, 1899: White Georgia Mob Lynches Man for "Talking Too Much" About Another Lynching*, EQUAL JUST. INST., https://calendar.eji.org/racial-injustice/apr/27 [http://perma.cc/W97H-FW5E].

104 *See* Leon F. Litwack, *Hellhounds*, *in* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 8–15 (James Allen, Hilton Als, John Lewis & Leon F. Litwack eds., 2000).

105 *See id.*

106 *See* AMY LOUISE WOOD, LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940 1–3, 48–49 (2009).

Not only was accountability for lynchings nonexistent, but official and scholarly apologias were offered for them. White scholars assumed without factual support that lynchings were the result of Black men raping white women.[107] One such scholar wrote in the *Yale Law Journal* that lynchings could be avoided with evidentiary rules that allowed white women to testify in secret, as opposed to having to face her accuser.[108] Future Supreme Court Chief Justice William Howard Taft argued in another *Yale Law Journal* Article that lynchings were the consequence of inefficiencies in the administration of justice.[109] Lynchings often took the place of court trials as far as African Americans were concerned, and any due process rights Black captives of the lynch mob may have had on paper went unrecognized by the mob.[110]

Similarly, race massacres consisted of violence by white civilians against Black people. In such massacres, African Americans were often killed or brutally assaulted, and whatever property they owned was taken or destroyed. During and after such grisly events, Black people were chased out of neighborhoods that remain almost or entirely white to this day.[111] Some massacres, like the one in Tulsa, featured local law enforcement assisting the violent white mob.[112] Other massacres, like the one in Elaine, Arkansas, led to Black people being vigorously prosecuted even though white people started them and caused far more casualties than they sustained.[113] The early 1900s produced dozens of such massacres, with the year 1919 getting the worst of it.[114] Extreme racial violence was the inevitable product of a white citizenry almost completely unrestrained by the federal Constitution.

The role of private white citizen violence in shaping practical constitutional meaning during Old Jim Crow should neither be overlooked nor minimized. Jared Goldstein notes the scholarly dismissal

107 *See, e.g.*, LESTER FRANK WARD, PURE SOCIOLOGY, 359–60 (1903).

108 William Reynolds, *The Remedy for Lynch Law*, 7 YALE L.J. 20, 21–22 (1897).

109 William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 16–17 (1905).

110 *See* Garland, *supra* note 102, at 809–12.

111 *See* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 166 (2d ed. 2007).

112 *See* USA Today, *Tulsa race massacre of 1921: The Painful Past of 'Black Wall Street,'* YOUTUBE (June 15, 2020), https://www.youtube.com/watch?v=3sorCAFQOqc. The survivor featured in the video noted that the police locked up all the Black men before telling the whites that they could go wreck Greenwood. Specifically, she said: "What they did was to disarm and lock up all Black men and then they said to the mob, 'There's nothing out there now but women and children, so you can do whatever you want to do.'" *Id.* at 2:01–2:25.

113 Grif Stockley, *Elaine Massacre of 1919*, ENCYC. ARKANSAS (Mar. 14, 2024), https://encyclopediaofarkansas.net/entries/elaine-massacre-of-1919-1102 [http://perma.cc/6RA4-MDSL]; *Sept. 30, 1919: Elaine Massacre*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/elaine-massacre [https://perma.cc/A9JX-CSZN] (last visited Aug. 2, 2024).

114 LOEWEN, *supra* note 111, at 165–66, 236, 367 n.25.

of the Klan's constitutional avowals,[115] but then he impliedly does the same by circumscribing his detailed analysis of their avowals to the entities themselves.[116] The Klan might have been dead between 1877 and 1915,[117] but Klan ideology, including the faithful adherence to violence in defense of whiteness, was very much alive. Thousands of lynchings and dozens of racial massacres occurred between the death of the first Klan and the rebirth of the second;[118] and it was this violence that enforced racial control.[119] This is why, as Goldstein notes, the Klan's membership swelled in the first ten years since its reactivation in 1915; the Klan's understanding of the nation's founding document in the early twentieth century was shared by white Americans across the country.[120] Goldstein observes that the second Klan "saw no contradiction between the embrace of white supremacy as a sacred constitutional right and the Constitution's guaranty of equal protection."[121] *Cruikshank* and its state action progeny demonstrates that the Court saw none either.

The extreme anti-Black animosity and violence from the white citizenry found nourishment in the abundance of "hate scholarship" produced during the nadir. It was the gospel of white intellectuals in the late nineteenth and early twentieth centuries that chattel slavery served a moral good, while Reconstruction's racial equality experiment, especially the efforts to promote Black suffrage, was a catastrophe on par with Southern secession.[122] White intellectual thinkers across the planet emphasized white superiority and Black inferiority, and they railed

115 Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 288 (2018).

116 *Id.* at 317. Goldstein wrote: "Vigilante activity to protect white rule had become unnecessary with federal occupation ended and Democrats in office committed to the denial of political rights to African Americans." This suggests that vigilante justice ended with Reconstruction, which is patently untrue. It reads logically, however, if the focus is specifically on entities calling themselves the Klan.

117 *See id.* at 317–20.

118 *See* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 284 (1998).

119 *See* Garland, *supra* note 102, at 811.

120 Goldstein, *supra* note 115, at 325–26.

121 *Id.* at 328.

122 *See, e.g.*, WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC, 1865–1877 117 (1907); William Archibald Dunning, *The Undoing of Reconstruction*, ATLANTIC (Oct. 1901), https://www.theatlantic.com/magazine/archive/1901/10/the-undoing-of-reconstruction/429219 [https://perma.cc/2426-4UE7]. Dunning, a Columbia University professor, was the most popular architect of hate scholarship during the nadir, and he would go on to influence generations of scholarship well into the 1980s. *See* James Humphreys, *William Archibald Dunning: Flawed Colossus of American Letters*, *in* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 77, 81–83 (John David Smith, J. Vincent Lowery & James S. Humphrey eds., 2013); John Harelson Hosmer, *A Persistent Specter: The Dunning School and Reconstruction Historiography*, *in* THE DUNNING SCHOOL AND RECONSTRUCTION ACCORDING TO JIM CROW 3–46 (1983).

nonstop against the idea of multiracial democracy.[123] White academics were the thought leaders of the eugenics movement, the widely popular (among whites) campaign to promote the birth of "good human stock" to the exclusion of "bad stock."[124] Unsurprisingly, race largely defined understandings of who was "good stock" and who was not.[125] The solution to the "negro problem," according to the "scholars" of the day, was to separate the two races and keep African Americans under sustained oppression.[126]

Collective white civilian action made true racial segregation possible throughout the country. African Americans faced discrimination in all facets of American private life, including in employment.[127] White homeowners established residential associations and covenanted amongst each other to not sell their homes to African Americans.[128] White real estate agents relegated Black prospective homebuyers to all-Black neighborhoods that were usually overcrowded and in disrepair.[129] White developers "blockbusted" white neighborhoods, using nefarious tactics to acquire white civilians' homes for cheap and then selling said homes to African Americans at premiums.[130] Given the scarcity of housing options for Black people, homes otherwise sold or rented to African Americans were rip-offs. In the instances where Black homebuyers were able to secure housing in "white neighborhoods," white neighbors organized to expel the newcomers. Approaches ranged from legal action, i.e., suing for enforcement of any existing racially restrictive covenant, to violence and intimidation.[131]

The only constitutional bound on the conduct of private white citizens was the Thirteenth Amendment; white civilians could not enslave Black people.[132] Yet, southern whites sufficiently resurrected enslavement in the form of sharecropping. Southern tenant farming consisted of

123 *See, e.g.*, JAMES BRYCE, AMERICAN COMMONWEALTH 1148 (2d ed. 1888). Bryce, a British intellectual, wrote that African Americans possessed "the childishness as well as lack of self-control which belongs to primitive peoples."

124 *See, e.g.*, Edward A. Ross, *The Causes of Race Superiority*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1901).

125 *See, e.g.*, *Eugenics and Scientific Racism*, NAT'L HUMAN GENOME RSCH. INST. (May 18, 2022), https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism [http://perma.cc/78WB-W3US].

126 *See* IDUS A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA, 1900–1930 48–51 (1965).

127 *See* Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 652–53 (2017).

128 *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 78–81 (2017).

129 *Id.* at vii.

130 *Id.* at 95–96.

131 *Id.* at 80–82, 139–51.

132 *See* Clyatt v. United States, 197 U.S. 207 (1905).

contracts between landowners and small farmers where the farmers would cultivate land in exchange for a share of the crop.[133] Both Black and white farmers sharecropped; but African American farmers were religiously taken advantage of and cheated by white landowners.[134] Consistently, Black farmers at the end of the harvest were either right back where they started or were somehow indebted to the landowners, which means that they had to work to pay the debt off.[135] Challenging white landowners was as dangerous as it was for enslaved Black people to challenge their enslavers.[136] Racialized debt slavery, therefore, became quite common in the South; and the federal Constitution worked no interference in that reality.

The federal Constitution, through its judicial arbiters, reaffirmed the inapplicability of the Fourteenth and Fifteenth Amendments to the private white citizen during the Old Jim Crow Era. In January 1883, the Court voided Section 2 of the Ku Klux Klan Act of 1871, declaring Congress' general inability to criminalize assault and murder under the Fourteenth Amendment.[137] Then in October 1883, the Court struck down the first two sections of the Civil Rights Act of 1875, once again announcing its state action rule.[138] The October decision, *Civil Rights Cases*, was major; by deeming efforts to bar private white citizens from discriminating against Black people constitutionally unauthorized, it gave white civilians carte blanche to fully actualize their prejudices. Over forty years later, the Court approved of the white segregationists' use of racially restrictive covenants in *Corrigan v. Buckley*,[139] placing it outside of the Constitution's reach.

With the Fourteenth and Fifteenth Amendments shut off, Congress tried to utilize the Thirteenth Amendment to punish racist conduct aside from literal enslavement. The Jim Crow Supreme Court consistently shut those efforts down; as far as the high court was concerned, the Thirteenth Amendment barred slavery and involuntary servitude, and nothing more.[140] The Court paid lip service in *Civil Rights Cases* to congressional authority to eradicate any "badges and incidents" of slavery;[141] and then it concluded: "Mere discriminations on account of race or color were not

133 *See* RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 36 (2003).

134 *Id.* at 36–37.

135 *Id.*

136 *Id.*

137 *See* United States v. Harris, 106 U.S. 629 (1883).

138 *See* Civil Rights Cases, 109 U.S. 3 (1883)

139 Corrigan v. Buckley, 271 U.S. 323 (1926).

140 *See Civil Rights Cases*, 109 U.S. at 25. The Court stated that the Thirteenth Amendment "merely abolishes slavery."

141 *See id.* at 20–21.

regarded as badges of slavery."[142] In 1906, the Court threw out convictions of "whitecapping"[143] farmers for using violence and threats to force Black people to abandon their labor contracts. Since the whitecappers were not accused of enslaving anyone, the Thirteenth Amendment did not apply.[144] Nor did the amendment prohibit the use of racially restrictive covenants.[145]

All in all, the facially race-neutral Constitution of the United States promoted racism by excising the private white actor from the Fourteenth and Fifteenth Amendments' commands. It imposed no mandate on state officials to protect the lives of Black people from the whims and wrath of lynch mobs and white supremacist gangs. In so failing, the Court made the white public the practical arbiters of the Constitution, and through violence, the vote, and collective organizing, the white public decided that African Americans "had no rights which the white man was bound to respect."[146] This empowering of private white citizens to advance white supremacy is an essential piece of constitutional racism.

2. Tenet Two: The Federal Constitution's Acceptance of Governmental Racial Discrimination that Lacks a Glaringly Obvious Intent to Racially Discriminate

Following the Civil War, several Southern states enacted Black Codes or laws specifically designed to regulate the conduct of Black people.[147] Black Codes constituted state governments' first and most obvious attempt at reinstituting slavery in post-Thirteenth Amendment

142 *See id.* at 25.

143 "Whitecapping" was a practice among white farmers in the late nineteenth and early twentieth centuries of using violence and the threat thereof to provoke fear in Black people; usually it was done to get African Americans to abandon land, breach labor contracts, and leave certain areas so whites could be more economically competitive. For further exploration, see, e.g., William F. Holmes, *Whitecapping in Georgia: Carroll and Houston Counties, 1893*, 64 GA. HIST. Q. 388 (1980).

144 Hodges v. United States, 203 U.S. 1, 16 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) ("The meaning of this [amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation.").

145 Corrigan v. Buckley, 271 U.S. at 329–30. The Court found the defendant's Thirteenth Amendment argument (and her other arguments as well) to be "entirely lacking in substance or color of merit."

146 Dred Scott v. Sanford, 60 U.S. 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

147 WORMSER, *supra* note 133, at 8–9.

America. After the Fourteenth Amendment was ratified, however, state officials could no longer discriminate overtly on the basis of race, at least not legally. While many examples exist of state and federal officials engaging in explicit racial discrimination in plain violation of the Fourteenth Amendment, many examples abound of state and federal agencies adopting verbally race-neutral policies that were surreptitiously implemented in a racially discriminatory manner.

One clear example of this is the states' approach to criminal justice. After the Fourteenth Amendment was ratified, states expanded their penal codes and criminalized a host of nonviolent behaviors, including loitering, public drunkenness, trespassing, and vagrancy.[148] State officials then disproportionately enforced those laws (and criminal laws generally) against African Americans, leading to an overrepresentation of Black people in the criminal judicial system that persists to date.[149] The reason for this was clear: the Thirteenth Amendment did not fully abolish slavery; rather, it conditioned enslavement on the subject's conviction of a crime.[150] This "loophole" was not new to the Thirteenth Amendment; the Northwest Ordinance of 1787, for example, had similar language prohibiting slavery except for those duly convicted of a crime.[151] Nonetheless, states used this phrasing to turn the Thirteenth Amendment, ironically designed to end slavery, into a guidebook for re-enslavement, with the criminal judicial system as the operative mechanism and state governments as the new masters.

While slavery in post-Thirteenth Amendment America was a national problem, the South was particularly brutal with it. The sharecropping system had already served to entrap Black people into bondage. Right after slavery, states began leasing African Americans who had been convicted of violating criminal law to private planters and businesspersons.[152] The conditions under which Black convicts were forced to labor were worse than chattel slavery; because convicts were not the property of private leasers the way chattel slaves were of their "masters," the financial incentive behind masters treating chattel slaves with a modicum of decency did not exist with the convict leaser.[153]

148 Bonnie Kristian, *Ahmaud Arbery and the racist history of loitering laws*, WEEK (May 7, 2020), https://theweek.com/articles/912977/ahmaud-arbery-racist-history-loitering-laws [https://perma.cc/XW6X-9AMU].

149 *Id.*

150 The Thirteenth Amendment reads, "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII § 1 (emphasis added).

151 1 U.S.C. § VI, Ordinance of 1787: The Northwest Territorial Government (1787).

152 *See* WORMSER, *supra* note 133, at 54.

153 *Id.* at 54–57; Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. RACE & L. 323, 334 (2022).

African American children were criminally convicted and leased as well.[154] Convict leasing was not solely a southern practice; in fact, it began in the North.[155] All of this was constitutional state action; there is no documentary evidence that the practice was ever challenged on Thirteenth Amendment grounds,[156] and the Supreme Court has never even considered a Fourteenth Amendment challenge to convict leasing.[157] Towards the mid-twentieth century, convict leasing gave way to state-controlled incarceration; but the legacy of chattel slavery carried on.[158]

Southern state governments were committed to depriving Black people of the right to vote; and they deployed facially race-neutral means to do it. In a page from the book of the original Constitution's framers, Mississippi,[159] South Carolina,[160] Louisiana,[161] North Carolina,[162] Alabama,[163] Virginia,[164] and Georgia[165] convened delegates and redrafted their constitutions with the express purpose of disenfranchising Black Americans without appearing to do so.[166] Their new state constitutions, as well as the laws they passed in service of those new constitutions, included devices such as poll taxes, literacy tests, grandfather clauses, and felony disenfranchisement provisions.[167] Poll taxes disadvantaged

154 *See* WORMSER, *supra* note 133, at 57.

155 Jefferis, *supra* note 153, at 333–34.

156 *Id.* at 331 n.43.

157 There is no Supreme Court case that even mentions "convict leasing" or any other derivatives of the phrase.

158 Jefferis, *supra* note 153, at 334–38.

159 *See Nov. 1, 1890: Mississippi Constitution*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/mississippi-constitution [https://perma.cc/4PTA-B66Q].

160 *See Sep. 10, 1895: South Carolina Constitutional Convention Convened*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/sc-constitutional-convention [https://perma.cc/EH3Z-HY87] (last visited Aug. 2, 2024).

161 *See Louisiana Officially Disenfranchises Black Voters and Jurors*, EQUAL JUST. INST., https://calendar.eji.org/racial-injustice/may/12 [https://perma.cc/QMC8-URKG].

162 *See North Carolina Votes to Disenfranchise Black Residents*, EQUAL JUST. INST., https://calendar.eji.org/racial-injustice/aug/02 [https://perma.cc/5YKE-BDS7].

163 *See* Sarah A. Warren, *Alabama Constitution of 1901*, ENCYC. ALA. (Mar. 8, 2011), http://encyclopediaofalabama.org/article/h-3030 [http://perma.cc/N2J9-PP3Q].

164 *See Constitutional Convention, Virginia (1901-02)*, ENCYC. VIRGINIA, https://encyclopediavirginia.org/entries/constitutional-convention-virginia-1901-1902 [http://perma.cc/VM6R-MRAZ] (last updated Mar. 23, 2023).

165 *See generally* Dewey W. Grantham, Jr., *Georgia Politics and the Disenfranchisement of the Negro*, 32 GA. HIST. Q. 1 (1948).

166 *See, e.g.*, NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 41 (1989).

167 *See* Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1515–16 (2002); *see also* Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 625–27 (2004).

African Americans because most Black Southerners lived in poverty;[168] and because of slavery-era literacy prohibitions and the deliberate inadequacies of segregated public education, literacy tests handicapped Black Southerners as well.[169] These constitutional and statutory mechanisms, coupled with the violence of the white citizenry, guaranteed not only the absence of Black participation in the electoral process but also the absence of Black representation in public office. By linking voter qualifications to juror qualifications,[170] state governments in the South also kept Black people off juries using "colorblind" policies and laws.

The eugenics movement predominated American life during its nadir,[171] and while white intellectuals were the thought leaders of the movement, state and federal officials gave the movement the force and legitimacy of government power. Virginia, for example, passed a sterilization law that allowed for the forcible sterilization of persons confined to state institutions.[172] Almost half of all U.S. states, as well as Washington, D.C., statutorily prohibited marriages among "genetically defective" persons.[173] Over half of all U.S. states had compulsory sterilization laws on their books at some point during the Old Jim Crow Era.[174] The state king of compulsory sterilizations was California, the site of over 20,000 sterilizations in America.[175] While sterilization statutes were race-neutral, the results of their implementation and enforcement were not: more than 70,000 people were forcibly sterilized in America,[176] and the majority of them were nonwhite, with African Americans being the most overrepresented among sterilization victims.[177]

The eugenics movement also featured tests purportedly designed to measure intelligence. The Intelligence Quotient (IQ) test and other like

168 *See* Atiba Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1041–42 (2009).

169 Goldman, *supra* note 167, at 616–17 ("fifty percent of all black men in the United States were illiterate at that time. In the South, the statistics were even more striking. In 1890, sixty-nine percent or more of the adult blacks in seven Southern states that adopted literacy tests were illiterate").

170 *See, e.g.*, *Louisiana Officially Disenfranchises Black Voters and Jurors*, EQUAL JUST. INST., https://calendar.eji.org/racial-injustice/may/12 [http://perma.cc/29XS-7MHT].

171 *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY, 60–64 (1997).

172 Virginia Sterilization Act of 1924, ch. 394, § 1, 1924 Va. Acts 569 (repealed 1968).

173 Roberts, *supra* note 171, at 65.

174 *Id.* at 69.

175 Shefali Luthra, *California Promised Reparations to Survivors of Forced Sterilization. Few People Have Gotten Them.*, 19TH NEWS (Sept. 5, 2023, 6:00 AM), https://19thnews.org/2023/09/california-forced-sterilization-incarceration-reparations [https://perma.cc/3XPB-Z634].

176 Roberts, *supra* note 171, at 89.

177 Abdallah Fayyad, *America's Shameful History of Sterilizing Women*, BOSTON GLOBE (Sept. 18, 2020, 5:25 AM), https://www.bostonglobe.com/2020/09/17/opinion/americas-shameful-ongoing-history-sterilizing-women [http://perma.cc/GML4-TALR].

assessments were either designed or manipulated to demonstrate white intellectual superiority.[178] Eventually, state governments began seeing the value of standardized testing as a means of combatting successful agitations for racial justice. Katie R. Eyer noted that

> [A]fter the NAACP prevailed in a pair of legal challenges in 1939 and 1940 to unequal pay scales for African American teachers, many jurisdictions in the South turned to a standardized test—the National Teacher Examination—as a "colorblind" way of ensuring that most African American teachers continued to be paid less. After legal challenges to segregated higher education resulted in public law-school opportunities for African Americans, many state legislatures revoked diploma privilege—under which all graduates of the state law school were entitled to admission to the bar—in favor of a mandatory bar exam. The SAT and ACT were adopted for the first time by many public Southern universities as a "means of keeping out Negro applicants." Regularly across the South, officials turned to standardized tests and other facially neutral measures as a way to "legally" exclude African Americans after facially discriminatory measures had been struck down.[179]

Hence, while the Old Jim Crow Era is understandably renowned for being an overtly racist time in American history, state action frequently embraced verbal race neutralism in service of white supremacy.

Of course, state governments were not alone in adopting "colorblind" laws and policies; the federal government did so as well. The Supreme Court did plenty of damage to the Enforcement Acts in the 1870s and 1880s, but the job would be for Congress to finish with a repeal of the acts in 1894.[180] The statutes repealing the acts made no explicit mentions of race, but voiding civil rights legislation during arguably the most violent decade of the nadir cannot be seen as anything more than a continued purveyance of racial subjugation.[181] During the Great Depression, Congress enacted legislation that recognized the right for

178 The IQ test, for example, was initially developed as a tool for assisting students struggling in particular school subjects. Eugenicists, however, seized it as a means of establishing white intellectual superiority. *See* Ajitha Reddy, *The Eugenic Origins of IQ Testing: Implications for Post-Atkins Litigation*, 57 DEPAUL L. REV. 667, 670–74 (2008).

179 Eyer, *supra* note 9, at 1034–35.

180 *Civil Rights Repeal Act 28 Stat. 36 (1894)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/civil-rights-repeal-act-28-stat-36-1894 [https://perma.cc/PZA9-E49L].

181 From 1891 to 1894, over 500 Black people were lynched in America. *See* WORMSER, *supra* note 133, at 74. Put another way, at the time the Enforcement Acts were repealed, a Black person was being lynched every two to three days.

persons to collectively bargain.[182] Using race-neutral language, exempting domestic workers and farm laborers from statutory protections,[183] Congress excluded the majority of Black laborers from being allowed to unionize.[184] This verbiage also appeared in other pieces of New Deal legislation, such as the Social Security Act.[185]

The executive branch of the federal government also assisted private white citizens in racially segregating America. The Federal Housing Administration (FHA) recommended and often demanded that homes include racially restrictive covenants for mortgages to receive its backing.[186] In 1921, Secretary of Commerce and future president Herbert Hoover convened an Advisory Committee on Zoning, which developed a model zoning ordinance for localities to adopt; that model ordinance was colorblind, but racially discriminatory in effect.[187] The National Recovery Administration created wage and hour standards for every industry, utilizing race-neutral classifications that amount to coded racism.[188] For example, work that was deemed "agricultural" paid less than work that was deemed "industrial."[189] The National Recovery Administration also categorized work as "northern" and "southern," with lower wages for "southern" work due to cost of living.[190] Of course, the work African Americans performed was far more likely to be classified as "agricultural" and "southern." Even more perniciously, classifications were deliberately manipulated to ensure racially disparate results. In Delaware, for example, fertilizer plants were "southern" because the workforce was 90 percent African American, while factories in Delaware that featured white workforces were "northern."[191] These federal endeavors were racist in practice but colorblind in language, which has always been what the federal Constitution tolerated.

Local governments also adopted thinly veiled colorblind policies in service of racial segregation efforts. They enacted zoning ordinances that classified white neighborhoods as "residential zones" and Black

182 National Labor Relations Act of 1935, Pub. L. No. 86-257, 73. Stat. 519 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

183 *See id.* § 152.

184 *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 118–26 (2011).

185 Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620, § 210 (1935) (codified as amended at 42 U.S.C. §§ 301–1397).

186 ROTHSTEIN, *supra* note 128, at 84–85 (2017).

187 *Id.* at 51–52.

188 *Id.* at 156–57.

189 *Id.*

190 *Id.*

191 *Id.*

neighborhoods as "industrial zones."[192] This permitted local government officials to both allow the building of socially disreputable businesses in Black neighborhoods that were banned from "white neighborhoods" out of fears of social disorder, and to place toxic waste sites and other unsafe enterprises in Black communities, all while avoiding overly racist language.[193] When the federal government sought to build an interstate highway system, local entities designated Black neighborhoods for destruction, and Black residents for displacement, in the name of "slum clearance."[194] These race-neutral endeavors helped to segregate America; and their usage was sanctioned by the federal Constitution during the Old Jim Crow Era.[195]

The federal Constitution, through its judicial arbiters, approved of state governments' colorblind endeavors to racially discriminate. In 1880, the Court in *Virginia v. Rives* found no constitutional infirmity in state criminal convictions of two Black man where the entire jury venire was white.[196] In so holding, the Court reversed a federal judge's decision to remove their case from state court to federal court.[197] The Court extolled verbal race neutralism here, opining that "in the absence of constitutional or legislative impediments, [a defendant] cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him."[198] The law of Virginia, the Court concluded, contains no such legislative impediment: "It does not exclude color citizens . . . . [T]he laws of Virginia make no such discrimination."[199] *Rives* is an excellent exemplar of the second tenet of constitutional racism: the federal judge that ordered removal, Alexander Rives, knew that the Black defendants would be mistreated on the basis of race despite there being no law on the books requiring said mistreatment;[200] but the Court did not care.

In 1898, the Court validated the changes to Mississippi's new constitution and rejected a Black homicide convict's Fourteenth Amendment challenge to it along with the legislation enacted to give

192 *Id.* at 48–50.

193 *Id.* at 54–57.

194 *Id.* at 128–31.

195 After Old Jim Crow, courts began disapproving of government housing endeavors that were either facially discriminatory or obviously racist. *See* Scott A. Marks, *Fair Housing Desegregation Policy: Recent Developments and Proposed Site Selections Safe Harbors*, 22 J. AFFORDABLE HOUSING & CMTY. DEV. L. 67, 69–70 & n.17 (2013).

196 Virginia v. Rives, 100 U.S. 313 (1879).

197 *Id.* at 323–24.

198 *Id.* at 320.

199 *Id.* at 321.

200 Brando Simeo Starkey, *Criminal Procedure, Jury Discrimination & the Pre-Davis Intent Doctrine: The Seeds of a Weak Equal Protection Clause*, 38 AM. J. CRIM. L. 1, 8–9 (2010).

force to it.[201] Even though the Mississippi Supreme Court admitted the racist motivations behind the new constitution and accompanying statutes, the U.S. Supreme Court looked to the language of both the state constitution and related statutes, found no express references to race in either, and ended its inquiry there.[202] The Court's dismissal of the Mississippi Supreme Court's admission allows it to pretend that it is not sanctioning overt racial discrimination; the state constitution and accompanying laws, the Court claims, "reach weak and vicious white men as well as weak and vicious black men."[203] Literacy tests and poll taxes, the use of which the Court would revalidate in the 1930s,[204] were devices that furthered constitutional racism.

Five years after *Williams v. Mississippi*, the Court implicitly sanctioned Alabama's new state constitution, which at the time of the decision was only two years old.[205] The new constitution effectively rendered over 98 percent of Alabama's Black voting-age population ineligible to participate in the electoral process.[206] Like with Mississippi's new constitution, there were open admissions by state government officials that the state constitution was rewritten to exclude Black people.[207] Yet, the U.S. Supreme Court did not even bother to decide the merits of the constitutional challenge brought by Black Alabamans. First, it perversely ruled that even if the state constitution were invalid, requiring that the plaintiffs be regulated would be an inappropriate remedy.[208] Then, despite having ruled in a prior case that equal protection can be violated if a race-neutral law is unevenly applied,[209] the Court declared itself powerless to examine how Alabama officials enforced their constitution and statutes.[210] Like the federal Constitution, the Alabama

201 Williams v. Mississippi, 170 U.S. 213 (1898).

202 *See id.* at 222.

203 *Id.*

204 *See* Breedlove v. Suttles, 302 U.S. 277 (1937).

205 *See* Giles v. Harris, 189 U.S. 475 (1903).

206 *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT 295, 303–04 (2000).

207 *See* HARV. L. REV., *Equal Protection—Race Discrimination—Eleventh Circuit Reverses Dismissal of Discrimination Claim Relying on Historical and Statistical Evidence.*—Lewis v. Governor of Alabama*, 896 F.3d 1282 (11th Cir. 2018)*, 132 HARV. L. REV. 771, 771 n.1 (2018) ("At Alabama's 1901 Constitutional Convention, John B. Knox, the President of the Convention, said in his opening speech to the delegates: '[T]he people of Alabama have been called upon to face no more important situation than now confronts us . . . And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.'" (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901 TO SEPTEMBER 3RD, 1901, at 7–8 (1940))).

208 *See Giles*, 189 U.S. at 486–87.

209 *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

210 *Giles*, 189 U.S. at 487–88.

constitution was facially race-neutral but designed to be racist in application.

The Constitution endorsed coded racism in contexts outside of voting as well. Despite the criminal judicial system's transformation into a racialized re-enslavement apparatus, the Court rejected multiple Fourteenth Amendment challenges to state convictions where there were neither laws mandating racial discrimination nor admissions from involved state officials that race was a motivating factor in the proceedings.[211] Three years after issuing its "separate but equal" mandate in *Plessy v. Ferguson*, the Court upheld a school board's decision to close down the only Black public high school in the county—while closing down no white public high schools—to erect four elementary schools.[212] Because the school board did not explicitly give race as the reason behind its decision, the Court found no constitutional infirmity.[213]

The Court only found governmental action to be violative of the Fourteenth Amendment where the intent to racially discriminate was glaringly obvious. In jury discrimination cases, the glaring obviousness was evidenced by the fact that Black people were systematically excluded for years or decades from jury service. The Court first held in *Norris v. Alabama*,[214] a case arising out of the Scottsboro incident in March 1931,[215] that the continuous absence of Black people from the jury box violated equal protection.[216] Between 1935 and 1965, the Court reversed numerous criminal convictions that featured yearslong patterns of Black exclusion from jury service.[217]

All in all, the facially race-neutral Constitution of the United States promoted racism by showing state governments how to legally disadvantage Black people on the basis of race. In the Old Jim Crow Era, governments could legally discriminate based on race as long as: (1) racial

211 *See, e.g.*, Marbles v. Creecy, 215 U.S. 63, 69–70 (1909) (defendant's contention regarding an inability to receive a fair trial in Mississippi given its racial prejudice is unsupported and thus insufficient to prevent extradition based on equal protection grounds); Thomas v. Texas, 212 U.S. 278, 282–83 (1909) (no racial discrimination where defendant could not prove intentional discrimination); Martin v. Texas, 200 U.S. 316, 320–21 (1906) (no racial discrimination where the petitioner only established the lack of Black people in either the grand jury that indicted him or the jury that convicted him); Brownfield v. South Carolina, 189 U.S. 426, 428–29 (1903) (no Fourteenth Amendment violation where defendant failed to prove intent on the part of the jury commissioners to discriminate); Tarrance v. Florida, 188 U.S. 519, 520 (1902) (no racial discrimination where defendants could not prove intentional discrimination); Smith v. Mississippi, 162 U.S. 592, 600–01 (1896) (no racial discrimination in jury selection where evidence of intent to discriminate lacking).

212 *See* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 532, 543 (1899).

213 *See id.* at 544.

214 Norris v. Alabama, 294 U.S. 587 (1935).

215 *See* JAMES GOODMAN, STORIES OF SCOTTSBORO 3–6 (1994).

216 *Norris*, 294 U.S. at 598–99.

217 For a discussion of these cases, see Starkey, *supra* note 200, at 30–43.

discrimination was not explicitly sanctioned in the statute or law in question; and (2) where more individualized state action was challenged, no state official admitted that his or her behavior under color of state law was racially motivated.[218] Of course, existing evidence of racist government intent did not guarantee that the Constitution's judicial arbiters would sustain a Fourteenth Amendment challenge; but they emphatically refused to find impermissible racism without explicit admissions or behavior that bespoke glaringly obvious discriminatory intent.[219] This is a key tenet of constitutional racism.

3. Tenet Three: The Federal Constitution's Despisal of Race-Explicit Government Actions that Treat Racial Groups Differently

Two of the charges against the respondents in *United States v. Cruikshank* were dismissed because they contained "no allegation that [those offenses were] done because of the race or color of the persons conspired against."[220] Put another way, there was a colorable argument—in the Supreme Court's view—that the victims could have been attacked for some other reason. As the previous Section demonstrated, the Constitution permitted racial discrimination as long as the government actors or entities did not make their racist motivations glaringly obvious.[221] Where the government *did* shamelessly unmask its racist intent, the Court often adhered to the law and invalidated the government action in the instances where the Court reviewed it.

One telltale sign of *unconstitutional* racism was when the government action in question was race-explicit and facially treated racial groups differently. This was the case in *Strauder v. West Virginia*, where the Supreme Court reversed a Black defendant's murder conviction because Black people were barred from serving on juries by a state statute.[222] The Court noted that "[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority . . . ."[223] The Court further noted that had the reverse been true, i.e., whites were excluded from jury service by state statute, the statute

218 *See, e.g.*, Williams v. Mississippi, 170 U.S. 213, 225 (1898).

219 *See id.*; *see also supra* note 166 and accompanying text.

220 United States v. Cruikshank, 92 U.S. 542, 554 (1875).

221 *See supra* Section III.B2.

222 Strauder v. West Virginia, 100 U.S. 303, 312 (1879)

223 *Id.* at 308.

would clearly violate equal protection.[224] This case shows that the federal Constitution disfavors race-explicit government action that treats racial groups differently.

Other cases highlight the Court's aversion to these kinds of governmental actions. In *Ex parte Commonwealth of Virginia*, the Court upheld the criminal conviction of a state court judge that expressly denied qualified African Americans the right to serve on grand and petit juries on the basis of their race.[225] In *Neal v. Delaware*, the Court found an equal protection violation in a criminal case where the state admitted to having intentionally barred Black people from serving on juries.[226] In *Bush v. Kentucky*, a Black man had his homicide conviction reversed because the Kentucky law applicable during his trial mandated the exclusion of African Americans from the jury.[227] The Court twice voided statutes that facially barred Black people from voting in Democratic Party primaries in Texas;[228] then after sanctioning electoral racial discrimination in the state in 1935,[229] the Court shut down all-white primaries in Texas for good in 1944.[230] Even during Old Jim Crow, the Court generally despised race-explicit state government actions that treated racial groups and their members differently from one another.

In assessing race-explicit government action, what distinguished endeavors that the Court tolerated from the activities the Court spurned turned on whether the statute facially treated racial groups *differently*. Being treated *differently* and being treated *separately* are not necessarily the same. Theoretically, two persons can be separated but nonetheless treated the same; and two persons can be kept together and still treated differently. Prior to *Brown v. Board of Education*, the Court did not mind race-explicit government actions that treated racial groups *separately*, as long as the government could claim to treat those racial groups *the same*. For example, the Court in *Pace v. State* found no constitutional problem with Alabama's anti-miscegenation law.[231] While the law obviously promoted keeping the racial groups separate, the Court found a lack of any discrimination against either race:

> Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189

224 *Id.*

225 Ex parte Commonwealth of Va., 100 U.S. 339, 370 (1879).

226 Neal v. Delaware, 103 U.S. 370, 391–92 (1880).

227 Bush v. Kentucky, 107 U.S. 110, 121–23 (1883).

228 Nixon v. Herndon, 273 U.S. 536, 540–41 (1927); Nixon v. Condon, 286 U.S. 73, 89 (1932).

229 Grovey v. Townsend, 295 U.S. 45 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

230 Smith v. Allwright, 321 U.S. 649 (1944).

231 Pace v. State, 106 U.S. 583, 585 (1883).

> applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any color or race. The punishment of each offending person, whether white or black, is the same.[232]

Be it legitimate or otherwise, this crucial distinction is what allows *Plessy* and its progeny to fit within the constitutional racism blueprint.[233] Race-neutral government action that promoted anti-Black racism was almost entirely permissible. Statutes that were race-explicit but did not expressly command *different* treatment of racial groups one from another were considered nondiscriminatory. Thus, until overruled by *Brown*, *Plessy* and its progeny comprised the bounds between the second and third tenets of constitutional racism. During Old Jim Crow, the federal Constitution tolerated government action that (by the Court's warped conception) was either race-neutral and facially differentiating, or race-explicit and facially non-differentiating. Only government action that was race-explicit *and* facially differentiating[234] qualified as unconstitutional racism during the Old Jim Crow Era.[235]

Implementation of the Court's "separate but equal" mandate invariably crossed over into overt, government-sanctioned, and impermissible racial discrimination. The creation of "sundown towns" all over the country were often products of local ordinances by local governments.[236] State officials were open in their denial of the rights of

---

232 *Id.*

233 The language of the majority opinion in *Plessy* contemplates equal political and civil rights for both races despite laws separating the two. *See* Plessy v. Ferguson, 163 U.S. 537, 543–46, 551–52 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

234 My use of this term is in no way to suggest that such conduct was not discriminatory. Indeed, all government actions that treated African Americans differently from white Americans was discriminatory, because they were actualizations of racial animus towards Black people. I use "differentiate" under the third tenet of constitutional racism instead of "discriminate" because differentiation is broader; it is inclusive of discrimination and also sweeps in nondiscriminatory conduct, i.e., conduct that is without racial animus. This distinction becomes relevant in the discussion of the third tenet during the Post-Civil Rights Era, *infra*, Part III.D.3.

235 The Court sanctioned overtly racist government action after Fourteenth Amendment ratification in only two cases, both of which arose out of the United States' detention of Japanese Americans during World War II: *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). The Court has never validated overtly racist government action—action the Court itself acknowledged as being racially discriminatory—in the anti-Black context.

236 *See* Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 746–47 (2016).

African Americans.[237] The federal government enforced racial segregation in its New Deal initiatives, from the FHA refusing to build housing projects for Black residents[238] to the Home Ownership Loan Corporation (HOLC) promoting redlining,[239] to the IRS granting tax-exempt status to "churches, hospitals, universities, neighborhood associations, and other groups that promoted residential segregation."[240] States defied the few Supreme Court precedents that interfered with their desires to fully subjugate Black people.[241] Thus, white supremacy during Old Jim Crow was a systemic mix of constitutional and unconstitutional racism; and federal, state, local, and private forces coalesced to create an apartheid regime in America.

The facially race-neutral Constitution of the United States promoted racism by setting the bounds of permissible racism. Its despisal of race-explicit, facially differentiating government action signaled to government actors as to which actions were constitutionally intolerable and which ones were not. The Constitution maintained some semblance of legitimacy by protecting the rights of African Americans, even if such protections are minimal and infrequent. Thus, boundary-setting is an important part of the third tenet of constitutional racism.

C. *Constitutional Racism—The Civil Rights Era*

The conventional narrative regarding the Civil Rights Movement casts the Supreme Court as the enemy of racism and the champion of equality. The historical record, however, is more complicated. To be clear, the Court deserves credit for overruling *Plessy* and its progeny, especially considering the massive white resistance and backlash that followed the decision for the next decade plus.[242] The Court remained vigilant in stamping out all of *Plessy*'s vestiges from the annals of American law and society, as well as eliminating the race-neutral mechanisms designed to

237 As one example, during the Great Depression, the Civilian Conservation Corps (CCC) created locally administered work camps for unemployed young people. State officials, however, openly refused to accept Black applicants. *See* ROTHSTEIN, *supra* note 128, at 19–20, 157.

238 *Id.* at 74–75.

239 *Id.* at 64–65.

240 *Id.* at 101.

241 For example, the Supreme Court ruled that racial zoning ordinances were unconstitutional (not because they violated equal protection, but because they violated the white seller's freedom to contract). *See* Buchanan v. Warley, 245 U.S. 60 (1917). Local and state officials rebelled against the decision and continued enacting and enforcing racial ordinances for decades after. *See* ROTHSTEIN, *supra* note 128, at 46–48.

242 *See* CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 75–97 (2016).

deny suffrage rights to Black Americans.[243] The Warren Court in particular was the closest the federal judicial branch would ever come to being an antiracist Supreme Court. All that said, the harsh reality is that aside from permanently putting "separate but equal" to bed, the Warren Supreme Court left the tenets of constitutional racism largely undisturbed.

1. The First Tenet

The first tenet of constitutional racism remained intact because the Court remained faithful to the state action doctrine. This faithfulness was present even in cases that were victories for civil rights advocates. For example, *Shelley v. Kraemer* was a win for the NAACP, as the Court ruled that judicial enforcement of racially restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment.[244] However, the Court also reaffirmed *Corrigan v. Buckley*, which approved of the private creation and use of racially restrictive covenants.[245] Thus, even while crippling the effectiveness of racially restrictive covenants, the Court reindorsed the state action rule. In 1953, the Court further held that a nonwhite person who purchased a home in violation of an existing racially restrictive covenant could not be made to pay damages to white residents of neighboring homes.[246] Yet again, the Court reiterated its obedience to the state action rule.[247]

The Warren Court was creative with the doctrine in the 1960s, but never overruled it. In 1961, the Court found the state action rule satisfied where a private restaurant located in a parking garage operated by the Wilmington Parking Authority refused to serve a Black man because he was Black.[248] Because the restaurant was situated in a public building and had its heat and gas paid for by the agency, the Court found that there was sufficient entanglement to render the restaurant a state actor.[249] In 1966, the Court added another wrinkle to the doctrine, finding that state action exists where private parties perform a function traditionally fulfilled by government.[250] With that rule, the Court found a violation of

243 *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 73–74 (1998).

244 Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

245 *Id.* at 13.

246 Barrows v. Jackson, 346 U.S. 249 (1953).

247 *Id.* at 253.

248 Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

249 *Id.* at 723–25.

250 Evans v. Newton, 382 U.S. 296, 302 (1966).

the Fourteenth Amendment where white managers excluded Black people from entering and utilizing a newly created local park.[251] While both cases, alongside others,[252] were victories for civil rights advocates, they were wrongly focused on "a search for the requisite quantum of state involvement with the private activity."[253] The most antiracist approach would have been to forever jettison the state action rule from constitutional doctrine.

Instead of taking that approach, the Court took other avenues to invalidate private discrimination. The Commerce Clause was a favored vehicle of the Warren Court. In 1960, the Court voided the criminal conviction of a Black law student who sat in the whites-only section of a segregated restaurant located in a bus station.[254] The Court held that the Interstate Commerce Act of 1887, a statute authorized by the Commerce Clause, prohibited discrimination in interstate travel and in services offered to interstate passengers.[255] Whether or not the restaurant was affiliated with the bus company was in dispute.[256] What was clear, however, was the Court's intention to find unlawful discrimination with some mechanism other than the Fourteenth Amendment.[257]

The Warren Court's failure to overrule *Cruikshank* and *Civil Rights Cases* produced a lost opportunity for eviscerating a central tenet of constitutional racism. The effects go beyond the judicial branch; Congress, for example, was forced to rely on the Commerce Clause when drafting and ultimately enacting the Civil Rights Act of 1964.[258] The Court's decision to uphold the constitutionality of the Act on Commerce Clause grounds,[259] while expressly declining to rule on its constitutionality on Fourteenth Amendment grounds,[260] did the Reconstruction Amendment no favors. With one important exception, *Jones v. Alfred H. Mayer Company*,[261] the Warren Court made no meaningful use of the Thirteenth Amendment as a vehicle for promoting

251 *Id.*

252 *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

253 Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 B.Y.U. L. REV. 575, 602–03 (2016).

254 Boynton v. Virginia, 364 U.S. 454 (1960).

255 *Id.* at 463–64.

256 *Id.* at 460–62.

257 The Court granted certiorari as to the Fourteenth Amendment question, only to then decide the case on the Interstate Commerce Act. *See id.* at 457.

258 Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1401 (1996).

259 Katzenbach v. McClung, 379 U.S. 294, 305 (1964).

260 *Id.* at 297, 304.

261 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–44. (1968). This decision makes clear that the Thirteenth Amendment regulated private conduct.

racial justice; and William M. Carter noted that since *Jones* was decided, the Court has neither "articulated or even suggested a consistent exegesis of the Amendment's meaning" or "defined the Amendment's self-executing scope."[262] Left to themselves, lower courts have adhered to narrow, literal interpretations of the Thirteenth Amendment.[263]

By the end of the Warren Court, the first component of the constitutional racism structure remained intact. The Court found innovative ways to quash racial discrimination by private parties, but it would not overturn the rule that exempted private discrimination from the Fourteenth Amendment's reach. The state action doctrine would remain good law by the time Richard Nixon began remaking the high court in his image.

2. The Second Tenet

The Warren Court weakened the second tenet of constitutional racism in certain respects and strengthened it in other respects. On the one hand, the Court continued to reaffirm the unconstitutionality of government action where racist discriminatory intent was glaringly obvious.[264] Aided by beneficent civil rights legislation, the Court also voided existing race-neutral mechanisms historically used to deprive Black people of the right to vote, although some cases were decided on grounds other than illegal racial discrimination.[265] The Court further issued a number of other facially race-neutral decisions that nonetheless advanced the cause of racial justice, both for individual claimants and for the country at large.[266] Burt Neuborne observed how race positively influenced Supreme Court decision-making in the areas of federalism,[267] First Amendment law,[268] procedural due process,[269] and criminal law and procedure.[270]

---

262 William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313–15 (2007).

263 *Id.* at 1315–16.

264 *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

265 *See, e.g.*, Gaston County v. United States, 395 U.S. 285, 286–87 (1969) (affirming federal government refusal to reinstate literacy tests pursuant to Voting Rights Act authority); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665–67 (1966) (invalidating poll taxes as a violation of equal protection, specifically in discriminating against those in poverty).

266 *See generally* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59 (2010).

267 *Id.* at 66–74.

268 *Id.* at 77–82, 84–85.

269 *Id.* at 84–85.

270 *Id.* at 85–86.

On the other hand, the Warren Court stayed as true to the discriminatory intent rule as it did with the state action doctrine. Thus, the Fourteenth Amendment's protections against racial discrimination were of no use in cases where racial subjugation was not glaringly obvious. In *Harper v. Virginia State Board of Elections*, for example, the Court was faced with another constitutional challenge to the use of poll taxes.[271] Despite the long history of poll taxes serving to disenfranchise Black people, the lack of an obvious discriminatory purpose meant that a Supreme Court committed to that rule could find no racial discrimination within the meaning of the statute.[272] Thus, it was forced to turned to a nonracial "invidious discrimination" rationale based on economic status to invalidate a device that was known to promote Black disenfranchisement.[273]

The Court also strengthened the intent rule in a bizarre volte-face in its jurisprudence regarding racial discrimination in the jury box. In 1965, the Court rejected an equal protection challenge to the racially motivated use of peremptory challenges, the legal devices trial attorneys utilize to determine who sits on a petit jury in a given case.[274] Despite a fifteen-year history of Black absence from juries resulting from the use of peremptory challenges,[275] the Court created a rule presuming the good faith of the prosecutor and declared that said presumption "is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."[276] Given *Norris* and its progeny, the Court's approach in this case was curious to say the least;[277] and the

271 *Harper*, 383 U.S. at 664–65.

272 Neuborne, *supra* note 267, at 83.

273 *Id.*; *Harper*, 383 U.S. at 666–67.

274 Swain v. Alabama, 380 U.S. 202, 209, 220–22 (1965).

275 Starkey, *supra* note 200, at 44.

276 *Swain*, 380 U.S. at 222.

277 Starkey described *Swain* as

> a self-contradictory and ultimately dangerous decision for minority criminal defendants. On the one hand, the Court stated that making the peremptory challenge open to equal protection challenge departed from established law. The Court nevertheless went on to intimate that if [B]lacks were long excluded from jury service because of a deliberate plan to knock off all [B]lack potential jurors, then a constitutional violation had occurred. The claim is impossible to prove, however, because Swain instructs courts to presume that prosecutors acted properly, just as the Supreme Court did with jury commissioners pre-Norris. Swain allowed states to maintain the all-white jury by ensuring that a small but real percentage of [B]lacks were on jury panels, much like in Akins, thus defeating a Norris-like attack. And those few [B]lacks on panels could be prevented from jury service with the use of the peremptory challenge.

Starkey, *supra* note 200, at 45.

decision handed a clear win for white supremacy in the criminal law arena.

Most scholars and historians designate *Brown v. Board of Education* as the Warren Court's crowning jewel.[278] Yet, ironically, it is the Warren Court's—and by extension, the Constitution's—continued endorsement of the "discriminatory intent" rule that inspired the national resistance necessary to stymy *Brown*'s implementation and ultimately leave it unfulfilled. In the South, colorblind resistance accompanied the violent rebellion of overt racists and was ultimately far more effective in preventing desegregation and racial equality.[279] The North was even more successful in evading integration and racial equity through race-neutral messaging that included denials of segregation and the assailing of Black students and parents with false cultural tropes.[280] In fact, northern congressmen wrote a loophole into the Civil Rights Act of 1964 that exempted northern cities from having to desegregate deeply segregated schools in their jurisdictions, rightfully drawing the ire of the South for behaving hypocritically.[281]

It is in the midst of this national rebellion that Ian Haney López charts the history of dog whistle usage by presidential candidates and political strategists. George Wallace and Barry Goldwater spoke of "states' rights," code for "the right of Southern states to continue laws mandating racial segregation . . . ."[282] The "states' rights" mantra was the argument in favor of Southern secession in the 1860s;[283] it was the argument against enforcement legislation during Reconstruction;[284] it was the rationale behind much of the Court's Old Jim Crow jurisprudence;[285] and it was the theme of many dissenting opinions during the Warren Court.[286] Richard Nixon utilized dog whistles when he ran for president in 1968: he denounced "forced busing," code words that translated into opposition to school desegregation; and he championed "law and order,"

278 *See, e.g.*, *Fifty Years After* Brown v. Board of Education--*Hope, Victory and History*, 73-MAY J. KAN. B.A. 6, 6–7 (2004).

279 *See* Eyer, *supra* note 9, at 1035–37.

280 *See, e.g.*, JEANNE THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY, 35–48 (2018) (examination of desegregation struggles in New York City); *id.* at 48–58 (discussion of desegregation fight in South Boston).

281 *Id.* at 46–47; Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5 U.S.C., 28 U.S.C., and 42 U.S.C.) (enacting 42 U.S.C. § 2000c(b), clarifying that "desegregation" should not be interpreted to "mean the assignment of students to public schools in order to overcome racial imbalance").

282 HANEY LÓPEZ, *supra* note 8, at 13–22.

283 *Id.* at 16.

284 *See* Ben-Dan & Appling, *supra* note 84, at 1400–01.

285 *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903).

286 *See, e.g.*, Carrington v. Rash, 380 U.S. 89, 97–98 (1965) (Harlan, J., dissenting).

a euphemism for Black criminality.[287] Political and national discourse from this point forward conformed to the second tenet of constitutional racism; it was verbal race neutralism lacking in glaringly obvious intent.

By the end of the Warren Court, the second component of the constitutional racism structure also remained intact. The Court found innovative ways to quash racial discrimination by government actors in the absence of a clear discriminatory purpose, but it would not overturn the rule that conditioned a Fourteenth Amendment finding of racial discrimination on such a purpose being present. The discriminatory intent doctrine was also good law by the time President Nixon started refashioning the high court.

3. The Third Tenet

Of the three tenets of constitutional racism, the Warren Court altered the third tenet the most. The major change the Warren Court worked into the Reconstruction Amendment landscape was rendering "separate but equal" race-explicit and facially differentiating (and therefore unconstitutional).[288] Further, the Old Jim Crow distinction between *different* treatment and *separate* treatment became void. From *Brown* onward, the Supreme Court both voided government actions that segregated on the basis of race and affirmed lower court decisions that outlawed racial segregation. State-mandated apartheid was banned at the state and federal levels in schools, locally-controlled transportation, parks and playgrounds, beaches, airport restaurants, courtrooms, public libraries, and prisons, among other places.[289] In 1967, the Court reversed course on interracial marriage and invalidated anti-miscegenation statutes.[290] By the end of the Warren Court era, "separate but equal" as a government-approved doctrine was officially dead.

Despite its alterations, the Court's adherence to the third tenet is evidenced by its one-dimensional construction of racial discrimination violative of the Fourteenth Amendment, coupled with its refusal to acknowledge unconstitutional racism outside of the context of race-explicit, facially differentiating actions. As Angela Onwuachi-Willig correctly observes, *Brown v. Board of Education* features no

287 HANEY LÓPEZ, *supra* note 8, at 22–24.

288 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

289 For a discussion of cases outlawing segregation after *Brown*, see Neuborne, *supra* note 267, at 65–66.

290 Loving v. Virginia, 388 U.S. 1, 12 (1967).

acknowledgement of structural racism.[291] In fact, the decision deems "separate but equal" in the educational sphere unconstitutional because Black children are not learning next to white children.[292] No other Warren Court decision admitted of systemic racism either. This failure, argues Onwuachi-Willig, had the perverse effect of "embolden[ing] and further[ing] white supremacy rather than defeating it."[293]

By the end of the Warren Court, *Plessy* and its progeny moved from reflecting the inner bounds between the second and third tenets of constitutional racism to reflecting the outer bounds. Race-neutral action that was not palpably motivated by race was acceptable under the Fourteenth Amendment; but race-explicit action that facially differentiated (or separated) racial groups one from another was deemed violative of the Fourteenth Amendment.

D. *Constitutional Racism—The Post Civil Rights Era*

Richard Nixon's ascendancy to the U.S. presidency signified white America's intention to roll back the gains of the Civil Rights Movement and resist further changes. Having campaigned on "fixing" the Supreme Court, which had become deeply unpopular amongst white Americans, Nixon appointed four justices to the nation's highest court, lurching the federal judicial branch to the right. The Court has remained right wing ever since. The Warren Court left the three components of the constitutional racism structure largely untouched. In the coming decades, the three high courts afterwards would refortify the three tenets of constitutional racism.

1. The First Tenet

Because the Warren Court left the Fourteenth Amendment rules governing private conduct undisturbed, there was not much that subsequent courts needed to do. In 1972, the Burger Court began dialing back on the Warren Court's state action creativeness, finding that a white club's refusal to serve a Black man was not discrimination by a state actor merely because the Pennsylvania liquor board issued them a license to operate.[294] Two years later, the Court found that a privately owned and

291 Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped Further White Supremacy*, 105 VA. L. REV. 343, 354–55 (2019).

292 *Brown*, 347 U.S. at 494.

293 Onwuachi-Willig, *supra* note 291, at 361.

294 Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175–76 (1972).

operated utility company, heavily regulated by the state and having a partial monopoly on utility provision, was not a state actor under the Fourteenth Amendment.[295] From that point forward, the Court has continuously found a lack of state action where private parties are concerned.[296] Moreover, *Jones v. Alfred Mayer Company*, issued in 1968, remains the last Thirteenth Amendment case of relevance the Court decided. Thus, the Thirteenth Amendment remains a weak avenue for holding private discriminators accountable.

The Court has also invalidated remedial federal government actions on the grounds that no state action was proven. *Milliken v. Bradley*[297] is a case in point. In *Milliken*, a federal district court determined that Detroit's public school system was racially segregated and ordered the implementation of a desegregation plan that not only involved Detroit's school district, but also eighty-five districts outside of Detroit.[298] The district court found pervasive government-sanctioned discrimination in Detroit that occasioned the present racial inequality in Detroit's schools.[299] Nonetheless, the Court rejected the plan, claiming that "there has been no showing that either the State or any of the 85 outlying districts engaged in activity that had a cross-district effect."[300] Such a conclusion casts racism as an isolated phenomenon that, absent overtly racist state action, operates in silos. In this regard, the *Milliken* Court displays the same lack of regard for structural racism as the *Brown* Court. Most relevantly here, the Court shot down a desegregation plan in Detroit not because racial segregation did not exist in Detroit, but because there was no proof that it was not just the work of private actors.[301] Today, Detroit's school system remains segregated.[302]

Thus, racial discrimination by private actors remains constitutionally protected from federal intervention.

---

295 Jackson v. Metro. Edison Co., 419 U.S. 345, 350–51 (1974).

296 *See, e.g.*, Manhattan Comm. Access v. Halleck, 587 U.S. 802 (2019); Blum v. Yaretsky, 457 U.S. 991 (1982).

297 Milliken v. Bradley, 418 U.S. 717 (1974).

298 *See* Bradley v. Milliken, 338 F. Supp. 582 (1971), *rev'd*, 418 U.S. 717 (1974).

299 *Id.* at 587.

300 *Milliken*, 418 U.S. at 748.

301 The Court wrote that the federal appeals court "relied on five factors which, it held, amounted to unconstitutional state action with respect to the violations found in the Detroit system . . . " before proceeding to dismiss each factor. *Id.* at 748–52.

302 *See* Elissa Nadworny & Cory Turner, *This Supreme Court Case Made School District Lines a Tool for Segregation*, NAT'L PUB. RADIO (July 25, 2019, 5:00 AM), https://www.npr.org/2019/07/25/739493839/this-supreme-court-case-made-school-district-lines-a-tool-for-segregation [http://perma.cc/P3JL-JF43].

2. The Second Tenet

The Warren Court left the second component of the constitutional racism structure mostly intact as well, so subsequent courts simply reaffirmed the doctrine and further strengthened it. Ironically, the strengthening of the doctrine would come at the expense of *Brown* itself. In 1973, the Court upheld San Antonio's financing system for its school district despite its negative impact on nonwhite students.[303] The Court further concluded that education, seemingly important enough to have occasioned the dismantling of "separate but equal" eighteen years prior, was not a fundamental right protected by the Constitution.[304] With this case and *Milliken*, the Court watered *Brown* down to near irrelevance in two decades.

In 1976, the Court applied the intent rule to the Civil Rights Act of 1964 and rejected a Fourteenth Amendment challenge to the Washington D.C. police department's hiring practices, which disproportionately impacted Black people.[305] The Court claimed that disparate impact, while not enough to establish impermissible discrimination, could be suggestive of an equal protection violation; but the fact that the Supreme Court has rarely ever found racial discrimination against nonwhites under the Fourteenth Amendment since this decision indicates otherwise.[306] Particularly in 1987, the Court rejected the most comprehensive racial discrimination challenge ever assembled in the criminal law context, finding that statistical evidence of racial bias in the administration of Georgia's death penalty scheme failed to "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[307] The Court's message could not be clearer: the Constitution tolerates racism as long as no state official is dumb enough to admit to it.[308]

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

304 *Id.* at 29–39.

305 Washington v. Davis, 426 U.S. 229 (1976).

306 *See* HANEY LÓPEZ, *supra* note 8, at 86.

307 McClesky v. Kemp, 481 U.S. 279, 313 (1987).

308 *Id.* at 292–93 ("A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination 'had a discriminatory effect' on him . . . Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study." (quoting Wayte v. United States, 470 U.S. 598, 608 (1985))).

3. The Third Tenet

The Warren Court altered the third component of the constitutional racism structure by excising "separate but equal" from America's legal fabric. Where Southern jurisdictions continued to openly resist desegregation as required by *Brown v. Board of Education*, the Burger Court held strong. In *Swann v. Charlotte-Mecklenburg Board of Education*,[309] for example, the Court was faced with a recalcitrant school district in North Carolina that failed to provide a suitable desegregation plan over a decade after *Brown*.[310] The Court held that under these circumstances, federal courts had the authority to fashion desegregation solutions for the time being.[311] In 1985, the Court in *Hunter v. Underwood* invalidated a provision of Alabama's 1901 constitution, finding that it was birthed out of racial animus.[312] Both *Swann* and *Hunter* were unanimous decisions. Thus, on the one hand, the Burger Court continued to despise overtly racist government action.

On the other hand, the Burger Court would also modify the third tenet, but perversely. In 1977, the Court in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* rejected a Hasidic Jewish challenge to a New York State redistricting plan that created several majority nonwhite districts, splitting one of their communities into two as a result.[313] The Court found that the apportionment plan was a valid endeavor under the Voting Rights Act.[314] The Court also observed that New York's use of race was acceptable under the Fourteenth Amendment.[315] Justice White stated the following:

> There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.[316]

In concurring with the judgement, Justice Stewart wrote:

> The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the

309 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

310 *Id.* at 5–11.

311 *Id.* at 15–18.

312 Hunter v. Underwood, 471 U.S. 222 (1985).

313 United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

314 *Id.* at 156–62.

315 *Id.* at 165.

316 *Id.*

> Fifteenth Amendment. They have made no showing that the that the redistricting scheme was employed as part of a 'contrivance to segregate'; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process.
>
> Under the Fourteenth Amendment, the question is whether the reapportionment plan represents purposeful discrimination against white voters. Disproportionate impact may afford some evidence that an invidious purpose was present. But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent.[317]

What this case demonstrates is that at one time, the United States Supreme Court understood that government use of race to *purvey* discrimination was quite different from government use of race to *remedy* discrimination. This case recognized the former to be unconstitutional and the latter to be constitutional. This decision also evidences a distinction between conduct that *discriminates* on the basis of race and conduct that *differentiates* on the basis of race; while discrimination necessarily involves differentiation, all differentiations do not qualify as discrimination. Racial differentiations during Old Jim Crow were discriminatory because they spawned from racial animus. From the 1960s onward, efforts to undo the effects of racial discrimination—like affirmative action—were never the products of racial prejudice and are consequently not discriminatory.[318] That whites may have been negatively impacted by remedial racial differentiations did not render those differentiations a violation of the Fourteenth Amendment. This was the Court's understanding in 1977.

---

317 *Id.* at 179–80 (Stewart, J., concurring).

318 President Lyndon B. Johnson recognized the purpose of affirmative action in a commencement speech at Howard University, remarking as follows:

> You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. 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 the others,' and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek 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.

President Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights," (June 4, 1965).

Then in 1978, the Court flipped the script. In *Regents of California v. Bakke*,[319] Justice Powell branded all racial differentiations as discriminatory, regardless of the intentions behind the government action in question.[320] His basis for distinguishing this matter from *United Jewish Organizations*, that "there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts,"[321] was utterly disingenuous, especially coming from a Supreme Court justice who was himself a segregationist.[322] This claim suggests that racism was not ubiquitous, but was relegated to certain pockets of the country; it falsely intimates that California had no history of racism, of which its universities played a part.[323]

Even Justice Powell's framing of the University's argument was dishonest. He claimed, for example, that the University cited *Lau v. Nichols*[324] "in support of the proposition that *discrimination* favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded 'suspect' classifications."[325] The *Davis* plan constituting "discrimination favoring racial or ethnic minorities" was Justice Powell's choice of words; the University never described its actions as being discriminatory.[326] The only permissible use of racial differentiations, Justice Powell concluded, was to promote diversity in higher education;[327] and his conclusion was not motivated out of any desire to accomplish racial justice.[328] Nonetheless, this labelling of remedial measures as "discrimination" would be the chief characterization the Court utilized in future precedents, including *Students for Fair Admissions*.

Bakke was a splintered decision that produced several opinions and little by way of majority rationale. Over the next decade and a half, the Court would go back and forth on the issue of affirmative action, finding

319 Regents of Cal. v. Bakke, 438 U.S. 265 (1978).

320 *Id.* at 289–91.

321 *Id.* at 305.

322 *See* Lewis Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell Jr. Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229, 1235–43 (2015).

323 *See* Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1577–83 (2000).

324 Lau v. Nichols, 414 U.S. 563 (1974).

325 *Bakke*, 438 U.S. at 303 (emphasis added).

326 *See* Brief for Petitioner, Regents of Cal. v. Bakke, No.76-811, 1977 WL 187977, at *75 (June 7, 1977).

327 *Bakke*, 438 U.S. at 311–15.

328 *See* Walker, *supra* note 322, at 1252–60.

it permissible in some cases and impermissible in others.[329] Ultimately, however, the two anti-Black *Bakke* principles—that benign racial differentiation is subject to the same constitutional scrutiny as overt racial discrimination, and that remedying the effects of past and present discrimination is insufficient to justify affirmative action—would come to define the Court's affirmative action jurisprudence.[330] In defiance of America's racial history, the Court equated remedial measures with racialized oppression, bastardizing civil rights precedents in the process.[331] It granted white people racial victimhood status, empowering them to use the courts and other legal processes to preserve white supremacy in the name of eliminating discrimination.[332]

The Court also found its tongue of outrage in cases involving challenges to racial justice efforts. Jamin B. Raskin illustrates this beautifully with the Court's decision in *Shaw v. Reno*.[333]

> Justice O'Connor employed "apartheid" to describe the Twelfth Congressional District in North Carolina—which happens to be the most integrated district in the history of the State, with fifty-three percent of its population black and forty-seven percent white. Amazingly, none of the conservatives who signed on to Justice O'Connor's opinion had ever before used the word apartheid in a Supreme Court opinion to describe the history of American racial oppression, segregation, Jim Crow, disenfranchisement, white primaries, poll taxes, or any of the other mechanisms of racial exclusion. Now, suddenly, the word apartheid was being used to describe the most racially balanced Congressional district in the state's history, and the first district to elect a black since Reconstruction. What could be wrong with such a district, unless you assume that white people have a presumptive constitutional right to be in the majority?[334]

329 For example, the Court approved affirmative action programs in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547 (1990), while disapproving of such programs in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

330 *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *Wygant*, 476 U.S. at 274–76 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

331 *See, e.g.*, Parents Involved in Comm. Schs. v. Seattle School Dist. 1, 551 U.S. 701 (2007).

332 *See* Wendy Parker, *Recognizing Discrimination: Lessons from White Plaintiffs*, 65 FLA. L. REV. 1871, 1873–74 (2013).

333 Shaw v. Reno, 509 U.S. 630 (1993).

334 Jamin B. Raskin, *From "Colorblind" White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 743, 750 (1996) (footnote omitted).

Thus, the third tenet of constitutional racism, as modified by the Burger Court and carried through the Rehnquist and Roberts Courts, classifies genuine racial equity endeavors as an affront to the nation's founding document. Once again, the second and third tenets are in tandem: the Constitution permits the colorblind purveying of racial injustice, but it bans the honest pursuit of racial justice. These tenets demonstrate why Georgia's racially biased death penalty scheme is consonant with the Constitution while efforts to desegregate schools in Seattle and Louisville, despite both cities having rich histories of government-sanctioned racial discrimination, violate the Constitution.[335] These tenets explain why the Court weakened the Voting Rights Act to uphold racist Arizona voter laws[336] and Texas' redistricting maps,[337] all after slashing another section of the statute designed to prevent racial discrimination despite an abundance of evidence of continued efforts by various states to implement bigoted electoral policies.[338] It explains why the current Supreme Court, allegedly so dedicated to the cause of eradicating racial discrimination that it all but killed affirmative action, refused to grant certiorari in a case where vestiges of Mississippi's Old Jim Crow constitution remain in use.[339]

IV. STUDENTS FOR FAIR ADMISSIONS AND CONSTITUTIONAL RACISM

Students for Fair Admissions is an abomination. It is a judicial commitment to white supremacy thinly disguised as a pronouncement against invidious racial discrimination, replete with an omissive, pseudohistorical reframing of the federal Constitution and the pertinent Fourteenth Amendment. The majority and concurring opinions,

335 *Parents Involved*, 551 U.S. at 807–19 (Breyer, J., dissenting).

336 Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021).

337 Abbott v. Perez, 585 S. U.S. 579 (2018).

338 Shelby Cnty. v. Holder, 570 U.S. 529 (2013). Justice Ginsburg's dissent lays out the successes of the Voting Rights Act, noting that the law led to the blocking of over 700 racially discriminatory voting changes that states bound by Section 4 of the act tried to make between 1982 and 2006. *Id.* at 570–76 (Ginsburg, J., dissenting).

339 Harness v. Watson, 143 S. Ct. 2426 (2023) (Jackson, J., dissenting from denial of certiorari). Jackson called out the Court for its hypocrisy in professing to oppose racial discrimination while refusing this case of racial discrimination.

> We were asked to address this problem 125 years ago in *Williams*, and declined to do so. And this Court blinks again today. So, at the same time that the Court undertakes to slay other giants, Mississippians can only hope that they will not have to wait another century for a judicial knight-errant. Constitutional wrongs do not right themselves. With its failure to take action, the Court has missed yet another opportunity to learn from its mistakes.

Id. at 2428.

particularly that of Justice Clarence Thomas, resurrect the dissenting opinions in the few cases where affirmative action programs were upheld;[340] Justice Thomas cites himself for a significant portion of his judicial missive.[341] The six anti-affirmative action judges deny the presence of systemic racism, exalting individualism as a counter. They reduce the holistic, multifactored admission programs of two universities to endeavors that rely on race to the exclusion of all other considerations. The principal dissenting opinion, while valiantly protesting the majority's assault on affirmative action, evinces a similarly selective understanding of America's racial history, with *Plessy* as the big bad wolf and *Brown* as the knight in shining armor.[342]

Yet, as terrible as it is, *Students for Fair Admissions* is not an anomaly. Just like *Dred Scott* during the days of chattel slavery, the Court's newest affirmative action precedent was quite predictable given the makeup of the Court and white America's seemingly unwavering commitment to maintaining racial subjugation. It was an unsurprising development in an area of law which anointed as its lodestar the concurrence of a segregationist who opposed race-conscious remedial measures. In sum, *Students for Fair Admissions* is the Court's latest homage to America's legacy of constitutional racism. The first Section in this Part will establish how it fits into the constitutional racism structure birthed during Reconstruction and maintained until the present. The second Section will further demonstrate the legacy of constitutional racism by examining the right-wing response to the decision. The third Section will discuss the implications of the decision for racial justice advocacy.

A. *The Constitutional Racism Structure*

Invoked in the majority opinion and littered all over Justice Thomas' concurrence are references to Supreme Court Justice John Marshall Harlan and his immortal words that the Constitution was "colorblind" in his *Plessy* dissent.[343] Both the majority and Thomas' concurrence gleefully cite to legal arguments made during the oral arguments in *Brown v. Board of Education* in support of their cause.[344] Justice Thomas identifies the birth of this "colorblind Constitution" as the ratification of

340 *Students for Fair Admissions*, 600 U.S. at 352 (Sotomayor, J., dissenting).

341 *Id.* at 2179, 2181–82, 2186, 2188, 2190, 2193, 2196-99, 2200–01, 2205, 2207 (Thomas, J., concurring).

342 *Students for Fair Admissions*, 600 U.S. at 326–31 (Sotomayor, J., dissenting).

343 *Id.* at 230–33, 235, 242–44, 246–47, 264, 278, 286, 307 (Thomas, J., concurring).

344 *Id.* at 204, 233.

the Fourteenth Amendment.[345] The logical implication of his claim is that the Constitution was *not* colorblind before 1868.

This is plainly false. The original Constitution made "*no textual reference to race whatsoever.*"[346] The original Constitution did not use the word "slave" or "slavery," either.[347] It was not until the Thirteenth Amendment was ratified that the Constitution contained the word "slavery";[348] and it was not until the Fifteenth Amendment was ratified that the Constitution used the word "race."[349] Thus, the Reconstruction Amendments made the Constitution *less* colorblind than it was before the Civil War. While the Court's antebellum jurisprudence was certainly race-explicit, the nation's founding document has always been facially colorblind. Thus, the racialized chattel slavery the original Constitution *protected*—not simply "acknowledg[ed]"[350]—was not a product of race-explicit language; it was a consequence of strategic verbal race-neutralism coupled with racially discriminatory administration, both of which the framers intended.[351]

What this proves is that the Court's equivalence of "colorblindness" and "racial equality" is utterly bogus. The "equality principle" Justice Thomas casts as the country's core belief was understood by the sources he cited for that proposition to exclude Black people.[352] Congress understood the "equality principle" to exclude Black people, evidenced by statutes that limited citizenship and militia eligibility to white Americans.[353] The Supreme Court had a similar understanding, evidenced by its antebellum precedents culminating with *Dred Scott*. The

345 *Id.* at 232.

346 *See id.* at 233.

347 *See* Section II.A.

348 *See supra* note 145 and accompanying text.

349 *See supra* note 78 and accompanying text.

350 *See id.* at 263.

351 *See* Section II.A.

352 *See id.* As proof of the Constitution's purported "equality principle," Justice Thomas cited to: (1) John Locke, who claimed that Black people were subhuman, see KEHINDE ANDREWS, THE NEW AGE OF EMPIRE 8 (2021); (2) The Virginia Constitution, which spoke of equality despite Virginia being a slave state, Va. Const. § 1 (1776); (3) the constitutions of Massachusetts, Pennsylvania, and New Hampshire, all of which had slavery within their borders at the time their constitutions were ratified, see N.H. Const. art I (1784); Pa. Const art. I (1776); Mass Const. art. I (1780); (4) Thomas Jefferson, a slaveowner who posited that Black people were "inferior to the whites in the endowments both of body and mind." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, at 150 (1785); and (5) Abraham Lincoln, who stated that he was "not, nor ever [has] been, in favor of bringing about in any way the social and political equality of the white and [B]lack races." Abraham Lincoln, The Lincoln-Douglas Debates, 4th Debate Part I (Sept. 18, 1858), https://teachingamericanhistory.org/document/the-lincoln-douglas-debates-4th-debate-part-i [https://perma.cc/2WQ2-G8NQ].

353 Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795); Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1795).

Court persisted in this understanding with its Reconstruction Era jurisprudence, which both the majority opinion and the concurring opinions do not touch. The majority's claim that "[a]t first, this Court embraced the transcendent aims of the Equal Protection Clause"[354] is spurious; the Court shrank the Fourteenth Amendment in *Reese*, *Cruikshank*, *Rives*, *Civil Rights Cases*, and other decisions, making *Plessy* both possible and inevitable.[355] That *Plessy's* lone dissenter may have accurately called the Constitution "colorblind" does not change the framers' intentions behind it; and it definitely did not transform the nation's founding document into an antiracism certificate.

In fact, the *full* Harlan quote, which both the majority opinion and Justice Thomas' concurrence deceptively shorten, places white supremacy and constitutional colorblindness in perfect harmony with each other. The full quote reads:

> The white race deems itself to be the dominant superior race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.[356]

Jamin B. Raskin observed that, "[A]t its very inception, the doctrine of juridical colorblindness was deemed to be perfectly compatible with the perpetuation of white supremacy . . . [Colorblindness] was seen by its author as a principle of formal neutrality that would allow white people to continue their absolute dominance of American life."[357] Put another way, Harlan's dissent *endorses* constitutional racism.

The Court's transformation of *Plessy* into the ultimate bogeyman is intellectually dishonest.[358] *Plessy* was not responsible for insulating decades of extreme and unrestrained white civilian violence towards Black people from federal accountability; *Cruikshank*, *Civil Rights Cases*, and *United States v. Harris* facilitated that. *Plessy* did not encourage judicial endorsement of racially discriminatory conduct that did not

354 *Students for Fair Admissions*, 600 U.S. at 202.

355 Framers of the Fourteenth Amendment went on record to denounce the Court's precedents, undermining any claims of having initially "embraced the transcendent aims of the Equal Protection Clause." *Id.* at 202; *see also* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 99–101 (1993).

356 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

357 Raskin, *supra* note 334, at 744.

358 *Students for Fair Admissions*, 600 U.S. at 203–04.

expressly mention race; *Virginia v. Rives* did that. *Plessy* was not responsible for the legalized deprivation of Black suffrage rights; *Williams v. Mississippi*, *Giles v. Harris*, and *Breedlove v. Suttles* permitted that. *Plessy* did not discourage courts from prying into intentions behind palpably discriminatory conduct; *Giles* and *Cumming v. County Board of Education of Richmond County* emphasized that. *Plessy* did not narrow the Thirteenth Amendment's congressional power; *Civil Rights Cases* and *Hodges v. United States* did that. *Plessy* did not endorse tools of private segregation; *Corrigan v. Buckley* did that. In fact, *Plessy* was not even the first Supreme Court case to approve of segregation; the Court hinted its approbation of apartheid in two Commerce Clause cases.[359] By the time *Plessy* came around, segregation was a national phenomenon. Aside from *Plessy*, none of the cases mentioned here were decided on race-explicit rationales; and none of these cases have been overturned to date.

Thus, the essence of America's race problem was far broader and more substantive than mere segregation; and other than ending "separate but equal" on paper, *Brown v. Board of Education* produced no fix to the problem. State-sponsored school segregation, the very action *Brown* was supposed to have voided, persisted throughout the country, particularly in the North; and American school systems remain segregated to this day.[360] Yet, the majority and concurrences alchemize *Brown* into a madrigal of racial redemption; and the principal dissent, while nobly attempting to properly frame *Brown* as a precedent permitting race-conscious remedies, nonetheless adopts the majority's disingenuous glorification of the decision. For the dissents, the result is a flawed analysis of America's history of legal racism; for the majority and concurrences, the consequence is yet another chapter of historical mythmaking. All the opinions, to varying degrees, demonstrate the tenets of constitutional racism.

359 In 1877, the Court invalidated a state statute that prohibited discrimination on a steamship that travelled to different states, finding a Commerce Clause violation. Hall v. DeCuir, 95 U.S. 485, 487–89 (1877). However, in 1890, the Court upheld a Mississippi statute requiring segregation on a train that travelled to different states. Louisville & Tex. Ry. Co. v. Mississippi, 133 U.S. 587, 588–89, 592 (1890). Part of the Court's rationale in *DeCuir* was the "burden" a carrier would have in going from one jurisdiction that banned racial segregation into another jurisdiction that required it. *Id.* at 488. However, no state in the country had a law mandating racial segregation in common carriers in 1877. Singer, *supra* note 261, at 1396.

360 *K-12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines*, U.S. GOV'T ACCOUNTABILITY OFF. (June 16, 2022), https://www.gao.gov/assets/gao-22-104737.pdf [https://perma.cc/YG49-B667].

1. The First Tenet

It is easy to miss the signs of the first component of the constitutional racism structure because no part of the decision mentions the state action doctrine or *Cruikshank*. Justice Jackson cites *Civil Rights Cases* in her dissent, but for a different purpose;[361] no opinion references *Civil Rights Cases* for its state action principle. Nonetheless, the presence of the first tenet is evidenced by the majority's emphasis on government conduct. It boasted of eradicating "racial discrimination by the States and Federal Government."[362] It spoke of all the laws the Court shot down;[363] law, of course, is the creation of governments. It quoted itself in *Palmer v. Sidoti* in describing the central aim of the Equal Protection Clause as "do[ing] away with all *governmentally imposed discrimination based on race*."[364]

The Court declared: "Eliminating racial discrimination means eliminating all of it."[365] Yet the emphasis on "race-based state action"[366] reflects the Court's continued adherence to the state action principle, which permitted, and still permits, private racial discrimination free of federal interference under the Fourteenth Amendment. If "[e]liminating racial discrimination means eliminating all of it,"[367] then the Court should be as willing to rethink the state action doctrine, long considered by scholars and past justices to be burdensome and confusing, as it is to scrap affirmative action. However, this demonstrates that the Court still does not mind explicit racial discrimination in American society if the purveyors of that discrimination are not government officials.

2. The Second Tenet

Like the first tenet, it is easy to miss the signs of the second component of the constitutional racism structure. Its appearance in the decision manifests in the form of a dog whistle originated by *northern* opponents of school desegregation: "de jure segregation." The majority opinion describes the post-*Brown* Court as having "set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government."[368] Justice Thomas wrote that "any attempt to compensate

361 *Students for Fair Admissions*, 600 U.S. at 387-88 (Jackson, J., dissenting).

362 *Students for Fair Admissions*, 600 U.S. at 204–05.

363 *Id.*

364 *Id.* at 206 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

365 *Id.*

366 *See id.* at 208.

367 *Id.* at 206.

368 *Id.* at 206.

victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy."[369] The dissent utilizes the opposite dog whistle, stressing the continuing presence of de facto segregation and subjugation.[370]

No such terms existed before *Brown* was decided. After *Brown*, segregationists in New York City popularized the terms de jure and de facto segregation to distinguish the northern brand of racial subjugation from the southern one. Civil rights attorney Paul Zuber noted the hypocrisy of New York City's school officials and the ridiculousness of those terms.[371] There was, for the most part, no such thing as de facto segregation; be it in the North or the South, private forces collaborated with local, state, and federal government officials to segregate their respective localities.[372] In actuality, "*de facto* racial subjugation" was de jure racial subjugation with subtler—or *colorblind*—racism.

Hence, using the terms "de jure" and "de facto" serves to signal which racial discrimination the Constitution condones versus which racial discrimination it excoriates. What the majority calls de jure segregation is what the Constitution prohibits. Logically then, what the dissent calls de facto segregation must be—and *is*—constitutionally tolerable. It is telling that the majority opinion makes no mention of de facto segregation, while the principal dissent does not meaningfully reference de jure segregation.[373] The majority clearly denies the persistence of white supremacy, while the principal dissent suggests a belief that de jure segregation may be a thing of the past (while arguing that the effects are long-lasting and evident today).[374] So once again, the majority's declaration that eradicating racial subjugation "means eliminating all of it" is further narrowed.

The presence of the second tenet is also exemplified in Justice Neil Gorsuch's concurrence. In commenting on Harvard's purported rejection of the Students for Fair Admissions' alternative proposals for increasing racial diversity, Justice Gorsuch called out the university for holding fast to legacy admissions and like advantages for family members of faculty and donors. He observed that, "[w]hile race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy

369 *Id.* at 259–60 (Thomas, J., concurring).

370 *Id.* at 328–29 (Sotomayor, J., dissenting); *id.* at 389–90 (Jackson, J., dissenting).

371 Theoharis, *supra* note 280, at 38–39.

372 *See* Eyer, *supra* note 9, at 1037–38.

373 Sotomayor's dissent mentions "de jure segregation" once, as part of a quote. *See Students for Fair Admissions*, 600 U.S. at 334–35 (Sotomayor, J., dissenting). The Jackson dissent does not mention it.

374 *Id.* at 334–37.

applicants the most. Still, Harvard stands by them. As a result, athletes and the children of donors, alumni and faculty—groups that together 'make up less than 5% of applicants to Harvard"—constitute "around 30% of the applicants admitted each year.'"[375]

Yet, the Court did not void Harvard's legacy admissions program. The Court did not invalidate the advantages it confers on the family members of donors and faculty. The Court did not express moral disapproval over Harvard's legacy admissions and advantages programs. The Court did not even posit that something might be wrong with Harvard's programs. In fact, the majority does not even talk about legacy admissions, except to note that it is one of the four pieces of information contained on the lop list.[376] It is not as if Harvard had no connection to America's racial history; Justice Sotomayor provides an account of the university's racism in her dissent.[377] These racial disparities, and by extension the connection between them and societal, de jure racism, are of no concern to Justice Gorsuch, and certainly of no concern to the Court. This was not the type of harm the Constitution was intended to address.

3. The Third Tenet

The signs of the third component of the constitutional racism architecture manifest most clearly in *Students for Fair Admissions*. The majority sanctifies itself as a protector of civil liberties against invidious racial discrimination. It discounts the universities' framing of the issue and cavalierly throws around the word "discrimination." It shamelessly classifies affirmative action as a societal evil on par with chattel slavery and Old Jim Crow. It warps *Brown v. Board of Education* into a token for colorblindness, distorting not only the case but its race-conscious progeny.[378] Because affirmative action is race-conscious, and because the federal Constitution, as interpreted by its judicial arbiters, despises race-explicit government conduct that facially differentiates (regardless of whether it *discriminates*), the Court remains faithful to the third tenet and deems affirmative action unconstitutional.

Most of the majority's approach—both in the main opinion and in concurrences—is not new; they rehash their views in earlier affirmative

375 *Id.* at 301 (Gorsuch, J., concurring).

376 *Id.* at 195.

377 *Id.* at 339–41 (Sotomayor, J., dissenting).

378 *See* Goodwin Liu, *"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL'Y REV. 53, 62–63 (2008). Liu's discussion focused on the Court's decision in *Parents Involved*, but it is applicable to the majority opinion in the instant matter.

action cases. However, there are two new features of this particular decision, both of which are emblematic of the third tenet. First, there is a novel attempt to reinvent the legislative intent of the Fourteenth Amendment to bring it into conformity with the decision. Second, the dissenters are nefariously placed in the same boat as the slaveholders and segregationists of old. The majority opinion produces the second feature while a concurrence produces the first. Nonetheless, this Section will discuss the assault on the legislative history first and the slander of the dissenters second.

a. Justice Thomas' Metamorphosis of the Fourteenth Amendment's Legislative History and Intent

The majority opinion offers no historical explication of the Fourteenth Amendment. Justice Thomas' attempt produces a winding claptrap of distortions, fabrications, and contradictions, the sourcing of which largely includes his own opinions and law review articles favorable to his ideas.[379] The Civil Rights Act of 1866, which guaranteed to African Americans—the *only* racial group from which persons were enslaved in America by the time the Civil War started—the same rights "as is enjoyed by white citizens"[380]—is "decidedly colorblind," according to Justice Thomas.[381] Yet later on, he referenced the same statute as "including its promise of [B]lack citizenship and the equal rights that citizenship entailed . . . ."[382] Note the contradiction: if the law was colorblind, then it would have no promise of *Black* citizenship; it would just promise citizenship to *all* Americans. This admission confirms the absurdity of his claim: where the law guarantees to two groups' rights that were previously denied to one group, then that law is not group-neutral; it benefits the group that was previously without rights.

Justice Thomas leans heavily on a law review article by Professor Michael Rappaport to make his case.[383] He adopts Rappaport's argument that the Freedmen's Bureau Acts, which principally concerned formerly enslaved Black people, was somehow race-neutral in text and in application because it used the "race-neutral" term *freedmen*.[384] By this logic, the Fugitive Slave Clause and both Fugitive Slave acts were completely race-neutral, since neither the two laws nor the constitutional provision authorizing them mention the words "slave," "negro,"

379 *See Students for Fair Admissions*, 600 U.S. at 232–53 (Thomas, J., concurring).

380 Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 1 (1866).

381 *Students for Fair Admissions*, 600 U.S. at 234–37 (Thomas, J. concurring).

382 *Id.* at 237.

383 *See id.* at 246–52 (quoting and citing Michael Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013)).

384 *Id.* at 247–48 (citing Rappaport, *supra* note 383, at 98).

"colored," or "Black" anywhere in the text. Justice Thomas further regurgitates Rappaport's argument that race-explicit laws that were passed may have been enacted for reasons other than race.[385] These arguments strain credulity to the breaking point; they can only make sense when one torturously bifurcates the texts of these statutes from their historical context and completely ignores the reality of that time. Most ironic is how far Rappaport (and Justice Thomas by extension) go to suppose race-neutral justifications for race-conscious government actions; they do not accord affirmative action endeavors the same courtesy.

In trying to explain away two state statutes that more directly invoke race, Justice Thomas makes a statement that completely contradicts his entire platform: "If services had been given only to white persons up to the Fourteenth Amendment's adoption, then providing those same services only to previously excluded [B]lack persons would work to equalize treatment against a concrete baseline of government-imposed inequality."[386] Stated differently, where government action only benefitted white people, Justice Thomas believes that race-conscious remedies that only benefitted Black people would have been constitutionally appropriate to achieve racial equality. Not even the most ardent defenders of affirmative action go this far. That Justice Thomas deems this scenario to be consonant with equal protection undermines any argument that the Fourteenth Amendment was intended to be colorblind.

It seems as if Justice Thomas' illogical foray into the history of the Amendment was motivated by a desire to address criticisms that his position on affirmative action conflicted with his devotion to originalism.[387] No other affirmative action case that Justice Thomas took part in deciding features any kind of historical examination of the Fourteenth Amendment on his part.[388] Rappaport's Article, which Justice Thomas (or his court clerks) obviously read, is a direct response to critics of Justice Thomas' and Justice Antonin Scalia's opposition to affirmative action.[389] By manufacturing this "originalist" account of the Fourteenth

385 *Id.* at 247–49 (citing Rappaport, *supra* note 383, at 104–05).

386 *Id.* at 251.

387 Sunstein, *supra* note 16, at 133–34.

388 Justice Thomas wrote a concurrence in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240–41 (1995), a concurrence in *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003), a partial concurrence in *Grutter v. Bollinger*, 539 U.S. 306, 349–78 (2003), a concurrence in *Fisher v. University of Texas at Austin*, 570 U.S. 297, 315–34 (2013) [hereinafter *Fisher I*], and a dissent in *Fisher v. University of Texas at Austin*, 579 U.S. 365, 389 (2016) [hereinafter *Fisher II*]. He also wrote a concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748–82 (2007). None of these cases include any such examination.

389 Rappaport, *supra* note 383, at 73.

Amendment's origins, Justice Thomas attempted to make the ahistorical historical; he sought to situate race-conscious remedies as having been historical anathema to the Fourteenth Amendment. In essence, he tried to make the third tenet, as modified in 1977, a deeply rooted part of Fourteenth Amendment law.

b. The Nefarious Maligning of the Dissenting Opinions

It is not enough for the majority to aggrandize themselves. Because they paint themselves as unwaveringly committed to the elimination of all forms of race-explicit "racial discrimination," the majority expresses disappointment that the dissenters do not go along with their view of things. They chide the dissent for failing to cite *Shaw v. Hunt*,[390] a racial gerrymandering case, and *Croson*, a case about affirmative action in city contracting.[391] Chief Justice Roberts criticizes the dissents for arguing a position that the Court has rejected,[392] a criticism that he unsurprisingly never levelled at Justice Thomas for repeatedly professing his disapproval of *Grutter v. Bollinger*.[393] The majority cannot fathom why the dissents would rather credit the words of the justice who fought against segregation than the words of a justice who promoted segregation.[394] Most perniciously, the majority pits the dissents as opposed to *Brown* and supportive of racialized subjugation.[395]

The dissents adequately address these absurd imputations,[396] and a plethora of scholars are sure to follow in due time. What the majority's faux indignation elucidates, however, is the newfound attitude of the third tenet's adherents. With unmitigated gall, they cast opponents of racial subjugation as supporters of it. This strategy—the "kick" of the punch-parry-kick dog whistle jujitsu Ian Haney López articulated[397]—is not new; colorblind opponents make racial justice advocates out to be the

390 Shaw v. Hunt, 517 U.S. 899 (1996).

391 *Students for Fair Admissions*, 600 U.S. at 227.

392 *Id.*

393 *See Fisher I*, 570 U.S. at 315 (Thomas, J., concurring) ("I write separately to explain that I would overrule *Grutter v. Bollinger* and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."); *Fisher II*, 579 U.S. at 389 (Thomas, J., dissenting) ("I would overrule *Grutter* and reverse the Fifth Circuit's judgment.").

394 *Students for Fair Admissions*, 600 U.S. at 227.

395 *Id.* at 229–30 ("Separate but equal is '*inherently* unequal,' said *Brown*. It depends, says the dissent. That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo.").

396 *Id.* at 330–31 (Sotomayor, J., dissenting) ("The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.").

397 *See* HANEY LÓPEZ, *supra* note 8, at 130, 133–34.

real racists in popular and political discourse.[398] But while Justice Thomas has shamelessly issued similar broadsides in concurring opinions,[399] *Students for Fair Admissions* marks the first time that a majority opinion curtailing affirmative action labeled the dissents' call for racial justice as racial discrimination. Only an extreme and deliberate ignorance of history allows for such a charge.[400]

B. *Right-Wing Response to Students for Fair Admissions*

To say that white supremacists were thrilled by the Court's decision would be an understatement. Just like the Court's assault on the Voting Rights Act in 2013 prompted a cavalcade of oppressive voting laws across the country,[401] the Court's recent offensive against affirmative action inspired right-wing politicians to vigorously oppose racial justice measures under the guise of combatting discrimination. For example, the very day the decision came out, Missouri Attorney General Andrew Bailey fired off a letter to all colleges in the state demanding that they "implement the Supreme Court's decisions immediately."[402] The letter charts the familiar right-wing cooptation of *Brown* and even claims that the decision bars facially race-neutral conduct that has a racially disparate impact,[403] which *Students for Fair Admissions* most assuredly does not

398 *Id.*

399 *See, e.g.*, *Parents Involved in Cmty. Schs.*, 551 U.S. at 748 (Thomas, J., concurring) ("Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregations in *Brown v. Board of Education*."); *id.* at 773 ("The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy* . . . .").

400 *See* Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–34 (1988) ("But whatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

401 *See* Kira Lerner, *A Timeline of Voting Restrictions Passed by US States Since 2013*, GUARDIAN (June 25, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/jun/25/voting-rights-act-2013-timeline-state-voter-restriction-map-registration-id-absentee-mail [https://perma.cc/JGZ9-E62K]; *How* Shelby County v. Holder *Broke Democracy*, LEGAL DEFENSE FUND, https://www.naacpldf.org/shelby-v-holder-impact [https://perma.cc/7PE6-QZ6R].

402 Letter from Andrew Bailey, Att'y Gen. of Mo. 2 (June 29, 2023), https://ago.mo.gov/wp-content/uploads/2023-06-29-equal-protection-clause-letter.pdf?sfvrsn=7f1897e3_2 [https://perma.cc/TKG3-UQCG].

403 *Id.* at 1–2.

do.[404] The letter concludes with the same flavor of self-righteousness that marks the majority's opinion: "As the chief legal officer for the State of Missouri, I intend to ensure that the constitutional rights of all Missourians are protected, including those who would be harmed by race-based policies that are unlawful under the rulings issued today."[405]

Approximately two weeks later, Bailey joined twelve other right-wing attorneys general in issuing a joint letter to the chief executive officers of Fortune 100 companies to "remind [them] of [their] obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise."[406] The letter complains that "racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses."[407] Endeavors to increase racial diversity in the workplace is characterized as "an inversion of the odious discriminatory practices of the distant past . . . ."[408] Finally, the letter notes that this "discrimination" is illegal under the Civil Rights Act of 1964; and companies were therefore required to stop "discriminating."[409]

Both public and private right-wing forces have gone on the attack. Among public officials, U.S. Senator of Arkansas Tim Cotton sent threatening letters to fifty-one law schools across the country deeming DEI initiatives "unpopular and unlawful" and demanding that they "take care to preserve relevant documents in anticipation of investigations and litigation."[410] One right-wing politician in Wisconsin promised to seek legislation ending scholarships for nonwhite students.[411] Amongst private forces, Students for Fair Admissions sent an email to 150 colleges

404 The majority opinion in *Students for Fair Admissions* features no discussion about race-neutral policies with disparate impact. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). Further, *Washington v. Davis* and its progeny confirm that disparate impact by itself is insufficient to establish discrimination under the legal standard. *See* Washington v. Davis, 426 U.S. 229 (1976).

405 Letter from Andrew Bailey, *supra* note 402, at 3.

406 Letter from Thirteen Attorneys General to Fortune 100 CEOs on Multistate Corporate Racial Discrimination 1 (July 13, 2023), https://s.wsj.net/public/resources/documents/AGLetterFortune100713.pdf [https://perma.cc/TP97-QQM4].

407 *Id.* at 2.

408 *Id.*

409 *Id.* at 5–6.

410 *See* Letter from Tom Cotton, U.S. Sen. of Ark., to law firms (July 17, 2023), https://www.cotton.senate.gov/imo/media/doc/Senator%20Cotton%20Letters%20to%20Law%20Firms%20re%20DEI.pdf [https://perma.cc/2ZUW-8MQP].

411 Ja'han Jones, *After Gutting Affirmative Action, Republicans Target Minority Scholarships*, MSNBC: THE REIDOUT BLOG (July 4, 2023, 6:00 AM), https://www.msnbc.com/the-reidout/reidout-blog/republicans-minority-scholarships-wisconsin-rcna92426 [https://perma.cc/K24M-KF85].

demanding colleges do a host of things the Court's decision did not require.[412] Its founder, Edward Blum, has filed multiple discrimination lawsuits against various private entities.[413] Stephen Miller sent a similar letter to 200 law schools,[414] and the organization he cofounded, America First Legal, "has filed complaints with the Equal Employment Opportunity Commission against diversity programs at more than a dozen companies."[415] More legal challenges by private white citizens are sure to follow.

White supremacy's sudden infatuation with racial equality would be laughable hypocrisy if it were not so appalling and dangerous. It belabors the obvious to state that these right-wingers only care about "discrimination" when it concerns white people. To prove the obvious, let's take Missouri as an example: in 2015, the U.S. Department of Justice issued a scathing report about Ferguson's police department and municipal court practices, declaring that they are racially discriminatory.[416] It was searing enough to make Ferguson enter into a federal consent decree the following year.[417] Yet, years after the report was released, the Ferguson Police Department was still racially discriminating.[418] Yet no warning letter has been sent to the Ferguson Police Department by Bailey or his predecessor. Evidently, then, the "chief legal officer for the state of Missouri" is uninterested in addressing anti-Black discrimination.

412 Scott Jaschik, *Students for Fair Admissions Sends Email With Demands to 150 Colleges*, INSIDE HIGHER ED (July 12, 2023), https://www.insidehighered.com/news/quick-takes/2023/07/12/students-fair-admissions-sends-demands-150-colleges [https://perma.cc/TH59-Z22A].

413 *See* Jessica Guynn, *Affirmative Action Wars Hit the Workplace: Conservatives Target 'Woke' DEI Programs*, USA TODAY (Sept. 15, 2023, 1:10 PM), https://www.usatoday.com/story/money/2023/09/08/affirmative-action-republicans-target-diversity-programs/70740724007 [https://perma.cc/L2W4-R9QM].

414 *See* Lauren Sforza, *Stephen Miller Warns Schools of Lawsuits if They Ignore Supreme Court Affirmative Action Ruling*, HILL (July 3, 2023, 8:07 AM), https://thehill.com/regulation/court-battles/4078821-stephen-miller-warns-schools-of-lawsuits-if-they-ignore-supreme-court-affirmative-action-ruling [https://perma.cc/L629-5M4X].

415 *See* Guynn, *supra* note 413.

416 *See generally* U.S. DEP'T OF JUST., CIVIL RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

417 Consent Decree at 2, United States v. City of Ferguson, No. 16-cv-000180 (E.D. Mo. Mar. 17, 2016), https://www.moed.uscourts.gov/sites/moed/files/documents/416cv0180-0012.pdf [https://perma.cc/2J4H-K854].

418 Hassan Kanu, *Seven Years After Ferguson Investigation, Missouri Police Still Resist Reforms*, REUTERS (Nov. 10, 2022, 1:47 PM), https://www.reuters.com/legal/government/seven-years-after-ferguson-investigation-missouri-police-still-resist-reforms-2022-11-10 [https://perma.cc/5RW5-TX3V].

As another example, Mississippi Attorney General Lynn Fitch, a signatory of the attorneys general letter,[419] feigns sadness about corporate racial discrimination. However, she has done nothing to address the rampant racism by law enforcement in Rankin County, Mississippi,[420] even though that culture came to light after six members of the Rankin County Sheriff's Office pled guilty to federal charges for torturing two Black men for nearly two hours.[421] When she filed practically useless state charges against the deputies *after* they were federally charged and convicted,[422] she released a paltry statement about an indisputably racist attack that did not even mention race.[423] True racial discrimination is of no concern to Fitch either; even when white deputies called two Black men "n-----s" and "monkeys" and demanded they stay on "their side" of town[424]—a clear harkening back to the racial segregation right-wingers profess to despise—Fitch could not even acknowledge the racism. Evidently, less majority-white populations in colleges and workplaces bother Fitch more than systematic, racialized police abuse that has hurt and killed Black people.[425]

The right-wing response to affirmative action, therefore, reflects the constitutionally acceptable brand of racism. *Students for Fair Admissions* has galvanized white citizens like Edward Blum to pursue a familiar vision

419 Letter from Thirteen Attorneys General to Fortune 100 CEOs on Multistate Corporate Racial Discrimination (July 13, 2023), https://s.wsj.net/public/resources/documents/AGLetterFortune100713.pdf [https://perma.cc/TP97-QQM4].

420 *See* Letter from Black Lawyers for Justice to the U.S. Department of Justice, Civil Rights Division on Behalf of Michael C. Jenkins and Eddie T. Parker Pleading for Prosecution of Hate Crimes Against Rankin County, Mississippi Deputies (May 8, 2023), https://img1.wsimg.com/blobby/go/ad90964b-34b5-4c0e-a46e-a70730d7ea2b/Michael%20Corey%20Jenkins%20Case.pdf [https://perma.cc/FB4Y-9TYN]; *see also* Michael Goldberg, *Racist Abuse by Mississippi Officers Reveals a Culture of Misconduct, Residents Say*, ASSOC. PRESS (Aug. 6, 2023, 12:03 AM), https://apnews.com/article/mississippi-racist-abuse-police-culture-1feb54483e62bef53efe1a1a16be29f1 [https://perma.cc/J33F-D2CA].

421 *See* Emma Tucker, *Tasers, Taunts, Torment: How 6 White Officers Subjected 2 Black Men to Hours of Grueling Violence, and then Tried to Cover It Up*, CNN (Aug. 13, 2023, 7:21 PM), https://www.cnn.com/2023/08/13/us/mississippi-white-officers-torture-black-men-federal-charge/index.html [https://perma.cc/JK3L-NS73].

422 Chang Che, *6 Ex-Officers Plead Guilty to State Charges in Torture of Two Black Men*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/mississippi-officers-guilty-torture.html [https://perma.cc/U9FB-L8SZ] ("Prosecutors said the officers could serve their state sentences concurrently with their federal sentences, which are likely to be more severe.").

423 *See* Press Release, State of Mississippi Attorney General, Att'y Gen. Fitch Statement on January 24 Officer-Involved Shooting in Rankin County (Aug. 3, 2023) (on file with author).

424 Sentencing Memorandum, United States v. McAlpin, Crim. No. 23-cr-63-TSL, at *5 (S.D. Miss. Mar. 20, 2024), ECF No. 73.

425 *See* Michael Goldberg, *Deputies Accused of Shoving Guns in Mouths of 2 Black Men*, ASSOC. PRESS (Mar. 27, 2023, 6:41 PM), https://apnews.com/article/mississippi-deputies-black-violent-arrests-61acf712b13fc3c77dce76e508fa94c1 [https://perma.cc/B4AU-3NW7].

of America, an America in which Black people have "no rights that the white man is bound to respect."[426] Like the Constitution's judicial arbiters, state officials pay lip service to equality principles; and like the Constitution's judicial arbiters, their ultimate aims are plainly sinister. Like most of the Court's jurisprudence, *Students for Fair Admissions* has emboldened white supremacy and hurt the cause of racial justice. This is what the federal Constitution was designed to do from its inception.

C. *What* Students for Fair Admissions *Means for Racial Justice Advocates*

> Because as soon as people realize that it's impossible for a chicken to produce a duck egg . . . a chicken just doesn't have within its system to produce a duck egg. It can't do it. It can only produce according to what that particular system was constructed to produce. The system in this country cannot produce freedom for an Afro-American . . . . And if ever a chicken did produce a duck egg, I'm certain you would say it was certainly a revolutionary chicken!
>
> – Malcolm X[427]

For an honest surveyor of 235 years of constitutional history as it relates to race, the conclusion becomes inescapable: *Students for Fair Admissions* is consistent with that history. The founding document was designed to promote white supremacy; and through interpretation by both the courts and the white public, it has done so. If, as racial justice advocates aver, racism is embedded in the fabric of American society, the federal Constitution's text, structure, and interpretation over two-plus centuries deserves significant blame. The "states' rights" argument, a common (and effective) rejoinder against racial equity endeavors, is a product of American constitutionalism. *Students for Fair Admissions* announced once again that white supremacy is the law of the land; and Justice Thomas' declaration that "[t]oday, and despite a lengthy interregnum, the Constitution prevails,"[428] painful as it may be to admit it, rings true.

Logically then, the day racial justice is meaningfully realized in America is the day the Constitution *loses*. Ruth Colker described the

426 *See* Dred Scott v. Sanford, 60 U.S. 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

427 Malcolm X, *Remarks at Militant Labor Forum Symposium on "Blood Brothers," May 29, 29, 1964*, *in* TWO SPEECHES BY MALCOLM X 15–18 (1990).

428 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 232 (2023) (Thomas, J., concurring).

Constitution as "usually just another barrier to change."[429] That is too kind of a characterization; the federal Constitution has historically been *the* legal barrier to change. It is why amending the Constitution during Reconstruction produced no racial justice, but simply modified the tenor of racism that the nation's founding document would tolerate. Civil rights legislation during both Reconstruction and the Civil Rights Movement was inherently inadequate. Towards the end of both Reconstruction and the Civil Rights Movement, the branch of the federal government that assumed responsibility for interpreting the nation's founding document consistently disemboweled the laws created to bring about racial equality. Even under the Warren Court, the friendliest Supreme Court Black America has ever seen, the three tenets of constitutional racism remained mostly untouched. What followed both Reconstruction and the Civil Rights Movement were the reduction of Black citizenship rights and "nadir" eras, the former defined by unprecedented white violence against Black people, and the latter defined by heightened police brutality and Black entrapment in the mass incarceration machine.[430] And from America's founding, the white public rendered constitutional meaning through supporting anti-Black government policies and rebelling against antiracist government endeavors, even those that benefit whites more than nonwhites.[431] In text, in structure, and in consistent interpretation, it patterned a brand of racism for the country to follow; and no time period exemplifies constitutional racism as well as the modern era.

Frankly, a belief that the Constitution can be a vehicle for true racial justice requires a quixotic optimism that neither history nor reality justifies. Abolition threatens white supremacy; and white supremacy is textually, structurally, and interpretively entrenched in the Constitution. Abolitionism and American constitutionalism cannot coexist. The Reconstruction Era was the closest America ever got to wedding abolitionism and constitutionalism together; and the cost to even arrive at that moment was the bloodiest war in America's history. Then, in that moment, advocates for racial justice tried to get the chicken to produce a duck egg; they tried to modify the original Constitution and make it what it was never intended to be. White supremacy—in the forms of a violent and infuriated white populace, a reenergized former Confederate electorate, a disenchanted federal government, and a racially

429 Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651, 658 (2022).

430 *See generally* ALEXANDER, *supra* note 29.

431 Affirmative action, for example, historically benefitted white women more than any other socioeconomic group. *See* Victoria M. Massie, *White Women Benefit Most From Affirmative Action—And Are Among Its Fiercest Opponents*, VOX (May 25, 2016, 9:56 AM), https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action [https://perma.cc/WUA2-2PEM].

unsympathetic Supreme Court—broke those efforts and realigned the Constitution with its original purpose. *Students for Fair Admissions* shows that 159 years after the end of the Civil War, both that realignment and the forces behind it are still going strong. And as Justice Clarence Thomas exemplifies, white supremacy need not solely rely on white voices for nourishment.

Thirty-two years ago, Derrick Bell advocated for "racial realism," arguing that African Americans must recognize the permanence of racism and accept their subordinate status in America. This Article modifies Bell's thesis and calls for a *constitutional realism*, which goes something like this:

> The federal Constitution will never serve as a vehicle for obtaining full racial equality in this country. The nation's founding document was structurally and substantively intended to perpetuate racism, and it has interpretively reinforced a baseline level of racism since it was amended after the Civil War. Looking for avenues of racial salvation in a document steeped in 235 years (and counting) of white supremacy is a striving after wind. Racial justice advocates must acknowledge this reality as they seek to affect positive change and remember that any and all gains African Americans have made resulted from mass struggle.

Scholars have all but admitted that utilizing the federal Constitution to challenge present-day racial subjugation is next to impossible.[432] Scholars have also noted that the rules making legal challenges

---

[432] *See, e.g.*, Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 407 (2022) ("The Fourteenth Amendment's Equal Protection Clause is a natural textual provision for contesting anticrime policies that disparately harm persons of color. Nonetheless, Court doctrine has made equal protection litigation an inadequate tool for combatting pervasive racial inequality generally and within criminal law and enforcement."); Barbara J. Flagg, *"And Grace Will Lead Me Home": The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 123 (2013) ("And perhaps most significantly for present purposes, the discriminatory intent rule disables courts from grappling with any of the subtle forms in which race discrimination occurs today. The rule that all explicit governmental uses of racial classifications trigger strict scrutiny also implements the colorblindness principle and impedes racial justice. Most obviously, the strict scrutiny rule enforces an extreme version of colorblindness: government is put to an almost impossible task of justification whenever it employs racial criteria even for benign purposes, with the consequence that in only two instances thus far has a voluntary race-specific affirmative action program survived Supreme Court review."); Cynthia Jones, *Confronting Race in the Criminal Justice System*, CRIM. JUST. 12, 13 (2012) ("Despite the fact that there is a wealth of research showing racial disparities in the state and federal adjudication process from pretrial to postconviction, and notwithstanding a constitutional prohibition against the selective enforcement of the criminal laws based on race, a criminal defendant faces significant hurdles in attempting to assert a constitutional challenge to the government's discretionary decisions in criminal cases. Such claims, rooted in (and restricted to) the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution, are extremely difficult to litigate.").

exceedingly difficult have been subject to sustained criticism for decades.[433] Yet, these doctrines endure, with no opposition from the other two branches of government; and white society, believing in a post-racial America despite overwhelming evidence to the contrary,[434] evidently favors the Court's views on racism.[435] Racial justice advocates do themselves no favors by ignoring the possibility that the Constitution is not just a roadblock to a truly equal society, but is the fundamental legal roadblock to a truly equal society.

CONCLUSION

The federal Constitution does not prohibit racism; it merely distinguishes between permissible and impermissible racism. The tenets of constitutionally permissible racism were birthed during Reconstruction, developed during Old Jim Crow, preserved with slight modifications during the Civil Rights Era, and strengthened in the Post Civil Rights Era. *Students for Fair Admissions* embodies all three tenets and reconfirms that America's commitment to white supremacy remains.

The author recognizes the seriousness of declaring the nation's founding document an enemy of racial justice. It is not a conclusion made lightly; it is the product of diligent study and careful observation. This Article throws down the gauntlet to constitutional scholars; it hopes to encourage intellectual quests to prove the abovementioned declaration wrong.

433 *See, e.g.*, Hutchinson, *supra* note 432, at 418 ("The discriminatory intent rule is archaic. It remains unchanged after more than thirty years of academic criticism."); HARV. L. REV., *The Evolution of the State Action Doctrine and the Current Debate*, 123 HARV. L. REV. 1255, 1255 (2010) ("Despite the decades-old and intermittently revived characterization of the state action doctrine as 'a conceptual disaster area,' the doctrine—along with the surrounding debate—persists in U.S. constitutional law.").

434 *See* Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 27 (2014).

435 *See* John Gramlich, *Americans and Affirmative Action: How the Public Sees the Consideration of Race in College Admissions, Hiring*, PEW RSCH. CTR. (June 16, 2023), https://www.pewresearch.org/short-reads/2023/06/16/americans-and-affirmative-action-how-the-public-sees-the-consideration-of-race-in-college-admissions-hiring [https://perma.cc/J3NX-589T].