The Limits of Equality: A People's History of Affirmative Action

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"A racist is one who despises someone because of his color, and an Alabama segregationist is one who conscientiously believes that it is in the best interest of Negro and white to have a separate education and social order."[1] *Governor of Alabama, George Wallace, 1964*

"[I]t does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school . . . a slower-track school where they do well . . . Maybe [the University of Texas] ought to have fewer [Black students] . . . I don't think it stands to reason that it's a good thing for the University of Texas to admit as many blacks as possible."[2]
Justice of the Supreme Court, Antonin Scalia, 2015

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[1] Diane Bernard, *How a Failed Assassination Attempt Pushed George Wallace to Reconsider His Segregationist Views*, SMITHSONIAN MAGAZINE (May 12, 2022), https://www.smithsonianmag.com/history/how-a-failed-assassination-attempt-pushed-george-wallace-to-reconsider-his-segregationist-views-180980063/ [https://perma.cc/JNF3-C3UD].

[2] Transcript of Oral Argument at 67, Fisher v. University of Texas at Austin, 579 U.S. 365 (2016) (No. 14–981).

Introduction

In *Black Reconstruction in the South*, W.E.B. Du Bois explained that the persistence of racial hierarchy after the Civil War is best understood in terms of its value to American elites who derive power from a divided working class. He wrote:

> [T]he theory of race was supplemented by a carefully planned and slowly evolved method, which drove such a wedge between the white and black workers that there probably are not today in the world two groups of workers with practically identical interests who hate and fear each other so deeply and persistently and who are kept so far apart that neither sees anything of common interest.[3]

Du Bois believed that rich whites had secured the consent of poor whites to their own economic exploitation in exchange for the "public and psychological wage" of whiteness.[4] This "wage" took many forms in society, including the exclusion of Blacks from public goods like education, to which poor whites were entitled.[5] Indeed, while "[w]hite schoolhouses were the best in the community, and . . . cost anywhere from twice to ten times as much per capita as colored schools," for racial minorities (Blacks, in particular) "the doors of wisdom [were] . . . shut tight and designed to remain that way . . . [through the use of an] ideology of race inferiority to justify that situation and ensure that it would stand firm."[6]

The institutions responsible for producing these racial disparities rest their claims to legitimacy on compliance with the law, while simultaneously

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[3] W.E.B. Du Bois, Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy In America, 1860-1880, 700-701 (1935).

[4] *Id.*

[5] *Id.* ("It must be remembered that the white group of laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage. . .They were admitted freely with all classes of white people to public functions, public parks, and the best schools."); *see also* Micehlle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, 15, 21 (2011) (following Bacon's Rebellion, elite whites "[d]eliberately and strategically . . . extended special privileges to poor whites in an effort to drive a wedge between them and black slaves . . . . [t]hese measures effectively eliminated the risk of future alliances . . . [because] poor whites suddenly had a direct, personal stake in the existence of a race-based system of slavery . . . .[Then, in that late 1800s], alarmed by the . . . apparent potency of the alliance between poor and working-class whites and African Americans, the conservatives raised the cry of white supremacy and resorted to . . . [tactics] including fraud, intimidation, bribery and terror"); Michael Parenti, Blackshirts and Reds: Rational Facism and the Overthrow of Communism, 134 (1997) ("[R]acist organizations and sentiments are often propagated by well-financed reactionary forces seeking to divide the working populace against itself, fracturing it into antagonistic ethnic enclaves.").

[6] Du Bois *supra* note 3; *in* Linda Darling-Hammond, The Flat World and Education: How America's commitment to equity will determine our future 28 (2010) (citing Lawrence A. Cremin, American Education: The Colonial Experience 1607-1783, (1970)).

mystifying the law's function as an instrument of oppression.[7] Typically, this mystification results from a widespread belief in "hegemonic ideologies," meaning, a set of beliefs that presents the "parochial interests [of the ruling class] as representative of the interests of all social groups."[8] In the context of judicial decision-making, judges often rely on these ideologies as their premise; that is to say, the "facts [which] are assumed . . . that are not true, but serve as the basis to guide judicial decisions," while in turn, the law itself serves as a powerful medium for disseminating and legitimizing such ideologies.[9] For example, although segregation under Jim Crow "harm[ed] blacks and benefit[ted] whites in ways too numerous and obvious to require citation," the Supreme Court relied on eugenics and the biological race myth to attribute the inferiority of Black institutions to the purported biological in-

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[7] Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 328-29 (2013) (Thomas J., concurring) ("Slaveholders argued that slavery was a "positive good" that civilized blacks . . . . A century later, segregationists similarly asserted that segregation was not only benign, but good for black students"); *see also* HUGH COLLINS, MARXISM AND THE LAW 58, 74 (1982) ("One way to obscure this purpose of the law is to insist upon law's traditional origins and stable content . . . [which] suggests a connection with basic conceptions of justice rather than the contingent interests of the ruling class.").

[8] COLLINS, *supra* note 7, at 50 ("The ruling class uses its position to disseminate its own world-views and values throughout a society. If it is successful . . . then everyone's commonsense ideas about right and wrong . . . will be formed by the assimilation of ideas supplied by agents of the ruling class. The pervasiveness of this ideological hegemony will prevent the development of alternative political perspectives within the working class, and thus ensure" the continuation of class domination.); Douglas Litowitz, *Gramsci, Hegemony, and the Law*, B.Y.U L. REV. 515, 519–23 (2000) (noting that "the most effective kind of domination" occurs through the "dissemination of the dominant group's [ideology] as universal and natural," to the extent that both the exploiter and the exploited come to see the world from the former's point of view, i.e., in terms that justify existing hierarchies); *see also* Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed., 1982) ("Antonio Gramsci's notion of 'hegemony,' *i.e.* that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order . . . represents the most that anyone could expect, because things pretty much have to be the way that are."); W.E.B. DU BOIS, *The Souls of White Folk*, *in* DARKWATER: VOICES FROM WITHIN THE VEIL 933 (1920) ("Everything great, good, efficient, fair, and honorable is 'white'; everything mean, bad, blundering, cheating, and dishonorable is 'yellow'; a bad taste is 'brown'; and the devil is 'Black.'").

[9] NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION 217, 219 (1975); *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND ATTITUDINAL MODEL REVISITED (2002) (explaining that the likelihood of judges behaving consistently with the attitudinal model depends on institutional incentives, which are strongest at the Supreme Court level, wherein there is a strong relationship between ideology and liberalism of aggregate voting behavior); *see also* COLLINS, *supra* note 7 at 50, 68 ([T]he legal framework of rules and doctrines provides a comprehensive interpretation and evaluation of social relationships . . . which is in tune with the main themes of the dominant ideology. Because the legal system is encountered frequently in daily life, its systematic articulation and dissemination of a dominant ideology are some of the chief mechanisms for the establishment of ideological hegemony. . . . [T]he dominant ideology produces the basic standards of justice, the underlying categories and values of the legal system . . . ."); ANTONTIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 246–47 (1971) ("If every State tends to create and maintain a certain type of civilization and of citizens . . . and to eliminate certain customs and attitudes and to disseminate others, then the Law will be the instrument for this purpose . . . .").

feriority of Black people, while portraying the flagrantly discriminatory Jim Crow regime as "equal."[10]

History shows that the Court's most backward decisions are rendered discursively rational through an implicit reliance on hegemonic ideologies that frame discriminatory laws as "equal" or "meritocratic," and the resultant inequalities as the result of "social and legal practices that recognize innate differences."[11] This thinly veiled social-Darwinism has evolved alongside the nature of hierarchy itself, in form but not substance.[12] Most recently, this evolution has given rise to a new "racial bourgeois," which forms a mirror image of poor whites by accepting the "wages" of *class* domination in exchange for their willing consent to the superexploitation of racialized groups.[13] Recent anti-affirmative action lawsuits filed by Students for Fair Admissions (hereinafter "SFFA")[14] and the Department of Justice for the Trump Administration ("Trump DOJ") rely on a corollary of this structural evolution, the "model minority" myth, to attribute the mass exclusion of

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[10] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980); *see also, e.g.*, Sweatt v. Painter, 339 U.S. 629, 633–34 (1950) ("[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library . . . . [And,] those qualities which are incapable of objective measurement but which make for greatness in a law school."); Plessy v. Ferguson, 163 U.S. 537 (1896).

[11] Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 996 (2007); *see, e.g.*, DU BOIS *supra* note 8 at 39–40 (citing *The Atlanta Daily Intelligencer* (Jan. 9, 1860)) ("This matter of . . . emancipation [is] . . . bad for the master, worse for the slave"); *Fisher*, *supra* note 7.

[12] *See* López, *supra* note 11, at 996 ("By the late nineteenth century, the earlier American belief that racial hierarchy reflected a divine order made manifest by the continental separation of races and by their obvious branding with different colors had largely given way to the certainty that racial stratification reflected a natural ordering of myriad human groups measurable through the techniques of scientific empiricism.").

[13] Mari Matsuda, *Are Asian-Americans the Racial Bourgeoisie?*, *in* WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 149 (1996); *see also* KWAME NKRUMAH, CLASS STRUGGLE IN AFRICA (1972) ("It is the indigenous bourgeoisie who provide the main means by which international monopoly finance continues to plunder and to frustrate the purpose of the African [people]"); *See also* ROSALIND S. CHOU & JOE R. FAGIN, MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM 14 (2015 ed. 2008) ("In spite of much data contradicting their commonplace view, numerous social scientists and media commentators have regularly cited the educational and economic 'success' of a particular Asian American group, one typically described as the 'model minority,' as an indication that whites no longer create significant racial barriers."); *see also* Transcript of Oral Argument at 67, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (Scalia J.) ("[I]t does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school . . . a slower-track school where they do well. . .Maybe [the University of Texas] ought to have fewer [Black students] . . . I don't think it stands to reason that it's a good thing for the University of Texas to admit as many Blacks as possible.").

[14] SFFA is a nonprofit organization that was founded by Edward Blum, an anti-affirmative action activist, anti-voting rights activist, and stockbroker, to solicit Asian plaintiffs. *See* Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 716 (2019) ("Edward Blum, who financed the *Fisher* litigation and founded SFFA, began openly recruiting Asian-American plaintiffs for a potential suit against Harvard.").

poor and non-white students from elite universities to innate racial differences rather than systemic inequality.[15] These lawsuits have been accompanied by a steady drumbeat of misinformation that attributes the views of segregationists to the leaders of the Civil Rights Movement, thereby obfuscating the clear parallels between SFFA's recent lawsuit and the legal maneuverings of the infamous pro-segregation "Massive Resistance" Movement after *Brown*.[16]

This paper was written in response to increasing engagement with and citation of such misinformation in the legal academy[17] and the media at large.[18] Although "fake news" has only recently become a popular topic of conversation, the far right has always and everywhere lied to enact its political agenda.[19] In order to address such misinformation, this paper highlights the timeless features of the modern discourse surrounding affirmative action, beginning with Reconstruction. This paper traces the evolution of the

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[15] *Id.* at 716–18 ("[SFFA's] strategy was, in many respects, predictable . . . . [This is due to] the rise and entrenchment of the 'model minority' myth, which constructs Asians as a monolithic block of 'superminorities' whose success is rooted in a culture that prioritizes hard work and education . . . . mask[s] intra-racial [Asian] diversity . . . [and] facilitates countervailing negative stereotypes about other groups of color . . . [which in turn] perpetuate[s] existing 'racial lay theories' about who does, and does not, belong in elite institutions of higher education.").

[16] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (Roberts C. J., declaring the judgment of the court) ("[T]he position of the plaintiffs in *Brown* . . . could not have been clearer: [T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.")(internal quotations omitted); Mark Tushnet, *Parents Involved and the Struggle for Historical Memory*, IND. L.J. 493, 494–95 (2016) ("The surviving lawyers, by then elderly, who had participated in the *Brown* litigation immediately responded . . . . [calling] Chief Justice Robert's characterization of the plaintiffs' position in *Brown* . . . . 'preposterous' . . . . and '100 percent wrong.'").

[17] *See* Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL., 317, 317 (Spring 2018) ("[By using affirmative action] schools demean [the accomplishments of Asian Americans] and stamp them with a badge of inferiority as to their status in the community.").

[18] *See, e.g.,* Alan M. Dershowitz, *Harvard Needs Merit-Based Admissions,* WALL ST J. (June 1, 2022) ("The time has come, however, for universities to abandon their efforts to achieve superficial, artificial diversity based on race . . . . Martin Luther King Jr. admitted that his goal [was] 'that one day my four children will live in a nation where they will not be judged by the color of their skin, but by the content of their character.'"); Jason L. Riley, *Asian-Americans Fight Back Against School Discrimination,* WALL ST J. (Mar. 1, 2022) ("[T]he school board in Fairfax County, Va., altered the admissions standards . . . in an effort to deny slots to Asian-Americans and boost enrollment among blacks and Hispanics.").

[19] *See, e.g.*, Kit O'Connell, *There is No Legitimate 'Debate' Over Gender-Affirming Healthcare*, TEXAS OBSERVER (July 22, 2022) ([Anti-trans activists claim] that exposure to transgender kids, education about trans people, and trans ideas on the internet could spread transness to others who might otherwise never have questioned their gender . . . contagion and child recruitment are the oldest tropes in the right-wing book . . . similar rhetoric has been used against Jewish people, immigrants, and other marginalized groups."); Tom Phillips, *Bolsonaro vowed to show a new Brazil but 'lie-filled' UN speech cuts little ice*, THE GUARDIAN (Sep. 21, 2021) ("Bolsonaro insisted his government had long championed Covid vaccination, even though he has personally undermined efforts to immunize citizens against a disease that has killed almost 600,000 Brazilians. . .'which other country in the world has a policy of environmental protection like ours?' asked Bolsonaro, who has been accused of encouraging environmental crime and under whom deforestation has soared to 12-year highs.").

methods the wealthy use to guard access to elite educational institutions, including the crucial role played by the Supreme Court. It also highlights the parallels between SFFA's and the Trump DOJ's recent admissions lawsuits and the legal maneuvers of the Massive Resistance Movement after *Brown*.

I. "Equality" and "Freedom" under Reconstruction and Redemption

Although once ubiquitous, the notion that judges are impartial in their application of the law has been supplanted by empirical scholarship showing that personal beliefs, rather than rationality, reason, or the law itself, often determine rulings.[20] This is especially true in the context of the Equal Protection Clause, which has been interpreted in drastically different ways depending upon the political beliefs of the Justices charged with its construction.[21] This section provides a brief overview of the ideological differences between the politicians, judges, and scholars who were charged with interpreting the Equal Protection Clause during Reconstruction and Jim Crow. It also explains the practical and legal consequences of these conflicting views.

A. "Freedom," "Equality," and the Fourteenth Amendment

The undisputed "one pervading purpose" of the Equal Protection Clause— and by extension the Civil Rights Act of 1964[22]—was to secure the "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[23] On freedom, Christine Sypnowich writes:

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[20] *See, e.g.*, *Fisher*, *supra* note 7.

[21] Bell, *supra* note 10, at 523 ("[T]he availability of [14]th amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks of the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps sub-conscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. . . . Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.").

[22] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell J., declaring the judgment of the court) ("In view of the clear legislative intent, Title VI [of the Civil Rights Act of 1964] must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971) ("Congress has now provided [with the Civil Rights Act of 1964] that tests or criteria . . . may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox . . . . [T]he posture and condition of the jobseeker [must] be taken into account.").

[23] Slaughter-House Cases, 83 U.S. 36 (1872); *See also, e.g.*, *Bakke*, 438 U.S. at 287 (1978) (Powell J., declaring the judgment of the Court) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

> When an individual is said to be free under the law, he is considered unencumbered in the exercise of his abilities, opportunities, and powers. Whether or not he is capable of exercising these faculties, however, will depend on social conditions; effective freedom from constraints may require that society intervene to ensure that all can make use of their negative freedom.[24]

This conception of freedom is reflected in the right to substantive equality, which aspires to produce more equal outcomes by safeguarding one's capacity to exercise negative freedoms.[25] The right to own private property, for example, is a negative freedom, which "inevitably denies those who do not own property the freedom to dispose or make use of it."[26] Thus, substantive equality permits unequal treatment to the extent necessary to ensure that underlying inequalities do not expand negative freedom for some at the expense of others.[27]

Substantive equality stands in contrast to formal equality, which emphasizes equal treatment over equal outcomes, and adheres to the principle that "once characteristics such as race, sex, etc. are disregarded, individuals can be treated entirely on their merit."[28] In reality, however, these same characteristics often serve as the basis for majoritarian discrimination, which tends to disadvantage vulnerable minority groups through abuses of the political process.[29] Further, "where there is antecedent disadvantage, 'like' treatment may in practice entrench difference, [and] unequal treatment may be necessary to achieve genuine equality."[30] For these reasons, among others,

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[24] CHRISTINE SYPNOWICH, THE CONCEPT OF SOCIALIST LAW 81 (1990).

[25] Sandra Fredman, *Substantive equality revisited*, 14 INT'L J. CON. L. 712, 720 (2016); Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965) (transcript on file at https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights [https://perma.cc/96RD-5BEU]) ("We seek . . . not just equality as a right and a theory, but equality as a fact and *equality as a result*.") (emphasis added)

[26] SYPNOWICH *supra* note 24, at 81–82;

[27] Fredman, *supra* note 25, at 718; *see also* ANATOLE FRANCE, LE LYS ROUGE (1984) ("The poor must work. . . .in presence of the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and stealing bread . . . under the pretense of making all men equal."); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32 (1982) ("The legal system as a hegemonic system operates at different levels and for different groups. . .play[ing] different parts in the lives of different social classes.").

[28] Fredman, *supra* note 25, at 718.

[29] *See, e.g.*, Randy T. Lee, Amanda D. Perez, C. Malik Boykin & Rodolfo Mendoza-Denton, *On the prevalence of racial discrimination in the U.S.*, PLOS ONE, Jan. 10, 2019, at 8 Tab. 3, 13 (finding that roughly 70% of Blacks, 57% of Asians and 45% of Latinos living in the U.S. had experienced identity-based discrimination and that "there is evidence that discrimination prevalence rates may be even higher than what is shown in our results"); United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . .").

[30] Fredman, *supra*, note 25; *see also* KARL MARX, CRITIQUE OF THE GOTHA PROGRAM 15 (1972) ("[T]he application of an equal standard . . . [is] a right to *inequality*," when applied to individuals in unequal circumstances) (emphasis added).

the international legal community has observed and acknowledged the limitations of formal equality with increasing frequency.[31]

B. Building Jim Crow: Government Intervention during Reconstruction and Redemption

Following the conclusion of the Civil War, the freedmen faced unique obstacles; slavery had left them maimed, impoverished, and largely illiterate, while widespread belief in the ideology of white supremacy restricted their access to public institutions including healthcare, education, and the protections of the political process.[32] Although Du Bois attributed the source of racial animus to class warfare, he also knew that racism had taken on an independent significance, describing whites as "a people imprisoned and enthralled, hampered and made miserable for . . . [the] phantasy" of white supremacy.[33] Additionally, Southern legislators did not resign themselves to accepting the spirit of abolition, but rather openly conspired "to make Negroes slaves in everything but name."[34] Thus, in light of the law's original purpose, it follows that the Framers of the Reconstruction Amendments conceived of "equality" in both race-conscious and substantive terms.[35] The subsequent passage of laws like the 1866 Freedmen's Bureau Act and the Civil Rights Act of 1875—which provided benefits exclusively to Blacks to

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[31] Sypnowich, *supra* note 24, at 66–67 ("Through its preoccupation with the formal conditions for making and applying rules, it distracts attention from the power relations instantiated in the content of the rules . . . [but] the idea that legality can be kept separate from all power relationships is a myth, since in reality, the judicial process is inescapably normative and political . . . . Neutrality in the application of the law is impossible, and legal formalism masks this inescapable fact."); *see, e.g.*, Withler v. Canada (Attorney General), [2011] SCR 396 (Can.) (holding that substantive equality is the "animating norm" of the right to equality embedded in the Canadian Charter); *Brink v. Kitshoff* 1996 SA 197 (CC) at 23–24 para. 42 (S. Afr.) (holding that the right to equality in South Africa exists to remedy patterns of disadvantage); S.T.F., Arguição de Descumprimento de Preceito Fundamental no. 186, Relator: Min. Ricardo Lewandowski, 26.04.2012, 205, D.J.e. 20.10.2014 (holding that the Constitutional right to dignity and equality in Brazil justified the use of racial quotas in higher-education for the purposes of overcoming historical social disadvantage and racial inequality and rejecting the myth of "racial democracy").

[32] Du Bois *supra* note 3 at 117-20.

[33] Du Bois, *supra* note 8, at 926; *see also* Fredman, *supra* note 20, at 730 ("Stigma, stereotyping, humiliation and violence on grounds of gender, race, disability, sexual orientation, or other status can be experienced regardless of relative disadvantage.").

[34] Du Bois *supra* note 3, at 41, 67 ("The ability of the slaveholder and landlord to sequester a large share of the profits of slave labor depended upon his exploitation of that labor, rather than upon high prices for his product in the market . . . . But there was another motive which more and more strongly as time went on compelled the plantar to cling to slavery. His political power was based on slavery . . . . [T]he economic power of the planter waned [due to industrialization], [and] his political power became more and more indispensable to the maintenance of his income and profits.").

[35] Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Phelps) ("The very discrimination [the Fourteenth Amendment] makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that . . . civil rights and immunities are sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.").

provide remedies for and protections against majoritarian discrimination—further reflects a substantive understanding of "equality."[36]

The Reconstruction Era brought rapid improvements in the lives of Black Americans, some of which have not yet been repeated.[37] However, the promise of substantive equality was "strangled in its infancy" by the efforts of southern legislators, who were enabled by a reactionary judiciary that "sacrificed the substance and spirit of the [Fourteenth Amendment]. . . by a subtle and ingenious verbal criticism."[38] In *The Civil Rights Cases*,[39] Justice Joseph P. Bradley, writing for the majority, gutted the Reconstruction Amendments and struck down the Civil Rights Act of 1875, which restricted public-facing institutions from adopting laws that would discriminate against vulnerable minorities.[40] In order to find the law unconstitutional, Bradley adopted an artificially narrow construction of "state action," and perversely framed the freedmen as "the special favorite of the laws" a mere 12 years after the formal end of chattel slavery in the United States.[41] Bradley's holding paved the way for Jim Crow by articulating a type of race-conscious formal equality, which permitted the formal recognition of race, but not its attendant disadvantages or benefits.[42]

Following the *The Civil Rights Cases* in the late 1870s, Southern legislators passed Jim Crow laws at all levels of government for the purpose of

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[36] Hina B. Shah, *Radical Reconstruction: (Re) Embracing Affirmative Action in Private Employment*, 48 U. BALTIMORE L. REV., 203, 206 (2019) ("From the Freedman's Bureau during Reconstruction to the executive orders mandating affirmative action in federal agencies and federal contracting, the federal government recognized affirmative action . . . [as a] mechanism[ ] to achieve equality").

[37] *See, e.g.,* ALEXANDER, *supra* note 4, at 18 ("In 1867 at the dawn of the Reconstruction Era, no Black man held political office in the South, yet three years later, at least 15 [%] of all Southern elected officials were Black. This is particularly extraordinary in light of the fact that fifteen years after the passage of the Voting Rights Act of 1965—the high water mark of the Civil Rights Movement—fewer than 8[%] of all Southern elected officials were Black").

[38] The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan J., dissenting); J. MICHAEL MARTINEZ, A LONG DARK NIGHT: RACE IN AMERICA FROM JIM CROW TO WORLD WAR II 61–63 (2016) ("One after another, the cases came to the high court, and the justices eviscerated the Reconstruction regime. . .Justice John Marshall Harlan questioned the court's reasoning . . . [he] could not understand how the court reached markedly different conclusions in factually analogous circumstances . . . [however, when viewed] through a prism of racial bias, the opinions suddenly appear remarkably consistent . . . . [Indeed, by] this time, the US Supreme Court was dependably an agent of white supremacy.").

[39] 109 U.S. 3 (1896).

[40] *Civil Rights Cases,* 109 U.S at 26 (Bradley J., writing for the Court).

[41] *Id.* at 25; *see also* Derrick Bryson Taylor, *So You Want to Learn About Juneteenth?*, N.Y. TIMES (June 20, 2022) ("On June 19, 1865 . . . Gordon Granger, a Union general, arrived in Galveston Texas, to inform enslaved African Americans of their freedom . . . . [This] put into effect the Emancipation Proclamation which had been issued more than two and a half years earlier on Jan. 1, 1863. . . .").

[42] *Civil Rights Cases*, 109 U.S. at 25 ("[T]here must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected . . . . [N]o one at that time thought that it was any invasion of [the equal protection rights of Blacks] because [they were] not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.").

recreating, as closely as possible, the system of racialized economic exploitation that existed in the South before the Civil War.[43] A precursor of things to come, these "Redeemers" adopted extreme fiscal austerity as a means of countering the perceived excesses of Reconstruction, declaring that "[l]ower taxes and less government intrusion into individual lives would allow citizens to escape the yoke of government oppression."[44] However, in practice, this meant tax cuts for the wealthy, reduced or eliminated aid for those rendered poor and disabled by the war, and the closing of public parks, universities, and libraries, such that "poverty would remain the South's predominant regional feature until well into the next century."[45] Public education was hit especially hard, as many states completely dismantled the educational systems established during Reconstruction; illiteracy became rampant among Blacks and poor whites alike.[46] Simultaneously, legal segregation became commonplace, as the courts refused to acknowledge that Southern legislators deliberately used formal equality as a pretext for vicious anti-Black discrimination.[47]

The Redemption government enjoyed broad—although not unanimous—support among poor whites who came to see themselves as allies of the Redeemers winning the war against the racial "other," rather than acting as traitors in a class war they were badly losing.[48] Indeed, as the gap between rich white landowners and the working poor rapidly grew, the condition of life for Blacks in the South approached, and in some instances surpassed, the evils of slavery.[49] The Supreme Court's insistence that Jim Crow was "equal"

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[43] DU BOIS, *supra* note 3, at 167.

[44] MARTINEZ, *supra* note 38, at 45.

[45] ERIC FONER, RECONSTRUCTION 589 (2002 ed. 1988) ("Fiscal [austerity] went hand in hand with a retreat from the idea of an activist state meeting broad social responsibilities").

[46] *Id.*

[47] MARTINEZ, *supra* note 38, at 63 ("*Plessy v. Ferguson* . . . related to a public accommodations matter arising out of Louisiana [wherein] [a] state statute enacted in 1890 provided for separate accommodation for Blacks and whites on railroads if he accommodations were 'equal.' The law did not define the term 'equal' . . . [but] no one was blind to the cynical meaning of the law, for segregated railroad accommodations were anything but equal in quality.").

[48] *Id.* at 46 ("Throughout the 1880s, class resentments festered. Upland whites who had never owned slaves clashed with the planter elite of the low country. Redeemers, with good reason, recognized that a populist backlash could drive them from power [and adopted divisive measures to] stave off the threat."); DU BOIS, *supra* note 3, at 130 ("[Though] impoverished, maimed and discouraged, victims of a war fought largely by the poor white for the benefit of the rich plantar, [poor whites] sought redress by demanding unity of white against Black, and not unity of poor against rich, or of worker against exploiter.").

[49] DAVID M. OSHINSKY, WORSE THAN SLAVERY (1997) ("However these men may have regarded the negro slave, they hated the negro freeman. However, kind they may have been to negro property, they were virulently vindictive against a property that had escaped from their control."); Letter, Webb's Ranch, Issaquena County, Mississippi, Nov. 13, 1865 *cited in* CHARLES SUMNER; HIS COMPLETE Works 88–89 (1900) ("I must give it as my deliberate opinion, that the freedmen are to-day, in the vicinity of where I am now writing, worse off in most respects than when they were held as slaves."); ALEXANDER, *supra* note 5 ("Constitutional amendments guaranteeing African Americans 'equal protection of the laws' and the right to vote proved. . . . impotent . . . . [O]nce a white backlash against Reconstruction gained steam . . . Black people found themselves yet again powerless and relegated to convict leasing camps that were, in many ways worse than slavery.").

lent further legitimacy to this system. As Justice Henry Billings Brown articulated in *Plessy v. Ferguson*:[50]

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if . . . the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position.[51]

Like Bradley, Justice Brown overlooks the fact that whether formal equality is *inherently* unequal, it is *actually* unequal when, for example, one group has been unjustly enriched through the impoverishment of the other.[52] For example, contrary to Justice Brown's assertion, Black Americans sought integrated schooling because "[w]hite schools offered better opportunities on many levels . . . more resources, higher graduation and college attendance rates, more demanding courses, and better facilities and equipment."[53] However, Justice Brown relied not on history, but the biological race myth to frame the subordination of Blacks under Jim Crow as the result of biological rather than structural differences among races.[54] Brown held that "the enforced separation of the races" does not deny Blacks "the equal protection of the laws . . . [and legislation] is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."[55]

II. A History of Two Movements

The Supreme Court's 1954 decision to overturn *Plessy* in *Brown v. the Board of Education*[56] was not the result of a commitment to race-consciousness, colorblindness, or any other "neutral principle" of law.[57] Rather, *Brown* is best understood in terms of its value to white liberals as a policy response

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[50] 163 U.S. 537 (1896).

[51] *Plessy*, 163 U.S. at 55.

[52] *See* W.E.B. Du Bois, *Does the Negro need Separate Schools*?, 4 J. Negro Educ. 328, 329 (1935) ("[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education.").

[53] Darling-Hammond, *supra* note 6, at 38.

[54] Martinez, *supra* note 38, at 53 ("One popular view suggested that dark-skinned peoples representing a missing link between the noble white man and lesser animals. This bastardized Darwinism justified unequal treatment of Blacks and became a convenient pretext for practicing disparate legal treatment").

[55] *Plessy*, 163 U.S. at 552 (emphasis added).

[56] 347 U.S. 483 (1954).

[57] Bell, *supra* note 10, at 523 ("[I]t is possible to discern . . . the outline of a principle . . . . Translated from judicial activity in racial cases both before and after Brown, this principle of 'interest convergence' provides: The interest of Blacks in achieving racial equality only when it converges with the interests of whites.").

to the "intense ideological struggle" between the U.S. and the Soviet Union wherein "American racism [had suddenly taken] on international significance as an effective propaganda weapon of the Communists."[58] Indeed, following World War II, the wildly popular American Eugenics movement—the most virulent expression of the biological race myth—had become toxic to American foreign policy efforts because of its affiliation with the defeated and despised Nazi fascists.[59] Thus, Justice Earl Warren's holding in *Brown*—that governmental segregation of schoolchildren by race violates the Equal Protection Clause—stood for the broad repudiation of Jim Crow laws and the racial caste system that it perpetuated.[60]

While the Warren Court emphasized the psychological harms that segregation imposed on Black children, many Black Americans conceived of school integration as a means of addressing the *material* harms as well, by tying "the fate[s] of poor and minority students . . . [to that] of their advantaged and white peers."[61] However, virtually no integration actually oc-

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[58] *Id.* at 522; *see also* Brief for the United States as Amicus Curiae at 6, Brown v., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10)("It is in the context of the present world struggle between [capitalism] and [communism] that the problem of racial discrimination must be viewed . . . . [D]iscrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.").

[59] Miriam H. Markfield, *A More Perfect Union: Eugenics in America*, NAELA NEWS J., (Apr. 2019), https://www.naela.org/NewsJournalOnline/NewsJournalOnline/OnlineJournalArticles/OnlineApril2019/Eugenics.aspx?subid=1063 [https://perma.cc/U2H3-ZK6G] ("[B]y the mid-20th century, two-thirds of American states had passed laws authorizing the sterilization of 'unfit' citizens. . .the definition of who was unfit varied across jurisdictions and became intertwined with racism, sexism, and other prejudices. . . ."); MEREDITH L. ROMAN, OPPOSING JIM CROW: AFRICAN AMERICANS AND THE SOVIET INDICTMENT OF RACISM, 1928-1937, 1–2 (2007) ("Before the Nazis came to power in Germany, U.S. racism was identified in the Soviet Union as the most egregiously horrific aspect of capitalism, and the United States was represented as the most racist nation in the world . . . . Notwithstanding the considerable propagandistic value . . . Soviet antiracism challenged the prevailing white supremacist notion—dominant throughout Europe and the globe—that Blacks were biologically inferior and unworthy of equality with whites.").

[60] Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting) ("[S]egregation policies did not simply tell schoolchildren 'where they could and could not go to school based on the color of their skin,'[ ]; they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination . . . . Brown held out a promise . . . . [It was] embodied in three amendments designed to make citizens of slaves.").

[61] *Brown*, 349 U.S. at 494 ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group . . . . [This] affects the motivation of a child to learn . . . .to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 107 (2010) ("[T]he [Milliken] plaintiffs believed, with justification, that inter-district busing would lead eventually to the elimination of gross financial disparities between districts. The reason was straightforward: if suburban students were bused into [urban] schools, suburban parents would have a reason to care about funding levels in [urban] schools."); *see also* Du Bois, *supra* note 52; Bell *supra* note 10, at 522 ("To doubt that racial segregation is harmful to Blacks, and to suggest that what Blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.").

curred between Brown and the Civil Rights Act of 1964, due to the efforts of the Massive Resistance Movement and inadequate federal enforcement.[62] Indeed, following *Brown* it was clear to both civil rights leaders and segregationists that without race-conscious government intervention, overturning *Plessy* would do nothing more than convert *de jure* segregation into *de facto* segregation.[63] Thus, while Thurgood Marshall, Martin Luther King Jr., and other progressives supported race-conscious affirmative action, the Massive Resistance Movement opposed it using bad-faith appeals to colorblindness and "freedom-of-choice."[64] This section explains how a shifting network of group alliances driven by the pressures of the Cold War opened and then rapidly closed the window of educational opportunity for poor and non-white students in the late 1970s and early 1980s.[65]

A. Substantive Colorblindness and the Return of Reconstruction

The Civil Rights Act of 1964 was passed by an overwhelmingly liberal congress elected in a landslide rebuke of Barry Goldwater's conservative extremism in the election of 1964.[66] Section 402 of the Civil Rights Act authorized the now famous Coleman Report, which found that the primary cause of the racial "achievement gap" was not inequitable schools themselves, but rather family characteristics that were closely tied to class and race, such as parental education level and the socioeconomic composition of a student's peer group (hereinafter the "Coleman factors").[67] Further, the report found

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[62] DARLING-HAMMOND, *supra* note 6, at 35 ("[B]y 1964 . . . 98% of African American students in Southern schools [remained] enrolled in all-Black schools and over 70% of Northern Black students were still enrolled in predominantly minority schools . . . . Progress [towards integration] made after the passage of the 1964 Civil Rights Act was steady for only about a decade."); Bell, *supra* note 10, at 518 ("Demographic patterns, white flight, and the inability of the courts to effect the necessary degree of social reform render further progress in implementing Brown almost impossible.").

[63] López *supra* note 11 at 1004 ("By the end of the 1960s, colorblindness had become a favored argument among those attempting to protect segregation. Simultaneously it had lost much of its attractiveness to those striving for racial progress.").

[64] Max *Brantley, Freedom of Choice, the segregation battle cry of the 60s, is now Arkansas law*, ARK. TIMES (Mar. 9, 2018), https://arktimes.com/arkansas-blog/2018/03/09/freedom-of-choice-the-segregation-battle-cry-of-the-60s-is-now-arkansas-law [https://perma.cc/SHH8-JPFF] ("Freedom of Choice was a well-understood code for segregated neighborhoods and schools in the 1950s and 1960s"); GROVER J. (RUSS) WHITEHURST, BROOKINGS, NEW EVIDENCE ON SCHOOL CHOICE AND RACIALLY SEGREGATED SCHOOLS (2017) ("The principal finding of this report] is a substantive positive correlation between how friendly districts are to school choice and the degree to which their high schools are racially imbalanced for Blacks and whites.").

[65] Bell, *supra* note 10 at 524.

[66] RICK PERLSTEIN, BEFORE THE STORM 512–513 (2001) ("[T]he commentaries were published that the pundits had begun writing in their heads in July, as soon as Barry Goldwater declared that extremism in defense of liberty was no vice . . . Goldwater won only sixteen congressional districts outside the South . . . . Lyndon Johnson would enjoy a 195 to 140 majority in the House, and a 68 to 32 majority in the Senate with which to build his Great Society.").

[67] JAMES S. COLEMAN, ET AL., NAT'L CTR. FOR EDUC. STAT., EQUALITY OF EDUCATIONAL OPPORTUNITY 325, 514 (1966) ("[T]he social composition of [a school's] student

that, while improving resource disparities at majority-minority schools lead to marginal improvements, the only way to close the racial achievement gap was to "improve socioeconomic conditions for black families, and implement integration not only by race, but by social class."[68] Despite liberals remaining lukewarm towards the prospect of wealth redistribution, the Civil Rights Act authorized widespread, race-conscious, affirmative action programs, including cross-district busing to integrate schools, while many Colleges and Universities voluntarily adopted race-conscious affirmative action policies out of a shared "sense, pure and simple, that universities had to do their part to help integrate higher education."[69] Consequently, during the 1970s and early 1980s, Asian Americans made massive gains in employment and education,[70] while Black and Latino students began "attending college at rates comparable to those of Whites," for the first and only time in American history.[71]

Prior to *Brown*, legislators exclusively used the concept of race to deny equal opportunity to Blacks; as a result, many of the speeches, lawsuits, and other efforts made by advocates for racial justice were couched in rhetorical and legal appeals to colorblindness.[72] Today, the modern opponents of affirmative action routinely quote these same advocates out-of-context for the

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body is more highly related to student achievement, independent of the student's own social background, than is any school factor . . . . One indicator of the socioeconomic status of a family is the education of the parents.").

[68] Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since*, ECON. POL'Y INST. (Aug. 27, 2013), https://www.epi.org/publication/unfinished-march-public-school-segregation/ [https://perma.cc/2J8W-DWR6] ("[T]he Office of Education . . . released only a summary downplaying the [Coleman Report's] main finding about the importance of family characteristics and social class integration and exaggerating the minor finding that school resource differences were associated—barely—with the achievement gap.").

[69] Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What It Got Wr*ong, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html [https://perma.cc/4BTR-XC48] (in response to uprisings and student strikes in more than 100 cities Universities adopted race-conscious affirmative action policies and the number of Black students admitted to Ivy League universities the next year more than doubled).

[70] *Why I support affirmative action: An open letter to Chinese America*, REAPPROPRIATE (Mar. 13, 2014) http://reappropriate.co/2014/03/why-i-support-affirmative-action-an-open-letter-to-chinese-america-noliesnohate-edu4all/ [https://perma.cc/K26A-CELA] ("40 years ago, Asian Americans (and particularly Chinese Americans) were huge beneficiaries of affirmative action programs—in college and the work force . . . . Affirmative action has been historically critical for Asian Americans, including Chinese Americans. . . .").

[71] DARLING-HAMMOND, *supra* note 6, at 18 ("By the mid-1970s . . . gaps in educational attainment had closed substantially . . . . Improvements in educational achievement for students of color followed. In reading, large gains in Black students' performance throughout the 1970s and early 1980s reduced the achievement gap considerably, cutting it nearly in half in just 15 years. The achievement gap in mathematics also narrowed sharply . . . . For a brief period in the mid-1970s, Black and Hispanic students were attending college at rates comparable to those of Whites, the only time this has happened before or since.").

[72] Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/us/29assess.html [https://perma.cc/TZF3-WPZC]; *See, e.g.*, Brief for Petitioner at 27, Sipuel v. Bd. Of Regents of Univ. of Okla., 332 U.S. 631 (1948) (No. 369) ("Classification and distinctions based on race or color have no moral or legal validity in our society.").

purpose of legitimizing their efforts to disenfranchise racial minorities.[73] For example, SFFA's website reads "[o]ur mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement."[74] But colorblindness, like "equality," can be interpreted in significantly different ways.[75] The substantive colorblindness that animated the Civil Rights Era was best articulated by Justice Wisdom in *United States v. Jefferson County*,[76] who wrote that the Constitution is "color blind . . . [in the sense that] a classification [which] denies a benefit, causes harm, or imposes a burden must not be based on race . . . [b]ut . . . color conscious to prevent discrimination being perpetuated *and to undo the effects of past discrimination*."[77]

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[73] *See, e.g.*, Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/G6DQ-NPE7] ("Blum saw the Harvard Case as . . . . restor[ing] what the nineteen-fifties and sixties civil-rights movement was all about . . . . [He saw the case as]saying that affirmative action was 'against Dr. Martin Luther King's famous words, right?' He said, 'I want my children to be judged by the content of their character, not by their skin color.'"); *but see, e.g.*, STEPHEN OATES, LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR., 426 (2013 ed. 1982) (Dr. Martin Luther King Jr. speaking) ("A society that has done something special against the Negro for hundreds of years must now do something special for him, in order to equip him to compete on a just and equal basis.").

[74] *About*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ [https://perma.cc/DW8D-PF3R] (last visited Dec. 24, 2020).

[75] López, *supra* note 11, at 995 ("[Colorblindness] as a method . . . lacks a transcendent moral quality, and instead takes on political and social significance only by virtue of its instant application.").

[76] United States v. Jefferson County Bd. of Ed., 372 F.2d 836, 876 (5th Cir. 1966) (Wisdom, J.)

[77] *Id.* at 877 ("[D]isestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race."); Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 207 (Nov. 2008) ("During the Brown litigation, lawyers advocating a blanket prohibition of racial classifications never put forth these arguments in isolation from other, more context-based, color-conscious arguments relating to the meaning of the Fourteenth Amendment . . . [C]ivil rights advocates easily moved back and forth between making [colorblindness] arguments and claims based on what has come to be known as 'anti-subordination' principles . . . based on 'the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.'"); *see, e.g.*, 110th Cong. Rec. 1510 (1964) (Senate Majority Leader Hubert Humphrey explaining that the purpose of Title VI "is to give fellow citizens – Negroes – the same rights and opportunities that white people take for granted. . .It is no more than what our constitution guarantees."); *Id.* at 1519 (Representative Emanuel Cellar explaining that Title VI "would . . . assure Negroes the benefits now accorded only white students in programs of high[er] education."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 864 (2007) ("[S]ince this Court's decision in Brown, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.").

B. Reactionary Colorblindness and the "New Right"

This section will discuss the origins of the Court's modern framework of affirmative action—accurately described by Professor Kermit Roosevelt III as "wildly, almost absurdly, wrong,"—in the Massive Resistance Movement and corresponding formation of the New Right.[78] As integration progressed, whites increasingly fled to suburban neighborhoods while Blacks and other racial minorities were isolated in cities.[79] Consequently, the fight for educational equity came to be waged in terms of if and when neighborhood lines could be crossed to integrate schools.[80] Unlike their liberal counterparts, white conservatives never wavered in their commitment to uphold segregation, but confrontations with the Civil Rights Movement forced them to "abandon their traditional, populist, and often starkly racist demagoguery and [create] a new conservatism predicated on a language of rights, freedoms, and individualism."[81] This "New Right" enabled white Americans throughout the U.S., led by Virginia Senator Harry Byrd, the White Citizens Council, and the Ku Klux Klan, to resist cross-district busing under the banner of federalism, states' rights, and the protection of individual liberties.[82] Noncompliant school districts didn't proclaim their allegiance to white supremacy, but rather adopted "freedom-of-choice" plans that were colorblind, and for that reason, completely ineffective toward integration.[83] For the courts, the pattern was the same; rather than demanding a return to *de jure* segregation under Jim Crow, segregationists argued for what Ian Haney López calls "reactionary colorblindness," a formal interpretation of the Equal Protection Clause which treats all laws that use racial classifications with

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[78] Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. Penn J .Con. Law 729, 730 (2015).

[79] *See, e.g.*, Kevin M. Kruse, White Flight: Atlanta and the Making of Modern Conservatism 8 (2005) ("Ultimately, the mass migration of whites from cities to the suburbs proved to be the most successful segregationist response to the moral demands of the civil rights movement and the legal authority of the courts.").

[80] Ryan, *supra* note 61, at 99 ("[T]he only issue in southern desegregation cases after 1954 concerned the proper remedy. In northern cases, by contrast, a remedy would be available if-and only if—plaintiffs succeeded in demonstrating that school officials engaged in de jure segregation.").

[81] Kruse, *supra* note 79, at 6; *see also* Ryan, *supra* note 61, at 75 (2010) ("Opponents of busing portrayed children as the victims of meddlesome federal courts . . . protesting that . . . 'the collar of governmental control has tightened around my neck so that I am about to strangle . . . [g]ive me liberty or give me death.'").

[82] Michel J. Klarman, From Jim Crow to civil rights: The Supreme Court and the Struggle for Racial Equality 320 (2006) ("[The] Southern Manifesto on Integration—a pact made among southern lawmakers to resist racial integration . . . was formally entitled the "Declaration of Constitutional Principles."); Press Release, United States Commission on Civil Rights, Announcing Release of Southern School desegregation, 1966-67 (Aug. 8, 1967), https://www2.law.umaryland.edu/marshall/usccr/documents/pressrel67.pdf [https://perma.cc/YAC3-FC72] ("[V]iolence against Negroes continues to be a deterrent to school desegregation.").

[83] Bell *supra* note 10 at 530 ("[S]ome pupil assignment schemes, [including] 'freedom-of-choice' plans, and similar 'desegregation plans,' were in fact designed to retain constitutionally condemned dual school systems.").

extreme hostility, regardless of whether they contribute to or ameliorate the subordination of vulnerable minority groups.[84]

The segregationists of the New Right favored reactionary colorblindness because it provided for a return to the "equal" protection standard under Jim Crow, through the rhetorical and ideological lens of the New Right. In other words, while reactionary colorblindness is "colorblind" and Jim Crow laws are distinctly race-conscious, both standards represent a type of formal equality that precludes the government from intervening "to ensure that all can make use of their negative freedom."[85] Indeed, after *Brown* it was clear to both segregationists and civil rights leaders, that whether race-conscious or colorblind, mere formal equality would perpetuate racial hierarchy to the extent that racism and the racial inequalities produced by slavery, Redemption, and Jim Crow, remained unremedied.[86]

Prominent segregationists and members of the New Right like Frederick T. Gray unsuccessfully argued for reactionary colorblindness by conflating race-consciousness with formal equality as the feature of equal protection law that enabled the evils of Jim Crow.[87] In other words, the New Right sought to emphasize the shared characteristics of substantive equality and Jim Crow (race-consciousness) while downplaying the similarities between Jim Crow and reactionary colorblindness (formal equality and unequal outcomes), and arguing that the Court's holding in *Brown* abolished race-consciousness, while leaving formal equality intact.[88] However, the federal courts repeatedly rejected this argument because it lacked a coherent justification and the lessons of *Plessy* and the *The Civil Rights Cases* had not yet been

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[84] López, *supra* note 11, at 985.

[85] Sypnowich, *supra* note 24, at 81.

[86] *See, e.g.*, Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 38 (1942) ("[T]he many minority groups in this country are by definition viewed with an irrational suspicion and disfavor by the majority and therefore cannot so effectively use the regular channels of group pressure . . . ."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part) ("The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro."); Lee, *supra* note 29.

[87] *See* Transcript of Oral Argument at 15, Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430 (1968) (No. 695) (Frederick T. Gray for the School Board arguing that in *Brown*, "what the court has done is strike down compulsory segregation, but it has not ordered compulsory integration."); GLAZER, *supra* note 9, at 44 ("The [Civil Rights Act] could be read as instituting into law Judge Harlan's famous dissent in *Plessy v. Ferguson*: 'Our Constitution is color-blind.'"); *but see* Aiken v. City of Memphis, 37 F.3d 1155, 1172 (6th Cir. 1994) (Jones, J., dissenting) ("The Fourteenth Amendment was never intended to impose an absolute standard of color blindness upon our law to the extent that such a standard becomes a bar to the achievement of the purposes of the amendment . . . . Review of [integration] plans under a strict scrutiny standard routinely results in the invalidation of plans which are designed to achieve the vital goal of remedying our nation's history of discrimination. Such an application is clearly antithetical to the Fourteenth Amendment.").

[88] *See, e.g.*, Transcript of Oral Argument, *supra* note 87, at 15. (Frederick T. Gray for the School Board arguing that in *Brown* "I cannot conceive your Honors that *Brown* ordered compulsory integration . . . . [I]t seems to me that we are going full circle . . . .").

forgotten. *North Carolina State Board of Education v. Swann*,[89] for example, held that:

> [T]he [freedom-of-choice] statute exploited an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.[90]

As Martin Luther King Jr.'s "Freedom Campaign" set its sights on the "concentration camp life," to which Blacks had been relegated in the North, the resulting backlash among white moderates began compromising the shared purpose that sustained the alliance between the liberal establishment and the Civil Rights Movement through the 1960s.[91] Indeed, as liberal politicians like Senator Joe Biden began championing laws to restrict cross-district busing, leading neoconservative sociologist Nathan Glazer perfected the theory of ethnicity that would provide a modern and internally coherent justification for resurgent racial inequality.[92] In 1971, President Nixon made his fourth appointment to the Supreme Court—the rumored segregationist William H. Rehnquist—which brought an abrupt end to the ideological lib-

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[89] 402 U.S. 1 (1971).

[90] 402 U.S. 43, 45–46 (1971).

[91] Loic Wacquant, Punishing the Poor, the Neoliberal Government of Social Insecurity, 203 (2004) ("The same liberal whites who had praised and supported [Martin Luther] King when he led marches and organized sit-ins against segregated facilities in the South condemned his tactics as irresponsible and provocative [when he moved to confront the ghetto.]".) The shift of the civil rights campaign from the rural South to the urban North, the sudden rise of separatist Black Power groups spearheading militant demands for Black self-determination, and the rising violence associated with public protests caused white backing for African-American demands to evaporate in a matter of months. And it triggered a virulent backlash that would grow over the next two decades to fuel the . . . abandon[ment] [of] public schools, shunn[ing] [of] mixed public space, and [flight] to the suburbs by the millions to avoid mingling and ward off the specter of "social equality" in the city."); Ryan, *supra* note 61 at 96 ("It was not just conservative southerners and their northern sympathizers who opposed busing the suburbs. Antibusing legislation in the early 1970s was just as likely to come from northern moderates and "liberals" whose suburban constituents faced the prospect of busing for school desegregations."); Marjorie Hunter, *The Nation*, N.Y. Times (Aug. 20, 1972), https://www.nytimes.com/1972/08/20/archives/blacks-will-say-america-lied-to-us-busing.html [https://perma.cc/7YZA-YT3L] ("[N]orthern liberals, once in the forefront of the fights for civil rights, spoke feelingly of the need to halt forced busing of children in the placid suburb[s] and the teeming cities that they represent.").

[92] Glazer, *supra* note 9, at 21-22; López *supra* note 11 at 1004 ("Contemporary color-blindness has its origins . . . in the efforts by northern opponents of affirmative action to craft a conception of racial dynamics in the United States that simultaneously embraced the moral necessity of ending de jure discrimination and yet rejected race-conscious remedies.").

eralism of the Warren Court.[93] This new conservative majority, deeply sympathetic to the arguments of the Massive Resistance Movement and freshly armed with socially acceptable political rhetoric, began the work of reinventing Jim Crow in a post-World War II America.[94]

C. Biology, Ethnicity, and the New Jim Crow

Regents of the University of California v. Bakke[95] was not the first Supreme Court opinion to invoke Glazer's theory of ethnicity, but this was the first time it was elevated to the level of a "constitutional truth." [96] Glazer's theory of ethnicity held that the path towards economic and racial integration "pioneered by white ethnic groups" was available to all, but Blacks and other racial minorities continued to fail because of their pathologically deficient cultures.[97] In this way "ethnicity erased the enormous differences in historical [and contemporary] experience between white immigrants and racial minorities and gave new legitimacy to the belief that not structural disadvantage but inability, now cultural" rather than biological, justified the subordinate position of racial minorities in the U.S.[98] Indeed, like Justice Brown relied on biological race in *Plessy*, Powell used Glazer's theory of ethnicity to reason that racial hierarchy was natural and beyond the powers of the Court, writing:

> The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above,

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[93] Memorandum from William H. Rehnquist to Justice Robert Jackson (1952) ("I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed."); 132 Cong. Rec. 23548 (1986) (testimony of Justice Robert Jackson, the man for whom Rehnquist clerked when writing his pro-*Plessy* memo, that he always instructed his clerks to express their own views); Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. Rev., 631, 651 (2012) ("Rehnquist's negative views about Brown, as captured in his late 1950s writings, are strikingly similar to his 1952 pro-Plessy memo.").

[94] Alexander, *supra* note 5, at 12-13 ("Since the [founding of the U.S.], African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time . . . . With each reincarnation of racial caste, the new system, as sociologist Loic Wacquant puts it, 'is less total, less capable of encompassing and controlling the entire race'. . . . Moreover, as the systems of control have evolved, they have become perfected, arguably more resilient to challenge, and thus capable of enduring for generations to come.").

[95] 438 U.S. 265, 287 (1978).

[96] López, *supra* note 11, at 1043.

[97] Nathan Glazer & Daniel Patrick Moynihan, Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City 24-86 (1963); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 n. 25 (1978) (citing John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro – The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363, 398 (1966) ("[I]nsofar as we are willing to admit that the Negro has a culture, and that it has something to contribute to American life, we must recognize that the more efforts we undertake to compel integration, the more difficult it will be for this culture to survive.")).

[98] López, *supra* note 11, at 1010.

> the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment . . . for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. *There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.*[99]

Through the use of what can fairly be characterized as sociological and political analysis to produce rankings of prejudice experienced by different groups, Powell paradoxically concludes that "[t]he kind of variable sociological and political analysis necessary to produce such rankings" are beyond the Court's capabilities.[100] Moreover, like his ideological forebears, Powell's analysis ignores how white European immigrants benefited from their participation in the "wage of whiteness."[101] Two notable examples are the Roosevelt administration's "New Deal" (which brought unprecedented prosperity to the white working class)[102] and the G.I. Bill, which allowed white veterans to attain the financial security of home ownership and the prestige of higher-education in unprecedented numbers.[103]

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[99] *Bakke*, 438 U.S. at 292 (emphasis added).

[100] *Id.*

[101] *See* Vasiliki Fouka et al., *From Immigrants to Americans: Race and Assimilation during the Great Migration* 3 (Harvard Business School BGIE Unit Working Paper No. 19-018, 2018) ("The establishment of a binary Black-white racial classification reduced the importance of ethnicity and allowed the acceptance of previously discriminated immigrants into the white majority."); Daniel O'Connell, Address to the Loyal National Repeal Association (Oct. 11, 1843) ("How can the generous, the charitable, the humane, the noble emotions of the Irish heart have become extinct amongst you? How can your nature be so totally changed as that you should become apologists and advocates of that execrable system which makes man the property of his fellow man . . . renders the slave hopeless of relief, and perpetuates oppression by law, and in the name of what you call a Constitution?").

[102] Ira Katznelson, When Affirmative Action was White 85 (2005) ("The South was willing to support [the New Deal] provided these statutes did not threaten Jim Crow. So southern members [of Congress] traded their votes for the exclusion of farmworkers and maids, the most widespread Black categories of employment, from the protections offered by these statutes . . . . As a result, these new arrangements were friendly to labor but unfriendly to the majority of African Americans."); Herbert Hill, *The Problem of Race in American Labor History*, 24 Revs. in Am. History, 189, 195 (Jun. 1996) "[R]acial discrimination by employers and white labor unions prevented [Blacks] from advancing through the workplace, the strategy that had been so effective for white ethnics.").

[103] Katznelson *supra* note 102 at 85–87 ("State committees appointed by Southern governors to control these schools start off with the determination that Negro soldiers shall not be trained under [the GI Bill], and they never let up . . . . [The] difference in eligibility was a good deal less significant in shaping the racial qualities of the GI Bill than the way in which its benefits were distributed by the nearly all-white decentralized apparatus charged with its administration . . . [especially] in the realm of education . . . . De facto quotas and . . . high selectivity closed these schools to the vast majority of Blacks qualified for higher education . . . . [Thus] 95 [%] of Black veterans [attended historically Black colleges] . . . . [T]he relative absence of support from southern states left most Black colleges unable to take all the [Black] veterans who qualified . . . . By contrast, 'flagship universities like . . . the University of Texas and the University of Alabama . . . were able to expand rapidly to meet the needs of returning [white] veterans under the G.I. Bill.'").

Even so, Powell's holding inverted the Warren Court's jurisprudence such that the "freedom of choice" plans the New Right used to resist *Brown* became presumptively legal, while the race-conscious affirmative action policies used to implement *Brown* would be presumptively illegal.[104] Notably, Powell's reliance on Glazer's theory of ethnicity enabled him to hold that a limited form of affirmative action was legal, exclusively for the purpose of pursuing "genuine diversity."[105] Powell went on to explain that "genuine" diversity should include "blacks," but also "musicians, football players, physicists [and] Californians."[106] Perhaps unsurprisingly, this proved to be especially controversial, drawing pointed critiques from the left for its incoherent logic and the danger it posed to the educational prospects of nonwhite students, and from the right for its deviation from the precedent set by *Korematsu v. United States*.[107] And indeed, the only plausible rebuttal to any of these critiques is found not in Powell's opinion, but in his implicit acceptance of Glazer's theory of ethnicity, which simultaneously justifies formal equality and its "genuine" diversity exception.[108] Glazer's theory does this, by arguing that culture, rather than race or class, is the most significant feature of American social life.[109] If one accepts this premise, it follows that rather than *racial* remediation, something like Powell's "genuine" diversity should be the normative end of representational justice in higher education.[110] The Supreme Court remained divided for years after *Bakke*, but ultimately Powell's holding was affirmed by a "politically conservative yet judicially activist" majority in *Richmond v. J.A. Croson Company*,[111] which currently serves as the basis of contemporary constitutional race law.[112]

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[104] *See* López, *supra* note 11, at 1061 ("As it currently stands, constitutional race law is a disaster. It approaches the problem of race in our society exactly backwards, almost invariably striking down efforts to respond to racial hierarchy while insulating from more than cursory review state policies that disproportionately harm minorities.").

[105] *Bakke*, 438 U.S. at 315, 320 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element . . . . [This] may be served by a properly devised admissions program"); *see also* López, *supra* note 11, at 1040–41 ("[Powell] rejected fostering integration or responding to societal discrimination as compelling interests, but held that encouraging racial diversity satisfied strict scrutiny. Many commentators find [the] two halves [of Powell's opinion] difficult to square . . . . No contradiction divides these two parts of Powell's opinion, however, if one accepts his vision of race as ethnicity.").

[106] *Bakke*, 438 U.S. at 437.

[107] 323 U.S. 214 (1944); *see* López, *supra* note 11, at 1040–41.

[108] *See id*; *Bakke*, 438 U.S. at 292.

[109] *See* GLAZER, *supra* note 8, at 21–22.

[110] *See* Lopez, *supra* note 11, at 1040.

[111] 488 U.S. 469 (1989).

[112] *See id.*; *see also, e.g.,* Fullilove v. Klutznik, 448 U.S. 448, 482 (1980) ([W]e reject the contention that, in the remedial context, the Congress must act in a wholly "color-blind" fashion . . . . 'In this remedial process, steps will almost invariably require that students be assigned differently because of their race. Any other approach would freeze the status quo that is the very target of all desegregation processes.'") (quoting McDaniel v. Barresi, 402 U.S. 39 (1971)).

Today, as ongoing judicial backlash to the Civil Rights Movement has virtually eliminated cross-district busing,[113] dismantled local court supervision of desegregation plans,[114] and further restricted the use of race-conscious affirmative action in all of its forms,[115] the re-segregation of American institutions, including the educational system, has progressed rapidly and shows no signs of slowing down.[116] Further, because the unjust impoverishment, segregation, and mis-education of racial minorities remains unremedied,[117] and widespread racial animus remains prevalent among whites,[118] segregation virtually always means schools characterized by "concentrated poverty" for every racial group in the U.S. besides whites.[119] "Concentrated

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[113] *See, e.g.*, Milliken v. Bradley 418 U.S. 717 (1974) (holding that district lines can only be crossed to integrate schools under extraordinary circumstances).

[114] Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT., 876, 877 (Fall, 2012) ("[O]ver half of all districts ever under court-ordered desegregation have been released . . . in the last 20 years . . . . [A]fter being released from court oversight, school districts become steadily more racially segregated.").

[115] *See e.g.,* Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014) (holding that individual states can ban affirmative action by voter referendum).

[116] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,041 app. at 26,062 (1996) (proposed May 23, 1996) ("In the immediate aftermath of [the *Croson* decision], state and local governments scaled back or eliminated altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers to minority opportunity and to correct for chronic underutilization of minority firms. As a result of this retreat from affirmative action, minority participation in state and local procurement plummeted quickly."); Reardon et al., *supra* note 114, at 877–78.

[117] *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 713 (1990) ("Race is, at present, a rough but adequate proxy for connection to a subordinated community."); William Elliott, Elizabeth Burland, Briana Starks & Trina Shanks, White Americans Have a Reason to Be Mad About Wealth Inequality 19, 24 (U. Mich. Ctr. on Assets, Educ., & Inclusion, Working Paper 2019) (in the U.S. today the wealth of the average white family is roughly $444,000 while the average Black and Latino family has less than $73,000. However, the extremely high figure for average wealth among white families masks severe and worsening wealth inequality among white Americans themselves such that the median wealth among the top 20% of white families is $1,115,779 while the median wealth among the bottom 20% is $14,727); *but see generally* JOHN TATEISHI, REDRESS: THE INSIDE STORY OF THE SUCCESSFUL CAMPAIGN FOR JAPANESE AMERICAN REPARATIONS (2020).

[118] *See, e.g.*, Betsy Woodruff Swan, *DHS draft document: White supremacists are greatest terror threat*, POLITICO (Sept. 4, 2020), https://www.politico.com/news/2020/09/04/white-supremacists-terror-threat-dhs-409236 [https://perma.cc/57TV-NCWK] ("White supremacists present the gravest terror threat to the [U.S.], according to a draft report from the Department of Homeland Security."); Lee, *supra* note 29; David A. Graham, *This Is a Coup*, ATL., (Jan. 6, 2020), https://www.theatlantic.com/ideas/archive/2021/01/attempted-coup/617570/ [https://perma.cc/J63L-G3U9] ("Insurrectionists are attacking the seat of American government in an attempted coup . . . . Some carried Confederate battle flags as they got much closer to the heart of the U.S. government than any Confederate troop ever did.").

[119] GARY ORFIELD & DIANE GLASS, HARV. PROJECT ON SCH. DESEGREGATION, *Asian Students and Multiethnic Desegregation* 12, 21 (Oct. 1994) ("A basic fact of African American and Latino segregation in U.S. public schools is that segregation by race usually equals segregation by poverty. . . . . [However, Asians] have little contact in schools with [Black] students and the largest minority group they confront in their schools is other Asians. Since Asians have higher educational attainment levels than whites this form of 'segregation' often brings disproportionate exposure of Asian students to high achieving students and school not inferior edu-

poverty" in turn is shorthand for a constellation of inequalities[120] that profoundly disadvantage students at majority-minority schools in the U.S. to this day.[121] This artificially constructed disadvantage is reflected in the consistently lower "academic" ratings that are used to justify the mass exclusion of Black, Latino, Native American, and Southeast Asian students from elite universities.[122]

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cation."); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/ [https://perma.cc/97JL-DLMS] ("Two-thirds of [racial] minority students still attend schools that are predominantly [non-white], most of them located in central cities and funded well below those in neighboring suburban districts. . .on every tangible measure . . . schools serving greater numbers of students of color had significantly fewer resources than schools serving mostly white students."); COLEMAN, *supra* note 67, at 99 ("Since large proportions of ethnic minority groups are in the lower socioeconomic levels, one might expect proportionately more of the minority group children to need special attention to overcome educational disadvantages.").

[120] *See* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, 7 RACE & SOC. PROBS. 21, 21 (2014) ("Social and economic disadvantage—not only poverty, but a host of associated conditions—depresses student performance. Concentrating students with these disadvantages in racially and economically homogenous schools depresses it further. Schools that the most disadvantaged Black children attend are segregated because they are located in segregated high-poverty neighborhoods . . . ."); Coleman, *supra* note 67, at 325 ("[T]he social composition of [a school's] student body is more highly related to student achievement, independent of the student's own social background, than is any school factor."); DARLING-HAMMOND, *supra* note 6, at 37 ("[S]tudents who are not low-income have lower achievement in high-poverty schools than do low-income students attending more affluent schools").

[121] Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 3, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908) ("More often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning. No doubt as a result of these disparities, measures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentages of nonwhite students.").

[122] *See* Julie J. Park, *Interest Convergence, Negative Action, and* SFFA vs. Harvard, 17 ASIAN AM. L.J. 13, 13 (2019); *Affirmative Action and Asian Americans*, Asian-Nation: The Landscape of Asian America, (Oct. 28, 2020), http://www.asian-nation.org/affirmative-action.shtml#sthash.qPGqyi8y.JeheOivF.dpbs [https://perma.cc/UU7S-BNEW] ("[A] student's scores – academic, personal, extracurricular, athletic, and overall—are the strongest predictors of admissions."); Andrew Howard Nichols, *Segregation Forever? The Continued Underrepresentation of Black and Latino Undergraduates at the Nation's 101 Most Selective Public Colleges and Universities*, EDUC. TRUST (Jul. 21, 2020), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf [https://perma.cc/MA9G-GNAU] ("[T]he overwhelming majority of the nation's most selective public colleges are still inaccessible for Black and Latino undergraduates.").

III. The Evolution of Ideology

Sociologist William Petersen coined the term "model minority" in 1966.[123] He, like Glazer, argued that the successes of Japanese Americans proved that innate cultural differences, such as attitudes towards hard work and family stability, were the primary cause of racial hierarchy in the U.S.[124] This idea gained popularity because of its utility as a response to the Soviet Union's portrayal of the U.S. as the most racist nation in the world.[125] However, Glazer's theory of ethnicity justifies both formal equality *and* its "genuine" diversity exception; SFFA's and the Trump DOJ's anti-affirmative action lawsuits rely upon the "model minority" myth to challenge the "genuine" diversity exception without encroaching upon the normative foundation of formal equality.[126] Further, while the Court has drifted away from the explicitly ethnic analysis used in *Bakke* and towards a "formal approach in which race is recognized as functioning only when explicitly invoked," both the practical consequences and ideological implications remain unchanged.[127]

Glazer's theory of ethnicity and the model minority myth are contradictory; the former centers culture and ethnicity as the primary determinants of social status in the U.S., while the latter relies upon the erasure of Asian

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[123] *See* William Peterson, *Success Story, Japanese American Style*, N.Y. Times Mag. (Jan. 9, 1966), https://www.nytimes.com/1966/01/09/archives/success-story-japaneseamerican-style-success-story-japaneseamerican.html [https://perma.cc/DQ3N-NV2N] (citing higher-educational attainment, lower crime rates, and longer life expectancy as proof of Japanese exceptionalism).

[124] *See id.*; *but see* Chou & Feagin, *supra* note 13, at 107 ("[T]he strong academic orientations and accomplishments of Japanese Americans during the 1950s and 1960s were often an intentional reaction to the *extreme* racial oppression they had recently suffered at the hands of many whites."); Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Calif. L. Rev. 1241, 1258–1264 (Oct. 1993) ("[T]he dominant culture's belief in the 'model minority' allows it to justify ignoring the unique discrimination faced by Asian Americans. The portrayal of Asian Americans as successful permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans . . . . To accept the myth of the model minority is to participate in the oppression of Asian Americans.").

[125] *See* Robert G. Lee, *The Cold War Origins of the Model Minority Myth, in* Asian American Studies Now: A Critical Reader 256 (Jean Yu-wen Shen Wu & Thomas C. Chen, eds., 2010) ("[The growing portrayal of Asian Americans as] the paragon of ethnic virtue . . . [during the 1960s] reflected not so much Asian success as the triumph of an emergent discourse of race in which cultural difference replaced biological difference as the new determinant of social outcomes."); Madeline Y. Hsu & Ellen D. Wu, "*Smoke and Mirrors": Conditional Inclusion, Model Minorities, and the Pre-1965 Dismantling of Asian Exclusion* 34 J. of Am. Ethnic History 43, 43 (2015) ("[Asians were recast] as desirable immigrants and model minorities. . .[and] the segregationist principles of Asian Exclusion unraveled with the geopolitical alliance of World War II and Cold War era immigration and racial reforms.").

[126] López, *supra* note 11, at 1051.

[127] *Id.* at 1061; *Social Darwinism*, Oxford Languages (2020) ("[T]he theory that individuals, groups, and peoples are subject to the same Darwinian laws of natural selection as plants and animals. Now largely discredited, social Darwinism . . . was used to justify political conservatism, imperialism, and racism and to discourage intervention and reform.").

ethnic and cultural diversity to the same effect.[128] However, there is no monolithic "Asian" culture, and educational outcomes do not correspond to cultural similarities among Asian Americans to the extent that they exist, but rather to structural inequality (as reflected by the Coleman factors).[129] The contradiction at the heart of these now infamous lawsuits rests upon a double standard premised upon the myth of Asian American homogeneity.[130] This section demonstrates how an analysis of Asian American educational outcomes that treats Asian and white ethnic diversity with equal regard tends to confirm rather than deny the propriety of race conscious affirmative action as a remedy for structural inequality.[131]

A. Structural Inequality, Immigration Law, and the Coleman Report

During and prior to Jim Crow, eugenicists crafted American immigration laws, seeking to maintain the "racial purity" of the U.S. by heavily restricting immigration from Eastern Europe and excluding most nonwhite immigrants entirely.[132] Like all nonwhite people living in the U.S., Asian immigrants were generally despised and seen as unintelligent foreigners who

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[128] *See* CHOU & FEAGIN, *supra* note 13, at 15 ("[T]oday Asian American groups . . . still face significant obstacles to academic success, in some cases more than in the past.").

[129] William Han, *For Asian-Americans, the Trump Administration's Attack on Affirmative Action Presents a Faustian Bargain,* S. CHINA MORNING POST (Aug. 16, 2020), https://www.scmp.com/week-asia/opinion/article/3097580/asian-americans-trump-administrations-attack-affirmative-action [https://perma.cc/7B6L-YCBG] ("Half of the world's population comes from the vast land mass called Asia. There is the Indian there is the Indonesian, there is the Korean and there is the Khmer: there is no Asian. Any similarities among them are purely in the eye of the (Western) beholder."); *see* CHOU & FEAGIN, *supra* note 13, at x ("Many of our first-generation respondents never identified as 'Asian' or 'Asian American' until they were treated as racialized 'others' during their early months in the United States."); Charles Lam, *Asian Americans Now Most Economically Divided Group in U.S., Report Finds*, NBC NEWS (July 11, 2018), https://www.nbcnews.com/news/asian-america/asian-americans-now-most-economically-divided-group-u-s-report-n890646 [https://perma.cc/5LQP-2546].

[130] *See* CHOU & FEAGIN, *supra* note 13, at 19 ("By lumping all Asian descent groups together and attributing certain distinctively 'Asian' cultural values to them . . . the model minority myth sets Asian Americans apart as a distinct racial-cultural 'other.'").

[131] United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 185 (1977) (Burger, C.J. dissenting) ("The 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denomination. It simply cannot be assumed that the legislative interests of all 'whites' are even substantially identical."); Complaint at 8, United States v. Yale U. ("For purposes of this Complaint, references to Asian applicants exclude racially-favored Asian applicants . . . such as applicants who identify as Cambodian, Hmong, Laotian, or Vietnamese.").

[132] *See* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 423 (1988) ("Eugenicists were successful in promoting [racially] restrictive laws at both the state and federal levels . . . [This included the] Immigration Restriction Act of 1924 . . . . [This also included the] the Racial Integrity Act of 1924 . . . ."); *see also id.* at 424 n. 16; then quoting DANIEL KEVLES, IN THE NAME OF EUGENICS 100 (1985)) ("[E]ugenicists never launched a formal campaign" in support of legal change, but formed "part of a coalition that put the laws on the books, and they provided prior (or, at times, post hoc) biological rationalizations for what other interest groups wanted.") (quoting MARK HALLER, EUGENICS, HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 158 (1984).

worked menial jobs for low wages.[133] Asian cultures were seen not as a harbinger of success, but as a marker of extreme difference that justified harsh treatment and legal discrimination.[134] Yet the same incentives that gave rise to *Brown* and the Civil Rights Act also facilitated the passage of the Immigration and Naturalization Act of 1965, which led to an influx of highly-educated and skilled immigrants primarily from East Asia and India.[135] Further, because the legal mechanisms that prioritize highly educated immigrants over their lesser educated peers do not apply to refugees, the Asian American community rapidly became a microcosm of structural inequality rather than a monolithic "model" minority.[136]

The evidence shows clearly that the Coleman factors (particularly, parental education and the socioeconomic class of a student's peer group), rather than culture or any other innate racial characteristic, determine educational outcomes not only between, but within racial groups.[137] Families from immigrant groups that tend to be highly educated also come "armed with the human capital and economic resources" to settle in better neighborhoods with vastly superior schools.[138] While less significant than the Coleman factors themselves, the superior teachers, facilities, and educational opportuni-

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[133] *See* CHOU & FEAGIN, *supra* note 13, at 7 ("[F]rom the 1950s onward, the first Asian Americans, the Chinese, were stereotyped by white officials and commentators as 'alien,' dangerous,' 'docile,' and 'dirty' . . . . [This] had precedents in earlier white views of African Americans and Native Americans.").

[134] *See* Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . . I allude to the Chinese race."); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (Harlan, J., dissenting) ("[Chinese people are]of a distinct race and religion, apparently incapable of assimilating with our own people, who might endanger good order, and be injurious to the public interests."); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58.

[135] *See* Lee, *supra* note 124 at 148-151; Michael G. Davis, *Impetus for Immigration Reform: Asian Refugees and the Cold War*, 7 J. AM.–E. ASIAN RELS. 127, 127-129 (Winter 1998) ("The 1965 Immigration Act terminated the nation's long-standing tradition of restricting and discriminating against Asian Immigration. . .[the drafters] worried about the problems that a discriminatory immigration policy created for the prestige of the United States. . . .The dramatic increase of post-1965 Asian immigration. . .should be seen as an unintended consequence of American Cold War foreign policy").

[136] *See* Stacy Kula & Susan J. Paik, *A Historical Analysis of Southeast Asian Refugee Communities: Post-war Acculturation and Education in the U.S.*, 11 J. S.E. ASIAN AM. EDUC. & ADVANCEMENT 1, 1 (2016) ("Southeast Asian refugee immigration [occurred] following the Vietnam War . . . . [T]heir limited job skills, English language knowledge, and education upon arrival were exacerbated by overall prejudiced societal reception . . . . All groups have generally experienced low academic achievement . . . .").

[137] *See* Coleman, *supra* note 67 at 325.

[138] Jennifer Lee, *It Takes More than Grit: Reframing Asian American Academic Achievement*, SOC. SCI. RSCH. COUNCIL (Jan. 2018), https://items.ssrc.org/from-our-programs/it-takes-more-than-grit-reframing-asian-american-academic-achievement/ [https://perma.cc/GQP4-SV6Z]; *see also* Kula & Paik, *supra* note 136, at 11.; *see also* Sen Nguyen, *Asian-Americans Divided on Yale Affirmative Action Case*, S. CHINA MORNING POST (Aug. 20, 2020), https://www.scmp.com/week-asia/people/article/3098023/asian-americans-divided-yale-affirmative-action-case [https://perma.cc/78MU-6DUJ] ("Hmong, Cambodian and Laotian refugees [the groups admitted under the Indochinese Refugee Act of 1975,] 'dispersed into poor neighborhoods with low-achieving peers' and a lack of residents of the same ethnicity . . . . Government assistance focused on helping them with survival rather than advancement . . . .").

ties offered by suburban schools further compound structural inequality as reflected by common measures of educational outcomes.[139] For example, although China and Cambodia share a Confucian cultural orientation, Chinese American students achieve some of the highest educational outcomes of any racial group, while Cambodian American students attain among the lowest educational outcomes.[140] Chinese American students are disproportionately suburban, and descended from wealthy, highly educated, non-refugee immigrants, while Cambodian American students are disproportionately urban, and descended from poor, less educated, refugee immigrants.[141] Further, were race itself, rather than structural inequality, outcome determinative, we would be able to observe consistent rates of achievement among Asian immigrants to all countries, yet this is simply not the case.[142]

B. Understanding the "Asian Penalty"

In the same way that there is no one monolithic Asian culture, there is not a single type of "Asian Penalty" at American universities. While Southeast Asian Americans and Pacific Islanders tend to be excluded on the basis of artificially low academic ratings, East Asian and Indian American students tend to be excluded in spite of their disproportionately high Academic ratings; a phenomenon referred to as "Negative Action."[143] Even so, many

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[139] *See* Nguyen, *supra* note 138; Karl Alexander, *Is It Family or School?*, 2 RUSSEL SAGE FOUND. J. SOC. SCIS. 18, 19 (2016) "[I]n the tug of war between family and school in shaping children's academic development, family wins. And it is a decisive victory."); ORFIELD & GLASS, *supra* note 119, at 25 ("[C]ompared to other minority groups, Asian students have lower proportions attending high poverty schools . . . . [However,] recent immigrants from Southeast Asia[ ] . . . . are much more likely to be confronting the characteristic problems of schools with [concentrated poverty].").

[140] *See* Nguyen, *supra* note 138.

[141] *See, e.g. Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Committee on the Judiciary*, 102nd Congress 969–76 (Sept. 20, 1991) (Statement of William Hou) ("[The National Asian Pacific-American Bar Association's] second concern is Judge [Clarence] Thomas' portrayal of Asian Pacific [A]mericans as a minority group whose accomplishments justify opposition to affirmative action. Specifically, Judge Thomas has asserted that because Asian Pacific-Americans have 'substantially greater family income than whites,' they have 'transcended the ravages caused even by harsh legal and social discrimination.' He has also stated that Asian Pacific-[A]mericans should not be the beneficiaries of affirmative action because they are 'overrepresented.'"); *but see* Chang, *supra* note 124, at 1262 ("[R]eliance on median family income as evidence for lack of discriminatory effects is misleading. It does not take into account the fact that Asian American families have more workers per household than do white families; in fact, 'more Asian American women are compelled to work because the male members of their families earn such low wages.'"); Carlos Echeveria-Estrada & Jeanne Batalova, Chinese Immigrants in the United States, MIGRATION INFO. SOURCE (Jan. 15, 2020) (explaining that 51% of Chinese immigrants to the U.S. are college-educated compared to 28% of American adults and 4% of Chinese adults).

[142] *See* ALEJANDRO PORTES ET AL., SPANISH LEGACIES: THE COMING OF AGE OF THE SECOND GENERATION 139 (2016) (explaining that while second-generation Chinese immigrants excel in the U.S., they exhibit the lowest educational aspirations and expectations of all racial groups in Spain).

[143] Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 1, 3 (1996) ("[N]egative action against Asian Americans is in force if a university denies admissions to an

schools, e.g., the University of California, Berkeley,[144] continue to lump all Asian Americans into one monolithic category.[145] Some schools, however, like Yale, distinguish among Asian ethnic groups, and are thereby able to use affirmative action to compensate for the structural barriers facing many Southeast Asian applicants.[146] Indeed, affirmative action is capable of providing vital protections for Southeast Asian applicants; requiring all universities to disaggregate the category of "Asian," would immediately improve educational equity for Southeast Asian students.[147] However, nothing in SFFA's lawsuit acknowledges the connection between affirmative action and equity for Southeast Asian students, while the Trump DOJ's lawsuit actually excludes Southeast Asians from its definition of the term "Asian."[148]

C. Affirmative Action for the Rich

Today at elite universities, there are more students from families in the top 1% of the wealth hierarchy than the entire bottom 60%.[149] Indeed, re-

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Asian American who would have been admitted had that person been White . . . . [T]he fact that an Asian American would have been admitted had she been some other racial minority is irrelevant to the specific question whether negative action against Asian Americans is in place."); *see, e.g.*, Note, *The Harvard Plan that Failed Asian Americans*, 131 HARV. L. REV. 604, 606 (Dec. 7, 2017) ("[I]n order to be admitted to certain selective institutions, Asian applicants needed to score . . . 140 points higher than whites.").

[144] In 1996 California voters approved Proposition 209, a state constitutional amendment that effectively banned the use of affirmative action and thereby any consideration of race or ethnicity at all public universities. *See, e.g.*, Vinay Harpalani, *What the California Vote to Keep the Ban on Affirmative Action Means for Higher Education*, CONVERSATION (Nov. 10, 2020), https://theconversation.com/what-the-california-vote-to-keep-the-ban-on-affirmative-action-means-for-higher-education-149508 [https://perma.cc/BRZ9-6ZRA].

[145] *See* CHOU & FEAGIN, *supra* note 13, at 19; Theodora Chang, *Debunking the Myth of 'Homogeneous' Asian Students*, CTR. FOR AM. PROGRESS (2011), https://www.educationworld.com/a_admin/debunking_myth_of_homogeneous_asian_students.*shtml* [https://perma.cc/H7C4-AELD] ("Popular media would have us believe that all Asian American and Pacific Islander students are part of the 'model minority' or are parented by 'tiger moms' who push them towards overachievement in areas such as math and music. The common assumption is that Asian American and Pacific Islander students excel in school without any outside help. The fact is that these students are far from homogenous when it comes to academic achievement, and actually share [many of] the educational challenges facing other students of color".)

[146] *See* Complaint at 8, United States v. Yale, *supra* note 131 ("Yale favors some applicants because of their race . . . includ[ing] applicants who identify, at least in part, as Black, Hispanic, Native American, or Pacific Islander . . . Cambodian, Hmong, Laotian, or Vietnamese").

[147] *See* Ashley Chen, *Why Data Disaggregation Matters for Asian-Americans*, BROWN POL. REV. (Mar. 18, 2018), https://brownpoliticalreview.org/2018/03/data-disaggregation-matters-asian-americans/ [https://perma.cc/EHS2-53NL] ("Asian-Americans speak different languages, practice different religions, and come from different cultural backgrounds, and the consequences of that heterogeneity are unequal outcomes . . . . [Data disaggregation is] a necessary step towards developing public policy that acknowledges and responds to the unique needs of historically marginalized [Asian-ethnic] subgroups."); Coleman, *supra* note 67, at 99 ("Exceptional children need special services appropriate to their particular needs or talents.").

[148] *See generally* Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-cv-14176-DJC); Complaint, U.S. v. Yale U., *supra* note 131.

[149] T. Liam Murphy, *Scrutinizing Legacy Admissions: Applying Tiers of Scrutiny to Legacy Preference Policies in University Admissions*, 22 U. PA. J. CONST. L. 315, 316 (2019).

search shows that the ALDC factors (athletics, legacies, dean's list, and children of faculty and staff) alone artificially inflate the number of wealthy and white students at elite universities by over 30%.[150] Further, research shows clearly that the only beneficiaries of discrimination against poor and non-white applicants—including both Negative Action and structural inequality—are these same children of extreme privilege, who disproportionately populate elite American Universities.[151] The Trump DOJ and SFFA both locate the source of the "Asian Penalty" in race-conscious affirmative action, because they rely on the model minority myth in place of meaningful analysis.[152]

Ending race-conscious affirmative action as proposed by the Trump DOJ and SFFA is unlikely to have a cognizable impact on Negative Action or structural inequality, but likely *will* have a cognizable impact on the law of employment, wherein Asian Americans—Asian women in particular—tend to derive the greatest benefits from affirmative action among all minority groups.[153] One study that observed employment rates for twelve years across

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[150] Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. ECON. 133, 137–38 (June 3, 2020) (explaining that 43% of white admitted students at Harvard College are athletes, legacies, on the Dean's list or children of Harvard faculty, while less than 16% of non-white applicants receive such bonuses, and that roughly 75% of white admits would have been rejected without ALDC bonus); *see also* Murphy, *supra* note 149, at 315 ("Children of alumni, or legacy applicants, are as much as five times more likely to be admitted into prestigious universities than non-legacy applicants."); Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), https://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/ [https://perma.cc/KJQ2-B27X] (explaining that students on the Dean's interest list are 9 times more likely to be admitted and are overwhelmingly the white and wealthy children of donors).

[151] *Affirmative Action*, ASIAN NATION (last visited August 10, 2022) http://www.asian-nation.org/affirmative-action.shtml#sthash.W04CVLWM.dpbs [https://perma.cc/9NPN-8ZX9] ("[N]ational research showed that . . . . Asian Americans were still the targets of discrimination . . . [but] the real beneficiaries of this were not other racial/ethnic minorities, but the children of alumni at elite universities."); Feingold, *supra* note 14 at 710 ("[T]he actual beneficiaries of Harvard's Asian penalty . . . [are] Harvard's *White* students, who effectively reap a "White bonus" at the expense of their Asian-American counterparts."); ORFIELD & GLASS, *supra* note 119, at 21 ("Many of the educational inequalities connected with racial segregation are no doubt the consequences of the enormous social and economic differences—which themselves are deeply shaped by earlier discrimination against the students' parents.").

[152] *See, e.g.*, Complaint at 3, Students for Fair Admissions, Inc. v. Harvard Coll., No. 14-cv-14176-ADB (D. Mass., Nov. 17, 2014) ("Today [Harvard uses affirmative action] to hide intentional discrimination against Asian Americans . . . . It is not a lack of non-academic achievement that is keeping [Asian applicants] from securing admission. It is Harvard's dominant use of [affirmative action] to their detriment.").

[153] *See* Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. BUS. L. 451, 456 (2004) (explaining that Bakke established the "parameters of permissible affirmative action programs in both admissions and employment," and the outcome of future admissions decisions "should be expected to have some cognizable impact on the jurisprudence of affirmative action in employment."); Jennifer Lee & Van C. Tran, *Asian Americans May Have an Educational Advantage, but They Face a 'Bamboo Ceiling' at Work*, L.A. TIMES (Feb. 21, 2019), https://www.latimes.com/opinion/op-ed/la-oe-lee-asian-american-attainment-gap-20190221-story.html [https://perma.cc/4WQW-U9PR] ("U.S.-born Asians have a distinct educational advantage over whites. But this competitive advantage disappears in the labor market, where we find clear evidence of an attainment gap . . . . Affirm-

four states that repealed affirmative action found that rates of employment in state and local government for Black women, Latino men, and Asian women declined on average by 4%, 7%, and 37%, respectively, while the number of white men rose by 4.7%.[154]

D. The Model-Minority Myth and the New Cold War

In an address given over thirty years ago to the Asian Law Caucus, Mari Matsuda explained that the ruling class often demonizes the "racial bourgeois" in order to shield itself from blame during times of crisis.[155] Further, from the American colony in the Philippines to the American wars in Korea, Vietnam, and Laos, American imperialism and domestic violence against Asian Americans has always been deeply connected.[156] For example, in the early 19th century, the portrayal of Asians as bearers of disease was used not only to justify the American colony in the Philippines, but also the burning of a Chinatown hamlet in Santa Ana.[157] Vietnamese who fled their

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ative action has helped women, especially white women, begin to break through the glass ceiling. It can do the same for Asian Americans . . . . [Asian Americans] find that college degrees—even ones from elite universities—do not open as many doors for them as for their white peers."); Wendy Leo Moore, *Affirmative Action Benefits White Women Most*, TEEN VOGUE (Mar. 30, 2022), https://www.teenvogue.com/story/affirmative-action-who-benefits [https://perma.cc/847H-WJVU] ("It can be difficult to measure the extent to which different groups have benefited from affirmative action . . . . But there are clear structural indicators that reveal that white women have benefited from these policies more than any other group.").

[154] Fidan Ana Kurtulus, *The Impact of Eliminating Affirmative Action on Minority and Female Employment: A Natural Experiment Approach using State-Level Affirmative Action Laws and EEO-4 Data*, (Upjohn Institute, Working Paper No. 15-221, 2013).

[155] Matsuda, *supra* note 13, at 154 ("Another classic way to use the racial bourgeoisie is as America's punching bag. There is a lot of rage in this country, and for good reason. Our economy is in shambles. Persistent unemployment is creating new ghost towns, new soup kitchens, from coast to coast. The symptoms of decay . . . . From out of this decay comes a rage looking for a scapegoat, and a traditional American scapegoat is the oriental menace.").

[156] *See, e.g.*, CHOU & FEAGIN, *supra* note 13, at 8–9 ("[T]he white view of the Chinese and of Koreans became more negative with the new conflicts that developed after World War II. With the rise of state communism in China in the late 1940s, Cold War stereotyping again positioned the Chinese, and by implication Chinese Americans, as "dangerous Orientals" in many white minds. Moreover, the U.S. intervention in Korea in 1950 was accompanied by emergency congressional legislation that gave the U.S. attorney general the authority to set up new concentration camps for Koreans, Chinese, and other Asians who might be perceived to be a domestic threat. The U.S. intervention in Korea, and later in Vietnam, further perpetuated an intensive racist stereotyping and framing of Asians and Asian Americans in the minds of many white and other non-Asian Americans.").

[157] Susan Sontag, *AIDS and Its Metaphors*, N.Y. REV. (Oct. 27, 1988) ("xenophobic propaganda has always depicted immigrants as bearers of disease"); WARWICK ANDERSON, COLONIAL PATHOLOGIES: AMERICAN TROPICAL MEDICINE, RACE, AND HYGIENE IN THE PHILIPPINES 69 (2006) ("At the end of the Spanish American War [and the acquisition of the Philippines] the United States was confronted with large responsibilities in the field of tropical sanitation . . . an entire nation had to be rehabilitated . . . so long as the Oriental was allowed to remain disease ridden, he was a constant threat to the Occidental." (quoting Victor G. Heisen)); History: SANTA ANA, Chinatown Torched in Ugly '06 Incident, L.A. TIMES (May 31, 1993), https://www.latimes.com/archives/la-xpm-1993-05-31-me-41995-story.html [https://perma.cc/F6WA-PYHS] ("'They wanted to get rid of Chinatown and they just deliberately burned it down' . . . . [Because] they concluded, the entire enclave was a threat to the public health.").

homeland during the Vietnam War were met in Texas by xenophobic locals who enlisted the Ku Klux Klan in a campaign of violence and intimidation aimed at curtailing their participation in the labor market.[158] Most recently, this phenomenon can be observed in the efforts of American politicians to blame the Communist Party of China for the preventable deaths of over 1,000,000 Americans during the COVID-19 crisis (rather than acknowledging the obvious shortcomings of for-profit health care) and the corresponding spike in anti-Asian violence in the U.S.[159] Any ruling in favor of SFFA would further perpetuate the racist myths and misinformation that are endangering the lives of Asian-Americans today and have done so throughout American history.[160]

Conclusion

As the relatively moderate post-war Republican administrations gave way to unbridled neoliberalism, an alliance of billionaires, powerful corporations and their political representatives enriched themselves by subjecting

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[158] *See, e.g.*, Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981).

[159] *See, e.g.*, Alexandra Stevenson, *Senator Tom Cotton Repeats Fringe Theory of Coronavirus Origins*, N.Y. Times (Feb. 17, 2020), *https://www.nytimes.com/2020/02/17/business/media/coronavirus-tom-cotton-china.html* [https://perma.cc/8A9W-YG4R] ("The rumor appeared shortly after the new coronavirus struck China and spread almost as quickly: that the outbreak now afflicting people around the world had been manufactured by the Chinese government. The conspiracy theory lacks evidence . . . . But it is the sort of tale that resonates with an expanding chorus of voices in Washington who see China as a growing Soviet-level threat to the United States, echoing the anti-Communist thinking of the Cold War era."); Kurt Bardella, *Trump and the GOP Put a Bull's-Eye on the Backs of Asian-Americans*, L.A. Times (Mar. 17, 2021), https://www.latimes.com/opinion/story/2021-03-17/asian-americans-coronavirus-hate-assaults-bigotry [https://perma.cc/KD5D-2NPF] ("In their effort to find a scapegoat for the coronavirus, Republicans effectively put a bull's-eye on the back[ ] of [the Asian-American] community."); Countering Chinese Communist Party Malign Influence Act, H.R. 7937, 116th Cong. (2nd Sess. 2020); ArLuther Lee, *Only 14 Republicans Voted to Denounce Racism, Violence; Remainder Called Democratic Effort 'Woke Culture on* Steroids,' Atlanta J. Const. (Mar. 18, 2021), https://www.ajc.com/news/last-year-gop-assailed-bill-condemning-violence-against-asians/2YB75WY4QVEEFBTVMIO6EJSTOQ/ [https://perma.cc/SCY6-FUFN] ("Six months before a shooting spree . . . left eight dead, including six Asian women, House Democrats passed a resolution condemning racism and violence against Asian Americans . . . . [But most House Republicans] called the legislation an election-year effort to slam then-President Donald Trump, who regularly used inflammatory phrases like 'the China Virus,' 'Wuhan Virus,' and 'Kung Flu' to fault China for the unabated death toll in the United States."); Owain David Williams, *COVID-19 and Private Health: Market and Governance Failure*, 63 Dev. 181, 181–82 (Nov. 17, 2020) ("Neoliberal austerity and retreat of the state from health systems have eroded publicly provided health systems and capacities . . . . The private healthcare service and business model has proven disastrous for coordinated national pandemic responses in a number of countries.").

[160] *See* Collins, *supra* note 7, at 50; Gramsci, *supra* note 9, at 246-47; Arpana Gupta, Dawn M. Szymanski & Frederick T.L. Leong, *The "model minority myth": Internalized racialism of positive stereotypes as correlates of psychological distress, and attitudes toward help-seeking*, 2 Asian Am. J. Psych. 101, 109 (2011) ("The findings of this study revealed that higher levels of endorsement of positive Asian stereotypes were related to higher levels of psychological distress. . . . [Additionally they] may be related to . . . more negative attitudes toward help-seeking.").

workers to longer hours for less pay in more dangerous conditions, gutting the social safety net, lowering taxes on themselves, and slashing spending on public goods including national parks, healthcare, and education.[161] Like the Redeemers, neoliberals have relied upon the ideology of race to stifle the working class's capacity to mobilize against their own exploitation.[162] Indeed, Glazer's theory of ethnicity, the model minority myth and even biological race persist to this day,[163] not because of their legitimacy, but because of their utility to American elites as mystifying ideologies that deepen racial divisions by positioning colorblindness, rather than substantive equality, as the normative end of racial justice.[164]

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[161] *See, e.g.*. David Jacobs & Lindsey Myers, *Union Strength, Neoliberalism, and Inequality: Contingent Political Analyses of U.S. Income Differences since 1950*, 79 AM. SOC. REV. 752, 753 (2014) ("[B]efore the politically induced decline in union strength . . . unions probably were the most effective advocate for public policies advantageous to the less affluent . . . . [N]eoliberal presidential administrations from both parties after the 1980 election of Ronald Reagan helped produce substantial decreases in union influence . . . ."); Alfredo Saad-Filho, *From COVID-19 to the End of Neoliberalism*, 46 CRITICAL SOCIO. 477, 478 (2020) ("[F]our decades of neoliberalism had depleted state capacities . . . fostered deindustrialization through the 'globalization' of production and built fragile financial structures secured by magical thinking and state guarantees, all in the name of short-term profitability.").

[162] *See, e.g.*, Cornel West, *Towards a Socialist Theory of Racism*, DEMOCRATIC SOCIALIST PERSPECTIVES (July 2017) ("[T]he Reagan administration curtail[ed] the public sector by cutting back federal transfer payments to the needy, diminishing occupational health and safety and environmental protection, increasing low wage service sector jobs, and granting tax incentives and giveaways to large corporations . . . Reagan's policies, which were often supported by the coded racist language of the religious right and secular neoconservatives, are racist in consequence. Poor women and children are disproportionately people of color").

[163] *See, e.g.*, *Jared Kushner Says Black People Must First 'Want to be Successful*,' ASSOCIATED PRESS NEWS, (Oct. 26, 2020), https://apnews.com/article/election-2020-race-and-ethnicity-donald-trump-racial-injustice-jared-kushner-d7cf670c43a41dc941e6ac21c0e683de [https://perma.cc/RU5N-VA9K] ("President Trump's policies . . . can help people break out of the problems that they're complaining about, but he can't want them to be more successful more than they want to be successful.") (quoting Jared Kushner); Nicholas Kristof, *The Asian Advantage*, N.Y. TIMES (Oct. 10, 2015), https://www.nytimes.com/2015/10/11/opinion/sunday/the-asian-advantage.html [https://perma.cc/2RXB-LRF7] ("I'm pretty sure that one factor [explaining the success of East Asian immigrants in the U.S.] is East Asia's long Confucian emphasis on education."); Andrew Sullivan, *Why Do Democrats Feel Sorry for Hillary Clinton*, N.Y. MAG. (Apr. 14, 2017), https://nymag.com/intelligencer/2017/04/why-do-democrats-feel-sorry-for-hillary-clinton.html [https://perma.cc/8WCT-XEL4] ("Asian-Americans are among the most prosperous, well-educated, and successful ethnic groups in America. What gives? . . . [T]hey maintained solid two-parent family structures, had social networks that looked after one another, placed enormous emphasis on education and hard work, and thereby turned false, negative stereotypes into true, positive ones . . . ?"); DARLING-HAMMOND, *supra* note 6, at 30 ("[R]ecurring explanations of educational inequality among everyday people, pundits, and policymakers often implicitly or explicitly blame children and their families for lack of effort, poor childrearing, a 'culture of poverty,' or 'inadequate genes.'"). *See also* Ella Myers, *Beyond the Wages of Whiteness: Du Bois on the Irrationality of AntiBlack Racism*, Soc. Sci. Rsch. Council (Mar. 21, 2017), https://items.ssrc.org/reading-racial-conflict/beyond-the-wages-of-whiteness-du-bois-on-the-irrationality-of-antiblack-racism/ [https://perma.cc/Z3YN-VKSF] ("Political appeals in the United States routinely link whites' (legitimate) fear of economic insecurity to (illegitimate) antiblack sentiment. Racial capitalism very nearly requires that linkage.").

[164] Contemporary colorblindness is a powerful ideology directed against the awareness of racial hierarchy which simultaneously justifies and entrenches racial domination through an insistence on formal equality. *See, e.g.*, SYPNOWICH, *supra* note 19, at 67 ("[Formal equality]

Recent examples of this mystification include an official press release by the Trump DOJ claiming that Frederick Douglass—a former president of the Freedman's bank—would have opposed affirmative action, and the oft repeated lie that reactionary colorblindness is "Justice Harlan's view in *Plessy* . . . [and] the rallying cry for the lawyers who litigated *Brown*."[165] These deceptions are legitimized in part by the Supreme Court's repeated insinuations that poor and non-white students are disproportionately excluded from elite universities not because they are disadvantaged, but because they are inferior.[166] If we start instead from the animating premise of Reconstruction and the Civil Rights Movement, that "all men are created equal," the extent to which the poor and nonwhite remain absent from elite universities can only be understood as a measure of society's failure to give them a fair chance.[167]

In reality, for poor whites and the "racial bourgeois" alike, historic events like SFFA's lawsuit represent a double-edged sword, an unnecessary compromise where a better alternative for all is possible.[168] The economic

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obscures the more fundamental question of whether man has access to the resources which determine his capacity to [make use of his] formal freedoms."); *see also, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2 (6th ed. 2021) ("Whereas Jim Crow racism explained Blacks' social standings as the result of their biological and moral inferiority, color-blind racism avoids such facile arguments. Instead, whites rationalize minorities' contemporary status as the product market dynamics, naturally occurring phenomena, and Blacks' imputed cultural limitations.").

[165] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Thomas, J., concurring). *See also* Press Release, Department of Justice, Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions (Oct. 8, 2020), https://www.justice.gov/opa/pr/justice-department-finds-yale-illegally-discriminates-against-asians-and-whites-undergraduate [https://perma.cc/V29A-WL8F] ("In 1890, Frederick Douglass explained that the 'business of government is to hold its broad shield overall and to see that every American citizen is alike and equally protected in his civil and personal rights.' The [Trump DOJ] agrees and will continue to fight for the civil rights of all people throughout our nation [by ending affirmative action]."); *but see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J. concurring in part and dissenting in part) ("[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitutions stands as a barrier.").

[166] *See* PARENTI, *supra* note 5 at 14 ("[According to] fascist doctrine, especially the Nazi variety . . . . one's position in the social structure is taken as a measure of one's innate nature. Genetics and biology are marshalled to justify the existing class structure, not unlike what academic racists today are doing with their 'bell curve' theories . . . ."); López, *supra* note 11.

[167] *See* Martin Luther King Jr., The American Dream (July 4, 1965) ("It wouldn't take us long to discover the substance of that dream. . .in those majestic words of the Declaration of Independence. . .'that all men are created equal' . . . . It doesn't say 'some men,' it says 'all men.' It doesn't say 'all white men,' it says 'all men,' which includes Black men . . . Jews . . . Catholics . . . humanists and agnostics.").

[168] *See Prisoner's Dilemma*, STAN. ENCYC. PHILOSOPHY, (Apr. 2, 2019), https://plato.stanford.edu/entries/prisoner-dilemma/ [https://perma.cc/SB54-CTM7] ("The 'dilemma' faced . . . is that, whatever the other does, each is better off [giving in] than [resisting]. But the outcome obtained when both [give in] is worse for each than the outcome they would have obtained had both [resisted] . . . . A group whose members pursue rational self-interest may all end up worse off than a group whose members act contrary to rational self-interest.").

exploitation of the entire working class is made possible by the maintenance of racial hierarchy; the legitimization of racism-denial in any context will legitimize more extreme attacks on minority rights in the future (or, in the words of James Baldwin, "If they take you in the morning, they will come for us that night").[169] Conversely, improving the quality of education provided to poor and nonwhite students, will pay dividends by stimulating the economy,[170] improving the quality of education for all Americans,[171] and beginning the process of mending the badly frayed social fabric of American life.[172] As wealth inequality approaches levels unseen since the eve of the Great Depression[173] and the world continues to be shaken by historically large protests against economic exploitation[174] and racist police violence,[175]

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[169] James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. Rev. (Jan. 1971), https://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis/ [https://perma.cc/NWW8-2ESX]; *see also* Park, *supra* note 122, at 18 ("[T]oday there is ultimately interest divergence between the anti-affirmative action movement and the broader Asian American community, wherein the system proposed by the anti-affirmative action movement (i.e., race-neutral admissions) is at odds with the interest of Asian Americans."); Parenti, *supra* note 5, at 134 ("[R]acism is used as a means of depressing wages by keeping a segment of the labor force vulnerable to super-exploitation."); Ian Haney López, White by Law: The Legal Construction of Race 148 (1996) ("[R]acial ideology does not guarantee equality among Whites. . .[but] rather to mask and distract from gross inequalities that divide that group."); Du Bois *supra* note 3 at 315 ("[White workers routinely] asked [Blacks] to organize separately; that is outside the real labor movement, in spite of the fact that it was a contradiction of all sound labor policy.").

[170] *See, e.g.*, *Inequality Hurts Economic Growth, Finds OECD Research*, OECD (Sept. 12, 2014), https://www.oecd.org/newsroom/inequality-hurts-economic-growth.htm [https://perma.cc/X27G-BK82] ("Reducing income inequality would boost economic growth . . . . [A] lack of investment in education [for] the poor is the main factor behind inequality hurting growth."); Celia R. Baker, *Evidence Says Educational Inequality is Hurting the U.S. Economy*, Deseret News (Dec. 27, 2012), https://www.deseret.com/2012/12/27/20511674/evidence-says-educational-inequality-is-hurting-the-u-s-economy [https://perma.cc/D9NY-3WYW].

[171] *See, e.g.*, Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *Racially Diverse Schools and Classrooms Can Benefit All Students*, Century Found., (Feb. 9, 2016), https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/?session=1 [https://perma.cc/K48A-HYK5] ("[B]uilding on Coleman's findings, a growing body of research produced a social science consensus that school integration—by race and by socioeconomic status—is good for children."); Bell, *supra* note 10, at 528 ("Nor do poorer whites gain from their opposition to the improvement of educational opportunities for Blacks: as noted earlier, the needs of the two groups differ little. Hence, over time all will reap the benefits from a concerted effort toward achieving racial equality.").

[172] *See* Karin Fischer, *The Barriers to Mobility: Why Higher Ed's Promise Remains Unfulfilled*, Chron. Higher Educ. (Dec. 30, 2019), https://www.chronicle.com/article/why-higher-ed-rsquo-s-promise-remains-unfulfilled/ [https://perma.cc/MP9R-ZN4K] ("'The only thing that mitigates intergenerational poverty is higher education' . . . . [But] the poorest Americans don't. Less than 15 [%] of students from the lowest socioeconomic bracket earn a bachelor's degree by age 24 . . . . While college-graduation rates have soared over the past 50 years for middle- and upper-income Americans, for those with family incomes of $42,000 or less, they've barely budged.").

[173] *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. Econ. 519 (May 2016) ("The top .1% wealth share has risen from 7% in 1978 to 22% in 2012, a level almost as high as in 1929 . . . . The increase in wealth inequality in recent decades is due to the upsurge of top incomes combined with an increase in savings rate inequality.").

[174] *See* Thomas Crowley, *"This is a Revolution, Sir,"* Jacobin Mag., (Dec. 1, 2020), https://jacobin.com/2020/12/general-strike-india-modi-bjp-cpm-bihar [https://perma.cc/T69Q-

Mari Matsuda's exhortation towards addressing Negative Action by increasing public investment in education, is worth revisiting:

> When university administrators have hidden quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we cannot let in all those Asian overachievers and maintain affirmative action for other minority groups . . . because that will mean either that our universities lose their predominantly white character or that we have to fund more and better universities. To either of those prospects, I say, why not?[176]

V973] ("Workers in India last week launched a general strike that brought out an estimated 250 million people, arguably the largest in human history.").

[175] *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (Jul. 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/TL4V-VFNQ] ("Four recent polls . . . suggest that about 15 million to 26 million people in the [U.S.] have participated in demonstrations over the death of George Floyd and others in recent weeks . . . . These figures would make the recent protests the largest movement in the country's history.").

[176] Matsuda, *supra* note 13, at 153.