

Our Constitution Has Never Been Colorblind

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This Article takes a contrarian approach to the first Justice Harlan’s famous phrase from his dissent in Plessy v. Ferguson, “[o]ur Constitution is color-blind,” to argue not only that the Constitution has never been colorblind, but also that racial realism counsels against falling for the siren call of constitutional colorblindness. This Article provides a quick tour through America’s racial history, from the colonial period through the first constitution, which then is remade following the Civil War. It sketches the operation of America’s racial compact that subordinates people who are Black, Indigenous, Latinx, and Asian in a system that simultaneously subordinates White people who lack wealth and power. The Court’s application of nominal or formal colorblindness has shielded those who have benefited and continue to benefit from racism such that colorblind constitutionalism, rather than addressing and redressing inequality, serves to enshrine and advance it. In this sense, our Constitution has never been colorblind.

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I. INTRODUCTION

I intend my title as a provocation. It challenges the deployment of Justice John Marshall Harlan’s talismanic phrase, “[o]ur Constitution is color-blind,”¹ as a winning gambit in the language game of American constitutional interpretation on matters regarding race.² By claiming that our Constitution has never been colorblind, I reject both the premise and promise of colorblind constitutionalism as it has been held aloft as a jurisprudential aspiration. In making this claim, I am saying something related to but different from what Justice Ketanji Brown Jackson said in her dissent in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, that “[o]ur country has never been colorblind.”³ Connecting this claim to her observation, our country has never been colorblind because our Constitution has never been colorblind.

First, it is important to say what is meant by “our Constitution.” As Joy Milligan and Bertrall L. Ross II observe, “The Constitution was not by us, nor was it for us.”⁴ And despite

[t]he Reconstruction Amendments and the Nineteenth Amendment, which provided something closer to full formal equality for people of color and women as a prospective matter, [they] did not rectify (and could not have rectified) the deficits in the rest of the Constitution, nor the legal and social consequences of prior exclusion.⁵

¹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

² For example, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, Chief Justice Roberts and Justices Thomas and Sotomayor each invoke Harlan’s words to support their respective positions regarding what the Fourteenth Amendment permits with regard to race. *Compare* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2175 (2023), *and id.* at 2176, 2182–83 (Thomas, J. concurring), *with id.* at 2230–32 (Sotomayor, J., dissenting).

³ *SFFA*, 143 S. Ct. at 2264 (Jackson, J., dissenting).

⁴ Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 307 (2023).

⁵ *Id.* at 309.

For much of this nation's history, and even now, because of the Court's interpretation of the Constitution, it has not been and continues to not be "our" Constitution.⁶

With regard to non-White racial minorities, a critical barrier to redressing the legal and social consequences of prior exclusion is the Court's prevailing imposition of colorblindness, including the grand but ultimately empty rhetorical flourishes of the current chief justice who proclaimed in *Parents Involved in Community Schools v. Seattle School District No. 1* that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁷ *SFFA* carried this sentiment forward: "Eliminating racial discrimination means eliminating all of it."⁸

But the Court, even after the Reconstruction Amendments as well as after the various 1960s Civil Rights Acts, had long ago given up on eliminating much of it—race discrimination—let alone all of it.⁹ Instead, the Court has instituted an impoverished reading of the Fourteenth Amendment that has made the Court not just complicit in, but as an abettor to, the race discrimination of public and private actors leading to severe, systemic inequality.¹⁰ Further, because the legal and social consequences of prior exclusion have not been redressed, the Constitution continues to not be "our" Constitution, despite attempts by some constitutional theorists to anchor legitimacy in thick and thin versions of "We the People."¹¹

If it was not "our Constitution," then whose was it? Despite attempts to revive the legitimacy through notions of republicanism, the original Constitution was by and for White men of property.¹² But to

⁶ An additional definitional point is that this Article treats "our Constitution" as both the literal text of the Constitution as well as the Court's interpretation of it. The literal text of the Constitution is given effect through the Court's interpretation of it.

⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

⁸ *SFFA*, 143 S. Ct. at 2150.

⁹ See discussion *infra* Part V.

¹⁰ See discussion *infra* Parts II–V.

¹¹ *E.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 5 (paperback ed. 1993); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 12 (1999), <https://doi.org/10.1515/9781400822973>.

¹² See Mary Anne Franks, *Book Talk: The Cult of the Constitution*, 13 CONLAWNOW 33, 34 (2021) ("White male supremacy permeates the creation, interpretation, explication, and execution of the Constitution. Only white, wealthy men were allowed to participate in the drafting of the Constitution itself.").

understand fully the racial compact that is “our Constitution,” it is critical to understand what preceded the Constitution that carries forward the racial project that is “America.”¹³

I develop my thesis that our Constitution has never been colorblind by examining, in Part II, the development of the racial ordering that preceded the 1789 Constitution, followed in Part III by how this constitution carried forward this prior racial ordering. In Part IV, I examine the attempt to create a new racial order following the Civil War and the Reconstruction Amendments, including how this attempt was thwarted. In Part V, I broaden the frame from the Black/White racial paradigm to show how non-Black racial minorities fit into the racial compact. Then, in Part VI, I jump to the Second Reconstruction as embodied in the 1960s Civil Rights Acts and how the Court thwarted this attempt to restructure the racial order. I close in Part VII by examining the current moment and the contestation over our nation’s history before concluding that a more accurate understanding of our nation’s history and the Court’s persistent failure to acknowledge it demonstrate that our Constitution has never been colorblind.

II. THE BEFORE TIMES

In telling this story about the current moment, I begin with the colonial era and the racial project called “America” that is underwritten by law. Judge A. Leon Higginbotham’s *In the Matter of Color* brilliantly and comprehensively documents the systematic development of a legal regime that constructs Black disadvantage and White privilege.¹⁴ He writes about the 1640 case of John Punch, an African indentured servant who ran away with two White indentured servants. After they were captured, the two White indentured servants

¹³ I have previously explored this notion of “America” as a racial project. See Robert S. Chang, *The Great White Hope: Social Control and the Psychological Wages of Whiteness*, 16 LAW CULTURE & HUMANS. 379, 382 (2020), <https://doi.org/10.1177/1743872117720356>. In doing so, the author of this Article follows MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 84 (2d ed. 1994) (“[The United States is a racial state in which] [t]he racial order is equilibrated by the state—encoded in law, organized through policy-making, and enforced by a repressive apparatus.”).

¹⁴ See generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 19–310 (1978) (documenting the development of these laws in colonial Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania).

had four years added to their term of servitude, while John Punch got lifetime servitude.¹⁵ Judge Higginbotham observed that the difference in treatment “reflected the legal process’s early adoption of social values that saw blacks as inferior” and that “[t]o make rigid the social stratifications these values called for, the court turned social biases, at will, into hard legal judgments.”¹⁶ These hard legal judgments were part of what transformed indentured servitude for Africans into lifetime servitude and then into hereditary servitude, intergenerational slavery.¹⁷ In doing so, the colonial authorities constructed a uniquely American Blackness.¹⁸

But the construction of American Blackness through the denial of legal, social, and economic rights was tied inextricably to the construction of a White racial identity.¹⁹ Key developments were spurred by Bacon’s Rebellion. In 1676, approximately six thousand European bondsmen joined with approximately two thousand African bondsmen in revolt, eventually marching upon and burning Jamestown.²⁰ Though the revolt ultimately failed, the ruling elite became increasingly worried that the lower social strata, including African and European peoples, might rise up and endanger the physical safety, material wealth, and political power of the ruling elite.²¹ They implemented, systematically, mechanisms of social control based on differential privilege, to embed racial fault lines that would disrupt the possibility of cross-racial class alliances.²² The law conferred privileges to European peoples, and imposed disadvantages upon African indentured servants, enslaved African persons, and free African people. This granting of privilege and imposition of

¹⁵ *Id.* at 28–29 (discussing *In Re* Negro John Punch).

¹⁶ *Id.* at 28.

¹⁷ *See id.* at 28, 30.

¹⁸ *Cf.* Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 699 (1996) (contrasting author’s experience in Nicaragua where “race is recognized as more fluid” with the “fixity of American Blackness”).

¹⁹ *Cf. id.* at 700–01 (“Her readings of classic nineteenth-century literature indicate that whiteness became largely defined by its opposite: color, and more specifically, blackness.” (citing TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 9, 31–59 (1992))).

²⁰ 2 THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE: THE ORIGINS OF RACIAL OPPRESSION IN ANGLO-AMERICA* 204, 211, 214 (2d ed. 2012).

²¹ *Id.* at 211–12.

²² For a detailed account of the development of Slave and Black codes in several colonies, see HIGGINBOTHAM, *supra* note 14, at 252–64.

disadvantage included fostering “racism[] to separate dangerous free whites from dangerous slave blacks by a screen of racial contempt.”²³ This helped to produce the different racial groups through the process of racialization.²⁴

These different racial groups and assignment of differential legal, material, and social privilege were not natural or even inevitable. Judge Higginbotham concludes his examination of the matter of color in the British Colonies by observing: “But it need not have been that way. The branding of any group as inferior or less than human on the basis of color was not inevitable.”²⁵ These differences were created to suit the particular needs of the ruling elite in the British colonies in North America.²⁶ Through this systematic granting of certain privileges to European people in juxtaposition to the imposition of disadvantages on Africans, enslaved or not, there emerged, over time, a unique form of American Whiteness.²⁷

Theodore Allen writes about how these laws that gave this differential privilege to White persons were communicated to the populace, lest anyone forget. For example, “parish clerks or churchwardens, once each spring and fall at the close of Sunday service should . . . read these laws in full to the congregants. Sheriffs were ordered to have the same done at the courthouse door at the June or July term of a court.”²⁸ A system was put into place to continually remind White persons of their privilege, which is part of producing this category—the White race.

²³ EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 328 (paperback ed. 2003).

²⁴ See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 *UCLA L. REV.* 1689, 1694–98 (2000) (discussing the process of racialization that produces different racial groups).

²⁵ HIGGINBOTHAM, *supra* note 14, at 390.

²⁶ Race as a mechanism of social control in Britain’s Caribbean colonies followed a different trajectory because of a key demographic difference: “In the continental plantation colonies and in the Upper South and Lower South states of the United States in the period 1700–1860, free African-Americans never constituted as much as 5 percent of the free population,” whereas in Jamaica, which contained half of Britain’s Caribbean population, free Black people swelled from 18 percent of the free population in 1768 to 72 percent in 1834. 2 ALLEN, *supra* note 20, at 233.

²⁷ See W.E.B. DU BOIS, *The Souls of White Folk*, in *WRITINGS* 923, 923 (Nathan Huggins ed., 1986) [hereinafter DU BOIS, *The Souls of White Folk*]; HIGGINBOTHAM, *supra* note 14, at 26–27; 2 ALLEN, *supra* note 20, at 252–53.

²⁸ 2 ALLEN, *supra* note 20, at 251.

The legal stratification of White and Black present in the various slave and Black codes in the colonies eventually gets carried forward in the racial compact known as the US Constitution, the racial compromise that allowed for the birth of the nation.

III. BRIEFLY, CONSTITUTION 1.0 AS A RACIAL COMPACT

Derrick Bell, in writing about the compromises baked into the 1789 Constitution, noted that “the framers resolved the dilemma they faced at the nation’s birth by writing into the Constitution *both* alternatives—equality and slavery—bequeathing as a principal heritage to the new nation a contradiction between their professed ideals and their established practices.”²⁹ Bell further notes that “[d]espite the care exercised by the drafters not to stain the document by mention of the words ‘slave’ or ‘slavery,’” the text of the Constitution reveals its proslavery orientation.³⁰ This text provided cover for judges who might personally disfavor slavery, but who nevertheless adjudicated slavery cases in ways that protected the institution of slavery; judges could justify their decisions by taking a judicial stance whereby “[t]he constitutional provisions protecting slavery were viewed as regrettable but necessary compromises without which the union would not have been possible.”³¹ The Constitution was a racial compact that bound the North and the South.

The Supreme Court then made good on the racial compromise embedded in the Constitution in a series of cases, *Prigg v. Pennsylvania*,³² *Strader v. Graham*,³³ and *Dred Scott v. Sandford*.³⁴ Article IV, Section 2, of the Constitution, provided:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence

²⁹ Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 7 (1985) [hereinafter Bell, *Civil Rights Chronicles*].

³⁰ *Id.* at 6–7, 7 n.9 (listing eight provisions that directly and indirectly accommodated slavery).

³¹ Derrick A. Bell, Jr., Book Review, 76 COLUM. L. REV. 350, 353 (1976) (reviewing ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)); Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1835 (1991) (“Northern federal judges—many of them committed abolitionists—enforced the Fugitive Slave Acts of 1793 and 1850 against Blacks and those who helped Blacks escape the slave-catchers.”).

³² See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 539–40 (1842).

³³ See *Strader v. Graham*, 51 U.S. (10 How.) 82, 82 (1850).

³⁴ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857).

of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.³⁵

Congress, soon after the ratification of the Constitution in 1789, passed the Fugitive Slave Act of 1793 to operationalize the constitutional provision.³⁶ Pursuant to the act, “the free states became ‘one vast hunting ground,’ as slave catchers went into those states, not only to reclaim runaway slaves but also to kidnap free blacks to sell into bondage in the South.”³⁷

Abolitionists attempted to provide some measure of protection to those who escaped slavery. This protection took the form of so-called personal liberty laws in some free states. Pennsylvania enacted such a law in 1820 called “An Act to Prevent Kidnapping” that included severe penalties for kidnapping, increasing a potential sentence to a “maximum of twenty-two years at hard labor.”³⁸ It also greatly limited which state officials could enforce the Fugitive Slave Act of 1793.³⁹ Though the 1820 act was revised in 1826 and cut back on some protections, the 1826 act included some important procedural and evidentiary safeguards to help protect against seizure of free Black people.⁴⁰ These procedural and evidentiary safeguards in the 1826 act greatly limited the ability of slave catchers to act with the impunity they had previously enjoyed. Unsurprisingly, the “1826 personal liberty act was unpopular with slave-catchers and slave-owners.”⁴¹

The constitutionality of Pennsylvania’s personal liberty act would be tested in *Prigg*, a case set up by Maryland and Pennsylvania to resolve

³⁵ U.S. CONST. art. IV, § 2, cl. 3.

³⁶ Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864).

³⁷ Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1087 (1993) (footnote omitted) (quoting C.W.A. David, *The Fugitive Slave Law of 1793 and its Antecedents*, 9 J. NEGRO HIST. 18, 22 (1924)). Solomon Northup provides one horrific account: he was born free in New York, but seized as an adult in Washington, D.C., by slave catchers who sold him into slavery. SOLOMON NORTHUP, *TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, A CITIZEN OF NEW YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853, FROM A COMMON PLANTATION NEAR THE RED RIVER, IN LOUISIANA* (Firework Press 2015) (1875).

³⁸ Holden-Smith, *supra* note 37, at 1120.

³⁹ *Id.* (“[The 1820 act] stripped aldermen and justices of the peace of . . . authority . . . , reserving that authority to state judges.”).

⁴⁰ *Id.* at 1120–21.

⁴¹ William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820–1860*, 65 J. AM. HIST. 34, 44 (1978), <https://doi.org/10.2307/1888141>.

the permissible scope of state personal liberty laws against the Constitution's Fugitive Slave Clause and the Fugitive Slave Act of 1793.⁴² To make a long, tragic story short,⁴³ Edward Prigg kidnapped Margaret Morgan and her children from Pennsylvania and removed them to Maryland. He then returned to Pennsylvania and cooperated in being arrested and convicted in order to challenge his conviction before the US Supreme Court.

Justice Joseph Story wrote the opinion of the Court in *Prigg*. He was known for his antislavery views and in the previous term, he delivered the opinion of the Court in *The Amistad*, in which the Court held that illegally captured and enslaved Africans "ought to be deemed free,"⁴⁴ and included language arguably condemning the slave trade.⁴⁵ But in *Prigg*, Justice Story issued what most commentators regard as a proslavery opinion,⁴⁶ striking down Pennsylvania's personal safety law, and upholding the Fugitive Slave Act of 1793 as a legitimate exercise of congressional power pursuant to the Constitution's Fugitive Slave

⁴² *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 609 (1842). In *Prigg*, Justice Joseph Story noted that the parties developed this test case and came to the Court in the most friendly and courteous spirit, with a view to have those questions finally disposed of by the adjudication of this Court; so that the agitations on this subject in both states, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest.

Id.

⁴³ The Court in *Prigg*, though relaying an account of Margaret Morgan's purported escape, capture, and return, did not include anything about what ultimately happened to her and her children. See Holden-Smith, *supra* note 37, at 1123. Though there are differing accounts about what happened to them, "what does seem certain is that a woman who had lived her entire life in near-freedom became [an enslaved person] and saw her children also taken into bondage, and that her husband, Jerry Morgan, [a free Black man], lost his entire family to slavery." *Id.*

⁴⁴ *United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 596 (1841).

⁴⁵ See *id.* at 593. Justice Story's language describing the slave trade as a "heinous crime" may be better understood as describing Spanish law's characterization of dealing in the slave trade.

⁴⁶ For a partial list of the scholars taking positions on this, see Jeffrey M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of Prigg v. Pennsylvania*, 123 PENN ST. L. REV. 103, 106 n.8 (2018). Paul Finkelman provides some of the strongest condemnation of Justice Story, including revealing that even as he was claiming that *Prigg* was an antislavery opinion, he was working behind the scenes to suggest legislation that "would tend much to facilitate the recapture of [enslaved people]." Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 251 n.23 (1994), <https://doi.org/10.1086/scr.1994.3109649>.

Clause.⁴⁷ In doing so, Justice Story fully accepted the racial compromise as a core component of the Constitution, stating “that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.”⁴⁸

It gets worse. Justice Story explicitly endorsed self-help by slave owners to do as they would to “seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.”⁴⁹ *Prigg* established the power of slave owners to exercise their right in any state or territory, all done with full constitutional authority and the Court’s blessing.

Approximately a decade later, Chief Justice Roger Taney avoided, on jurisdictional grounds, the question of whether three enslaved people had gained freedom when they had traveled from Kentucky to Ohio “to perform at public entertainments.”⁵⁰ The Court stated, “There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject”⁵¹ and that “[e]very state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory.”⁵²

Taken together, *Prigg* prevented free states from interfering and advanced a notion of federal supremacy in the form of the Constitution and legislation that protected the institution of slavery and property rights of slave owners that extended into free states; *Strader* sketched a particular version of states’ rights that found that slavery states’ property regimes trumped those of free states.⁵³ But because Chief Justice Taney found that the Court lacked jurisdiction, he disposed of this case summarily in a mercifully short opinion.⁵⁴

⁴⁷ *Prigg*, 41 U.S. at 625–26.

⁴⁸ *Id.* at 611.

⁴⁹ *Id.* at 613.

⁵⁰ *Strader v. Graham*, 51 U.S. (10 How.) 82, 93 (1850).

⁵¹ *Id.* at 93–94.

⁵² *Id.* at 93. For a detailed account of this case and its impact, including in the later *Dred Scott* decision, see generally Robert G. Schwemm, *Strader v. Graham: Kentucky’s Contribution to National Slavery Litigation and the Dred Scott Decision*, 97 Ky. L.J. 353 (2009), <https://doi.org/10.2139/ssrn.1396752>.

⁵³ *Strader*, 51 U.S. at 93.

⁵⁴ *Id.* at 93–94.

When a similar legal issue came before the Court a few years later in *Dred Scott*,⁵⁵ the Court heard arguments twice before Chief Justice Taney issued his unmercifully long and infamous opinion, in which he posed what he described as a simple question:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?⁵⁶

Chief Justice Taney said no, that national citizenship would forever elude Black people, regardless of status as free or enslaved, and regardless of whether any particular state chose to recognize or confer state citizenship upon Black people.⁵⁷ Embedded in Taney's logic was a perverse notion of states' rights. He argued that if a Black person's state citizenship were thought to confer citizenship in the Union, then this would necessarily be transferrable to other states, even to those who forbid Black people from becoming state citizens.⁵⁸ To preserve state autonomy and each state's choices of who to include as members of their political community, Taney held that state citizenship did not confer national citizenship, at least as to Black people who Taney considered to have been excluded from the Union created by the Constitution.⁵⁹

Once Chief Justice Taney determined that Dred Scott was not a citizen of Missouri and therefore had no right to sue in federal court, leaving federal courts with no jurisdiction,⁶⁰ the opinion should have stopped there. But Taney went on to hold that Congress had no authority to ban slavery in any US territory.⁶¹ This undercut Dred Scott's claim of freedom after his owner transported him to territories where slavery was banned because that ban of slavery itself was unconstitutional. The abolitionist leader, James G. Birney, worried

⁵⁵ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 400 (1857).

⁵⁶ *Id.* at 399, 403.

⁵⁷ *Id.* at 405.

⁵⁸ *Id.* at 406.

⁵⁹ *Id.* at 409–12.

⁶⁰ *Id.* at 452.

⁶¹ *Dred Scott*, 60 U.S. at 452.

that “[f]ree blacks in free states were little better off than slaves in the South in terms of security for their personal liberty.”⁶²

Dred Scott is sometimes held out to be an aberration. The historian William Wiecek, working through *Dred Scott*'s antecedents, argues that “*Dred Scott* does not appear exceptional or anomalous; rather, it emerges as a natural result of judge-made doctrines and tendencies that had been developing for two decades.”⁶³ Understood in this way, the slavery cases leading up to and including *Dred Scott* are simply the fulfillment of the racial compact embedded in the 1789 Constitution. Unfortunately, this racial compact would prove to be not just unstable but also a powder keg.

IV. CONSTITUTION 2.0: A SECOND FOUNDING, THWARTED

The Civil War created a system shock that required a revised racial compact. Initially, this took the form of the Reconstruction Amendments, which some scholars consider to be the nation's second founding.⁶⁴ The Thirteenth Amendment abolished slavery;⁶⁵ the Fourteenth undid the evil written into the Constitution by *Dred Scott*—the permanent exclusion of Black people, regardless of enslaved status, from “We the People”—by providing for citizenship and nominally assuring to all persons “the equal protection of the laws;”⁶⁶ and the Fifteenth ensured that the right of US citizens to vote “shall not be denied or abridged by the United States or by any [s]tate on account of race, color, or previous condition of servitude.”⁶⁷

In addition to the Reconstruction Amendments, Congress passed various civil rights laws to protect the rights of newly freed Black people.⁶⁸ But this new racial compact proved to be unstable. The wholesale grant of freedom and the equalization of privilege and disadvantage ran counter to the racial compromise that had developed in the American colonies, carried forward in the 1789 Constitution,

⁶² Wiecek, *supra* note 41, at 54.

⁶³ *Id.* at 35; cf. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 411 (2011) (“In his time, Taney could not easily have held other than he did.”).

⁶⁴ *E.g.*, ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*, at xxiv–xxviii (2019).

⁶⁵ U.S. CONST. amend. XIII, § 1.

⁶⁶ U.S. CONST. amend. XIV, § 1.

⁶⁷ U.S. CONST. amend. XV, § 1.

⁶⁸ *E.g.*, Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Civil Rights Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

and maintained through the Supreme Court's slavery jurisprudence.⁶⁹ The social changes wrought by the Reconstruction Amendments and the Reconstruction-era civil rights laws proved to be too much too fast and fostered a backlash. The backlash thesis that critiques the power of courts to bring about social change⁷⁰ may apply with equal force to democratically produced changes, especially during this period when it could be argued that the Reconstruction Amendments were illegally ratified and forced upon Southern states.⁷¹ The ensuing backlash helps lead to the 1877 Hayes-Tilden Compromise whereby the contested presidential election was awarded to Rutherford B. Hayes in exchange for an agreement to withdraw Union troops from the South.⁷² The withdrawal of Union troops led to what has been called the Redemption of the South, a renewed racial state.⁷³

W.E.B. Du Bois, writing about this period, describes the bargain offered to White laborers to participate in the renewed racial state that subordinated Black people:

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. . . .

On the other hand, in the same way, the Negro was subject to public insult; was afraid of mobs; was liable to the jibes of children and the unreasoning fears of white women; and was compelled almost continuously to submit to various badges of inferiority. The result of this was that the wages of both classes could be kept low, the whites fearing to be supplanted by Negro labor, the Negroes always being threatened by the substitution of white labor.⁷⁴

⁶⁹ See discussion *supra* Parts I–II.

⁷⁰ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 10–21 (2d ed. 2008); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 *passim* (1994), <https://doi.org/10.2307/2080994>.

⁷¹ See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 419–20, 423–24, 429, 431 (2001), <https://doi.org/10.2307/1600377> (discussing the claims that the Reconstruction Amendments were not validly ratified and ultimately rejecting them).

⁷² See Bell, *Civil Rights Chronicles*, *supra* note 29, at 9 n.19.

⁷³ See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 69–71 (3d rev. ed. 1974).

⁷⁴ W.E.B. DU BOIS, *BLACK RECONSTRUCTION* 700–01 (1935) [hereinafter DU BOIS, *BLACK RECONSTRUCTION*].

Du Bois presciently wrote about the fear among White non-elites who saw Reconstruction and the freeing of the former enslaved people as an advancement of Black rights: “White labor saw in every advance of Negroes a threat to their racial prerogatives.”⁷⁵ The psychological and public wage of Whiteness accrues into a property interest, something that must be jealously protected.⁷⁶

Similar to the earlier “before times” period, racial division is fostered to hinder solidarity and collective action by those occupying the lower social strata. Oppression of Black people and the public and psychological wages associated with Whiteness help to produce what W.E.B. Du Bois describes as “[t]he discovery of personal whiteness among the world’s people [which] is a very modern thing,—a nineteenth and twentieth century matter, indeed.”⁷⁷

The renewed racial state required that Constitution 2.0 be interpreted so as to revive some of the mean features of Constitution 1.0. Each of the Reconstruction Amendments was severely curtailed. Derrick Bell provides an elegantly simple explanation for why the “Civil War amendments failed to produce equality for blacks . . . : effective remedies for harm attributable to discrimination in society in general will not be granted to blacks if that relief involves a significant cost to whites.”⁷⁸

The Thirteenth Amendment had language that offered a loophole, appearing to permit slavery or involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.”⁷⁹ Freed from slavery’s forced labor, many Black people found themselves losing their freedom and forced to work without compensation in convict leasing programs.⁸⁰ Convict leasing was an

⁷⁵ *Id.* at 701.

⁷⁶ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1725, 1741 (1993), <https://doi.org/10.2307/1341787>.

⁷⁷ DU BOIS, *The Souls of White Folk*, *supra* note 27, at 923; *see also* NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE*, at xii (2010) (“[T]he notion of American whiteness will continue to evolve, as it has since the creation of the American Republic.”).

⁷⁸ Bell, *Civil Rights Chronicles*, *supra* note 29, at 10.

⁷⁹ U.S. CONST. amend. XIII, § 1.

⁸⁰ *See generally* Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1853–64 (2022) (discussing use of criminal fines and fees as basis for forced labor); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1501–27 (2019) [hereinafter Pope, *Mass Incarceration*] (discussing convict leasing). Convict leasing may suggest a particular form of forced labor whereby incarcerated persons sentenced to hard labor

especially lucrative arrangement for Southern states that did not have and did not then need to invest in extensive prison systems but instead “leased” persons convicted of criminal offenses to “sugar and cotton plantations, as well as coal mines, turpentine farms, phosphate beds, sawmills, and other outposts of entrepreneurial daring in the impoverished region.”⁸¹ Those subjected to this system were mostly Black, and this system has been described as having “effectively reinstated slavery by a different means.”⁸²

Though the Court in 1914 would reject certain systems of forced labor, it made clear that states remained free to

‘impose fines and penalties [that] must be worked out for the benefit of the state . . . in such manner as the state may legitimately prescribe’ [which] has allowed governments to continue to require labor of those convicted of crimes as a manner to pay off debts stemming from the criminal case.⁸³

This acquiescence by the Court permitted various forms of convict leasing to continue until the 1940s when its end, consistent with Derrick Bell’s interest convergence hypothesis,⁸⁴ was brought on in part because enemy propaganda called out American hypocrisy in allowing convict leasing and other racism to persist even as it denounced Germany’s racism.⁸⁵ Further, I am unaware if the Court has ever acknowledged the evils it permitted by not doing more than

work directly for the state or, as came to be, “leased” out to work for private businesses. Pope, *Mass Incarceration*, *supra*, at 1519. But new forms of forced labor developed, including forced labor to pay court fines and fees. Lollar, *supra*, at 1856–64 (discussing surety system and debt slavery). Cortney Lollar and James Gray Pope argue that the acquiescence, then and now, to an expansive notion of the criminal conviction exception is not warranted. *Id.* at 1887 (arguing that forced labor under the punishment clause should only be permitted only “for valid, carefully-tailored penological purposes and not for revenue-generating purposes”); Pope, *Mass Incarceration*, *supra*, at 1468 (arguing that the exception should apply only if slavery or involuntary servitude is the punishment for the crime).

⁸¹ Christopher Seeds, *Historical Modes of Perpetual Penal Confinement: Theories and Practices Before Life Without Parole*, 44 LAW & SOC. INQUIRY 305, 321 (2019), <https://doi.org/10.1017/lsi.2018.25>.

⁸² *Id.*; see generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (documenting large-scale implementation of neoslavery through convict leasing).

⁸³ Lollar, *supra* note 80, at 1863 (quoting *United States v. Reynolds*, 235 U.S. 133, 149 (1914)).

⁸⁴ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 *passim* (1980), <https://doi.org/10.2307/1340546>.

⁸⁵ BLACKMON, *supra* note 82, at 377–82.

it did in *United States v. Reynolds*, which only eliminated one artifice whereby private parties acted as sureties to effectively enslave Black people.⁸⁶ The Court's role in permitting other forms of convict leasing is part of the factual predicate that the Court complains is missing when race-conscious remedial measures are advanced.⁸⁷

That is the Thirteenth. What happened to the Fourteenth Amendment? In addition to its citizenship clause, it assured that a state could not "abridge the privileges or immunities of citizens of the United States" and that no state could "deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws."⁸⁸ It further provided that Congress shall have the power to enforce these protections.⁸⁹ But this power to enforce by legislation was severely curtailed by the Court in 1883 in the *Civil Rights Cases*.⁹⁰

The Civil Rights Act of 1875 sought to permit all citizens, regardless of race, color, or any previous condition of servitude to have "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."⁹¹ In its 1882 term, the Supreme Court would take up six cases that challenged the constitutionality of the 1875 act.⁹² The Court collectively decided five of them in an opinion denoted the *Civil Rights Cases*.

The Court held that Congress had overreached, that it lacked authority under either Section 5 of the Fourteenth Amendment or Section 2 of the Thirteenth Amendment to reach private discrimination with regard to public accommodations. It held that the Fourteenth Amendment only protected persons from actions taken by a state that deprived a person of due process or denied equal

⁸⁶ *Reynolds*, 235 U.S. at 150.

⁸⁷ See discussion *infra* Part VI.

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ *Id.* § 5.

⁹⁰ The Civil Rights Cases, 109 U.S. 3, 25 (1883).

⁹¹ Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336.

⁹² A careful reader will notice that the case captions listed in the *Civil Rights Cases* only list five. Aderson François explains that one of them was dismissed as outside its jurisdiction. Aderson Bellegarde François, *A Lost World: Sallie Robinson, the Civil Rights Cases, and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence*, 109 GEO. L.J. 1015, 1017 n.8 (2021).

protection and did not reach private conduct;⁹³ it further held that denial of equal access to public accommodations was not an incident or badge of slavery.⁹⁴ Then, setting the tone that would dominate the Court's race jurisprudence under Constitution 2.0, with a brief interregnum during the civil rights era, but returning in full force in the Rehnquist and Roberts Courts, Justice Joseph Philo Bradley chided Black people for seeking special treatment:

When a man has emerged from slavery, and by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there 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 laws⁹⁵

Justice Bradley expressed what might today be described as racial exhaustion,⁹⁶ in essence asking: "Have we not done enough for you already?"

But in its holding, the Court included language that suggested a different result if the impairment was done by the state or pursuant to state authority.⁹⁷ The sincerity of the Court's statement would be tested thirteen years later when Homer Plessy, who "was seven eighths Caucasian and one eighth African blood," challenged his arrest under an 1890 Louisiana law that "provided for separate railway carriages for the white and colored races" after he boarded "a coach "where passengers of the white race were accommodated."⁹⁸ Though Justice Harlan dissented and famously declared that "[o]ur Constitution is color-blind," Justice Brown delivered the opinion of the court, enshrining the doctrine of separate but equal into the Constitution⁹⁹ until it was excised six decades later in *Brown v. Board of Education*.¹⁰⁰

Though the *Plessy* decision is now universally condemned, Jamal Greene reminds us that *Plessy* followed simply on a case the Court had

⁹³ *The Civil Rights Cases*, 109 U.S. at 18–19, 24.

⁹⁴ *Id.* at 23, 25.

⁹⁵ *Id.* at 25.

⁹⁶ See Darren L. Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 919, 922 (2009). For a discussion of how "special rights" are invoked in the LGBTQ context, see Robert S. Chang & Jerome McCristal Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229, 239–40 (1997).

⁹⁷ *The Civil Rights Cases*, 109 U.S. at 17.

⁹⁸ *Plessy v. Ferguson*, 163 U.S. 537, 540–41 (1896).

⁹⁹ *Id.* at 552, 559 (Harlan, J., dissenting).

¹⁰⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

decided just three years earlier, *Pace v. Alabama*.¹⁰¹ Alabama criminalized adultery and fornication but the punishment was more severe if the offending couple was interracial. The Court found no unequal treatment because “[t]he punishment of each offending person, whether white or black, is the same.”¹⁰² Notably, Justice Harlan did not dissent in *Pace*.

As a matter of formal logic, Louisiana’s statute similarly punished transgressors without regard to race in that a White person who sat in a railway carriage for the “colored” race would be subject to the same treatment as Homer Plessy when he sat in the White car. Justice Brown in *Plessy*, recognizing that there were differences between the statute at question in *Pace*, including that he did not cite it, addressed Plessy’s Thirteenth Amendment argument. As in the *Civil Rights Cases*, the Court in *Plessy* rejected the notion that being required to sit in a separate car from White people in any way destroyed legal equality or reestablished involuntary servitude.¹⁰³ The Court also rejected the notion that “enforced separation of the two races stamps the colored race with a badge of inferiority,” finding that if the “colored” race felt that, it was because they chose to feel that.¹⁰⁴ Because transgressors were punished equally regardless of race, and because the Louisiana statute required that the separate cars be equal, the statute did not violate the Fourteenth Amendment.¹⁰⁵

Taken together, the *Civil Rights Cases* authorized private discrimination by placing it beyond federal remedial power; *Plessy* authorized state discrimination so long as there is ostensibly equivalent treatment. Taken together, these cases gutted the Fourteenth Amendment, authorizing both private and subnational governmental discrimination, and in this way inscribed inequality into Constitution 2.0.

The Fifteenth Amendment sought to do what Section 2 of the Fourteenth Amendment failed to do. Section 2 of the Fourteenth Amendment provided a negative consequence if a state infringed the voting rights of men who were at least twenty-one years of age.¹⁰⁶ The Fifteenth Amendment went further, and parallel to Section 1 of the

¹⁰¹ *Pace v. Alabama*, 106 U.S. 583 (1883).

¹⁰² *Id.* at 585.

¹⁰³ *Plessy*, 163 U.S. at 541–43.

¹⁰⁴ *Id.* at 551.

¹⁰⁵ *Id.* at 547–48.

¹⁰⁶ U.S. CONST. amend. XIV, § 2.

Fourteenth Amendment, it assured that the United States and states could not deny or abridge the right to vote “on account of race, color, or previous condition of servitude.”¹⁰⁷ Importantly, the Fifteenth Amendment did not “directly confer suffrage on a single black person in the South or the North,”¹⁰⁸ such that “the battle to maintain and effectuate their voting rights had just begun.”¹⁰⁹

In Southern states, the Reconstruction Acts of 1867 led to broad Black male participation in elections, including Black male voter turnout reaching “80% and even 90%” under peaceful conditions.¹¹⁰ But even before the withdrawal of federal troops in 1877, White men used violence to disenfranchise Black voters. One of the most well-known incidents is the Colfax Massacre, which took place on Easter Sunday 1873, when an electoral dispute erupted when White supremacists attacked Black men guarding a courthouse in Colfax, Louisiana, with as many as 280 Black people being killed.¹¹¹ Ninety-eight White people were indicted, nine went to trial, with three convicted of violating the Enforcement Act of 1870, also known as the First Ku Klux Klan Act.¹¹² Their convictions came before the Court in *United States v. Cruikshank*,¹¹³ though Justice Bradley first heard the cases and overturned the convictions in his role as circuit justice.¹¹⁴ In affirming Justice Bradley, the Court held that the Fourteenth Amendment only protected against state action “and not directly against private action.”¹¹⁵ It further held that violations of the

¹⁰⁷ U.S. CONST. amend. XV, § 1.

¹⁰⁸ Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860–1870*, 17 CARDOZO L. REV. 2153, 2222 (1996).

¹⁰⁹ *Id.* at 2223.

¹¹⁰ James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 387 (2014) [hereinafter Pope, *Snubbed*].

¹¹¹ Zanita E. Fenton, *Disarming State Action: Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47, 57 (2017). Though the historical record does not agree on the number killed, with some figures being 150, the precise number of those killed in the Colfax Massacre is irrelevant for the point that a group of White persons attacked and killed many Black people for trying to safeguard and advance their ability to participate in the political process. The horrific acts include summary executions of captured Black people.

¹¹² *Id.*

¹¹³ *United States v. Cruikshank*, 92 U.S. 542, 561 (1875).

¹¹⁴ *United States v. Cruikshank*, 25 F. Cas. 707, 708 (C.C.D. La. 1874).

¹¹⁵ Pope, *Snubbed*, *supra* note 110, at 388 (citing *Cruikshank*, 92 U.S. at 554).

Fourteenth and Fifteenth Amendments required “provably intentional race discrimination.”¹¹⁶ The Court in *Cruikshank* turned on its colorblind lens and refused to see that the US citizens of African descent who had been victimized were victimized because of their race or color.¹¹⁷ The Court turned a blind eye to the obvious, and its failure to provide redress led to decades of private violence as White Citizens Leagues, the Ku Klux Klan, and others used violence to disenfranchise Black voters.¹¹⁸

In 1903, the Court would take up state and local government efforts to disenfranchise voters in *Giles v. Harris*.¹¹⁹ Justice Oliver Wendell Holmes described the case as “a bill in equity brought by a colored man, on behalf of himself ‘and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama.’”¹²⁰ Mr. Jackson W. Giles challenged the denial of his registration to vote, alleging that he was denied registration “arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered.”¹²¹ Though Justice Holmes seemed to acknowledge that the provision in question had been intended to enfranchise White male voters through their permanent voter registration while not permitting the same privilege to otherwise qualified Black male voters, he avoided reaching the constitutional question on jurisdictional grounds.¹²² Justice Holmes held that the Court could not grant the relief Giles sought, placement on the voter rolls.¹²³ Giles argued that the challenged Alabama constitutional provision was enacted as part of a racial conspiracy to deny him and others this right; placing him on the voter rolls would have made the

¹¹⁶ *Id.* at 389 (citing *Cruikshank*, 92 U.S. at 554–55).

¹¹⁷ *Cruikshank*, 92 U.S. at 554 (“There is no allegation that this was done because of the race or color of the persons conspired against.”).

¹¹⁸ *Cf.* *Williams v. Mississippi*, 170 U.S. 213, 225 (1898) (giving effect to the so-called Mississippi Plan that utilized illegal means and extralegal violence to disenfranchise Black voters).

¹¹⁹ *Giles v. Harris*, 189 U.S. 475, 482 (1903). My discussion of *Giles* is drawn from an earlier piece. See Robert S. Chang, *Remembrance, One Person, One Vote: The Enduring Legacy of Joaquín Avila*, 18 SEATTLE J. SOC. JUST. 97, 99–101 (2019).

¹²⁰ *Giles*, 189 U.S. at 482.

¹²¹ *Id.*

¹²² *Id.* at 486–88.

¹²³ *Id.* at 488.

Court complicit in the fraudulent scheme alleged by Giles: “how can we make the court a party to the unlawful scheme . . . ?”¹²⁴

Then, in a very telling passage, Justice Holmes in essence admitted to the powerlessness of the courts to redress certain abuses of political power. Holmes stated:

The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff’s name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.¹²⁵

Holmes’s phrase, “[u]nless we are prepared,” is deceptive. It would have been forthcoming if he admitted that the Court and the federal judiciary were unprepared to supervise voting in Alabama, and any relief short of that would be meaningless. But rather than admit to the powerlessness of the courts, or at least an unwillingness to meaningfully address electoral race discrimination, Justice Holmes ruled on jurisdictional grounds, in essence telling disenfranchised Black men that it was powerless to address the merits of their claims.

Taken together, *Cruikshank* and *Giles* advanced a vision of the Fifteenth Amendment under which the federal government and the federal courts were powerless to stop White violence and state action that disenfranchised voters.

Though the Reconstruction Amendments may have been part of a second founding of this nation, the promise of racial equality at the heart of this second founding was darkened within a few decades through the Court’s Reconstruction Amendments’ jurisprudence. In doing so, the Court gave the lie to the promise that the second founding would usher in a more inclusive “We the People” that might have made it more “our Constitution.” Instead, the Court reinscribed racial inequality into Constitution 2.0.

¹²⁴ *Id.* at 486.

¹²⁵ *Id.* at 488.

V. THE RACIAL COMPACT, IN TECHNICOLOR

So far, this Article has focused on how the Constitution formed a racial compact that carried forward the colonial racial project that created American Blackness and American Whiteness. But the racial compact was never just a Black and White affair.¹²⁶ Perhaps, by focusing on American Blackness and American Whiteness, this story started at the wrong point, ignoring and erasing that it began with settler colonialism and the conquest, displacement, and genocide inflicted upon Indigenous people. These practices were authorized by Constitution 1.0 and Constitution 2.0.¹²⁷ One reason that this history tends to be written out of the way that we think about the Constitution and Indigenous people is that the law of empire tends to be treated as, somehow, extraconstitutional.¹²⁸

The racial position of Latinx people is confounded by many factors, including, for a period, accidental Whiteness. Though Latinx people were initially incorporated into the United States following the 1848 Treaty of Guadalupe Hidalgo, with former Mexican citizens formally made US citizens¹²⁹ and, as one court would have it, legally White,¹³⁰ their positionality and treatment under Constitution 2.0 calls into question their experience under colorblind constitutionalism.

The racial position of persons of Asian ancestry as non-White was clearer than it was for Latinx people. Asians were, racially, not Black, White, or Indigenous, despite the Supreme Court of California declaring at one point that Chinese people were either Indian or Black.¹³¹ State courts had to figure out where persons of Asian ancestry fit in America's racial topography after persons of Asian ancestry entered the United States in significant numbers in waves of

¹²⁶ For critiques of the Black-White racial paradigm, see Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1214 (1997), <https://doi.org/10.2307/3481059>; Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1267 (1993), <https://doi.org/10.2307/3480919>.

¹²⁷ See *infra* Parts III–IV.

¹²⁸ See *infra* notes 136–37 and accompanying text.

¹²⁹ Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., art. IX, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

¹³⁰ *In re Rodriguez*, 81 F. 337, 354–55 (W.D. Tex. 1897). Though the court did not explicitly declare Mr. Rodríguez to be White, that is, nevertheless, how later courts interpreted this case. See *infra* notes 157–58 and accompanying text.

¹³¹ See *infra* notes 177–78 and accompanying text.

immigration following the discovery of gold in California in 1849. As for the US Supreme Court, it racialized persons of Asian ancestry primarily under Constitution 2.0.¹³²

The racial compromise—ensuring White legal, political, and social dominance—required the management and containment of Black and non-Black non-Whites.¹³³ What follows is a quick sketch that narrates the racialization of other non-White people under “our Constitution.” This is presented primarily as parallel accounts instead of a more complicated account of multigroup racial formation.¹³⁴ This more complicated account will have to wait.

A. *Racialization of Indigenous People*¹³⁵

Maggie Blackhawk observes that “[w]e have yet to reckon with the constitution of American colonialism as an aspect of our constitutional law.”¹³⁶ By not including American colonialism as being underwritten by “our constitution,” we get to pretend that the evils of conquest, displacement, and genocide are somehow extralegal—exceptional and aberrational—rather than central to what made America, America. Blackhawk suggests that “[i]t is difficult, if not foolish, to attempt to understand American history and the development of the

¹³² See discussion *infra* Part V.C.

¹³³ Neil Gotanda refers to “non-Black racial minorities” as “other non-whites.” See Neil Gotanda, “*Other Non-Whites*” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (reviewing PETER IRONS, *JUSTICE AT WAR* (1983)), <https://doi.org/10.2307/1122468>.

¹³⁴ For an excellent account of multigroup racial formation, see Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105 (1999), <https://doi.org/10.1177/0032329299027001005>; Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1024–27 (2007) (drawing from Kim’s racial triangulation theory to sketch how it operates in other contexts with other racial groups); Vinay Harpalani, *Racial Triangulation, Interest-Convergence, and the Double-Consciousness of Asian Americans*, 37 GA. ST. U. L. REV. 1361, 1365–66 (2021), <https://doi.org/10.2139/ssrn.3806339>.

¹³⁵ Despite the formal legal construction of members of federally recognized Indian tribes as having a political but not racial identity, the author of this Article argues that Indigenous people are racialized even if the Court does not formally recognize Indigeneity as a racial category. See Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 802, 806 (2008).

¹³⁶ Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 12 (2023).

United States without placing the constitution of American colonialism at the center of our constitutional theorization.”¹³⁷

The federal government’s policy toward Indigenous people is often described as following these historical stages:

- Treaty Era (1778–1820);
- Removal and Reservation (1820–1887);
- Allotment and Assimilation (1887–1934);
- Self-Government Era (1934–1953);
- Termination and Relocation (Redux) (1953–1968);
- Self-determination (Redux) (1968–Present).¹³⁸

These different stages were both under- and overwritten by the Constitution and by the Court.

Two key provisions in Constitution 1.0 reference Indigenous people. Article I, Section 2, states that, in determining congressional representatives and direct taxes, White people, including indentured servants, and three-fifths of all other persons would be counted, but that “Indians not taxed” would not.¹³⁹ Article I, Section 8 states that Congress shall have the power “[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.”¹⁴⁰ The latter becomes the basis for the so-called Marshall Trilogy.¹⁴¹

In the first case in the trilogy, *Johnson v. M’Intosh*, Chief Justice John Marshall authorizes a certain notion of the law of “discovery” that subordinates the will of the “discovered,” making that which is acquired by discovery and conquest lawful.¹⁴² Critical to understanding the Marshall Trilogy, as well as later intrusions on Indigenous sovereignty, is the plenary power doctrine. This doctrine

¹³⁷ *Id.* at 18.

¹³⁸ See generally *A Brief History of Civil Rights in the United States: Indigenous Peoples’ Civil Rights*, HOW. UNIV. SCH. OF L.: VERNON E. JORDAN L. LIBR., <https://library.law.howard.edu/civilrightshistory/indigenous> (Jan. 6, 2023, 12:25 PM).

¹³⁹ U.S. CONST. art. I, § 2, cl. 3 (amended 1868).

¹⁴⁰ *Id.* § 8.

¹⁴¹ Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS’N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law (“The history of Indian law in the Supreme Court opens with the Marshall Trilogy—*Johnson v. M’Intosh*, 21 U.S. [(8 Wheat.)] 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. [(5 Pet.)] 1 (1831); and *Worcester v. Georgia*, 31 U.S. [(6 Pet.)] 515 (1832).”).

¹⁴² *Johnson*, 21 U.S. at 595.

contains within it the notion that the federal government is generally free to impose its will on Indigenous tribes and Indigenous people, and on any lands they might lay claim to.¹⁴³ This power, in theory, was reserved to the federal government and its duly authorized agents, which did not include the state of Georgia and its efforts to take land away from the Cherokee Nation and to remove its people.¹⁴⁴ Though the Court said as much in *Cherokee Nation v. Georgia*,¹⁴⁵ and *Worcester v. Georgia* said that the state of Georgia did not have jurisdiction to impose its laws in the Cherokee Nation,¹⁴⁶ President Andrew Jackson's failure to enforce the Court's mandate and his withdrawal of federal troops from Georgia made those court victories empty.¹⁴⁷ Then, despite what Matthew Fletcher characterized as the Court's strongest "statement of respect for the legal authority of Indian tribes,"¹⁴⁸ the Court, "[a] mere twelve years later . . . reversed course"¹⁴⁹ in *United States v. Rogers*. Chief Justice Taney—yes, same person who later wrote *Dred Scott*—declared that Indigenous people and the lands they occupied have been "continually held to be, and treated as, subject to . . . [the colonizer's] dominion and control."¹⁵⁰ Critical here is the way Taney wrote the Court and the federal judiciary out of the picture through this vision of plenary power that gave the nation's political branches "complete freedom from judicial review."¹⁵¹

With Constitution 2.0, although the Fourteenth Amendment includes birthright citizenship, the "subject to the jurisdiction thereof" clause is interpreted by the Court in *Elk v. Wilkins* to exclude John Elk from being a citizen by birth because the Court presumed that he had been "born a member of one of the Indian tribes within the United States" and therefore was not born subject "to the jurisdiction of the United States."¹⁵² The Court then went on to hold that the only way

¹⁴³ See Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 647 (2006) [hereinafter Fletcher, *The Iron Cold of the Marshall Trilogy*].

¹⁴⁴ *Id.* at 627, 678.

¹⁴⁵ 30 U.S. (5 Pet.) 1, 44 (1831).

¹⁴⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

¹⁴⁷ See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1823 (2019).

¹⁴⁸ Fletcher, *The Iron Cold of the Marshall Trilogy*, *supra* note 143, at 647.

¹⁴⁹ Blackhawk, *supra* note 147, at 1823.

¹⁵⁰ *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846).

¹⁵¹ Blackhawk, *supra* note 147, at 1823.

¹⁵² *Elk v. Wilkins*, 112 U.S. 94, 99, 102, 109 (1884).

an Indigenous person like him could be considered a US citizen was if he were to naturalize, which the Court acknowledged would require affirmative legislative authorization, including possibly by treaty.¹⁵³ No such treaty existed to authorize Elk's naturalization, and the Naturalization Act of 1870 only permitted White persons and persons of African nativity and descent to naturalize.¹⁵⁴ Although Chief Justice Taney, in *Dred Scott*, suggested that "if an individual [Indian] should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people,"¹⁵⁵ the *Elk* Court said that John Elk's averment that "he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States" and even living in Omaha, Nebraska, was not enough.¹⁵⁶ In an amusing turn of phrase, the Court said that the fact that he may have "surrendered himself to the jurisdiction of the United States" did not establish "that the United States accepted his surrender."¹⁵⁷ Constitution 2.0 expanded the "we" in "We the People," but did not require the inclusion of Indigenous people. Only in 1924, Indigenous people born in the United States were made US citizens through the Indian Citizenship Act.¹⁵⁸

Meanwhile, the United States continued its expansion of jurisdiction over Indigenous people in Indian territory through the 1885 Major Crimes Act, which withstood a challenge to its constitutionality in *United States v. Kagama*.¹⁵⁹ The basis: the plenary power the United States exercised over Indian tribes and Indigenous people.¹⁶⁰ The Dawes Act of 1887 followed shortly, advancing a program to assimilate Indigenous people by allotting land to them with the possibility of US citizenship for those who complied with the

¹⁵³ *Id.* at 103.

¹⁵⁴ Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

¹⁵⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857).

¹⁵⁶ *Elk*, 112 U.S. at 99, 109.

¹⁵⁷ *Id.* at 99.

¹⁵⁸ Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b)). The Dawes Act of 1887 had previously provided a pathway for individual Indigenous people to acquire citizenship.

¹⁵⁹ 118 U.S. 375 (1886).

¹⁶⁰ *Id.* at 382.

allotment program.¹⁶¹ But citizenship acquired in this manner was considered irrelevant if the federal government chose to subject Indigenous people to disparate treatment.¹⁶² The interplay of Constitution 2.0 and the plenary power doctrine meant that the Fourteenth Amendment did not guarantee equal privileges and immunities to Indigenous people.

Then, even after the wholesale grant of citizenship through the Indian Citizenship Act, the plenary power doctrine warped the operation of the constitutional treatment of Indigenous people and Indian tribes. Though Indigenous identity is sometimes treated as a political identity based on membership in a federally recognized tribe, and critical to consider when rights are based on this political membership,¹⁶³ Indigenous people are, nevertheless, racialized.

B. *Racialization of Latinx People*

With regard to Latinx people, similar to Indigenous tribes, their experience in the United States began with conquest, followed by formal incorporation through the 1848 Treaty of Guadalupe Hidalgo, which resolved the Mexican-American War.¹⁶⁴ Though it made Mexican citizens in the ceded territory US citizens unless they affirmatively opted out, the treaty said nothing about the race of those who were incorporated wholesale into the United States. This gap led to the racially ambiguous position Latinx people came to occupy in the American imaginary.

Though Mexican Americans were subjected to discrimination, they came to be regarded as legally White, at least for purposes of naturalization. The US District Court for the Western District of Texas had to decide whether Ricardo Rodríguez, an immigrant from Mexico who presented himself to the court as “pure-blooded Mexican,” could become a naturalized US citizen.¹⁶⁵ At that time, the only people who could become naturalized were White persons and aliens of African nativity and persons of African descent.¹⁶⁶ Though the court did not declare him to be White, the court nevertheless permitted him to

¹⁶¹ General Allotment (Dawes) Act of 1887, ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 349).

¹⁶² *United States v. Nice*, 241 U.S. 591, 601 (1916).

¹⁶³ *Cf. Haaland v. Brackeen*, 143 S. Ct. 1609, 1623–24 (2023).

¹⁶⁴ Treaty of Guadalupe Hidalgo, *supra* note 129, pmbl.

¹⁶⁵ *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897).

¹⁶⁶ Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

naturalize based on the Treaty of Guadalupe Hidalgo.¹⁶⁷ Because Mexican citizens had been allowed to become US citizens under the treaty, this constituted tacit acceptance that Mexicans were legally White, at least for purposes of naturalization.¹⁶⁸

This accidental Whiteness was carried forward and embraced by groups such as the League of United Latin American Citizens (LULAC) in its early efforts to advance the rights of Mexican Americans in the United States. Ariela Gross discusses these early efforts by LULAC to advance notions of shared Caucasian-ness in the political sphere as well as what she describes as the “‘other white’ strategy” in litigation.¹⁶⁹ Perhaps it should not come as a surprise that the “other white” strategy ended up backfiring. As an example, after *Brown v. Board of Education*, some school districts, such as Corpus Christi, Texas, decided that it would desegregate by putting Mexican Americans together with African Americans, accomplishing integration because the Mexican American students were legally White.¹⁷⁰ This example shows that legal Whiteness did not protect Mexican Americans from race discrimination. Nevertheless, the continued discrimination that Mexican Americans faced as non-Anglos operated to produce a racialized category.¹⁷¹ But continued claims to Whiteness affected how courts regarded discrimination claims brought by Latinx people.

¹⁶⁷ *In re Rodriguez*, 81 F. at 355.

¹⁶⁸ *Id.* at 350–52, 354–55.

¹⁶⁹ Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 362, 370–71, 384 (2007).

¹⁷⁰ Steven Harmon Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust Upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years After Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 201, 213 (2005), <https://doi.org/10.5070/C7251021160>.

[Civil rights lawyer James] DeAnda complained that Corpus Christi Independent School District, like many Texas districts, had turned the “other white” notion to its own illegitimate purposes. In order to delay the court-ordered desegregation, while at the same time obscuring its slow pace, district officials frequently assigned African and Mexican Americans to the same schools, rather than to white schools, a practice often facilitated by the close proximity of the ghettos to the barrios. The administrators maintained that, because Mexican Americans were “white,” the barrio-ghetto schools had been desegregated.

Id.

¹⁷¹ See Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1152 (1998), <https://doi.org/10.2307/3481058>; LAURA E. GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* (2022) (ebook).

Complicating the constitutional treatment of Latinx people was the operation of the federal government's plenary power with regard to matters involving the border. Because of plenary power, federal officials engaged in immigration law enforcement could, even within the United States and not just at the border, decide to stop someone based in part on that person's Mexican appearance.¹⁷² Justice Lewis Powell offered that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."¹⁷³ Constitution 2.0 did not protect Latinx people from racial profiling.¹⁷⁴

C. *Racialization of Asian Americans*¹⁷⁵

Persons of Asian ancestry only began entering the United States in significant numbers after gold was discovered in California in 1849.¹⁷⁶ Though the Supreme Court of California struggled in deciding how to fit Chinese immigrants within the existing legislative racial taxonomy (Black, Mulatto, Indian), it knew that White criminal defendants needed to be safeguarded from Chinese testimony.¹⁷⁷ And so the court classified Chinese people as either Indian or Black and overturned the murder conviction of a White man who had murdered

¹⁷² *United States v. Brignoni-Ponce*, 422 U.S. 873, 855–87 (1975).

¹⁷³ *Id.* at 886–87.

¹⁷⁴ See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007–08 (2010).

¹⁷⁵ Caveat: "Asian American" here does not include Pacific Islanders, Native Hawaiians, and Pacific Islanders. Sometimes, "Asian American" or "Asian Pacific American" or "Asian American and Pacific Islander" are used as umbrella terms. It is important, however, to do so intentionally and to understand when aggregation can operate to erase smaller subgroups. For example, a recent report on race and Washington's criminal justice system found that when Native Hawaiians and Pacific Islanders were disaggregated, it was discovered that they were 3.3 times more likely than a White person to be killed by police in Washington State. RSCH. WORKING GRP., TASK FORCE ON RACE & THE CRIM. JUST. SYS., RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM: 2021 REPORT TO THE WASHINGTON SUPREME COURT 2 (2021), <https://perma.cc/J4PP-JV8J>.

¹⁷⁶ See ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 79 (1999).

¹⁷⁷ See *People v. Hall*, 4 Cal. 399, 399 (1854).

Ling Sing because three Chinese witnesses testified against him at trial.¹⁷⁸

After initial efforts by California to regulate Chinese immigration failed on federal immigration preemption grounds,¹⁷⁹ Chinese exclusionists in California got the message and developed a public campaign to garner support in California and other western states before shifting to Congress and obtaining the passage of the 1882 Chinese Exclusion Act, which excluded Chinese laborers from America's shores for an initial ten-year period.¹⁸⁰ The lawfulness of congressional action in discriminating against Chinese persons would be tested in a series of cases that demonstrated, convincingly, that Constitution 2.0 did not offer much in the way of equality to persons of Chinese ancestry.

There are two important exceptions to this last point. The first is *Yick Wo v. Hopkins*,¹⁸¹ in which the Court definitively found that Chinese persons in the United States were considered persons protected by the Fourteenth Amendment's Equal Protection Clause, at least as against subnational governmental action.¹⁸² The second is *United States v. Wong Kim Ark*,¹⁸³ which established that a child born in the United States, unless to parents employed in a diplomatic and official capacity under a foreign sovereign, "becomes at the time of his birth a citizen of the United States."¹⁸⁴ It is noteworthy that Justice Harlan, who proclaimed "[o]ur constitution is color-blind" in his famous *Plessy* dissent, joined Chief Justice Melville Weston Fuller's dissent in *Wong Kim Ark*. Chief Justice Fuller and Justice Harlan invoked Chief Justice Taney's views on "people of the United States"¹⁸⁵ and would preclude Chinese individuals from that group, concluding that the "Fourteenth Amendment was not designed to accord

¹⁷⁸ *Id.* at 399–401, 403–04. In 1869, the Supreme Court of California extended the protection White people enjoyed to Black people, holding that the Fourteenth Amendment required the Court to interpret California's prohibition of Chinese testimony against a White person to confer that same benefit to Black people. *See People v. Washington*, 36 Cal. 658, 662, 666 (1869).

¹⁷⁹ *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875).

¹⁸⁰ *See* Charles P. Reichmann, *Anti-Chinese Racism at Berkeley: The Case for Renaming Boalt Hall*, 25 *ASIAN AM. L.J.* 5, 14–17 (2018), <https://doi.org/10.2139/ssrn.2965219>.

¹⁸¹ 118 U.S. 356 (1886).

¹⁸² *See id.* at 373.

¹⁸³ 169 U.S. 649 (1898).

¹⁸⁴ *Id.* at 705.

¹⁸⁵ *See id.* at 717 (Fuller, C.J., dissenting). Justice Harlan joined the dissent.

citizenship” to persons born to subjects of the emperor of China.¹⁸⁶ One might argue that Justice Harlan’s jurisprudence in cases involving persons of Chinese ancestry reflected selective colorblindness.¹⁸⁷

The Court’s decision in *Wong Kim Ark* led to renewed efforts by Asian exclusionists to discriminate against and keep Asians out¹⁸⁸ and, to the extent possible, prevent family formation that might produce US-citizen children.¹⁸⁹ The Supreme Court gave Asian exclusionists a big boost in *Ping v. United States*, a case designated in the official United States Reports and commonly referred to as the *Chinese Exclusion Case*.¹⁹⁰ In this case, the Court established definitively the plenary power the political branches held over matters involving the border.¹⁹¹ Ping, who lived and worked in the San Francisco area since 1875, obtained the statutorily required reentry certificate before going to visit his family in China in 1887.¹⁹² But upon his return to San Francisco on October 8, 1888, President Hayes had signed, effective as of October 1, 1888, a law that invalidated all reentry certificates, including Ping’s.¹⁹³

In deciding if Congress could pass and the president effect with a stroke of a pen a law invalidating all reentry certificates of Chinese persons domiciled in the United States who went abroad, the Court announced:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate

¹⁸⁶ *Id.* at 726.

¹⁸⁷ See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157 (1996) (discussing Justice Harlan’s positions in cases involving Chinese litigants).

¹⁸⁸ See generally Amanda Frost, “By Accident of Birth”: *The Battle over Birthright Citizenship After United States v. Wong Kim Ark*, 32 YALE J.L. & HUMANS. 1, 62–65 (2021) (discussing tactics deployed by federal immigration officials to exclude even those claiming birthright citizenship).

¹⁸⁹ See Robert S. Chang, *Constructing a White-ish Nation by Excluding Asians*, in RACE, SOCIAL DOMINANCE, AND THE SUPREME COURT (forthcoming 2025) (discussing congressional testimony advocating for Asian exclusion because of fear that, otherwise, “Oriental families” would establish themselves in the United States).

¹⁹⁰ 130 U.S. 581 (1889).

¹⁹¹ *Ping*, 130 U.S. at 606 (decisions by political branches conclusive upon the judiciary).

¹⁹² *Id.* at 582.

¹⁹³ *Id.*

with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.¹⁹⁴

Though the Fourteenth Amendment might normally apply to persons of Asian ancestry who were not US citizens when in the country,¹⁹⁵ this protection was ignored when the United States sought to exclude Ping, even though he had entered the United States legally in 1875, established domicile in California, obtained the congressionally required certificate of reentry before visiting China, and presented it upon his return to the United States.¹⁹⁶

In holding that congressional determinations with regard to entry of persons at the border were conclusive and not judicially reviewable, the Court ceded the power it normally held to review the actions of the political branches. Instead of following the popular, grand tradition announced in *Marbury v. Madison*¹⁹⁷ and celebrated as the Court's critical role in reviewing and checking the excesses of the political branches, the Court's cession of judicial authority gave carte blanche to the political branches to engage in racism and xenophobia with regard to matters involving the border, unconstrained by the Fifth Amendment's Due Process Clause.

This power to exclude at the border, soon extended to banishment or deportation of those who failed to obtain papers that established their lawful place in the United States. In *Fong Yue Ting v. United States*,¹⁹⁸ the Court upheld the banishment of Chinese persons who failed or refused to obtain certificates establishing their lawful US residence based on evidence provided by at least one credible White

¹⁹⁴ *Id.* at 606.

¹⁹⁵ See generally *Yick Wo*, 118 U.S. at 369 (“[The Fourteenth Amendment’s due process and equal protection clauses] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”).

¹⁹⁶ *Ping*, 130 U.S. at 582.

¹⁹⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁹⁸ *Ting v. United States*, 149 U.S. 698, 724 (1893).

witness.¹⁹⁹ The Court, the year before, read congressional immigration legislation as including jurisdiction-stripping clauses²⁰⁰ so powerful that it later required that the Court abide by a determination by an appointed executive officer that a Chinese man was not a natural born US citizen, even though a federal district court had found that he was.²⁰¹

The takeaway is that Congress can establish rules with regard to entry and continued residency in the United States. These rules can be racist, singling out a group for disparate treatment or allowing evidence only from credible White witnesses without running afoul of the Fifth or Fourteenth Amendments. The Court carried this forward in the citizenship cases, holding in *Ozawa v. United States*²⁰² and in *United States v. Thind*²⁰³ that persons of Asian ancestry were racially ineligible to naturalize as US citizens. Then, once it had definitively determined that Asians could not become naturalized, a new racialized category was created: aliens ineligible for citizenship. This new category became the basis for a whole host of facially race-neutral laws used by the federal government and by states. When states used this facially race-neutral category to discriminate against persons of Asian ancestry with regard to land ownership, the Court held that it was rational for states to discriminate against persons of Asian ancestry because they were following the lead of the federal government.²⁰⁴ As a matter of equal protection logic, because the federal government discriminated against persons of Asian ancestry pursuant to the plenary power doctrine, it was rational then for state governments to do the same without violating the Equal Protection Clause.²⁰⁵

In this way, Constitution 2.0 severely limited protections for persons of Asian ancestry, for the most part relegating them to a form of second-class membership, including during World War II when the

¹⁹⁹ *Id.*

²⁰⁰ *E.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

²⁰¹ *United States v. Ju Toy*, 198 U.S. 253, 262 (1905).

²⁰² *Ozawa v. United States*, 260 U.S. 178, 194–95 (1922).

²⁰³ *United States v. Thind*, 261 U.S. 204, 207–08 (1923).

²⁰⁴ *See Terrace v. Thompson*, 263 U.S. 197, 219–20 (1923); *Porterfield v. Webb*, 263 U.S. 225, 233 (1923); *Frick v. Webb*, 263 U.S. 326, 333–34 (1923).

²⁰⁵ *Terrace*, 263 U.S. at 219–20; *Porterfield*, 263 U.S. at 233; *Frick*, 263 U.S. 333–34. These cases validated state discrimination that relied upon a federal classification.

Supreme Court found no constitutional violation when the federal government incarcerated over 125,000 persons of Japanese ancestry.²⁰⁶

VI. THE SECOND RECONSTRUCTION, THWARTED

C. Vann Woodward describes the modern civil rights era as constituting the Second Reconstruction.²⁰⁷ This period is characterized by the civil rights struggles, including the litigation that led to *Brown v. Board of Education*, and especially the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the 1968 Fair Housing Act. *Brown*, of course, took *Plessy's* separate-but-equal doctrine out of the Constitution, but even its follow-up remedial decision failed to provide an effective prospective remedy, leaving the lower courts to “enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”²⁰⁸ Such remedial relief was limited to that which was *necessary and proper* and *only* to the parties in the cases before the Court. Our history books reveal what happened next, with many states and local school boards doing nothing, waiting to be sued. Active and passive resistance by state and local officials and the public in the face of court-ordered desegregation often followed *Brown*.²⁰⁹ But even aside from the problem of effective prospective relief, the opinion included nothing about redressing the harm done in the name of that doctrine.

The 1960s Civil Rights Acts might be described as a second attempt to make good on the Reconstruction Amendments. But would they fare any better than the various 1960s Civil Rights Acts during the First Reconstruction? The discussion below focuses on the Court’s equal protection jurisprudence and its general failure to consider fully and to redress the past harms of racial discrimination.

Griggs v. Duke Power Co., a high-water mark, reflected the Court’s willingness to consider the harm of past racial discrimination.²¹⁰ *Griggs* was a game-changer. Rather than having to show that an employer adopted a hiring or promotion policy intending to discriminate against a protected class, employer liability could be found if an

²⁰⁶ See *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

²⁰⁷ WOODWARD, *supra* note 73, at 134–35.

²⁰⁸ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

²⁰⁹ See generally CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2004).

²¹⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 424 (1971).

employment practice had, provable by statistical data, a disparate impact on a protected class that could not be justified by business necessity.²¹¹ But the Court connected its new disparate impact theory to the fact that Black people “have long received inferior education in segregated schools.”²¹² This could be read as limiting when employers can passively participate and advance past racism by relying upon “the results of segregation—cultural and educational deprivation—to become a justification for the perpetuation of segregation.”²¹³

Griggs, though, produced a panic in some circles that employers would have to adopt racial preferences or quotas to avoid liability under Title VII.²¹⁴ Changes in Court personnel led to a growing chorus of justices expressing concern or anxiety about quotas. In the Title VII context, this led the Court to gut disparate impact in *Wards Cove Packing Co., Inc. v. Atonio*.²¹⁵ In doing so, the Court reinforced its recent decision in *City of Richmond v. J.A. Croson Co.*,²¹⁶ in which the Court narrowed when statistical race disparities permitted inferences that they resulted from discrimination. Justice Sandra Day O’Connor, aware that only .67 percent of prime contracts were awarded to minority-owned businesses even though minorities constituted 50 percent of the city’s population, observed that “Blacks may be disproportionately attracted to industries other than construction.”²¹⁷ This observation ignored that this disparity was likely a direct consequence of race discrimination in the awarding of government contracts as well as uncontroverted evidence that construction trade unions excluded Black people.

²¹¹ *Id.* at 431 (“If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”). Having an additional remedial pathway to intentional discrimination was critical because intentional racial animus is difficult to prove and doing so would become increasingly difficult as society moved beyond the Jim Crow era and outward expressions of race bigotry became less common.

²¹² *Id.* at 430.

²¹³ Herbert N. Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEX. L. REV. 901, 902 (1972).

²¹⁴ See Charles J. Cooper, *Wards Cove Packing Co. v. Atonio: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL’Y 84, 89–90 (1991).

²¹⁵ 490 U.S. 642 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k).

²¹⁶ 488 U.S. 469 (1989).

²¹⁷ *Id.* at 503.

A key unifying theme in the Court's jurisprudence relating to educational and employment opportunities and its antidiscrimination jurisprudence is driven by its fear of quotas. In *Wards Cove*, the Court stated that its approach, which in essence gutted disparate impact, was necessary because otherwise "the only practicable option [for employers] would be the adoption of racial quotas."²¹⁸ Severely curtailing disparate impact would help to ensure White social dominance by leaving racial minorities locked out of workplaces or limited in terms of promotion and compensation without legal recourse.

Washington v. Davis rejected disparate impact under the Equal Protection Clause and required plaintiffs to prove intentional discrimination.²¹⁹ Though dealing with employment but not governed by Title VII and *Griggs*, the Court permitted the continued use of a general civil service exam, neither designed for nor validated in terms of actual performance as a police officer, despite its disparate negative impact on Black applicants seeking employment as police officers.

Even when previously excluded racial minorities are able to gain a toehold and be hired, these gains can be wiped out when layoffs occur, with White employees protected based on seniority accrued when they did not have to compete for employment against the previously excluded minorities.²²⁰ In this way, Du Bois's social and psychological wages of Whiteness transform into material wages of Whiteness with the Court protecting accumulated White advantage as property,²²¹ thereby inverting the Fourteenth Amendment and making White people the victims of reverse discrimination whenever the government, employer, or educational institution attempts to do anything affirmative to address racial inequality.

²¹⁸ *Wards Cove*, 490 U.S. at 643.

²¹⁹ 426 U.S. 229 (1976).

²²⁰ See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578–79 (1984) (protecting White firefighters from layoffs, even though they accrued seniority when employer engaged in race discrimination, and that Black firefighters, having little accrued seniority because they had been hired recently as part of a consent decree to settle Title VII discrimination lawsuit, could not be protected from layoffs based on seniority); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283–84 (1986) (rejecting authority of the trial court to protect recently hired minority workers with less seniority from layoffs in contravention of an existing seniority system that favored white workers with greater seniority).

²²¹ Harris, *supra* note 76, at 1776–77 (discussing how *Wygant* along with *Bakke* and *Croson* "enshrine whiteness as property").

A key barrier to any affirmative action can be found in Justice Powell's opinion announcing the judgment in *Regents of the University of California v. Bakke*.²²² Justice Powell, writing only for himself, expressed a condemnation of governmental action to remedy "societal discrimination."²²³ Notably, that phrase, "societal discrimination," makes its first appearance in a Supreme Court opinion in *Bakke*.²²⁴ The University of California, in defending its admissions program, could have documented discrimination by the state of California in its public education system; instead, it chose to rely on the "absence of minorities in the class . . . [as] the product of societal discrimination, so obvious that the issue did not require any additional proof or discussion."²²⁵ Note the passive construction that erases discrimination by public and private actors that could be traced and documented if the parties chose to do so. The University of California's choice follows a pattern whereby, even when evidence of their own past discrimination might exist, parties "are understandably reluctant to present evidence of their own past discrimination in order to justify an affirmative action program."²²⁶

Part of Justice Powell's issue with attempts to remedy the effects of societal discrimination is that he regarded it as "an amorphous concept of injury that may be ageless in its reach into the past."²²⁷ He is concerned that once the past is opened up, there is no articulable limiting judicial principle. With echoes of a "fear of too much justice,"²²⁸ the Court carries forward Justice Powell's use of the inadequacy of societal discrimination to strike down affirmative action

²²² See 438 U.S. 265, 307–10 (1978).

²²³ *Id.* For an excellent discussion of Justice Powell's notion that remedying "societal discrimination" is beyond a court's remedial authority and illegitimate for a governmental actor to pursue affirmatively, see Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1582–93 (2002) [hereinafter Selmi, *Remedying Societal Discrimination*], <https://doi.org/10.2139/ssrn.266481>.

²²⁴ See WESTLAW, <https://1.next.westlaw.com> (last visited Mar. 30, 2024) (search term "societal discrimination"; then choose "United States Supreme Court" in search results; then sort results by clicking "date"; then scroll down to bottom of results).

²²⁵ Selmi, *Remedying Societal Discrimination*, *supra* note 223, at 1583.

²²⁶ Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1309 (1995); *cf.* Ricci v. DeStefano, 557 U.S. 557, 610 (2009) (Ginsburg, J., dissenting) (discussing New Haven's past failure to hire and promote racial minorities).

²²⁷ *Bakke*, 438 U.S. at 307.

²²⁸ McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

program after affirmative action program,²²⁹ most recently in the consolidated cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)* and *Students for Fair Admissions, Inc. v. University of North Carolina*.²³⁰

Over sharp dissents written by Justices Sonia Sotomayor and Jackson, Chief Justice Roberts held that the two admissions programs in question lacked “sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.”²³¹ Chief Justice Roberts conceded that universities were free to consider an applicant’s discussion of how race affected their life and can benefit a student whose race or heritage or culture are connected to “*that student’s* courage and determination” or attainment of a particular goal “tied to *that student’s* unique ability to contribute to the university.”²³² But he also cautioned, “[W]hat cannot be done directly cannot be done indirectly.”²³³

After these cases, universities, whether under Title VI or the Fourteenth Amendment, cannot explicitly consider race as part of their admissions criteria, but they may consider experiences that stem from a student’s race, heritage, or culture that will contribute to the university. But then the finger wag from Chief Justice Roberts—do not, by stealth, reinstitute race-based affirmative action through this indirect method I just authorized.

²²⁹ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989) (noting that in *Wygant*, four members of the Court joined Justice Powell, endorsing his position on societal discrimination in *Bakke*); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220–21 (1995) (requiring more than reliance upon “societal discrimination” to justify even federal affirmative action programs for strict scrutiny); *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (subjecting race-conscious drawing of voting districts to strict scrutiny and noting that alleviating the effects of societal discrimination is not a compelling governmental interest); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731–32 (2007) (finding that societal discrimination is an insufficient basis for a school district to voluntarily implement a race-conscious student assignment plan with no finding that it discriminated on the basis of race).

²³⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2173 (2023) (finding societal discrimination as an insufficient compelling interest).

²³¹ *Id.* at 2175.

²³² *Id.* at 2176.

²³³ *Id.* (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867)).

Some headlines following *SFFA* declared that the Court had killed race-based affirmative action.²³⁴ Scholars such as Jonathan Feingold argue that the Court did not kill affirmative action, cautioning universities against overcorrecting and reminding universities of their continuing obligations under Title VI to avoid admissions and campus policies that disparately disadvantage students of color.²³⁵ Only time will tell what universities will do, whether there will be additional litigation, and how this ruling will impact diversity, equity, and inclusion initiatives at universities, whether public or private, and on companies and governmental entities.

In the meantime, Chief Justice Roberts carried forward a rhetorical project he began in *Parents Involved in Community Schools v. Seattle School District No. 1* when he offered his empty tautology, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” to stop Seattle, Washington, and Jefferson County, Kentucky, from considering race in assigning students to schools when Seattle had never engaged in de jure segregation and Jefferson County was found to have cured its previous de jure segregation.²³⁶ In *SFFA*, he pronounced, “Eliminating racial discrimination means eliminating all of it.”²³⁷

The Court left in place admissions policies at Harvard that advantaged applicants who were legacies, athletes, or related to donors or faculty and staff. Those benefiting from these facially race-neutral categories are overwhelmingly White.²³⁸ Further, three-fourths of those White students admitted based on these preferences would otherwise have been rejected.²³⁹ Eliminating explicit consideration of race for admissions while leaving intact admissions policies known to favor White applicants and disfavor applicants of color calls into question whether Chief Justice Roberts is sincere about eliminating all racial discrimination.

²³⁴ See, e.g., William McGurn, *Edward Blum, the Man Who Killed Affirmative Action*, WALL ST. J. (July 3, 2023, 2:06 PM), <https://www.wsj.com/articles/the-man-who-killed-affirmative-action-ed-blum-sffa-harvard-court-race-36143530>.

²³⁵ Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. COLL. & U. L. 239, 241–42 (2024).

²³⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007).

²³⁷ *SFFA*, 143 S. Ct. at 2161.

²³⁸ Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard* 16 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26316, 2019), <https://doi.org/10.3386/w26316>.

²³⁹ *Id.* at 5.

But the Court is able to do this as the culmination of its decades-long effort to rein in remedies for racism committed by the government and by private parties, all with the blessing of the Court. The sunseting of affirmative action, presaged in *Grutter v. Bollinger* (O'Connor's twenty-five years), and fulfilled in *SFFA*, recalls what Justice Bradley declared in the *Civil Rights Cases* in 1883 that the time had come:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there 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.²⁴⁰

In *SFFA*, the exasperation of the Court is, similarly, apparent. In essence, Chief Justice Roberts in *SFFA* said that it is time for Black and Brown applicants to take their place as ordinary members of our society and cast off the yoke of victimhood as special favorites of the law; they have been given fifty-five years since the Court decided *Bakke*, and twenty years after the Court gave the diversity rationale continued life, if only temporarily in *Grutter*.

In its decision, the *SFFA* Court, in essence, declared that people should not be concerned that it was leaving in place admissions criteria that benefit White people. Relying upon its precedent, because there is no evidence that the policies that favor legacies, athletes, donors, and children of faculty and staff were put into place or maintained to advantage White applicants and to disfavor Black, Brown, and Asian applicants, the fact that applicants from certain groups, who by circumstance are White, happen to have an advantage cannot be held against them. These White applicants are, after all, "innocent."

At the end of the day, affirmative remediation that benefits a member of a racial minority may be done by a governmental entity *only* (1) if that entity harbored racial animus, (2) was motivated by this animus to engage in purposeful conduct, and (3) engaged in purposeful conduct that (4) caused harm to an identifiable victim.²⁴¹ The Court accomplished this doctrinal objective through a series of

²⁴⁰ The Civil Rights Cases, 109 U.S. 3, 31 (1883).

²⁴¹ See Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?*, 100 MINN. L. REV. 2103, 2110–11 (2016) (discussing the perpetrator perspective that limits what the Court "sees" as discrimination).

cases, from *City of Richmond v. J.A. Croson Co.*, *Adarand Constructors, Inc. v. Peña*, *Parents Involved v. Seattle School Dist. No. 1*, to *Ricci v. DeStefano*.²⁴² In *Croson* and *Adarand*, affirmative action race remediation in government contracting is subject to strict scrutiny, which nearly always results in the program being struck down. In *Parents Involved*, because the school district played no active role in producing Seattle's residential segregation, it could not use race as part of its school assignment plan. In *Ricci*, though New Haven might have been committing a Title VII disparate impact violation through its reliance upon an unvalidated promotion test, the city's act of throwing out the test results that produced race disparity was seen as intentional race discrimination against the group of test-takers, nearly all-White, who would have benefited.

Conversely, the Court has made it difficult for racial minorities to prevail in race discrimination claims. In *Washington v. Davis*, the Court held that the Equal Protection Clause only protected against intentional discrimination and not against disparate impact.²⁴³ In *McCleskey v. Kemp*, the Court, fearful of too much justice, held that statistical evidence of race-disparate application of the death penalty cannot sustain a race discrimination claim by Mr. McCleskey, a Black man whose death sentence was upheld despite uncontroverted statistical evidence of racial discrimination in the administration of the death penalty.²⁴⁴ He failed to prove that a specific criminal legal system actor—judge, prosecutor, or jury—harbored anti-Black animus that affected their decision-making leading to the imposition of the death penalty against him.²⁴⁵ Instead, all he could prove was that the system was racist, which if afforded relief, would result in “too much justice.”²⁴⁶

Following *SEFA*, Chief Justice Roberts's empty paeans to racial equality are revealed for what they are, enshrining White innocence and freezing and thereby protecting undeserved, accrued privilege. White material privilege manifests in tangible forms like advantages in admission to selective higher education institutions, and in less tangible forms like accrued seniority in employment or wealth

²⁴² See cases cited *supra* note 229.

²⁴³ 426 U.S. 229, 239 (1976).

²⁴⁴ *McCleskey v. Kemp*, 481 U.S. 279, 312–13 (1987).

²⁴⁵ *Id.* at 297.

²⁴⁶ *Id.* at 339 (1987) (Brennan, J., dissenting) (characterizing Court's opinion as expressing fear that “recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing”).

accumulated through programs like social security, which excluded agricultural and domestic workers, the G.I. education and home lending programs, which discriminated on the basis of race, public schools that funneled better educational opportunities to White children, and so on.²⁴⁷ Racial differences in family wealth accumulation gets transmitted intergenerationally, with the beneficiaries of wealth accumulated in White families largely being White.²⁴⁸

Under Constitution 2.0, voluntary race-conscious acts undertaken by government actors or those who receive certain federal funding are immediately suspect. Constitution 2.0 inverts the Fourteenth Amendment's promise of providing for equality to those who had been previously racially oppressed and instead protects the interests of those who are the beneficiaries of accumulated advantage.

VII. THE CURRENT NARRATIVE WAR

Bryan Stevenson, the founder of the Equal Justice Initiative, notes:

The North won the Civil War, but the South won the narrative war because that idea of racial hierarchy, of white supremacy, survived the Civil War. It even survived the constitutional amendment that attempted to end slavery. The 13th Amendment talks about ending involuntary servitude and forced labor, but says nothing about ending this ideology of white supremacy, this narrative of racial difference. And because of that, I don't think slavery really ended in America; I think it just evolved.²⁴⁹

In this Article, I have endeavored to narrate a history of "our Constitution," from the way it began as a racial compact that preserved White advantage and Black disadvantage; that this racial compact also created and preserved Indigenous, Asian, and Latinx disadvantage; and that the Court played a critical role in its interpretation of the

²⁴⁷ See Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual? Brown and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181, 1188–92 (2004) (discussing what the authors term as the inequality cycle to discuss the way past discrimination becomes entrenched and carried forward); Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 *passim* (2003).

²⁴⁸ Chang & Culp, *supra* note 247, at 1190–91.

²⁴⁹ Bryan Stevenson, Remarks at the Washington Foreign Press Center Briefing on Addressing Racial Inequality in the Justice System (Feb. 3, 2021), in *Understanding America: Addressing Racial Inequality in the Justice System*, U.S. DEP'T OF STATE (Feb. 3, 2021), <https://www.state.gov/briefings-foreign-press-centers/understanding-america-addressing-racial-inequality-in-the-justice-system>.

Constitution that enshrined White advantage and racial and ethnic minority disadvantage in such a way to give truth to Justice Jackson's dissent in *SFFA*: "Our country has never been colorblind."²⁵⁰

I suggest three general areas that require attention if the ideology and continuing effects of White supremacy are to be combatted: (1) the teaching of history, (2) the meaning of societal discrimination in equal protection jurisprudence, and (3) the meaning of "our constitution is colorblind."

History: I am reminded of a chapter in W.E.B. Du Bois's *Black Reconstruction in America*, "The Propaganda of History."²⁵¹ He opens:

How the facts of American history have in the last half century been falsified because the nation was ashamed. The South was ashamed because it fought to perpetuate human slavery. The North was ashamed because it had to call in the black men to save the Union, abolish slavery and establish democracy.²⁵²

This notion of an ashamed nation is contained in an argument that has been put forward today to suppress the accurate teaching of this nation's history. For example, under Florida's Stop W.O.K.E. Act, teachers can get into trouble if they include materials in their classrooms about this country's history that might cause discomfort to students.²⁵³ The Trump Administration, through an executive order, forbade certain "divisive concepts" from being included in instruction or training materials for the military and "workplace trainings by government contractors."²⁵⁴ And before that, the state of Arizona

²⁵⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 143 S. Ct. 2141, 2264 (Jackson, J., dissenting).

²⁵¹ DU BOIS, *BLACK RECONSTRUCTION*, *supra* note 74, at 711.

²⁵² *Id.*

²⁵³ FLA. STAT. § 1000.05(4)(a) (2023).

²⁵⁴ Leah M. Watson, *The Anti-"Critical Race Theory" Campaign—Classroom Censorship and Racial Backlash by Another Name*, 58 HARV. C.R.-C.L. L. REV. 487, 506–07 (2023). These "divisive concepts" include the following:

- (1) one race or sex is inherently superior to another race or sex;
- (2) the United States is fundamentally racist or sexist;
- (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (6) an individual's moral character is necessarily determined by his or her race or sex;

passed a law in 2010 forbidding certain “divisive concepts,” which was used to terminate the Mexican American Studies Program at the Tucson Unified School District.²⁵⁵

Though part of the Stop W.O.K.E. Act restricting higher education has been enjoined, litigation is ongoing;²⁵⁶ President Biden issued an executive order revoking the Trump Administration’s Executive Order 13950;²⁵⁷ and after years of litigation, the Arizona law was held to have been enacted and enforced in violation of the First and Fourteenth Amendments.²⁵⁸ From my experience litigating the Arizona case, I know that the resources required to fight book and curriculum bans, though costly, are worth the investment.²⁵⁹ As a result of the litigation, Mexican American students knew that people outside their community cared enough to fight to have their stories and history included in their classrooms; as a result of the litigation, a federal judge held that removing Mexican American stories and history from their classrooms violated the First and Fourteenth Amendments.²⁶⁰

Those advocating for the bans understand what is at stake. Banning the accurate presentation of this nation’s history is a

(7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;

(8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

Combatting Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020).

²⁵⁵ See *González v. Douglas*, 269 F. Supp. 3d 948, 950 (D. Ariz. 2017).

²⁵⁶ *Watson*, *supra* note 254, at 525.

²⁵⁷ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7012 (Jan. 20, 2021).

²⁵⁸ *González*, 269 F. Supp. 3d at 972–74 (finding in favor of plaintiffs on their Fourteenth Amendment equal protection claim and First Amendment viewpoint discrimination claim).

²⁵⁹ I served from 2012 through 2018 as co-counsel to the high school students who brought this challenge. For a discussion of certain aspects of this litigation, see Robert S. Chang, *The 14th Amendment and Me: How I Learned Not to Give Up on the 14th Amendment*, 64 *HOW. L.J.* 53 (2020). For a more in-depth discussion, see NOLAN CABRERA & ROBERT S. CHANG, *BANNED! FIGHTING FOR MEXICAN AMERICAN STUDIES IN THE STREETS AND IN THE COURTS* (forthcoming 2025).

²⁶⁰ CABRERA & CHANG, *supra* note 259.

continuation of the narrative war Bryan Stevenson described that has, for the most part, permitted racial inequality to persist.

Societal Discrimination in Equal Protection Jurisprudence. There has been insufficient pushback against the notion Justice Powell advanced in *Bakke*,²⁶¹ that the Fourteenth Amendment cannot redress societal discrimination.²⁶² There are two aspects to winning the narrative war on this one. The first is that litigants are not doing enough to establish the factual predicate that would permit voluntary race-conscious action. The Court in *Croson* suggested as much when it stated that the city of Richmond had not provided an adequate factual predicate to justify its use of a race-conscious remedial affirmative action program.²⁶³ The second is that litigants, scholars, and jurists have not pushed back sufficiently with regard to how “societal discrimination” ought to be treated. Even Justice William Brennan conceded, in *Bakke*, that redressing societal discrimination was an “important” governmental interest,²⁶⁴ which cannot satisfy strict scrutiny. Litigants, scholars, and jurists have too easily conceded ground that permits courts to regard White people who have been advantaged by explicit, racially discriminatory actions, including those who passively accepted the un- and undeserved benefits they received, as innocent. What would a true accounting of slavery, the convict leasing program that replaced it, discriminatory public and private lending, discriminatory administration of the G.I. Bill, the discriminatory exclusion of agricultural and domestic workers from social security, and so on produce? When the details are filled in, are the effects of societal discrimination really as amorphous as suggested by Justice Powell in *Bakke*?

But filling in this detail—establishing the factual predicate—is part of the narrative war.

“Our Constitution Is Colorblind”: Finally, the premise of the current interpretation that “[o]ur Constitution is color-blind” is based on a notion of false equivalents. For a time, at least doctrinally, the Court treated affirmative race discrimination differently than affirmative race-conscious remediation. This is reflected in the different levels of

²⁶¹ See *supra* notes 222–27 and accompanying text.

²⁶² See Selmi, *Remedying Societal Discrimination*, *supra* note 223, at 1582.

²⁶³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–99 (1989).

²⁶⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 368–69 (1978) (Brennan, J., concurring in part and dissenting in part).

scrutiny the Court used for affirmative race discrimination (strict)²⁶⁵ and affirmative race-conscious remediation (intermediate).²⁶⁶ But the Court, following a shift in Court personnel, ignored *stare decisis* and held that every affirmative consideration of race was equivalent and deserving of strict scrutiny.²⁶⁷ False equivalents.

But we are here, doctrinally, because we have acquiesced to the Court's notion that we ought to be, or aspire to be, colorblind.

Justice Jackson, in her *SFFA* dissent, narrates a different account of the factual predicate that would permit, and perhaps even require, the University of North Carolina to take affirmative steps to create educational opportunities for underrepresented minorities. In making these arguments, Justice Jackson, like her colleague Justice Sotomayor, tries to enlist Justice Harlan to her cause.²⁶⁸ But the colorblindness Harlan advanced in the *Civil Rights Cases* and in *Plessy* is quite different from the Court's current colorblindness, notwithstanding the efforts by Justices Sotomayor and Jackson to fill it with different content. If people actually listened to Justices Sotomayor and Jackson, people might understand that Justice Harlan's words must be understood in context instead of the way the *SFFA* majority abstracted them. This point is similar to the narrative struggle over Dr. Martin Luther King's *I Have a Dream Speech*.²⁶⁹

VIII. CONCLUSION

In short, our country has never been colorblind because the Constitution, as interpreted by the Court, has never been colorblind.

²⁶⁵ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

²⁶⁶ See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990).

²⁶⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

²⁶⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 143 S. Ct. 2141, 2227–32 (Sotomayor, J., dissenting) (discussing Harlan's dissent in *Plessy*); *id.* at 2265–69 (Jackson, J., dissenting) (same).

²⁶⁹ See, e.g., Gary Younge, *The Misremembering of "I Have a Dream,"* THE NATION, Sept. 2–9, 2013, at 13, 14, 17 (discussing how conservatives have taken King's phrase, "content of their character" out of context, co-opting the words to advance colorblindness even though King specifically disavowed colorblindness).