

“THE WAY TO STOP DISCRIMINATION ON  
THE BASIS OF RACE . . . ”

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*Chief Justice John G. Roberts, Jr. and Justice Sonia Sotomayor have expressed differing views on the “way to stop discrimination on the basis of race.” Chief Justice Roberts, in the Supreme Court’s 2007 Parents Involved decision, stated: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Justice Sotomayor, in the Court’s 2014 Schuette decision, stated: “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.” This Article examines the Justices’ disagreement on this important subject. As discussed herein, Chief Justice Roberts’s race-based approach focuses, in acontextual and ahistorical ways, on racial classifications and race as color or phenotype. Justice Sotomayor’s racism-based analysis is cognizant of the harmful effects of this nation’s contextual and historical discrimination against racial minorities. This Article concludes that Justice Sotomayor’s position provides the best avenue for those interested in reaching the “stop discrimination” destination.*

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*“America has never discriminated on the basis of race (which does not exist) but on the basis of racism (which most certainly does).”<sup>1</sup>*

*“The concept of race might be a unicorn, but its horn could draw blood.”<sup>2</sup>*

## INTRODUCTION

In the Supreme Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice John G. Roberts, Jr. declared: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>3</sup> More recently, in the Court’s 2014 *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary* decision, Justice Sonia Sotomayor stated: “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes wide open to the unfortunate effects of centuries of racial discrimination.”<sup>4</sup>

This Article examines Chief Justice Roberts’s and Justice Sotomayor’s differing views on the “way to stop discrimination on the basis of race.” As discussed herein, the Justices’ disagreement is grounded in and reflects fundamental differences in their understandings of and approaches to “race.”<sup>5</sup>

1. Ta-Nehisi Coates, *This Town Needs a Better Class of Racist*, THE ATLANTIC (May 1, 2014, 11:30 AM), <http://www.theatlantic.com/politics/archive/2015/05/This-Town-Needs-A-Better-Class-Of-Racist/361443>.

2. KWAME ANTHONY APPIAH, *LINES OF DESCENT: W.E.B. DU BOIS AND THE EMERGENCE OF IDENTITY* 113 (2014).

3. 551 U.S. 701, 748 (2007) (plurality opinion).

4. 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

5. The placement of quotation marks around the word race is done for the purpose of recognizing and emphasizing that “race is a social construction” and “a biologically arbitrary grouping of individuals” with “no fundamental moorings in biology or genetics.” Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 28, 30 (2013); see also Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 883 (2006) (“[R]ace, while often signaled by phenotype, is not biologically defined. . . . Instead, race is socially constructed; it is formed through human interactions and commonly held notions of what it means to be a person of a certain race.” (citations omitted)).

An opposing view and theory posits “that race has a biological essence” and that “individuals belonging to a race are united by shared genes and are genetically more similar to one another than to those of different races.” Bridges, *supra*, at 28. This notion of biological race is a false belief that has been debunked and disconfirmed by the Human Genome Project’s revelation that, in genetic terms, all individuals are 99.9% the same. See DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 50 (2011); see also Bridges, *supra*, at 32 (“The [Human Genome] Project revealed that all persons, without regard to racial ascription or identification, share 99.9 percent of the same genes, and it concluded—definitively—that humans could not be divided into coherent biological races.”). Accordingly, “there are no biological races in the human species. Period.” ROBERTS, *supra*, at 77.

racism, discrimination, and the operative meaning of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>6</sup> Chief Justice Roberts's way to stop what he has framed as *race-based discrimination* reflects an exclusive focus on racial classifications and an acontextual and ahistorical equal protection analysis.<sup>7</sup> Disconnected from this nation's history and the realities of white-supremacist racism, his focus on race as skin color or phenotype renders constitutionally problematic any and all governmental considerations of race. On that view, discrimination on the basis of race (in the form of racial classifications) can be ended by the cessation of governmental racial classifications.

Unlike Chief Justice Roberts, Justice Sotomayor's way to stop *racism-based discrimination* expressly points to and is grounded in the ways that racism has and does matter, and emphasizes the real and harmful effects of this form of discrimination on the nation's racial minorities.<sup>8</sup> Connected to and cognizant of history and the various ways in which race has been used to classify, marginalize, and subordinate racial minorities, Justice Sotomayor's equal protection analysis deems constitutionally relevant, not just race as color or phenotype, but the lived experiences of those subjected to racism-based discrimination and mistreatment. As facts and context matter, governmental consideration of race used to segregate and exclude is not the same as governmental race-conscious measures used to integrate and include. On that view, the effects of centuries of racism-based discrimination and the current manifestations thereof cannot be meaningfully addressed by merely prohibiting racial classifications.

Preferring Justice Sotomayor's racism-based analysis over Chief Justice Roberts's simplistic tautology, this Article argues that, in drawing the line between permissible and impermissible race-conscious decision making by governmental entities, the Court should and must go beyond an equal protection analysis solely focused on socially constructed and fictional "race." Instead, the Court should engage in an analysis that is cognizant of the actuality and effects of racism as evidenced by the lived experiences of those historically subjected to and affected by the legal and social practice of racism-based subordination.

The discussion unfolds as follows. Part I's discussion of race, racism, and the Constitution surveys key moments and developments in the nation's and the Court's constitutional history. Part II turns to the Court's affirmative action jurisprudence with special reference to the Justices' differing race-based and racism-based approaches to the application and interpretation of the Fourteenth Amendment in cases involving explicit race-conscious actions by governmental

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6. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

7. See *infra* Part III.A.

8. See *infra* Part III.B.

entities. With the backdrop of Parts I and II in mind, Part III examines Chief Justice Roberts's and Justice Sotomayor's views on the way to stop discrimination. Part III considers the problems of their differing analytical and jurisprudential foci in cases presenting equal protection challenges to voluntary government efforts to address the effects of discrimination, and argues that Justice Sotomayor's racism-based discrimination approach best captures the realities, dynamics, and proactive responses to this nation's racism-based history and contemporary realities.

## I. RACE, RACISM, AND THE CONSTITUTION

This prefatory Part's discussion of race, racism, and the Constitution addresses key moments and developments in the Supreme Court's construction of the Fourteenth Amendment. Beginning with the Constitution's recognition and protection of slavery in Part I.A, Part I.B turns to the adoption of the Fourteenth Amendment and the Court's initial interpretations and applications of that consequential amendment. Part I.B.1 follows the path from *Plessy v. Ferguson*<sup>9</sup> to *Brown v. Board of Education*<sup>10</sup> and the Court's pre-1900 endorsement and mid-twentieth century rejection of the noxious separate-but-equal doctrine.

### A. Slavery

While the United States Constitution of 1789 did not explicitly use the term "slavery," a number of constitutional provisions directly or indirectly referred to that subject.<sup>11</sup> The "peculiar institution" of this nation's chattel slavery<sup>12</sup> was justified, in part, by a white-supremacist theory of congenital inferiority and the lie that enslaved persons of African descent were inferior to whites<sup>13</sup> (a view

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9. 163 U.S. 537 (1896).

10. 347 U.S. 483 (1954).

11. The Constitution prohibited Congressional interference with the slave trade before 1808. See U.S. CONST. art. I, § 9, cl. 1. Enslaved persons who escaped to a free state were to be "delivered up" and returned to the state from which they fled. U.S. CONST. art. IV, § 2, cl. 3 (amended 1865); *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842). Enslaved persons were counted as "three fifths of all other Persons" for purposes of determining representation in the House of Representatives and a state's number of votes in the Electoral College and for levying taxes among the states. U.S. CONST. art. I, § 2 (amended 1868). This "federal ratio" enshrined in the three-fifths clause "richly rewarded the southern states, artificially inflating their House seats and electoral votes and helping to explain why four of the first five presidents hailed from Virginia." RON CHERNOW, *ALEXANDER HAMILTON* 239 (2004).

12. See generally EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

13. See JOHN HOPE FRANKLIN, *RACE AND HISTORY: SELECTED ESSAYS 1938-1988*, at 325 (1992).

held by *The Star Spangled Banner* author Francis Scott Key<sup>14</sup>).

The Supreme Court validated the black-inferiority thesis in its infamous decision in *Dred Scott v. Sandford*.<sup>15</sup> The Court declared that African slaves and their descendants were not and could not be citizens of the United States; they were “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”<sup>16</sup> This supposition of inferior persons of African descent, endorsed by the Court a mere eleven years before the adoption of the Fourteenth Amendment, was an undeniable feature of the social, political, legal, and economic life in pre- and post-Civil War America.

## B. The Fourteenth Amendment

Slavery was formally banned in 1865 by the Thirteenth Amendment to the Constitution.<sup>17</sup> Emancipation was met by a backlash in the states of the former Confederacy in the forms of white vigilantism and lynchings,<sup>18</sup> and the paramilitary Ku Klux Klan commenced a campaign of harassment and intimidation directed at freedpersons and others.<sup>19</sup> A “new slavery,” pursued via Black Codes,<sup>20</sup> returned freedpersons to “a condition as close to their former one as it was possible to get without actually reinstituting slavery.”<sup>21</sup>

Responding to the Black Codes, Congress, over the veto of white supremacist and “fervent Negrophobe” President Andrew Johnson,<sup>22</sup> enacted

14. See JEFFERSON MORLEY, *SNOW-STORM IN AUGUST: WASHINGTON CITY, FRANCIS SCOTT KEY, AND THE FORGOTTEN RACE RIOT OF 1835*, at 40 (2012) (“Key shared a general view of the free people of color as shiftless and untrustworthy: a nuisance, if not a menace, to white people. He spoke publicly of Africans in America as ‘a distinct and inferior race of people, which all experience proves to be the greatest evil that afflicts a community.’”).

15. 60 U.S. (19 How.) 393 (1857) *superseded by constitutional amendment*, U.S. CONST. amend. XIV. For more on this decision, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

16. *Dred Scott*, 60 U.S. at 407.

17. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

18. See generally PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2002).

19. See STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 267, 276-80 (2003).

20. “Black Codes were formally and facially asymmetric: They heaped disabilities on blacks but not on whites.” AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 149 (2012); see also JACQUELINE JONES, *A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA’S AMERICA* 101 (2013) (noting that Black Codes denying certain right to black persons also existed in a number of post-Revolutionary northern states).

21. NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 34 (2006).

22. RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND*

the Civil Rights Act of 1866.<sup>23</sup> That legislation provides that all persons born in the United States are citizens of this country and shall have the same specified civil rights “as is enjoyed by white citizens.”<sup>24</sup> Thereafter, seeking to constitutionalize the 1866 legislation,<sup>25</sup> Congress proposed the Fourteenth Amendment to the Constitution. The amendment, officially ratified in 1868, provides, among other things, that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>26</sup>

What governmental practices were subject to the Fourteenth Amendment’s guarantee of equal protection? As Michael Klarman has noted, the text of the Fourteenth Amendment (unlike that of the Fifteenth Amendment)<sup>27</sup> does not expressly prohibit racial classifications. “Advocates of abolishing all racial classifications proposed suitable language, but it was rejected. Indeed, some Radical Republicans opposed ratification because they thought the amendment’s limited reach rendered it a party trick designed only for electioneering purposes.”<sup>28</sup>

In the years following the adoption of the Fourteenth Amendment, the Court did not find it “difficult to give . . . meaning” to the Equal Protection Clause.<sup>29</sup> The *Slaughter-House Cases* declared that “[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”<sup>30</sup> The “one

THE OBAMA PRESIDENCY 42 (2011); see also Annette Gordon-Reed, *Andrew Johnson*, in *THE AMERICAN PRESIDENTS* 112, 124 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011) (discussing Johnson’s white-supremacist views).

23. 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2013)).

24. *Id.* The statute provides that all citizens shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”

*Id.*

25. See *Neal v. Delaware*, 103 U.S. 370, 386 (1881); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 187 (1998) (arguing that Section 1 of the Fourteenth Amendment “was consciously designed and widely understood to embrace” the Civil Rights Act of 1866). *But see* GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 165 (2006) (rejecting the view that the Fourteenth Amendment was intended to constitutionalize the 1866 Civil Rights Act).

26. U.S. CONST. amend. XIV, § 1.

27. See *Id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”).

28. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 18 (2004) (internal quotation marks omitted).

29. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

30. *Id.*

pervading purpose found [in the Civil War Amendments to the Constitution], lying at the foundation of each" is "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>31</sup>

*Strauder v. West Virginia*, described the "common purpose" of the Equal Protection Clause as "securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy[s]."<sup>32</sup> A "necessary implication" of the equal protection guarantee is "a positive immunity, or right, most valuable to the colored race"; that immunity included a "right to exemption from unfriendly legislation against them distinctively as colored" and "from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."<sup>33</sup> Describing African Americans as "abject and ignorant" members of the "colored race" who were "unfitted to command the respect of those who had superior intelligence,"<sup>34</sup> the Court opined that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."<sup>35</sup>

Three years after the *Strauder* decision, the Court in the *Civil Rights Cases* held that the Fourteenth Amendment's protections did not apply to or prohibit the racially discriminatory actions of private persons.<sup>36</sup> Limiting the amendment's coverage to protection against discriminatory state action, and moving away from a solely black-protective reading and understanding of the amendment, the Court determined that the amendment "extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."<sup>37</sup> The Court also opined that the equal protection guarantee for African Americans had its limits. "When a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of a

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31. *Id.* at 71.

32. 100 U.S. 303, 306 (1880).

33. *Id.* at 307-08.

34. *Id.* at 306.

35. *Id.*; see also *id.* ("[I]t required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.").

36. 109 U.S. 3, 11 (1883).

37. *Id.* at 24.

mere citizen, and ceases to be the special favorite of the laws . . . .”<sup>38</sup> This eagerness to view an African American as a “mere citizen” was announced less than two decades after the appearance of the Black Codes, fifteen years after the ratification of the Fourteenth Amendment, and seven years after the end of the First Reconstruction and the federal government’s abandonment of African Americans living in the states of the former Confederacy.<sup>39</sup>

### 1. From *Plessy* to *Brown*

In *Plessy v. Ferguson*,<sup>40</sup> one of its anticanon decisions,<sup>41</sup> the Supreme Court rejected an equal protection challenge to a Louisiana statute which provided that “all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.”<sup>42</sup>

In June 1892, Homer Adolphe Plessy (described by the Court as a man “of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood”) paid for first-class travel from New Orleans to Covington, Louisiana on the East Louisiana railway and sat in the coach designated for white passengers.<sup>43</sup> Prior to Plessy’s purchase of his ticket, local railroad companies, opposed to the Separate Car Law because of the law’s extra cost and inconvenience, joined with the Citizens’ Committee to Test the Constitutionality of the Separate Car Law in making arrangements to have

38. *Id.* at 25.

39. On the end of Reconstruction, see generally ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876* (2003); and C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951).

40. 163 U.S. 537 (1896).

41. See Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412-17 (2011).

42. *Plessy*, 163 U.S. at 540 (quoting Act of July 10, 1890, 1890 La. Acts 152, 153) (internal quotation marks omitted).

43. *Id.* at 538. Plessy’s attorney, Albion Tourgée, searched for “a plaintiff who had ‘not more than one-eighth colored blood’ and would be able to pass as ‘white.’” MARK ELLIOT, *COLOR-BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR RACIAL EQUALITY FROM THE CIVIL WAR TO PLESSY v. FERGUSON* 264 (2006). In doing so Tourgée sought “to exploit the Louisiana legislature’s failure to define race and to introduce the inconclusiveness of scientific evidence on racial categories and definitions into evidence.” *Id.*; see also BLISS BROYARD, *ONE DROP: MY FATHER’S HIDDEN LIFE—A STORY OF RACE AND FAMILY SECRETS* 280 (2007) (“Plessy looked white enough to enter the ‘whites only’ coach without calling attention to himself, but was black enough—one-eighth—to get himself arrested.”). See generally Mark Golub, *Plessy as “Passing”: Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*, 39 LAW & SOC’Y REV. 563 (2005).

Plessy removed from that car.<sup>44</sup> A conductor ordered Plessy to move to the coach “for persons not of the white race”; when Plessy refused, he was arrested and charged with violating the separate-but-equal statute.<sup>45</sup>

Upholding the Separate Car Law, the Court, in an opinion by Justice Henry Billings Brown, concluded that the challenged statute was a “reasonable regulation,” with the “question of reasonableness” answered by the state’s “liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”<sup>46</sup> In Justice Brown’s view, the Separate Car Law did not offend the Fourteenth Amendment, the object of which “was undoubtedly to enforce the absolute equality of the two races before the law.”<sup>47</sup> “[E]quality” was not “intended to abolish distinctions based upon color,” the Justice wrote, “or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”<sup>48</sup> Moreover, Justice Brown continued, “[l]aws permitting, and even requiring” the separation of the races “do not necessarily imply the inferiority of either race to the other.”<sup>49</sup> Such laws “have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power,” most commonly in “the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.”<sup>50</sup> Any “assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority . . . is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>51</sup>

Justice Brown considered and rejected an additional assumption: that “social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races.”<sup>52</sup> That assumption wrongly conjectured that social equality could be achieved by

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44. See ELLIOT, *supra* note 43, at 265.

45. *Plessy*, 163 U.S. at 538.

46. *Id.* at 550.

47. *Id.* at 544, 548.

48. *Id.* at 544.

49. *Id.*

50. *Id.* “Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State.” *Id.* at 545. In *Loving v. Virginia*, the Court held that antiscegenation laws violated the Fourteenth Amendment’s Equal Protection and Due Process Clauses. 388 U.S. 1, 1 (1967).

51. *Plessy*, 163 U.S. at 551.

52. *Id.*

law, he reasoned.<sup>53</sup> (As James Fleming has remarked, in this passage the Court suggests, “that’s their problem: they’ve got an inferiority complex.”)<sup>54</sup> “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”<sup>55</sup> Thus, “[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.”<sup>56</sup>

As is well known, one Justice dissented from the Court’s decision. Justice John Marshall Harlan rejected the Court’s position that the assumption that Louisiana’s law placed a badge of inferiority on African Americans was “because the colored race chooses to put that construction upon it.”<sup>57</sup> “Every one knows,” he wrote, “that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”<sup>58</sup> For Justice Harlan, the “real meaning” of the Separate Car Law was one “proceed[ing] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”<sup>59</sup> This recognition and rejection of the law’s subordinating purpose and effect is grounded in a racism-based conceptualization of the separate-but-equal doctrine missing from the majority’s opinion and analysis.

Justice Harlan’s dissent also set out his metaphoric conception of the colorblind Constitution:

[I]n the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind*, and neither knows nor tolerates classes among citizens. In respect of *civil rights*, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>60</sup>

It is also noteworthy that the aforementioned colorblindness passage of Justice Harlan’s dissent was immediately preceded by the following sentences:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great

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53. *Id.* at 551-52.

54. James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1145 (2008).

55. *Plessy*, 163 U.S. at 551.

56. *Id.*

57. *Id.*

58. *Id.* at 557 (Harlan, J., dissenting).

59. *Id.* at 560.

60. *Id.* at 559 (emphasis added).

heritage and holds fast to the principles of constitutional liberty.<sup>61</sup>

Justice Harlan, a “person of his time,”<sup>62</sup> thus endorsed “white superiority in the very paragraph in which he proclaimed fealty to colorblindness.”<sup>63</sup> Acutely conscious of race and racial hierarchy,<sup>64</sup> he “believed in the centrality of race and in the legitimacy of racial thinking.”<sup>65</sup> Indeed, in the Court’s pre-*Plessy* ruling in *Pace v. Alabama*, Justice Harlan joined the Court’s opinion rejecting an equal protection challenge to an Alabama criminal law’s penalty-enhancement for adultery and fornication engaged in by black-white couples.<sup>66</sup> And Justice Harlan wrote the Court’s post-*Plessy* decision, holding that a school board did not violate the Equal Protection Clause when it closed an all-black high school and continued to operate a high school for whites.<sup>67</sup> As one commentator has noted, in that case Justice Harlan deemed the board’s “separate-and-unequal scheme” to be reasonable and therefore constitutional.<sup>68</sup>

Did the separate-but-equal doctrine endorsed by the *Plessy* Court in the context of public transportation permit state-mandated racial segregation in public schools? In *Brown v. Board of Education* a unanimous Court, in an opinion authored by Chief Justice Earl Warren, answered that question in the negative.<sup>69</sup> Because “lawyers and judges all fail to study Warren’s words with care, choosing instead to see the opinion as a way station on the route to some far more glorious principle,”<sup>70</sup> a close examination of the Court’s decision and reasoning is warranted.

The *Brown* Court considered four cases from Kansas, South Carolina, Virginia, and Delaware in which the lower courts rejected Fourteenth Amendment challenges to state-sanctioned racial segregation of elementary and secondary public school students. Initially argued during the Court’s 1952 Term, the cases were set for reargument “largely devoted to the circumstances

61. *Id.* (Harlan, J., dissenting); see *id.* at 561 (agreeing that the Separate Car Law was unconstitutional because “a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . . I allude to the Chinese race . . . . can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union,” cannot).

62. Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts”*, 81 N.C. L. REV. 1927, 2021 (2003).

63. Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 993 (2007).

64. See Davison M. Douglas, *The Surprising Role of Racial Hierarchy in the Civil Rights Jurisprudence of the First Justice John Marshall Harlan*, 15 U. PA. J. CONST. L. 1037, 1040 (2013).

65. Purcell, *supra* note 62, at 2021.

66. 106 U.S. 583 (1882).

67. See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899).

68. KLARMAN, *supra* note 28, at 45.

69. 347 U.S. 483, 495 (1954).

70. BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* 128 (2014).

surrounding the adoption of the Fourteenth Amendment in 1868" and the "consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment."<sup>71</sup> Chief Justice Warren's decision determined that the sources examined in the reargument "cast some light" but were "not enough to resolve the problem with which we are faced. At best, they are inconclusive."<sup>72</sup>

Committing an act of sociological jurisprudence,<sup>73</sup> Chief Justice Warren explained that at the time of the adoption of the Fourteenth Amendment "[i]n the South, the movement toward free common schools, supported by general taxation, had not yet taken hold."<sup>74</sup> The "[e]ducation of white children was largely in the hands of private groups" while the "[e]ducation of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states."<sup>75</sup> The impact of the Fourteenth Amendment on public education in the "Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today."<sup>76</sup> Given these facts and circumstances, the Chief Justice was not surprised "that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."<sup>77</sup>

Turning to the Court's early Fourteenth Amendment decisions, Chief Justice Warren remarked that in those cases the Court interpreted the amendment "as proscribing all state-imposed discriminations against the Negro race."<sup>78</sup> The separate-but-equal doctrine "did not make its appearance in this

71. *Brown*, 347 U.S. at 489.

72. *Id.* On the Court's inconclusivity conclusion, see RICHARD A. POSNER, *OVERCOMING LAW* 62 (1995) ("It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the equal protection clause to prevent racially segregated public education."); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 156 (1999) (explaining that "the very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia," and the Amendment's supporters gave assurances that the Amendment would not lead to desegregated schools); and Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955) ("[T]he immediate objectives to which section I of the fourteenth amendment was addressed . . . was not expected in 1866 to apply to segregation.").

73. See ACKERMAN, *supra* note 70, at 129.

74. *Brown*, 347 U.S. at 489-90.

75. *Id.* at 490.

76. *Id.* "The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown." *Id.*

77. *Id.*

78. *Id.* at 490 n.5 (citing *Ex Parte Virginia*, 100 U.S. 339 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

Court until 1896 in the case of *Plessy v. Ferguson* . . . involving not education but transportation.”<sup>79</sup> Declaring that “we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,”<sup>80</sup> Warren instead focused on “public education in the light of its full development and its present place in American life throughout the Nation.”<sup>81</sup> Warren argued that:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>82</sup>

Chief Justice Warren then asked whether segregating children by race unconstitutionally deprived children of color of equal educational opportunities even though physical facilities and other tangible factors were “equal.”<sup>83</sup> Noting the Court’s invalidation of segregated education in the graduate school setting,<sup>84</sup> he opined that the Court’s focus on intangible considerations in those cases “apply with added force to children in grade and high schools.”<sup>85</sup> “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>86</sup> This statement was supported with a finding made by the district court in the Kansas case reviewed by the Court:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would

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79. *Id.* at 491.

80. *Id.* at 492.

81. *Id.* at 492-93.

82. *Id.* at 493.

83. *Id.*

84. *See id.* (citing *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950)).

85. *Id.* at 494.

86. *Id.*

receive in a racial[ly] integrated school system.<sup>87</sup>

Chief Justice Warren concluded “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”<sup>88</sup>

Accordingly, the Chief Justice announced, “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>89</sup> The plaintiffs and other similarly situated persons had been “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”<sup>90</sup> But they did not obtain immediate remediation of that unconstitutional conduct. Rather than order the end to the challenged conduct, and concerned that an immediate desegregation order would be met by resistance and violence,<sup>91</sup> the Court set the cases for yet another argument focusing on the issue of the formulation of judicial decrees governing the admission of African American children to schools from which they had been excluded because of their race.<sup>92</sup>

In its 1955 *Brown II* decision, the Court remanded the cases so that local “public and private needs” could be assessed by the lower courts “guided by equitable principles.”<sup>93</sup> Those courts were directed “to take such proceedings and 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*

87. *Id.* (alterations in original) (quoting *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952)).

88. *Id.* at 494-95. The “modern authority” language in the quoted text was supported by footnote 11’s citation to social science studies, including Dr. Kenneth Clark’s report on the results of his doll test. *See id.* n.11. For more on footnote 11, see ACKERMAN, *supra* note 70, at 132; ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 42-58 (2006); and ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 13-15 (1996).

89. *Brown*, 347 U.S. at 495.

90. *Id.*

91. Justice Hugo Black feared that “people are going to die” and that “before the tree of liberalism could be renewed in the South a few candidates must water it with their blood.” ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 438-39 (2d ed. 1997) (internal quotation marks omitted). Black believed that the Court should “[w]rite a decree and quit . . . . The less we say, the better off we are.” *Id.* at 439 (internal quotation marks omitted). Justice Felix Frankfurter argued that a specific date set by the Court would be arbitrary and would “alienate instead of enlist favorable or educable local sentiment.” MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 228 (1994) (internal quotation marks omitted). Chief Justice Warren was “especially aware that the Court by itself could not do much to enforce a firm order” and believed that neither President Dwight Eisenhower nor the Congress would support a Court order requiring the end of public school segregation by a specified date. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 83 (2001).

92. *Brown*, 347 U.S. at 495.

93. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

*all deliberate speed* the parties to these cases.”<sup>94</sup> The “with all deliberate speed” instruction, proposed by Justice Felix Frankfurter,<sup>95</sup> has been described as oxymoronic,<sup>96</sup> an “infamous remedial formula,”<sup>97</sup> and “a grave mistake” which “sacrificed individual and immediate vindication of the newly discovered right to desegregated education in favor of a mass solution.”<sup>98</sup> In one scholar’s view, the Court’s ruling and approach “gave local decision makers too much choice.”<sup>99</sup> As Thurgood Marshall explained, “all deliberate speed” meant “S-L-O-W.”<sup>100</sup>

Supporters of the pre-*Brown* segregationist status quo reacted negatively to the Court’s decision. For instance, in March 1956 the vast majority of United States Senators and Representatives from southern states issued a “Declaration of Constitutional Principles,” also known as the “Southern Manifesto.”<sup>101</sup> Drafted by Senators Strom Thurmond, Sam Ervin, Harry Byrd, Richard Russell, and others,<sup>102</sup> the Manifesto stated that the “unwanted decision of the

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94. *Id.* at 301 (emphasis added).

95. See TUSHNET, *supra* note 91, at 230. Justice Frankfurter had previously used the “with all deliberate speed” phrase in *Sutton v. Lieb*, 342 U.S. 402, 414 (1952) (Frankfurter, J., concurring), and in *Chrysler Corp. v. United States*, 316 U.S. 556, 568 (1942) (Frankfurter, J., dissenting). Justice Oliver Wendell Holmes employed the phrase and concept in *Virginia v. West Virginia*, 222 U.S. 17, 19-20 (1911) (“[A] [s]tate cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed.”).

The phrase was also used in the United States’s brief to the Court in the 1952 argument in *Brown*, having been inserted in the brief by former Frankfurter clerk and Justice Department official Philip Elman. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 742 (1976). According to Elman, the brief was “the first to suggest” that “if the Court should hold that racial segregation in public schools is unconstitutional, it should give district courts a reasonable period of time to work out the details and timing of implementation of the decision. In other words, ‘with all deliberate speed.’” Philip Elman & Norman Silber, *Interview: The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 827 (1987).

96. See David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753, 764 (1993).

97. Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 220 (2004).

98. Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968).

99. TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* 321 (1995).

100. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 10 (2004).

101. See 102 CONG. REC. 4459-61 (1956) (statement of Sen. Walter George); 102 CONG. REC. 5445 (1956) (statement of Sen. Strom Thurmond). Albert Gore and Estes Kefauver of Tennessee and Lyndon B. Johnson of Texas were “the only three southern Senators who did not sign” the Manifesto. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1079 (2014).

102. See KARL E. CAMPBELL, *SENATOR SAM ERVIN, THE LAST OF THE FOUNDING FATHERS* 105-07 (2007); ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE*

Supreme Court is now bearing fruit always produced when men substitute naked power for established law.”<sup>103</sup> Protesting this “unwanted decision”<sup>104</sup> and approvingly referring to *Plessy v. Ferguson*,<sup>105</sup> the Manifesto stated that the “original Constitution does not mention education”; that the “very Congress which proposed the [Fourteenth Amendment] subsequently provided for segregated schools in the District of Columbia”; and that at the time of the adoption of the amendment, twenty-six of the thirty-seven states of the union “that had any substantial racial differences among its people, either approved the operation of segregated schools already in existence or subsequently established such schools by action of the same law-making body which considered the 14th amendment.”<sup>106</sup> Asserting that *Brown* “violated the original understanding of the Fourteenth Amendment. . . . the Manifesto placed in the foreground precisely the argument that the Court’s opinion in *Brown* sought to force into the background.”<sup>107</sup>

A majority of the states of the former Confederacy, employing the doctrine of interposition and nullification,<sup>108</sup> passed resolutions declaring *Brown* null and void.<sup>109</sup> For instance, in February 1956 Virginia resolved to use “all ‘honorable, legal and constitutional’ means to ‘resist this illegal encroachment on our sovereign powers.’”<sup>110</sup> The “Parker Doctrine” posited that the Constitution “does not require integration. It merely forbids discrimination.”<sup>111</sup>

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SENATE 785 (2002); DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE C. WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 86 (2d ed. 2000).

103. 102 CONG. REC. 4460 (1956).

104. *Id.*

105. According to the Manifesto, *Plessy* “became a part of the life of the people of the many states and confirmed their habits, customs, tradition, and way of life. It is founded on elemental humanity and common sense, for parents should not be deprived by government of the right to direct the lives and education of their own children.” *Id.*

106. *Id.*

107. Driver, *supra* note 101, at 1063.

108. This doctrine and theory dates back to the 1880s and is associated with secessionist John Calhoun of South Carolina and others. See Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2734 (2003); see also DANIEL FARBER, *LINCOLN’S CONSTITUTION* 26-91 (2003) (discussing interposition theories).

The doctrine’s basic premise is that the Constitution is a compact between sovereign states that delegates strictly limited powers to the federal government. According to the theory, when the federal government exceeds those limits, states have a right to “interpose” their authority between the federal government and their citizens.

David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1081 n.43 (2004).

109. See TAYLOR BRANCH, *PARTING THE WATERS* 380 (1988).

110. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 60 (2000) (quoting S.J. Res. 3, 1956 Gen. Assem., Reg. Sess. 1956 Va. Acts 1213, 1215).

111. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955). This decision was written by Judge John J. Parker. In 1930, President Herbert Hoover nominated Parker to a seat on the Supreme Court. That nomination was opposed by the National Association for the Advancement of Colored People after the organization learned of a 1920 speech in which

In 1957 a mob initially thwarted the enrollment of nine African American students at the Little Rock Central High School. President Dwight D. Eisenhower dispatched to Little Rock one thousand soldiers from the 101st Airborne Division to restore order and the students were able to enroll.<sup>112</sup> Three years later federal marshals escorted six-year-old Ruby Bridges into the William Frantz Elementary School in New Orleans, Louisiana; that moment is depicted in Norman Rockwell's famous painting *The Problem We All Live With*.<sup>113</sup> The child was "the first black pupil to integrate a school" in New Orleans.<sup>114</sup>

*Brown*'s formal interment of the separate-but-equal doctrine, as applied to elementary and secondary schools, repudiated one aspect of the Court's acceptance, indeed embrace and endorsement, of American apartheid in *Plessy*. While the text of the Equal Protection Clause did not change, what did change in the interim between *Plessy* and *Brown* were the legal and sociopolitical meanings of race. The Court's 1954 decision broke with the institution's prior acceptance of the white-supremacist subordination of African Americans, and spoke to and against that apartheid regime and the oppression of African Americans "com[ing] down in apostolic succession from slavery" to modern times.<sup>115</sup>

## II. THE COURT'S RACE-CONSCIOUS AFFIRMATIVE ACTION JURISPRUDENCE

This Part examines Supreme Court decisions addressing the constitutionality of race-conscious affirmative action in university admissions and government contracting. As will be seen, on display in these cases are the differing race-based discrimination and racism-based discrimination approaches also found in Chief Justice Roberts's and Justice Sotomayor's divergent views on the way to stop discrimination.

### A. "A Nation of Minorities"?

In *Regents of the University of California v. Bakke*, Allan Bakke, a white male applicant, sued the University of California at Davis Medical School after

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Parker stated that "[t]he participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina." KLUGER, *supra* note 95, at 142. A Republican-controlled Senate rejected the nomination. See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENT PROCESS 2* (2007).

112. See BRANCH, *supra* note 109, at 224.

113. See DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 257 (2006).

114. *Id.*

115. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1959).

his application for admission was rejected.<sup>116</sup> Bakke alleged that the medical school's special admissions program, which reserved sixteen of one hundred places in an incoming class for disadvantaged members of minority groups, excluded him from the school on the basis of his race in violation of the Equal Protection Clause.<sup>117</sup> The Court held (1) that the admissions program unlawfully excluded applicants who were not minority group members from a specific number of seats in an incoming class,<sup>118</sup> and (2) that race may be considered as a "plus" factor in the admissions process.<sup>119</sup>

Of special interest here are the Justices' understandings of and approaches to race. In his opinion announcing the judgment of the Court, Justice Lewis F. Powell, Jr.<sup>120</sup> set out his view of the meaning of the Fourteenth Amendment.

The guarantees of the Fourteenth Amendment extend to all persons. . . . It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.<sup>121</sup>

Justice Powell opined that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>122</sup>

Justice Powell noted that the "Court's initial view of the Fourteenth Amendment was that its 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.'"<sup>123</sup> The Equal Protection Clause "was '[v]irtually strangled in infancy by post-civil-war judicial reactionism'"<sup>124</sup> and "was relegated to decades of relative desuetude" before it "began to attain a genuine measure of vitality."<sup>125</sup> During that dormant period, Powell opined,

116. 438 U.S. 265, 270 (1978).

117. Bakke also alleged, and the Court held, that the medical school's rejection of his application violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

118. *Bakke*, 438 U.S. at 320; *id.* at 420 (Stevens, J., joined by Burger, C.J., Stewart, & Rehnquist, JJ., concurring in the judgment in part and dissenting in part) (holding that the university's admissions program violated Title VI of the 1964 Civil Rights Act).

119. *Id.* at 317-20; *id.* at 326 (Brennan, J., concurring in part and dissenting in part).

120. In discussing Justice Powell's *Bakke* opinion, I am indebted to Ian Haney López. See López, *supra* note 63.

121. *Bakke*, 438 U.S. at 289-90 (citations omitted) (internal quotation marks omitted).

122. *Id.* at 291.

123. *Id.* (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873)); see *supra* note 28 and accompanying text.

124. *Bakke*, 438 U.S. at 291 (alteration in original) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949)).

125. *Id.* at 291-92 (citations omitted).

“the United States had become a Nation of minorities.”<sup>126</sup>

Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a “majority” composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. . . . The guarantees of equal protection . . . “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”<sup>127</sup>

Justice Powell cited Court cases referring to what he called the “stock of many lands” protected by the Equal Protection Clause: “Celtic Irishman,” “Chinese,” “Austrian resident aliens,” “Japanese,” and “Mexican Americans.”<sup>128</sup> As used by Powell, “these non-black minorities helped make more plausible the claim that race operated similarly for all ethnic groups—that the experiences of the Irish and Austrians resembled that of the Chinese, Japanese, and Mexicans in the United States, and by extension tracked the fate of blacks as well.”<sup>129</sup>

“Over the past 30 years,” Justice Powell stated, “this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons ‘the protection of equal laws’ . . . in a Nation confronting the legacy of slavery and racial discrimination.”<sup>130</sup> While the Court’s decisions addressed the constitutionality of “the continued exclusion of Negroes from the mainstream of American society” and “could be characterized as involving discrimination by the ‘majority’ white race against the Negro minority. . . . [T]hey need not be read as depending upon that characterization for their results.”<sup>131</sup> He wrote that it sufficed to say that the Court “has consistently repudiated [d]istinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>132</sup>

In addition, and consistent with his aforementioned views, Justice Powell rejected a “two-class theory” of the Fourteenth Amendment based on differences between African Americans and whites.<sup>133</sup> The equal protection guarantee applies “to *all* persons” and does not allow “the recognition of

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126. *Id.* at 292.

127. *Id.* at 292-93 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

128. *Id.* at 292.

129. López, *supra* note 63, at 1036.

130. *Bakke*, 438 U.S. at 293-94 (citation omitted).

131. *Id.* at 294.

132. *Id.* at 294 (alteration in original) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)) (internal quotation marks omitted).

133. *See id.* at 295 (quoting *Hernandez v. Texas*, 347 U.S. 475, 478 (1954)).

special wards entitled to a degree of protection greater than that accorded others.”<sup>134</sup> “Majority” and “minority” concepts “necessarily reflect temporary arrangements and political judgments,” and “the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.”<sup>135</sup> Judicial toleration of the preferential treatment of these groups based on their race and nationality would result in a “majority” comprised of “a new minority of white Anglo-Saxon Protestants.”<sup>136</sup> Having “cast whites as vulnerable minorities” and “magically conjured WASPs as America’s most vulnerable potential victim,”<sup>137</sup> Justice Powell argued that there would be “no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.”<sup>138</sup>

Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability, then, would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effects, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if it otherwise were politically feasible and socially desirable.<sup>139</sup>

Justice Powell did conclude that an institution of higher education could constitutionally consider race in furtherance of the attainment of a diverse student body. Grounding his analysis in academic freedom, “a special concern of the First Amendment,”<sup>140</sup> he opined that “the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>141</sup>

134. *Id.* (footnote omitted). Recall that in the *Civil Rights Cases*, the Court declared that there must be a time at which African Americans cease to be the “special favorite of the laws.” 109 U.S. 3, 25-26 (1883).

135. *Bakke*, 438 U.S. at 295; see also NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 200-01 (1987) (“All ‘whites’ are consigned to the same category, deserving of no special consideration. That is not the way ‘whites’ see themselves, or indeed are, in social reality. Some may be ‘whites,’ pure and simple. But almost all have some specific ethnic or religious identification, which, to the individual involved, may mean a distinctive history of past—and perhaps some present—discrimination.”).

136. *Bakke*, 438 U.S. at 296.

137. López, *supra* note 63, at 1039.

138. 438 U.S. at 296 (footnote omitted).

139. *Id.* at 296-97 (footnote omitted).

140. *Id.* at 312.

141. *Id.* at 313 (internal quotation marks omitted).

An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.<sup>142</sup>

The opinion of Justices William J. Brennan, Jr., Byron Raymond White, Thurgood Marshall, and Harry A. Blackmun (the Brennan opinion) agreed with Justice Powell that certain uses of race in university admissions are permissible and further concluded, in disagreement with Powell, that the medical school's program did not violate the Equal Protection Clause. Relevant to present purposes, their opinion noted that the Fourteenth Amendment "has been the law of our land for only slightly more than half its 200 years" and that "for half of that half, the Equal Protection Clause of the Amendment was largely moribund" and "was early turned against those whom it was intended to set free, condemning them to a 'separate but equal' status before the law, a status always separate but seldom equal."<sup>143</sup> Noting aspirational claims that law must be colorblind, they argued that "reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities" and that "many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."<sup>144</sup>

The Brennan opinion's approach to the Equal Protection Clause recognized the association between an assertion of "human equality" and the "proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated."<sup>145</sup> But the view that those factors must be constitutionally irrelevant "has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."<sup>146</sup> Thus, the opinion concluded, "racial classifications are not *per se* invalid under the Fourteenth Amendment."<sup>147</sup>

Attention must also be paid to Justice Marshall's separate opinion and his racism-based discrimination approach to the constitutionality of the medical school's admissions program. The program does not violate the Constitution, he concluded:

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe

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142. *Id.* at 314 (footnote omitted).

143. *Id.* at 326-27 (Brennan, J., concurring in part and dissenting in part) (footnote omitted).

144. *Id.* at 327.

145. *Id.* at 355.

146. *Id.* at 355-56.

147. *Id.* at 356.

that this same Constitution stands as a barrier.<sup>148</sup>

Justice Marshall recounted the nation's historical mistreatment of African Americans' human rights from colonial times<sup>149</sup> to the "implicit protection of slavery" in the Constitution<sup>150</sup> to the Court's confirmation of the "position of the Negro slave as mere property" in *Dred Scott v. Sandford*.<sup>151</sup> Post-Civil War emancipation, "while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. . . . The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War."<sup>152</sup> Southern states moved to "re-enslave the Negroes" through Black Codes, and "the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary."<sup>153</sup> Reconstruction was "short-lived" and "with the assistance of this Court, the Negro was rapidly stripped of his new civil rights."<sup>154</sup> In *Plessy v. Ferguson*,<sup>155</sup> the "Court's ultimate blow to the Civil War Amendments and to the equality of the Negroes,"<sup>156</sup> the Court "[i]gnor[ed] totally the realities of the positions of the two races."<sup>157</sup>

In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts.<sup>158</sup>

Many northern states also engaged in discrimination against African Americans, as did the federal government when President Woodrow Wilson ordered racial segregation in public buildings.<sup>159</sup> African Americans were "confined to separate military units" during World Wars I and II, a practice

148. *Id.* at 387 (Marshall, J., concurring in part and dissenting in part).

149. *Id.* at 388-89 ("[E]ven as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.").

150. *Id.* at 389; see also *supra* notes 11-14 and accompanying text.

151. 438 U.S. at 389 (Marshall, J., concurring in part and dissenting in part).

152. *Id.* at 390.

153. *Id.*

154. *Id.* at 391 (citations omitted).

155. 163 U.S. 537 (1896); see also *supra* notes 40-68 and accompanying text.

156. *Bakke*, 438 U.S. at 392 (Marshall, J., concurring in part and dissenting in part).

157. *Id.*

158. *Id.* at 393.

159. *Id.* at 394.

formally ended by President Harry S. Truman in 1948.<sup>160</sup> And black children were excluded from “white public schools” and graduate and professional schools.<sup>161</sup> While “some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court”<sup>162</sup> in cases culminating in *Brown v. Board of Education*, those rulings “did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.”<sup>163</sup>

“The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment,” Justice Marshall opined.<sup>164</sup> Referencing data on African American life expectancy, infant mortality, the deaths of mothers during childbirth, median income, poverty, and unemployment, he argued that the “relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.”<sup>165</sup> Given this “sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.”<sup>166</sup>

As can be seen, Justice Powell employed a race-based analysis in interpreting and applying the Equal Protection Clause in the affirmative action context. The clause applies to and protects all persons and all ethnic groups in this “Nation of minorities,” he opined, and prohibits preferential classifications for members of one group at the expense of individuals belonging to other groups.<sup>167</sup> That nonblack minorities did not have the same racism-based and subordinating experiences as African Americans was of no moment. For Justice Powell (like Chief Justice Roberts), racial classification was the constitutionally problematic feature of governmental action challenged by the plaintiff. It is useful to compare Justice Powell’s approach with Justice Marshall’s focus on the historical mistreatment of African Americans and the ways in which centuries of unequal treatment negatively impacted their lives in contemporary America. What mattered for Justice Marshall was the hundreds of years of discrimination and subordination of African Americans and their lived experiences which in no way resembled the experiences of other racial groups.

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 395.

165. *Id.* at 396.

166. *Id.*

167. *Id.* at 292-93 (citation omitted).

For Justice Marshall (like Justice Sotomayor), the effect of racism-based discrimination is the salient issue.

## B. Government Contracting

In *City of Richmond v. J.A. Croson Co.* the Court considered an equal protection challenge to a Richmond, Virginia program requiring construction contractors to award at least thirty percent of the dollar amount of each contract to minority business enterprises.<sup>168</sup> By a five-to-four vote, the Court, strictly scrutinizing the set-aside program, held that Richmond failed to demonstrate a compelling governmental interest justifying the plan, and that the plan was not narrowly tailored to remedy the effects of prior discrimination.<sup>169</sup>

Justice Sandra Day O'Connor's plurality opinion<sup>170</sup> determined that the Richmond plan denied a specified percentage of public contracts based solely on the basis of a citizen's race. Seeing no way to distinguish "benign" from "remedial" racial classifications, she stated that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."<sup>171</sup> Racial classifications "carry a danger of stigmatic harm," Justice O'Connor wrote, and if not restricted to remedial settings "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>172</sup> For those reasons, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."<sup>173</sup>

Having focused on what she perceived to be the dangers of racial classifications, Justice O'Connor argued that the racial makeup of Richmond and the city's council necessitated strict judicial scrutiny. "[B]lack[s] constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks."<sup>174</sup> In her view, these facts gave rise to the "concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts."<sup>175</sup> (A dissenting Justice Marshall argued that this view "implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional

168. 488 U.S. 469, 477 (1989).

169. *Id.* at 486.

170. A concurring Justice Antonin Scalia agreed with the plurality's conclusion that strict scrutiny applied to all governmental classifications by race. *See id.* at 520 (Scalia, J., concurring in the judgment).

171. *Id.* at 493 (plurality opinion).

172. *Id.* at 493-94 (citation omitted).

173. *Id.* at 494.

174. *Id.* at 495.

175. *Id.* at 495-96.

jurisprudence.”)<sup>176</sup>

Justice O'Connor addressed the issue of the kind of discrimination addressable by governmental race-conscious affirmative action. Government's interest in remedying past racial discrimination is compelling and justifiable; government's interest in “remedying . . . the effects of societal discrimination, an amorphous concept of injury that may be ageless in its reach into the past,” is not.<sup>177</sup>

Justice O'Connor did not “doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs”; she determined, however, that “this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.”<sup>178</sup>

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as “identified discrimination” would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.<sup>179</sup>

Finding no evidence of identified discrimination in the Richmond construction industry, Justice O'Connor speculated that the low level of minority participation (0.67% of the city's prime construction contracts) could reflect societal discrimination in educational and economic opportunities and “both black and white career and entrepreneurial choices.”<sup>180</sup> “Blacks may be disproportionately attracted to industries other than construction.”<sup>181</sup> The city's thirty percent set-aside constituted “outright racial balancing” resting upon “the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.”<sup>182</sup>

In the concluding paragraph of her opinion, Justice O'Connor instructed that evidence and findings of discrimination against qualified minority contractors will

assure all citizens that the deviation from the norm of equal treatment of all

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176. *Id.* at 555 (Marshall, J., dissenting).

177. *Id.* at 497 (plurality opinion) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)) (internal quotation marks omitted); *see also id.* at 520-21 (Scalia, J., concurring in the judgment).

178. *Id.* at 499 (plurality opinion).

179. *Id.*

180. *See id.* at 479-80, 500-03.

181. *Id.* at 503 (citation omitted).

182. *Id.* at 507 (citations omitted) (internal quotation marks omitted).

racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.<sup>183</sup>

Having acted without the requisite findings, the city of Richmond violated “the dictates of the Equal Protection Clause.”<sup>184</sup>

Justice Marshall’s dissent, joined by Justices Brennan and Blackmun, opened with the following sentence: “It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst.”<sup>185</sup> Finding “deep irony” in the Court’s “second-guessing” of Richmond’s judgment, he opined that “[a]s much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city’s disgraceful history of public and private racial discrimination.”<sup>186</sup> The “facts of the Richmond experience”—“the deliberate diminution of black residents’ voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination”—were “deeply familiar” to the leadership of Richmond.<sup>187</sup> Where leaders of legislatures and cities determine that past discrimination has infected the construction industry, “armchair cynicism like that exercised by the majority has no place.”<sup>188</sup> Justice Marshall thus rejected the Court’s “cramped vision of the Equal Protection Clause” and its scuttling of Richmond’s “laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won.”<sup>189</sup>

*Adarand Constructors, Inc. v. Peña* provides yet another illustration of the Justices’ differing approaches to the race and/or racism approach.<sup>190</sup> In that case, the Court, by another five-to-four vote, held that a federal program providing prime contractors with a financial incentive to hire subcontractors certified as small disadvantaged businesses<sup>191</sup> violated the equal protection

183. *Id.* at 510.

184. *Id.* at 511.

185. *Id.* at 528 (Marshall, J., dissenting); *see also id.* at 561 (Blackmun, J., dissenting) (“I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. . . . Yet this Court, the supposed bastion of equality, strikes down Richmond’s efforts as though discrimination had never existed or was not demonstrated in this particular litigation. . . . History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.”).

186. *Id.* at 529 (Marshall, J., dissenting).

187. *Id.* at 544.

188. *Id.* at 546.

189. *Id.* at 561.

190. 515 U.S. 200 (1995).

191. The prime contractor received additional compensation for hiring a certified small business controlled by “socially and economically disadvantaged individuals” who presumptively included “Black Americans, Hispanic Americans, Native Americans, Asian

component of the Fifth Amendment's Due Process Clause.<sup>192</sup> Writing for the Court, Justice O'Connor set forth three general propositions established by the Court's decisions involving race-based governmental action: skepticism, consistency, and congruence.<sup>193</sup> "Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."<sup>194</sup> "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."<sup>195</sup>

Justice O'Connor sought to "dispel the notion that strict scrutiny is strict in theory, but fatal in fact."<sup>196</sup> Recognizing that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality," she opined that "government is not disqualified from acting in response to it."<sup>197</sup> But that governmental action must survive strict judicial scrutiny.<sup>198</sup>

Justice Antonin Scalia, concurring, argued that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination . . . . In the eyes of government, we are just one race here. It is American."<sup>199</sup> Also concurring, Justice Clarence Thomas, disagreeing with Justice John Paul Stevens, expressed his view that there is a moral and constitutional equivalence between laws subjugating and

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Pacific Americans, and other minorities, or any other individual found to be disadvantaged" pursuant to Section 8(a) of the Small Business Administration Act. 15 U.S.C. §§ 637(d)(2)-(3); *Adarand*, 515 U.S. at 205 (citation omitted).

192. See U.S. CONST. amend. V (1791) ("No person shall . . . be deprived of life, liberty, or property, without due process of law."). The Fifth Amendment does not contain an equal protection provision. In *Bolling v. Sharpe*, decided the same day as *Brown*, the Court concluded that "it would be unthinkable that the same Constitution" that prohibited state-mandated segregation in public schools "would impose a lesser duty" and permit such segregation in the public schools of the District of Columbia. 347 U.S. 497, 500 (1954). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

193. See *Adarand*, 515 U.S. at 223-24. Skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination." *Id.* at 223 (citations omitted) (internal quotation marks omitted). Consistency: "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Id.* at 224 (citations omitted) (internal quotation marks omitted). Congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Id.* (citations omitted) (internal quotation marks omitted).

194. *Id.*

195. *Id.* at 227.

196. *Id.* at 237 (citations omitted) (internal quotation marks omitted).

197. *Id.*

198. See *id.*

199. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

laws benefiting persons on the basis of race.<sup>200</sup> “Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.”<sup>201</sup>

In dissent, Justice David H. Souter, joined by Justice Stephen G. Breyer, argued that “[w]hen the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism . . . the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct.”<sup>202</sup> If that price “is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing.”<sup>203</sup>

In a separate dissent, Justice Ruth Bader Ginsburg, joined by Justice Breyer, noted Justice O’Connor’s reference to the “unfortunate reality” of the persistence of the practice and lingering effects of racial discrimination against minority groups.<sup>204</sup> This is so, she stated, “because, for most of our Nation’s history, the idea that ‘we are just one race,’ . . . was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in

200. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

Justice Stevens argued that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.” *Id.* at 243 (Stevens, J., dissenting). He distinguished invidious discrimination, “an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority,” from remedial race-conscious preferences “reflect[ing] the opposite impulse: a desire to foster equality in society.” *Id.* For Justice Stevens, there is a “difference between a ‘No Trespassing’ sign and a welcome mat” and “a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor.” *Id.* at 245.

Disagreeing with Justice Stevens, Justice Thomas argued that

it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

*Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment) (citing the Declaration of Independence). In his view, “government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.” *Id.* at 241. This equivalency argument has been called “one of the silliest, albeit influential, formulations in all of American law.” RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 165 (2013).

201. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

202. *Id.* at 270 (Souter, J., dissenting).

203. *Id.*

204. *Id.* at 272 (Ginsburg, J., dissenting).

this land no superior race, no race inferior to any other.”<sup>205</sup> Focusing on the lingering effects of racial discrimination, she opined that such effects

are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumé, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.<sup>206</sup>

Once again, the Justices’ approaches reflected fundamental differences in their approaches to race and the meaning and application of the Equal Protection Clause. In *Croson*, Justice O’Connor expressed her concern about the dangers of stigmatic harm carried by racial classifications. Justice Marshall focused, instead, on the history of public and private racial discrimination in Richmond. In *Adarand*, the majority viewed the issue before the Court through a race-based prism. The dissenting Justices, looking through a racism-based lens, spoke of the lingering effects of discrimination against minority groups evident in today’s neighborhoods, workplaces, and markets.

### C. Law School Admissions

In *Grutter v. Bollinger* the Court evaluated the constitutionality of the University of Michigan Law School’s consideration of race when making admissions decisions.<sup>207</sup> A five-Justice majority of the Court, in an opinion by Justice O’Connor, applied strict scrutiny and held that the law school had a compelling interest in attaining a diverse student body,<sup>208</sup> and that the race-conscious admissions program was narrowly tailored to serve that compelling interest.<sup>209</sup>

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205. *Id.*

206. *Id.* at 273-74 (Ginsburg, J., dissenting); see also *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (“[G]overnment actors, including state universities, need not be blind to the lingering effects of an overtly discriminatory past, the legacy of centuries of law-sanctioned inequality.” (citations omitted) (internal quotation marks omitted))).

207. 539 U.S. 306, 311 (2003).

208. In so holding the Court referenced *Bakke* and “endorse[d] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Id.* at 325; see *supra* notes 140-142 and accompanying text.

209. *Grutter*, 539 U.S. at 334. The law school’s admissions policy reaffirmed the institution’s commitment to racial and ethnic diversity with particular focus on students from groups that have been historically discriminated against, such as African Americans, Hispanics, and Native Americans. The policy also stated that enrolling a “critical mass” of

In so holding, Justice O'Connor noted that strict scrutiny "is not 'strict in theory, but fatal in fact,'" and that while "all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."<sup>210</sup> "Context matters when reviewing race-based governmental action under the Equal Protection Clause," she wrote, and "[n]ot every decision influenced by race is equally objectionable."<sup>211</sup> Deferring to the law school's judgment that diversity was critical to the institution's educational mission and would yield educational benefits, and presuming that the law school was acting in good faith, Justice O'Connor accepted the school's goal of enrolling a "critical mass" of minority students "defined by reference to the educational benefits that diversity is designed to produce."<sup>212</sup> Justice O'Connor noted that amicus briefs submitted by "major American businesses . . . made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and viewpoints."<sup>213</sup> She also noted an amicus brief for retired officers and civilian leaders of the nation's military which stated that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security."<sup>214</sup>

Noting that "education . . . is the very foundation of good citizenship,"<sup>215</sup> Justice O'Connor opined that "public institutions of higher education must be accessible to all individuals regardless of race or ethnicity," for "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>216</sup> In her view, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" so that "a set of leaders with legitimacy in the eyes of the citizenry" are cultivated.<sup>217</sup> Universities and law schools are "the training ground for a large number of our Nation's leaders," and access to legal education and the legal profession "must

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underrepresented minority students could "ensure their ability to make unique contributions to the character of the Law School." *Id.* at 316 (internal quotation marks omitted). An applicant's race or ethnicity was considered as a "plus" factor in admissions decisions, and every law school applicant was subjected to "a highly individualized, holistic review" which considered "all the ways an applicant might contribute to a diverse educational environment." *Id.* at 336-37.

210. *Id.* at 326-27 (quoting *Adarand*, 515 U.S. at 237).

211. *Id.* at 327.

212. *Id.* at 329-30. The educational benefits: promoting "cross-racial understanding," breaking down racial stereotypes, and enabling students to better understand students of other races. *Id.*

213. *Id.*

214. *Id.* at 331 (alteration in original) (quoting Brief for Julius W. Becton, Jr., et al. as Amici Curiae at 5) (internal quotation marks omitted).

215. *Id.* (alteration in original) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (internal quotation marks omitted).

216. *Id.* at 331-32.

217. *Id.* at 332.

be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>218</sup>

This instrumental and operational affirmative action<sup>219</sup> considers race and ethnicity for diversity-based and not remedial purposes. Diversity is important to educational missions and benefits, to recognizing the needs of businesses operating in a global marketplace, to national security, to good citizenship, and to the inclusion of all members of society in the nation’s civic life and leadership. Remediation of past and current racial wrongs—of racism-based discrimination—is not the goal or focus of this type of affirmative action.<sup>220</sup> What matters and what is desired is the admission of a “critical mass” of students identified by race and ethnicity, individuals whose views are likely affected by the “unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>221</sup> This experiential aspect of racial diversity recognizes that “[b]y virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”<sup>222</sup>

Justice Thomas dissented from the Court’s validation of the law school’s affirmative action program. He argued that “the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.”<sup>223</sup> The law school did not seek students who “[would] succeed in the study of law,” the Justice wrote; instead, it sought “only a facade [sic]—it is sufficient

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218. *Id.* at 332-33.

219. See Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004); Ronald Turner, *Grutter, the Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 206-07, 218-19 (2005).

220. Turner, *supra* note 219, at 216-27.

221. *Grutter*, 539 U.S. at 333.

222. *Id.* at 338. Additionally, Justice O’Connor stated that “race-conscious admissions policies must be limited in time,” for “all “race-conscious programs must have reasonable durational limits.” *Id.* at 342 (citations omitted) (internal quotation marks omitted). She “expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Id.* at 343; see also *id.* at 346 (Ginsburg, J., concurring) (“[O]ne may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”). But see *id.* at 375-76 (Thomas, J., concurring in part and dissenting in part) (writing that the Court “holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School’s fabricated compelling state interest” and disagreeing with Justice Ginsburg’s characterization of the Court’s holding as an expression of hope).

223. *Id.* at 371 (Thomas, J., concurring in part and dissenting in part).

that the class looks right, even if it does not perform right.”<sup>224</sup> The law school’s affirmative action program “engender[s] attitudes of superiority or . . . provoke[s] resentment among those who believe that they have been wronged by the government’s use of race” and “stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are entitled to preferences.”<sup>225</sup> Expressing his concern for the “handful of” African Americans not admitted to the law school because of racial discrimination, Justice Thomas asked, “Who can differentiate between those who belong and those who do not?”<sup>226</sup>

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.<sup>227</sup>

For Justice Thomas, consideration of race in the form of racial classifications and in pursuit of racial diversity was stigmatic and constituted race-based discrimination.

### III. “THE WAY TO STOP DISCRIMINATION ON THE BASIS OF RACE . . .”

As noted in the preceding Part, one finds in the Court’s affirmative action precedents a clear jurisprudential divide between (1) Justices employing a race-based discrimination analysis focusing on racial classifications and (2) Justices employing a racism-based discrimination analysis grounded in racial realities and emphasizing the harmful effects of subordinating discrimination on racial minorities. That divide is on full display in Chief Justice Roberts’s and Justice Sotomayor’s differing views on the “way to stop discrimination on the basis of race.”

#### A. Chief Justice Roberts’s Way to Stop Discrimination

In *Parents Involved in Community Schools v. Seattle School Dist. No. 1* the Court addressed the question of “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.”<sup>228</sup>

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224. *Id.* at 372.

225. *Id.* at 373 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (first and second alterations in original) (internal quotation marks omitted)).

226. *Id.*

227. *Id.*

228. 551 U.S. 701, 711 (2007).

By a five-to-four vote, the Court invalidated race-conscious student assignment plans voluntarily adopted by school boards in Seattle, Washington and Jefferson County, Kentucky. Chief Justice Roberts's plurality opinion<sup>229</sup> concluded that

it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.<sup>230</sup>

In his view, the at-issue plans were tied to the school districts' racial demographics and not to "any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."<sup>231</sup> He concluded that the school boards sought racial balance "set solely by reference to the demographics of the respective school districts" and "work[ed] backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits."<sup>232</sup>

Quoting Justice John Marshall Harlan's "[o]ur Constitution is color-blind" axiom,<sup>233</sup> Chief Justice Roberts opined that "'outright racial balancing' is 'patently unconstitutional'"<sup>234</sup> and prophesied that "[a]ccepting [such] balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society."<sup>235</sup> He also predicted that

[a]llowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first

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229. Justices Scalia, Thomas, and Samuel A. Alito, Jr. joined the opinion. *Id.* at 708-09.

230. *Id.* at 726.

231. *Id.* Seattle argued that its consideration of race "helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools." *Id.* at 725. Jefferson County contended that its plan was adopted in pursuit of the goal of "educating its students in a racially integrated environment." *Id.* (citations omitted) (internal quotation marks omitted). Both districts asserted that "educational and broader socialization benefits flow from a racially diverse learning environment," and that given their interest in racial diversity "it makes sense to promote that interest directly by relying on race alone." *Id.* at 725-26.

232. *Id.* at 729.

233. *Id.*; see *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *supra* text accompanying note 60.

234. *Parents Involved*, 551 U.S. at 730 (plurality opinion) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

235. *Id.*

to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.”<sup>236</sup>

Having presented a race-based narrative, and casting the Court as the staunch opponent of racial balancing and the champion of a colorblind Equal Protection Clause, Chief Justice Roberts opined that “[w]hen it comes to using race to assign children to schools, history will be heard.”<sup>237</sup> That history includes *Brown v. Board of Education*.<sup>238</sup> Setting forth a revisionist account of *Brown*, the Chief Justice concluded that the Court’s landmark 1954 decision supported his conclusion that the Seattle and Jefferson County plans were unconstitutional. His rendition of *Brown*, grounded in and flowing from his race-based narrative, began with this observation: “the position of the plaintiffs . . . was spelled out in their brief and could not have been clearer: [T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.”<sup>239</sup> What did the racial classifications in Seattle and Jefferson County do, he asked, “if not accord differential treatment on the basis of race?”<sup>240</sup>

Chief Justice Roberts then quoted a statement made by *Brown* lawyer Robert L. Carter in the 1952 oral argument before the Court: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”<sup>241</sup> The Chief Justice found “no ambiguity in that statement”,<sup>242</sup> that he did not is not surprising given his acontextual and ahistorical approach to and understanding of the issue before and decided by the *Brown* Court. Interestingly, in June 2007, Carter (then a federal judge) responded to Roberts’s characterization of Carter’s 1952 argument. “All that race was used for at that point in time was to deny equal opportunity to black people . . . . It’s to stand that argument on its head to use race the way they use [it] now.”<sup>243</sup>

236. *Id.* at 730-31 (second, third, and fourth alterations in original) (citations omitted).

237. *Id.* at 746. Note that in a dissenting opinion in an earlier case, Chief Justice Roberts stated: “It is a familiar adage that history is written by the victors.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 275 (2007) (Roberts, C.J., dissenting).

238. 347 U.S. 483 (1954).

239. *Parents Involved*, 551 U.S. at 747 (plurality opinion) (second alteration in original) (citation omitted) (internal quotation marks omitted).

240. *Id.*

241. *Id.* (quoting Transcript of Oral Argument at 7, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No.8) (internal quotation marks omitted).

242. *Id.* Also attempting to align himself with the *Brown* lawyers, Justice Thomas announced that his view that the Constitution is colorblind “was the rallying cry for the lawyers who litigated *Brown*.” *Id.* at 772 (Thomas, J., concurring).

243. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), at A24 (quoting Carter) (internal quotation marks omitted); see also *id.* (*Brown* lawyer Jack Greenberg describes Roberts’s characterization of *Brown* as “preposterous,” and *Brown*

Continuing his discussion of *Brown*, Chief Justice Roberts made this remarkable statement: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”<sup>244</sup> The absurdity of this deracinated description of the real-world issue in *Brown* did not escape Justice Stevens:

This sentence reminds me of Anatole France’s observation: “The majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.” THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.<sup>245</sup>

Closing his opinion, Chief Justice Roberts wrote that the way for the school districts “‘to achieve a system of determining admission . . . on a nonracial basis’ is to stop assigning students on a racial basis. *The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.*”<sup>246</sup> This race-based construction of the Equal Protection Clause does not consider as relevant or significant the events and developments set out in Parts I and II of this article. Race, and not racism, is the focal point of Chief Justice Roberts’s analysis.

A majority of the Court did not sign onto Chief Justice Roberts’s “way to stop discrimination” analysis. Justice Anthony M. Kennedy, while providing the majority-creating fifth vote for the Court’s invalidation of the districts’ plans, submitted that the “postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race’ . . . is not sufficient to decide these cases. Fifty years of experience since *Brown* . . . should teach us that the problem . . . defies so easy a solution.”<sup>247</sup>

A dissenting Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, rejected the notion that “to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives.”<sup>248</sup> Breyer stated:

By way of contrast, I do not claim to know *how best to stop harmful discrimination*; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation,

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lawyer William Coleman states that the *Parents Involved* decision is “100 percent wrong” and is “dirty pool”).

244. *Parents Involved*, 551 U.S. at 747 (plurality opinion).

245. *Id.* at 799 (Stevens, J., dissenting) (alterations in original) (citations omitted).

246. *Id.* at 748 (plurality opinion) (citation omitted) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955)) (emphasis added); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1222 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (“The way to end racial discrimination is to stop discriminating by race.”), *rev’d and remanded*, 551 U.S. 701 (2007).

247. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) (citations omitted).

248. *Id.* at 862 (Breyer, J., dissenting).

troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is best for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.<sup>249</sup>

Justice Breyer, noting that "[c]ontext matters,"<sup>250</sup> also emphasized the significant differences in the various contexts in which governmental use of race-based criteria arise ("for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools").<sup>251</sup> The subject before the *Parents Involved* Court—advancing or maintaining racial integration—"is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply,"<sup>252</sup> or "one in which race-conscious limits stigmatize or exclude,"<sup>253</sup> or one that "pit[s] the races against each other or otherwise significantly exacerbate[s] racial tensions. . . . The context here is one of racial limits that seek, not to keep the races apart, but to bring them together."<sup>254</sup> Placed in that context,

the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.<sup>255</sup>

As for Chief Justice Roberts's citing of the *Brown* lawyers as support for the conclusion that the at-issue plans were unconstitutional, Justice Breyer, employing a racism-based discrimination analysis, opined that "segregation policies did not simply tell schoolchildren 'where they could and could not go to school based on the color of their skin'; they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination."<sup>256</sup>

The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration.

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249. *Id.* at 862-63 (emphasis added) (citations omitted).

250. *Id.* at 834 (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

251. *Id.*

252. *Id.*

253. *Id.* at 834-35.

254. *Id.* at 835.

255. *Id.*

256. *Id.* at 867 (citation omitted).

Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying 'a state-mandated racial label.' But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.<sup>257</sup>

The "hope and promise of *Brown*"<sup>258</sup> was addressed in the closing pages of Justice Breyer's dissent. "For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools."<sup>259</sup> *Brown* "challenged this history and helped to change it" and "held out . . . the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools."<sup>260</sup> While

[t]he last half century has witnessed great strides toward racial equality . . . we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.<sup>261</sup>

For Justice Breyer, the focal point of his contextual equal protection analysis was, not race, but harmful race-based discrimination.

## B. Justice Sotomayor's Way to Stop Discrimination

In April 2014 the Court issued its decision in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary*.<sup>262</sup> By a 6-2 vote,<sup>263</sup> the Court held that the Equal Protection Clause was not violated by Proposal 2, a voter-approved amendment to the Michigan Constitution prohibiting the state and other governmental entities from granting race-based and other preferences in public employment, public education, and public contracting.<sup>264</sup> Announcing the Court's judgment, Justice Kennedy stated that "[t]his case is not about how the debate about racial preferences should be resolved. It is about who may resolve

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257. *Id.* (citations omitted) (internal quotation marks omitted).

258. *Id.* at 867.

259. *Id.*

260. *Id.*

261. *Id.* at 868.

262. 134 S. Ct. 1623 (2014).

263. Justice Elena Kagan did not consider or participate in the decision.

264. See MICH. CONST. art. I, § 26. Proposal 2 was a response to the Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Schuette*, 134 S. Ct. at 1623, 1629.

it.”<sup>265</sup> He concluded that nothing in the United States Constitution or the Court’s precedents authorized “the Judiciary to set aside Michigan laws that commit this policy determination to the voters. . . . Democracy does not presume that some subjects are either too divisive or too profound for public debate.”<sup>266</sup>

Justice Ginsburg, the senior Justice in dissent, assigned the writing of the dissenting opinion to Justice Sotomayor. According to Ginsburg, Sotomayor “might have been distressed about some of the reports in the *Fisher* [*v. University of Texas*] case where she went along with the court. So if anybody had doubts about her views on affirmative action she wanted to quell them, which she certainly did.”<sup>267</sup>

Justice Sotomayor opened her opinion with the observation that “[w]e are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do.”<sup>268</sup> She declaimed that “to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.”<sup>269</sup>

Noting Chief Justice Roberts’s “the way to stop discrimination” declaration in *Parents Involved*, Justice Sotomayor argued that the Chief Justice’s position expresses “a sentiment out of touch with reality, one not required by our Constitution, and one that has properly been rejected as ‘not sufficient’ to resolve cases of this nature.”<sup>270</sup> “Race matters,” she wrote, “because of the long history of racial minorities’ being denied access to the political process” and “because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.”<sup>271</sup> Race matters

265. *Schuette*, 134 S. Ct. at 1638.

266. *Id.*

267. Marcia Coyle, *Ginsburg on Rulings, Race*, NAT. L.J. (Aug. 22, 2014), at 1, 6 (alteration in original). In *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), the Court held that the United States Court of Appeals for the Fifth Circuit did not correctly apply strict scrutiny in its examination of the university’s race-conscious undergraduate admissions program. Applying *Grutter*, the Court concluded that the university must prove that the means chosen to attain diversity are narrowly tailored to that objective, and that a reviewing court “must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity.” *Id.* at 2420. The Fifth Circuit failed to satisfy this requirement when it presumed that the university acted in good faith and placed the burden on those challenging the program of rebutting that presumption. Remanding the case for further proceedings, the Court instructed that the Fifth Circuit “must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored.” *Id.* at 2421.

268. *Schuette*, 134 S. Ct. at 1651 (Sotomayor, J., dissenting).

269. *Id.*

270. *Id.* at 1675 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

271. *Id.* at 1676 (Sotomayor, J., dissenting).

“for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away.”<sup>272</sup> In a gripping passage Justice Sotomayor addressed other specific ways in which race matters:

Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?,” regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”<sup>273</sup>

Critiquing the view that “examining the racial impact of legislation only perpetuates racial discrimination,”<sup>274</sup> Justice Sotomayor wrote:

This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.<sup>275</sup>

Chief Justice Roberts responded that Justice Sotomayor

urges that “[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’” But it is not “out of touch with reality” to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good. To disagree with the dissent’s views on the costs and benefits of racial preferences is not to “wish away, rather than confront” racial inequality. People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.<sup>276</sup>

272. *Id.*

273. *Id.* In this passage Justice Sotomayor “paints a picture that looks a lot like her own life.” Dahlia Lithwick, *What We Talk About When We Talk About Talking About Race*, SLATE (Apr. 24, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/race\\_and\\_the\\_supreme\\_court\\_what\\_the\\_schuetz\\_decision\\_reveals\\_about\\_how.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/race_and_the_supreme_court_what_the_schuetz_decision_reveals_about_how.html). For more on Justice Sotomayor’s life and experiences, see SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013).

274. *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

275. *Id.*

276. *Id.* at 1638-39 (Roberts, C.J., concurring) (citations omitted).

## C. The Problematics of Focusing on Race and Not Racism

In *Parents Involved* Chief Justice Roberts made clear his view that racial classification was *the* critical issue and focal point of his equal protection analysis. Driving his anticlassification approach<sup>277</sup> is the concern that consideration of race can lead to racial balancing and would “justify the imposition of racial proportionality throughout American society.”<sup>278</sup> The intensity of his aversion to any governmental considerations of race can be seen in his characterization and bleaching of *Brown*. Recall that Roberts cited the *Brown* lawyers as support for his position that the Equal Protection Clause forbids the use of race as a factor in assigning students to particular schools and his astonishing statement that prior to *Brown*, children (not just African American children) “were told where they could and could not go to school based on the color of their skin.”<sup>279</sup> That incorrect and revisionist description of *Brown* makes no mention of the specific and contextualized issue before the Court in 1954, and elides the reality of white supremacy and the manifestation thereof in the form of the separate but supposedly equal public schools challenged by the plaintiffs and the *Brown* lawyers. His acontextual/ahistorical approach unsurprisingly yields the conclusion that all race-conscious measures, including plans designed to promote racial integration and diversity, constitute unlawful discrimination on the basis of race.

When race is perceived “as a superficial individual trait, disconnected from vertical understandings of group hierarchy,”<sup>280</sup> all persons have a race and can be fitted into some category of a racial schemata. Under a no-consideration-of-race legal regime, the use of a race-conscious criterion in government decision making can be framed as treating similarly situated persons advantaged by the criterion in a discriminatory fashion relative to those not so advantaged. But race, a political invention and social construct,<sup>281</sup> cannot be disconnected from racism-based realities which form the backdrop to current race-conscious efforts like those undertaken in Seattle and Jefferson County. “Instead, race must always be historically grounded. . . . [W]e must ask what race has done

277. Proponents of the anticlassification approach argue that strict judicial oversight of government action should be reserved only for policies that employed racial classifications . . . and insist[] that any use of racial classifications, even to integrate, [is] unconstitutional. This “anticlassification” position view[s] the paradigmatic harm not as group subordination but rather the classification of any individual by race.

Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287 (2011). This approach, along with colorblind constitutionalism, focuses on “protecting individuals from the harm of categorization by race.” *Id.*

278. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion).

279. *Id.* at 747; see *supra* notes 239-244 and accompanying text.

280. OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 116 (2014).

281. See *supra* note 5.

and been asked to do throughout history.”<sup>282</sup>

That history includes narratives of race beginning “with Europeans’ encounters with the various inhabitants of the African continent during the sixteenth century,”<sup>283</sup> the conceptualization of race as biology that “served an important ideological function in revolutionary America,” and the presumption of “[b]iological difference . . . essential to justifying the enslavement of Africans in a nation founded on a radical commitment to liberty, equality, and natural rights.”<sup>284</sup> While “slavery got along for a hundred years after its establishment without race as its ideological rationale,” the fiction of race was later used to explain “why some people could rightly be denied what others took for granted: namely, liberty, supposedly a self-evident gift of nature’s God. But there was nothing to explain until most people could, in fact, take liberty for granted—as the indentured servants and disfranchised freedmen of colonial America could not.”<sup>285</sup>

Chief Justice Roberts’s race-based approach is disconnected from this nation’s racism-based history and realities. In his view, governmental recognition and consideration of race, whether it is for segregation and exclusion or integration and inclusion, raises equal protection concerns. Conceptualized and understood in this way, why government has decided to consider race is constitutionally irrelevant. On that view, discrimination on the basis of race can be stopped by the cessation of discrimination on the basis of race.

Compare and contrast Chief Justice Roberts’s approach to that taken by Justice Sotomayor. Her *Schuetz* opinion expressly pointed to and grounded the constitutional analysis in history and the experiences of racialized persons.<sup>286</sup> She pointed out that “[a]fter over a century of being shut out of Michigan’s institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity,” and that “[f]or much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics.”<sup>287</sup> Unlike Chief Justice Roberts, she focused on contextual/historical racism, the “social practice” and “theory and practice of applying a social, civic, or legal double standard” and

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282. Bridges, *supra* note 5, at 37.

283. *Id.* at 28.

284. ROBERTS, *supra* note 5, at 24.

285. KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE* (2012); *see also* LUNDY BRAUN, *BREATHING RACE INTO THE MACHINE: THE SURPRISING CAREER OF THE SPIROMETER FROM PLANTATION TO GENETICS* 28 (2014) (noting that “Southern physicians deployed science to defend the institution of slavery”).

286. On racialization, see STEVE MARTINOT, *THE MACHINERY OF WHITENESS: STUDIES IN THE STRUCTURE OF RACIALIZATION* (2010).

287. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1652, 1654 (Sotomayor, J., dissenting).

operationalizing “the ideology surrounding such a double standard.”<sup>288</sup> Her antisubordination approach<sup>289</sup> is cognizant of the ways in which the fiction of race has been used to classify, marginalize, and subordinate racial minorities.

For Justice Sotomayor, the issue, the focal point, is not a fictional and invented race but real-world racism. Effectively addressing and combatting racism requires more than the tautological observation that the way to stop discrimination on the basis of race is to stop discriminating on the basis of race. Rather, the stopping-racism-based-discrimination project deems constitutionally relevant the ways in which the lived experiences of those subject to racism-based mistreatment matters. On this view, the differential treatment of the dissimilarly situated (those subjected to and adversely affected by the social practice of racism and those not so affected) does not violate the treat-like-alike precept posited by the race-based anticlassification model. Discrimination on the basis of race can only be stopped, not by the cessation of discrimination on the basis of race, but by the application of the Constitution “to the unfortunate effects of centuries of racial discrimination.”<sup>290</sup>

A separate inquiry must also be made: what constitutes permissible or impermissible “discrimination”? Chief Justice Roberts’s approach views all considerations of race as “discrimination.” That term “has come to have a negative connotation. To call something ‘discrimination’ is to criticize it, to assert that it is wrong. But of course the term has positive associations as well. One can be complimented for discriminating taste (in art, wine, literature, etc.).”<sup>291</sup> Thus, to refer to any and all differential treatment as forbidden discrimination suffers from the same and problematic absence of context found in the Chief Justice’s concept of “race.” Legal discriminations among persons are “ubiquitous and necessary.”<sup>292</sup> For example, a legal mandate that a person seeking a driver’s license must be at least sixteen years of age and pass a driving test discriminates on the basis of age.<sup>293</sup> A law mandating that African American passengers sit in the back and white passengers sit in the front of the

288. FIELDS & FIELDS, *supra* note 285, at 17.

289. Reva Siegel has described this approach as an analysis “concerned with practices that disproportionately harm members of marginalized groups” and one which “can tell the difference between benign and invidious discrimination.” Siegel, *supra* note 277, at 1288-89; see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 157 (1976) (discussing the “group-disadvantaging principle” and the view that laws may not “aggravate[]” or “perpetuate[] . . . the subordinate position of a specially disadvantaged group”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004) (discussing the “antisubordination principle: the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups”).

290. *Schuette*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

291. DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 2 (2008).

292. *Id.*

293. See *id.* at 3.

bus<sup>294</sup> discriminates on the basis of race and racism. Is one or both or none of these discriminatory enactments unlawful? How should that question be answered and on what grounds?

Unless one takes the position that any and all governmental considerations of race are wrongful and should be legally proscribed, the question of whether certain (not all) race-conscious decision making is or is not unconstitutional must be addressed. Depending on the facts and the context, the answer may be “yes,” “no,” or “it depends.” Requiring African Americans to sit in the back of the bus in furtherance of the enforcement and maintenance of a noxious and white-supremacist policy is now recognized as an historical example of unlawful racism-based discrimination. Is a race-conscious diversity-enhancing governmental initiative contextually different from the bus scenario or other situations in which actions are taken or not taken because of an individual’s race? If context matters (as it should), the answer to that question should not be answered by way of a judicial inquiry hermetically sealed from and indifferent to the past and present, from lived realities and racial inequality. Racism-based discrimination matters.

### CONCLUSION

Notably absent from Chief Justice Roberts’s “the way to stop discrimination” platitude is any recognition and understanding that all differential treatment is not and should not be viewed as unlawful “discrimination,” as “it is often desirable and sometimes necessary to treat people differently.”<sup>295</sup> Some may believe that Roberts’s slogan has a “verbal and intellectual fluency.”<sup>296</sup> But the distinct issue and dynamics of discrimination on the basis of racism militate against such a simplistic directive. Those tasked with “separating wrongful discrimination violative of the principle of racial equality from lawful differential treatment employed in pursuit of that principle”<sup>297</sup> must adopt and employ a nuanced analytical approach, one cognizant of the realities and effects of racism-based discrimination and not based on fictional “race” viewed as skin color or phenotype.<sup>298</sup> The failure to recognize that “America has never discriminated on the basis of race (which does not exist) but on the basis of racism (which

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294. *See id.* at 1.

295. *Id.* at 4.

296. Martha Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 91 (2007) (noting but not agreeing with this position).

297. Ronald Turner, *On Neutral and Preferred Principles of Constitutional Law*, 74 U. PITT. L. REV. 433, 487 (2013).

298. *See* Mario Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO L.J. 967, 977 (2010).

most certainly does)”<sup>299</sup> renders invisible racism-based discrimination and results in a weakened and unequal Equal Protection Clause. Racism-based discrimination matters.

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299. Coates, *supra* note 1.