

REVERSE DISCRIMINATION AND OTHER RACIAL PROJECTS

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Abstract: The U.S. Supreme Court's decision in *Ames v. Ohio Department of Youth Services* abandoned historical context when assessing discrimination allegations, thus clearing remaining obstacles to reverse discrimination lawsuits. Reverse discrimination claims challenge equal protection jurisprudence, presenting whites as victims of racial subordination in claims that can be difficult to adjudicate if historical context is no longer a litmus test. Reverse discrimination claims also function as a white racial project—an attempt to represent and explain white racial identity in ways that redistribute societal resources to reflect a racial hierarchy that still benefits whites. A white racial project, however, is not unique. Rather, all racial groups are engaged in racial projects that interact and negotiate racial positioning in the United States. Neither inherently good nor bad, racial projects can move us closer to or further from a multiracial democracy depending on whether they disrupt or further embed racial hierarchy. Examination of reverse discrimination suits must interrogate them as white racial projects, while also considering the benefit of explicitly recognizing and engaging the multiple racial projects operating in American society. Explicit engagement makes it easier to identify the interests of some racial groups that are vindicated at a cost to other racial groups, to facilitate consensus on what can and cannot be defended in terms of those tradeoffs, and to identify the proper forums, if not courts, for resolving the competing claims of racial projects.

INTRODUCTION

In June 2025, the U.S. Supreme Court issued an opinion in *Ames v. Ohio Department of Youth Services* that will accelerate the rise of reverse discrimination suits.¹ Brought by Marlean Ames, a straight woman who accused her employer of discrimination, *Ames* considered whether plaintiffs from majority groups should face heightened pleading standards when bringing workplace

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¹ See 605 U.S. 303, 309–12 (2025) (declining to adopt an elevated standard for majority-group plaintiffs in Title VII claims).

discrimination lawsuits.² The U.S. Court of Appeals for the Sixth Circuit, drawing on a “background circumstances” rule, asserted that because Ames was heterosexual, she had to make a “showing in addition to the usual ones for establishing a prima-facie case” against her employer, using “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”³ A Reuters headline, acknowledging the racial implications of the case, read, “U.S. Supreme Court to Decide if White, Straight, Workers Face Higher Bar in Bias Suits.”⁴ In a 9–0 decision, the Supreme Court found that a heightened pleading standard for plaintiffs from majority groups runs afoul of both Title VII of the Civil Rights Act of 1964 (Title VII) and the Court’s precedents interpreting Title VII.⁵ Declining to consider the merits of the case, the Court vacated and remanded the case so that Ames would have an opportunity to plead absent heightened standards.⁶

The decision was unanimous but not unremarkable. To the contrary, it is difficult to divorce the outcome in *Ames* from the Court’s 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*, affirming the challenge brought by white and Asian plaintiffs to the consideration of race in college and university admissions.⁷ Nor can the *Ames* decision be considered independently of sustained political attacks on

² *Id.* at 305–06. After a decade working as an executive secretary, Ames was promoted to program administrator, a job for which she received solid performance reviews from her gay supervisor. *Id.* at 306. In 2019, Ames applied for and was denied a promotion, with the position ultimately filled by a gay woman. *Id.* Shortly thereafter, Ames was demoted from her program administrator role back to an executive secretary, a decision made, in part, by the two supervisors who initially denied Ames the promotion. *Id.* A gay man ultimately filled the position newly vacated by Ames. *Ames v. Ohio Dep’t of Youth Servs.*, 87 F.4th 822, 824 (6th Cir. 2023), *vacated*, 605 U.S. 303, *remanded to No. 23-3341*, 2025 WL 2554965 (6th Cir. Sep. 2, 2025).

³ *Ames*, 87 F.4th at 825 (citing *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008)). The language is a modification of the *McDonnell Douglas* analytical framework used in Title VII employment discrimination claims. In cases of reverse discrimination, the first prong of the standard—plaintiff belongs to a racial minority—is changed to instead require plaintiffs to establish circumstances supporting a suspicion of discrimination against a member of the majority, while the remaining elements of the framework are modified to reflect that plaintiffs were treated differently than other similarly situated employees who were not members of the protected group. *See Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (summarizing the modified framework). Whether the unusual employer standard, used previously by the Sixth Circuit in cases involving white plaintiffs, is actually required was the question presented to the Supreme Court for review. *See, e.g., Arendale*, 519 F.3d at 590, 603 (articulating the standard in a case alleging reverse discrimination brought by a white male plaintiff); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 65, 67 (6th Cir. 1985) (articulating the standard in a case alleging reverse discrimination brought by a white female plaintiff).

⁴ Daniel Wiessner, *US Supreme Court to Decide if White, Straight Workers Face Higher Bar in Bias Lawsuits*, REUTERS (Oct. 4, 2024), <https://www.reuters.com/legal/us-supreme-court-decide-if-white-straight-workers-face-higher-bar-bias-lawsuits-2024-10-04/> [perma.cc/C844-RFVN].

⁵ *Ames*, 605 U.S. at 313.

⁶ *Id.*

⁷ 600 U.S. 181, 206–07 (2023).

diversity, equity, and inclusion efforts led by the Trump administration, or a seeming rise in the number of suits asserting that employers are working to discriminate against members of racial majorities in the United States.⁸ When accusing Costco in 2024 of possible “illegal discrimination” against “white, Asian, male or straight” employees, the National Center for Public Policy cited a 2023 lawsuit in which a white woman was awarded over twenty-five million dollars after successfully arguing that she was fired because of her race.⁹ In April 2024, Amazon was sued for its delivery service partnership aimed at maximizing minority-owned business opportunities with the tech giant.¹⁰ In June of 2024, in *American Alliance for Equal Rights v. Fearless Fund Management, LLC (Fearless Fund)*, the U.S. Court of Appeals for the Eleventh Circuit granted a preliminary injunction against Fearless Funds, paralyzing their grant program for Black female business owners in light of claims that it discriminated against white grant applicants.¹¹ Multiple district court cases

⁸ See, e.g., Exec. Order No. 14190, 90 Fed. Reg. 8853, 8855 (Jan. 29, 2025) (eliminating federal funding for discriminatory equity ideology); Exec. Order No. 14151, 90 Fed. Reg. 8339, 8339 (Jan. 20, 2025) (terminating “illegal” DEI mandates, policies, programs, preferences, and activities in the federal government); Exec. Order No. 14173, 90 Fed. Reg. 8633, 8633–34 (Jan. 21, 2025) (revoking executive orders promoting diversity and inclusion in employment and contracting, excising references to DEI language, principles, or commitments in acquisitions, contracts, and grants); Andrew Ross Sorkin et al., *The War on D.E.I. Heats Up*, N.Y. TIMES (Jan. 23, 2025), <https://www.nytimes.com/2025/01/23/business/dealbook/trump-diversity-equity-inclusion.html> [perma.cc/NFG3-88KA] (detailing a “crackdown” on DEI that includes penalties for federal workers who choose not to report coworkers who go against orders to remove DEI).

⁹ COSTCO WHOLESALE, NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 31–32 (2025), https://s201.q4cdn.com/287523651/files/doc_financials/2025/ar/COST-Proxy-2025.pdf [perma.cc/E7XX-F8D5]; see also Meredith Deliso, *Starbucks Ordered to Pay Extra \$2.7M to Employee Who Said She Was Fired for Being White*, ABC NEWS (Aug. 16, 2023), <https://abcnews.com/US/starbucks-ordered-pay-extra-27m-employee-fired-white/story?id=102327372> [perma.cc/G3SU-AHV9] (detailing another instance of a majority-group plaintiff being awarded compensation for reverse discrimination). The National Center for Public Policy Research submitted a shareholder proposal asking Costco to conduct an evaluation and publish a report on the risk of the company’s diversity, equity and inclusion roles, policies, and goals. COSTCO WHOLESALE, *supra*, at 32. Unlike many peer companies, including Walmart, Tractor Supply, Ford Motor, Harley Davidson, Toyota, Boeing, Microsoft, Home Depot, Southwest Airlines, and Deere, all of which rolled back DEI initiatives as a result of controversy regarding the programs, Costco instead pushed back. See *id.* (listing the anti-DEI responses of named corporations). In addition to the Board of Directors’ unanimous recommendation that shareholders vote against the Center’s shareholder proposal, the Board defended its DEI initiatives as anchored in the company’s code of ethics, and critical to Costco’s success. *Id.* at 32–33; see Giulia Carbonaro, *How Costco Is Bucking the DEI Trend*, NEWSWEEK (Jan. 17, 2025), <https://www.newsweek.com/how-costco-bucking-dei-trend-2016527> [perma.cc/36VK-2MTT] (reporting that Costco’s CEO stated they were “not prepared to change” the company’s DEI practices); Sarah Nassauer, *Why Costco Isn’t Joining the Backlash Against DEI*, WALL ST. J. (Jan. 15, 2025), [perma.cc/KV5P-HX9D] (stating that Costco’s affirmation of DEI reflects a penchant for avoiding corporate bandwagons).

¹⁰ *Bolduc v. Amazon.com Inc.*, No. 4:22-CV-00615, 2024 WL 1808616, at *1–2 (E.D. Tex. Apr. 25, 2024).

¹¹ 103 F.4th 765, 769–70, 780 (11th Cir. 2024).

currently being litigated implicate reverse discrimination claims, and experts predict a rise in these claims after an extended period of decline.¹²

Although Title VII and the Equal Protection Clause of the Fourteenth Amendment (Equal Protection Clause), the statutory and constitutional frameworks under which many reverse discrimination suits are filed, were initially adopted against the historical context of discrimination against minorities, white plaintiffs are increasingly finding judicial solicitude under both frameworks. Indeed, in penning the unanimous decision in *Ames*, Justice Brown Jackson noted that neither the text of Title VII nor the Court's interpretive precedents make any mention of special burdens or heightened pleading standards based on one's racial identity.¹³ In this same spirit, Xiao Wang, the lawyer who successfully argued *Ames*, rejects the characterization of "reverse discrimination," asserting that these claims implicate "just discrimination."¹⁴

The decision, however, does more than just clarify Title VII or align the application of Title VII with equal protection doctrine. Rather, the Court's decision does the consequential work of shaping our understanding of race in the United States. Hewing to colorblindness, the outcome in *Ames* disavows differences in racial experience despite data that suggests otherwise.¹⁵ By declining to affirm a history of discrimination that has typically worked in favor of the majority, the decision renders discrimination an individual interpersonal phenomenon (as it is more likely to be when involving members of a racial majority), even though racial discrimination against minorities is pernicious precisely because of the structural and social dynamics on which it feeds.¹⁶ Further, the decision's selective use of history also shapes race: the *Ames* opinion emphasizes the text of Title VII in combination with the Court's precedents

¹² See, e.g., *Goetz v. Gardner*, No. 4:23-cv-00031, 2025 WL 1615938, at *1, 5 (E.D. Mo. June 6, 2025) (denying a 12(b)(6) motion in part because white plaintiffs successfully established they had been discriminated against on the basis of race); Jessica Guynn, *Supreme Court Just Reversed Affirmative Action. What That Means for Workplace Diversity*, USA TODAY, <https://www.usatoday.com/story/money/2023/06/29/affirmative-action-supreme-court-ruling-workplace-diversity/70328166007/> [perma.cc/848W-BHUZ] (June 30, 2023) (reviewing EEOC filings to discover that reverse discrimination complaints fell from 2011 to 2021); Jessica Guynn, 'Reverse Discrimination' Claims Rising, DEMOCRAT & CHRON. (Dec. 23, 2023), https://exploringracism.org/wp-content/uploads/2023/12/Rochester-Democrat-and-Chronicle_12-23-23.pdf [perma.cc/8C4C-6KVM] (documenting a modest increase in reverse discrimination claims at the federal level after the Supreme Court's holding in *SFFA*).

¹³ 605 U.S. 303, 309–10 (2025).

¹⁴ Abby Vesoulis, *What SCOTUS Actually Said About Workplace Fairness in This Year's Big "Reverse Discrimination" Case*, MOTHER JONES (June 11, 2025), <https://www.motherjones.com/politics/2025/06/supreme-court-ames-v-ohio-dei-xiao-wang/> [perma.cc/8HHU-DSE7] (emphasis omitted).

¹⁵ See *supra* note 13 and accompanying text.

¹⁶ See *infra* notes 152–157 and accompanying text.

on its application, but in doing so, it completely ignores a history of Title VII as a response to white supremacy.¹⁷

As a doctrinal matter, the opinion also removes a barrier to reverse discrimination claims, thereby legitimating suits that make claims to resources. Reverse discrimination plaintiffs want something—a job, a grant, an opportunity—that went to a person from a minority group. In this sense, reverse discrimination claims are demanding a redistribution of resources along racial lines, intimating that the current distribution has skewed too far in one direction.¹⁸ This is an empirical question, the impact of which implicates costs and benefits for different groups. This reality, however, is obscured by the opinion's “neutral” doctrinal analysis.¹⁹

The rise of reverse discrimination claims, and the pathway the Court has cleared for the claims, raises several pressing questions. If historical context is no longer a defining criterion for recognizing discrimination, and there are no distinctions based on the identity of the litigant, how should legal actors distinguish between claims of discrimination that advance equality and those that entrench inequality? How does one answer this question given that whites are increasingly developing a sense of solidarity that is distinct and even independent of prejudice or racial resentment? That is, if whites believe they are subordinated and in need of protection, and cloak these assertions in the rhetoric of civil rights, are reverse discrimination claims really the same in meaning and scope as traditional discrimination claims? To what extent are courts equipped to draw relevant distinctions? Does this expansion in the typical and historical application of equal protection demand alternatives in the movement for equal justice in the United States?

This project begins to consider these questions. Existing scholarly critiques of reverse discrimination suits assert that the claims invite inversion of equal protection or highlight weaknesses with antidiscrimination law.²⁰ Analy-

¹⁷ 605 U.S. at 309–10 (discussing the text and jurisprudence of Title VII); *see also* Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. et al. at 6–12, *Ames*, 605 U.S. 303 (No. 23-1039) (explaining that when Congress enacted Title VII, Black people were more likely to endure employment discrimination than members of the majority, and that the Court took this into account when fashioning a test for Title VII that considered whether plaintiffs belonged to a minority group, thereby describing Title VII as the culmination of federal efforts to study and address discrimination against Black people and other communities of color).

¹⁸ *See infra* notes 169–172 and accompanying text.

¹⁹ *See supra* note 13 and accompanying text (noting the majority's investigation of Title VII's text and subsequent jurisprudence).

²⁰ Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 257–58 (using *Masterpiece Cakeshop v. Colorado Human Rights Commission* to go beyond “the collision of religious liberty and equality” into a reframing of antidiscrimination law as positioned to protect “dissenters from majoritarian norms” (citing 584 U.S. 617 (2018))); Darren Leonard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 637 (arguing that through equal protection jurisprudence, courts “now reserve their most exacting level of scrutiny for laws that

sis, however, must go further, interrogating reverse discrimination lawsuits as informing a white racial project. Racial projects link racial signification and racial structure, giving meaning to race by advancing racial symbols and advocating for structural arrangements that organize and distribute resources along racial lines.²¹ The Civil Rights Movement is the paradigmatic racial project, but reverse discrimination claims are racial projects, too—they demand distribution and redistribution of resources informed by racial realities.²² Racial projects are neither inherently good nor bad but rather can be assessed on the basis of whether they reproduce racial hierarchy or subvert it.²³ There is no escaping racial projects: as long as racial hierarchy exists in the United States, racial groups will navigate and negotiate that hierarchy through racial projects.²⁴ Given the enduring nature of racial projects, there is no possibility of return to a “neutral” baseline. And although current equality jurisprudence purports to offer an objective assessment, in reality, it only serves to hinder racial projects that subvert racial hierarchy, obscuring the tradeoffs that are made when advancing the interests of one group over another.

Filtering the insights of critical race theory through a legal realist lens, this article theorizes reverse discrimination as one racial project in a field of many, and sometimes competing, racial projects. Assessing reverse discrimination claims through the analytical lens of racial projects reaches beyond rhetoric to more directly confront the racial structuring, signification, and resource distribution on which the project insists. Racial projects analysis allows for clearer distinctions between those projects that should be advanced and those that should be delayed or obstructed, and to identify who, judges, legislators, or maybe even private parties, are in the best position to act as honest brokers of these projects. Finally, confronting the reality and inevitability of racial projects should destabilize faith in doctrine, potentially informing needed changes to both doctrine and adjudication, judicial or otherwise.

‘burden’ historically privileged groups but assume the constitutionality of enactments that harm historically disadvantaged groups”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–31 (1997) (arguing that because the rules and reasons the legal system employs to enforce status relations evolve as they are contested, justifications for facially neutral state action should be scrutinized with skepticism).

²¹ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 56 (2d ed. 1994) [hereinafter OMI & WINANT (2d ed.)]; MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 125 (3d ed. 2015) [hereinafter OMI & WINANT (3d ed.)].

²² See OMI & WINANT (3d ed.), *supra* note 21, at 125 (“Projects take shape not only at the macro-level of racial policy-making, state activity, and collective action, but also at the level of everyday experience and personal interaction.”).

²³ See *id.* (listing voter disenfranchisement and altruistic measures such as organizing work for community health rights in the barrio as two examples of racial projects).

²⁴ See *id.* (asserting that “[e]very racial project is both a reflection of and response to the broader patterning of race in the overall social system” and thus “every racial project attempts to reproduce, extend, subvert, or directly challenge that system”).

Responding to reverse discrimination suits requires engagement not only with white racial projects but with racial projects across the racial spectrum. In service of this argument, Part I considers both minoritized and white racial projects.²⁵ Racial projects borrow from, and against, each other, making sometimes complementary and sometimes competing claims regarding race and racial hierarchy.²⁶ Reverse discrimination suits are a white racial project reflecting both a rise in white racial resentment and the deepening salience of racial identity to white Americans.²⁷ Part II illustrates how reverse discrimination suits in education reinterpret racial meaning in service of consolidating resources that maintain white supremacy.²⁸ Judicial review of the claims advances the characterization of whites as victims of racial hierarchy, potentially to troubling doctrinal development—the recognition of harms to white racial dignity.²⁹ Part III considers the adjudication of reverse discrimination claims informed by direct engagement with the reality of racial projects.³⁰ Explicit engagement with racial projects beyond doctrine may make it easier to identify the interests of some groups that are vindicated at the cost to the interests of others, to facilitate consensus on what can and cannot be defended in terms of tradeoffs, and to identify the proper forums, if not courts, for resolving the competing claims of racial projects.³¹

I. RACIAL PROJECTS

As explained by authors Michael Omi and Howard Winant, race exists at the intersection of social structure and cultural representation.³² Take, for example, the phenomenon of residential segregation.³³ Understanding how race operates through residential segregation requires understanding both how symbols that give meaning to race led to residential segregation and how segregation itself creates and reinforces the symbols and idea of race.³⁴ Considering residential segregation as a purely structural phenomenon—the mere distribution of people among physical space—neglects the racial meaning of segregated homes and neighborhoods, as well as how social identity is informed by that distribution.³⁵ Segregated neighborhoods signal hierarchy and thus

²⁵ See *infra* notes 32–125 and accompanying text.

²⁶ See *infra* notes 47–77 and accompanying text.

²⁷ See *infra* notes 78–125 and accompanying text.

²⁸ See *infra* notes 126–254 and accompanying text.

²⁹ See *infra* notes 212–254 and accompanying text.

³⁰ See *infra* notes 255–303 and accompanying text.

³¹ See *infra* notes 260–303 and accompanying text.

³² OMI & WINANT (3d ed.), *supra* note 21, at 124.

³³ Residential segregation is, in fact, the example Omi and Winant offer.

³⁴ OMI & WINANT (3d ed.), *supra* note 21, at 125.

³⁵ See *id.* at 126 (discussing how notions of race among immigrants are shaped “in reference to, and in dialogue with, concepts of race in both their countries of origin and settlement”).

mark people in those neighborhoods as racially superior or inferior.³⁶ Conversely, examining residential segregation in its purely symbolic, cultural, or identitarian form neglects the way that the physical distribution of people is continually deepening the very concept of race through resource allocation.³⁷

Racial projects link signification and structure.³⁸ Ranging from laws and social movements, to political initiatives and cultural phenomena, racial projects are “simultaneously an interpretation, representation, or explanation of racial identities and meanings, and an effort to organize and distribute resources . . . along particular racial lines.”³⁹ These efforts can occur at the state or institutional level, as well as at the individual or micro level.⁴⁰

Racial projects are neither inherently good nor bad but rather can be assessed on the basis of whether they reproduce racial hierarchy or subvert it. A racial project is racist “if and only if it creates or reproduces structures of domination based on essentialist categories of race.”⁴¹ If essentialism is the “belief in real, true human essences, existing outside or impervious to social and historical context,” then racial projects that consider difference in light of histories of racial oppression are positive, while initiatives that link “essentialist representations of race and social structures of domination” are negative.⁴² Theories, for example, suggesting that class differences among different racial groups form due to the inherent capabilities and limitations of each racial group are “bad” racial projects that reproduce the fiction of biological race and accompanying racial essentialism.⁴³

Although racial projects can be primarily promoted by, or designed to serve, a particular racial group, they can also be multiracial in representation or scope. Although the Black racial project of the Civil Rights Movement was a response to the second-class citizen status of Black Americans, the movement was informed, in part, by a multiracial coalition that linked justice for Black

³⁶ *Id.*

³⁷ See *id.* at 124–25 (asserting that racial projects are not just reflections of race, but also a response to the larger, racialized system). See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (documenting how the color line in the United States was reinforced through state-facilitated housing segregation).

³⁸ OMI & WINANT (3d ed.), *supra* note 21, at 125.

³⁹ *Id.* (emphasis omitted); see *Racial Projects and Histories of Racialization* (summarizing Omi and Winant’s concept of racial projects), in *RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 91, 91 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012).

⁴⁰ OMI & WINANT (3d ed.), *supra* note 21, at 125–26.

⁴¹ OMI & WINANT (2d ed.), *supra* note 21, at 71 (emphasis & footnote omitted); see also OMI & WINANT (3d ed.), *supra* note 21, at 128 (“A racial project can be defined as racist if it creates or reproduces structures of domination based on racial significations and identities.” (emphasis omitted)).

⁴² OMI & WINANT (2d ed.), *supra* note 21, at 72, 187 n.57.

⁴³ See DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 3–25 (2011) (tracing the history of race and establishing race as a political system rather than a biological fact).

Americans to justice for all Americans.⁴⁴ Similarly, the investment of some Latinos in immigration discourse that racializes immigrants from Latin America as non-white suggests that investment in racial projects is not necessarily exclusive to the groups who have the most to gain from such a project.⁴⁵ No matter the beneficiary, all groups are involved and invested in racial projects.

Racial projects, moreover, do not exist in a vacuum—they borrow from and against other racial projects. Although minoritized racial projects are typically thought to be developed in response to racial projects that advance white supremacy, they also speak to each other in attempts to flatten or even climb the racial hierarchy. Furthermore, significant shifts in white racial identity signal a new white racial project attempting to change the expressive and material effect of whiteness in the United States by co-opting the rhetoric of minoritized racial projects. Clarity about the ubiquitous nature of racial projects and the intergroup dynamics they shape is essential to developing enduring equality projects in response. By tracing minority racial movements across several decades, Section A of this Part highlights the ways in which minoritized racial projects have shaped and been informed by American antidiscrimination law.⁴⁶ Section B of this Part then examines white racial projects, characterizing reverse discrimination claims as an instance of white racial projects in action.⁴⁷

A. Minoritized Racial Projects

The Civil Rights Movement (the “Movement”) of the mid-twentieth century serves as the paradigmatic racial project. Exposing its participants to harassment, intimidation, and violence in response to years of mass protest, demonstration, and advocacy, the Movement was a racial project that targeted both state policies and institutions to end racial segregation and the second-class status of Black Americans.⁴⁸ These changes were sought at multiple reg-

⁴⁴ Jennifer Richeson, *Not Just Kumbaya: Multiracial Coalitions Yield Pragmatic Results for the Common Good*, AM. PROSPECT (Feb. 18, 2015), <https://prospect.org/2015/02/18/just-kumbaya-multiracial-coalitions-yield-pragmatic-results-common-good/> [perma.cc/2SRM-DSQE] (detailing Latino and Jewish support, alongside the Southern Christian Leadership Conference, in the fight for voting rights, as exemplified by the amicus briefs filed by Japanese, Black, and Jewish American organizations in the Brown and Mendez school desegregation cases); JAKOBI WILLIAMS, *FROM THE BULLET TO THE BALLOT: THE ILLINOIS CHAPTER OF THE BLACK PANTHER PARTY AND RACIAL COALITION POLITICS IN CHICAGO* 125–28 (2013) (documenting racial coalitions between the Illinois Chapter of the Black Panther Party and other activist organizations, as well as the history of the anti-racist, anti-class Rainbow Coalition in Chicago).

⁴⁵ See *infra* notes 72–77 and accompanying text.

⁴⁶ See *infra* notes 48–80 and accompanying text.

⁴⁷ See *infra* notes 81–125 and accompanying text.

⁴⁸ See Allison R. Ferraris, Note, “*The Right to Protest for Right*”: Reaffirming the First Amendment Principle That Limits the Tort Liability of Protest Organizers, 63 B.C. L. REV. 1093, 1096–97 (2022) (contending that civil rights activists’ participation in civil disobedience paved the way for both the Voting Rights Act of 1965 and the Civil Rights Act of 1964).

isters, including both legislative advocacy to secure Black citizenship and participation in social, political, and economic spheres, and a long-term litigation strategy challenging as unconstitutional laws that segregated public places and mandated racial isolation even in private and domestic spheres.⁴⁹ After securing a prohibition on public school segregation at the Supreme Court in 1954, in *Brown v. Board of Education*, the NAACP Legal Defense Fund (LDF) initiated hundreds of lawsuits against school districts across the country that resisted the Court's desegregation mandate, securing desegregation orders and guidelines for the integration of public schools in the South.⁵⁰

The targets of litigation in *Brown* illustrate how racial projects can both reinterpret race and redistribute resources along racial lines. In addition to being marked by racial composition, Black and white public schools were also defined by massive resource disparities. Black schools were regularly and significantly underfunded, and taxes raised to fund schools equally were often diverted to white schools instead.⁵¹ The goal was not simply to isolate white students from Black ones, but to ensure that white students enjoyed superior schooling in terms of financing, quality of education, and capital projects. At the same time, segregated schools performed a symbolic function that illustrated and affirmed racial dynamics. The very purpose of school segregation was to communicate the inferiority of Black students and their families relative to whites in a way that reflected and cemented American racial hierarchy more

⁴⁹ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that Virginia's anti-miscegenation law banning inter-racial marriage violated the Equal Protection Clause of the Fourteenth Amendment). The Movement extracted multiple legislative victories, including: the Civil Right Act of 1964, that guaranteed equal employment without regard to race, and ensured federal authority to integrate public facilities; the Voting Rights Act of 1965, that prohibited literacy tests and poll taxes used to restrict the right of Blacks to vote, and required that formerly slaveholding states obtain preclearance for new voting practices or procedures; and the Fair Housing Act of 1968, that prevented housing discrimination on the basis of race, sex, national origin, or religion. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

⁵⁰ See 347 U.S. 483, 495 (1954) (holding that "separate but equal" public schools violate equal protection); see, e.g., *Cooper v. Aaron*, 358 U.S. 1, 2 (1958) (affirming that state officials were bound by federal court orders mandating desegregation); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968) (providing factors to be used when assessing whether a school district has achieved unitary status); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-19, 21 (1971) (providing guidelines for gauging the necessity and effectiveness of desegregation remedies).

⁵¹ See CAMILLE WALSH, *RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869-1973*, at 17-18 (2018) (detailing how states circumvented equal funding by apportioning school funding by the taxes paid by Blacks and whites, and placing collected taxes under the control over white local officials with discretion over the allocation of funds); ROBERT A. MARGO, *RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY* 37 (1990) (using the "cash value" of Black students to fund white schools).

broadly.⁵² The legal attack on segregation orchestrated by the LDF, that culminated in the *Brown* decision, radically reformed racial meaning and Blackness in American life.

By demanding the end of legislative and social structures that marginalized Black people and rejecting the belief in inherent Black racial inferiority that had justified slavery and Jim Crow, the Civil Rights Movement was a worthy racial project that undercut domination based on faulty essentialist categories of race. The Movement, however, was neither the first nor the last Black racial project, and the Black Lives Matter Movement (BLM) serves as a more recent instantiation of a Black racial project.⁵³ Making up with intensity for what it lacked in originality, the BLM protests peaked in the summer of 2020, after the murder of George Floyd and amid a pandemic that at the time was disproportionately killing Blacks and Latinos, and stands as the broadest and most sustained movement against racial injustice in American history.⁵⁴ Like its predecessors, BLM challenged white racial hegemony by reshaping racial meaning: Black racialized vulnerability to racial profiling and police brutality was not the product of inherent Black criminality, but rather the unequal distribution of policing resources and disparities in the inherent worthiness attributed to Black people in comparison to whites.⁵⁵ The visibility and scope of the project significantly impacted mainstream American politics.⁵⁶

⁵² See *Brown*, 347 U.S. at 494 (“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.”).

⁵³ See *infra* notes 54 & 56 and accompanying text (describing the impact of the Black Lives Matter racial project). Black racial projects challenging hegemonic whiteness were leveled during Reconstruction, during the Antebellum era in the form of slave insurrections, and even earlier.

⁵⁴ See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [perma.cc/HE56-C6QE] (comparing protester turnout at BLM protests in the wake of the Floyd murder to previous social movements).

⁵⁵ See, e.g., M. Keith Chen et al., *Smartphone Data Reveal Neighborhood-Level Racial Disparities in Police Presence*, 107 REV. OF ECON. & STAT. 1734, 1737 (2025) (finding that police officers spend significantly more time in Black neighborhoods than in other areas with similar socioeconomic demographics and crime-driven demand for policing); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2087–88 (2017) (suggesting legal estrangement as a theory of detachment and alienation from the law’s enforcers reflecting the intuition of poor communities of color that the law operates to exclude them from society); Laura Flanders, *Building Movements Without Shedding Differences: Alicia Garza of #BlackLivesMatter*, TRUTHOUT (Mar. 24, 2015), <http://www.truth-out.org/news/item/29813-building-movements-without-shedding-differences-alicia-garza> [perma.cc/CPG7-6WH9] (describing the Movement as a “love note” to Black people).

⁵⁶ See Clare Foran, *A Year of Black Lives Matter*, THE ATLANTIC (Dec. 31, 2015), <http://www.theatlantic.com/politics/archive/2015/12/black-lives-matter/421839/> [perma.cc/NF5H-DW9G] (describing the increasing embeddedness of Black Lives Matter within mainstream politics). The Movement, for example, was successful in prompting several presidential candidates to address the Movement’s concerns. See, e.g., Bernie Sanders, *Issues: Racial Justice*, BERNIE SANDERS 2016, <https://berniesanders.com/issues/racial-justice/> [perma.cc/M46P-CM7K] (debuting a more detailed racial justice platform after a series of challenges by Black Lives Matter activists); Victoria M. Massie, *Hillary Clinton Said*

Other non-white racial projects, often built in dialogue with Black racial projects, abound. In the 1960s, for example, an Asian American project, modeled after the Black Power Movement, deepened Asian political consciousness and helped to unite Japanese, Chinese, and Filipino American students on college campuses.⁵⁷ In higher education, Asian advocacy groups have challenged patterns of exclusion and discrimination in applications and enrollment processes.⁵⁸ And scholars have announced Asian American “moments” in the legal academy, meant as opportunities to oppose patterns of discrimination against Asian Americans.⁵⁹ Although a model minority myth continues to obstruct social and political interventions for the group, the dramatic spike in anti-Asian racism and violence during the COVID-19 pandemic illustrates how easily the

‘Systemic Racism’ in Tonight’s Speech. That’s Major., VOX (July 29, 2016), <http://www.vox.com/2016/7/29/12320118/hillary-clinton-speech-systemic-racism> [perma.cc/875P-HDZT] (reporting that Hillary Clinton became the first presidential nominee to coin the phrase “systemic racism” in a party nomination speech).

⁵⁷ See Caitlin Yoshiko Kandil, *After 50 Years of ‘Asian American,’ Advocates Say the Term Is ‘More Essential Than Ever,’* NBC NEWS (May 31, 2018), <https://www.nbcnews.com/news/asian-america/after-50-years-asian-american-advocates-say-term-more-essential-n875601> [perma.cc/6D8N-Z4LJ] (tracing the origin of the term “Asian American”); Anna Purna Kambhampaty, *In 1968, These Activists Coined the Term ‘Asian American’—And Helped Shape Decades of Advocacy*, TIME (May 22, 2020), <https://time.com/5837805/asian-american-history/> [perma.cc/W33E-3K7X] (detailing the development of the term “Asian American” as a response to both the integration of Asian American subgroups and undifferentiated discrimination leveled at all Asian subgroups). The collapsing of multiple groups under the umbrella term “Asian” masks the varied ethnic identities, immigration histories, and citizenship experiences of the individuals and groups that comprise the category. Bach-Mai Dolly Nguyen, Mike Hoa Nguyen & Tu-Lien Kim Nguyen, *Advancing the Asian American and Pacific Islander Data Quality Campaign: Data Disaggregation Practice and Policy*, 24 ASIAN AM. POL’Y REV. 55, 56 (2014) (explaining that Asian American and Pacific Islander (AAPI) student populations consist of over forty-eight ethnic groups that vary in historical experiences, cultural histories, and socioeconomic backgrounds). I acknowledge this limitation while also keeping in mind that the term “Asian” or “Asian American” can also reflect a political sensibility or identity in addition to referencing a particular racial group. See Kandil, *supra* (tracing the origin of the term to its inspiration from the Civil Rights Movement, and its aspiration of uniting Filipino, Japanese, and Chinese American students on college campuses).

⁵⁸ In the mid-1980s, for example, several complaints filed with the Office of Civil Rights at the U.S. Department of Education alleged discrimination against Asian Americans in college admission processes, resulting in an investigation of several schools, including Harvard and UCLA. See Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 5 n.17, 19 n.86 (1996) (listing anti-Asian American admissions policies at the two schools). And in 1984, Brown University concluded a lengthy internal inquiry finding that Asian Americans had been treated unfairly in their admissions process. *Id.* at 19 n.87.

⁵⁹ See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1288 (1993) (listing several instances where movements against anti-Asian discrimination resulted in change). But see Sora Y. Han, *The Politics of Race in Asian American Jurisprudence*, 11 UCLA ASIAN PAC. AM. L.J. 1, 3–4 (2006) (contextualizing a critique of contemporary Asian American jurisprudence against the goal of multiracial coalition-building).

perception of Asians as “immutably foreign” is triggered, and how urgently Asian political projects challenging racial hierarchy are needed.⁶⁰

Latinos, including Mexicans and Puerto Ricans, have endured a history of conquest, colonization, and segregation that has produced multiple political consciousnesses and racial projects.⁶¹ Although formally considered white for purposes of citizenship since 1896, Mexicans have nevertheless been racialized as non-white, subjecting Mexican Americans to segregation in schools and other public places across the Southwest during the twentieth century.⁶² Justified by purporting linguistic deficiencies, Mexican American children were regularly held back in first grade for multiple years.⁶³ Challenges to these practices—a Latino racial project—set the stage for the eventual challenge to Black segregation in *Brown v. Board of Education*.⁶⁴ Moreover, in the 1960s,

⁶⁰ See Daisy Ball & Nicholas Daniel Hartlep, *Introduction: Asian/Americans and Crime: A Critical Overview* (using analysis in the context of education, race, media, and the criminal justice system to show how the model minority characterization masks the victimization and violence Asian Americans experience in the twenty-first century), in *ASIAN/AMERICANS, EDUCATION, AND CRIME: THE MODEL MINORITY AS VICTIM AND PERPETRATOR* 1, 3–21 (Daisy Ball & Nicholas Daniel Hartlep eds., 2017); Jennifer Lee & Dian Sheng, *The Asian American Assimilation Paradox*, 50 J. ETHNIC & MIGRATION STUD. 68, 68, 81 (2024) (using the inconsistency of predictions of rapid Asian American assimilation and the rise of anti-Asian discrimination and violence during the COVID-19 pandemic to illustrate the ahistorical nature of sociologists’ research on Asian assimilation).

⁶¹ The annexation of Texas and the U.S. war with Mexico from 1846–48 resulted in a second conquest that followed a first round of conquest by Spain. Struggle over former lands and the people of Mexico did not end after annexation was complete, and Mexicans were often met with indiscriminate and state-sanctioned violence, including thousands of lynchings at and near the border meant to control Mexicans and affirm white racial supremacy. See Simon Romero, *Lynch Mobs Killed Latinos Across the West. The Fight to Remember These Atrocities Is Just Starting.*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/porvenir-massacre-texas-mexicans.html> [perma.cc/9NU2-J5QQ] (documenting efforts to uncover and remember “the lynching of thousands of men, women and children of Mexican descent from the mid-19th century until well into the 20th century”). Despite coming under the jurisdiction of the United States after the Spanish War of 1898, Puerto Rico’s inhabitants were denied citizenship for decades. See Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1430 (2004) (reporting the origin of Puerto Rico’s inclusion under U.S. sovereignty). The island’s enduring commonwealth status affords Puerto Ricans second-class status in the United States, leading historian José Triás Monge to deem the island America’s “oldest colony.” See generally JOSÉ TRIÁS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997).

⁶² See generally GILBERT G. GONZALEZ, *CHICANO EDUCATION IN THE ERA OF SEGREGATION* 136–56 (1990); Guadalupe San Miguel, Jr. & Richard R. Valencia, *From the Treaty of Guadalupe Hidalgo to Hopwood: The Educational Plight and Struggle of Mexican Americans in the Southwest*, 68 HARV. EDUC. REV. 353 (1998).

⁶³ Perea, *supra* note 61, at 1441 (documenting the segregation and isolation of Mexican American students).

⁶⁴ See *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 776, 781 (9th Cir. 1947) (successfully challenging the segregation of Mexican American public schoolchildren in Orange County, California). On appeal, Thurgood Marshall helped author an amicus brief on behalf of the NAACP supporting plaintiffs. *Id.* at 775. The brief also served as a dry run of the argument Marshall would make eight years later in *Brown*, “that segregation was unconstitutional per se.” Perea, *supra* note 61, at 1422; see

programs like Chicano/a or Raza Studies were established to present curricula that “reflected the experiences and contributions of ethnic minorities, including Mexican-Americans.”⁶⁵ From crystallizing political identity to accessing integrated schooling and elite education, Asian and Latino racial projects have sought to change the meaning of race while redistributing resources more fairly across racial lines.

Racial projects, however, can develop conflicting aims, both internally and relative to other projects. *Students for Fair Admissions*, for example, included both traditional challenges that race-conscious admissions disadvantaged whites, and the more novel claim that the consideration of race in admissions worked to disadvantage Asians by keeping their admission rates artificially low.⁶⁶ Although a challenge to race-conscious admission would likely always have been successful given the composition of the Court that heard the challenge, the inclusion of Asian American plaintiffs was strategic: given histories of anti-Asian racism in the United States and stronger test score profiles relative to other minoritized groups in elite admission pools, Asian plaintiffs were a more sympathetic group than white plaintiffs who have challenged race-conscious admissions in the past.⁶⁷

Plaintiffs capitalized on this dynamic, presenting a narrative that Asian applicants worked hard and scored well, and thus *deserved* higher admission rates to elite institutions.⁶⁸ The implicit contrast, of course, was to Blacks and Latinos who purportedly benefited from an unfair advantage in race-conscious admissions that they did not deserve. This contrast easily mapped onto longstanding racial stereotypes that position Blacks as welfare cheats and Lati-

Mendez, 161 F.2d at 780 (summarizing arguments of several amicus briefs that urge the Ninth Circuit to take heed of recent advancements in segregation cases and scholarship).

⁶⁵ Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 VA. L. REV. 1689, 1698 (2022). “Meant to empower students who would see themselves reflected in what they were learning, often for the first time, the programs were credited with helping to close academic achievement gaps by race in school districts.” *Id.* As late as 2017, these types of programs were under attack by hostile legislatures. *See id.* at 1740–44 (documenting the challenge to Mexican American Studies in *González v. Douglas*); *González*, 269 F. Supp. 3d 948 (D. Ariz. 2017).

⁶⁶ *See* Complaint at 1, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-CV-14176).

⁶⁷ *See* Nancy Leong, *Preliminary Thoughts on the Summary Judgment Motions in the Harvard Affirmative Action Lawsuit*, TAKE CARE BLOG (June 18, 2018), <https://takecareblog.com/blog/preliminary-thoughts-on-the-summary-judgment-motions-in-the-harvard-affirmative-action-lawsuit> [perma.cc/8BAK-5LAV] (commenting on the statement of Edward Blum, an adversary of affirmative action, that he “needed Asian plaintiffs,” and recruited accordingly).

⁶⁸ *See id.* (asserting that plaintiffs link “discrimination against Asian Americans” with affirmative action, thereby implying that “[i]f ‘Hispanics and African Americans’ did not receive ‘racial preferences,’ . . . discrimination against Asian Americans would disappear”). *But see* Stephanie Saul, *High School Did Not Discriminate Against Asian American Students, Court Rules*, N.Y. TIMES (May 23, 2023), <https://www.nytimes.com/2023/05/23/us/thomas-jefferson-high-school-admissions.html> [perma.cc/SFF7-J2JW] (reporting on the Fourth Circuit’s decision that admissions policies were not adopted with discriminatory intent against Asian Americans).

nos as undocumented immigrants who enjoy ill-gotten gains, and also reflected public sentiment about who does and does not deserve elite college admissions.⁶⁹ The exploitation of these dynamics informs a specific Asian racial project that capitalizes on the antidiscrimination discourse of Black racial projects while also positioning Blacks as a foil to the industriousness of Asians, thus aligning with racist white racial projects.⁷⁰

Shifts in Latino voting trends further illustrate the capacity for minoritized racial projects to develop in alignment with white racial projects. Although Latino racialization and racism did not originate with the Republican Party, Donald Trump's ascendancy within the party by 2016 explicitly capitalized on that racialization, as illustrated by the racist and xenophobic language that was a centerpiece of his campaign.⁷¹ He proposed a wall along the U.S.-Mexican border to curtail supposed high levels of undocumented migration.⁷² He alleged that Mexico was not sending its best, and equated Latino immigrants with criminals, "drug lords," and "bad hombres."⁷³ During his first administration, President Trump signed executive orders that disproportionately targeted Latinos, and manufactured a humanitarian crisis at the border by de-

⁶⁹ See Jennifer Lee & Van C. Tran, *The Mere Mention of Asians in Affirmative Action*, 6 SOCIO. SCI. 551, 568 (2019) (finding that the "mere mention of Asians" as either victims of affirmative action alongside whites, or as victims of discrimination alongside Blacks, shifts support for preferential hiring and promotion of Blacks). See generally V. Thandi Sulé, Rachel Winkle-Wagner, Dina C. Maramba & Abigail Sachs, *When Higher Education Is Framed as a Privilege: Anti-Blackness and Affirmative Action During Tumultuous Times*, 45 REV. HIGHER EDUC. 415 (2022) (finding that public opinion frames selective higher education as a privilege of which white or non-Black students are most deserving).

⁷⁰ Political scientist Claire Jean Kim argues that Asian Americans are located in the field of racial positions with reference to Blacks and whites by means of two processes: (1) "relative valorization" whereby whites valorize Asians relative to Blacks "in order to dominate both groups, but especially the latter"; and (2) "civic ostracism" whereby whites construct Asians "as immutably foreign and unassimilable with Whites . . . in order to ostracize them from the body politic and civic membership." Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 107 (1999). Others argue that Asian positioning shifts depending on the particular axes of subordination by which minoritized groups are measured, such that Asian Americans are considered relatively superior to African Americans and Latinos, but inferior relative to whites or African Americans on the basis of "foreignness." Linda X. Zou & Sapna Cheryan, *Two Axes of Subordination: A New Model of Racial Position*, 112 J. PERSONALITY & SOC. PSYCH. 696, 697–98 (2017).

⁷¹ See *infra* notes 72–74 and accompanying text.

⁷² Amy Chozick & Manny Fernandez, *Trump Seeks Path for Mexico Barrier. But Will It Be a 'Big, Beautiful Wall'?*, N.Y. TIMES (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/us/trump-mexico-wall.html> [perma.cc/5DNR-H7W3] (detailing the signature promise of Trump's 2016 campaign); Jonathan Swan, Maggie Haberman & Ruth Igielnik, *Trump Thinks the Border Got Him Elected in 2016. He's Convinced It Will Do So Again*, N.Y. TIMES (Oct. 19, 2024), <https://www.nytimes.com/2024/10/19/us/politics/trump-immigration-closing-message.html> [perma.cc/T7WB-RX4T] (framing a border wall as a "signature policy proposal[]" for Trump in both 2016 and 2024).

⁷³ Julia Jacobo, *Donald Trump Says He Will Get 'Bad Hombres' Out of US*, ABC NEWS (Oct. 19, 2016), <https://abcnews.com/Politics/donald-trump-bad-hombres-us/story?id=42926041> [perma.cc/727B-3DDM].

taining children and families in appalling conditions.⁷⁴ In the run-up to the 2024 presidential election, then-candidate Donald Trump announced his intention to implement the “largest deportation operation in American history”: an aggressive redux of the family separation policy that characterized his first administration and primarily impacted Latinos in the country.⁷⁵

Despite the campaign’s overt and covert appeals to whiteness, including anti-immigration policies and rhetoric that demeans Latinos, Latino support for the Republican Party during the same decade that Donald Trump became the face of the party grew from 29% in 2012 to 39% in 2024.⁷⁶ Although religious commitments or economic concerns are sometimes provided as reasons for the shift, some sociologists believe assimilation to whiteness is the primary driver.⁷⁷ In a reflection of the indeterminate and evolving status of Latinos in the United States, the 2030 American census will include a new racial category of

⁷⁴ Exec. Order No. 13767, 82 Fed. Reg. 8793, 8793–96 (Jan. 25, 2017) (announcing Trump Administration immigration policies, including building a wall along the Southern U.S. border, authorizing expansion of Border Control, directing the Department of Homeland Security to construct additional detention facilities along the border, and restricting asylum access); Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800–01 (Jan. 25, 2017) (increasing the number of Immigration and Customs Enforcement (ICE) agents, reinstating the “Secure Communities” ICE program, that was closed during the Obama administration, and expanding enforcement priorities to include undocumented immigrants charged with minor offenses or merely suspected of a crime); see *Family Separation—a Timeline*, S. POVERTY L. CTR. (Mar. 23, 2022), <https://www.splcenter.org/news/2022/03/23/family-separation-timeline> [perma.cc/XD6D-7H8D] (summarizing the Trump administration’s executive orders into a timeline).

⁷⁵ Lauren Gambino, *If Trump Wins the Election, This Is What’s at Stake*, THE GUARDIAN (Oct. 31, 2024), <https://www.theguardian.com/us-news/ng-interactive/2024/oct/31/election-trump-immigration-policies> [perma.cc/ATG9-BSWH].

⁷⁶ See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 13–34 (2015) (documenting the Republican Party’s decision to become “the white man’s party”); David Leonhardt, *A Q&A About Latino Republicans*, N.Y. TIMES (Apr. 30, 2024), <https://www.nytimes.com/2024/04/30/briefing/latino-republicans-2024.html> [perma.cc/DMC7-8AAJ] (examining greater Republican support among Latinos).

⁷⁷ See BRENT BAKER, *MSNBC Features Guest Who Charges Latinos Who Back Trump ‘Want to Be White’*, at 0:28 (YouTube, Sep. 30, 2024), <https://www.youtube.com/watch?v=UOAsBhm4QxY&t=46s> [perma.cc/3LBK-Y34J] (asserting that the Democratic advantage in Latino support has sunk to its lowest level in the last four election cycles because Latinos “want to be white” and “don’t want to be identified with all those other immigrants that Donald Trump speaks so badly of”). Similarly, in October of 2024, journalist Paola Ramos blamed “internalized racism” for why Latinos are leaving the Democratic Party. AMANPOUR & CO., *“The Rise of the Latino Far Right:” Why Latinos Are Turning Out for Trump*, at 2:55 (PBS, Oct. 1, 2024), <https://www.pbs.org/video/the-rise-of-the-latino-far-right-why-latinos-are-turning-out-for-trump-xjz6yp/> [perma.cc/VX2W-VYQL]. Efrén Pérez, a professor of political science at UCLA, argued in February of 2024 that Latino Republicans have an “earnest and devout investment in whiteness as an ideology,” that makes a subjugating worldview more important than your skin color or racial classification. Efrén Pérez, *Opinion, Why the Politics of Republican Latinos Suggests They Want to Be White*, NEWSWEEK (Feb. 29, 2024), <https://www.newsweek.com/why-politics-republican-latinos-suggests-they-want-white-opinion-1874029> [perma.cc/E5G6-A8VN].

“Hispanic or Latino,” giving the group more time to navigate the ongoing development of Latino racial consciousness.⁷⁸

Ultimately, racial projects operate relative to other racial projects, as their fundamental goal is to challenge or establish relative positioning. Although Black racial projects are typically understood as working to flatten racial hierarchy, there are Black racial projects that instead invest in white racial hierarchy.⁷⁹ And although coalitions between minoritized groups endure, Asian and Latino racial projects that work to secure “better” racial positioning relative to, and potentially at the cost of, other racial groups do exist.⁸⁰

B. White Racial Projects

Although scholars outside of the law have been detailing changing whiteness and its relationship to racial hierarchy, little attention has been paid in legal scholarship to how changing conceptions of whiteness and the progression of white racial projects are shaping antidiscrimination law. As detailed in Subsection 1 of this Section, white racial projects are not distinct from other racial projects in their attempts to define racial meaning and distribute racial resources.⁸¹ Subsection 2 of this Section, however, notes that changes in the psychology of whiteness are producing new racial projects, of which reverse discrimination is one manifestation.⁸²

1. Changing Whiteness

“White,” as a socially constructed category of racial identity, is complex, with access to the privileges of whiteness dependent on other social identities,

⁷⁸ See Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, *Who Is Hispanic?*, PEW RSCH. CTR. (Sep. 12, 2024), <https://www.pewresearch.org/short-reads/2024/09/12/who-is-hispanic/> [perma.cc/9GAS-5EE6] (detailing revisions to the 2030 U.S. census).

⁷⁹ See Nate Cohn, *As Groups Have Shifted, Has It Become a ‘Normal’ Election?*, N.Y. TIMES (Sep. 4, 2024), <https://www.nytimes.com/2024/09/04/upshot/kamala-harris-trump-polls.html> [perma.cc/8ZDM-8Q5U] (stating that Trump enjoyed the greatest level of support from Black voters for a GOP presidential candidate in pre-election polling since the Civil Rights Movement in the 1960s). Such support, especially against Kamala Harris, a Black candidate with South Asian heritage, is notable even in a country where a conservative Black racial project, often critiqued as anti-Black, has always existed. See, e.g., CHRISTOPHER BRACEY, *SAVIORS OR SELLOUTS: THE PROMISE AND PERIL OF BLACK CONSERVATISM, FROM BOOKER T. WASHINGTON TO CONDOLEEZZA RICE* (2008) (tracing the history of Black conservative thought and engaging questions about whether Black conservatives are protecting the interests of Blacks).

⁸⁰ See Eduardo Bonilla-Silva & David R. Dietrich, *The Latin Americanization of Racial Stratification in the U.S.* (contending that the United States is developing a tri-racial system that elevates certain minorities over others, yet below white Americans), in *RACISM IN THE 21ST CENTURY: AN EMPIRICAL ANALYSIS OF SKIN COLOR* 151, 153–54 (Ronald E. Hall ed., 2008).

⁸¹ See *infra* notes 83–110 and accompanying text.

⁸² See *infra* notes 111–125 and accompanying text.

including nationality, gender, class, and sexual identity, among others.⁸³ Notwithstanding this variability, “trends can be discerned” in the social elaboration of whiteness.⁸⁴ The value of whiteness often lies in the privileges to which it provides access, both materially and psychologically. Psychologically, the “wages of whiteness” refer to the psychic benefit that access to whiteness confers, including a belief in the superiority of the white racial group and of the individuals who can claim to be white.⁸⁵ Materially, white people in the United States are on the favorable end of racial disparities in housing, wealth and capital, healthcare, and education. From slavery and Jim Crow to more contemporary forms of racial isolation and exclusion, including second-generation school segregation or voting barriers, the law has been central to reserving and preserving material and psychological benefits for whites at the expense of non-whites in the United States.⁸⁶

Despite its psychological and material advantage, whiteness has historically been characterized by the phenomenon of transparency—the tendency of white Americans not to think of themselves as having a racial identity unless it is juxtaposed against other non-white racial groups.⁸⁷ This characterization of

⁸³ See Ruth Frankenberg, *The Mirage of an Unmarked Whiteness* (“Whiteness as a site of privilege is not absolute but rather cross-cut by a range of other axes of relative advantage or subordination; these do not erase or render irrelevant race privilege, but rather inflect or modify it.”), in *THE MAKING AND UNMAKING OF WHITENESS* 72, 76 (Birgit Brander Rasmussen, Eric Klinenberg, Irene J. Nexica & Matt Wray eds., 2001); Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1502, 1505 (2010) (drawing on psychology, sociology, anthropology and critical theory to introduce the concept of “marginal whites,” individuals who, by virtue of possessing a nonracial, stigmatized identity characteristic, have limited access to white privilege).

⁸⁴ IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xxii (2006).

⁸⁵ W.E.B. DuBois offered the earliest articulation of a “public and psychological wage,” arguing that white laborers in the United States adopted the racial identity of elites rather than adopt a class identity in solidarity with the formerly enslaved because it provided a “wage” in the form of social status relative to Blacks. W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 700 (1935) (asserting that “the white group of laborers” “were admitted freely with all classes of white people to public functions, public parks, and the best schools”).

⁸⁶ The law has affirmed the supposed racial superiority of whites, even in moments where legal actors were purporting to appeal to the equality of whites and non-whites before the law. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (asserting that the “white race” believes that it is “the dominant race” in the United States in “prestige, in achievements, in education, in wealth and in power,” but will not remain as such “if it remains true to its great heritage and holds fast to the principles of constitutional liberty”).

⁸⁷ See Barbara J. Flaggs, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 970, 980 (1993) (describing the transparency phenomenon and using it to challenge the discriminatory intent requirement of equal protection). See generally TONI MORRISON, *PLAYING IN THE DARK* (1992) (theorizing how literary tropes work to mark non-white groups in contrast to an implicitly white American identity). Of course, white racial identity has been more and less salient at various points in history. Theodore Allen has argued that the bourgeoisie response to the possibility of black-white labor solidarity in the early eighteenth century was to cultivate white racial identity to which differential privileges could attach, thus undermining the potential for coalition. See generally THEODORE W. ALLEN, *CLASS STRUGGLE AND THE ORIGIN*

white racelessness has been historically dominant, sometimes even amplified by scholars who conceptualize race as “Black,” while thinking of whiteness as a non-racialized default category.⁸⁸ As a result, whites are less likely to think about the norms, behaviors, experiences, preferences, or perspectives that are specific to being white.⁸⁹

The nature of white racial identity, however, is changing.⁹⁰ The transparency phenomenon, for example, has been waning, prompted by three historical developments: the fading of opportunities for political mobilization along class lines in a postindustrial economy; the appropriation and reinterpretation by the political right of the limited reforms of the Civil Rights Movement; and the erosion of white ethnicity in the post-WWII period.⁹¹ Interviews of white interview respondents in the late 1990s, for example, revealed that claims to ethnicity had been replaced by explicit claims to race, in a marked shift from the work of earlier scholars who found that race and ethnicity were each distinct vehicles for white identity and interests.⁹² Ethnic identity had vanished, to be replaced entirely by race.⁹³

Perceptions of intensified resource competition also inform changes in whiteness. Demographers predict that by mid-century, America’s ethnic and

OF RACIAL SLAVERY: THE INVENTION OF THE WHITE RACE (2d ed. 2006). George Lipsitz argues that white Americans have always been encouraged to invest in whiteness, and that “possessive investment in whiteness” is reproduced “in a new form in every era.” GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS*, at vii, 3 (1998).

⁸⁸ See Marcus Bell, *Invisible No More: White Racialization and the Localness of Racial Identity*, 15 SOCIO. COMPASS, Aug. 2021, at 1, 1 (defining “white racelessness” as “the theory that posits whiteness as the invisible, raceless norm”); Ashley W. Doane Jr., *Dominant Group Ethnic Identity in the United States: The Role of “Hidden” Ethnicity in Intergroup Relations*, 38 SOCIO. Q. 375, 377 (1997) (finding that white Americans feel connected to their ethnic identity less than minority groups).

⁸⁹ See, e.g., Evelyn Nakano Glenn, *Yearning for Lightness: Transnational Circuits in the Marketing and Consumption of Skin Lighteners*, 22 GENDER & SOC’Y 281, 283–85, 287–88 (2008) (examining the media messages, cultural themes, and symbols used to create a desire for lighter skin); Mary Bucholtz, *The Whiteness of Nerds: Superstandard English and Racial Markedness*, 11 J. LINGUISTIC ANTHROPOLOGY 84, 86–87 (2001) (documenting how young people use language to distance themselves from the Black underpinnings of white American culture).

⁹⁰ See Rich, *supra* note 83, at 1516 n.56, 1524–25 (considering how whites are injured by minority-targeted racism); I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 802, 809–11 (2022) (considering how the power of the prosecutor stems, in part, from both whiteness and maleness); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355 (2019) (considering the dehumanizing effects of discrimination for whites).

⁹¹ See Howard Winant, *Behind Blue Eyes: Whiteness and Contemporary US Racial Politics*, 225 NEW LEFT REV., Sep.–Oct. 1997, at 73, 74–75 (tracing the origins of the problematization of white identity).

⁹² *Id.*

⁹³ Charles A. Gallagher, *White Racial Formation: Into the Twenty-First Century*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 6, 8 (Richard Delgado & Jean Stefancic eds., 1997).

racial minorities will outnumber the white population.⁹⁴ At the same time, and for the first time in recent history, children entering today's labor market have only a fifty-percent chance of doing economically better than their parents.⁹⁵ Effective economic insecurity is a consistent and significant predictor of white racial resentment, and the more economically insecure white Americans perceive themselves to be, the more likely they are to believe that whites cannot find jobs because employers are hiring racial minorities.⁹⁶ In a country where class consciousness has always been stymied by racial hierarchy, politicians' assertions that immigrants are "taking" white jobs only further undercut white transparency.⁹⁷

Cultural shifts that decenter whiteness further destabilize the psychological and economic wages that a transparent whiteness used to provide. Affirmative celebration of minoritized identities, in contrast to the normalized and hegemonic quality of white culture, is in vogue. Rap music, considered a Black art form, is one of the most popular genres in the United States.⁹⁸ Moreover, the increased visibility of Black country artists in a genre steadfast in its claim to whiteness (despite its minoritized origins), has been threatening to white

⁹⁴ William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/articles/the-us-will-become-minority-white-in-2045-census-projects/> [perma.cc/KE5H-KVCC]. But see Richard Alba, Morris Levy & Dowell Myers, *The Myth of a Majority-Minority America*, THE ATLANTIC (June 13, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-majority-minority-america/619190/> [perma.cc/4NKS-7VKK] (countering that "[t]he majority-minority narrative contributes to our national polarization" and is faulty considering the fluid nature of race in today's society).

⁹⁵ Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, at 18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22910, 2016), <http://www.nber.org/papers/w22910> [perma.cc/32AW-SMGM].

⁹⁶ See *infra* note 97 and accompanying text.

⁹⁷ Daniel Politi, *Donald Trump in Phoenix: Mexicans Are "Taking Our Jobs" and "Killing Us,"* SLATE (July 12, 2015), <https://slate.com/news-and-politics/2015/07/donald-trump-in-phoenix-mexicans-are-taking-our-jobs-and-killing-us.html> [perma.cc/9AK7-BBG2]; see also Michael A. Memoli, *Donald Trump's Newest Branding Endeavor: The Economy*, L.A. TIMES (Dec. 31, 2016), <https://www.latimes.com/nation/la-na-trump-economy-20161231-story.html> [perma.cc/P4RB-S6SW] (quoting Donald Trump's assertions at a Republican rally that "[o]ur jobs are being stolen like candy from a baby" and "[t]hey take our money," and further "[t]hey take our jobs"). At times, Trump has asserted that immigration even threatens the jobs of racial minorities. See *The Latest: Trump Says Immigrants Taking Minorities' Jobs*, AP NEWS (Aug. 30, 2016), <https://apnews.com/united-states-presidential-election-events-general-news-09215cf7f37f4c6ea05f92f8c83e6125> [perma.cc/58DX-2E3G] (reporting that at a rally in Washington state, Trump asserted that refugees and undocumented immigrants "take jobs from hardworking African-Americans and Hispanic citizens"); Maya King, *What's a 'Black Job'? Trump's Anti-Immigration Remarks Are Met With Derision*, N.Y. TIMES (June 28, 2024), <https://www.nytimes.com/2024/06/28/us/politics/black-job-trump-immigration.html> [perma.cc/5RJ4-HZCW] (reporting on Trump's assertion during a presidential debate that immigrants are taking "Black jobs" and "Hispanic jobs").

⁹⁸ See Nearly a Quarter of All Streams on Spotify Are Hip-Hop. Spotify's Global Editors Reflect on the Genre's Growth, SPOTIFY (Aug. 10, 2023), <https://newsroom.spotify.com/2023-08-10/hip-hop-50-murals-new-york-atlanta-miami-los-angeles/> [perma.cc/G6JZ-4MQD] (asserting that, as of 2023, approximately 25% of streams on a popular music platform fall into the hip-hop category).

country listeners.⁹⁹ Even the politics of speech signal racial discontent. A growing number of whites report that the specter of “political correctness” stifles their capacity to address taboo topics for fear of offending people of color.¹⁰⁰ Assumptions about “normalized” whiteness, marked by invisibility and a monolithic character, are no longer tenable, especially in the post-civil rights era.¹⁰¹

Although there are no signs that whiteness will not continue to confer on its claimants disproportionate access to societal resources, these political, economic, social, and demographic changes are nevertheless producing more than mere racial hostility. Rather, whiteness as a social identity is becoming more salient.¹⁰² The American Mosaic Project, for example, found that in contrast to earlier assumptions that racial identity is not salient for whites, 74% of whites felt their racial identity was “very important” or “somewhat important” to them, compared to 90% of non-whites.¹⁰³ Beyond mere out-group racism or pride in ethnic heritage, white people in the United States are increasingly developing a “sense of commonality, attachment, and solidarity with their racial group,” prompting more and more whites to believe that their racial group is endangered and in need of protection through coordinated political action.¹⁰⁴

⁹⁹ See Amanda Marie Martinez, “The Industry Is Playing the People Cheap”: Race and the Country Music Business from Nixon to 9/11 (2022) (Ph.D. dissertation, UCLA) (eScholarship) (contending that country music disregarded the Black and Brown roots of the genre, defining its audience as white and predominantly conservative); Li Zhou, *Maren Morris Distancing Herself from Country Music Underscores Its Existential Crisis*, VOX (Sep. 19, 2023), <https://www.vox.com/culture/2023/9/19/23880804/maren-morris-country-music> [perma.cc/73LN-SNHV] (documenting the genre’s problems with racism and its appropriation of Black artists in an attempt to define the genre as white); KARL HAGSTROM MILLER, SEGREGATING SOUND: INVENTING FOLK AND POP MUSIC IN THE AGE OF JIM CROW 5–6 (2010) (arguing that Southern music was reduced to distinct genres like “blues” and “country” on the basis on race and ethnicity, producing a “musical color line”). Some country fans referred to Beyoncé’s country album, *Cowboy Carter*, as “ghetto trash,” and country music artist Travis Tritt walked out on Beyoncé’s 2016 Country Music Awards performance, later tweeting, “I love honest to God country music and feel the need to stand up for it at all costs. We don’t need pop or rap artists to validate us.” Elyssa Ford & Rebecca Scofield, *Beyoncé Backlash Is Part of a Century of Cowboy Gatekeeping*, TIME (Apr. 12, 2024), <https://time.com/6965367/cowboy-carter-black-country-history/> [perma.cc/MB3J-DKN5]. In response to Beyoncé’s release of two country songs during the Super Bowl, and her announcement during the event that she would release a full-length country album, “Dukes of Hazzard” actor John Schneider commented, “They’ve got to make their mark, like a dog at a dog walk park.” *Beyoncé Likened to a Dog by Actor Who Starred in Sitcom Featuring Car with Confederate Flag*, THE GRIO (Feb. 20, 2024), <https://thegrio.com/2024/02/20/beyonce-likened-to-a-dog-country-music-song/> [perma.cc/TB45-VTQP].

¹⁰⁰ See Bell, *supra* note 88, at 6 (listing, as topics considered taboo by white people, racial IQ differences, Black-on-Black crime, culture of poverty, and negative descriptions of minority groups).

¹⁰¹ See Winant, *supra* note 91, at 74 (concluding that “[a]n unprecedented period of racial anxiety and opportunity has resulted” following the Civil Rights Movement “in which competing racial projects struggle to reinterpret the meaning of race and to redefine racial identity”).

¹⁰² See *supra* note 90 and accompanying text.

¹⁰³ Paul R. Croll, *Modeling Determinants of White Racial Identity: Results from a New National Survey*, 86 SOC. FORCES 613, 614 (2007).

¹⁰⁴ ASHLEY JARDINA, WHITE IDENTITY POLITICS 3–4 (2019) (discussing the evolution of the protectionist white racial project); Maria Abascal, *Contraction as a Response to Group Threat: De-*

Instead of only looking outward and seeking to exclude, whiteness is also looking inward, seeking to define.

This phenomenon can manifest across a spectrum. At a Charlottesville convening, for example, “shock jock” Mike Enoch asserted, “[w]e’re here to talk about white genocide, the deliberate and intentional displacement of the white race.”¹⁰⁵ Chants at the rally included “you will not replace us” and “Jews will not replace us,” suggesting both racial resentment and in-group solidarity.¹⁰⁶ Deepening in-group preference, however, can also inform less extreme political and social issues: even though salient white racial identity informs opposition to immigration or trade policies, it also informs support for social welfare spending.¹⁰⁷ Further, although much of the focus on white racial identity is grounded in out-group antipathy and racial resentment, white *in-group* attitudes and preferences may better explain the surprise of the 2016 and 2024 presidential elections.¹⁰⁸ Ultimately, whites’ in-group attitudes are not necessarily “synonymous with prejudice.”¹⁰⁹ And although out-group hostility might

mographic Decline and Whites’ Classification of People Who Are Ambiguously White, 85 AM. SOCIO. REV. 298, 298 (2020) (finding that when faced with the threat of numeric decline, white people in the United States are less likely to classify racially ambiguous individuals as white in an attempt to contract the boundaries around whiteness, homogenize the group, and enhance group status).

¹⁰⁵ Andrew Marantz, *Birth of a White Supremacist: Mike Enoch’s Transformation from Leftist Contrarian to Nationalist Shock Jock*, NEW YORKER (Oct. 9, 2017), <https://www.newyorker.com/magazine/2017/10/16/birth-of-a-white-supremacist> [perma.cc/F4ZZ-HMDY]. According to historian A. Dirk Moses, the white genocide claim is that declining white births combined with mass immigration of more rapidly reproducing minority peoples will result in the cultural and racial eradication of white/European people. A. Dirk Moses, “*White Genocide*” and the Ethics of Public Analysis, 21 J. GENOCIDE RSCH. 201, 203 (2019).

¹⁰⁶ Moses, *supra* note 105, at 208; Jonathan D. Sarna, *The Long, Ugly Antisemitic History of “Jews Will Not Replace Us,”* BRANDEIS UNIV. (Nov. 19, 2021), <https://www.brandeis.edu/jewish-experience/jewish-america/2021/november/replacement-antisemitism-sarna.html> [perma.cc/3R3M-6A2Y].

¹⁰⁷ See JARDINA, *supra* note 104, at 4 (listing the preservation of Medicare and Social Security as desired social endeavors supported by white solidarity).

¹⁰⁸ See *id.* at 4 (contending that white identity contributes significantly to today’s political arena). There was no shortage of political analysis regarding the surprise of the 2016 election outcomes. See, e.g., Jim Norman, *Trump Victory Surprises Americans; Four in 10 Afraid*, GALLUP (Nov. 11, 2016), <https://news.gallup.com/poll/197375/trump-victory-surprises-americans-four-afraid.aspx> [perma.cc/38UV-MDAC] (reporting that 75% of voters polled were surprised at the 2016 presidential election outcome); Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016), <https://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070> [perma.cc/UL8U-XQZP] (calling Trump’s election “an extraordinary rebuke to the nation’s political class . . . that will go down as the most stunning upset in American history”); Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PNAS E4330, E4330 (2018) (concluding that although changes in financial status played a small role in the 2016 presidential election, “issues that threaten white Americans’ sense of dominant group status” did drive candidate preference).

¹⁰⁹ See JARDINA, *supra* note 104, at 5.

be unlearned, in-group preference is about hierarchy and power in ways that are more deeply entrenched than mere antipathy for others.¹¹⁰

2. Changing Projects

The changing experience of whiteness drives the development of new racial projects. Like all racial projects, white racial projects are an attempt to represent and explain white racial identity. As a racial project, reverse discrimination claims reflect the deepening salience of white racial identity, working to both maintain the distribution of resources along existing racial hierarchies and to hide that distribution behind the language and rhetoric of civil rights litigation.¹¹¹

To be sure, white racial identity politics and racial projects have always operated in the United States. School segregation and white resource hoarding are attempts by whites to secure themselves and their hold on resources relative to people of color, and Black people, in particular.¹¹² Anchored by the hegemonic nature of whiteness, however, the racial character of these projects was more easily obscured by the purportedly race-neutral rhetoric of states' rights and busing, local control, and even class politics.¹¹³ Cultural and psychological shifts, however, have "shattered the illusion of white normality."¹¹⁴

¹¹⁰ See Ashley Jardina, *In-Group Love and Out-Group Hate: White Racial Attitudes in Contemporary U.S. Elections*, 43 POL. BEHAV. 1535, 1540 (2020) (explaining that whites' desire to guard their dominant racial position is independent of outward racism against other races).

¹¹¹ OMI & WINANT (3d ed.), *supra* note 21, at 125.

¹¹² Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2382 (2021) (analyzing racial segregation from the vantage points of white students to conclude that laws surrounding school district boundary lines enable white students in racially diverse metropolitan areas to engage in social closure and thus monopolize high-quality schools).

¹¹³ See LÓPEZ, *supra* note 76, at 16, 23 (describing "[s]tates' rights" as a "paper-thin abstraction from the days before the Civil War when it had meant the right of Southern states to continue slavery" and "busing" as the Northern analog to "states' rights"); JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 3 (2018) (characterizing local governments as the vehicle for collective action that create and perpetuate segregation); Kate Walz, *The Color of Power: How Local Control Over Affordable Housing Shapes America*, SHRIVER CTR. ON POVERTY L. (Sep. 14, 2018), <https://www.povertylaw.org/article/the-color-of-power-how-local-control-over-affordable-housing-shapes-america-2/> [perma.cc/L8T3-YNL3] (contending that "[l]ocal governments have long neglected to fulfill their civil rights obligations by failing to ensure more equitable, affordable housing opportunities"); Elaine Gross, *Housing Discrimination and Local Control*, NYU FURMAN CTR. (Mar. 4, 2019), <https://www.furmancenter.org/publication/housing-discrimination-and-local-control/> [perma.cc/6GGQ-TC22] (explaining how local control maintains power arrangements initially established through structural racism); LÓPEZ, *supra* note 76, at 30, 71 (explaining that the term "middle class" is often code for the fusion of class and race, and that dog whistle politics often have a class component in terms of deciding between guilt and innocence); German Lopez, *The Sneaky Language Today's Politicians Use to Get Away with Racism and Sexism*, VOX (Feb. 1, 2016), <https://www.vox.com/2016/2/1/10889138/coded-language-thug-bossy> [perma.cc/KGE5-MJHW] (explaining that the term "middle-class" is often code for white people and that terms like "urban" and "inner city" are often code for Black Americans).

¹¹⁴ Bell, *supra* note 88, at 1.

Growing numbers of whites are confronting their racial identities.¹¹⁵ Even as the topic of whiteness has been folded into broader courses on race, students increasingly learn that whiteness and white identity are not “‘natural,’ stable, unchanging, unproblematic and unambiguous” but “socially, economically and politically produced through violence and structural racism.”¹¹⁶

In local environments where non-whites constitute the demographic majority, whites can experience “momentary minority status” that can heighten racial awareness and trigger feelings of stigma, perceptions of anti-white bias, and allegations of reverse discrimination.¹¹⁷ Crystallizing whiteness, moreover, is also increasingly defined by a perception of deprivation and a need to refurbish white culture in a “nondemonized fashion.”¹¹⁸ This increasing saliency of whiteness can be accompanied by an increasing distaste for whiteness, the belief that being white is a liability, or a sense of being a victim.¹¹⁹

The evolving politicization of whiteness has produced a range of white racial projects, each rearticulating and reinterpreting whiteness.¹²⁰ The “Far Right” white racial project, for example, has affirmed purported biological differences between whites and non-whites in pursuit of a white ethnostate.¹²¹ At the other end of the spectrum lies a “New Abolitionist” white racial project that situates the “invention of whiteness” as central to the rise of capitalism in the United States, and advocates for “the repudiation of white identity and white privilege.”¹²² Oth-

¹¹⁵ *Id.*

¹¹⁶ Charles Gallagher & France Winddance Twine, *From Wave to Tsunami: The Growth of Third Wave Whiteness*, 40 ETHNIC & RACIAL STUD. 1598, 1600 (2017); see also *id.* at 1599–1600 (stating that the number of college courses with the term “whiteness” in their titles peaked in the first few years of the 1990s, only to virtually disappear by the new millennium).

¹¹⁷ Bell, *supra* note 88, at 2 (emphasis omitted); see also Marcus Bell, *Becoming White Teachers: Symbolic Interactions and Racializing the Raceless Norm in Predominantly Black Schools*, 6 SOCIO. RACE & ETHNICITY 209, 212 (2020) (finding that white teachers in a predominantly Black school went from thinking of themselves as the invisible, raceless norm, to seeing themselves as the “hyper-visible, racial other”); MARCUS BELL, WHITENESS INTERRUPTED: WHITE TEACHERS AND RACIAL IDENTITY IN PREDOMINANTLY BLACK SCHOOLS 21–22 (2021) (finding that whites can go from seeing themselves as stigmatized victims in Black spaces to adopting a colorblind attitude regarding race in white spaces); Gallagher, *supra* note 93, at 6 (concluding that the meaning of whiteness is undefinable because white people can switch from being reactionary, to defensive, to humane, and to naïve regarding their racial identity).

¹¹⁸ Gallagher, *supra* note 93, at 7.

¹¹⁹ Monica McDermott & Annie Ferguson, *Sociology of Whiteness*, 48 ANN. REV. SOCIO. 257, 261 (2022).

¹²⁰ See Winant, *supra* note 91, at 75 (finding that “white ‘politics of difference’” are evident in white reactions to affirmative action programs, such as federal contracting, university admissions, and professional hiring).

¹²¹ *Id.* at 76.

¹²² *Id.* at 84–85.

er white racial projects might be defined by the ways that they differentiate between “good” and “bad” non-whites.¹²³

Within this spectrum lies white racial projects defined less by aversion to other racial groups than by solicitousness for whites. White identity politics, defined not by prejudice and racism, but by a sense of commonality, attachment, and solidarity with other whites, is increasingly central to political and social issues, as well as contemporary electoral politics in the United States.¹²⁴ Unweighted by distasteful reference to white supremacy or racial slurs, white racial projects informed by this posture can more successfully invoke white disadvantage and unfair resource distribution.¹²⁵ Like other racial projects, this white racial project borrows against other projects, reappropriating the rhetoric of the Civil Rights Movement in service of individualism and racial equality. By presenting whiteness as a source of disadvantage, this racial project redefines race by inverting the structure of racial hierarchy in the United States and demanding a redistribution of resources according to that inversion.

II. REVERSE DISCRIMINATION AS A WHITE RACIAL PROJECT

The term “reverse discrimination” in this project refers to a broad range of allegations maintaining that members of the majority racial group in the United States are discriminated against in favor of members of minoritized groups. Reverse discrimination suits can be grounded in statute (as claims under Title VII) or constitutional law (as claims under the Equal Protection

¹²³ See *supra* notes 66–70 and accompanying text; Andreas Hackl, *Good Immigrants, Permitted Outsiders: Conditional Inclusion and Citizenship in Comparison*, 45 ETHNIC & RACIAL STUD. 989, 998–1000 (2022) (exploring the phenomenon of conditional citizenship and inclusion of migrants and immigrant-origin minorities).

¹²⁴ JARDINA, *supra* note 104, at 3–4.

¹²⁵ America First Legal, for example, is a “nonprofit law firm” founded by White House Deputy Chief of Staff Stephen Miller committed to “defend[ing] the rights of everyday Americans,” and “oppos[ing] lawless government overreach and fight[ing] to restore the rule of law in the United States.” *Mission*, AM. FIRST LEGAL, <https://aflegal.org/mission/> [perma.cc/EP2M-JBLT]. The firm files complaints against corporations because “[t]oo many major corporations have embraced radical Diversity, Equity, and Inclusion (DEI) agendas that violate the law.” *Frequently Asked Questions: Why Does America First Legal File Complaints Against Corporations?*, AM. FIRST LEGAL, <https://aflegal.org/faqs/> [perma.cc/9H8H-PS96]. Since 2021, the firm has filed over 300 lawsuits, EEOC complaints, and amicus briefs accusing corporations like IBM, Disney, Nike, Hershey, United Airlines, the NFL, and CBS of discriminating against white males. See Robert Draper, *America First Legal, a Trump-Aligned Group, Is Spoiling for a Fight*, N.Y. TIMES (Mar. 21, 2024), <https://www.nytimes.com/2024/03/21/us/politics/stephen-miller-america-first-legal.html> [perma.cc/AJN6-6AAJ] (naming corporations that the organization has pursued legal action against); *Dismantling Diversity, Equity, and Inclusion*: Loeffler v. IBM, AM. FIRST LEGAL, <https://aflegal.org/litigation/loeffler-v-ibm/> [perma.cc/2UC7-EUA3] (summarizing the group’s efforts against IBM); *Dismantling Diversity, Equity, and Inclusion*: Rhoden v. CBS Broadcasting Inc., AM. FIRST LEGAL, <https://aflegal.org/litigation/andre-rhoden-v-cbs-broadcasting-inc-et-al/> [perma.cc/2QTX-VSTZ] (summarizing the group’s efforts against CBS broadcasting).

Clause), and analysis of both can sometimes overlap.¹²⁶ Lawsuits alleging reverse discrimination are sometimes leveled at race-conscious institutional programs and initiatives, and at other times leveled at individuals, implicating mismatches in injury and remedy that are not always easily resolved or analyzed.¹²⁷ This project focuses primarily on challenges to institutional programs that better engage the structural nature of race generally, and of whiteness, in particular.

Reverse discrimination suits, and the policy concerns they raise, are not new. During Reconstruction, for example, responses to reparations for the formerly enslaved included arguments that doing so would be harmful to whites.¹²⁸ Conservative discourse on reverse discrimination, moreover, emerged forcefully during the 1970s when white plaintiffs began to allege that their racial identity was being used to deny them opportunities from which racial minorities were exclusively benefiting.¹²⁹ As white racial identity crystallizes socially, however, the innovation of reverse discrimination claims is in positioning whites as victims in need of judicial solicitude, and in extending the court's jurisprudence such that it may eventually apply to a novel racial harm. Despite the absence of factors that would justify judicial solicitude for the challenges, the suits and court rulings are laying the foundation for an articulation of dignity that extends the Court's previous developments in equal protection doctrine.¹³⁰ Like all racial projects, reverse discrimination claims make expressive claims to inform material consequences. Section A of this Part examines lawsuits to illustrate the ways in which plaintiffs use litigation to reinterpret the meaning of race and racial injury and center whites as victims of discrimination.¹³¹ Section B of this Part illustrates how these reinterpretations move past the symbolic to redistribute material resources according to new understandings of race, to the benefit of white plaintiffs.¹³² Finally, Section C of this Part argues that the adjudication of these reverse discrimination claims, including their doctrinal interpretation, is a white racial project.¹³³

¹²⁶ See *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (stating that equal protection and Title VI analysis are coterminous). Although sometimes difficult to cordon off each path for analytical engagement, I reserve for another project a more comprehensive engagement of whiteness as specifically informing statutory civil rights claims.

¹²⁷ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1782–83 (1993) (stating that judicial focus “on innocent whites” in cases challenging affirmative action weakens the inquiry by placing attention on those who “have benefited from prior discrimination”).

¹²⁸ AMY E. ANSELL, *RACE AND ETHNICITY: THE KEY CONCEPTS* 136 (2013).

¹²⁹ See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276–77 (1978).

¹³⁰ See *infra* notes 246–254 and accompanying text.

¹³¹ See *infra* notes 134–158 and accompanying text.

¹³² See *infra* notes 159–172 and accompanying text.

¹³³ See *infra* notes 173–254 and accompanying text.

A. Racial Meaning

Reverse discrimination lawsuits are often replete with rhetoric that places the suits squarely within a neoconservative white racial framework. In contrast to acknowledging racial diversity, articulating a commitment to antisubordination, or asserting the enduring necessity of redistributive justice to address the legacy of white supremacy in the United States, the lawsuits instead explicitly disavow racial difference. Some suits promote individualism, while others ignore the historical and contemporary racial disparities that drive the allegedly discriminatory initiatives. All suits situate whites as victimized parties, unconnected to power and privilege, and on the losing end of racial hierarchy in the United States. Animated by a commitment to “colorblindness,” the lawsuits assert not only that race should have no meaning that merits consideration in an application process, but that race-consciousness is contrary to idealized norms of meritocracy and individualism.¹³⁴ These are the meanings of race and racial discrimination reverse discrimination suits enshrine.

Petitioner’s brief in *SFFA*, for example, opens with the following: “It is a sordid business, this divvying us up by race,” before referring to the promise of equal protection.¹³⁵ In doing so, the brief engages in abstract liberalism, appealing to racial equality while ignoring the enduring reality of racial disparities in the United States and implicitly conflating benign and invidious uses of race. The brief goes on to denounce discrimination on the basis of race as “illegal, immoral, unconstitutional, . . . and destructive of democratic society,” while also trumpeting colorblindness as the goal of the U.S. Constitution.¹³⁶ According to petitioners, the consideration of race, no matter what the goal, is demeaning to human beings.¹³⁷

Consider, further, *Fearless Fund*, a 2023 lawsuit that targeted the Fearless Fund’s grant awards of \$20,000 to Black female business owners.¹³⁸ In challenging the program, plaintiffs opened with the assertion that “[r]acial discrimination is invidious in all contexts,” before appealing to colorblindness and individualism: “It ‘demeans the dignity and worth of a person to be judged by

¹³⁴ See Gary Delgado, *Kill the Messengers: Can We Achieve Racial Justice Without Mentioning Race?* (highlighting the differing approaches to affirmative action between proponents of colorblindness and proponents of racial justice), in *RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 162, 170–71 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012).

¹³⁵ Brief for Petitioner at 1, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707) (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part)).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 103 F.4th 765 (11th Cir. 2024); see *supra* note 11 and accompanying text (describing the case).

ancestry instead of by his or her own merit and essential qualities.”¹³⁹ The complaint further casts suspicion on race-conscious remedies and their purported capacity to more deeply entrench racism by quoting Justice Roberts’ assertion in *SFFA* that “[e]liminating racial discrimination means eliminating all of it.”¹⁴⁰

Plaintiffs’ brief to the U.S. Court of Appeals for the Eleventh Circuit made specific reference to white racial injury, opening with a description of a hypothetical investment company with “profoundly racist views on immigration, civil rights, and what it means to be ‘American’” that chooses only to invest in businesses owned by whites.¹⁴¹ Promoting a false equivalency, given history and current racial disparities, plaintiffs went on to assert that such a scenario was “what Fearless is doing today,” except Fearless “swaps ‘white’ for ‘black.’”¹⁴² The brief goes on to situate whites as the ultimate victims of Fearless Funds’ grant program.¹⁴³ After the Eleventh Circuit concluded that American Alliance for Equal Rights was likely to prevail in its claim that the grant program violates the Civil Rights Act, Fearless Fund reached a settlement with challengers in September of 2024, ending their grant program for Black women entrepreneurs.¹⁴⁴

Earlier suits engage in similar rhetoric. In 2022, in *Do No Harm v. Pfizer, Inc.*, a lawsuit challenging Pfizer’s minority fellowship program, plaintiff’s complaint reframed race-conscious initiatives as “[r]acial discrimination” that is “fundamentally ‘immoral,’ ‘inherently wrong,’ and ‘destructive of democratic society.’”¹⁴⁵ Plaintiff then immediately appealed to the debasing nature of racial categories, asserting that when a government “makes race relevant to the provision of burdens or benefits,” it affects the entire citizenry, regardless of race.¹⁴⁶ Plaintiff presented whites and Asian Americans as victims of Pfizer’s goal to increase the pipeline for Black, African American, Latino/Hispanic, and

¹³⁹ Complaint at 1, *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-cv-03424 (N.D. Ga. Sep. 27, 2023), 2023 WL 6295121 (quoting *SFFA*, 600 U.S. at 214, 220).

¹⁴⁰ *Id.* (quoting *SFFA*, 600 U.S. at 206).

¹⁴¹ Brief of Appellant at 1, *Fearless Fund*, 103 F.4th 765 (No. 23-13138).

¹⁴² *Id.*

¹⁴³ *See id.* at 3 (“It provides venture capital to businesses so long as the owner isn’t white.”).

¹⁴⁴ *Fearless Fund*, 103 F.4th at 769; see Alexandra Olson, *Fearless Fund Drops Grant Program for Black Women Business Owners in Lawsuit Settlement*, SEATTLE TIMES (Sep. 11, 2024), <https://www.seattletimes.com/business/fearless-fund-drops-grant-program-for-black-women-business-owners-in-lawsuit-settlement/> [perma.cc/E28Q-CE7G] (detailing the aftermath of the Eleventh Circuit’s holding).

¹⁴⁵ Complaint at 1–2, *Do No Harm v. Pfizer, Inc.*, 646 F. Supp. 3d 490 (S.D.N.Y. 2022) (No. 1:22-cv-07908), *aff’d*, 96 F.4th 106 (2d Cir. 2024) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment), *vacated and superseded on reh’g on other grounds*, No. 23-15, 2025 WL 63404 (2d Cir. Jan. 10, 2025)).

¹⁴⁶ *Id.* at 1.

Native American applicants when it imputed to Pfizer the assertion that white and Asian applicants “need not apply.”¹⁴⁷

More than just strategic, the inclusion of Asian plaintiffs attempts to reorganize racial hierarchy. Race-conscious admissions have historically been advanced to counter white supremacy that maximized access to elite higher education for whites, while excluding minority racial groups, including Asians.¹⁴⁸ The inclusion, then, of Asian plaintiffs in *SFFA* invited Asians to develop racial projects that align with or even join white racial projects in maintaining racial hierarchy.¹⁴⁹ Alternatively, through inclusion as plaintiffs in *SFFA*, Asians are potentially being extended access to honorary white status.¹⁵⁰

Moreover, in framing whites as victims of race-conscious initiatives, innocent of any unfair advantage on the basis of race, whites are implicitly contrasted to the “guilty” racial minorities who perpetrate harm. The “white innocence” narrative repeatedly surfaces in the Court’s own jurisprudence, framed as assertions that race-conscious remedies unfairly ask “innocent persons . . . to endure [deprivation as] . . . the price of membership in the dominant majority,” and that “classification[s] that aid[] persons perceived as members of relatively victimized groups [do so] at the expense of other *innocent* individu-

¹⁴⁷ *Id.* at 7.

¹⁴⁸ See Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 90, 91–92 (2016) (arguing that framing opposition to affirmative action as concern for Asian Americans serves the interest of mostly-white affirmative action opponents).

¹⁴⁹ See generally GEORGE YANCEY, WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NOBLACK DIVIDE (2003) (using measures of social attitudes, alienation, and residential and marital segregation to argue that Latinos and Asians will successfully assimilate into whiteness in the United States). Of course, the Court’s racial prerequisite cases from the early twentieth century are a reminder that this is not the first time that Asian access to whiteness has been either considered or requested. See *Ozawa v. United States*, 260 U.S. 178, 184–85, 197–98 (1922) (holding that despite the Japanese plaintiff’s claims that his skin was whiter than that of Caucasians and that naturalization laws were only meant to distinguish Blacks from others, he remained ineligible to naturalize because he was “clearly of a race which is not Caucasian”); *United States v. Thind*, 261 U.S. 204, 215 (1923) (holding that, despite plaintiff’s argument that scientific treatises technically classified him as Caucasian, Thind’s physical traits as a Hindu man were not commonly recognized to be white); *Lum v. Rice*, 275 U.S. 78, 80–81, 87 (1927) (holding that, despite Chinese plaintiff’s claims of closer cultural proximity to whites than to “colored” students, Chinese people were not white and were therefore “colored”).

¹⁵⁰ Philip Lee, *Rejecting Honorary Whiteness: Asian Americans and the Attack on Race-Conscious Admissions*, 70 EMORY L.J. 1475, 1500–01 (2021) (characterizing the inclusion of Asian American plaintiffs as an invitation to assume “honorary white” status). According to his Latin Americanization thesis, Bonilla-Silva argues that the United States is developing a tri-racial system similar to racial stratification in Latin America, with “whites” at the pinnacle, “honorary whites” below them in the middle, “and a non-white group” or “collective black” group at the bottom. Bonilla-Silva & Dietrich, *supra* note 80, at 153–54. The white group will include “traditional” whites and new “white” immigrants, assimilated Latinos, and “light-skinned” multiracial individuals. *Id.* at 154. “Honorary whites” will include most lighter-skinned Latinos, most multiracial individuals, and ethnic subgroups, including Japanese- and Korean-Americans, Asian Indians, Chinese Americans, and a majority of Americans of Middle Eastern descent. *Id.* The “collective black” group will include “[B]lacks, dark-skinned Latinos, Vietnamese, Cambodians, Laotians, and maybe Filipinos.” *Id.*

als.”¹⁵¹ Further, remedial uses of race remain subject to oversight to ensure that it will “work the least harm possible to other *innocent* persons competing for the benefit.”¹⁵² Absent in these proclamations is acknowledgement that white plaintiffs’ challenges to race-conscious initiatives are informed by entitlement—a belief that were it not for the consideration of race, they would surely secure access to a valuable resource, a belief informed by historically disproportionate access secured by a history of racial subordination.¹⁵³

These explanations, reinterpretations, and expectations of race are particularly perverse when one considers existing racial disparities in the fields targeted. Nearly three-quarters of elite institutions of higher education, for example, are white; in biotech and biopharma, Native American, Black, and Hispanic employees represent only 1, 6, and 7% of the workforce, respectively; and Blacks in business receive less than 1% of venture capital funding.¹⁵⁴ Moreover, the lawsuits arose after a racially tumultuous period that, starting in 2016 with the election of Donald Trump as president, reached an apex in the summer of 2020 as the country reeled from the racially disparate impact of the COVID-19 pandemic and participated in historic protests against the murder of George Floyd.¹⁵⁵ After a racial reckoning that purportedly ushered in a new awareness among whites about racial inequality, one would not be faulted for expecting coalition rather than confrontation.¹⁵⁶

¹⁵¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34, 307 (1978) (emphasis added); see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against *innocent* people, societal discrimination is insufficient and over expansive.” (second emphasis added)).

¹⁵² *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Bakke*, 438 U.S. at 308) (emphasis added).

¹⁵³ Harris, *supra* note 127, at 1783–84 (arguing that individuals and groups should not be able to claim positions, advantages, or benefits they would not have otherwise been awarded under fair conditions).

¹⁵⁴ Patroski Lawson, *Biotech Needs to Bring More Diversity to the Table*, FORBES (Dec. 30, 2022), <https://www.forbes.com/councils/forbesbusinesscouncil/2022/12/30/biotech-needs-to-bring-more-diversity-to-the-table/> [perma.cc/F2P8-34FV].

¹⁵⁵ See *supra* notes 54, 56, and accompanying text.

¹⁵⁶ See, e.g., *America’s Reckoning on Racism Spreads Beyond Policing*, N.Y. TIMES, <https://www.nytimes.com/2020/06/10/us/protests-black-lives-matter-george-floyd.html> [perma.cc/K99U-33YG] (June 15, 2020) (asserting that the response to the BLM movement ranged from calls for removal of corporate figureheads to the appearance of George Floyd’s brother before Congress); Anna North, *White Americans Are Finally Talking About Racism. Will It Translate into Action?*, VOX (June 11, 2020), <https://www.vox.com/2020/6/11/21286642/george-floyd-protests-white-people-police-racism> [perma.cc/X9H7-AN2M] (reporting findings that the number of Americans who said they believed racial discrimination is a big problem and support the Black Lives Matter movement spiked in the wake of George Floyd’s murder); Eliot C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why> [perma.cc/EN9Q-MVRU] (hypothesizing on the reasons behind the BLM movement’s strength, including COVID-19, the nature of the crimes against George Floyd, Ahmaud Arbery, and Breonna Taylor, and video evidence of the murder); Fabiola

But that is precisely the point. The suits are more than mere strategic litigation, given recent court rulings or changes to court composition. Rather, the suits are an attempt to recuperate and reposition whiteness at a time when whites are finding “commonality, attachment, and solidarity with their racial group.”¹⁵⁷ In attempting to prohibit the consideration of race, reverse discrimination challengers reorganize our understanding of race by arguing that color-blindness is not, in fact, a return to an unrecognized baseline that benefits whites, but rather the restoration of “objective, neutral, and meritorious” distribution of resources.¹⁵⁸ Accepting this argument requires the redistribution of resources along racial lines that favor whites. The danger, moreover, is in the sleight of hand that reverse discrimination suits perform. By positioning whites as victims, rather than beneficiaries, of racial hierarchy, the suits reinterpret the significance of race, a key function of racial projects.

B. Racial Resources

Higher education can function as both a valuable public good that promotes democracy, public health, and societal wealth, and a valuable private good that can maximize individual health and wealth creation.¹⁵⁹ Higher education is increasingly necessary for occupational success in the United States; although employment that requires on-the-job training is expected to decline, ninety percent of jobs in the information and service economy will require

Cineas, *The “Racial Reckoning” of 2020 Set Off an Entirely New Kind of Backlash*, VOX (June 3, 2024), <https://www.vox.com/olicy/351106/backlash-politics-2020-george-floyd-race> [perma.cc/U827-UPFS] (describing a grievance-driven era of backlash and racial resentment); James, *supra* note 65, at 1710–22 (documenting the political and legal responses to the “racial reckoning” and increase in antiracism initiatives adopted in the wake of George Floyd’s death). *But see* Wesley Lowery, *Why There Was No Racial Reckoning*, THE ATLANTIC (Feb. 8, 2023), <https://www.theatlantic.com/ideas/archive/2023/02/tyre-nichols-death-memphis-george-floyd-police-reform/672986/> [perma.cc/3SXL-RNVR] (describing representational victories as insufficient to address systemic problems).

¹⁵⁷ JARDINA, *supra* note 104, at 3.

¹⁵⁸ Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences: Rethinking Racial Projects*, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 116, 183 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012).

¹⁵⁹ See Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 57–58, 64–65 (2011) (finding that the rise of both a consumer model and corporate model in higher education illustrates how it “has been shaped by market concepts and private transactions”). In recent years, however, researchers have found a waning college wealth premium. The Federal Reserve Bank of St. Louis, for example, found that although white college graduates born before 1980 were much wealthier than their white non-college educated peers, white college graduates born later only had slightly more wealth than white high school graduates born at the same time. William R. Emmons, Ana H. Kent & Lowell R. Ricketts, *Is College Still Worth It? The New Calculus of Falling Returns*, 101 FED. RES. BANK OF ST. LOUIS REV. 297, 304 (2019). Moreover, the wealth premium for postgraduate families with a head born in the 1980s is indistinguishable from zero for all other races and ethnicities. *Id.* at 308.

some postsecondary education.¹⁶⁰ Moreover, higher education is associated with lower rates of unemployment and higher income for all ethnic groups; it acts as a signaling function to employers, and it imparts cultural and social capital that can help graduates both navigate life's challenges and take advantage of life's opportunities.¹⁶¹

Access to an elite college can be considered even more valuable. Research suggests, for example, that aspects of institutional selectivity, as measured by average test scores and resources, are related to subsequent economic success.¹⁶² Graduates of higher-priced institutions, for example, eventually earn higher incomes, potentially because those selective institutions provide their students with more resources.¹⁶³ Moreover, the research is particularly clear that income gains from attending highly selective institutions are highest for women and lower-income students.¹⁶⁴

It is thus no surprise that litigation in reverse discrimination cases in higher education often targets selective public and private institutions.¹⁶⁵ During an era in which individuals are left to navigate educational hazards with limited state support, parents and caregivers are particularly incentivized to aggressively pursue selective education to try to guard against the risk of long-term economic instability for the students in their care.¹⁶⁶ Given the long-term benefits of higher education in general, and of selective higher education, in

¹⁶⁰ SEC'Y OF EDUC.'S COMM'N ON THE FUTURE OF HIGHER EDUC., U.S. DEP'T OF EDUC., *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION* 6 (2006).

¹⁶¹ See *Ensuring a Living Wage Through Higher Education*, HEA GRP. (Feb. 20, 2024), <https://www.theheagroup.com/blog/ensuring-a-living-wage-through-higher-education> [perma.cc/879Q-59EY] (asserting that most college graduates not only enjoy a higher annual income than high school graduates a decade after enrollment, but they also earn significantly above the poverty line).

¹⁶² See *infra* notes 163–164 and accompanying text.

¹⁶³ Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables* 30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7322, 1999).

¹⁶⁴ See Suqin Ge, Elliott Isaac & Amalia Miller, *Elite Schools and Opting In: Effects of College Selectivity on Career and Family Outcomes* 31, 34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25315, 2018) (finding that attending a more selective school increases women's likelihood of achieving an advanced degree by 5% and overall earnings by 14%); Chetty et al., *supra* note 95, at 18 (finding that decreases in economic mobility are propelled by growing income distribution issues in recent decades); Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23618, 2017) (finding a correlation between elite school enrollment and the probability that lower-income enrolled students will reach the top of the earnings distribution after graduation).

¹⁶⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 316–17 (2003) (stating that petitioner, a white applicant of the University of Michigan Law School, alleged that race-conscious admissions programs impermissibly discriminate in contravention of both the Civil Rights Act and the Fourteenth Amendment).

¹⁶⁶ See Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 673 (2021) (characterizing risky education as: the systematic ways that parents and caregivers manage the state's abandonment of responsibility for education in the K-12 and higher education context, and against rising social and economic insecurity for Americans).

particular, postsecondary education is a highly valuable resource worth fighting for. Declining acceptance rates at the most selective schools only raise the stakes.¹⁶⁷

Reverse discrimination suits that challenge race-conscious admissions, then, seek to redistribute the valuable resource of higher education away from students of color and toward white students. Plaintiffs in reverse discrimination cases allege they have been denied access to the benefit of selective education on account of race.¹⁶⁸ And although the negative impact on white applicants due to race-conscious admissions is debatable, there is no question that race-conscious admissions have benefited applicants of color.¹⁶⁹ In states that banned the consideration of race in admissions before *SFFA*, enrollment among non-Asian minority groups often dropped precipitously.¹⁷⁰ Notably, this pattern repeated itself with the first entering class completely constructed after *SFFA*.¹⁷¹ Further, early evidence suggests not only dips in minority representation at selective institutions, but significant accompanying increases in white

¹⁶⁷ See Abby Jackson, *The Drop in Ivy League Acceptance Rates in the Past Decade Is Shocking*, BUS. INSIDER (May 18, 2015), <https://www.businessinsider.com/the-acceptance-rate-into-the-ivy-league-is-plummeting-2015-5> [perma.cc/B7TS-ZU2M] (documenting acceptance rate declines among Ivy League institutions).

¹⁶⁸ See *supra* notes 135–147 and accompanying text.

¹⁶⁹ Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 807 n.112 (2006) (explaining that affirmative action programs lead to a modest decrease in white students' chances of admission); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002) (exposing the “causation fallacy,” the “common yet mistaken notion that when white applicants . . . fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action”); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 272 n.9 (2023) (“In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way . . . has discriminated based on race to the benefit of some races and the detriment of others.” (citation omitted)).

¹⁷⁰ See WILLIAM C. KIDDER & PATRICIA GÁNDARA, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA'S RACE-NEUTRAL EFFORTS 14 (2015) (finding that affirmative action bans in California preceded sharp declines in application rates for Latinos, American Indians, and African Americans across the UC system).

¹⁷¹ See Q&A: *Undergraduate Admissions in the Wake of the 2023 Supreme Court Ruling*, MIT NEWS (Aug. 21, 2024), <https://news.mit.edu/2024/qa-undergraduate-admissions-in-wake-of-supreme-court-ruling-0821> [perma.cc/K4R5-B5PM] (announcing a 9% drop in enrollment for the incoming class of 2028); Anemona Hartocollis & Stephanie Saul, *At 2 Elite Colleges, Shifts in Racial Makeup After Affirmative Action Ban*, N.Y. TIMES (Aug. 30, 2024), <https://www.nytimes.com/2024/08/30/us/black-enrollment-affirmative-action-amherst-tufts-uva.html> [perma.cc/3ZR2-Z9PC] (reporting drops in the number of Black students at Amherst College and Tufts University); Aatish Bhatia et al., *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. TIMES (Jan. 15, 2025), <https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html> [perma.cc/2T5R-H744] (finding that the share of both incoming Black and Hispanic students at selective colleges dropped one percentage point, on average, based on data that likely undercounts all students who identify as Black).

student enrollment.¹⁷² Eschewing the value of diversity, reverse discrimination suits ultimately work to redistribute the valuable good of higher education along racial lines that favor whites—a hallmark of a racial project.

C. Adjudication as a White Racial Project

Reverse discrimination lawsuits make several legal claims regarding whiteness that must be adjudicated: (1) innocent white people are intentionally discriminated against on account of their race in screening processes or organizational initiatives that consider race; (2) innocent white people are the casualties, however unintentional, of unconstitutional initiatives that use race to benefit racial minorities; and (3) an implied claim that the positioning of whites as party to, or beneficiaries of, white supremacy and racial subordination is a dignitary harm prohibited by the constitution.¹⁷³ Claims 1 and 2 merit a nuanced and detailed contextualization of racial discrimination and injury that the Court has consistently resisted in traditional discrimination claims, but that would better account for racial projects and racial hierarchy.¹⁷⁴ Claim 3 is only implied in reverse discrimination suits but is poised to gain greater traction in the future.

The Court's role in mediating these suits goes beyond merely resolving claims. Rather, under the guise of colorblindness, the Court also constructs racial meaning while distributing and redistributing resources along racial lines.¹⁷⁵ Ultimately, the Court has functioned as a handmaiden to the white racial project of reverse discrimination, to potentially dangerous doctrinal consequences.

1. Adjudicating Reverse Discrimination Claims in Education

Modern challenges to race-conscious admissions programs span over five decades.¹⁷⁶ In 1971, Marco DeFunis Jr. challenged his denial of admission to

¹⁷² See Hartocollis & Saul, *supra* note 171 (reporting “sharp” enrollment increases in white students at Amherst and Tufts).

¹⁷³ See *supra* notes 135–147 and accompanying text. White innocence, that informs most of the Court's rulings on race-conscious admissions, positions white plaintiffs' mounting challenges to race-conscious initiatives as “innocent” victims. In *Regents of the University of California v. Bakke*, for example, the Court highlighted the problem of asking: “innocent persons . . . [t]o endure . . . [deprivation as] the price of membership in the dominant majority.” 438 U.S. 265, 294 n.34 (1978) (emphasis added). The Court further insisted that it had “never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent* individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.” *Id.* at 307 (emphasis added). That innocence narrative was returned to in subsequent cases, including *Grutter* and *SFFA*. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (citing *Bakke*, 438 U.S. at 308). See generally *SFFA*, 600 U.S. 181.

¹⁷⁴ See, e.g., *Bakke*, 438 U.S. at 294 n.34 (framing members of a majority racial group as innocent and thus ignoring the intent of the Civil Rights movement).

¹⁷⁵ See *infra* notes 210–219 and accompanying text (discussing *SFFA* and its aftermath).

¹⁷⁶ See *infra* notes 165–172 and accompanying text (detailing the challenges to race-conscious admissions programs over that time period).

the University of Washington Law School as a violation of equal protection.¹⁷⁷ The University of Washington complied with a trial court order to admit DeFunis to the entering class, but then appealed to the Supreme Court of Washington.¹⁷⁸ The Court ultimately dismissed the case for mootness—DeFunis was on track to graduate before the end of the term during which the Court would issue a decision—and thus did not resolve the challenge of reverse discrimination claims.¹⁷⁹

Eight years later, Allan Bakke challenged the University of California Medical School at Davis, that, in an attempt to address a history of minority exclusion from medicine, reserved sixteen spots in a class of one hundred for qualified minorities.¹⁸⁰ Bakke claimed that the University unconstitutionally discriminated against him as a white man.¹⁸¹ In a plurality opinion, five justices struck down the Medical School's admissions program, although a different combination of five also concluded that race-conscious admissions were permissible in limited circumstances, like when admitting a diverse entering class.¹⁸² Justice Powell provided the fifth vote for both conclusions, articulating the diversity rationale that would ultimately be squarely challenged in *SFFA*.¹⁸³

Although fragmented, the *Bakke* diversity plurality nevertheless constructed enduring racial meaning. In emphasizing the tragedy of asking "innocent" whites to "endure . . . [deprivation as] the price of membership in the dominant majority," the plurality posited whites, a group it conceded was societally dominant, as victims to be protected.¹⁸⁴ Moreover, in advancing a diversity rationale, Justice Powell sidestepped the reality of the racial project before the Court.¹⁸⁵ Whites had unfairly benefited from unearned and disproportionate access to medical training, and the affirmative action program under review was a response to that reality.¹⁸⁶ The original goal was not diversity, but rather the incorrect distribution of societal resources and the means for correcting for it.¹⁸⁷ Whites, although not innocent, did endure a cost for that redistribution—the cost of competing for only eighty-four seats, rather than one hundred.¹⁸⁸ Given a history of racial discrimination, the net benefit to racial minorities from the program likely outweighed the net cost to white applicants. Instead of

¹⁷⁷ *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974).

¹⁷⁸ *Id.* at 314–15.

¹⁷⁹ *Id.* at 317.

¹⁸⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272, 279 (1978).

¹⁸¹ *Id.* at 276–78.

¹⁸² *Id.* at 320–21, 325–26.

¹⁸³ *Id.* at 326.

¹⁸⁴ *Id.* at 294 n.34.

¹⁸⁵ *See id.* at 295 (minimizing the role of race by asserting that minority or majority status "necessarily reflect temporary arrangements and political judgments").

¹⁸⁶ *See id.* at 272 (detailing the origins of the race-based admissions policy).

¹⁸⁷ *See supra* note 180 and accompanying text.

¹⁸⁸ *See supra* note 180 and accompanying text.

engaging these tradeoffs, Justice Powell instead pivoted to diversity and individual rights rhetoric.¹⁸⁹ This rhetoric purported to advance equality but instead froze in place the existing racialized distribution of resources.

Still, challenges continued. The U.S. Supreme Court's companion cases of 2003, for example, revisited the question of race-conscious initiatives in higher education.¹⁹⁰ In 2003, in *Gratz v. Bollinger*, Jennifer Gratz brought suit to challenge undergraduate race-conscious admissions at the University of Michigan, explaining that, "[w]e are taught in our schools and in our homes and in our churches that you should never judge another person based on her skin color."¹⁹¹ That same year, in *Grutter v. Bollinger*, Barbara Grutter brought suit challenging the University's law school admissions process, explaining that, "I had always taught (my kids) discrimination was wrong and the law protects them from that."¹⁹² In Grutter's own words, rather than remain "angry and bitter," she sought relief through the courts to "do something positive."¹⁹³ Both Grutter and Gratz alleged that they had been denied admission because the University discriminated against them on the basis of their race, a violation of their civil rights.¹⁹⁴

Despite these claims, the Court formally adopted Justice Powell's rationale from *Bakke*, affirming that the consideration of diversity was a compelling interest in pursuit of which colleges and universities could consider race in admissions.¹⁹⁵ Here, too, the Court engaged in a racial redistribution. In affirming diversity, the Court conceded that white racial monopoly over access to elite higher education was incompatible with a true racial democracy.¹⁹⁶ Nowhere was this more obvious than in Justice O'Connor's assertion that diversity in higher education promotes "cross-racial understanding," while also en-

¹⁸⁹ See *Bakke*, 438 U.S. at 289–90 (asserting that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

¹⁹⁰ See *infra* notes 191–197 and accompanying text.

¹⁹¹ Tomislav Ladika, *Plaintiffs Discuss Goals in Bringing Their Cases Before Supreme Court*, MICH. DAILY (Apr. 1, 2003), <https://www.michigandaily.com/uncategorized/plaintiffs-discuss-goals-bringing-their-cases-supreme-court/> [perma.cc/CA8X-PWJJ].

¹⁹² Mark Clayton, *The Woman Behind the Law-School Admissions Suit*, CHRISTIAN SCI. MONITOR (Apr. 3, 2001), <https://www.csmonitor.com/2001/0403/p14s1.html> [perma.cc/Y7ZF-LW3N].

¹⁹³ *Id.*

¹⁹⁴ See Complaint at 8, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 2:97-cv-75928), 1997 WL 34642450 (alleging that plaintiff was rejected because the law school used race as a predominant factor that gave minority groups a greater chance of admission than students with similar credentials from disfavored group); Complaint at 4, 6, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (No. 2:97-cv-75231) (same). This is an example of claim two. See *supra* note 173.

¹⁹⁵ *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003); see *supra* note 189.

¹⁹⁶ See *Grutter*, 539 U.S. at 332 (affirming that the pathway to education and leadership must remain open to qualified people "of every race and ethnicity" for the cultivation of "a set of leaders with legitimacy in the eyes of the citizenry").

hancing preparation for work and society, leadership and military service, and citizenship practice.¹⁹⁷

Justice O'Connor did, however, qualify this concession. In dictum on which opponents capitalized decades later, she wrote, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."¹⁹⁸ Despite affirming diversity, she invoked anew the purported problem of unfair burdens to innocent whites by suggesting whites were unfavored even as they constituted the majority.¹⁹⁹ She also led the Court's silence on questions of societal discrimination or social justice, ignoring the social justice intervenors whose briefs explained how university reliance on admissions criteria that disproportionately disadvantage people of color required race-conscious policies to broaden access.²⁰⁰ By focusing on diversity, while at the same time framing whites as innocent victims and ignoring historical and ongoing injustice experienced by racial minorities, the Court rendered the issue of racialized resource distribution mostly invisible.²⁰¹ The Court did not engage with how *Grutter* and *Gratz*'s challenges to race-conscious admissions—a racial project, to be sure—sought to maintain existing resource distributions that favored whites. The Court did not make explicit the limitations of its own concession: we can have diversity, but not too much, and for not too long.

The extension of the diversity rationale to the K-12 setting was obstructed in a subsequent reverse discrimination case, *Parents Involved in Community Schools v. Seattle School District No. 1*.²⁰² In Seattle, Washington, and Louisville, Kentucky, district officials adopted controlled-choice assignment plans designed to integrate schools and promote equal access to the cities' most competitive schools.²⁰³ When schools became oversubscribed by a particular racial group, the district used race, along with other factors like sibling enroll-

¹⁹⁷ *Id.* at 330–31.

¹⁹⁸ *Id.* at 343.

¹⁹⁹ See *id.* at 341 ("Even remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.' To be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'" (citations omitted) (first quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978); then quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting))).

²⁰⁰ See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1457–59 (2005) (detailing the social justice group intervenors that took action to prevent the "death knell of affirmative action").

²⁰¹ See *Grutter v. Bollinger*, 539 U.S. 306, at 341–42 (2003) (determining that race-conscious policies cannot be indefinite in duration because the Fourteenth Amendment was designed to eliminate discrimination in all forms).

²⁰² See 551 U.S. 701, 731–33 (2007) (avoiding the reverse discrimination question).

²⁰³ See Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 278–79 (2007) (detailing the school choice programs).

ment and distance from home, to make final assignments.²⁰⁴ White parents, led by mothers Kathleen Brose in Seattle and Meredith Crystal in Louisville, challenged the school assignment policies as racial discrimination.²⁰⁵ Brose, who founded the organization Parents Involved in Community Schools after her daughter was denied her preferred school choices, lamented, “I felt absolutely betrayed that my child was denied access to three schools because of her race and the community where she resided.”²⁰⁶

The Supreme Court ultimately declined to directly address whether the diversity rationale extended beyond the higher education context, deciding, instead, that Seattle and Kentucky’s controlled-choice plans amounted to racial balancing prohibited by the Constitution.²⁰⁷ Comparing the majority, concurring, and dissenting opinions, however, offers a glimpse into the sort of racial tradeoffs in which the Court was engaging but failed to make explicit.²⁰⁸ Justice Roberts, writing for the majority, was particularly solicitous of Joshua McDonald, the then-kindergarten son of Meredith Crystal, referring to him by first name no less than seven times out of eleven total invocations between the majority and dissenting opinions.²⁰⁹ In contrast to Justice Roberts’ concrete humanization of the white plaintiff, he engaged neither the history of housing segregation in either city nor the disproportionate access of white students to the highest performing schools in both school districts. The majority opinion focused, instead, on more abstract questions regarding narrow tailoring and school district failures to establish the benefit of diversity in the K-12 context.²¹⁰

Justice Kennedy, who joined the majority, nevertheless wrote a concurrence conditioning his endorsement.²¹¹ Although invoking Joshua three times, Justice Kennedy also recalled a history of housing and school segregation that could justify the consideration of race, characterizing as “profoundly mistaken” the majority opinion’s implication that the Constitution could require school districts to ignore de facto resegregation in schooling.²¹² Although agreeing with Justice Roberts that the school district plans were flawed, Justice

²⁰⁴ *Id.* at 278.

²⁰⁵ Brief for Petitioner at 2, 6, *Meredith v. Jefferson Cnty. Bd. of Educ.*, 547 U.S. 1178 (2006) (No. 05-915), 2006 WL 3090048; see Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U.L. REV. 425, 480 (2014) (reporting the statements of plaintiff in *Parents Involved in Community Schools*).

²⁰⁶ James, *supra* note 205, at 480 (citation omitted).

²⁰⁷ *Parents Involved in Cmty. Schs.*, 551 U.S. at 729–30.

²⁰⁸ See *infra* notes 209–214 and accompanying text (discussing the majority, concurring, and dissenting opinions).

²⁰⁹ See *Parents Involved in Cmty. Schs.*, 551 U.S. at 717, 719–20 (referring to Meredith Crystal’s son by his first name).

²¹⁰ See *id.* at 735 (holding that the plan is not narrowly tailored because the school districts failed to consider race-neutral alternatives).

²¹¹ *Id.* at 782–83 (Kennedy, J., concurring).

²¹² *Id.* at 788.

Kennedy affirmed diversity as a compelling K-12 educational goal, and implicitly acknowledged that the Court's decision necessarily involved tradeoffs between white and non-white interests.²¹³

In his dissent, Justice Breyer made the tradeoffs most explicit. Although acknowledging that there might be a cost in applying "a state-mandated racial label," he asserted that the cost of being denied a transfer to a school closer to home as part of a school integration initiative "does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation."²¹⁴ Here, at last, was an attempt to identify the tradeoffs of advancing some racial projects over others, but only in dissent.

Reverse discrimination plaintiffs then scored a significant victory in 2023.²¹⁵ Led by Edward Blum, the same activist who successfully challenged the preclearance requirements of the Voting Rights Act, Students for Fair Admissions was an organization unabashedly and explicitly committed to ending the consideration of race in college and university admissions.²¹⁶ After recruiting Asian plaintiffs to join white plaintiffs in lawsuits challenging race-conscious admissions, the organization filed suit against Harvard University and the University of North Carolina.²¹⁷ In an opinion written by Chief Justice Roberts, the Court ultimately prohibited colleges and universities from considering race when considering applicants for admission.²¹⁸ Although applicants were free to use their application essays to address the impact of race in their lives, admissions officers were restricted to considering an applicant's invocation of race only so far as that invocation was illustrative of other race-neutral

²¹³ See *id.* at 788–89 (affirming that "[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races" through means different than those at issue in the case under review).

²¹⁴ *Id.* at 867 (Breyer, J., dissenting) (quoting *id.* at 797 (Kennedy, J., concurring in part and concurring in judgment)).

²¹⁵ See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230–31 (2023) (reversing the lower court and holding that Harvard College and the University of North Carolina's admissions policies were unconstitutional).

²¹⁶ See Julian Maxwell Hayter, *Edward Blum's Crusade Against Affirmative Action Used Legal Strategy of Civil Rights Activists*, ARK. ADVOC. (Dec. 4, 2023), <https://arkansasadvocate.com/2023/12/04/edward-blums-crusade-against-affirmative-action-used-legal-strategy-of-civil-rights-activists/> [perma.cc/RNU4-3Y9J] (stating Edward Blum's former anti-affirmative action involvements); *Shelby County v. Holder*, 570 U.S. 529, 530 (2013) (holding that the preclearance requirements of the Voting Rights Act violated the Constitution); STUDENTS FOR FAIR ADMISSIONS, Home Page, <https://studentsforfairadmissions.org/> [perma.cc/MZ8T-AKH4] ("Students for Fair Admissions is a nonprofit membership group . . . who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.").

²¹⁷ *SFFA*, 600 U.S. at 197–98; see *supra* note 149 and accompanying text (detailing the inclusion of Asian Americans as plaintiffs in the lawsuit).

²¹⁸ *SFFA*, 600 U.S. at 230–31.

characteristics, like perseverance or ambition.²¹⁹ Race-conscious college and university admissions, better known as affirmative action, were over.²²⁰

Although most institutions of higher education did not consider race in admissions, the decision was nevertheless a momentous shift in the Court's race jurisprudence.²²¹ If diversity could no longer serve as a compelling interest justifying the consideration of race in admissions, then any number of race-conscious programs outside of higher education were potentially vulnerable to challenge. Indeed, many reverse discrimination challenges filed since *SFFA* attempt to extend the ruling beyond college and university admissions to private companies and charitable organizations.²²²

More than mere doctrinal shift, the challenge and ultimate opinion in *SFFA* are the latest in legal meaning making about race and the redistribution of resources along racial lines. By failing to offer a remedy tailored to the discrimination Asians were experiencing in the admissions process, the Court left

²¹⁹ See *id.* at 347 (Jackson, J., dissenting) (explaining the Court's assertion that colleges "can consider a student's race in its admissions process so long as that use is 'contextual'" (quoting *Fisher v. Univ. of Tex.*, 579 U.S. 365, 375 (2016))).

²²⁰ But see Russell K. Robinson, *The Incoherence of the "Colorblind Constitution"*, 113 CALIF. L. REV. 997, 1032 (2025) (arguing that the Court's opinion in *SFFA* cannot plausibly be interpreted as a complete victory for "colorblindness," and thus cautioning liberals against acquiescing to colorblind discourses that "ignore racially-forged realities and cede the moral high ground").

²²¹ See Drew DeSilver, *Private, Selective Colleges Are Most Likely to Use Race, Ethnicity as a Factor in Admissions Decisions*, PEW RSCH. CTR. (July 14, 2023), <https://www.pewresearch.org/short-reads/2023/07/14/private-selective-colleges-are-most-likely-to-use-race-ethnicity-as-a-factor-in-admissions-decisions/> [perma.cc/L8DS-CMDL] (finding that it is primarily selective private universities that would be impacted by the Supreme Court's decision to limit race-conscious admissions in higher education, and that most colleges and universities are not selective).

²²² See, e.g., *supra* notes 139–140 and accompanying text. As it turns out, the explicit threat of litigation was not even necessary to end such initiatives at other colleges and universities not subject to the suit. To the contrary, both public and private institutions of higher education using any kind of public funds started voluntarily and quietly dismantling their diversity and access programs. Danielle Douglas-Gabriel, *Many Universities Are Abandoning Race-Conscious Scholarships Worth Millions*, WASH. POST (July 9, 2024), <https://www.washingtonpost.com/education/2024/07/09/college-scholarships-race-affirmative-action/> [perma.cc/V438-R6D9]; see also Mia Penner, *Duke Ends Full-Ride Scholarship Program for Select Black Students in Wake of Affirmative Action Ruling*, DUKE CHRON. (Apr. 10, 2024), <https://dukechronicle.com/article/duke-university-reginaldo-howard-scholarship-program-black-students-affirmative-action-ruling-undergraduates-leadership-program-20240411> [perma.cc/WQ7Q-GRH8] (reporting the discontinuance of a Duke scholarship program honoring "top applicants of African descent"); Mia Penner, *'Talking to a Wall': Duke Changes Merit Scholarship Timeline, Current Recipients Express Concerns*, DUKE CHRON. (Mar. 27, 2024), <https://dukechronicle.com/article/duke-university-changes-merit-scholarship-timeline-current-recipients-express-concerns-taking-to-a-wall-20240328> [perma.cc/E7C8-VZJ4] (describing a shift to a "post-matriculation" model at Duke University in which admitted students must first commit before learning whether they have received a merit scholarship; the model has caused concerns about undermining racial and economic diversity); Nadia Bey, *Duke University Mirrors National Trend with Troubling Retreat on DEI*, NC NEWSLINE (June 13, 2024), <https://ncnewsline.com/2024/06/13/duke-university-mirrors-national-trend-with-troubling-retreat-on-dei/> [perma.cc/TR7U-ZB65] (describing Duke University student and alumni responses to the removal of diversity scholarships).

undisturbed the implicit alignment of white and Asian claims regarding race, merit, and hierarchy.²²³ Moreover, the decision was a redistribution of resources from non-whites back to whites, without acknowledgment of the tradeoffs that redistribution required. Explicitly overruling its own precedents regarding diversity, the Court signaled that *Grutter* was essentially an overcorrection. In prohibiting the consideration of race in admissions, the resource of elite higher education has shifted in favor of whites and maybe Asians.²²⁴ Heavily informed by colorblind rhetoric, the opinion contains no discussion of whether, and on what grounds, this redistribution can be defended. In changing meaning about race and redistributing resources along racial lines, the Court engages in adjudication as a racial project.

2. Disparate Treatment and White Racial Dignity

In keeping with the protection of “discrete and insular minorities,” the Court’s equal protection jurisprudence has been deployed to address disparities in treatment on the basis of race.²²⁵ *Brown v. Board of Education*, the paradigmatic discrimination suit in the United States, was defined by its demands for inclusion in a system that subjected Black people to psychological and ma-

²²³ See Vinay Harpalani, “Bait-and-Switch”: How Asian Americans Were Weaponized to Dismantle Affirmative Action, 71 DRAKE L. REV. 323, 325–26 (2024) (arguing that Asian American plaintiffs were used to attack and dismantle race-conscious university admissions).

²²⁴ Anemona Hartocollis, *Yale, Princeton and Duke Are Questioned Over Decline in Asian Students*, N.Y. TIMES (Sep. 17, 2024), <https://www.nytimes.com/2024/09/17/us/yale-princeton-duke-asian-students-affirmative-action.html> [perma.cc/5EDV-9YG6] (reporting on *SFFA*’s threats to investigate “notable” declines in Asian enrollment in 2024 compared to 2023).

²²⁵ Federal courts typically extend tiered levels of scrutiny that impose more or less rigorous interrogation of government classifications based on identity markers. Historically, these classifications included race and ethnicity, gender, and children of non-marital parentage, and have thus far precluded sexual orientation, class, and disability. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (declining to apply strict scrutiny to school financing schemes that place students in poorer districts at a funding disadvantage). The seed of tiered scrutiny lies in footnote 4 of *United States v. Carolene Products Co.*, in which the Court refers to “discrete and insular” minorities that have a history of enduring discrimination, suggesting that government classifications targeting such groups might warrant more searching judicial inquiry. 304 U.S. 144, 153 n.4 (1938). A minority group is discrete “when its members are marked out in ways that make it relatively easy for others to identify them,” and is insular when its members tend to frequently interact with each other in a multitude of social environments. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 726, 729 (1985). Insularity enhances a group’s capacity to build a dense communal life, breeds sentiments of group solidarity, socially sanctions free-riders, lowers organizational costs for political action, and thus maximizes political influence. See *id.* at 722–29 (arguing that judges ought to protect groups characterized as “anonymous and diffuse” rather than “discrete and insular”). The Court’s invocation of discrete and insular minority status as justification for heightened scrutiny is not without complication. If, in some cases, minority groups are actually in a better position to advance their political interests than anonymous and diffuse majorities, courts should consider not only failures in the political process but also prejudice that is leveled against groups despite their political power. See *id.* at 745 (noting African Americans as a specific example of this dichotomy between political gain and real prejudicial experiences in society).

terial disparities in order to maintain white supremacy. It is difficult, however, for white plaintiffs to genuinely claim disparate treatment in reverse discrimination lawsuits, particularly in those suits challenging diversity initiatives. A claim that an individual white plaintiff was denied benefits because they were white is distinct in both symbolic and material effect from initiatives that dedicate resources to recruiting, retaining, or supporting members of underrepresented racial groups. Indeed, the reverse discrimination lawsuits demand *more* resources for whites in areas already defined by white monopoly on those resources.

For much of the history of selective colleges and universities, for example, the overwhelming majority of graduates have been white males. In 2009, whites constituted 75% of all enrollments among the 468 most selective 4-year institutions, and between 2009 and 2019, white enrollment at selective institutions only increased despite large decreases in the white college-age population.²²⁶ At Harvard, one of the institutions sued in *SFFA*, 43% of white students fall into at least one of several preferential categories, including scholarship athletes, students of alumni, dean's interest list scholars, or the children of staff and faculty.²²⁷ In contrast, only 16% of Black, Hispanic, and Asian students fall into the same categories.²²⁸ Moreover, given the racialized history of elite institutions, the benefit of legacy status inures almost exclusively to whites.²²⁹

Disparities continue in financial aid. In May of 2024, the American Bar Association (ABA) reported that white students received more than 70% of full-ride scholarships, despite making up just over 60% of law school clas-

²²⁶ ANTHONY P. CARNEVALE & JEFF STROHL, *SEPARATE AND UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE* 10 (2013). In 2019, white and Asian/Pacific Islander enrollment at selective institutions was 73% of the population, while American Indian/Alaskan Native, Black/African American, and Hispanic/Latino students accounted for only 21% of students at the institutions. JEFF STROHL, EMMA NYHOF & CATHERINE MORRIS, *PROGRESS INTERRUPTED: EVALUATING A DECADE OF DEMOGRAPHIC CHANGE AT SELECTIVE AND OPEN-ACCESS INSTITUTIONS PRIOR TO THE END OF RACE-CONSCIOUS AFFIRMATIVE ACTION* 12, 22 (2024).

²²⁷ Andre Perry, *Making Elite Colleges White Again*, HECHINGER REP. (Oct. 8, 2019), <https://hechingerreport.org/making-elite-colleges-white-again/> [perma.cc/4VPB-CS8M].

²²⁸ *Id.*; see Daniel A. Gross, *How Elite US Schools Give Preference to Wealthy and White 'Legacy' Applicants*, THE GUARDIAN (Jan. 23, 2019), <https://www.theguardian.com/us-news/2019/jan/23/elite-schools-ivy-league-legacy-admissions-harvard-wealthier-whiter> [perma.cc/GU4Q-MYMV] (reporting that the acceptance rate for legacy students is 33% compared to an overall acceptance rate of 6%, and that among white applicants accepted to Harvard, 21.5% enjoyed legacy status, while only 6.6% of Asian, and 4.8% of African American students enjoyed the same); Saahil Desai, *College Sports Are Affirmative Action for Rich White Students*, THE ATLANTIC (Oct. 23, 2018), <https://www.theatlantic.com/education/archive/2018/10/college-sports-benefits-white-students/573688/> [perma.cc/C8L7-89MH] (reporting 61% of NCAA athletes in 2017 were white).

²²⁹ For the first three hundred years of its existence, for example, Harvard was reserved exclusively for whites. Perry, *supra* note 227.

ses.²³⁰ In contrast, law students of color, who make up more than 30% of law school classes, are awarded a higher percentage of partial scholarships.²³¹ Despite these obvious imbalances, reverse discrimination suits have zeroed in on the harm to white plaintiffs from efforts to ameliorate racial disparities.

A similar pattern presents itself in the *Fearless Funds* litigation. Black women entrepreneurs enjoy a mere 1% of venture capital funding, and make up just 2% of professionals at venture capital companies in 2022.²³² In contrast, white males comprise 30% of the general population, but make up 58% of all venture capital investors, and manage 93% of venture capital dollars.²³³ Even conceding that race-conscious initiatives might disadvantage those in the majority, those disadvantages pale in comparison to the disparities the initiatives are adopted to address in the first place.²³⁴ Despite this enduring asymmetry, the Court is increasingly capable of finding injury to white plaintiffs.²³⁵ In light of material realities, however, the insubstantiality of the claims gestures at a new racial injury—injury to white racial dignity.

Scholars have increasingly paid attention to dignity as driving the Court's continually developing race jurisprudence. As early as 2011, scholar Kenji Yoshino argued that the Supreme Court was responding to pluralism anxiety by moving away from group-based equality claims to "dignity claims" rooted in the due process guarantees of the Fifth and Fourteenth Amendments.²³⁶ Rather than double down on group-based equality assurances, the Court has instead moved toward liberty-based dignity claims that draw on a "more inclusive form of 'we.'"²³⁷ This is so even as the court has limited Congressional powers to remedy discrimination, foreclosed disparate impact claims, and placed limitations on the recognition of new classifications that require heightened judicial scrutiny.

²³⁰ Memorandum from the Am. Bar. Ass'n, Data Policy and Collection Committee Activity Since February 2024 (May 9, 2024).

²³¹ *Id.* Hispanic students received just over 12% of full scholarships, while Black and Asian students received just over 7% of full scholarships. *Id.*

²³² Alexandra Olson, *A Grant Program for Black Women Business Owners Is Discriminatory, Appeals Court Rules*, AP NEWS (June 3, 2024), <https://apnews.com/article/fearless-fund-dei-backlash-dab43ae98158a0bd6175fa64fa79bcfd> [perma.cc/5K22-775U].

²³³ Suraj Gupta, *Diversity: The Holy Grail of Venture Capital*, FORBES (May 26, 2022), <https://www.forbes.com/councils/forbesbusinesscouncil/2022/05/26/diversity-the-holy-grail-of-venture-capital/> [perma.cc/Y873-KC3D].

²³⁴ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (affirming that the pathway to education and leadership must remain open to qualified people "of every race and ethnicity" for the cultivation of "a set of leaders with legitimacy in the eyes of the citizenry").

²³⁵ *See supra* notes 184–189, 207–210 and accompanying text.

²³⁶ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781 (2011).

²³⁷ *Id.* at 776.

Other scholars, however, have approached dignity claims with skepticism.²³⁸ The Court has long invoked dignity claims when constraining race-conscious remedies, arguing that the balkanizing impact of racial classifications is harmful to human dignity, even when those classifications are employed to remedy rather than reinscribe racial discrimination.²³⁹ In *Bakke*, Justice Powell drew on an innocence narrative to explain that affirmative action measures in higher education can stigmatize innocent whites, just as invidious discrimination can stigmatize racial minorities.²⁴⁰ In most challenges to race-conscious initiatives since, the Court has only doubled down on the assertion that all racial classifications, whether benign or invidious, are presumptively harmful because they “demean[] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities”—language often echoed in reverse discrimination suits.²⁴¹

Further, when invalidating benign race-conscious initiatives, the Court ignores the affront to dignity caused by the individual and structural racism that race-conscious initiatives are meant to address. Instead, the Court has signaled a consistent and growing resistance to using minoritized racial identity as a lens through which to examine inequality, characterizing identity claims as problematic because of the inherent problem of racial classification.²⁴²

At the same time, the Court’s race jurisprudence is becoming more hospitable to claims regarding white dignity. The 2024 U.S. Supreme Court decision in *Muldrow v. City of St. Louis*, for example, held that Title VII of the Civil Rights Act bars employers from discrimination without requiring employees to show the discrimination caused “significant disadvantage.”²⁴³ Hailed as an “enormous win for workers,” the decision also paved the way for claims of white dignitary harm due to initiatives that use racial classifications to undercut white monopoly on resources.²⁴⁴ To be sure, *Muldrow* concerned a statuto-

²³⁸ See, e.g., Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017).

²³⁹ See *supra* notes 221–224 and accompanying text.

²⁴⁰ 438 U.S. 265, 294 (1978); see *supra* notes 151–153 and accompanying text. Of course, innocent persons from the dominant majority in the United States are white. Failing to specify this, while advancing an innocence narrative, is a particularly effective merging of the innocence narrative with the transparency phenomenon in ways that obscure racial hierarchy.

²⁴¹ *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007). For example, the opening line of the complaint in *American Alliance for Equal Rights v. Fearless Fund Management* reads: “Racial discrimination is invidious in all contexts.” See Complaint, *supra* note 139, at 1.

²⁴² Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 135–38 (2017) (examining U.S. Supreme Court case law and its tendency to refuse “to acknowledge societal discrimination against minorities as a compelling interest”).

²⁴³ 601 U.S. 346, 358 (2024).

²⁴⁴ *Supreme Court Delivers Big Win for Workplace Equality in Muldrow v. City of St. Louis Ruling*, ACLU (Apr. 17, 2024), <https://www.aclu.org/press-releases/supreme-court-delivers-big-win-for-workplace-equality-in-muldrow-v-city-of-st-louis-ruling> [perma.cc/C3FX-36QG].

ry challenge.²⁴⁵ Nevertheless, the decision gestures at the positive reception to claims of white dignitary harm that reverse discrimination claims may increasingly enjoy.

Moreover, the white racial innocence narrative that runs through the Court's race jurisprudence performs a subtle function in service of claims regarding white dignitary harm—that of demanding that white racial identity be psychically unencumbered by the reality of racial inequality.²⁴⁶ Whites are not only discriminated against but also completely unconnected to the history of racial subordination from which they benefit. *SFFA* illustrates this phenomenon at the level of the individual plaintiff.²⁴⁷ Although the inclusion of Asian plaintiffs was an innovation that garnered significant attention, the majority opinion ultimately made limited reference to discrimination leveled against the group. In the vacuum of this omission, readers are defaulted to imagining innocent whites as the injured party.²⁴⁸ The majority opinion left completely unaddressed centuries of limited or denied access to higher education endured by Blacks in the United States, nor did it acknowledge ongoing disparities in access that justified race-conscious admissions policies.²⁴⁹ Eschewing empirical data and a historical account of the exclusion of non-white people in higher education at the hands of, and for the benefit of, white people, positions whites as the true victims of racial hierarchy—their injury implicitly presented as the burden of being characterized as a complicit party in the history of racial injustice.

The U.S. Supreme Court's 2013 holding in *Shelby County v. Holder* illustrates this phenomenon at a state-wide level, and at a more explicit register.²⁵⁰ In *Shelby County*, southern states bristled against the Voting Rights Act's pre-clearance requirements that presumed that any attempts to change voting regulations in the former slaveholding states were racially discriminatory and thus subject to review.²⁵¹ Citing a principle of equal dignity among states, the *Shelby County* majority invalidated preclearance regulations in the absence of sufficiently explicit evidence that southern states could not be trusted to abstain

²⁴⁵ See 601 U.S. at 350 (holding that the text of Title VII does not require the showing of significant harm).

²⁴⁶ See *supra* notes 184–189 and accompanying text.

²⁴⁷ See 600 U.S. 181, 231 (2023) (faulting defendant universities for wrongly asserting “that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned, but the color of their skin”).

²⁴⁸ See *supra* notes 184–189 and accompanying text.

²⁴⁹ The task of tracing this history was left to dissenting Justices. See *SFFA*, 600 U.S. at 319–30, 334–41 (Sotomayor, J., dissenting); *id.* at 319–30, 385–98 (Jackson, J., dissenting).

²⁵⁰ See 570 U.S. 529, 543–44 (2013) (striking down the Voting Rights Act’s pre-clearance requirement).

²⁵¹ See *id.* at 539–40 (stating that a district in Texas attempted to escape the VRA’s coverage after the legislation was re-authorized in 2006, and in 2010, Shelby County sought to evade the legislation’s demands through a permanent injunction).

from racial discrimination in voting.²⁵² The Court essentially prioritized the states' need to be free from presumptions of racial subordination in voting over the right of racial minorities to actually vote.²⁵³ That this prioritization happened despite considerable evidence establishing second-generation minority voter disenfranchisement reflects the Court's insistence on dismissing white complicity in racial hierarchy.²⁵⁴ This is the doctrinal direction in which the judiciary is headed.

III. NEGOTIATING RACIAL PROJECTS

There is no escaping racial projects. As long as a racial hierarchy exists in the United States, racial groups will attempt to either upwardly renegotiate their racial positioning or dismantle the racial hierarchy altogether.

There is deep value, however, in accepting this reality. Explicit recognition of and engagement with racial projects enables us to better come to terms with the tradeoffs these projects entail. When reviewing the racial project of affirmative action in *Bakke*, for example, Justice Powell considered the interests of Black and Latino applicants in having their minoritized racial or ethnic identities considered in the admissions process.²⁵⁵ The Court also considered the interest of historically white institutions in pursuing diversity relative to the interest of white applicants in being unburdened by the experience of race in the admissions process.²⁵⁶ In a plurality opinion, the Court was not definitive on whose, if anyone's, interests would be wholly vindicated, but tradeoffs were nevertheless weighed. In *Grutter*, the Court returned to this attempt to balance multiple and competing racial interests, definitively rejecting racial quotas—a seeming accommodation of the white racial project—while affirming the consideration of race in pursuit of diversity—an accommodation of the racial project of minoritized groups.²⁵⁷

The outcome in *SFFA*, however, is judicial accommodation of a white racial project that has moved away from the limited compromise first conceived

²⁵² *Id.* at 543–44.

²⁵³ *See id.* at 543 (calling on the Tenth Amendment's entrenchment of federalism in the United States while ignoring the implications of its holding).

²⁵⁴ *See id.* at 560 (Ginsburg, J., dissenting) (citing the majority opinion's concession that "[v]oting discrimination still exists; no one doubts that" (citation omitted)). In her dissent, Justice Ginsburg documented second-generation barriers including gerrymandering, changes from district-by-district voting to at-large voting in cities with sizable Black majorities, discriminatory annexation through which majority-white areas would be incorporated into city limits to decrease the impact of Black voting, and the fact that between 1982 and 2004, Shelby County, Alabama, had one of the highest rates of successful challenges under section two of the Voting Rights Act, second only to Mississippi. *Id.* at 563, 582.

²⁵⁵ *See* 438 U.S. 265, 311–19 (1978).

²⁵⁶ *See id.* at 318.

²⁵⁷ *See* 539 U.S. 306, 330–32 (2003) (rejecting racial quotas while also promoting the position that racial diversity is key to true democracy).

in *Bakke* and later affirmed in *Grutter*.²⁵⁸ The Court again considered the interest of Black and Latino college applicants in admissions relative to the interests of white (and Asian) applicants in maintaining and even augmenting their overrepresentation without regard to the past and present impact of race on admissions—and this time resolved the question wholly in favor of the latter.²⁵⁹ If *Grutter* was an attempt to more evenly distribute the resource of selective higher education between dominant and sub-dominant racial groups, *SFFA* was a redistribution to the dominant group.

Unfortunately, these tradeoffs were obscured behind doctrinal analysis and constitutional pronouncements. Absent recognition that all groups are engaged in racial projects, and that even the application of doctrine functions in service of particular racial projects, jurisprudence continues to either further embed racial hierarchy or claw back the progress that more egalitarian racial projects have made. Capitalizing on the doctrinal rhetoric of equal protection and colorblindness, reverse discrimination claims are presented as neutral, and not as the white racial projects they are.

Can the racial projects advanced in either *Bakke* or *SFFA* be defended? Should the racial projects advanced in either case be defended? Section A of this Part argues that the answers to these questions cannot be found in doctrine, the current applications and interpretations of which promote a false objectivity while obscuring a racialized distribution of resources.²⁶⁰ Section B of this Part, however, argues that if racial projects are neither necessarily good nor bad, the explicit recognition of racial projects can facilitate deliberation, and ultimately maybe even consensus, on what racial tradeoffs can and cannot be defended.²⁶¹ Engaging the reality of racial tradeoffs might also reveal the forums—the judiciary? the legislature? the market?—best suited for the fair and transparent negotiation that competing racial projects demand.

A. Doctrine

The near-exclusive role of courts and judges as arbiters of the negotiations that racial projects demand has yielded disastrous results, given the Court's investment in the white racial project of reverse discrimination. Despite the calls of equality scholars for an antisubordination approach to antidiscrimination that obligates the state to affirmatively dismantle racial hierarchy, the Court has instead adopted an anti-classification approach to equal protec-

²⁵⁸ See 600 U.S. 181, 230–31 (2023) (reversing the lower court and holding that Harvard and North Carolina's admissions policies were unconstitutional).

²⁵⁹ *Id.*

²⁶⁰ See *infra* notes 262–281 and accompanying text.

²⁶¹ See *infra* notes 282–303 and accompanying text.

tion.²⁶² As a result, the Court has subjected both benign and invidious uses of race to the same level of judicial scrutiny. Under such a regime, facially neutral laws with a disparate impact on racial minorities are preserved so long as explicit discriminatory intent cannot be found, while race-conscious policies intended to address racial inequality, like the consideration of race in admissions, are prohibited.²⁶³ Adhering to an anti-classification approach that permits reverse discrimination claims only advances a white racial project that maintains white supremacy, both symbolically and materially, while countering racial projects intended to dismantle racial hierarchy. Setting aside, however, the question of whether the Court can be an honest broker of racial projects, what *would* a doctrinal approach to reverse discrimination that accounts for the reality of racial projects look like?

To be sure, racial discrimination against white plaintiffs is plausible. There are surely state and private actors who harbor animus toward white people, and who may structure their social interactions so as to avoid interaction with white people. This is prejudice, and to the extent it is based on broad generalizations regarding white people, it may be socially condemned even if not legally barred.²⁶⁴ Discrimination as a legal matter, however, should require

²⁶² See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003) (arguing that because we cannot achieve equal citizenship while “pervasive social stratification” remains, laws should reform institutions and practices that enforce the subordinate status of historically oppressed groups); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066–76 (2011) (arguing that the Reconstruction Amendments require substantive, and not just formal, equality goals that must inform equal protection jurisprudence); *SFFA*, 600 U.S. at 271–72 (Thomas, J., concurring) (“The antisubordination view thus has never guided the Court’s analysis because ‘whether a law relying upon racial taxonomy is ‘benign’ or ‘malign’ either turns on ‘whose ox is gored’ or on distinctions found only in the eye of the beholder.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring))). Key dissents, however, have articulated an antisubordination approach to equal protection, the most recent being Justices Sotomayor and Jackson in *SFFA*. See 600 U.S. at 322–26 (Sotomayor, J., dissenting) (highlighting the color-conscious laws used to fulfill equal protection’s promise of equality); *id.* at 385 (Jackson, J., dissenting) (writing to expound on the universal benefits of race-conscious admissions in a country that has “never been color-blind”).

²⁶³ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 287, 297 (1987) (upholding a Georgia death penalty statute despite conclusive evidence illustrating the impact of race on sentencing); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (striking down school assignment plans adopted to integrate public schools through the use of race as a tiebreaker in assignments); Hutchinson, *supra* note 20, at 637 (arguing that through equal protection jurisprudence, courts “now reserve their most exacting level of scrutiny for laws that ‘burden’ historically privileged groups but assume the constitutionality of enactments that harm historically disadvantaged groups”).

²⁶⁴ Indeed, this is the current state of the law. The Constitution does not generally reach private behavior about race, although civil rights statutes can reach the behavior of private institutions that receive public assistance or enter into contracts. Title VI of the Civil Rights Act, for example, prohibits discrimination on the basis of race or national origin, even at private colleges or universities that receive or process federal financial assistance, such as grants or student loans. 42 U.S.C. § 2000d. Section 1981 prohibits racial discrimination in making and enforcing contracts, extending to private employers. *Id.* § 1981. Title II of the Civil Rights Act prohibits racial discrimination in places of pub-

more: actors harboring animus and using state power or resources to deny white plaintiffs access to goods on account of their race. To screen for this impermissible motive, an investigation into the putatively exclusionary behavior is warranted.

Screening for it, as the Court does, in ways that presume that anti-white discrimination functions the same as discrimination against racial minorities, disregards historical and contemporary context in ways that benefit whites while imposing costs on non-whites. The needed contextual analysis should be informed by history, empirical data, and even symbolism, and is ultimately a call for the Court to recommit to the “discrete and insular minority” framing of discrimination by grappling more directly with which groups merit constitutional protection, and when.²⁶⁵

To make it more concrete, consider the context of race-conscious admissions as applied to a pool of applicants in which all applicants clear a minimum threshold for admission—how should the consideration of race in a way that disadvantages white applicants be reviewed?²⁶⁶ One could imagine two

lic accommodation, like hotels and restaurants. *Id.* § 2000a. The line, however, between public and private institutions, can be fine, particularly in those contexts where private choices impact public goods. White flight from public schools, for example, is private conduct that facilitates the segregation of the nation’s public schools. Despite the difficulties of line-drawing, Supreme Court jurisprudence has limited the capacity of school districts to respond to such flight. *See* *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 193, 214 n.18 (1973) (refusing to characterize de facto segregation perpetuated by white flight as a cognizable equal protection harm that requires remedy); *Milliken v. Bradley*, 418 U.S. 717, 749–50 (1974) (refusing to supply an interdistrict integration order that would compel integration between majority-minority Detroit public schools and surrounding white suburban school districts).

²⁶⁵ *See supra* note 225 and accompanying text.

²⁶⁶ Race-conscious admissions were typically adopted by selective colleges and universities that used the practice to blunt the racially disparate impact of other selection criteria, including standardized test scores. Debates about both the source of racial disparities in test scores as well as the predictive value of the tests abound, although some researchers find that there are soft thresholds above which students can academically succeed, particularly in quantitative fields. *See, e.g.,* Sean F. Reardon, Demetra Kalogrides & Kenneth Shores, *The Geography of Racial/Ethnic Test Score Gaps*, 124 AM. J. SOCIO. 1164, 1164 (2019) (finding that economic, demographic, segregation, and schooling characteristics drive racial/ethnic achievement gaps); Sean F. Reardon et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, 89 AM. SOCIO. REV. 971, 971 (2024) (finding that school segregation is still strongly correlated with racial disparities in standardized test scores); Francis A. Pearman II, F. Chris Curran, Benjamin Fisher & Joseph Gardella, *Are Achievement Gaps Related to Discipline Gaps? Evidence from National Data*, AERA OPEN, Oct.–Dec. 2019, at 1, 5 (finding that increases in the Black-white discipline gap predicted achievement gaps as measured by standardized test scores); Stephen D.H. Hsu & James Schombert, *Nonlinear Psychometric Thresholds for Physics and Mathematics*, ARXIV, Nov. 2, 2010, <https://arxiv.org/abs/1011.0663>, [perma.cc/F9KR-SA5S] (finding a nonlinear standardized test score threshold for physics and math); You Zhou, Nathan R. Kuncel & Paul R. Sackett, *Examining the Existence of Cognitive Thresholds in Highly Quantitative College Courses*, 12 J. INTEL. 37, 37 (2024) (finding no cognitive threshold below which success is impossible, but finding a “virtually necessary condition” for success). *See generally* Francis A. Pearman II, *Collective Racial Bias and the Black-White Test Score Gap*, 14 RACE & SOC. PROBLEMS 283 (2022) (finding that implicit bias at the county-level was on par with other accepted predictors of black-white test score disparities) A threshold is used in this exam-

potential reasons for such consideration. The first might be a desire to act on account of animus, and the second might be a finding that historically, white monopoly of the resources and experiences that facilitate college access makes it difficult to broaden access to minority applicants. A contextually-driven review, informed by a history of white monopoly on educational resources that persists in driving opportunity gaps today, may support treating these rationales differently. Consideration of white racial identity driven by the equity-informed latter reason should withstand legal challenge, while consideration of white racial identity driven by the animus-informed former reason should not. Although a simplified illustration of the issues at play in reverse discrimination cases, the ultimate takeaway is that even in reverse discrimination challenges where the allegation is that race operates to disadvantage white plaintiffs, courts should not automatically conclude that that disadvantage is necessarily discriminatory.²⁶⁷

The accompanying dignitary allegations often made in reverse discrimination suits—both the mere invocation of race absent intentional discrimination against innocent whites and the dignitary harm of positioning whites as party to racial subordination—should be dispensed of all together. Ignoring the affronts to dignity caused by both symbolic and material discrimination leveled against racial minorities while affirming abstract claims of injury to white innocence is indefensible.²⁶⁸ The claim also sounds in the register of societal discrimination, a remedy for which the Court has repeatedly failed to offer even to racial minorities with a documented history of marginalization in the United States.²⁶⁹

ple to dispense with debates about the meaning of merit, thus freeing the reader to focus on other issues implicated in the hypothetical. This scenario is distinct from the race-conscious admissions policies affirmed in 2003 and successfully challenged in 2023. As affirmed by the U.S. Supreme Court in 2003, race could operate only as a “plus” factor in a holistic review of minority applications. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“Instead, a university may consider race or ethnicity only as a ‘plus in a particular applicant’s file’” (quotations omitted) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978))). In *SFFA*, the majority opinion seems to concede that race was used as a plus, but it highlighted the risk that race could be used as a negative to discriminate against groups that were not the beneficiaries of race-based preferences. See 600 U.S. at 212 (summarizing *Grutter* to conclude that universities cannot use race to disadvantage racial majority applicants); see also Kimberly West-Faulcon, *The SFFA v. Harvard Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355, 1415 (2024) (arguing that the *SFFA* opinion erroneously implied that Harvard and UNC considered race not in service of inclusion but to discriminate against white and Asian American applicants).

²⁶⁷ See *supra* notes 226–233 and accompanying text (illustrating contemporary racial advantages in higher education and venture capital funding). Reverse discrimination challenges in higher education necessarily implicate debates regarding the definition of “merit,” evidentiary showings regarding individual and institutional intent, and even questions about how applicants are racially categorized.

²⁶⁸ See *supra* notes 236–244 and accompanying text.

²⁶⁹ *Bakke*, 438 U.S. at 310 (rejecting a compelling interest in remedying societal discrimination because it would unfairly burden innocent whites); *Grutter*, 539 U.S. at 323–24 (reaffirming the rejec-

Though denying relief in most reverse discrimination claims might be a provocative position, it is not a new one. Rather, there is Supreme Court precedent for this very practice. In 2004, in *General Dynamics Land Systems, Inc. v. Cline*, the U.S. Supreme Court heard a case involving plaintiffs who brought suit because a collective-bargaining agreement between General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retired employees, with the exception of then-current workers who were at least fifty years old.²⁷⁰ Plaintiffs alleged that under the Age Discrimination in Employment Act of 1967 (ADEA), preference for "the old over the young" was not permitted.²⁷¹ Based on a "natural reading" of the ADEA, in combination with congressional "interpretive clues," the Court ultimately concluded that such a prohibition was warranted.²⁷²

To be sure, *Cline* is a case concerning statutory construction.²⁷³ Nonetheless, engagement with the 6–3 majority's reasoning is instructive. In writing the opinion, Justice Souter highlighted the "disadvantage to older individuals from arbitrary and stereotypical employment distinctions" that prompted the Secretary of Labor's study of the issue; the "widespread and persistent" arbitrary discrimination leveled against older workers; and the costs that prompt employers to prefer younger workers over older ones.²⁷⁴ Implicitly distinguishing age from race, Justice Souter referred to Congress's decision not to include age within discrimination forbidden by Title VII of the Civil Rights Act, writing that Congress was aware of both legitimate and invidious reasons for discriminating on the basis of age.²⁷⁵ Justice Souter further noted the dearth of complaints regarding discrimination in favor of older workers over younger workers.²⁷⁶

Replacing the word "age" with "race" and "older" with "darker-skinned" is illuminating in thinking about constitutional responses to discrimination, and the capacity of courts to consider context, history, and the trap of false equivalencies. The opinion forcefully makes an argument about the need to respond

tion of societal discrimination in *Bakke*); *SFFA*, 600 U.S. at 226–27 (reaffirming the rejection of societal discrimination in *Bakke*).

²⁷⁰ 540 U.S. 581, 584 (2004).

²⁷¹ *Id.* at 584.

²⁷² *Id.* at 586.

²⁷³ *See id.* at 584 (setting the question before the Court). Focused, in particular, on the language and structure of the ADEA, as well as the substance of congressional testimony that informed the proposed legislature, including testimony on the effect of older age on the ability to work, the majority concluded that the "text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes," did not intend to prohibit an employer from elevating older employees over younger ones. *Id.* at 600.

²⁷⁴ *Id.* at 587.

²⁷⁵ *See id.* at 584, 587 (discussing the ADEA's legislative history).

²⁷⁶ *See id.* at 589 (discussing the "voluminous records of the hearings" in the House of Representatives on the ADEA).

to discrimination against older workers, and only older workers, in light of the absence of widespread discrimination against younger workers and the pervasive reality of discrimination against older workers.²⁷⁷ One can easily imagine the same arguments being made about race. Researchers continually document the persistence of racial discrimination and disparities in the United States.²⁷⁸ In addition to ongoing unconscious bias, institutional racism, and explicit dis-

²⁷⁷ See *supra* note 274 and accompanying text.

²⁷⁸ See Abdulrahman JBaily et al., *Air Pollution Exposure Disparities Across US Population and Income Groups*, 601 NATURE 228, 228 (2022) (stating racial minorities are more likely to be exposed to air pollution); Michaelle Bond, *Seventy Percent of Superfund Sites Are Within a Mile of Public Housing, Report Finds*, PHILA. INQUIRER (July 14, 2020), <https://www.inquirer.com/news/environmental-justice-superfund-nj-shriver-center-20200714.html#:~:text=Seventy%20percent%20of%20Superfund%20sites,direct%20proximity%20to%20environmental%20toxins.%E2%80%9D> [perma.cc/FE39-XUGM] (stating racial minorities are more likely to live within a mile of hazardous waste sites); Benjamin Q. Huynh, Elizabeth T. Chin & Mathew V. Kiang, *Estimated Childhood Lead Exposure from Drinking Water in Chicago*, 178 JAMA PEDIATRICS 473, 473 (2024) (documenting racial inequalities in testing and exposure rates to lead); Jan M. Eberth et al., *The Problem of the Color Line: Spatial Access to Hospital Services for Minoritized Racial and Ethnic Groups*, 41 HEALTH AFFS. 237, 237 (2022) (reporting that racial minorities are less likely to be served by a hospital in rural areas); Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCH. 934, 934 (2006) (finding non-white housing applicants experience lower response rates); Andrew Hanson, Zackary Hawley & Aryn Taylor, *Subtle Discrimination in the Rental Housing Market: Evidence from E-mail Correspondence with Landlords*, 20 J. HOUS. ECON. 276, 276 (2011) (finding African American and Arab names received significantly fewer positive responses to housing inquiries than white names); Ann Choi, Keith Herbert, Olivia Winslow & Arthur Browne, *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newspday.com/long-island/real-estate-agents-investigation/#open-paywall-message> [perma.cc/7J46-VL2C] (controlling for income and documenting discrimination against Asians, Hispanics, and Blacks relative to whites in the housing market); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004) (finding that white-sounding names receive 50% more callbacks for job interviews); Patrick Kline, Evan K. Rose & Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers*, 137 Q.J. ECON. 1963, 1965 (2022) (finding that job callback rates among Fortune 500 firms were 9% less for Black-sounding names); Lincoln Quillian, Devah Pager, Ole Hexel & Arnfinn H. Midtbøen, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 PNAS 10870, 10870 (2017) (finding an average Black-white callback rate of 36% and an average Latino-white callback rate of 24%); Lincoln Quillian, John J. Lee & Mariana Oliver, *Evidence from Field Experiments in Hiring Shows Substantial Additional Racial Discrimination After the Callback*, 99 SOC. FORCES 732, 732 (2020) (controlling for qualifications and finding considerable racial discrimination “in hiring after the callback”); JOINT ECON. COMM. DEMOCRATS, PEOPLE OF COLOR AND LOW-INCOME COMMUNITIES ARE DISPROPORTIONATELY HARMED BY BANKING AND FINANCIAL EXCLUSION 2 (2022) (finding Black and Hispanic households are more likely than whites to be denied access to credit); Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker’s The Economics of Discrimination*, 116 J. POL. ECON. 773, 773 (2008) (finding that areas with higher measures of prejudice, as measured through Implicit Association Tests, have larger racial wage gaps); David H. Chae et al., *Association Between an Internet-Based Measure of Area Racism and Black Mortality*, 10 PLOS ONE, Apr. 24, 2015, at 1, 1 (finding that areas with higher measures of prejudice, as measured through Implicit Association Tests, have larger racial mortality gaps).

crimination, hate crimes against racial minorities are trending upwards.²⁷⁹ And, like age, there are legitimate reasons to draw distinctions on the basis of racial identity, including contexts where the goal of the distinction is to maximize access for marginalized communities in the face of ongoing racial subordination.²⁸⁰

Ultimately, the Court acknowledged that affording solicitude to a particular class while denying it to others—a form of discrimination that benefits some groups at the expense of others—can be done in a principled manner informed by both empirical realities and historical context.²⁸¹ That we are unable to draw these lines regarding race only reflects our inability to be forthright not only about the impact of race, but about the benefits and costs of racial projects.

B. Beyond Doctrine

A jurisprudence regarding reverse discrimination that is clear-eyed about racial projects, and the tradeoffs they entail, is likely not forthcoming. Although this does not necessarily suggest there is no longer a role for litigation in service of racial equality projects, it also provides an opportunity to reconsider the alternative forms and forums in which racial projects might be engaged and negotiated. Subsection 1 of this Section considers the value of litigation, if it is not equality-producing adjudication.²⁸² Subsection 2 of this Section argues that the Supreme Court's equal protection jurisprudence renders the legislature a potentially better arena in which to resolve conflicts over race, resources, and equality.²⁸³

1. Strategic Litigation

SFFA advanced a white racial project that maintains racial hierarchy, and the Court's decision in *Ames v. Ohio Department of Youth Services* moves in the same direction.²⁸⁴ Far from a fringe ideology, reverse discrimination com-

²⁷⁹ See *FBI Releases 2022 Crime in the Nation Statistics*, FBI (Oct. 16, 2023), <https://www.fbi.gov/news/press-releases/fbi-releases-2022-crime-in-the-nation-statistics> [perma.cc/P3ZA-DD7R] (reporting an increase in “law enforcement agency participation” for hate crimes); Gloria Oladipo, *FBI Report Shows Stark Increase in US Hate Crimes and Drop in Violent Crime*, THE GUARDIAN (Oct. 16, 2023), <https://www.theguardian.com/us-news/2023/oct/16/hate-crimes-increasing-fbi-report> [perma.cc/Y7AV-FFJJ] (documenting an increase in hate crimes reported in 2022, compared to 2021, the majority of which targeted Black people).

²⁸⁰ See *supra* notes 157–169 and accompanying text (discussing racial resources and the importance of access to higher education).

²⁸¹ See *supra* notes 270–276 and accompanying text (discussing *Cline*).

²⁸² See *infra* notes 284–296 and accompanying text.

²⁸³ See *infra* notes 297–303 and accompanying text.

²⁸⁴ See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 231 (2023) (rejecting defendant universities' admissions practices because of their characterization that “the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin”); *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 309–12 (2025) (declining to adopt an elevated standard for majority-group plaintiffs in Title VII claims).

plaints are becoming a mainstream legal strategy and informing political discourse that will feed ever more extreme versions of this racial project. In the face of this accelerating trend, it is not unreasonable to wonder what litigation is still good for.²⁸⁵

The answer might be gleaned in the “racial uplift” work of civil rights lawyers of the early twentieth century. Documenting the work of the civil rights bar of the late 1930s, legal historian Kenneth Mack characterized their efforts as grounded in legal realism rather than legal liberalism.²⁸⁶ Focused as much, if not more, on building up intraracial African American institutions than on attacking segregation, these lawyers engaged in a fusion of legalism and voluntarism.²⁸⁷ The legalism strand of their work produced moral and legal claims directed at a larger white majority, while the voluntarist strand of their work emphasized interracial progress.²⁸⁸

Skeptical of the courts’ capacity to support social reform through doctrine, these lawyers responded to the needs of Black communities *in addition to* attacking segregation, including providing business law support, facilitating interracial labor organizing, and challenging private discrimination. Litigation also served to “arouse and strengthen the will of the local communities to demand and fight for their rights.”²⁸⁹ That litigation facilitated both education and inspiration in minoritized communities, and serves as a reminder that litigation responses to reverse discrimination claims can be successful even if failing to change doctrine or successfully oppose claims.²⁹⁰ Litigation might even be a tool for mobilizing social protest that some scholars believe is a necessary prerequisite for any sort of racial change in the United States.²⁹¹

²⁸⁵ Indeed, scholars have questioned the utility of law in movements for social change, sometimes pointing to social protest as more effective. See Brown-Nagin, *supra* note 200, at 1506 (arguing that social movements that define themselves through law potentially undermine their insurgent role in the political process, and risk losing their ability to set the agenda).

²⁸⁶ See Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 265 (2005) (“The legal liberal interpretation of civil rights lawyering and politics emerged only after the apparent success of a particular mode of civil rights lawyering in the *Brown* litigation.”).

²⁸⁷ See *id.* at 280 (“Race uplift had two strands—a voluntarist strand that emphasized intraracial progress, and a legalist strand that centered on moral and legal claims directed to the larger white majority.”).

²⁸⁸ See *id.* (distinguishing between voluntarist strands and legalist strands).

²⁸⁹ *Id.* at 347 (quoting Memorandum from Charles H. Houston to the Joint Comm. of the NAACP & the Am. Fund for Pub. Serv. (Oct. 26, 1934)).

²⁹⁰ To be sure, there was a “respectability politics” flavor to this racial uplift orientation. *Id.* at 280 (“[R]ace uplift affirmed both the rights and duties of citizenship, and based its equality claims on the argument that African-Americans were exhibiting the type of civic responsibility required of those who *deserved* equal civil rights.” (emphasis added)).

²⁹¹ See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 240 (4th ed. 2014) (characterizing social protest as “arguably the most effective form of politics”); FRANCES FOX PIVEN, *CHALLENGING AUTHORITY:*

Litigation responses to reverse discrimination claims might also be thought of as political in nature—that is, litigation is fought to create a counter record that exposes the racial meanings and resource redistributions implicit in reverse discrimination claims.²⁹² Critiques of race-conscious initiatives, for example, can focus on process: although the critic supports diversity efforts, they are opposed to the way such initiatives “disadvantage” members of the majority who came to opportunities without the benefit of race. Others insist that equal opportunity and personal responsibility for individual choices are undermined by race-conscious evaluative processes that benefit minorities who made “poor” choices and punish the whites who made “good” choices.²⁹³ Informed by these views, whiteness creates disadvantage, the benign consideration of race in favor of minorities is unfair, and the “overrepresentation” of minorities in any evaluative process is an unconstitutional skew.

This view, however, ignores that baselines for comparison are not, themselves, race neutral. To the contrary, accusations that race-conscious initiatives deviate from a natural “norm” only ignore the race-conscious initiatives, conduct, and commitments that established an overrepresentation of whiteness in the first instance. A school’s attempt to change enrollment demographics, for example, is only a deviation from the “norm” of majority-white enrollment if one ignores the state and local action that unconstitutionally created racially identifiable schools in the first instance. A lawsuit challenging attempts to diversify faculty demographics through race-conscious hiring is only a new and unwarranted use of race if one ignores the public and private action that worked to keep faculties historically white. Ultimately, there should be no constitutional protection of white advantage or overrepresentation originally secured through unconstitutional and immoral means.²⁹⁴

HOW ORDINARY PEOPLE CHANGE AMERICA 16, 18 (2006) (crediting disruptive protest movements for periods of egalitarian reform in American political history).

²⁹² See Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1954 (2021) (arguing that courts can be noteworthy sites of exchange, offering groups an opportunity to articulate claims that lawmakers and the public failed to consider).

²⁹³ By engaging race through the lens of abstract liberalism, whites in particular appear both reasonable and moral despite opposing approaches to racial inequality that practically recognize the state-initiated and sanctioned behaviors that racialize individual choices, or the structural obstacles to equal opportunity or representation in the United States. See BONILLA-SILVA, *supra* note 291, at 40 (stating that “[t]he best proof that there are still structural barriers to the election of blacks is the fact that despite their burgeoning rate of voter registration and participation since 1965, black officials still represent 1 to 2 percent of all elected officials”) (emphasis omitted)).

²⁹⁴ Although a de facto-de jure distinction has often been used to obstruct court intervention in response to school segregation, literature reveals that segregated patterns characterized as the product of individual choice are often facilitated by state action. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 212 (1973) (using intentionally segregative school board actions in one part of the district to justify a presumption that segregated schooling in other parts of the district was not adventitious). *But see id.* at 219 (Powell, J. concurring in part, dissenting in part) (“[I]f our national concern is for those

Discovery through litigation can be a useful forum through which to expose these uninterrogated racial baselines. Litigation in *SFFA*, for example, exposed just how much of a benefit to whites that athletics and legacy admissions provided in the admissions process, leading some to call for the abolition of the latter in service of racial equality.²⁹⁵ Similarly, in defending race-conscious initiatives, litigators can purposefully work to highlight the official state action that warrants race-conscious remedies. Even private action can be exposed, educating litigants, juries, and even judges of the ways that race unofficially but powerfully works to benefit whites. In the case of faculty hiring, for example, everything from access to developed alumni networks, to spousal hiring (sometimes through the creation of fellowships when formal hires cannot be made), to legacy enrollment at elite institutions that facilitate later employment, is grounded in de jure state action that ultimately develops into the “informal” advantages that disproportionately advantage whites today. Wider exposure through discovery of this reality, even if ultimately not successful in staving off challenge, is valuable.²⁹⁶

2. Political Processes

If the Court is invested in a white racial project, then perhaps the political process is a better alternative for resolving the competing claims to resources and racial meaning advanced by racial projects. Recent debate regarding Supreme Court reform echoes the sentiment that the Court, invested in racial projects hostile to equality, cannot be a reliably trustworthy arbiter of racial projects. From the Civil Rights Cases of the late 1880s that restricted Congress from passing antidiscrimination laws, to *Shelby County* in 2013, in which the Court curtailed congressional ability to guard against discriminatory voter disenfranchisement at the state level, the Court has a history of invalidating feder-

who attend [segregated] schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.”); see also ROTHSTEIN, *supra* note 37, at vii–viii (showing how federal, state, and local governments systematically imposed residential segregation nevertheless understood today as “de facto in nature”).

²⁹⁵ Mansee Khurana, *Colleges Are Ending Legacy Admissions to Diversify Campuses Post-Affirmative Action*, NPR (July 29, 2023), <https://www.npr.org/2023/07/26/1190123330/naacps-ivory-toldson-discusses-the-investigation-into-harvard-legacy-admissions> [perma.cc/WEE9-CNBD] (reporting on the trend among public and private colleges to end legacy admissions, especially in light of admissions data cited in *SFFA* revealing that almost 70% of legacy admissions at Harvard were white).

²⁹⁶ See NeJaime & Siegel, *supra* note 292, at 1955 (noting the potential role of the Court in enabling the disempowered to transform the majority’s understanding of its norms, that eventually changes the Court’s own posture in response to “newly emergent views of majorities”).

al laws designed to expand racial equality—federal laws that were, themselves, the product of racial projects seeking to flatten racial hierarchy.²⁹⁷

Legislative processes, however, may also be superior because of the nature of racial projects. There are many ways to respond to inequality, and racial projects are neither inherently good or bad, right or wrong. The only litmus test is whether it reifies racial hierarchy. Although constitutionally prohibited according to the Court, why *can't* the United States consider racial quotas given that other countries have used them to varying levels of success?²⁹⁸ Although increasingly under attack, just what *is* the proper role of DEI programs in private institutions? Assuming the Court had not decided the way it did in *SFFA*, should the consideration of race have been quantified and even monitored in ways that were not possible in a regime of “holistic” assessment?

These are questions that require honest assessment of the benefits and costs of initiatives. Indeed, the Court has admitted as much in earlier cases.²⁹⁹ Racial quotas, for example, may, in fact, decrease white access to state institutions, but is that cost outweighed by the ongoing and pressing need for racial remediation in the United States? If white access is diminished, what does empirical data tell us about both the depth of that diminishment and the ways in which white monopoly over other resources can blunt harm?³⁰⁰ These are questions that legislative processes, with their capacity for democratic representation, data collection, opinion gathering, and, ultimately, negotiation, can be particularly well-suited to facilitate. Hiding behind doctrine, however, and unwilling to acknowledge the reality of racial projects, we are unable to honestly confront and answer these moral, social, and empirical questions.

²⁹⁷ PRESIDENTIAL COMM'N ON THE SUPREME CT. OF THE U.S., *THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES* 8–9 (2021) (written statement of Nicholas Bowie).

²⁹⁸ See, e.g., Bruno Meyerfeld, *Brazil's Racial Quotas Have Given Rise to a New Generation of Black Graduates*, LE MONDE (Aug. 16, 2023), https://www.lemonde.fr/en/international/article/2023/08/15/brazil-s-racial-quotas-have-given-rise-to-a-new-generation-of-black-graduates_6094394_4.html [perma.cc/A29L-9ARZ] (reporting that “Brazil’s racial quota system, which reserves spots in Brazil’s public and private universities for students of African or indigenous descent, has led to a 400% increase in Black students in just one decade”).

²⁹⁹ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978) (conceding that decisions regarding preferential status “necessarily reflect temporary arrangements and political judgments”).

³⁰⁰ See Stacy Dale & Alan B. Krueger, *Estimating the Return to College Selectivity Over the Career Using Administrative Earnings Data* 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17159, 2011) (finding that returns from college selectivity are essentially non-existent, with the exception of Black and Hispanic students for whom returns remain large); Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q.J. ECON. 115, 115–16 (2022) (finding that affirmative action's net educational and wage benefits for underrepresented minorities still exceeded its potentially small net costs for on-the-margin white and Asian applicants); Bhatia et al., *supra* note 171 (finding that, although the end of race-conscious admissions at selective institutions undercut Black and Hispanic enrollment, there was no comparable increase in Asian and white enrollment).

Just as legislative processes allowed for disparate impact analysis under Title VII, even as disparate impact goes unrecognized at the constitutional level, legislative processes might produce the parameters for the engagement of race in public and private settings. If the state has the ultimate obligation to address legacies of discrimination, then perhaps race-conscious initiatives could be permitted at state institutions, but not in the private sphere. Or maybe, given the expressive concerns animating notions of liberty and speech in the United States, private institutions like Costco might consider race as long as that consideration is animated by the goal of either remediation or diversity, even as state institutions are limited in their capacity to consider race. In yet another iteration, the state, though limited in its consideration of race, might provide market incentives that encourage private institutions to consider race in their practices. These bargains, however, cannot be struck until racial projects are acknowledged, and their engagement is no longer limited to judicial review that purports to be colorblind, but in fact only freezes in place existing hierarchies.

Admittedly, political trends in the United States over the last decade raise concerns that American political forums are increasingly co-opted by white racial projects. In 2016 and again in 2024, Donald Trump, a candidate whose campaign traded in implicit and explicit appeals to the racial project of white supremacy, was elected president. Although debate continues as to which demographic groups were most instrumental in Trump's victories, political observers often suggest that his base is anchored in the specific grievances of white working-class Americans.³⁰¹ Other scholars register his electoral wins as

³⁰¹ See German Lopez, *Survey: The Poor White Working Class Was, if Anything, More Likely Than the Rich to Vote for Clinton*, VOX (May 9, 2017), <https://www.vox.com/policy-and-politics/2017/5/9/15592634/trump-clinton-racism-economy-prri-survey> [perma.cc/HGS5-QB86] (explaining that racism and xenophobia, rather than the economy, helped explain Trump's political rise); John J. Dilulio, Jr., *Biden, Trump, and the 4 Categories of White Votes*, BROOKINGS (Apr. 15, 2024), <https://www.brookings.edu/articles/biden-trump-and-the-4-categories-of-white-votes/> [perma.cc/E44Y-CJP8] (considering variation among white working class Trump voters); Katie Rogers, *White Women Helped Elect Donald Trump*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/12/01/us/politics/white-women-helped-elect-donald-trump.html> [perma.cc/8LQT-5YD2] (reporting polling that over 50% of white women voters selected Donald Trump as president). But see Molly Ball, *Donald Trump Didn't Really Win 52% of White Women in 2016*, TIME (Oct. 18, 2018), <https://time.com/5422644/trump-white-women-2016/> [perma.cc/X5UE-VP7N] (suggesting that polling showing high support for Donald Trump among white women was flawed); Stephen L. Morgan & Jiwon Lee, *Trump Voters and the White Working Class*, 5 SOCIO. SCI. 234, 234 (2018) (using self-reports and county vote tallies to show that Trump's gains in 2016 above Romney's 2012 performance were strongly related to the proportion of voters that were white and working class); Mona Chalabi, *Trump's Angry White Men—and Why There Are More of Them Than You Think*, THE GUARDIAN (Jan. 8, 2016), <https://www.theguardian.com/us-news/2016/jan/08/angry-white-men-love-donald-trump> [perma.cc/78RJ-35VF] (hypothesizing several reasons for Trump's popularity among white men, including racism); Heather Digby Parton, *The Truth About Donald Trump's Angry White Men: Inside the Media Narrative That the Media Doesn't Understand*, SALON (Mar. 28, 2016), https://www.salon.com/2016/03/28/the_truth_about_donald_trumps_angry_white_men_inside_the_media_narrative_that_the_media_

an indication of a rise of white racial resentment more generally, although others still argue that Trump advanced a vision of white protectionism, mobilizing Americans who affirmatively embrace their white racial identities.³⁰² The latter is a posture echoed in reverse discrimination claims.

In such a political environment, using the political process to advance progressive racial projects may prove particularly challenging. Indeed, in just the first week after Trump's 2025 inauguration, he signed a series of executive orders that authorized the use of military service members to launch a mass deportation program targeted at Latinos, suspended the U.S. Refugee Admission Program, attempted to redefine birthright citizenship to exclude American-born children of undocumented immigrants, and revoked a 1965 executive order banning discrimination in federal contracting.³⁰³ And yet, Trump's election and re-election represent an ascendant white racial project that has staked out claims regarding the meaning of race and racialized resource distribution. The need for racial projects that can counter the methods and goals of that project in the political arena is more urgent than ever before.

CONCLUSION

More than mere inversions of antidiscrimination law, reverse discrimination claims are part of a broader white racial project with social, political, and jurisprudential consequences. White racial projects, however, are not unique in their development or deployment. Theorizing reverse discrimination claims as a white racial project among many racial projects facilitates the development of counter projects that might preserve, if not advance, what remains of a racial equality project in the United States.

doesn't understand/ [perma.cc/CEG3-B23X] (pointing to non-traditional explanations for Trump's popularity among white men, including echo chambers, economic fears, and cultural shifts).

³⁰² See Rogers M. Smith & Desmond King, *White Protectionism in America*, 19 PERSPS. ON POL. 460, 471 (2021) (concluding that "Trump's movement has shifted American politics toward a sharper clash between two altered race-conscious policy alliances," with one promising protection for the majority group and the other promising protection for minorities). See generally JONATHAN M. METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND (2019) (arguing that in an effort to remain atop racial hierarchy in the United States, white Americans have endorsed political agendas, and the politicians that advance them, even when to do so was detrimental to the health and well-being of whites).

³⁰³ See Bill Barrow, *Everything Trump Did in the First Executive Orders and Actions of His Presidency*, AP NEWS, <https://apnews.com/article/what-has-trump-done-trump-executive-orders-f061f8e7f08c08d81509a6af20ef8fc0> [perma.cc/X2T8-ARCC] (Jan. 22, 2025) (summarizing President Trump's initial executive orders); Erica L. Green & Hamed Aleaziz, *Federal Workers Ordered to Report on Colleagues Over D.E.I. Crackdown*, N.Y. TIMES, <https://www.nytimes.com/2025/01/22/us/politics/trump-order-discrimination-federal-hiring.html> [perma.cc/QS7R-LH2Y] (Jan. 25, 2025) (reporting on President Trump's executive order promoting coworker complaints against DEI efforts).