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## Article

# “The More Things Change . . .”: New Moves for Legitimizing Racial Discrimination in a “Post-Race” World

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If race is something about which we dare not speak in polite social company, the same cannot be said of the *viewing* of race. How, or whether, blacks are seen depends upon a dynamic of display that ricochets between hypervisibility and oblivion. Blacks are seen ‘everywhere,’ taking over the world one minute; yet the great ongoing toll of poverty and isolation that engulfs so many remains the object of persistent oversight.

-Patricia Williams, *Seeing a Color-Blind Future: The Paradox of Race*<sup>1</sup>

## INTRODUCTION

In his influential article, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*,<sup>2</sup> Critical Legal Studies (CLS) scholar Alan David Freeman attempts to address the “persistent oversight” of which Patricia Williams speaks in the above quoted language. He does so by reviewing twenty-five years of U.S.

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1. PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 17 (1997).

2. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter Freeman, *Legitimizing Racial Discrimination*].

Supreme Court jurisprudence in diverse areas, with the goal of analyzing the space between the statutory and constitutional prohibitions on racial discrimination and the continuing subordination of racial minorities. Starting in 1954, and dividing the period into three eras where varied judicial approaches to race and antidiscrimination prevailed, he astutely identified how inequality is maintained partially through the complicity of legal actors.<sup>3</sup> His analysis asserted that this regrettable circumstance occurred because the Court typically sought to address violations of antidiscrimination principles rather than inculcate remedies and focused principally on perpetrator conduct rather than the conditions of victims.<sup>4</sup> Moreover, the Court's analyses applied ambiguous or so-called "colorblind" interpretations of the Equal Protection Clause,<sup>5</sup> which presumed that "racial classifications almost always are unrelated to any valid governmental purpose,"<sup>6</sup> and frequently failed to give primacy to matters of substantive equality. Focusing on U.S. Supreme Court cases primarily from the areas of education, voting, and employment, Freeman repeatedly demonstrated how judicial conduct across the eras he identified simultaneously instantiated racial disadvantage for minorities while bolstering society's moral claims to providing fair treatment to all.<sup>7</sup>

In the nearly forty years since Professor Freeman published his article, despite the improvements in many areas of race relations—to include the election of the country's first African-American president—the disjuncture Freeman located remains, and, in some ways, has worsened. Gaps for people of color between law's protective promise and their lived experi-

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3. *See id.* at 1057–118.

4. *Id.* at 1118–19.

5. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") In the dissent in *Plessy v. Ferguson*—the case famous for adopting as lawful in the majority a position that came to be known as "separate but equal"—colorblind interpretations were given life when Justice Harlan averred, "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

6. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1066.

7. According to Professor Freeman, the falsity of the liberal promise of equality is maintained by the Court manipulating antidiscrimination law to convince society of the doctrine's legitimacy by "hold[ing] out a promise of liberation" that it "refrain[s] from delivering on." *Id.* at 1052.

ence,<sup>8</sup> however, are now regarded by many as not arising out of racial bias at all. While Professor Freeman wrote his piece during a time where courts articulated then embraced colorblind constitutionalism,<sup>9</sup> he appears to have foreseen that the country was moving rapidly beyond claims of “not seeing” race toward more completely denying the salience of race. In particular, he suggested that beginning in 1974—which was at the end of the time period he initially analyzed—the country entered into an “Era of Rationalization.”<sup>10</sup> In this era, antidiscrimination law was marked by a pretense that the aspirational future where racial discrimination would be an “occasional aberrational practice” was “already here and functioning.”<sup>11</sup> These comments signaled that well before the idea of completely mov-

8. This attentiveness to the space between law “in books” and law “in action,” or the way that legal rules are often subjectively manipulated by judges and other legal actors, is a central claim of the legal realists. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267–68 (1997) (discussing the premise that laws are shaped not by rules, per se, but by the political and moral leanings of judges); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (explaining that the justification of law as a device to secure liberty is to preserve individual liberty). In a contemporary vein, we have seen scholars attempt to revitalize and expand the tenets of legal realism. See Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (substantially reframing legal realism around the need for the empirical study of law). Various descriptions as a “new legal realism” or as ‘empirical legal studies,’ this restored focus on the social sciences in many ways echoes an earlier era of legal realism in American law, with some important differences.” Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 483 (2007) (citation omitted).

9. See Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 809 (2010) (identifying colorblindness as a twentieth century aspirational view of race as operating neither to confer privilege nor disadvantage). Similar to Alan Freeman, Neil Gotanda asserts that “color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination.” Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991).

10. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1102. While not discussed extensively in this Article, Professor Freeman identified two additional eras in this piece. From 1954 to 1965, he described an “Era of Uncertainty” where it was initially unclear how the Court would deal with a perpetrator-focused antidiscrimination jurisprudence in a post-*Brown* world. *Id.* at 1057. From 1965 to 1974, there was the “Era of Contradiction,” where the Court struggled to balance between fixating on violations versus remedies in antidiscrimination cases. *Id.* at 1079. Part of the contradiction within this era was produced by that fact that once the Court acknowledged race as relevant to understanding violations in particular traditional contexts, it would be forced to consider race in other contexts, given the pervasiveness of racial discrimination. *Id.* at 1080–81.

11. *Id.* at 1103.

ing beyond identity occupied our societal imagination, the Court had moved to a perspective that is now best described as being post-race. Professor Freeman confirmed this understanding that the Court essentially no longer considered race to be a meaningful category for determining social status several years later. Just over a decade after writing *Legitimizing Racial Discrimination*, Professor Freeman updated his assessment of antidiscrimination law in a *Tulane Law Review* article entitled, *Antidiscrimination Law: The View from 1989*.<sup>12</sup> For anyone who doubts *Legitimizing Racial Discrimination* had identified a post-race leaning in the Court, *The View from 1989* confirmed the blossoming of the phenomenon he earlier outlined in his “Era of Rationalization.”<sup>13</sup> In *The View from 1989*, Professor Freeman closes out that previously open-ended era in 1984, and describes subsequent cases from that point on as belonging to an “Era of Denial.”<sup>14</sup> In that era, Professor Freeman claims the Court “complete[d] the dismantling process that had begun in the period of rationalization” by treating unequal conditions of victim groups as a “neutral feature of our socioeconomic landscape.”<sup>15</sup>

In *The View from 1989*, using primarily employment cases occurring between 1974 and 1989, Professor Freeman effectively predicted an approach to antidiscrimination that substantially remains to this day. While the “Era of Denial” was left open-ended,<sup>16</sup> there are some very important differences between approaches to antidiscrimination law in the late 1980s and today. For one, Professor Freeman spoke of a supposed victory over racial bias that could be inferred from the outcomes of cases. Today, the Court’s post-race perspective, or perhaps, mantra, need not be inferred. It has explicitly and repeatedly made such representations, which have grown in ardor, at least since the rise of President Barack Obama.<sup>17</sup> Moreover, as key recent opinions of the Roberts Court demonstrate, post-racialism now functions more as a primary lens, rather than as

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12. Alan David Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990) [hereinafter Freeman, *The View from 1989*].

13. *Id.* at 1422–26.

14. *Id.* at 1426.

15. *Id.* at 1426–27.

16. *Id.* at 1426–41.

17. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010) [hereinafter Haney López, *Post-Racial Racism*].

a background theory used to bolster the merits of ostensibly neutral decision-making.<sup>18</sup> Relevant to Professor Freeman's claims, in a world where race has presumptively lost its salience, the Court is even more empowered to focus on perpetrators over victims, violations rather than remedies, and formal instead of substantive equality. Additionally, in a society where race is of no consequence, little analysis need be invested in assessing the institutional and structural, rather than individual, means at work in creating disadvantage. Applying Professor Freeman's method of assessing key antidiscrimination cases in voting, education, and employment within a modern context, this Article identifies the contemporary manner in which post-race discourses are used to legitimize discrimination. The goal is not to assess every race case in these areas over the last twenty-five years, but rather to analyze particularly representative matters. Much in the way that Professor Freeman foregrounded CLS and legal realism principles in his analysis, this Article will similarly apply foundational concepts and scholarship from a prominent CLS successor movement that has arisen since 1978—Critical Race Theory (CRT).<sup>19</sup> In order to stay focused on Professor Freeman's primary arguments, this Article also accepts some constraints on analysis imposed within his critique. Like Professor Freeman, the analysis here will be limited to looking at racial discrimination rather than

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18. See *infra* notes 129–33 and accompanying text.

19. Critical Race Theory is a scholarly movement and philosophy that is committed to “studying and transforming the relationship among race, racism, and power.” RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION 2* (2001). CRT grew out of and has always been closely aligned with the Critical Legal Studies movement, with both being described as “reject[ing] the prevailing orthodoxy that scholarship should be or could be ‘neutral’ and ‘objective.’” *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii (Kimberlé W. Crenshaw et al. eds., 1995). Specifically, CRT was formed by a group of scholars of color (race-“crits”) who were concerned with how CLS treated issues of race at its conference and within its scholarship. *Id.* at xiv–xix. In addition to the Crenshaw text, foundational readings from the CRT movement have been amassed in several other edited collections. See *CRITICAL RACE FEMINISM: A READER* (Adrien K. Wing ed., 2003) (including articles about racism and civil rights intertwined with feminism, gender, mental illness, and social class); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995) (including articles about the intersection of race, sex, and class as well as critical race feminism and essentialism/antiessentialism); *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002); *THE DERRICK BELL READER* (Richard Delgado & Jean Stefancic et al. eds., 2005) (including many articles about racial realism, racial standing, price of racial remedies, and racism as meanness).

myriad forms of bias, and will focus primarily on black-white relations.<sup>20</sup>

Based on the foregoing, this Article will focus primarily on three aspects of Professor Freeman's scholarship. Part I focuses on the eerily prescient aspect of Freeman's work: how courts transformed legal doctrine designed to fight discrimination into a means to instantiate unfair societal race relations, by treating race as if it had lost its salience. With regard to these claims, this Article situates Freeman's work as an early commentary on the hazards of presuming America a post-race society. Second, Part II revisits Professor Freeman's articulation of the alternative understandings of equal protection under the U.S. Constitution. Additionally, particular attention is paid to a fissure: how Professor Freeman's antidiscrimination critique was important to enhancing the CLS critique of rights, but simultaneously somewhat under-inclusive for meeting the broader needs of the emerging CRT movement. Part III, guided by CRT principles, argues that the Court has transitioned beyond the "Era of Denial" described by Professor Freeman.<sup>21</sup>

Moving forward from 1989, and using Professor Freeman's method of assessing key Supreme Court decisions in the areas of employment, education, and voting, this Article explores judicial antidiscrimination analysis in our now explicitly post-race world as implicating an "Era of Incredulity." In essence, the Court has moved beyond merely denying the influence of race to professing astonishment at how anyone could imagine race being the reason for the existence of unequal arrangements and life consequences across social groups. This is so even in the face of significant data depicting racialized differences in most important areas of social life.<sup>22</sup> As prominent

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20. See Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1050 n.8. On the dangers of antidiscrimination discourse overly focusing on a black/white binary, see Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1219–21 (1997); cf. Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107 (2010) (defending the black/white binary by arguing that critics have misread the extant law for civil rights and disrespect a tradition of black scholarship).

21. Freeman, *The View from 1989*, *supra* note 12, at 1426.

22. See, e.g., Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 982–92 (2010) (explicating disadvantages for Blacks in several important areas of social life); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States 1948–2009*, 44 L. & SOC'Y REV. 431, 441–51 (2010) (looking at the fragility of

CRT and Feminist Legal Scholar Angela Harris has stated, based on the State's decreased investment in white supremacy and a belief that "racist ideology is now taboo," Supreme Court Justices are "now shocked, shocked! to find racial discrimination still occurring."<sup>23</sup> As a part of identifying the characteristics of this era, this Part evaluates something that Professor Freeman under-considered—the Court's obsessive tendency to look for discrimination as stemming from individual conduct rather than institutional practice. Based on the prescient nature of the analysis of discrimination attached to Professor Freeman's eras of rationalization and denial, this Article concludes that the "Era of Incredulity" antidiscrimination decisions, however, still typically legitimize discrimination, and that the methods for doing so hold much in common with the practices Professor Freeman observed. This is the impressive but regrettable legacy of his work.

### I. LEGITIMIZING RACIAL DISCRIMINATION AS A POST-RACE PREQUEL

A primary contention of this Article is that Professor Freeman's theory of the judicially constructed, counterproductive effects of antidiscrimination law on racial equality is nearly as relevant now as when he wrote *Legitimizing Racial Discrimination* and its follow-up, *The View from 1989*. That is so because nearly forty years ago, Professor Freeman already foresaw that the Court's interpretations were premised upon contesting the continuing significance of race.<sup>24</sup> A key reason Professor Freeman's articles remain germane is that at this point in U.S. history, a significant portion of America has embraced the desire to transcend race.<sup>25</sup> Marking the parameters

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black progress over the years in the areas of income, wealth, education, employment and criminal justice); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 512–21 (2009) (discussing disproportionately negative outcomes for Blacks in the areas of wealth accumulation, housing, and health outcomes).

23. Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL'Y REP. 207, 208 (1995).

24. The Court invested in this narrative despite the emerging sociological literature suggesting that even the positions of successful Blacks were precarious. See, e.g., Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101 (1991) (looking at public accommodations and public-space discrimination and detailing the remaining hurdles for middle-class Blacks).

25. See Haney López, *Post-Racial Racism*, *supra* note 17, at 1024 (explaining how the election of Obama has inspired many to believe race as a basis for social ordering in the United States has ended).



of this so-called post-race desire has been undertaken by a number of scholars from law<sup>26</sup> and other disciplines.<sup>27</sup> As one communications scholar has suggested, in proclaiming society post-race, there are multiple goals:

On the one hand, the existence of a *post-race* era proves that the Civil Rights era accomplished its goals. Therefore, a *post-race* era is one in which racism has no significance. On the other hand, living in a *post-race* era means living in an era in which race itself is not significant.<sup>28</sup>

Professor Freeman forecasted the emergence of both of these elements of post-race reasoning in his analysis of the “Era of

26. See, e.g., Mario L. Barnes, *Reflection on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 6, 7 (2009) (discussing how some used the rise of President Barack Obama to claim that “America has, in fact, substantially overcome the longstanding effects of racism, and perhaps, its national obsession with race”); Cho, *supra* note 17, at 1594 (defining post-racialism as “a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies”); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 114 (2012) (“Post-racialism is the notion that the United States has reached a point where race is so infrequently salient that it no longer makes sense to organize around it or even acknowledge its presence.”); Janine Young Kim, *Post-racialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063 (2013) (exploring myriad potential meanings of post-racialism); cf. Haney López, *Post-Racial Racism*, *supra* note 17, at 1027 (arguing that the national obsession with denying the salience of race has produced “post-racial racism,” a term used to refer to the various practices that collectively operate to maintain racial hierarchy even in the face of a broad social repudiation of purposeful racial mistreatment”).

27. THE EDUCATION OF BLACK MALES IN A POST-RACIAL WORLD (Anthony Brown & Jamel Donnor eds., 2012) (discussing how the rise of President Obama gave credence to a post-racial narrative that has affected the schooling of black boys); CATHERINE R. SQUIRES, *THE POST-RACIAL MYSTIQUE: MEDIA & RACE IN THE TWENTY-FIRST CENTURY* (2014) (exploring how various media outlets define, employ, and interrogate the meaning of post-racialism in American society); Lawrence D. Bobo, *Somewhere Between Jim Crow and Post-Racialism: Reflections on the Racial Divide in America Today*, 140 DAEDALUS 11, 13 (2011) (offering that there are multiple understandings of post-racialism, including a term “intended merely to signal a hopeful trajectory for events and social trends” and “the waning salience of what some have portrayed as a ‘black victimology’ narrative”); Marcia A. Dawkins, *Mixed Messages: Barack Obama and Post-Racial Politics*, 30 POST IDENTITY 9 (2010) (analyzing media, President Obama, and post-racial politics); Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 TCHRS. C. REC. 47, 47 (1995) (arguing for a critical race theoretical perspective by “developing three propositions: (1) race continues to be significant in the United States; (2) U.S. society is based on property rights rather than human rights; and (3) the intersection of race and property creates and analytical tool for understanding inequity”).

28. Dawkins, *supra* note 27, at 9–10 (citing Ralina L. Joseph, *New Millennium “Mulattas”: Post-Ethnicity, Post-Feminism, and Mixed-Race* (2005) (unpublished Ph.D. dissertation, University of San Diego)).

Rationalization.<sup>29</sup> A key move in this era was to declare that the “war is over,”<sup>30</sup> and, discriminatory appearances aside, that “the actual violation has already been cured.”<sup>31</sup> In a sense, his analysis was an early articulation of beliefs questioning racial salience. Using the prevalent term of the period, he essentially described the end result of operationalizing colorblindness.<sup>32</sup>

While they share a common ideology, colorblindness and post-racialism are not precisely the same thing. Colorblindness speaks to an aspirational goal for people to work not to “see” (or act upon) race; post-racialism more fervently declares the end of race and racism as a mission accomplished.<sup>33</sup> As Berkeley Law Professor Ian Haney López has stated, “post-racialism constitutes a liberal embrace of colorblindness. It differs in important particulars, but nevertheless largely tracks this ideology in a way likely to limit progress toward increased racial equality.”<sup>34</sup> Professor Freeman understood this tension between aspiring toward racial equality and proclaiming racial parity attained. He described antidiscrimination law as a prize in a pitched battle between these competing interest groups—those

29. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1102. A key feature of that era was the court seeking to limit the holding in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See Freeman, *The View from 1989*, *supra* note 12, at 1423–24. Rather than solely focusing on the turn away from the salience of race, Freeman focused his analysis on perspective, claiming that a flaw of the U.S. system is that it is more concerned with perpetrators’ than victims’ perspectives. Moreover, he notes that proof of discrimination is achieved through identifying fault (intentionality) and causation. *Id.* at 1425–26.

30. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1102. The Court, however, has been attempting to declare racism dead nearly since the slaves were freed. See Barnes, Chemerinsky & Jones, *supra* note 22, at 972–74.

31. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1102.

32. Importantly, when Professor Freeman wrote *Legitimizing Racial Discrimination*, the near fanatical requirement that government actions be “color-blind” had not been fully embraced by the Court. *Id.* at 1067 (“The color-blind theory has never become the law; the Supreme Court has in fact explicitly upheld the remedial use of racial classifications on a number of occasions.” (citation omitted)). Since the late 1970s, however, many of the color-conscious remedies previously approved by the Court have been pared back. *Id.*

33. U.C. Hasting Law Professor Osagie Obasogie describes the phenomenon as follows: “[W]hile colorblindness offers a *normative* perspective on how race ought to be treated in law and public policy, post-racialism operates as a *descriptive* account of where society currently is.” OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE IN THE EYES OF THE BLIND* 171 (2014).

34. Haney López, *supra* note 9, at 808; see also Barnes, Chemerinsky & Jones, *supra* note 22, at 977–79 (discussing why the promise of post-racialism is still premature).

who saw the goals of color blindness as belonging to a better but unrealized future and those who wished to use color blindness to undermine remedial practices.<sup>35</sup> Professor Freeman describes courts as advancing along this spectrum, away from merely imagining a hopeful racial future toward pronouncing improved racial conditions as the status quo. He does so in the allegorical narrative that begins *Legitimizing Racial Discrimination*. In that narrative, Professor Freeman structures a conversation between “Black Americans” and “The Law,” where “The Law” encourages Blacks to rejoice because “Racial discrimination has now become illegal.”<sup>36</sup> The true purpose of this claim, “The Law” further instructs, is to deny Blacks meaningful equality and impress upon them that they should not “demand any remedy involving racial balance or proportionality; to recognize such claims would be racist.”<sup>37</sup>

A characteristic of modern, post-race politics is that in a world where race is not deemed important for understanding disparate conditions across social groups, it is the first person that mentions race that is often deemed the racist.<sup>38</sup> What Professor Freeman essentially described as an ill-considered judicial myopia of sorts, is a belief that has now been substantially adopted as a favorable societal standard. Believers assert that one need look no further than the Presidency of the United States to observe proof that race no longer serves as a limiting category.<sup>39</sup> As will be argued in greater detail below, an en-

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35. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1107.

36. *Id.* at 1049.

37. *Id.* at 1050.

38. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 133 (2014) (describing the practice where persons professing color blindness use the label “racist” as a stinging counterattack against proponents of color-consciousness injecting race into the conversation). This work is intellectually tied to Eduardo Bonilla-Silva’s game-changing work, which describes how the United States ends up with disadvantage exhibiting a racial valence, even though no one is racist. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (4th ed. 2014).

39. See Bobo, *supra* note 27; Cho, *supra* note 17, at 1621–26 (contending that black politicians should adopt post-racial electoral strategies to avoid marginalization); Haney López, *Post-Racial Racism*, *supra* note 17, at 1023–26 (stating that many believe Obama’s election ended the basis for social ordering around race in the United States); Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of “Obama” in Anti-Discrimination Law*, 87 IND. L.J. 325, 325 (2012) (noting that, for many, Obama’s election to “the most prominent, powerful, and prestigious job in the

dorsement of America as truly post-race has freed up the Court to move beyond the issues Professor Freeman noted, toward an even stingier conception of equality.<sup>40</sup> Twenty-five years ago, literally structuring a conversation between “race” and “the law,” he sought to expose this “dissonance in this dialogue.”<sup>41</sup>

In his early description of the rise of post-racialism, Professor Freeman had to infer such a belief from the Court opinions. Since his 1989 article, however, courts—the U.S. Supreme Court, in particular—have become increasingly explicit with regard to their beliefs that race is now an outmoded concept.<sup>42</sup> As shall be discussed below in cases such as *Grutter v. Bollinger*,<sup>43</sup> *Parents Involved v. Seattle School District No. 1*,<sup>44</sup> *Ricci v. DeStefano*,<sup>45</sup> and *Shelby County v. Holder*,<sup>46</sup> various opinions of the Justices have been explicitly premised upon a belief that race and racism no longer operate as significant impediments within society.<sup>47</sup> Understanding the nuanced slippage between colorblindness and post-race helps one to understand how and why the dissonance Professor Freeman identified has expanded. Prior, however, to assessing the impact of the Court’s now fully post-race approach to equality, the next Part will first consider broader implications of Professor Freeman’s antidiscrimination critique.

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United States” symbolized the post-racial society, where race is no longer meaningful).

40. A recent assessment of the Court’s analysis in race cases in the multiple areas considered within this Article—which were treated more favorably during the Civil Rights Era—has made this point:

The Supreme Court has used individual rights to undermine much of the practical work of the Second Reconstruction—from twisting employment discrimination law against itself in *Ricci v. DeStefano* to slowly choking off the life of affirmative action in *Fisher v. University of Texas* to gutting the Voting Rights Act in *Shelby County v. Holder*—all in the name of equal rights. Today’s Equal Protection Clause works against equality more often than it furthers it.

Richard T. Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2949–50 (2014) (citation omitted).

41. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1050.

42. Along with co-authors, I have argued in the past that the courts’ post-race leanings actually date back to Reconstruction. See Barnes, Chemerinsky & Jones, *supra* note 22, at 969–75.

43. 539 U.S. 306 (2003).

44. 551 U.S. 701 (2007).

45. 557 U.S. 557 (2009).

46. 133 S. Ct. 2612 (2013).

47. See *infra* notes 125–27, 129, 133–34, 136, 139, 183–84, 190, 219, 234–35, 240–41, 270 and accompanying text.

## II. PROFESSOR FREEMAN'S ANTIDISCRIMINATION ANALYSIS AND ITS INFLUENTIAL BEARING ON OTHER CLS AND CRT CRITIQUES

While Professor Freeman's critique was important for articulating an approach to race more fully adopted by courts decades later, his critique had more immediate impacts. First, it appears that Professor Freeman's article provided a prominent, early CLS critique of the contours of Equal Protection Doctrine, which became critically important to the broader CLS critique of rights.<sup>48</sup> Second, Professor Freeman's critique was formative to CRT, the burgeoning scholarly movement dedicated to identifying and rewriting the relationship between race, law and power that followed CLS. This second effect is a bit surprising given that one of the primary reasons race-crits constructed CRT as a separate enterprise was that CLS critiques under-considered the importance of racism,<sup>49</sup> and adopted an overly nihilistic critique of rights.<sup>50</sup> These two effects of his piece are next considered.

### A. ENHANCING THE CLS CRITIQUE OF ANTIDISCRIMINATION

To the extent CLS was an associated offshoot of American Legal Realism, it was committed to demonstrating law's indeterminacy; this commitment informed the CLS left critique of legal reasoning.<sup>51</sup> This critique was built upon the assertion that "law' is not distinct from 'politics' in any simple way" and that legal doctrine was not only indeterminate, but contradictory and "systematically biased in favor of economically and socially privileged elites."<sup>52</sup> Another prominent critique within CLS, however, was the critique of rights.<sup>53</sup> This criticism ap-

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48. See *infra* notes 56–57 and accompanying text.

49. See *infra* notes 92–94 and accompanying text.

50. See *infra* notes 95–105 and accompanying text.

51. See OBASOGIE, *supra* note 33, at 183–86 (noting that two primary tenets of CLS were its critique of legal formalism and the effects of law's indeterminacy).

52. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 746 (1994).

53. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 166–71 (1990) (discussing the rights critique of prominent CLS scholars Alan Freeman, Peter Gabel, Duncan Kennedy, and Mark Tushnet); Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW 641, 657–58 (David Kairys ed., 1998) (debating whether "rights" lack objective substance and if they are shared practices that people adopt and use to subordinate groups); Morton Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988) (discussing the discourse of rights by defin-

plied a deep skepticism to the progress that could be obtained through rights discourse,<sup>54</sup> and was partially framed through a discussion of constitutional equal protection principles and their accessibility to disadvantaged groups.<sup>55</sup> In *Legitimizing Racial Discrimination*, Professor Freeman sought to use his views of antidiscrimination cases to stake out important ground in the CLS rights critiques,<sup>56</sup> in that his analysis moved beyond abstractly theorizing the fallacy of rights to include a concrete assessment of how judges were constructing and applying equal protection principles in cases. This move ultimately provided a rich and complimentary exemplar for the early CLS critique,<sup>57</sup> one that contributed to the framing of CLS and CRT rights discourses moving forward.

Even prior to Professor Freeman writing *Legitimizing Racial Discrimination*, legal scholars had problematized equal

ing the controversy and suggesting ways in which theories of rights have influenced the progress towards a more just society); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993) (elaborating on the general critique of rights by examining the relationship between legal victories and political effects); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (explaining the four critiques of rights discussed in contemporary American legal circles). Professor Freeman, however, claimed that there was no consensus on a coherent CLS critique of rights. See Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 316 (1988) [hereinafter Freeman, *Racism, Rights and the Quest*].

54. See, e.g., MATHIAS MÖSCHEL, LAW, LAWYERS AND RACE: CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE 53–54 (2014) (discussing how rights discourse prevents real social transformation because it helps legitimize hegemony, which induces people to accept domination); OBASOGIE, *supra* note 33, at 185.

55. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 181–83 (Wendy Brown & Janet Halley eds., 2002) (describing the rhetorical emphasis on identity and anti-discrimination through the frame of “equal protection” for individual members of previously subordinated social groups).

56. In essence, “the critique of formal antidiscrimination rights played a major role in the development of the critical legal scholars’ critique of rights . . . .” ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 147 (2011) (footnote omitted) (citing Freeman, *Legitimizing Racial Discrimination*, *supra* note 2).

57. In his acknowledgments to *Legitimizing Racial Discrimination*, Professor Freeman thanked scholars associated with the Conference on Critical Legal Studies. The founding meeting of the conference took place in Madison, Wisconsin, in 1977. See Kimberlé W. Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1354 (2002) [hereinafter Crenshaw, *A Foot in the Closing Door*]. The conference took place a year before he published *Legitimizing Racial Discrimination*. In later work, however, he directly associated himself and his work with the movement. See Freeman, *Racism, Rights and the Quest*, *supra* note 53, at 296–97.

protection as a somewhat inchoate concept, one capable of being endowed with multiple and oppositional meanings.<sup>58</sup> Historically, one predominant analytical frame has focused on the propriety of legal doctrine providing for similar treatment across dissimilarly situated groups rather than seeking to ensure substantively similar outcomes.<sup>59</sup> This disconnect has been described, alternatively, in terms of approaches concerned with classification versus subordination,<sup>60</sup> formal versus substantive equities,<sup>61</sup> and a manifesting sameness/difference discourse in equality jurisprudence.<sup>62</sup> This difference between formal and

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58. See, e.g., Reva B. Seigel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (noting how equal protection doctrine has historically provided liminal rights protections while failing to topple more troublesome status hierarchies).

59. On this point, the following words of Professor Angela Harris are instructive:

Above all, the language of equality seduces us away from the realities of social power, and into an imaginary land where groups of people can be laid side by side to see if they're similarly situated, and then they can be made equal. Equality discourse, then, inherently brings us into a vexed relationship with history.

Angela P. Harris, *Foreword: Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice*, 85 CORNELL L. REV. 1181, 1186 (2000).

60. A common oppositional reading of constitutional equality norms is referred to as a split between the anti-classification and anti-subordination approaches to the Equal Protection Doctrine. See Jack M. Balkin & Reva B. Seigel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Reva B. Seigel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (adding antibalkanization—a commitment to race-conscious, facially neutral interventions which serve the ends of social cohesion—to the anticlassification and antisubordination frameworks for equal protection). Professor Freeman himself described equal protection as being an unhelpful, morally neutral concept. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1058 (“In its pure form, the principle is perfectly abstract, concerned only with questions of neatness; inasmuch as it serves to check technique rather than goal, it is utterly value-neutral.” (citation omitted)).

61. See, e.g., Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CALIF. L. REV. 1687, 1689–90 (1986).

62. See, e.g., Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1962–66 (2000) (describing continuing racial dominance by interpreting racial distinctions in law as a “notion of difference”); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296. It is important to remember, however, that there is no true biological significance of race; the concept was created to mark perceived social/cultural differences for the purpose of excluding. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Kim, *supra* note 26, at 1067–75, 1079–82 (examining race as difference, denigration, and exclusion).

substantive equality was a starting point for Professor Freeman. While committed to the legal realist tradition, he was not, however, content to merely note that formal equality was insufficient to protect the interests of historically disadvantaged peoples. Rather, Professor Freeman created his own more detailed categories for assessing the Court's antidiscrimination jurisprudence. Beginning in 1954, with the *Brown v. Board of Education*<sup>63</sup> case and in what Professor Freeman describes at the "Era of Uncertainty," he uses cases to discuss multiple, potential understandings of equality under the Constitution.<sup>64</sup> He labels the first two of these varying meanings as "means-oriented,"<sup>65</sup> and a "fundamental right" rationale.<sup>66</sup> By contrast, the third meaning was tied to an understanding that historically the Clause was designed to provide rights to freed slaves.<sup>67</sup> According to Professor Freeman, through strategic but non-specific maneuvering among these meanings, the Court defined the resulting expanse of antidiscrimination laws.<sup>68</sup> The Court's more consistently focusing upon the former two understandings, rather than questioning the historical purpose of the Clause, is one factor that led to opinions Professor Freeman saw as undermining racial equality. He also noted, however, other common tendencies—operating across the varying meanings—that helped to explain why antidiscrimination laws rarely served the ends of racial justice.

Professor Freeman was especially critical of much of equality jurisprudence because opinions so heavily focused on judi-

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63. 347 U.S. 483 (1954).

64. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1057.

65. This approach regards the Equal Protection Clause as "nothing more than a judicial check on legislative mistakes." *Id.* at 1058.

66. This approach involves using the Fourteenth Amendment fundamental rights analysis to enforce the language of the Equal Protection Clause. *Id.* at 1059–60. As opposed to suspect classification analysis under the clause, Erwin Chemerinsky describes another overlap between the fundamental rights (substantive due process) and equal protection analysis, which turns on using the Equal Protection Clause to prevent discrimination in the exercise of fundamental rights. ERWIN CHEMEKINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 691–92 (4th ed. 2011).

67. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1061. Similarly, writing with Erwin Chemerinsky, I have previously asserted that the purpose of the Reconstruction Amendments—to make freed slaves full citizens—should have been used to inform courts' understandings of equality. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine*, 43 *CONN. L. REV.* 1059 (2010).

68. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1064–65.



cial perspectives concerned with perpetrators rather than victims.<sup>69</sup> While this may seem like a somewhat facile insight, it was very instructive for seeing judicial determinations as contextual. As Harvard Law Dean Martha Minow stated:

The critique of rights afforded by this argument introduces the possibility that reality is not unified but multiple and is based on the situation of the particular people perceiving it. Freeman suggests that there is an important relationship between knowledge and power, between what is known and who does the knowing. This idea . . . also opens up questions about how relationships between people influence their knowledge about one another, and about how legal rules make some perspectives seem simply true rather than selected over others.<sup>70</sup>

As a result of courts being overly invested in the perpetrator perspective, when a discrimination claim was advanced, they would fixate on the conduct of individuals—seeking to locate intentional conduct that violated an “antidiscrimination principle.”<sup>71</sup> Moreover, a court captured by the perpetrator perspective focuses primarily on fault and causation rather than remedy.<sup>72</sup> Much like our modern post-race approach,<sup>73</sup> the perpetrator perspective seeks to identify aberrant racist behavior at odds with the innocent status that most citizens enjoy.<sup>74</sup> Professor Freeman, however, endorsed the victim perspective, where discrimination is defined through the conditions of the social existence of members of subjugated groups.<sup>75</sup>

#### B. PROFESSOR FREEMAN’S LEFT CRITIQUE OF RIGHTS AND THE RISE OF THE CRT

While Professor Freeman’s work modeled the legal realist tradition of marking the space between the law on the books and on the ground, a second important contribution of his piece is that it is a CLS critique of race and discrimination that was part of an ongoing post-modernist leftist critique in the academy, which included burgeoning race-crit approaches. While *Le-*

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69. *Id.* at 1052–57.

70. MINOW, *supra* note 53, at 167–68.

71. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1053. The term is defined as a “prohibition of race-dependent decisions that disadvantage members of minority groups.” *Id.* at 1053–54.

72. *Id.* at 1054.

73. See Barnes, Chemerinsky & Jones, *supra* note 22, at 968–69, 975–76 (noting the effect of “post-racial” ideology on Supreme Court interpretation of equality).

74. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1054–55.

75. *Id.* at 1053.

*gitimizing Racial Discrimination* was published ten years prior to the formal creation of CRT, by the time Professor Freeman wrote *The View from 1989*,<sup>76</sup> there was certainly a burgeoning critique of CLS and civil rights discourse by race-crits, a number of whom had ties to CLS.<sup>77</sup> Until that time, prominent race scholars such as Derrick Bell were publishing articles that engaged important race questions without necessarily critiquing the CLS movement.<sup>78</sup> CRT rose as a movement and body of legal scholarship during the same period Professor Freeman theorized the “Era of Denial.”<sup>79</sup> By the content of his articles on race,<sup>80</sup> one could surmise that his theories of anti-discrimination should have provided a furtive starting place for race-crits formulating their scholarly identity within the CLS movement. The connection, however, between CLS and CRT was more complicated. As Devon Carbado has articulated,

CLS created a condition of possibility for CRT not only in the sense of rehearsing a set of themes about the indeterminacy of law and about its productive capacity . . . to constitute social arrangements, social hierarchies, and social interests but also in the sense of failing to se-

76. Freeman, *The View from 1989*, *supra* note 12.

77. See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (criticizing CLS for its penchant for theoretical criticism and deconstruction of liberalism without sufficiently investigating why it holds such attraction to the subordinated); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) [hereinafter Delgado, *Ethereal Scholar*] (explaining the problematic aspects of CLS); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562 n.3 (1984) (highlighting the insular minority rights scholarship of many, predominantly white, scholars); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that there is no paradox in persons at the bottom seeking protection through a rights model even though rights are illusory).

78. See, e.g., Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). While they predated the formal creation of CRT as a scholarly movement and endeavor, Professor Bell's writings on race have been seen as formative to the creation of CRT. See MÖSCHEL, *supra* note 54, at 44.

79. Freeman, *The View from 1989*, *supra* note 12, at 1426–33.

80. Beyond *Legitimizing Racial Discrimination* and *The View from 1989*, Professor Freeman authored another race critique, which was an engagement with the work of a Derrick Bell text. Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* (1980)).

riously engage the role of race as a phenomenon, not an epiphenomenon, in this process.<sup>81</sup>

It is for this reason that Professor Freeman's impact on race-crits is not absolutely clear; even as there were some commonalities, CRT and CLS were not seamless enterprises, without significant differences in theoretical commitments and approaches.<sup>82</sup>

An attendee at early CLS conferences, founding CRT movement member and UCLA/Columbia Law Professor Kimberlé Crenshaw has extensively articulated the conditions which precipitated the rise of CRT.<sup>83</sup> Consistent with the claims of Professor Carbado, she notes that there were obvious synergies between CLS and the splinter group of race-crits that founded CRT. In this vein, Professor Crenshaw has pointed out that race-crits shared in common the commitment to critically interrogating the relationship between "law and white supremacy" and "the belief that legal consciousness functioned to legitimize social power."<sup>84</sup> Race-crits, by contrast, "also understood that race and racism likewise functioned as central pillars of hegemonic power."<sup>85</sup> Ultimately, however, there was a split,<sup>86</sup> with "CRT emerg[ing] not only as a critical intervention in a particular institutional contestation over race but also as a race intervention in a critical space, namely CLS."<sup>87</sup> A significant reason for this split surrounded a somewhat oppositional approach to rights discourse. For race-crits, it was neither solely

81. Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1596 (2011).

82. See MÖSCHEL, *supra* note 54, at 53–56; OBASOGIE, *supra* note 33, at 186–90.

83. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 19, at xviii–xxvii; Crenshaw, *A Foot in a Closing Door*, *supra* note 57; Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1258–64 (2011) [hereinafter Crenshaw, *Twenty Years of Critical Race Theory*] (discussing the emergence of CRT).

84. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 19, at xxii.

85. *Id.* Others have claimed the CLS account of race is more complicated. See David M. Trubek, *Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends*, 43 CONN. L. REV. 1503 (2011).

86. For the specifics of the split and the rise of the CRT workshop, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 19, at xxvi–xxxii; Crenshaw, *Twenty Years of Critical Race Theory*, *supra* note 83, at 1262–64, 1288–300.

87. Crenshaw, *Twenty Years of Critical Race Theory*, *supra* note 83, at 1288.

about theorizing the limits of rights as a tool to provide remedies, nor merely describing their illusory operation within legal cases. Rather,

To the emerging race crits, rights discourse held a social and transformative value in the context of racial subordination that transcended the narrower question of whether reliance on rights could alone bring about any determinate results. Race crits realized that the very notion of a subordinate people exercising rights was an important dimension of Black empowerment . . . .<sup>88</sup>

The CRT concern with CLS approaches, however, was not a wholesale rejection.<sup>89</sup> For instance, both enterprises were committed to criticizing liberalism's false promise, and scholars within both movements "agree that rights discourses are indeterminate and that legal ideals are easy to manipulate, and tend to legitimate racial hierarchy."<sup>90</sup> Key CLS scholars, however, claim that rights discourses engender hegemony and fail to offer real opportunities for social change. By contrast, a number of CRT scholars understand rights not only as a tool to fight subordination but also essentially concur with a more integral conception of rights as "a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance."<sup>91</sup>

Professor Freeman's work also specifically animated early CRT critiques of CLS. Of the arguments of Professor Freeman and other CLS scholars, Professor Crenshaw argued that while they are useful to understanding the transformative limits of antidiscrimination law, attempting to apply CLS themes to critiques of subordination and racial power has been a more troubling enterprise.<sup>92</sup> In particular, she asserted that just like

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88. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 19, at xxiii; *see also* OBASOGIE, *supra* note 33, at 189 ("For many minority scholars, this heated discussion over the utility of rights represented fundamental differences between the social visions embraced by Critical Legal Studies and those of the racial minorities that would come to create Critical Race Theory."); Kennedy, *supra* note 55, at 184 ("Feminists and critical race theorists, who took up the critique . . . objected not on the grounds of totalitarian tendency, but on the grounds that rights really did or should exist, or on the grounds that it was demoralizing to criticize them.").

89. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 764 n.12, 765 n.13, 770 n.20, 777 n.33, 782 n.38 (relying upon and citing to a number of Professor Freeman's determinations).

90. MÖSCHEL, *supra* note 54, at 53.

91. *Id.* at 54 (citing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A MAD LAW PROFESSOR* (1991)).

92. *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 19, at xxi-xxiv.

mainstream legal scholarship, CLS failed to "sufficiently account for the effects or the causes of the oppression that they routinely acknowledge."<sup>93</sup> At bottom, her claim is that CLS scholars, including Professor Freeman, failed to fully account for how racism shapes American law.<sup>94</sup>

There were other critical assessments of CLS and its engagements with rights discourses and scholars of color. For example, founding and preeminent CRT scholars Mari Matsuda,<sup>95</sup> Patricia Williams,<sup>96</sup> and Richard Delgado<sup>97</sup> each replied to CLS insights manifested in Professor Freeman's articles. Professor Matsuda took CLS to task for "trashing" rights and overly concentrating on the concept that law is indeterminate. She suggested that CLS should have focused more on the lived experiences of people of color, which demonstrate that a "logical inconsistency in [an] intellectual argument" does not necessarily result in such a phenomenon in the real world.<sup>98</sup> Professor Williams's criticism focused both on a concern for the accessibility of CLS theories to the disenfranchised,<sup>99</sup> and a skepticism of its rights critique, noting, "in CLS, I have sometimes been left with the sense that lawyers and clients engaged in the pursuit of 'rights' are viewed as foolish, 'falsely conscious,' benighted, or misled."<sup>100</sup> Not only does she believe that rights matter to the oppressed,<sup>101</sup> she suggests "[w]hat is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of each others'

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93. Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988).

94. *Id.* at 1356-57.

95. See Matsuda, *supra* note 77.

96. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

97. See Delgado, *Ethereal Scholar*, *supra* note 77.

98. Matsuda, *supra* note 77, at 341; see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-57 (1989) [hereinafter Matsuda, *Public Response to Racist Speech*] (noting the importance of rights to victims and stating, "for it is those on the bottom who are most hurt by the absence of rights, and . . . who have sustained the struggle for rights in American history").

99. See Williams, *supra* note 96, at 403 ("CLS has a good deal of powerful theory-magic of its own to offer; but I think it has failed to make its words and un-words tangible, reach-able and applicable to those in this society who need its powerful assistance most.").

100. *Id.* (citation omitted).

101. *Id.* at 410.

rights-valuation.”<sup>102</sup> Richard Delgado identifies Professor Freeman’s work as prominent to the CLS rights critique, which he claims, “is the most problematic aspect of the CLS program, and provides few answers for minority scholars and lawyers.”<sup>103</sup> He further provides that rights do serve a protective function and CLS provides no program for what should replace this function of rights.<sup>104</sup> Each of these critiques not only highlight a different approach to rights but also reveal CRT, unlike CLS, to be a reconstructive paradigm.<sup>105</sup>

At times when important scholarship is remembered, there is a tendency to treat the work as if it was perfect when written and has so remained throughout time. Reviewed, however, against this backdrop of the CRT critique, Professor Freeman’s article translates as somewhat more paradoxical. On the one hand, in deftly articulating the harms of the perpetrator perspective within antidiscrimination analysis and predicting the rise of post-race judicial perspectives, his article confirms the CLS tenet that law works to ratify existing unfair social arrangements. Importantly, these insights still hold significant meaning for contemporary discussions of race and rights. By contrast, Professor Freeman neither expressly implicated white supremacy as the source of failed antidiscrimination efforts nor troubled how rights might matter differently to Blacks—how it might be important for minority racial group members to construct themselves as rights-bearing citizens, irrespective of the

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102. *Id.* It is the sentiment in Professor Williams’s work that critical scholars of varying kinds owe each other the duty of doing translation work across intellectual differences that frames both the challenge and the potential solution for reaching accord across progressive but distinct scholarly movements. Subject to some limitations, see *infra* note 106 and accompanying text, Professor Freeman’s article does some of this critical translation work.

103. Delgado, *Ethereal Scholar*, *supra* note 77, at 303–04.

104. *Id.* at 305 (“Rights do, at times, give pause to those who would otherwise oppress us; without the law’s sanction, these individuals would be more likely to express racist sentiments on the job.”). Race-crits were not the only scholars to express such concerns. See Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 L. & SOC. INQUIRY 779, 780 (1992) (claiming the question was, “[W]hat would you put in its place?” and suggesting a key concern with CLS was that there was no program for what should replace the current flawed structure).

105. See Harlan Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 440 (1987); Fischl, *supra* note 104; Barbara Flagg, *Changing the Rules: Doctrinal Reform, Indeterminacy, and Whiteness*, 2 AFR.-AM. L. & POL’Y REP. 250, 251 (1995) (“CLS is characterized, if not defined, by its emphasis on deconstructing legal doctrines and accompanying distrust of any reconstructive or reform effort. In this respect, the agenda of CRT seems diametrically opposed . . .”).

dangers investing in rights otherwise pose.<sup>106</sup> Perhaps, one of the important aspects of *Legitimizing Racial Discrimination*, then, is that it did not at its core explicate the broader and more nihilistic CLS rights critique. Rather than engage in an assessment of the illusory nature of rights more generally, Professor Freeman attempted—supported by CLS commitments—to describe issues he observed in myriad cases involving race discrimination claims.<sup>107</sup> While it was not always the case in his work,<sup>108</sup> at least in this article, Professor Freeman focused on a narrower explication of Court-constructed analyses of race bias and their effects. It is likely one reason that though *Legitimizing Racial Discrimination* raises some problems from a CRT perspective, it still has been described by at least one commentator as *the* meaningful articulation of the CLS position on race and racism.<sup>109</sup> Understood in this light, Professor Freeman's

106. See MÖSCHEL, *supra* note 54, at 44 (contrasting Freeman's perpetrator and victim perspectives).

107. At least one founder of CRT has described Professor Freeman's work in this period as work attempting to explain that since Civil Rights era racial advances had stalled, a new effort was needed to "combat the subtler forms of racism that were gaining ground." DELGADO & STEFANCIC, *supra* note 19, at 4.

108. See Freeman, *Racism, Rights and the Quest*, *supra* note 53. In this later piece responding to minority critiques of CLS, he both directly addresses the illusory nature of rights and discusses prominent CLS critiques as moving between indeterminacy and contradictions. *Id.* at 316–23. Importantly, however, his words indicate that he was not so interested in challenging the claims of race-crits as he was explaining his own positionality:

I regard this essay as the most difficult one I have ever tried to write. I am writing nervously. I do not wish to be charged, at least unfairly, with insensitivity, callousness, pretentious intellectualism or even plain ignorance. Nor do I wish to be either guilty or defensive, though to be sure both are tempting. To avoid what I see as unproductive negativity, I am therefore not going to try to refute systematically arguments made in the critique. My goal is simply to offer my comments on the general subject of racism and rights, based on my experiences since I last wrote about the subject.

*Id.* at 296–97.

109. The following comment on the place of Freeman's article is representative:

Alan Freeman represents the writer that virtually all persons identify as the leading spokesman for the CLS response to racism. In fact, his article *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, stands out as one of the finest examples of the CLS scholarship, and probably has had the greatest influence in winning what attention . . . CLS[] has gained from persons of color.

Andrew W. Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?*, 13 WM. MITCHELL L. REV. 685, 706 (1987) (citation omit-

key findings regarding the particularized limits of antidiscrimination law, rather than rights more broadly, are not so troubling as to require a complete repudiation. His work was not inconsistent with a fundamental concept of CRT, which one of its founders described as a broad-based critique of liberalism and an attempt to move beyond traditional civil rights movement paradigms.<sup>110</sup> Quite to the contrary, it appears that despite the CLS-CRT split over rights, to include Professor Freeman's work, *Legitimizing Racial Discrimination* is still regarded by some as a "building block in the foundations of CRT," whose analysis was "elaborated upon and partially countered" by CRT scholars.<sup>111</sup>

Ultimately, even though Professor Freeman's work was seen as generally belonging to the troubling CLS critique of rights, the impact of Professor Freeman's focus on race discrimination over rights talk can be seen as sparking meaningful engagement with the CRT scholarship that followed.<sup>112</sup> In particu-

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ted). The truth of this sentiment is partially borne out in the fact that after the publication of *Legitimizing Racial Discrimination*, there was no widespread movement within CLS to engage with race-crits to further articulate its racial justice project. Not until the much later move by scholars within the law and society tradition do we see an attempt to craft a left critique inclusive of sociolegal/empirical and critical perspectives. On this point, see Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 L. & SOC'Y REV. 221 (2012); Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004); Osagie K. Obasogie, *Race in Law and Society: A Critique*, in RACE, LAW AND SOCIETY 445 (Ian Haney López ed., 2007).

110. CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 19, at 1.

111. MÖSCHEL, *supra* note 54, at 44; *see also* DELGADO & STEFANCIC, *supra* note 19, at 5–6 (describing Professor Freeman as a principal figure in the rise of CRT and *Legitimizing Racial Discrimination* as "a pathbreaking piece that documented how the U.S. Supreme Court's race jurisprudence, even when seemingly liberal in thrust, nevertheless legitimized racism"); Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1511 (2009) (describing the origins of CRT as emanating from "the early work of Derrick Bell and Alan Freeman, scholars [who] put forward the idea that racism is normal, not aberrant, in American society and over time becomes natural to those living in it").

112. This is so much the case that *Legitimizing Racial Discrimination* has been included in a prominent edited collection of CRT articles and described as an "important intellectual precursor" to CRT and classic example of CLS scholarship. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 19, at 3. Additionally, early works of CRT scholars engaged Professor Freeman's work in form and substance. For example, in an early foundational CRT article, Professor Charles Lawrence expands upon the critique of Professor Freeman and others that constitutional claims should be available in disparate impact cases. Charles R. Lawrence III, *The Id, the Ego*,



lar, Professor Freeman's claim that courts have used laws designed to ensure equality as tools to instantiate disadvantage, became a primary framing device in important early CRT work. Most prominently, within Professor Kimberlé Crenshaw's germinal article, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, Professor Freeman's influence is seen.<sup>113</sup> For example, in that piece Professor Crenshaw described her goal as challenging the "New Right" and "New Left" critiques of civil rights, where "New Left" was represented in the CLS critique of rights and the assertion that rights were counterproductive means for seeking racial equality.<sup>114</sup> In addressing *Legitimizing Racial Discrimination*, she identifies Professor Freeman's work as particularly germane: "Freeman's central argument is that the severe limitations of legal reform were dictated by the legitimating role of legal discourse. If law functions to reinforce a worldview that things should be the way they are, then law cannot provide an effective means to challenge the present order."<sup>115</sup> She also, however, provides the central CRT critique of such work in claiming, "Alan Freeman's discussion of antidiscrimination law suffers from a failure to ground the critique in the historical and ideological conditions that brought about antidiscrimination law."<sup>116</sup> While Professor Crenshaw correctly identifies the "What about racism?" question as the most stark difference between a CRT and CLS approach to assessing antidiscrimination, this critique does not deprive *Legitimizing Racial Discrimination* of its usefulness. This is especially true in the modern era where many believe racism is all but dead. In the next Part, as a way to explore the commonalities and differences between the movements, both Professor Freeman's race critique and insights from foundational works from the CRT canon will be used to

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*and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (citing to *Legitimizing Racial Discrimination* and other work critical of the intentional discrimination standard articulated in *Washington v. Davis*, 426 U.S. 229 (1976)). Professor Lawrence's frequent co-author, Mari Matsuda, similarly engaged in work that expanded upon Professor Freeman's call to focus on the victim's perspective. See Matsuda, *Public Response to Racist Speech*, *supra* note 98; see also Linda S. Greene, *Race in the Twenty-First Century: Equality Through Law?*, 64 TUL. L. REV. 1515 (1990) (adopting, like in Professor Freeman's antidiscrimination work, the practice of assessing judicial conduct across a set of race cases).

113. Crenshaw, *supra* note 93.

114. *Id.* at 1333-34.

115. *Id.* at 1352.

116. *Id.* at 1360.

analyze race discrimination cases arising since Professor Freeman's last assessment in 1989.

### III. CRT PRINCIPLES AND ANALYZING CASES IN THE "ERA OF INCREDULITY"

Until this point, the discussion has centered on Professor Freeman's work, as a genre-shifting CLS articulation of race and rights. In this Part, the evolution of antidiscrimination case law is considered since Professor Freeman last commented on the subject in 1989. Since that time, the Court has hardened the post-race perspective Professor Freeman first described. In order, however, to develop and maintain a contemporary post-race approach to equal protection, the Court has ignored or found unpersuasive significant amounts of data, empirical and otherwise, detailing the difference in life outcomes across racial groups. One might imagine that in order to do so, the Court would only need to extend the "Era of Denial." While it is not wrong to suggest that elements of the "Era of Denial" remain in the Roberts Court, the level of vitriol behind the refusal of the Court to see the continuing salience of race reads as something greater than mere denial. According to Professor Freeman, "denial implies the existence of a reality to which the Court, through its rhetorical ploys, seeks to prevent our access."<sup>117</sup> This definition represents scienter as to the Court depriving us of awareness of the true implications of a racialized existence. By contrast, the Court now appears unwilling or, perhaps, unable to believe in the existence of most types of racial bias. For this reason, rather than terming the Court's approach as denial, the conduct signals righteous indignation toward most race claims, more appropriately now described as reflecting an "Era of Incredulity."<sup>118</sup> While so naming the era does not fully capture the multiple obfuscations that take place within Court cases considering racial inequality,<sup>119</sup> the phrase does describe a prominent rhetorical tactic of the most vocal conservative Justices, and one seamlessly connected to rejecting racial salience.

Given that the Court has become increasingly skeptical of most race-conscious decision making, it is reasonable to think

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117. Freeman, *The View from 1989*, *supra* note 12, at 1433.

118. Elements of this era are further explained in the below analysis of the Court's modern race jurisprudence. See *infra* Parts III.A–C.

119. Other names that were considered as also descriptive of current considerations of race in the Court were: "The Era of Revision," "The Era of Irrationality," and "The Age of Racial Amnesia."

of its current embrace of incredulity as an extension or consequence of its long period of denying the effects of racism. There is, however, now both a much stronger post-racial rhetoric advanced to justify opinions rejecting the significance of race and ever-more acrobatic distortions used to explain disadvantages for minorities as arising from something other than unlawful disfavor. From one vantage point, the opinions of leading Justices of this era might be said to be particularly invidious. Such a critique can be premised upon the unseemly tactic of Justices deploying society's incomplete racial progress narrative to justify rejection of<sup>120</sup> and outrage over<sup>121</sup> state considerations of race, even as large swaths of racial minorities live under mean and unfair conditions.<sup>122</sup> Under such a perspective, the Court's understanding of race is essentially believed to be dishonest, as their determinations are only defensible at all if the Court invests in revisionist and anti-historical understandings of race. Such a view ignores, however, the possibility that the incredulous Justices genuinely believe that race lacks salience. While one could pronounce their statements on race to be either disingenuous or an elaborate ruse, the words of the Supreme Court Justices themselves suggest the existence of deeply held commitments.

In various cases in the Court's recent history, Justices—all of whom would be associated with the Court's conservative wing—have made statements reflecting that race should almost never be considered by the State. Behind this sentiment is a belief that the ills of racism have largely been ameliorated, such that people should always be treated “the same.” Justice Scalia—described by Professor Freeman as a “strident” voice that joined the Court during the “Era of Denial”<sup>123</sup>—has endorsed such a framing. For example, in *Adarand Constructors*,<sup>124</sup> a case deciding whether strict scrutiny should be applied to govern-

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120. See *infra* note 132 and accompanying text (describing Justice Roberts' analysis in *Shelby County v. Holder*).

121. See *infra* notes 135–39 and accompanying text (describing Justice Thomas' disdainful comments and comparisons in *Fisher v. University of Texas*).

122. See *supra* note 22. In related scholarship, I have previously challenged this point of courts and others overinvesting in racial progress narratives. See, e.g., Mario L. Barnes, “But Some of [Them] Are Brave”: *Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL'Y 693, 713 (2007); Barnes, *supra* note 26, at 14.

123. Freeman, *A View of 1989*, *supra* note 12, at 1428.

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

ment considerations of race, Justice Scalia indicated: “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction,” and “[i]n the eyes of the government, we are just one race here. It is American.”<sup>125</sup> More recently, in his concurrence in *Ricci v. DeStefano*, he described Title VII disparate impact rules—which are designed to allow racially disparate results to be used to infer employer motivation—as a “racial thumb on the scales” and suggested that disparate impact alone should not be sufficient to prove the existence of racial animus.<sup>126</sup> Most recently, in the oral argument in *Fisher II*, Justice Scalia exhibited a new tact, suggesting that considering race may, in fact, be bad for Blacks. Addressing the counsel for the University of Texas, he stated:

There are those who contend that it does not benefit African Americans to—to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less—a slower-track school where they do well . . . .

I’m just not impressed by the fact that the University of Texas may have fewer [black students if the admissions policy changes]. Maybe it ought to have fewer. And maybe, when you take more, the number of blacks, really competent blacks, admitted to lesser schools, turns out to be less . . . . I don’t think it stands to reason that it’s a good thing for the University of Texas to admit as many blacks as possible.<sup>127</sup>

Although addressing the specific prospects of Blacks may seem race-conscious, the take away from the comments is that admitting Blacks to elite schools provides neither a benefit to them nor the educational environment. This refutation of the diversity rationale is a decidedly post-race sentiment—one that

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125. *Id.* at 239 (Scalia, J., concurring).

126. 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

127. Dan Roberts, *Justice Scalia: Minority Students May Be Better off Going to “Lesser Schools,”* GUARDIAN (Dec. 9, 2015), <http://www.theguardian.com/law/2015/dec/09/supreme-court-affirmative-action-fisher-v-university-of-texas>. It appears that Justice Scalia was referring to the data on race and “mismatch”—minorities being admitted to elite institutions for which they purportedly lack qualifications. See RICHARD SANDER & STUART TAYLOR, MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 4 (2013). Mismatch theory, which was apparently raised in an amicus brief, was endorsed by Justice Thomas in his concurrence in *Fisher I*. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2430–32 (2013). For a critique of mismatch theory, see RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW (2013); William Kidder & Angela Onwuachi-Willig, *Still Hazy After All of These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEX. L. REV. 895, 896 (2014).

apparently missed the irony of suggesting Blacks would do better in separate and lesser quality schools.<sup>128</sup>

Justice Roberts has also provided fairly strong post-race opinions in at least two cases. In *Parents Involved in Community Schools v. Seattle School District No. 1*, a case striking down the use of racial integration plans in Louisville, Kentucky, and Seattle, Washington, he stated in the plurality opinion: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>129</sup> More recently, in *Shelby County v. Holder*, he ignored significant congressional data detailing the history of racial discrimination in voting,<sup>130</sup> to conclude that Section 4 preclearance requirements of the Voting Rights Act (VRA)<sup>131</sup> are outdated due to the racial progress that has taken place in the country over the last five decades.<sup>132</sup> The following statement is representative:

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and lower voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. . . . Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. . . . There is no longer such a disparity.<sup>133</sup>

Justice Thomas too has signaled a significant disbelief in the need to consider race in myriad contexts. In *Shelby County*, he wrote separately in concurrence to additionally attack Section 5 of the VRA. Relying on his concurrence in the *Northwest Austin Municipal Utility District* case, he repeated the belief that “[t]he extensive pattern of discrimination that led the Court to previously uphold Section 5 as enforcing the Fifteenth Amendment no longer exists.”<sup>134</sup> Justice Thomas also saw no need to consider race in college admissions in *Fisher v. Univer-*

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128. This is the precise point Gregory Garre, counsel for the University of Texas, made in response to Justice Scalia: “I don’t think the solution to the problems with student body diversity can be to set up a system in which not only are minorities going to separate schools, they’re going to inferior schools.” Roberts, *supra* note 127.

129. 551 U.S. 701, 748 (2007).

130. See, e.g., Peter Halewood, *Any Is Too Much: Shelby County v. Holder and Diminished Citizenship*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 66, 66–67 (2015).

131. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2012).

132. 133 S. Ct. 2618–22, 2625–26 (2013).

133. *Id.* at 2627–28 (2013) (citation omitted).

134. *Id.* at 2632 (Thomas, J., concurring) (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 226 (2009)).

sity of Texas.<sup>135</sup> On the basic question of how race should matter to admissions, he opined: “All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.”<sup>136</sup> Perhaps more disturbing because of the ways that his personal history should have made skepticism of the existence of racism less likely,<sup>137</sup> his discomfort with the consideration of race in *Fisher*, further manifested itself in provocative but dubious historical distortions.<sup>138</sup> In that case, he went so far as to suggest that colleges considering diversity—including racial diversity—for the benefit of the educational environment is similar to the justifications of slaveholders and segregationists, claiming: “There is no principled distinction between the University’s assertion that diversity yields educational benefits and the segregationists’ assertions that segregation yielded those same benefits.”<sup>139</sup>

These judicial pronouncements embody a full commitment to the universalist turn in antidiscrimination discourse,<sup>140</sup> which Professor Freeman described in its nascent phase in *Legitimizing Racial Discrimination*.<sup>141</sup> As a result of this commitment, the Justices essentially regard all groups as requiring

135. 133 S. Ct. 2411, 2422 (2013).

136. *Id.* at 2428–29 (Thomas, J., concurring).

137. Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 293 (2015) (discussing how Justice Thomas addressed the significance of race in his own autobiography, CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR (2007)); see also Devon Carbado & Cheryl Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1174–86 (2008) (discussing how race has affected Justice Thomas’s life experiences and accomplishments).

138. See, e.g., Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 137, at 297–303; Mae Kuykendall & Charles Adside III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1019–20 (2014).

139. *Fisher*, 133 S. Ct. at 2428 (Thomas, J., concurring). In suggesting that considering race in education should not be treated as a benign consideration, he pointed out that both slaveholders and segregationists believed that slavery and segregation, respectively, were good for Blacks. *Id.* at 2429–30. He made similar arguments in his concurrence in the *Parents Involved* plurality, arguing there were similarities between claims in the dissent and claims made by segregationists. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 773–79 (2007) (Thomas, J., concurring).

140. See Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2842–47 (2014); John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. L. REV. 785, 791 (2008).

141. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1058–59.

similar treatment under law, despite the purpose of the different treatment or the disparate histories of the groups being considered.<sup>142</sup> Moreover, the Justices make stark comparisons between the time when race mattered (then) and our racism-free present. Notably, Justice Roberts uses history to argue in *Shelby County* that we have moved beyond our racist past.<sup>143</sup> By contrast, Justice Thomas, in *Fisher*, uses historical references to claim that by considering race in admissions, we are attempting to re-inscribe it, but this time against the interests of persons belonging to groups who receive no preference in admissions.<sup>144</sup> All three Justices are deeply skeptical of government considerations of race and tend to suggest that it is those who claim the need for race-consciousness who are in fact the racists.<sup>145</sup> Based on these beliefs, very few considerations of race would be able to withstand a constitutional analysis under strict scrutiny.<sup>146</sup>

While Justices Alito and Kennedy have not made comments about race as stark as these,<sup>147</sup> they have routinely voted with Justices Scalia, Thomas and Roberts in cases resting on post-racial principles. It is this explicit hostility to the idea that race still matters that fuels the “Era of Incredulity.” Cases do not merely ignore racial consequences, they question how anyone could believe in them. Given the country’s racial progress, how could race possibly still matter? Additionally, in light of the oppressive histories surrounding racial consideration, how could anyone believe in the existence of benign forms of consideration now? It is in this determination that the Justices see very little possibility that our regrettable racial past haunts our

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142. See *Fisher*, 133 S. Ct. at 2431–32; *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618–22 (2013).

143. *Shelby Cty.*, 133 S. Ct. at 2618–22; see also *Fisher*, 133 S. Ct. at 2431–32.

144. *Fisher*, 133 S. Ct. at 2431–32.

145. See *Shelby Cty.*, 133 S. Ct. at 2618–22; *Fisher*, 133 S. Ct. at 2431–32.

146. In fact, ironically, Justice Thomas suggests that very few interests support government consideration of race, but notes that the “pressing public necessity” was met by the national security interest advanced in the *Korematsu* case. *Fisher*, 133 S. Ct. at 2423.

147. Justice Kennedy’s status as a more moderate Justice on questions of race has been somewhat contested. See, e.g., Luis Fuentes-Rowher, *The Racial Metamorphosis of Justice Kennedy and the Future of Civil Rights Law*, in *THE NEW BLACK: WHAT HAS CHANGED—AND WHAT HAS NOT—WITH RACE IN AMERICA* 80 (Kenneth W. Mack & Guy-Uriel E. Charles eds., 2013); cf. Russell K. Robinson, *Unequal Protection*, 68 *STAN. L. REV.* 151 (2016) (discussing the divergent tacks between Justice Kennedy’s race and sexual orientation jurisprudence).

“e-raced” present,<sup>148</sup> that the explicitly post-race agenda proves so startling.<sup>149</sup> It is with this outsized judicial disbelief as a starting place, that contemporary cases from the areas of voting, education, and employment—the same areas chiefly considered by Professor Freeman—are next analyzed. While references will be made to the ways in which these cases reinforce Professor Freeman’s central insights, the primary analytical frames to be applied are derived from CRT. In particular, attention will be paid to the different tacks the Court now uses to maintain the post-race status quo and how they track with CRT theories of racial subordination. As such, in addition to considering the indeterminacy of law and the Court’s penchant to concentrate on perpetrators’ rather than victims’ subjectivity, analysis in this modern era places greater emphasis on such issues as structural inequality and unconscious forms of bias. Professor Freeman claimed in *Legitimizing Racial Discrimination* that his goals were “descriptive and explanatory.”<sup>150</sup> The aims here will also include insights, drawing upon classic CRT interventions, which are designed to be more “normative and prescriptive.”<sup>151</sup> Given the limits of this format, it would be implausible to consider every potentially relevant case in the areas of voting, employment, and education.<sup>152</sup> Rather, the cases

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148. See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968 (2002) (discussing how the Supreme Court’s Fourth Amendment jurisprudence reflects a colorblind conception of race).

149. The race-conscious position adopts a diametrically opposed framework. A good example of this view is seen in Michael Higginbotham’s definition of America’s racial paradigm: “Today’s racial disparities are rooted in a long-standing paradigm dating back well before the creation of the Constitution. . . . Discrimination and physical separation of blacks, legally and extralegally, not only has become enmeshed in our social fabric but has prevented us from eliminating racial disparities.” F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA* 33 (2013).

150. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1050–51. This choice might, however, also be considered a shortcoming of the article. Why is Professor Freeman so narrow in his approach? Despite the CRT reconstructive theorizing that is clearly underway by the time he writes *A View from 1989*, he offers no broader theoretical intervention in either of his articles on racial discrimination. Even though he can be criticized for limiting the arc of his analysis, as argued above, one can see his work as creating openings for further interventions, particularly those mounted by other scholars with a closer proximity to the victims of structural inequality. Thank you to my colleague Sameer Ashar for pressing me on this point.

151. *Id.* at 1051.

152. Additionally, one area that Professor Freeman did not consider broadly and will not be considered here, but in which there are significant racial disparities in the United States is the criminal justice system. See, e.g., DEAD-



have been selected for the coverage of particularly significant issues and the related importance of the opinions.

#### A. VOTING RIGHTS

While there have been a number of impactful voting cases since 1989, this Section will focus primarily on two prominent cases. These cases cover two areas where significant questions of race are often raised within the voting context—gerrymandering and the VRA preclearance procedures—and both provide an opportunity to question whether modern cases have continued to legitimize bias through antidiscrimination law.

The first pertinent case is *Shaw v. Reno*.<sup>153</sup> In *Shaw*, North Carolina residents raised an unconstitutional racial gerrymandering claim to the state's revised reapportionment plan.<sup>154</sup> Consistent with the requirements of Section 5 of the VRA, North Carolina submitted a reapportionment plan that created one black-majority district.<sup>155</sup> This plan was rejected by the U.S. Attorney General as not sufficiently addressing racial imbalance within the state.<sup>156</sup> The facially race-neutral revised plan created two districts, including one that was very oddly-shaped, concentrating a majority of black votes.<sup>157</sup> Plaintiffs claimed that the districts were allegedly so drawn with the goal of producing two black representatives, which they argued violated the 14th Amendment Equal Protection Clause.<sup>158</sup> The white voters did not claim that the districts diluted the white vote, rather, they argued "that the deliberate segregation of voters into separate districts on the basis on race violated their constitutional right to participate in a 'color-blind' electoral process."<sup>159</sup> Applying the "unexplainable on grounds other than

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LY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM (Devon Johnson et al. eds., 2015); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

153. 509 U.S. 630, 630 (1993).

154. *Id.* at 636.

155. *Id.* at 634.

156. *Id.* at 635. According to the Court, while Blacks constituted twenty percent of the State's population, "[t]he black population is relatively dispersed; blacks constitute a majority of the general population in only 5 of the state's 100 counties." *Id.* at 634.

157. One of the districts was described as "even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor." *Id.* at 635.

158. *Id.* at 637.

159. *Id.* at 641-42.

race" standard from the *Arlington Heights v. Metropolitan Housing Development Corp.* case,<sup>160</sup> the Court found the district to be so irregularly drawn that it could only be rationally viewed as an effort to segregate races for the purpose of voting.<sup>161</sup> The Court therefore held that the North Carolina residents' motion was sufficient to state a claim upon which relief could be granted under equal protection.<sup>162</sup> Essentially, then, the Court determined that the facially race-neutral plan could not be understood as "anything other than an effort to separate voters into different districts on the basis of race."<sup>163</sup> Additionally the Court opined that "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group."<sup>164</sup> They remanded the case to the District Court indicating that strict scrutiny should be applied to the plan.

In one way the *Shaw* majority embodies elements of Freeman's framework. Consistent with the "Era of Rationalization" and much like his description of the analysis in the *Bakke* case,<sup>165</sup> *Shaw* involves a judicial commitment to colorblindness that undermines the consideration of race for the purposes of securing racial justice.<sup>166</sup> Just like cases within the "Era of Denial," in *Shaw*, a potential claim of reverse discrimination is elevated "to an identical status with claims on behalf of discrimi-

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160. 429 U.S. 252, 266 (1977).

161. *Shaw*, 509 U.S. at 657-58.

162. *Id.* at 658.

163. *Id.* at 649. The Court made a similar determination in later cases that followed *Shaw*. See, e.g., *Bush v. Vera*, 517 U.S. 952, 970-71, 985-86 (1996) (striking down districts in Texas in a 5-4 plurality opinion, for which the Court determined race was a predominant factor in their creation); *Miller v. Johnson*, 515 U.S. 900, 909 (1995) (following the holding in *Shaw* in a 5-4 decision striking down a Georgia district called a geographic "monstrosity" because it was deemed to be so highly irregular in shape that it rationally could not be understood as anything other than an effort to racially segregate voters); cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 447 (2006) (holding in a 5-4 Justice Kennedy opinion that the Texas Legislature's redistricting plan for District 23 violated the Voting Rights Act, because it had been redrawn in such a way as to deny Latino voters as a group the opportunity to elect a candidate of their choosing); *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (ruling that an allegedly peculiarly shaped district that was created for political rather than racial reasons does not violate the Constitution).

164. *Shaw*, 509 U.S. at 648.

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

166. See *Shaw*, 509 U.S. at 657; Freeman, *The View from 1989*, *supra* note 12, at 1424-25 (describing Justice Powell's "rhetoric of colorblindness" in *Bakke*).

nation's historic and traditional victims."<sup>167</sup> As a result, reverse discrimination is treated as "so serious a social problem that we must offer those aggrieved a chance to vindicate their 'rights.'"<sup>168</sup> As two scholars have suggested recently, as a result of decisions like *Shaw*, minority voters and lower courts are left without a clear understanding on how to proceed:

While the Voting Rights Act of 1965 (VRA) was founded with the clear purpose of increasing the voice and power of minority voters through their aggregation in majority-minority districts, in a post-*Shaw v. Reno* . . . world, race is no longer allowed as the "predominant factor" in redistricting decisions. The Supreme Court has suggested alternatives ranging from a wholesale abandonment of racial classification to the adoption of race-neutral criteria that nevertheless satisfy VRA requirements. But a coherent doctrine to guide lower courts' efforts to protect racial minorities constituting communities of common interest has not yet materialized.<sup>169</sup>

*Shaw* does more than minimize a commitment to racial justice, it turns Professor Freeman's perpetrator/victim dynamic on its head. In a case where Whites are alleged to be the victims, instead of questioning the intent of legislators to protect the interest of perpetrators, the Court redefines the harm. Where Justice Souter in dissent argued that the harm should be measured in terms of dilution of the white vote,<sup>170</sup> the Court reorients its opinion to instead focus on the dangers of a color-conscious process.

With regard to the *Shaw* case, some insights from CRT would be somewhat similar to a CLS critique. A significant additional concern, however, would be raised that would be potentially overlooked in a CLS critique<sup>171</sup>—that the Court's analysis

167. Freeman, *The View from 1989*, *supra* note 12, at 1432 (noting that such an understanding had "turned [law] on its head").

168. *Id.* Professor Freeman also saw the Court's giving credence to reverse discrimination claims as being derived from it reifying the values of color blindness. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1066 ("By abstracting racial discrimination into a myth-world where all problems of race or ethnicity are fungible, the color-blind theory turns around and denies concrete demands of blacks with the argument that to yield to such demands would be impossible since every other ethnic group would be entitled to make the same demand." (citation omitted)).

169. Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359, 360 (2013).

170. *Shaw*, 509 U.S. at 680–81 (Souter, J., dissenting). This inquiry seems appropriate given the wording of the Fifteenth Amendment, which protects citizens from having their right to vote abridged or denied due to "race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

171. See *supra* note 94 and accompanying text.

ignored the lived experience of people of color in order to find government attempts at racial remedy to be as suspect as invidious racial discrimination. It does so by moving away from the manner the intent standard had been applied in other areas in which minorities had raised constitutional equal protections claims. In cases such as *Washington v. Davis*<sup>172</sup> and *McCleskey v. Kemp*,<sup>173</sup> both involving facially race-neutral government practices, the Court found no availability to assert a constitutional claim without specific reference to a particular actor who intentionally discriminated against a suspect class member. In these cases, where applying such a precedent would benefit people of color, the Court refuses to peek under the veneer of facial neutrality in the law or treat impact as sufficient evidence of intent. Ironically, then, when white voters claimed to be victimized by reapportionment plans, the Court abandoned deference to facial neutrality in favor of a more process-focused analysis that suggested race must be operative in the government's actions because there were no other bases upon which to explain the shape of the voting district.<sup>174</sup>

The Court's ability to reach this result seems somewhat explainable in line with CRT scholarship of two founding members of the movement. First, to invest in such an approach elevates colorblindness in ways that implicate landmark work by Neil Gotanda, claiming that the concept "fosters white racial domination."<sup>175</sup> Interestingly, like Professor Freeman, Professor Gotanda identifies Supreme Court jurisprudence as troubled framing. Professor Gotanda's critique, however, explicitly defines the Court's varying approaches to race and their links to racism as the core problem.<sup>176</sup> Naming racism as an explanation for why the Court misconstrues the importance of race is one key way in which CLS and CRT critiques differ.<sup>177</sup> A second as-

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172. 426 U.S. 229 (1976) (finding no constitutional violation under the Fourteenth Amendment, where a written personnel test utilized by the District of Columbia Police Department produced a discriminatory impact on racial minorities).

173. 481 U.S. 279 (1987) (refusing to find purposeful discrimination in racial impact data detailing that Blacks who killed Whites were disproportionately more likely to be sentenced to death in a challenge to the administration of the death penalty in Georgia).

174. See *Shaw*, 509 U.S. at 649.

175. Gotanda, *supra* note 9.

176. *Id.* at 36–40, 56 (noting that the Court's colorblindness covers four distinct variants of race: "status-race," "formal-race," "historical-race," and "culture-race").

177. See *supra* notes 93–94, 116 and accompanying text.

pect of the case which implicates early CRT work is that the Court asks no questions about who is actually disadvantaged or disenfranchised by a decision to void the reapportionment plan. According to Professor Mari Matsuda, this involves a failure to “look to the bottom.”<sup>178</sup> *Shaw* also falls squarely within the description of the “Era of Incredulity.” Rather than denying that race matters, the Court decides that an apportionment plan built upon concerns about minority representation is nearly per se violative of the Constitution. Additionally, electing someone pursuant to a race-consciousness plan carries with it at least two unacceptable dangers—presuming that race is a proxy for political perspective and raising the fear that a minority representative will privilege minority constituents. Framed in this way, how could anyone defend the thinly veiled use of race in redistricting? Peculiarly, the Court never frames such questions in the alternative: What is the danger of diverse states erecting districts that rarely produce successful minority candidates? In the Court’s defense, such a question should not be asked if race does not matter. It is acceptable, however, to query why the Court does not question the ability of majority white districts to serve minority interests. Improper racial affinity, then, appears to only be a concern for elected officials of color.

The second voting case is *Shelby County v. Holder*.<sup>179</sup> In *Shelby County*, the Court considered the continuing viability of the Section 4 Preclearance procedures of the Voting Rights Act (VRA), but set against a fairly strong Tenth Amendment framing.<sup>180</sup> Irrespective of the content of the federal statute, the Court stated that the “equal sovereignty” of states should be

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178. Matsuda, *supra* note 77.

179. 133 S. Ct. 2612 (2013). While the *Northwest Austin* case preceded *Shelby County*, many of the important findings are incorporated into the *Shelby County* decision. *Id.* at 2621. However, *Northwest Austin* failed to answer the broader question about preclearance. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204–05 (2009). In *Shelby County*, the Court commented, “in *Northwest Austin*, we stated that ‘the Act imposes current burdens and must be justified by current needs.’ . . . And we concluded that ‘a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.’” 133 S. Ct. at 2621. This conclusion became a guiding principle in *Shelby County*. *See id.*

180. *Id.* at 2623–24; *see also* Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of Voting Rights Act of 1965*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 251, 253 (2015) (describing how the Supreme Court framed *Shelby County* as an example of federal overreach and encroachment upon state power).

breached only in rare circumstances.<sup>181</sup> The case reflects a decidedly “then and now” approach to race. For example, in the first line of the opinion, Justice Roberts declares that the VRA was an “extraordinary measure[] to an extraordinary problem.”<sup>182</sup> Yet, he quickly follows with, “[t]here is no denying, however, that the conditions that originally justified these measures no longer characterize voting in covered jurisdictions.”<sup>183</sup> Based on this sentiment, he later states that current data no longer justify Section 4 Preclearance, and that this is largely due to the success of the VRA.<sup>184</sup> On the counter-normative aspects of these statements, the following characterization by researcher Pantea Javidan is representative:

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181. 133 S. Ct. at 2621. This equal sovereignty analysis, which includes a presumption that Congress should treat states substantially similarly, notwithstanding important contemporary and historical differences, has been roundly criticized on a number of grounds. *See, e.g.*, Seth Davis, *Equal Sovereignty As a Right Against a Remedy*, 76 LA. L. REV. 83, 106 (2015) (“The Court’s equal sovereignty doctrine had a flimsy foundation in precedent. Its failure to specify the standard of review reflected poor judicial craftsmanship, and its call for a congressional fix of Section 4 was illusive—or perhaps elusive.” (citation omitted)); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2133–37 (2015); Leah Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. (forthcoming 2016) (manuscript at 4) (on file with *Minnesota Law Review*) (noting that Congress has at various times distinguished among the states and that the Court has not given this issue sustained attention).

182. 133 S. Ct. at 2618.

183. *Id.* Later in the opinion he even suggests that Section 4 procedures would not have been reauthorized in 2006 if Congress had not so heavily relied on historical evidence. *Id.* at 2630. On this topic, he claimed, “[i]t would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story.” *Id.* at 2630–31.

184. Germane to this point, Justice Roberts stated:

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the “current need[]” for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

*Id.* at 2628–29. That he should espouse such a belief is not surprising, given his attempts to pare back the VRA during his time as a government attorney and the skepticism held toward his approach to the VRA by a number of the legislators that questioned him during the confirmation process. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 249–51 (2015).

*Shelby County* claims that there is sufficient racial progress or transcendence to warrant the elimination of Section 5 voter protections. In the two main arguments, Chief Justice Roberts quotes his own opinion in Northwest Austin Municipality Utility District Number One (2009): (1) “things have changed in the South,” and (2) the “evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.” In other words, Jim Crow is over; remedies meant to address systemic subordination and oppression are antiquated and unnecessarily burdensome. Even if this argument is unconvincing, Roberts claims that the South should not be specially scrutinized because voter discrimination does not exclusively occur in the South.<sup>185</sup>

Justice Roberts’ analysis leads to the conclusion that in covered jurisdictions, such as *Shelby County*, race no longer leads to substantial, disparate voting consequences. Justice Roberts does not quite say that race is absolutely of no moment, just that it no longer matters enough to upset states’ rights.<sup>186</sup> This sentiment, however, was stated more simply by Justice Scalia during the *Shelby County* oral argument, where he said that the VRA provides for the perpetuation of “racial entitlement.”<sup>187</sup>

Based on Justice Roberts praising the good works of the VRA, one can clearly see the *Shelby County* decision as representing a claim of mission accomplished with regard to racial progress. Professor Freeman also spoke of the Court’s justifying its decisions by relying upon peculiar readings of history, which also seems relevant here.<sup>188</sup> The Court’s explicit and deep commitments to racial transcendence, however, also are consistent with the “Era of Incredulity.”<sup>189</sup> From this vantage point, given

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185. Pantea Javidan, *Legal Post-Racialism As an Instrument of Racial Compromise in Shelby County v. Holder*, 17 BERKELEY J. AFR.-AM. L. & POL’Y REP. 127, 129 (2015).

186. In particular, Justice Roberts stated, “At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.” *Shelby Cty.*, 133 S. Ct. at 2619.

187. Gary May, *Scalia’s Understanding of the Voting Rights Act Is Short-sighted*, WASH. POST (Apr. 26, 2013), [https://www.washingtonpost.com/opinions/scalias-understanding-of-the-voting-rights-act-is-short-sighted/2013/04/26/2b63179e-ad07-11e2-b6fd-ba6f5f26d70e\\_story.html](https://www.washingtonpost.com/opinions/scalias-understanding-of-the-voting-rights-act-is-short-sighted/2013/04/26/2b63179e-ad07-11e2-b6fd-ba6f5f26d70e_story.html).

188. See Freeman, *Racism, Rights and the Quest*, *supra* note 53, at 348–49; Freeman, *The View from 1989*, *supra* note 12, at 1412 (describing how the Court denies the historical reality of why antidiscrimination was crafted).

189. As one scholar has described it, *Shelby County* is an example of “[p]ost-racial jurisprudence [which] abandons the policy of race-based remedies for race-based wrongs ‘in favor of seemingly universal solutions.’” Javidan, *supra* note 185, at 130 (quoting Cho, *supra* note 17, at 1601); see also powell, *supra* note 140, at 791–99.

its racial progress, it is ridiculous to suggest that the country is still burdened with the sins of its racist past. As Justice Scalia suggested in the *Shelby County* oral argument,<sup>190</sup> those who do are themselves the problem. Despite claims that he was relying on representative data on race and voting, Justice Roberts' opinion was completely inconsistent with the lived experiences of many Blacks in America. In North Carolina, for example, Blacks made up at least twenty percent of the population<sup>191</sup> but went ninety years (1902–1992) without electing an African American to Congress.<sup>192</sup> In Alabama, the *Shelby County* decision cleared the way for the State to pass a voter ID law that has increased voter disenfranchisement.<sup>193</sup> Additionally, drawing on another insight from foundational CRT texts, the Court's analysis appears essentialist—i.e., uses broad identity categories to speak to a universal experience of a group without marking other important within-group distinctions<sup>194</sup>—and unconcerned with the fates of voters inhabiting multiple identity categories.<sup>195</sup> Justice Roberts, for example, could not effectively sell a black progress narrative in the voting rights area if, instead of looking to the experience of Blacks, he considered the more varied experiences of black women.<sup>196</sup> Rather than focus-

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190. See May, *supra* note 187.

191. See *supra* note 156.

192. See BERMAN, *supra* note 184, at 194–95.

193. See Ari Berman, *Alabama, Birthplace of the Voting Rights Act, Is Once Again Gutting Voting Rights*, NATION (Oct. 1, 2015) <http://www.thenation.com/article/alabama-birthplace-of-voting-rights-act-once-again-gutting-voting-rights>.

194. See Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19–22 (1995). Professor Grillo's succinct definition provides that “[e]ssentialism is the notion that there is a single woman's, or Black person's, or any other group's, experience that can be described independently from other aspects of the person—that there is an ‘essence’ to that experience.” *Id.* at 19. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

195. See Kimberlé Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251–52 (1991); Grillo, *supra* note 194, at 17–19.

196. See, e.g., Amber Phillips, *The Sad State of Black Women in Statewide Political Office*, WASH. POST (Dec. 5, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/05/the-sad-state-of-black-women-in-statewide-political-office>. Citing to a Rutgers University report, commissioned by a non-partisan political organization, the article provided that:

[B]lack women make up 7.4 percent of the U.S. population but just:

- 3.4 percent of Congress
- 3.5 percent of state legislators



ing on whether contemporary society continues to be plagued with precisely the *same* types of voter suppression that prompted the passing of the VRA, the Court should have considered whether the “legacy of racial discrimination still permeates our society.”<sup>197</sup>

The history of race relations in America is neither a narrative of undisturbed linear progress nor that of a stable phenomenon that remains unchanged. Slavery was followed by a period of *de jure* discrimination where formal exclusionary social practices during Reconstruction, such as Jim Crow<sup>198</sup> and the Black Codes,<sup>199</sup> ultimately resulted in racial segregation in most important areas of social life.<sup>200</sup> Even though civil unrest, litiga-

• 1.9 percent of mayors in cities of more than 30,000 people

• Less than 1 percent of statewide elected executives (we’ll get to that last abysmally low number in a minute)

Just one of many sobering statistics in the report: Eighteen black women serve in congressional delegations in 13 states, and 12 states have never had a woman—much less one of color—serve in their congressional delegations.

*Id.* The tendency to speak of Blacks and mean black men or to speak of women and mean white women has been a topic that has historically occupied feminist critiques outside of law as well. See ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN’S STUDIES (Gloria T. Hull et al. eds., 1982).

197. Baldwin, *supra* note 180, at 254 (“Today voter suppression is manifested in the persisting climate of violence targeting racial minorities, strategic disenfranchisement through the criminal justice system and stagnant political representation for citizens of color both in federal and state political offices.”).

198. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (rev. paperback ed. 2012) (arguing that the modern mass incarceration of black men is reminiscent of the Jim Crow era, which is marked by a “comprehensive and well-disguised system of racialized social control” and an enforced system of segregated “second-class citizenship”); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (2002) (providing that while the origins of the phrase “Jim Crow” have been lost, it referred to a system of formal and legal segregation between Whites and Blacks).

199. The Black Codes, Reconstruction-era statutes, have been described as follows:

Throughout the former Confederate area, state governments . . . proceeded in 1865 and 1866 to pass legislation regulating the status and conduct of newly freed Negroes. Termed Black Codes, these laws were based on the explicit assumption of Negro inferiority and sharply restricted the mobility and personal liberties of former free Negroes and new freedmen alike.

CIVIL RIGHTS AND AFRICAN AMERICANS: A DOCUMENTARY HISTORY 217 (Albert P. Blaustein & Robert L. Zangrando eds., Nw. Univ. Press 1991) (1968).

200. Public Accommodations discrimination, at least based on race and national origin, was effectively ended by the Civil Rights Act of 1964, which due

tion victories, such as *Brown v. Board of Education*, and landmark civil rights legislation<sup>201</sup> pared back formal methods of exclusion, racism continues to flourish.<sup>202</sup> One of the most provocative suggestions of CRT luminary Professor Derrick Bell was that racism is permanent, and that laws should be crafted with this in mind.<sup>203</sup> Instead of struggling with the ways that racism morphs rather than dies, the Court simply declares improvement to be a sign of victory—never stopping to acknowledge that such victories have been declared since emancipation.<sup>204</sup> This effect is an example of incredulity being a double-edged sword. First, the Court is so completely invested in post-racialism that it can scoff at those who make claims based on a belief in racial salience. Alternatively, their universalist narratives are shielded from race-conscious critiques even when the lived experience of a great many people refute the strength of the Court's claims. The net result of the approach is that the Court co-opts the long-term benefits of the VRA in service to a

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to the state action requirement of the Fourteenth Amendment, was ironically premised upon Congress's power under the Commerce Clause rather than the Equal Protection Clause. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress acted within its power in outlawing racial discrimination in restaurants based on the burden the practice creates for interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that Congress had a rational basis for finding that racial discrimination in public accommodations could impact interstate commerce). Segregation limited opportunities in everything from housing, education, public accommodation, and labor market participation to private intimacy. On the legality of segregation, in general, see *Plessy v. Ferguson*, 163 U.S. 537 (1896). Legally sanctioned segregation persisted for many years. For example, education remained segregated until the *Brown v. Board of Education*, 347 U.S. 483 (1954) decision, and interracial marriage was barred in a number of states until the decision in *Loving v. Virginia*, 388 U.S. 1 (1967).

201. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, were two such important pieces of legislation.

202. See, e.g., Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Action*, 51 U. MIAMI L. REV. 191, 194 (1997) ("We do not live, nor have we ever lived in a colorblind nation. We live in a nation blinded by color. America is in the midst of the Second Deconstruction, a period of stagnation and retrenchment following thirty years of significant gains ushered in by affirmative action." (citation omitted)).

203. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 10 (1992) (describing a symbiotic existence between Whites and Blacks where civil rights gains are necessarily followed by set-backs and declaring that for Blacks "[t]he fact is that, despite what we designate as progress wrought through struggle over many generations, we remain what we were in the beginning: a dark and foreign presence, always the designated 'other'").

204. See Barnes, Chemerinsky & Jones, *supra* note 22.

racial success narrative, rather than preserving the Act's ability to address biased voting practices<sup>205</sup> and their implications.<sup>206</sup>

## B. EDUCATION

In *Legitimizing Racial Discrimination*, Professor Freeman claims that the "Era of Rationalization" was ushered in by an education case: *Milliken v. Bradley*.<sup>207</sup> *Milliken* was a challenge to the segregated schools in Detroit. Professor Freeman saw the Court's refusal to approve an integration plan that extended beyond the city to capture a number of suburban districts to be a retrenchment from *Brown*.<sup>208</sup> While there have been a number of meaningful race-related education cases since *Milliken*,<sup>209</sup> this Section will consider following influential cases: *Grutter v. Bollinger*,<sup>210</sup> *Gratz v. Bollinger*,<sup>211</sup> *Parents Involved*,<sup>212</sup> and *Fisher*

205. Voting rights scholar Atiba R. Ellis provides the following representative refutation of Justice Roberts' racial progress justification:

As we have seen in our brief discussion of voter identification, this racial progressivity narrative is at odds with the nature of second-generation voter denial claims and the demographic reality of twenty-first century America. Both voter identification laws and felon disenfranchisement laws represent an enduring barrier to the franchise that falls disproportionately on racial minorities. These barriers have bred distrust concerning the electoral process, especially among minorities, despite the race-neutral rationale that these policies promote election integrity. This conflict has clearly created cynicism among some concerning the underlying integrity of the right to vote as it pertains to minorities.

Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463, 488 (2015).

206. According to one commentator,

In 2014, the first post-Shelby election, thousands were turned away by new restrictions in states like Texas and North Carolina. A 2014 study by the Government Accountability Office found that voter ID laws in Kansas and Tennessee reduced turnout by 2 to 3 percent during the 2012 election, enough to swing a close vote, with the highest drop-off among young, black and newly registered voters.

Ari Berman, Opinion, *Why the Voting Rights Act Is Once Again Under Threat*, N.Y. TIMES (Aug. 6, 2015), <http://www.nytimes.com/2015/08/06/opinion/why-the-voting-rights-act-is-once-again-under-threat.html>.

207. 418 U.S. 717 (1974).

208. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1107–08.

209. See *United States v. Fordice*, 505 U.S. 717 (1992); *Missouri v. Jenkins*, 495 U.S. 35 (1990).

210. 539 U.S. 306 (2003).

211. 539 U.S. 244 (2003).

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

*v. University of Texas at Austin*.<sup>213</sup> Ironically, Professor Freeman's first era—the "Era of Uncertainty"—was marked by cautious optimism, largely due to the result in *Brown*.<sup>214</sup> With the exception of *Grutter*, the Court's recent considerations of race in education have done little to push back against the rolling tide of applying more universal approaches to antidiscrimination claims.

The *Grutter* and *Gratz* cases, which involved the admissions policies for the University of Michigan's law school and undergraduate program, respectively, reached very different outcomes. In *Gratz*, where the university used a highly formalistic review process which provided additional points to files of applicants from certain underrepresented minority backgrounds, the Court rejected this practice as overweighting race in the application process in a manner that violated Title VI of the Civil Rights Act and the Equal Protection Clause.<sup>215</sup> In *Grutter*, by contrast, the Court revisited the decision in *Bakke*.<sup>216</sup> In a Justice O'Connor opinion that took favorable notice of the law school's holistic approach to admissions, the Court reaffirmed the diversity rationale articulated in the *Bakke* plurality opinion and held "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."<sup>217</sup> As important, Justice O'Connor acknowledges in *Grutter* that race is still salient: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."<sup>218</sup>

In recent history, *Grutter* stands as the lone example of the Court substantively examining a case on the merits and upholding affirmative action. The case, however, was far from ideal. First, in dicta, Justice O'Connor mentioned that affirmative action would likely not be needed in twenty-five years—a

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213. 133 S. Ct. 2411 (2013).

214. See Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1057–79.

215. *Gratz*, 539 U.S. at 275–76.

216. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (determining, in a plurality opinion by Justice Powell, when race as one of several factors could be considered in higher education admissions).

217. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

218. *Id.* at 333.

comment Justice Thomas, joined by Justice Scalia, attempted to recast as a hardened limit.<sup>219</sup> Second, the case was likely as much about the military and business interests in hiring diverse employees as it was about preserving economic opportunity for students and educational freedom for institutions.<sup>220</sup> It certainly did not engage in more provocative theorizing, such as addressing whether the multiple and potentially life-changing effects of an education, transform admissions decisions into political acts.<sup>221</sup> While Professor Freeman likely would have appreciated the outcome in *Grutter* as representative of an acceptable remedy to ongoing societal discrimination, it would likely still be problematic. First, Professor Freeman challenged the *Bakke* opinion as constructing a false equivalence whereby, “in the name of a diversity that equates race with being a ‘farm boy from Idaho,’ admissions programs could continue to admit students on the basis of race.”<sup>222</sup> Second, a hallmark of the “Era of Rationalization” was the Court moving to contain cases that provided benefits to victims of discrimination.<sup>223</sup> The reading of *Grutter* applied in the *Parents Involved* plurality and the first decision in *Fisher* appear to confirm this.<sup>224</sup>

The CRT critique of *Grutter* is equally skeptical. While a number of scholars have critiqued the limits of the diversity ra-

219. *Id.* at 351 (Thomas, J., concurring in part and dissenting in part) (“Second, I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years.”).

220. *Id.* at 330–31.

221. See Lani Guinier, Comment, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 (2003) (“Admissions decisions affect the individuals who apply, the institutional environments . . . and the stability and legitimacy of our democracy. They are political as well as educational acts.”).

222. Freeman, *The View from 1989*, *supra* note 12, at 1425 (citation omitted).

223. In particular, he criticized the Court for refusing to extend the disparate impact standard from *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to constitutional complaints. Freeman, *The View from 1989*, *supra* note 12, at 1422–24. He noted a similar phenomenon in the “Era of Denial,” for cases retreating from an earlier decision protecting a work-place affirmative action plan. See *infra* notes 247–55 and accompanying text. At bottom, these forms of retrenchment are consistent with Professor Freeman’s broader claim that color-blind theory “exerts an insistent pressure” that for any deviation from race-neutral norms, the Court “limit[s] their duration to facilitate a quick return to the comfortable, abstract world of colorblindness.” Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1067 (citation omitted).

224. See *infra* notes 232–46 and accompanying text.

tionale,<sup>225</sup> *Grutter* also stands as a prominent example of Derrick Bell's theory of interest-convergence.<sup>226</sup> The basic premise of interest-convergence is that rights for people of color will be "recognized and protected when and only so long as policymakers perceive that such advances will further interests that are their primary concern."<sup>227</sup> Hence, gains for Blacks only persist to the extent that they include benefits for Whites.<sup>228</sup> Of the Michigan affirmative action cases and interest-convergence, Professor Bell, himself, stated:

Actually, the Michigan decisions should provide me with some measure of a prophet's pride. For more than two decades, I have been writing and teaching that no matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern. Read together, *Grutter* and *Gratz* provide a definitive example of my Interest-Convergence theory.<sup>229</sup>

Specifically, the interest-convergence thesis was implicated by the business and military interests noted above, which Professor Bell also recognized as the true drivers of Justice O'Connor's opinion.<sup>230</sup> In the end, then, though affirmative action is preserved, "blacks and Hispanics are the fortuitous ben-

225. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) ("[T]he concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice."); Maurice C. Daniels & Cameron Van Patterson, *(Re)considering Race in the Desegregation of Higher Education*, 46 GA. L. REV. 521, 527 (2012) ("While increasing diversity enriches the academic environment and enhances the curricular aims of education, the legal and rhetorical emphasis on diversity sidesteps the more challenging social issues of race and class inequality."); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 450 (2014) ("[T]he diversity rationale . . . has been challenged for failing to genuinely advance racial justice, for primarily benefiting white institutions instead of students of color, for legitimizing admissions policies that favor the privileged, and for potentially pitting minority groups against each other."); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 602-18 (2009) (discussing diversity as costly to the educational opportunity of minority children).

226. See, e.g., Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

227. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 49 (2004).

228. While the interest-convergence thesis has been a foundational concept within CRT, it has been recently revisited and challenged. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011).

229. Bell, *supra* note 225, at 1624 (citation omitted).

230. *Id.* at 1625.

eficiaries of a ruling motivated by other interests that can and likely will change when different priorities assert themselves."<sup>231</sup>

Though *Grutter* spared affirmative action in higher education admissions, the case has provided little reason to expect that the Court is committed to consistently interpreting anti-discrimination laws for the benefit of historically oppressed groups. Two education cases that attempted to build upon the *Grutter* holding, *Fisher* and *Parents Involved*, bear this out. In *Fisher*, plaintiffs sought to challenge the *Grutter* Court's embrace of the diversity rationale by questioning a university's ability to employ race-conscious admissions protocols alongside race-neutral practices in its undergraduate admissions. Rather than deciding the constitutionality of such a plan, the Court remanded the case and directed the lower court to more carefully apply the strict scrutiny standard.<sup>232</sup> The concurrences in the case, however, shed considerable light on the more hostile posture of a number of Justices toward affirmative action in education. Justice Scalia, for example, wrote only to say that while the question was not before the Court in *Fisher*, he would vote to overrule the *Grutter* holding that the diversity rationale satisfies the compelling interest standard.<sup>233</sup> As mentioned above, Justice Thomas not only expressed a similar sentiment with regard to overruling *Grutter*, but he did so by invoking a number of troubling and provocative analogies between modern-day supporters of affirmative action, and slave holders and segregationists.<sup>234</sup> Notably, it was in response to language in the Respondent's brief indicating that America had not reached an aspirational colorblind future, that Justice Thomas clearly stated his position: "Yet again, the University echoes the hollow justifications advanced by the segregationists."<sup>235</sup> Interestingly, although there is now at least a generation of students whose lives have been positively altered through expanded educational opportunity, and some current studies suggest that race-conscious affirmative action remains beneficial,<sup>236</sup> these types of

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231. *Id.*

232. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421–22 (2013). The Court, however, did state that the lower court should not defer to the University's good faith determinations in deciding whether the plan was narrowly tailored. *Id.* at 2421.

233. *Id.* at 2422 (Scalia, J., concurring).

234. *Id.* at 2426–30 (Thomas, J., concurring).

235. *Id.* at 2428.

236. See KENNEDY, *supra* note 127, at 216; Michal Kurlaender & Eric

data points are not likely to significantly sway a majority of the Court.

In *Fisher*, the Court refused to endorse a liberal reading of the appropriate consideration of race in higher education admissions; *Parents Involved*, by contrast, limited the application of *Grutter* outside of the higher education context. The case sought to extend the diversity rationale from higher education affirmative action cases into the primary/secondary school integration context, but the Court struck down race-conscious voluntary assignment plans from Seattle, Washington, and Jefferson County, Kentucky.<sup>237</sup> Finding that such cases were not governed by *Grutter* and applying strict scrutiny, the Court determined that racial diversity was not a compelling interest that could justify race-based student selections for high school admittance.<sup>238</sup> The Court held that the plans were also not narrowly tailored, in that the interests the districts sought to achieve did not justify the methods selected to achieve them.<sup>239</sup> While a number of scholars have pointed to Justice Roberts' controversial claim in *Parents Involved* that racial disadvantage would continue to flourish as long as race was considered,<sup>240</sup> he also articulated a peculiar relationship between the case and *Brown*: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once

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Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions*, 86 SOC. EDUC. 294, 306 (2013) (using data from post-Proposition University of California campuses to determine that so-called "mismatched" students "are no more likely to leave in their first four years prior to earning a degree than are regularly admitted students"); Adriane Kayoko Peralta, *A Market Analysis of Race-Conscious University Admissions for Students of Color*, 93 DENV. U. L. REV. 173, 212–17 (2015).

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

238. *Id.* at 731–33.

239. *Id.* at 735. Interestingly, one way Justice Roberts criticizes the Jefferson County plan is that the necessity of using a racial classification in Louisville is undermined by its "minimal impact" on enrollment. *Id.* at 734. This seems odd given that it was the success of race-specific measures that lead to his striking down Section 5 of the VRA. See Javidan, *supra* note 185.

240. See Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of Brown*, 69 OHIO ST. L.J. 791, 796–97 (2008); Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 520–21 (2009).



again—even for very different reasons.”<sup>241</sup> Two CRT critiques of the Roberts opinion in *Parents Involved* are particularly poignant. On the dubious nature of Justice Roberts ignoring the reality of race for the affected children, CRT founding member Charles Lawrence III opines, “Chief Justice Roberts says he sees no color (blackness) in these families’ faces, except that which the school districts’ plans have painted and the Constitution compels him to erase.”<sup>242</sup> On the opinion’s cramped consideration of race more broadly, Berkeley Law scholar John A. Powell refers to it as “callous” and so narrow that “racial hierarchy is legally irrelevant to the Constitutional principle of Equal Protection unless state-sponsored, conscious discrimination is directly implicated and is a proximate cause.”<sup>243</sup>

Taken together, these cases represent an uneven approach to race that flourishes in a post-race society. As such, even when there are small gains, they cannot overcome the effects of our long history of maintaining a racial spoils system that results in only pyrrhic advances. Ultimately, it seems that race-conscious practices must yield to attachments to false universalism.<sup>244</sup> The only real difference between the time Professor Freeman wrote his pieces and now is the framing. In the “Era of Denial,” the framing suggested that courts ignored the power of race to disadvantage when they shouldn’t.<sup>245</sup> Courts in the “Era of Incredulity” turn racism on its head, such that every consideration of race, even those attempting to undo historical racial disadvantage, is viewed as toxic. It is for this reason that it is highly unlikely that the Roberts Court will defer to the diversity rationale much longer.<sup>246</sup> The framing makes those who

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241. *Parents Involved*, 551 U.S. at 747. In his concurrence, Justice Thomas also compares *Parents Involved* to *Brown v. Board of Education*, 347 U.S. 483 (1954), in so far as he claims that the racial imbalance in the affected schools is not tantamount to segregation. *Id.* at 748–49.

242. Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 937 (2008) (citation omitted).

243. Powell, *supra* note 140, at 787.

244. *See id.* at 795–97.

245. Freeman, *The View from 1989*, *supra* note 12, at 1426–33.

246. For example, in discussing diversity in *Parents Involved*, Justice Roberts noted that “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” *Parents Involved*, 551 U.S. at 732. Moreover, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2003), is returning to the Court in this current term, where the viability of the diversity rationale may be tested once more. Max Kutner, *Affirmative Action Returning to the Supreme Court*, NEWSWEEK (June 29,

are interested in asserting that race matters the problem. Those that believe in race-consciousness therefore become the new slaveholders, segregationists, and discriminators.

### C. EMPLOYMENT

In *The View from 1989*, Professor Freeman spent most of his analysis of the "Era of Denial" on employment cases.<sup>247</sup> Toward the end of the "Era of Rationalization," the Court upheld *United Steelworkers v. Weber*,<sup>248</sup> a case involving a collective bargaining agreement that outlined an affirmative action program in an aluminum plant where Blacks made up a significant portion of the workforce but less than 2% of the skilled craftworkers.<sup>249</sup> Despite the *Weber* holding, the "Era of Denial" was marked by cases representing a systematic repeal of most workplace affirmative action.<sup>250</sup> According to Professor Freeman, cases such as *Wygant v. Jackson Board of Education*,<sup>251</sup> *Wards Cove Packing Co. v. Atonio*,<sup>252</sup> *Martin v. Wilks*,<sup>253</sup> and *City of Richmond v. J. A. Croson Co.*,<sup>254</sup> repudiated the "implicit principles" of cases such as *Weber* and *Griggs*. Of *Wards Cove*, in particular, he claimed it "obliterates the assumption . . . that serious statistical disparities are presumptive violations of Ti-

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2015), <http://www.newsweek.com/affirmative-action-case-returning-supreme-court-348157>.

247. See Freeman, *The View from 1989*, *supra* note 12, at 1426–33.

248. 443 U.S. 193 (1979).

249. Freeman, *The View from 1989*, *supra* note 12, at 1425–26.

250. See *id.* at 1426.

251. 476 U.S. 267 (1986) (finding that a mismatch between the percentage of minority students and the percentage of minority teachers did not justify the consideration of race in a teacher layoff plan, and that racial preferences had to be based on prior discrimination).

252. 490 U.S. 642 (1989) (holding that a racial disparity across one class of jobs does not itself prove that the firm practices discriminatory hiring, and that the relevant inquiry should focus on the qualified minority pool in the labor force rather than the percentage of minority employees).

253. 490 U.S. 755 (1989) (allowing white firefighters to challenge a consent decree between the City of Birmingham and black firefighters, even where the white firefighters had not been party to the original litigation).

254. 488 U.S. 469 (1989) (holding that unspecified claims of past racial discrimination did not justify the implementation of a system of racial quotas in the awarding of public contracts and that strict scrutiny was the proper standard to review such cases). Of *Weber* and germane to Professor Freeman's thesis, Gary Peller claimed: "In our times, conservatives utilize the very rhetoric of tolerance, color-blindness, and equal opportunity that once characterized progressive discourse to mark the limits of reform." Peller, *supra* note 89, at 762.

tle VII.<sup>255</sup> Importantly, at the end of this line of cases, the Court had done away with the idea that state and local governments engaging in so-called benign discrimination—considerations of race designed to benefit rather than harm minorities—would be subject to less rigorous scrutiny than other classifications.<sup>256</sup> The net effect of this approach was to subject attempts at remedial considerations of race to the same judicial review as those with an invidious purpose. This move alone nearly ensures the primacy of Professor Freeman's perpetrator perspective.

In response to some of the holdings in the employment cases noted above and in an effort to set new standards for suits filed under Title VII and Section 1981,<sup>257</sup> Congress passed the Civil Rights Act of 1991.<sup>258</sup> Notably, to address issues raised by the *Wards Cove* decision, the Act codified the disparate impact claim articulated in *Griggs*<sup>259</sup> and provided that discrimination could be proven through direct evidence or indirect means.<sup>260</sup> Though Congress can alter antidiscrimination statutes, the Court both interprets the constitutionality of that legislation<sup>261</sup> and sets the standards for claims directly premised upon the Constitution.<sup>262</sup> It is not surprising, then, that neither the changes in the Civil Rights Act of 1991, nor previously helpful precedent,<sup>263</sup> ultimately ceased the demise of affirmative action

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255. Freeman, *The View from 1989*, *supra* note 12, at 1431. At least one Justice has now explicitly called for limiting the presumed meaning of disparate impact evidence in Title VII cases. *See supra* note 126 and accompanying text.

256. *J.A. Croson*, 488 U.S. at 495.

257. 42 U.S.C. § 1981 (2012). Enacted as part of the Civil Rights Act of 1866, Section 1981, in part, authorizes complainants to sue to make or enforce contracts, including employment contracts.

258. Civil Rights Act of 1991, Pub. L. 102-166., 105 Stat. 1071.

259. With regard to disparate impact, the Act provides that a plaintiff establishes a prima facie violation by demonstrating an employer has engaged in "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

260. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (providing a burden-shifting formula later codified by the "indirect means" language in the Civil Rights Act).

261. *See Marbury v. Madison*, 5 U.S. 137, 167 (1803) (describing the roles and powers of the judicial branch).

262. *See McCleskey v. Kemp*, 481 U.S. 279, 312–13 (1987); *Washington v. Davis*, 426 U.S. 299, 248–52 (1976).

263. *See, e.g., Metro Broad. Inc. v. FCC*, 497 U.S. 547, 600 (1990) (using intermediate scrutiny to approve FCC minority preference policies for the consideration of awarding broadcast licenses); *Fullilove v. Klutznick*, 448 U.S.

in employment and government contracting. In this vein, the most relevant decision in the “Era of Incredulity” is *Adarand Constructors v. Peña*.<sup>264</sup> In *Adarand*, the Court had an opportunity to maintain a relaxed standard for reviewing federal race-based affirmative action. The government contracting provisions at issue in *Adarand* provided additional compensation for prime contractors who contracted with sub-contractors operated by “socially and economically disadvantaged individuals.”<sup>265</sup> Under this provision, minority-operated businesses were presumptively deemed socially disadvantaged.<sup>266</sup> Plaintiff sued after a minority-owned business received the sub-contract, although it did not offer the lowest-priced bid.<sup>267</sup> Asserting that the Equal Protection Clause was designed to protect persons not groups, the Court struck down the policy and did so using strict scrutiny.<sup>268</sup> As such, it overruled *Metro Broadcasting*, which had previously applied intermediate scrutiny to a federal affirmative action policy.<sup>269</sup> The fate of *Adarand*, however, was likely sealed with the earlier *Croson* decision. In *Croson*, Justices Thomas and Scalia espoused strong commitments to anti-classification, stating that dividing people by race is inherently problematic because doing so promotes “notions of racial inferiority or simple racial politics.”<sup>270</sup>

Affirmative action in the workplace has not been the only casualty of the Court’s current approach to antidiscrimination. The assault on statutory disparate impact claims continued after the passage of the Civil Rights Act of 1991. Most recently, the Court considered disparate impact in *DeStefano v. Ricci*.<sup>271</sup> In 2003, based on a belief that test results would lead to a disparate impact suit from black test-takers, New Haven city officials discarded a written/oral test used to promote firefighters. Whites, as a group, had outperformed minorities on the test; seventeen firefighters—sixteen white and one Hispanic—who

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448, 490 (1980) (approving, as a legitimate exercise of government power, a spending provision that required ten percent of federal funds going towards public works programs to go to minority-owned companies).

264. 515 U.S. 200 (1995).

265. *Id.* at 204.

266. *Id.* at 207.

267. *Id.* at 204–05.

268. *Id.* at 227.

269. *Id.*

270. *Id.* at 226–27 (quoting *City of Richmond v. J.A. Croson*, 488 U.S.469, 493 (1989)).

271. 557 U.S. 557 (2009).

believed they were likely to be promoted based on their performance on the test sued the City. The suit alleged that the City created a disparate impact upon the plaintiffs in violation of Title VII and the Equal Protection Clause.<sup>272</sup> The Court held that the City's actions were impermissible under Title VII, as it did not "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."<sup>273</sup> This seemed an odd determination given the poor history of integration of the New Haven Fire Department and the disproportionately low numbers of Blacks and Hispanics among the ranks of lieutenant and captain.<sup>274</sup> Essentially, the Court determined that a negative effect on minorities alone was not sufficient evidence of the merits of a potential disparate impact claim. As other scholars have suggested, with such a finding the Court is, de facto, reading an intent requirement into disparate impact analysis,<sup>275</sup> and shifting the Title VII statutory standard into something akin to the approach applied for constitutional rather than statutory claims.<sup>276</sup>

In his work, Professor Freeman identified the winnowing of disparate impact protection as a major problem within antidiscrimination law.<sup>277</sup> He situated the demise in the rise of color blindness, which led to reverse discrimination cases where the Court applied universal approaches to race that ignored the special history and status of minority victims.<sup>278</sup> Professor Freeman's analysis is compatible with early CRT scholarship assessing the Court's disregard of impact evidence.<sup>279</sup> At least since Professor Charles Lawrence's foundational article, *The Id*,

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272. *Id.* at 563.

273. *Id.*

274. See Ann C. McGinley, *Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 NEV. L.J. 626, 627 (2012).

275. *Id.* at 629–32; see also Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 665–68 (2015) (describing *Ricci* and its role in disparate impact jurisprudence).

276. See Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1135 (2010).

277. See Freeman, *Legitimizing Racial Discrimination*, *supra* note 2. While the Court has been cautious about expanding disparate impact analysis over the years, one recent case made the approach available within a different statutory context. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (recognizing the availability of disparate impact claims under the Fair Housing Act).

278. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2; Freeman, *A View from 1989*, *supra* note 12.

279. Lawrence, *supra* note 112, at 321–22.

*the Ego, and Equal Protection: Reckoning with Unconscious Biases*,<sup>280</sup> critical scholars have been critiquing these positions. Like Professor Freeman, Professor Lawrence's work calls for a broader use of disparate impact evidence. Using social science evidence on unconscious bias, Professor Lawrence suggests that the Court's antidiscrimination precedent has included a maladaptive intent requirement.<sup>281</sup> In revisiting this work, Professor Lawrence indicated that the central point of the article was to address something else that is relevant to modern analysis of race: the cultural meaning of racial texts.<sup>282</sup> As Professor Lawrence surmises, "white supremacy is maintained not only through the intentional deployment of coercive power, but also through the creation, interpretation, and assimilation of racial text."<sup>283</sup> Antidiscrimination law, then, does not fail merely because judges neutrally and objectively uncloak meaning in a legal contest. This is a point that Professor Freeman and CRT scholars would likely agree upon: for antidiscrimination decisions, the choice of framing, and the theory of racial justice that animates judicial decisions, are an entrenched part of the problem.

Under the current framing of disparate impact, the negative life opportunities that were once considered a side effect of workplace discrimination are now viewed as being largely tied to personal failings.<sup>284</sup> Georgetown Law Professor Gerry Spann has described the reliance on such assumptions as "post-racial discrimination."<sup>285</sup> Professor Spann, however, makes clear that the *Ricci* decision is but one example of the phenomenon:

When *Ricci* is considered in conjunction with other Roberts Court decisions concerning voting rights, racial profiling, English language

280. *Id.*

281. *Id.* at 325.

282. Lawrence, *supra* note 242, at 938–39.

283. *Id.* at 939. See also HANEY LÓPEZ, *supra* note 62, at 126 ("In addition to legitimating race, legal rules operate as an idea-system to construct races . . . . Though race as a social concept has some autonomy, it is always bounded in its meanings by the local setting.")

284. See Barnes, *supra* note 26, at 14 (describing post-racialism as "but-tressing a story about colorblindness, meritocracy and individual responsibility" and "creat[ing] the expectation that each person is responsible for his or her own success or lack thereof").

285. Spann, *supra* note 276, at 1142; see also Haney López, *Colorblind*, *supra* note 9 (describing his compatible concept of Spann's "post-race racism"); Tukufu Zuberi, *Critical Race Theory of Society*, 43 CONN. L. REV. 1573, 1587 (2011) (describing "post-racial blindness" which occurs when "[t]he post-racial rhetoric of this moment serves as a powerful mask over the racial realities that persist").

education, and school resegregation, the Roberts Court's race cases seem to fit neatly into the pattern of Supreme Court hostility to racial minority interests that is becoming the hallmark of postracial discrimination.<sup>286</sup>

This approach is also a touchstone of the "Era of Incredulity." It is the refusal to acknowledge the vast array of hidden forms of bias that allows the Court to pronounce racism dead. Poor life outcomes for people of color, then, are either attributable to the failures of would-be victims or a happenstance for which neither blame nor remedy should attach. As a result, the Court, for many, seems correct to show disdain for race-conscious measures.

The larger consequence of the outsized disbelief in the realness of race is that racism only exists for the Court principally as a function of the aberrant conduct of individual outliers.<sup>287</sup> Under such a model, the Court avoids interrogating larger concerns such as structural racism and white supremacy. One goal of CRT scholars and others has been to identify the manner in which discrimination is perpetrated through other than individual means.<sup>288</sup> In a manner that de-emphasizes claims to white innocence,<sup>289</sup> the CRT approach focuses on explicating institutional or structural racism. Ian Haney López defines institutional racism as a "theory of racism that explains organizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent."<sup>290</sup> Similarly, Professor Roy L. Brooks has described structural discrimination as "discriminatory effects"

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286. Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 26 (2009).

287. See Barnes, Chemerinsky, & Jones, *supra* note 22, at 968 (defining post-racialism as "a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress"); Powell, *supra* note 140, at 789 (noting post-racial proponents assert that "a few old-style racists may remain, especially in the South, but they, like many civil rights activists, are still stuck in the old paradigm from the past").

288. See, e.g., DELGADO & STEFANCIC, *supra* note 19, at 79–80 ("Many critical race theorists and social scientists alike hold that racism is pervasive, systemic, and deeply ingrained.").

289. *Id.* at 80.

290. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000); see also Jeff Nesbit, *At the Edge: Institutional Racism Is Our Way of Life*, US NEWS (May 6, 2015, 1:16 PM), <http://www.usnews.com/news/blogs/at-the-edge/2015/05/06/institutional-racism-is-our-way-of-life> (presenting several examples of skewed racial results from social institutions, especially in the areas of policing and the criminal justice system more broadly).

or discriminatory treatment “not motivated by an antecedent racial animus, and to that extent . . . ‘facially neutral.’”<sup>291</sup> While animus may not be intended, institutional policies and practices are often captured by negative racial stereotypes. As a recent empirical study of police stops has articulated: “[s]ome institutional structures of law and official policy ameliorate or oppose negative racial stereotypes, as is the case with civil rights law. Other institutional structures build on and accentuate these negative stereotypes . . . .”<sup>292</sup> As a result, the researchers posit that “institutionalized racial framing” effectively serves the purpose of activating “culturally embedded racial stereotypes.”<sup>293</sup>

The net results of institutional racism are myriad and serious. First, consistent with Professor Freeman’s claims, the Court overly focuses on individual conduct and intent.<sup>294</sup> Second, society behaves as if disproportionately negative racialized consequences for minorities in important areas of social life are not caused by racism or white supremacy. Finally, this approach masks another phenomenon identified by groundbreaking, early CRT work: UCLA Law Professor Cheryl Harris’s theory of “whiteness as property.” Of the advantages of whiteness, she states:

The relative economic, political, and social advantages dispensed to whites under systematic white supremacy in the United States were reinforced through patterns of oppression of Blacks and Native Americans. Materially, these advantages became institutionalized privileges, and ideologically, they became part of settled expectations of whites . . . .<sup>295</sup>

And while whiteness also functions as an identity, Professor Harris clarifies that it does so much more in that it also functions as a “reputation in the interstices between internal and external identity; and, as property in the extrinsic, public,

291. ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA* 43 (2009).

292. CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 50 (2014).

293. *Id.* at 50–51.

294. In discussing the perpetrator perspective, Professor Freeman acknowledged the Court’s failure to address institutional racism. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1054 (“[P]erpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric . . . . From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.” (citations omitted)). He, however, failed to expand on this discussion.

295. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1777 (1993) (footnote omitted).



and legal realms.”<sup>296</sup> In a world where race is of so little importance and whiteness is rarely regarded a marker of racial stigma,<sup>297</sup> the value of the property interest is both seamless and overwhelming. As Duke sociologist Eduardo Bonilla-Silva explains, in racialized systems a hierarchy is produced whereby the “race placed in the superior position tends to receive greater economic remuneration and access to better occupations and/or prospects in the labor market, occupies a primary position in the political system, is granted higher social estimation.”<sup>298</sup> Professor Freeman started to mark the outlines of a system that has now been rendered untouchable by the modern Court failing to ever conceptualize race in this more sophisticated manner.

Given the Court’s disposition in the above cases, it should come as no surprise that attempts to expand previously adopted antidiscrimination approaches within employment have also been rejected. One such example pertains to the mixed motive or motivational factor approach in discriminatory treatment cases.<sup>299</sup> Under that standard, rather than having to prove that improper bias was the sole motivation for an employer’s actions, a plaintiff can assert that unlawful bias partially explains the employer’s adverse decision.<sup>300</sup> Recently, however, the Court rejected an expansion of this standard from the statute’s status-based discrimination section to retaliation cases.<sup>301</sup> In *University of Texas Southwestern Medical Center v.*

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296. *Id.* at 1725. Harris notes further that “[a]ccording whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest.” *Id.*

297. CRT scholars, in fact, have commented that Whites have the privilege of seeing themselves as not having a race. DELGADO & STEFANCIC, *supra* note 19, at 80; Barbara J. Flagg, *The Transparency Phenomenon, Race-Neutral Decisionmaking, and Discriminatory Intent*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 220 (Richard Delgado & Jean Stefancic eds., 1997) (“In this society, the white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: to be white is not to think about it.”).

298. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 469–70 (1997).

299. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (allowing a plaintiff to sue in a Title VII disparate treatment case where the protected status was a “motivating” or “substantial” factor in the employer’s decision).

300. *See id.*

301. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

*Nassar*,<sup>302</sup> a plaintiff of Middle Eastern descent brought a Title VII suit claiming discrimination “on account of his religion and ethnic heritage, a bias manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that ‘Middle Easterners are lazy.’”<sup>303</sup> After filing a complaint, the institution blocked his transfer to a new job and the plaintiff alleged it did so in retaliation.<sup>304</sup> In *Nassar*, the Court considered whether motivational factor analysis can be used in a retaliation case filed under Title VII and held that in such cases there must be a demonstrable causal link between the injury sustained and the wrong alleged.<sup>305</sup> Although the motivating factor standard was codified in the Civil Rights Act of 1991, the Court reads Congress as requiring that the causal link in retaliation cases only be satisfied by a “but-for” standard of causation.<sup>306</sup> In addition to its interpretation of congressional intent, the Court justifies not relaxing the causation standard by arguing that doing so would excessively increase employer liability and result in a larger number of frivolous claims.<sup>307</sup>

There are a number of issues with the Court’s analysis in *Nassar*. First, the Court presented no evidence to support the claim that expanding motivational factor analysis to cover retaliation claims would result in greater numbers of fraudulent or frivolous claims.<sup>308</sup> The Court also does not provide a coherent articulation of why a causation analysis Congress found suitable for disparate treatment claims, based on one’s protected status, somehow becomes so ill-advised when the basis of the complaint shifts to a claim of retaliation—alleged to arise in response to the filing of an underlying status discrimination claim.<sup>309</sup> As for motivating factor analysis, itself, why is it not

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302. *Id.* The Court’s decision should not have been terribly surprising, given that it had previously declined to extend motivational factor analysis to claims under the Age Discrimination in Employment Act of 1967 (ADEA). See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–77 (2009).

303. *Nassar*, 133 S. Ct. at 2523.

304. *Id.* at 2524.

305. *Id.* at 2526.

306. *Id.* at 2521 (“[T]he proper conclusion is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.”).

307. *Id.* at 2531–32.

308. See Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223, 234–39 (2014) (discussing the Court’s lack of evidence for increased, frivolous claims).

309. On the illogical and counterintuitive nature of this difference and its consequences, see Kimberly A. Pathman, *Protecting Title VII’s Antiretaliation*

possible for an employer to take actions against a complaining employee based on both legitimate and retaliatory reasons simultaneously? One way to explain the Court's decision consistent with CRT principles and post-racial politics is to suggest that the Court constructs the employer through the lens of white innocence. Consequently, there is a significant likelihood that retaliation claims represent employers being subjected to racism allegations the Court believed to be typically overblown or fraudulent. In this case, the but-for standard for causation is actually selected to ameliorate the dangers of upsetting the Court's preferred vision of the post-race workplace.

### CONCLUSION

Using Professor Freeman's writings as a starting point and supplementing his analysis with key CRT insights, this Article has attempted to use selected cases to assess the Court's approaches to antidiscrimination doctrine over the recent twenty-five years. As indicated in the Introduction, the merits of Professor Freeman's work are borne out by the fact that his articulation of how the Court's antidiscrimination jurisprudence undermines racial equality is at least as relevant today as it was in the late 1970s. While the limits of his project have been noted, the importance of the work has not been diminished by foundational CRT scholarship that rose in its wake. Rather, that scholarship has served as a means to further explicate, for scholars and the Court, how race and racism continue to inform judicial approaches. A significant point of common agreement between Professor Freeman's work and CRT scholarship has been that the Court's problematic analyses of race within anti-discrimination cases have been marked by a retreat from racial salience. The Court's zealous commitment to moving beyond race, which has grown since Professor Freeman wrote *Legitimizing Racial Discrimination*, ensures that a disjuncture between statutory protections and lived experience will continue to grow.<sup>310</sup> In some ways the Court's full-blown commitment to post-racialism is understandable. First, it is a natural instinct to want to pat oneself on the back for the arc of racial progress and use it to declare ourselves no longer racist.<sup>311</sup> Additionally,

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*Provision in the Wake of University of Texas Southwestern Medical Center v. Nassar*, 109 NW. U. L. REV. 475, 494–95 (2015).

310. See generally Freeman, *Legitimizing Racial Discrimination*, *supra* note 2.

311. See Barnes, Chemerinsky & Jones, *supra* note 22, at 975.

a significant contribution of CRT scholars has been to articulate that race as a category is socially constructed, and of no biological or genetic import.<sup>312</sup> Hence, on some level, it makes sense for people to posit that race is not real. And for these people it also seems logical to reject calls for racial remedies or respond with incredulity to claims that race continues to matter. This relationship to race mirrors Professor Darren Hutchinson's concept of "racial exhaustion," which he defined as opposition to racial egalitarian measures premised upon "the grounds that they are redundant, unnecessary, or too burdensome or taxing."<sup>313</sup>

While some may experience frustration related to there being continuous demands for society to invest in equality, that fatigue pales in comparison to the "everyday indignities" and "psychic injury" experienced by those who labor under the weight of stereotypes connected to racial classifications.<sup>314</sup> While race may not be real, the effects of a system of racialization—one that society invests in to create winners and losers along color lines—are real.<sup>315</sup> Under these circumstances, for

312. See, e.g., DELGADO & STEFANCIC, *supra* note 19, at 7 ("A third theme of critical race theory, the 'social construction' thesis, holds that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality . . . ."); see also OBASOGIE, *supra* note 33, at 191–92 (detailing the lack of genetic impact of race); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994) (describing the social construct of race). For a critique of biological and genetic claims arguing racial significance, see, for example, DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011).

313. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 922 (2009).

314. On the more subtle forms of discrimination constituting everyday indignities, see Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 535–45 (2003). On the psychic injury that accompanies being a victim of discrimination, see ANNE ANLIN CHENG, *THE MELANCHOLY OF RACE: PSYCHOANALYSIS, ASSIMILATION, AND HIDDEN GRIEF* 14–19 (2001) (describing the concept of racial melancholia, which identifies grief as both a byproduct of racial discrimination and a source of racial identity); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) ("Society is only beginning to recognize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault; indeed they are often the same.").

315. See GUY P. HARRISON, *RACE AND REALITY: WHAT EVERYONE SHOULD KNOW ABOUT OUR BIOLOGICAL DIVERSITY* 34 (2010) ("Races may not exist as the biological categories many people imagine them to be, but they are still here with us, nonetheless. Races are real because we made them real."). Pro-

the Court to nearly wholesale treat race as some sort of false consciousness is more than denial and more than disingenuous. For Professor Freeman, the goal was merely to expose this dishonesty and its untenable consequences for racial justice. The goal moving forward has to be to push back against the premature embrace of post-race with the same ardor that the Court displays when it turns its skeptical eye and incredulous tone toward discrimination claims. With the recent passing of Justice Antonin Scalia,<sup>316</sup> a stalwart conservative and proponent of post-racial ideologies, the opportunity to reorient the Supreme Court's views on race may now exist.

With moral force and all the tools at our disposable—empirical, normative, theoretical—race scholars should strike now to defend the truth of both the past history and the current lived experience of racism. To quote Professor Angela Harris, “Claiming a nonwhite racial identity in [an] anti-racist context is to make a moral demand on whites to recognize and redress the injuries caused by white supremacy.”<sup>317</sup> Currently, claims for race-based redress are treated as if they are outdated and themselves the problem. The real problem is the Court's ahistorical and inaccurate views of the world—views Professor Freeman saw as perpetuating “the myth of equality of opportunity.”<sup>318</sup> Such views produce the bizarre circumstance where instead of attempting to assess when racial difference is tied to discrimination, they invest in seemingly universal “colorblind rhetoric,” which is itself “a form of racism that ha[s] facilitated the re-articulation of [a] once-defeated justification for racial stratification as a statement in support of social justice.”<sup>319</sup> Hopefully, we will not have to endure twenty-five more years of out-of-touch and unsound rulings on race before the Court accepts this reality.

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fessor Freeman also noted of this reality that “the actual conditions of racial powerlessness, poverty, and unemployment can be regarded as no more than conditions—not as racial discrimination.” Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1103.

316. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), [http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0).

317. Harris, *supra* note 23, at 212.

318. Freeman, *Legitimizing Racial Discrimination*, *supra* note 2, at 1119.

319. Zuberi, *supra* note 285.