Redress, Reparations, & Reconciliation in the Black Community: The Role AAPIs Play in Allyship

The killings of George Floyd, Breonna Taylor, Ahmaud Arbery, and countless other Black victims have laid bare the culture of systemic racism, which is supported by a persistent and sizeable percent of our nation harboring bigoted and intolerant views. Consequently, past wrongs and inequalities have entered the mainstream consciousness and there is heightened public awareness and activism to create an opportunity for social change not seen since the days of the Civil Rights Movement in the 1960s. As the nation addresses the historic injustices against communities of color—particularly against Black communities—AAPIs can play an important role in allyship with the Black community in changing hearts and minds to address systemic racism.

This panel will address why and how members of the AAPI legal community can and need to contribute their voices, time, and resources to the national conversation on race and, in particular, the need to address a culture that perpetuates injustice against Black lives.

- The common history shared by communities of color in this country, including how their dehumanization, disenfranchisement, and social and economic isolation have and, in many ways, continue to be embedded in the culture, the law, and legal institutions;
- What our community has learned about intergenerational trauma caused by past injustices;
- The ways in which Asian Pacific Americans have benefited from the civil rights gains achieved by Black civil rights leaders; and
- How AAPIs can best ally with the Black community in their quest for reparations.

Moderator:
Helen Zia, Author and Activist (Not Confirmed)

Speakers:
Debo P. Adegbile, Partner, Co-Chair, Anti-Discrimination Practice, WilmerHale | Commissioner, U.S. Commission on Civil Rights
Lorraine K. Bannai, Director, Fred T. Korematsu Center For Law And Equality And Professor Of Lawyering Skills, Seattle University of Law
Tracy Jan, Reporter, Race and the Economy, The Washington Post (Not Confirmed)
Eric K. Yamamoto, Fred T. Korematsu Professor of Law and Social Justice, University of Hawaii, Richardson School of Law
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Materials for CLE Submission.


Pg. 180 The Supreme Court of the State of Washington, Letter from the Justices on Black Lives


Pg. 273 Recommendations of the Commission on Wartime Relocation and Internment of Civilians
12-1-1998

Racial Reparations: Japanese American Redress and African American Claims

Eric K. Yamamoto
RACIAL REPARATIONS: JAPANESE AMERICAN REDRESS AND AFRICAN AMERICAN CLAIMS

ERIC K. YAMAMOTO*

I. INTRODUCTION

In 1991 the United States Office of Redress Administration presented the first $20,000 reparations check to the oldest Hawai‘i survivor of the Japanese American internment camps. I attended the stately ceremony. The mood, while serious, was decidedly upbeat. Tears of relief mixed with sighs of joy. Freed at last.

Amidst the celebration I reflected on the Japanese American redress process and wondered about its impacts over time. The process had been arduous, with twists and turns. Many Japanese Americans contributed,1 and their communities overwhelmingly considered reparations a great victory, as did I.

Other racial groups lent support, often in the form of political endorsements. Support also came as ringing oratory—for instance, the moving speech on the floor of the House of Representatives by African American Congressperson Ron Dellums.2 Yet some of the support seemed begrudging. One African American scholar observed,

[t]he apology [to Japanese Americans] was so appropriate and the payment so justified . . . that the source of my ambivalent reaction was at first difficult to identify. After some introspection, I guiltily discovered that my sentiments were related to a very dark, brooding feeling that I had fought long

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1 See Takeshi Nakayama, Historic Chapter Closes, RAFO SHIMPO, Aug. 10, 1998, 1, 3. Contributors to Japanese American redress included the Japanese American Citizens League (JACL), the National Coalition for Japanese American Redress, numerous elected officials and grassroots organizers.

and hard to conquer—inferiority. A feeling that took first root in the soil of "Why them and not me."  

This confession led me to ask about what political role Japanese Americans might play in future struggles for racial justice in America. That question then led to my essay in 1992 about the social meanings of Japanese American redress. The essay started with the recognition that Japanese American beneficiaries of reparations benefited personally, sometimes profoundly. The trauma of racial incarceration, without charges or trial, and the lingering self-doubt over two generations left scars on the soul. The government's apology and bestowal of symbolic reparations fostered long overdue healing for many. As I observed then, redress was:

cathartic for internees. A measure of dignity was restored. Former internees could finally talk about the internment. Feelings long repressed, surfaced. One woman, now in her sixties, stated that she always felt the internment was wrong, but that, after being told by the military, the President and the Supreme Court that it was a necessity, she had come seriously to doubt herself. Redress and reparations and the recent successful court challenges, she said, had now freed her soul.

But, I wondered, what were the long-term societal effects of reparations—the social legacy of Japanese American redress beyond personal benefits? Would societal attitudes toward Asian Americans and other racial minorities change? Would institutions, especially those that curtailed civil liberties in the name of national security, be restruc-

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I participated in the debate that gave rise to the authorizing legislation. For some of us in this Chamber, that was a very painful debate for me, a very emotional debate. Hopefully, for all of us it was a debate full of principle[,] integrity and compassion. . . .

Mr. Speaker, I urge support of the amendment before us. This is a matter of high principle, and those of us who recall the debate on the floor remember there were tears in the House Chamber, and there was conflict, agony, and pain in this Chamber.


5 Yamamoto, Social Meanings of Redress, supra note 4, at 227.
tured? Would Japanese American reparations serve as a catalyst for redress for others?

I identified and critiqued two emerging and seemingly contradictory views of reparations for Japanese Americans and then offered a third. The first view was that redress demonstrates that America does the right thing, that the Constitution works (if belatedly) and that the United States is far along on its march to racial justice for all. I criticized that view as unrealistically bright.

The criticism is not that reparations are insignificant for recipients; the criticism is that they can lead to an “adjustment of individual attitudes” towards the historical injustice of the internment without giving current “consideration to the fundamental realities of power.” The “danger lies in the possibility of enabling people to ‘feel good’ about each other” for the moment, “while leaving undisturbed the attendant social realities” creating the underlying conflict.6

The second view was that “reparations legislation has the potential of becoming a civil rights law that at best delivers far less than it promises and that at worst creates illusions of progress, functioning as a hegemonic device to preserve the status quo.”7 I criticized that view as overly dark.

As part of this critique, and drawing upon critical race theory insights, I offered a third view.

[R]eparations legislation and court rulings in cases such as [the] Korematsu [coram nobis case] do not . . . inevitably lead to a restructuring of governmental institutions, a changing of societal attitudes or a transformation of social relationships, and the dangers of illusory progress and co-optation are real. At the same time, reparations claims, and the rights discourse they engender in attempts to harness the power of the state, can and should be appreciated as intensely powerful and calculated political acts that challenge racial assumptions underlying past and present social arrangements. They bear potential for contributing to institutional and attitudinal restructuring . . . .8

6 Id. at 231–32 (citations omitted) (quoting Edmonds, Beyond Prejudice Reduction, MCS Conciliation Q., Spring 1991, at 15).

7 Id. at 229.

8 Id. at 233. The Korematsu coram nobis litigation in 1983–84 reopened the United States Supreme Court’s decision in the original Korematsu case in 1944 which upheld the constitution-
In light of this third view, I posited that the social meaning of Japanese American redress was yet to be determined. I suggested that the key to the legacy of redress was how Japanese Americans acted when faced with continuing racial subordination of African Americans, Native Americans, Native Hawaiians, Latinas/os and Asian Americans. Would we draw upon the lessons of the reparations movement and work to end all forms of societal oppression, or would we close up shop because we got ours?

Six years have passed. During that time, the United States, indeed the world, has gone apology crazy. Japanese American redress has stimulated a spate of race apologies. Some apologies appear to reflect heartfelt recognition of historical and current injustice and are backed by reparations. Other apologies appear empty, as strategic maneuvers to release pent-up social pressure.9

Amidst this phenomenon African Americans have renewed their call for reparations for the legally sanctioned harms of slavery and Jim Crow oppression. These renewed claims have gained momentum, perhaps more so than at any time since Reconstruction—when Congress and the President sought to confiscate Southern land and provide freed slaves with forty acres and a mule.10 The Florida legislature recently approved reparations for survivors and descendants of the 1923 Rosewood massacre.11 The African American victims of the Tuskegee syphilis experiment received reparations and a presidential apology in 1997.12 One reparations lawsuit was filed on the West Coast and a reparations class action is contemplated on the East Coast.13 Representative John Conyers' resolution calling for a Congressional Reparations Study
Commission, reintroduced every year since 1989, has garnered endorsements from an impressive array of political organizations.\(^\text{14}\)

And in every African American reparations publication, in every legal argument, in almost every discussion, the topic of Japanese American redress surfaces.\(^\text{15}\) Sometimes as legal precedent. Sometimes as moral compass. Sometimes as political guide. In similar fashion, Native Hawaiian reparations claims against the United States for the illegal overthrow of the sovereign Hawaiian nation in 1893, and against the State of Hawai‘i for mismanagement of Hawaiian trust lands,\(^\text{16}\) also cite reparations for Japanese Americans.

In light of recent reparations history and contemporary claims, the diverging views of Japanese American redress and the February 1999 closure of the Office of Redress Administration,\(^\text{17}\) the time is ripe

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\(^\text{14}\) See Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 105th Cong. (1997). Groups supporting this bill include the NAACP, the Southern Christian Leadership Conference, the city councils of Cleveland, Detroit, and Inglewood and the Council of Independent Black Institutions. See Robinson, supra note 11.

\(^\text{15}\) See Derrick A. Bell, Jr., Race, Racism, and American Law 51 (2d ed. 1980); Verdun, supra note 3.

\(^\text{16}\) Current Hawaiian claims for reparations are divided into both court and legislative claims against both the federal and state governments. Examples of court claims against the state government include: Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0203-01, appeal docketed, No. 20281 (1998) (the Office of Hawaiian Affairs, created by the Hawai‘i Constitution to represent Native Hawaiians, has asserted claims to back payment of one-fifth of ceded land trust revenues, over $1 billion; the case is on appeal to the Supreme Court of Hawai‘i); Ka‘ai‘ai v. Drake, Civ. No. 92-3742-10 (1st Cir. 1992) (after successful lobbying, the 1995 legislature committed $30 million a year for 20 years, $600 million total, to the Homelands Trust); Kealoha v. Hee, Civ. No. 94-0118-01 (1st Cir. 1994) (plaintiffs sought to enjoin negotiations, settlement, and the execution of release by trustees of Office of Hawaiian Affairs “concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawai‘i”).

Examples of legislative reparations proposals include: The Aboriginal Lands of Hawaiian Ancestry, Inc. Association (“ALOHA”) (during the 1970s ALOHA called attention to the United States involvement in the overthrow of the Hawaiian government; their efforts resulted in the introduction of a series of reparations bills into Congress, bringing attention to Native Hawaiian claims on a federal and state level); The Native Hawaiian Autonomy Act, H.B. 98-0270-1, 19th Leg., 1st Spec. Sess. (Haw. 1997) (the bill proposed the creation of Native Hawaiian Trust Corporation to assume the assets, liabilities and responsibilities currently held by the state as trustees for Native Hawaiians; in the face of stiff Hawaiian political opposition, the legislation died); The Native Hawaiian Plebiscite, 1996 Haw. Sess. Laws 140 (to acknowledge and recognize the unique status the Native Hawaiian people bear to the State of Hawaii and to the United States and to hold an election allowing Native Hawaiians to decide whether to set up a constitutional convention establishing an indigenous sovereign government); Senator Daniel Akaka’s commitment to introducing legislation in Congress. See Pete Pichaske, Honolulu Star Bulletin, July 14, 1998 (describing Akaka’s proposed advisory committee of tribal leaders and indigenous peoples to address Native Hawaiian self-determination rights). See generally Native Hawaiian Rights Handbook (Melody Kapilialoha MacKenzie ed., 1991).

to revisit the legacy of Japanese American redress. As part of that inquiry, it is also time to assess what Japanese American redress means to racial reparations movements for others.

In this essay I examine aspects of Japanese American reparations history and the current reparations debates and offer the beginnings of a conceptual framework for inquiring into, critiquing and guiding ongoing reparations efforts in the United States. The framework I offer operates from a specific vantage point: groups seeking reparations. The framework, however, does not address "how to get reparations" so much as "how to think about the reparations process with all its potential and risk." Its utility lies in helping groups frame concepts, craft language and determine strategy in deciding whether to embark on a reparations journey and what to anticipate along the way.\textsuperscript{18}

More specifically, Section II of this essay surveys the terrain of recent race apologies and reparations and asks about the extent of Japanese American support for other groups currently seeking redress for historical injustice. Section III asks what lessons, bright and dark, might be drawn from the political and legal processes of Japanese American redress. It begins with the assumption that reparations usually have salutary impact upon recipients and that in certain situations reparations can be transformative for groups struggling against oppression. The section then focuses on the underside of that assumption, a darker side often only minimally explored during legislative lobbying, court suits, community demonstrations and media presentations—a darker side often overlooked amid the hot rhetoric justifying reparations.

That underside is comprised of the risks of reparations efforts—the hidden dangers of entrenched victim status, image distortion, mainstream backlash, interminority friction and status quo enhancement. Drawing from experiences of Japanese American redress and the current African American and Native Hawaiian reparations move-

\textsuperscript{18} In discussing Japanese American redress and African American and, to a lesser extent, indigenous Hawaiian reparations claims, I am not passing judgment about the comparative value or priority of racial group reparations claims. Nor is my decision in this essay to not address in depth reparations claims of other groups (such as various Native American tribes; \textit{see infra} note 22) meant to diminish the importance of those claims. In saying this, I am not suggesting that all group reparations claims are the same. Groups have experienced oppression differently, and every serious discussion of reparations should acknowledge the uniqueness and moral strength of African American claims (due to slavery and Jim Crow apartheid) and indigenous peoples’ claims (due to physical and cultural genocide). \textit{See generally} Eric K. Yamamoto, \textit{Rethinking Alliances: Agency, Responsibility and Interracial Justice}, 3 ASIAN PAC. AM. L.J. 33 (1995) [hereinafter \textit{Rethinking Alliances}] (describing how groups are "differentially racialized," giving rise to differing group identities, living conditions and claims).
ments, and for the sake of simplicity, I cast this underside, the risks, in three ways. The first is the distorted legal framing of reparations claims; the second, the dilemma of reparations process; and the third, the ideology of reparations.

Section IV assesses pending African American reparations claims in light of these concerns. Finally, in the context of future claims, Section V offers an expanded view of reparations not as compensation, but as "repair"—the restoration of broken relationships through justice.

II. JAPANESE AMERICAN AND OTHER REDRESS MOVEMENTS

Movements to redress historical racial injustice mark the global landscape. These movements are part of the Japanese American redress legacy. Internationally, the Canadian government recently apologized to and promised substantial reparations for Canada's indigenous peoples for destruction of their culture and way of life; the British offered reparations to New Zealand's Maori for British-initiated 19th century bloody race wars; French President, Jacques Chirac, recognized French complicity in the deportation of 76,000 Jews to death camps; the Catholic Church apologized for its assimilationist policy in Australia that contributed to the Aborigines' spiritual and cultural destruction. Still unresolved are the claims of the Korean "comfort women" forced into prostitution by the Japanese government.

Nationally, President Clinton apologized to indigenous Hawaiians for the illegal U.S.-aided overthrow of the sovereign nation and the near decimation of Hawaiian life that followed; the Methodist Church apologized to Native Americans in Wyoming for the 1865 post-treaty slaughter at the hands of the U.S. cavalry led by a Methodist minister; the Florida legislature awarded reparations to survivors of mayhem at Rosewood; and the federal government offered reparations to the African American victims of the Tuskegee syphilis experiment and agreed to apologize to and provide limited reparations for Japanese Latin Americans kidnapped from Latin American countries and placed in U.S. internment camps as hostages during WWII.

19 The following are brief descriptions of recent national and international apologies and reparations catalogued in greater detail in Yamamoto, Race Apologies, supra note 9, at 68 app.


still pending include: Native Hawaiian claims for land and money reparations from the U.S. and the State of Hawai‘i, Native American reparations claims for treaty violations by the U.S. and African American slavery-based reparations claims.

The political movements supporting these reparations claims have been bolstered by the reality of Japanese American redress. Yet the larger questions asked six years ago remain. First, in what ways have Japanese Americans, as an exercise of group agency, engaged in these recent and ongoing reparations efforts of others? Have the Japanese Americans—community and legal organizations, media, politicians, educators—lent organizational help and political and legal muscle to the movements of others? Or, have they sat back and said, “you’re on your own?”

Second, to what extent have Japanese Americans engaged with other Asian American groups and other communities of color.


One example of organizational help is the Hawai‘i Chapter of the Japanese American Citizens League’s endorsement of the Hawaiian sovereignty movement and its educational sessions on Hawaiian history and the various forms of indigenous sovereignty. Interview with Alan Murakami, President of the Hawai‘i Chapter of the Japanese American Citizens League, in Honolulu, Hawai‘i (Mar. 29, 1997). Of course, one important factor of engagement is the extent to which other groups have asked Japanese Americans to participate.


More recent Asian American immigrant groups, including Vietnamese, Laotians, Hmong,
on racial justice issues beyond reparations, such as anti-immigrant legislation, the ending of affirmative action, the curtailment of welfare, job discrimination, English-only proposals and hate violence?27

Of course, Japanese American activists have supported others in their political struggles and have worked hard to forge multiracial alliances.28 Some reparations beneficiaries have pooled reparations money to aid others struggling socially and economically.29

Nevertheless, the question persists: Why do some activists in current reparations movements perceive that, as a whole, Japanese Americans benefitting from redress have offered relatively little financial aid and political and spiritual support to others in their justice struggles?30 Is this perception completely false? Or partially true? If it is false, why does the perception exist? If true in some part, what are the explanations, and what is the Japanese American response?

These questions engender complicated inquiries that encompass, but also extend well beyond, present-day Japanese American political activities. They entail detailed inquiry into past and present intergroup

Koreans, Filipinos and Cambodians, face poverty, discrimination and violence. See Jeff Chang, Housing Divided, Tragic Failures and Hopeful Successes in Public and Non-Profit Housing Struggles to Integrate the Poor (describing violence against Vietnamese families in San Francisco public housing project and tense interracial relations) (unpublished manuscript, on file with author).


28 Recent multiracial collaborations involving Japanese Americans include: Challenging the Anti-Immigrant Backlash (educating lawyers in a grassroots campaign to defeat Proposition 187); the Japanese American Citizens League with Native Americans (commemorating the achievements of Native Americans); Asian American Studies/Latino Workers collaboration (organizing a Latino union at the New Otani Hotel in Los Angeles); Asian Pacific Islanders Against Proposition 187 (uniting 60 organizations to oppose the immigration law); the MultiCultural Collaborative (working on affirmative action and school reform in Watts); APALC of Southern California (providing Los Angeles Asian Pacific American community with multilingual legal services and civil rights advocacy); Asian Pacific American Dispute Resolution Center (mediating services for conflicts within Asian Pacific American communities and interracial conflicts); “A.K.A. Don Bonus” (1995) (a film of a first generation working-class Cambodian family by filmmaker Spencer Nakasako and Cambodian student Sokly “Don Bonus” Ny); the Encampment for Citizenship (a non-profit youth service organization bringing together young people of various cultural and class backgrounds to promote the ideals of equality, social justice and democracy). See also Dean Takehara, Nikkei in the Civil Rights Movement, LOS ANGELES JAPANESE DAILY NEWS, Wednesday, Feb. 3, 1997, No. 26,897 (discussing the bicultural efforts of Japanese and African Americans opposing discrimination in the 1950s and 60s including Yuri Kochiyama’s political work with Malcolm X).

29 For example, fifteen families from Kahuku, Oahu, in Hawaii gave $20,000 from their reparations awards to the rural high school in their low-income area, the population of which is predominantly Hawaiian, Samoan and Tongan American. See Tino Ramirez, Past Laid to Rest with School Gift, HONOLULU STAR BULLETIN, June 30, 1998, at A1.

30 See Yamamoto, Social Meanings of Redress, supra note 4, at 237, 241.
relations. In brief, this inquiry may require digging into whether other groups opposed the Japanese American internment at the time and later supported Japanese American redress. For example, preliminary research reveals an apparent lack of opposition by the National Association for the Advancement of Colored People ("NAACP") to the internment at the time. Although black journalists voiced dissent, neither the NAACP nor any other African American organization submitted an amicus brief when the Korematsu internment cases were before the Supreme Court. Did this apparent historical lack of public opposition to the violation of the civil liberties of Japanese Americans, when the NAACP was beginning to forge its civil rights strategy, create an African American interest in later assisting in Japanese Americans’ struggles for redress? Consider the strong support for Japanese American redress in the 1980s by black congressional leaders.

The inquiry into intergroup relations may also require digging into and beyond the pervasive effects of white supremacy, into the extent to which Japanese Americans (and Asian Americans) have been complicit in the subordination of African American communities over the last fifty years. In present-day America, depending on the circumstances, racial groups can be simultaneously disempowered and empowered, oppressed and complicit in oppression, liberating and subordinating. Do Asian Americans, themselves subject to continuing discrimination and negative stereotyping, have an obligation to aid in the healing of African American communities culturally, spiritually and economically?

These questions about Japanese American engagement with the justice struggles of other racial groups, which I raise rather than seek to answer in this essay, speak to a larger issue: Is Japanese American reparations solely about redress for Japanese Americans? Or is it also about racial justice for all?

31 See Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1780 (1989) ("Significantly, neither the NAACP nor any other predominantly black organization submitted an amicus curiae brief to the Supreme Court in Korematsu v. United States or the other cases challenging the government’s internment policy."). Id. See Korematsu v. United States, 323 U.S. 214 (1944). See also RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 171 n.25 (1996). To place this apparent inaction in context, the Japanese American Citizens League initially decided not to oppose the internment (although it later submitted an amicus brief when the Hirabayashi case was argued in 1943). In addition, the national office of the American Civil Liberties Union refused to publicly oppose the internment. See PETER IRONS, JUSTICE AT WAR 105–18 (1983).

32 See supra note 2.

33 See generally Yamanoto, Rethinking Alliances, supra note 18.

34 See ANGELO N. ANCHETA, RACE RIGHTS AND THE ASIAN AMERICAN EXPERIENCE 7–10 (1998)
As I did six years ago, I suggest that the response to these questions, and the mature legacy of Japanese American redress, is yet in the making.

III. THE POTENTIAL UNDERSIDE OF REPARATIONS PROCESS

With this in mind, I turn to reparations process: What larger lessons might communities of color in the United States draw from Japanese American redress? Most addressing this question talk about how the government rectified a serious violation of constitutional liberties and how a diverse racial community banded together to achieve reparations legislation.35 These are important salutary lessons. Indeed, I start with the premise that reparations can be beneficial and at times transformative for recipients.

This essay, however, takes a different tack. It focuses on the underside of reparations process—a darker side requiring careful strategic attention by those seeking reparations and requiring forthright acknowledgement by those who have achieved them. To simplify, I identify three aspects of this underside: the distorted legal framing of reparations claims, the dilemma of reparations process and the ideology of reparations. My thesis is not that this underside diminishes the significance of achieving reparations or forecloses future redress efforts. Rather, I suggest that the risks caution careful strategic framing of debate and action and anticipatory grappling with a reparations movement's both bright and darker potential.

A. Legal Framing of Reparations Claims

The first aspect of the underside of reparations process is the distorted legal framing of reparations claims. Reparations that repair are costly.36 Meaningful reparations entail change. Change means the loss of some social advantages by those more powerful. For these reasons, those charged with repairing the harms always resist.

Opponents employ legalisms in two ways to aid their resistance. First, they cite the sufficiency of existing laws. Since existing civil rights

36. See infra Section V (describing the reframing of reparations from compensation to "repair"—that is, the repairing of tears in the structural and psychological fabric of a society resulting from the social and economic subordination of some of its members).
laws already afford individuals equal opportunity, the argument goes, there is no need for additional reparations legislation to rectify social inequalities.\(^{37}\) Second, those resisting reparations raise objections shaped by narrow legal concerns. They argue the criminal law defense of lack of bad intent on the part of wrongdoers; they assert the procedural bar of lack of standing by claimants (the difficulty of identifying specific perpetrators and victims); they cite the lack of legal causation (specific acts causing specific injuries); and they cite the impossibility of accurately calculating damages (or compensation).\(^{38}\)

These concerns seem compelling to lawyers and judges because they resonate with the common law paradigm of a lawsuit—where an individual wrongfully harmed by the specific actions of another in the recent past is entitled to recover damages to compensate for actual personal losses. The typical situation is the pedestrian hit by a speeding car. As Mari Matsuda observes, however, that paradigm works poorly where, over time, members of a group act to preserve that group’s system of dominance and privilege by denigrating other groups and excluding other groups’ members from housing, businesses, jobs and political and social opportunities; that is, situations of systemic racial oppression.\(^{39}\)

Yet, despite the misfit, the common law paradigm for reparations persists. African Americans seeking reparations for slavery have tended to frame their arguments according to traditional remedies law—that reparations are a form of both payment for individual losses (just compensation) and divestiture of ill-gotten gain (preventing unjust enrichment).\(^{40}\) This resort to traditional legal remedies makes some sense at first glance. Compensation and unjust enrichment are well-recognized remedial principles, and they generally appear to fit the circumstances of African American slavery-based claims.

In practical legal application, however, those traditional principles erect inordinately high barriers. For instance, as Vincene Verdun observes, by casting reparations as a “claim for compensation based on

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39 See Matsuda, Looking to the Bottom, supra note 38, at 376.

40 See Verdun, supra note 3, at 621.
slavery," present-day African Americans are required to prove "that all African Americans were injured by slavery and that all white Americans caused the injury or benefitted from the spoils of slave labor."41 The courts legally, and mainstream America politically, have been unwilling to accept this group victim/group perpetrator proposition. They continue to look instead for individual wrongdoers who inflict harm on identifiable individuals, resulting in quantifiable damages. This search, framed by the common law paradigm, undermines historical group-based claims for the wrongs of slavery and Jim Crow segregation.42

Without a marked shift away from the individual rights/remedies paradigm, reparations claims face formidable obstacles—unless the circumstances, particulars and timing of the claims allow for recasting those claims in traditional legal garb. For example, the Japanese American redress movement stalled in the late 1970s in part because former internee claims lacked a traditional legal basis. Despite hindsight recognition of historical injustice, government decisionmakers opposed to reparations cited the Supreme Court's 1944 constitutional validation of the internment in Korematsu.43 The government argued there was no legal claim and that, therefore, compensation could not be awarded.44 Indeed, the Hohri45 class action case, filed in the early 1980s on behalf of internees seeking monetary compensation for internment losses, also ran aground on the shoals of legal procedure—the statute of limitations.

The redress movement regained its political momentum in the mid-1980s in part from the judiciary's rulings in the Korematsu46 and Hirabayashi47 coram nobis cases. Those cases reopened the original

41 Id. at 630.
42 See infra Section IV for a detailed discussion.
43 Korematsu v. United States, 323 U.S. 214 (1944). See also James Kilpatrick, quoted by Senator Thurmond in the Civil Liberties Act debates:
As the Supreme Court noted in the case of Korematsu v. United States, most of the internees were loyal Americans. But some were not. More than 5,000 of them refused to swear allegiance to the United States and to renounce allegiance to the emperor. Several thousand evacuees requested repatriation to Japan. It is all very well to say today that these citizens should have received fair hearings, but in the spring of 1942 we were involved in a desperate war for national survival. Due process had to yield to the exigencies of the day.
44 See Korematsu v. United States, 323 U.S. 214 (1944).
47 See Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).
World War II internment decisions by the Supreme Court on the basis of declassified government documents. The federal courts found that during the war the Justice and War Departments had destroyed and suppressed key evidence and lied to the Supreme Court about the military necessity for the internment. These "factual findings" in specific cases, coupled with a congressional commission's similar conclusions, provided the missing traditional legal cornerstone to the foundation for Japanese American reparations claims.

Ultimately, Japanese Americans succeeded on their reparations claims not because they transcended the individual rights paradigm, but because they were able to fit their claims tightly within it. Consider these facets of the internees' claim: (1) their challenge addressed a specific executive order and ensuing military orders; (2) the challenge was based on then-existing constitutional norms (due process and equal protection); (3) both a congressional commission and the courts identified specific facts amounting to violations of those norms; (4) the claimants were easily identifiable as individuals (those who had been interned and were still living); (5) the government agents were identifiable (specific military and Justice and War Department Officials); (6) these agents' wrongful acts resulted directly in the imprisonment of innocent people, causing them injury; (7) the damages, although uncertain, covered a fixed time and were limited to survivors; and (8) payment meant finality. In the end, the traditional legal rights/remedies paradigm bolstered rather than hindered the internees' reparations claims.

For similar reasons, reparations awarded to African Americans emerged from narrow legal claims of families and survivors of the 1923 Rosewood Massacre. In 1995, the State of Florida paid each of the nine survivors $150,000 and each of the 145 descendants of residents between $375 and $22,535. Framed in terms of property damage, the Rosewood claims fit within the traditional individual rights paradigm. The government perpetrators and victims were identifiable, direct causation was established, damages were certain and limited, and payment meant finality.

By contrast, and as developed further in Section IV, African American groups seeking broad redress for slavery and Jim Crow segregation

50 See Robinson, L., supra note 11.
have encountered considerable difficulty in casting their reparations claims in terms of individual rights and remedies. Legally framed claims for lost wages, liberty and property meet the slew of standard legal objections identified earlier. Opponents of African American reparations point to: (1) the statute of limitations ("this all happened over one hundred years ago"); (2) the absence of directly harmed individuals ("all ex-slaves have been dead for at least a generation"); (3) the absence of individual perpetrators ("white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers"); (4) the lack of direct causation ("slavery did not cause the present ills of African American communities"); (5) the indeterminacy of compensation amounts ("it is impossible to determine who should get what and how much").

The strength of these legal objections impelled Boris Bittker in his highly publicized book, The Case for Black Reparations, to purposely omit slavery as the basis for African American reparations. His argument, which fashioned reparations as a civil rights claim under a Reconstruction era statute (known as Section 1983), conceded insurmountable legal obstacles to reparations for the harms of slavery. Rather than challenging the appropriateness of framing black reparations claims as narrow legal civil rights claims, Bittker abandoned slavery as the principal justification for reparations. He instead stressed compensation for present-day societal discrimination. This argument identified harmed individuals—living blacks experiencing discrimination. It identified perpetrators—Americans who operated government and private institutions that supported discrimination in housing, education and jobs. It linked present harm to contemporary acts whose historical roots lay in legalized Jim Crow segregation. And the argument cast damages in terms of lost wages, property and economic opportunities. Bittker framed his argument in this limited fashion to characterize black reparations claims as recognized by law.

Even this narrow legal framing, however, foundered in at least two significant respects. First, the framing was still not narrow enough. Issues such as governmental immunity and proof of racist intent of government actors appeared to block current damage claims. Second, and more significant, this framing reflected "a tactical loss [by]..."
excluding the slavery period: setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands. 55

Opponents of Native Hawaiian reparations cite similar legal objections. They contend that “[i]f there were now a legal right to reparations the Hawaiians could have sued the U.S. government and won years ago . . . . [T]here is now no legal remedy for the alleged moral wrong.” 56 These opponents thus deem reparations claims unavailing because they perceive no legal wrong. 57

Legal arguments against African American and Native Hawaiian reparations often appear compelling when reparations claims are cast narrowly within the traditional individual rights and remedies paradigm. Indeed, for this reason, reparations critics continue to frame reparations claims primarily in narrow legal terms. This does not mean that African American and Native Hawaiian claims lack merit as justice claims. It means that the narrow legal framing of those sweeping reparations claims, based largely on a vast array of historical events, carries heavy baggage.

That baggage does not counsel abandonment of legal claims and court battles. Rather, it counsels a dual strategy. One strategic path focuses on bite-sized legal claims, with limited numbers of claimants, well-defined in time and place. This would resemble situations like Rosewood and Tuskegee and, to some extent, the internment, which were framed in terms of individual rights and remedies. The second, and simultaneous, strategic path recognizes the distortions of narrow legal framing. It therefore reconceptualizes law and litigation broadly as key components of larger political strategies. This alternative path means treating law and court process—regardless of formal legal outcome—as generators of “cultural performances” and as vehicles for providing outsiders an institutional public forum. The strategy also entails communicating counter-narratives to dominant stories about the racial order and attracting media attention to help organize racial

55 Id. at 158.
57 By contrast, many Native Hawaiians seek redress for the U.S.-aided illegal overthrow of the Hawaiian Nation in 1893, which resulted in a loss of sovereignty and land. Because the Provisional Government, which replaced the Queen, actively sought and eventually secured a treaty annexing Hawai'i to the United States, proponents seeking redress contend that the United States and the State of Hawai'i perpetrated the harm upon all Native Hawaiians. See generally NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 16.
communities politically in support of more sweeping reparations claims.58

As described in the concluding section, when law and court process are recast in this fashion and when reparations claims are reframed within the law-based paradigm and beyond it in terms of moral, ethical and political dimensions of “repair,” reparations can address both the improvement of present-day living conditions of a historically oppressed group and the healing of breaches in the larger social polity. Under these circumstances, reparations claims can appear not only justifiable but essential to the racial health of both communities of color and the nation. This alternative framework for reparations has yet to gain a foundational hold in the rhetoric and strategy of reparations movements. Narrow legal framing of reparations claims continues to dominate, allowing opponents to hide their underlying social and political objections.

What are the opponent’s objections? Money. Critics are wondering where reparations resources will come from, and if reparations sufficient to “do justice” will disrupt the economy. Power. They are calculating how reparations can be shaped and conveyed in ways that will advance the interests of mainstream America. Privilege. Critics question whether reparations will alter the existing racial order.59

These objections by dominant interests suggest a need for concern about reparations’ likely impacts. Will the benefits to recipients have lasting, or only temporary, effect? Will the reparations process reopen or exacerbate old wounds, inflaming rather than healing? Will there be social and political backlash against reparations beneficiaries and political leaders, not only by disgruntled dominant group members but also by marginalized groups who have not received reparations?

Collectively, these questions raise serious concerns worthy of careful consideration in every situation where reparations claims are contemplated. In most instances, no clear answers will be forthcoming. Although there is no simple way to cut through the morass of questions and concerns, I suggest merging them into two additional conceptual categories to facilitate practical exploration by those engaged in reparations movements. Those categories are the dilemma of reparations and the ideology of reparations.


59 See generally Matsuda, Looking to the Bottom, supra note 38.
B. Dilemma of Reparations

The dilemma of reparations is the second aspect of the darker side of reparations. Reparations, if thoughtfully conceived, offered and administered, can be transformative. They can help change material conditions of group life and send political messages about societal commitment to principles of equality. When reparations stimulate change, however, they also generate resistance. Proponents suffer backlash. Thus, when reparations claims are treated seriously, they tend to recreate victimhood by inflaming old wounds and triggering regressive reactions. This is the dilemma of reparations.

Seeing these dual possibilities in all redress movements, Joe Singer describes the potential for further victimization in two contemporary situations. He recounts Jews’ highly publicized demands in 1997 that Swiss banks account for and restore Jewish money and gold held by the banks for Nazis during World War II. Bank acknowledgment and restitution treats Jews as worthy human beings with rights, including the right to own property. Restitution counters the anti-Semitic myth of Jews misappropriating the property of others. Jewish “victimhood is acknowledged, but Jews are not treated as mere victims, but as agents calling the Swiss banks to account . . .”

One problem, however, is that Jewish demands for monetary restitution resurrect for some the harsh historical stereotypes of Jews “as money-grubbing, as having both accumulated secret bank accounts in the past and as caring now about nothing more than money . . .” Another, and broader, problem is that additional Jewish reparations claims may spark resentment among other groups whose reparations claims have gone unmet (such as Hungarian gypsies who were exterminated by Nazis in Auschwitz and elsewhere).

Singer also describes reparations demands for African Americans. Some understand those demands as a call for redress of past injustice; others understand the demands as a “refusal to grow up.”

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61 See id. at 3–4.
63 Singer, supra note 60, at 3.
64 Id. at 3. See also Johanna Mcgeary et al., Echoes of the Holocaust: The Effort to Recover Jewish Assets Deposited in Swiss Banks Before and During the War has Grown into a Bitter Crusade that Dredges Up the Horrors of the Past, TIME, Feb. 24, 1997, at 36.
65 See, e.g., Alex Bundy, Gypsies Demand Compensation for Suffering During Holocaust, HONOLULU ADVERTISER, Aug. 4, 1997, at A10.
66 See Singer, supra note 60, at 4.
67 Id.
The result, evident in the volatile affirmative action debates, is that "calls to repair the current effects of past injustice are met with derisory denials that continuing injustice exists and that the problems of African Americans are now purely of their own making." As Singer observes about mixed healing potential in both situations, the "very thing that restoration is intended to combat may be the result of the demand for restoration."69

There are other examples of the reparations dilemma. In 1970 James Forman interrupted Sunday services at the Riverside church in New York to demand 500 million dollars from America's churches and synagogues for the oppression of blacks.70 He demanded the "beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted."71 The backlash against Forman and his "Black Manifesto" was swift and strong. Many were appalled at the idea. Others, who agreed in concept, criticized Forman's tactics. Among this latter group were African American churches that acknowledged continuing racism against blacks and pledged money for church programs to uplift blacks, while stipulating that none of the money could go to Forman or his supporters.72 Forman, who issued the challenge to repair the degradation, felt exploited and persecuted.

The dilemma of reparations process, the dual realities, also played out in the United Church of Christ, Hawai'i Conference redress process. The Hawai'i Conference of the United Church of Christ proposed and eventually approved a plan to apologize to Native Hawaiians for its predecessor's participation in the overthrow of the Hawaiian Nation in 1893 and to offer monetary reparations. The arduous process took several years.73

Serious discussion of reparations within the Hawai'i Conference raised a host of serious fears.74 Amid fractious debate at the 1993 Conference's annual meeting, some delegates called for a halt to the process to stop the bleeding.75 Both missionary descendants and Hawaiian church members expressed fears about tearing apart the Con---

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68 Id.
69 Id. at 3.
72 See Arnold Schuchter, Reparations: The Black Manifesto and Its Challenge to White America 7–13 (1970); Forman, supra note 71, at 548.
73 See Yamamoto, Rethinking Alliances, supra note 18, at 39, 74.
75 See id.
ference by reopening (and not healing) one hundred year-old wounds. Others hinted at possibilities for renewed betrayal—where the Conference would regain Hawaiian churches’ trust, revisit the pain and then, due to internal backlash, disappoint once again. Still others worried about reinforcing negative stereotypes of Hawaiians still unable to lift themselves up.

In addition to illuminating the angst of the reparations process—a fear of replicating the very injuries reparations are designed to heal—the dilemma of reparations also partially explains the disappointed expectations of some Hawaiian community leaders. Those leaders criticized Conference redress priorities that directed reparations primarily to Hawaiian Churches and not community organizations. The leaders asked, in effect, why them and not us, why so much for the churches and so little for the rest.76

The dilemma also played out—but in a different way—after Japanese American redress. Since past governmental sin had been absolved, Asian Americans were once again permissible targets for the government and mainstream America.77 The President and Congress criticized Japanese competition in the auto industry and extensive Japanese real estate purchases in the United States.78 Asian immigrants became a target of popular initiatives like California’s Proposition 187 and federal welfare reforms. They were blamed for America’s depressed economy, inadequate public education and other social ills.79 The recent congressional investigation into campaign finance tarred with the taint of “yellow peril” not only Asian nationals and immigrants, but also all American citizens of Asian ancestry.80 Some believe that although the redress process educated many about the historical injustice, reparations, combined with a feeling that “now the system works,” also let the government off the hook so that it no longer needed to vigorously oppose racism against Asian Americans.

The transformative potential of reparations is therefore linked, ironically, to dissatisfaction and risk. Reparations for some does not necessarily presage reparations for deserving others. Reparations for one group may stretch the resources or political capital of the giver, precluding immediate reparations (or enough reparations) for oth-

76 See id.
77 See Yamamoto, Social Meanings of Redress, supra note 4, at 236.
78 See id.
79 See id.
ers. The very dynamic of reparations process, even where salutary for recipients, can generate backlash and disappointment.

C. Ideology of Reparations

The third aspect of the underside of reparations process is the ideology of reparations. Reparations ideology is illuminated by Derrick Bell’s interest-convergence thesis. Bell’s thesis suggests that dominant groups only recognize “rights” of minorities when the recognition of those rights benefits the dominant group’s larger interests. That is, a government will rarely simply do the right thing; rather, it is likely to confer reparations only at a time and in a manner that furthers the interests of those in political power.

Rhonda Magee employs the interest-convergence thesis to explain why African Americans have not received reparations for slavery. She observes that, “[s]elf-interested whites who must make the ultimate decision on whether or not to transfer property (land or currency) to African-Americans have no incentive to make such self-defeating decisions.” Magee discusses how after the Civil War and during Reconstruction, Congress decided to seize land from the wealthiest Southerners and distribute forty acres to each adult former slave. Support for the redistribution came from those who believed “the establishment of an African-American economic base was critical to the dissolution of the economic legacy of slavery.” After two years of lobbying, Congress created the Freedman’s Bureau to distribute “captured and abandoned land.” In January 1865, possessory title to

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81 In July 1998, just before President Clinton’s visit to China, the U.S. agreed to apologize and bestow limited monetary reparations ($5,000) to Japanese Latin Americans (“JLAs”) kidnapped from Latin American countries by the U.S. and placed in U.S. internment camps during World War II. Previously, the government had refused to award reparations to the JLAs under the Civil Liberties Act of 1988 on grounds that they were not U.S. citizens and had been in the U.S. illegally. The settlement of the JLAs’ class action lawsuit and the government’s apology and limited reparations brought mixed reactions. Some hailed the settlement as a “major victory for JLAs.” John Tateishi, A Major Victory for JLAs, PACIFIC CITIZEN, June 19:July 2, 1998, at 3. Others called it a “bittersweet victory.” Aoyagi, supra note 21. “Many would argue that JLAs in fact endured much more suffering than what [U.S. Japanese Americans] went through,” said the attorney for the JLAs, Robin Toma. “That’s why I think many people feel that it’s a bitter pill to swallow to take so much less than what the [U.S. Japanese Americans] received.” Id.


83 See Yamamoto, Social Meanings of Redress, supra note 4, at 230.

84 Magee, supra note 37, at 908.

85 See id. at 886-88.

86 Id. at 887.

87 Id. at 888.
485,000 acres was awarded to 40,000 former slaves who immediately began to settle and work the land.88 Later that same year, however, in the face of rising Southern states’ opposition to Reconstruction, President Andrew Johnson rescinded the land reparations program, ordered the black settlers to leave the occupied land and returned the land to former Southern slave owners.89 Land reparations threatened the nation’s newfound peace. Therefore, the President scrapped the program, assuring peace among the states, but at incalculable long-term cost to former slaves.90

The Alaska Native Claims Settlement Act of 1971 can also be viewed through the lens of interest-convergence. The United States agreed to pay one billion dollars and to return forty-four million acres of land to Native Alaskans as reparations for the wrongful seizure of lands.91 However, the primary impetus for reparations was the need to clear land title for development of the Alaska oil pipeline. The United States deemed the pipeline essential not only to its economic health but also to national security. The Middle Eastern oil cartel controlled oil supplies to the United States and was threatening to strangle the American economy.92

Broadly conceived, the interest-convergence thesis underscores reparations ideology in these instances. While no one ideology controls all situations, underlying systems of beliefs and values which serve particular interests tend to shape whether, when and how reparations will be awarded. At least two related strands of reparations ideology are significant to our discussion. One involves the tension between race and class; the other, the characterization of group “worthiness.”

A race/class tension is manifested ideologically in the reparations debate when opponents of reparations play the “class card” to defeat racial reparations. How is this argument structured?93 These critics argue that racial group reparations are overinclusive. Middle class blacks, for example, will benefit to some extent even though they are not economically disadvantaged. The critics conclude, therefore, that

88 See id. at 888–89.
89 See id. at 889.
90 See id. at 888–89.
93 These ideas are developed and critiqued by Robert Westley in another article in this symposium issue. See generally, Robert Westley, Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?, in this issue, at 429.
racial reparations make bad policy. Many of these critics of race-based reparations, however, do not actually support economically tailored reparations for historically oppressed groups. Instead, they use class concerns to mask hostility for reparations of any kind.

Similarly, opponents of racial reparations employ class to argue underinclusiveness—that other economically disadvantaged groups will be left out of a race-based reparations program. Here again, the failure of these critics to support more expansive reparations for those other groups belies their ideological use of class rhetoric.94

The second ideological strand is the characterization of group worthiness. In an earlier article in this symposium, Chris Iijima traced the Congressional debates preceding Japanese American redress. Politicians, lobbyists and media largely shaped crucial reparations arguments around the cooperativeness of the internees, the heroism of the 442nd Regimental Combat Team and the “good citizenship” of Japanese Americans during and after the internment.95 Mike Masaoka’s words, for example, were uplifted in the debates. Masaoka, the Executive Secretary and spokesperson of the Japanese American Citizens League during the war, had urged acquiescence to the government’s internment orders as an act of patriotism.

I am proud that I am an American citizen of Japanese ancestry, for my very background makes me appreciate more fully the wonderful advantages of this Nation. I believe in her institutions, ideals and traditions; I glory in her heritage . . . .

Although some individuals may discriminate against me I shall never become bitter or lose faith, for I know such persons are not representative of the majority of the American people . . . .

Because I believe in America, and I trust she believes in me, and because I have received innumerable benefits from her I pledge myself to do honor to her at all times and in all places, to support her Constitution, to obey her laws, to respect her Flag, to defend her against all enemies, foreign or domestic, to actively assume my duties and obligations as a citizen, cheerfully and without any reservations whatsoever,

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94 Those who make class-based arguments to limit the scope of racial reparations to those with financial need, and who are serious about supporting reparations in this fashion, raise arguments deserving careful consideration.

95 See generally Chris Iijima, Reparations and the “Model Minority” Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation, in this issue, at 385.
on the hope that I may become a better American in a greater America.\(^96\)

With this and other testimonials as a backdrop, Congress, at least in part, appeared to award redress for "deserving superpatriots." It thereby refined the image of a model minority—those who are loyal to and willing to sacrifice for the United States.\(^97\) Congressman Robert Matsui, a key player in Japanese American redress, reinforced this point at a recent gathering of redress activists:

> There could be no question about our patriotism after people like Rudy [Tokigawa of the 442nd Regimental Combat Team], who was locked up in camp, went to war for the U.S. I don't think redress would have passed without the 442nd, without those who gave up their lives and gave themselves for the war effort while their families were interned.\(^98\)

The superpatriot/model minority vision was bolstered by Congressmen Shumway (Japanese Americans are "some of the most respectable, hard working, loyal Americans that we have in this country"), Brown (Japanese Americans are some of Colorado's "finest citizens . . . some of our most honest, hardworking, and productive human beings"), and Lehman (the bill for reparations will show "the respect we all have for the contributions that Japanese Americans have made to our society").\(^99\)

Most interesting, according to Iijima's research, the Congressional reparations debates avoided reference to Japanese American draft resisters—those who refused to fight while their families were wrongfully imprisoned.\(^100\) The debates also failed to address the riots and work and hunger strikes during which interned Japanese Americans voiced discontent with internment conditions.\(^101\) Throughout the internment, considerable disagreement existed within Japanese American communities over cooperation with and support for the government—disagreements later ignored by the narrow framing of redress discourse around Japanese American patriotism and sacrifice.\(^102\)

\(^{96}\) Id. at 399–400 n.42 (quoting 134 CONG. REC. H6308–09 (daily ed. Aug. 4, 1988)).

\(^{97}\) See id. at 395.


\(^{99}\) Iijima, supra note 95, at 393 n.25.

\(^{100}\) See id. at 398.

\(^{101}\) See id. at 402–03.

\(^{102}\) See id. at 401–02.
Framing reparations worthiness in terms of the superpatriot/model minority served several interests. Certainly, and pragmatically, it aided Japanese American internees—they received long-overdue reparations. That framing also appears to have served the government’s practical and policy interests. Practically, it enabled the government to award reparations to a relatively small number of “highly deserving” Japanese Americans without opening the floodgates to reparations for other racial groups. In terms of policy, it enabled the United States unblushingly to tout democracy and human rights in its hard push against Communism in the Soviet Union and Central Europe.

I supported Japanese American redress. Reparations were a well-deserved and appropriate response to a horrendous violation of constitutional liberties and to human suffering. Yet, difficult questions about ideology bear asking. In the broadest sense, were reparations a monetary buy-off of protest, an assuaging of white American guilt without changes in mainstream attitudes and the restructuring of institutions? Were reparations a transactional exchange along the lines of: “we’ll admit you into the club for now if you don’t challenge our exclusion of others?” In my view, Japanese American redress will not likely be seen by the mainstream and by other communities of color as a buy-off, or an exclusive transactional exchange. But that danger exists unless Japanese Americans now and tomorrow press for racial, immigrant, gender, class and sexual orientation justice in the United States.

The “danger lies in the possibility of enabling people to ‘feel good’ about each other” for the moment, “while leaving undisturbed the attendant social realities” creating the underlying conflict. ... [R]edress and reparations could in the long term “unwittingly be seduced into becoming one more means of social control that attempts to neutralize the need to strive for justice.”

Inquiry into reparations ideology reveals this potential hidden danger of reparations; that leaving undisturbed the social structural sources of racial grievance may neutralize “the need to strive for justice.”

IV. AFRICAN AMERICAN REPARATIONS CLAIMS

As developed more fully in the concluding section, I support reparations for African Americans for a variety of reasons, including the need to heal the continuing wounds of many African American communities and to help repair the larger racial breach in the American polity. Others, including Robert Westley in this symposium, have made compelling arguments for reparations based on the economic and psychological harms of slavery, of Jim Crow violence and legalized segregation and of continuing institutional discrimination.104 With this in mind, and drawing upon emergent lessons of Japanese American redress, this section grapples with strategic obstacles to current African American reparations claims.

A. Legal Framing

Most claims for African American reparations are framed by civil rights law. The claims articulated by the National Coalition of Blacks for Reparations in America (N’COBRA) are one example. Although N’COBRA has several spokespersons at any given time, its main positions can be fairly characterized. N’COBRA cloaks its claims for African American reparations in legal cloth. It grounds those claims primarily in the Thirteenth and Fourteenth Amendments and civil rights statutes and, secondarily, in international law guarantees of equality and self-determination.105 N’COBRA’s strategy is to seek legislative or judicial recognition of an existing legal entitlement to reparations.106

1. Thirteenth Amendment

N’COBRA maintains there is no need to seek a Congressional amendment to the Thirteenth Amendment to authorize reparations. All that is necessary is enabling legislation to “put the already existing


106 See id. at 10.
13th Amendment into effect. For this reason, in 1987 N’COBRA members drafted procedural legislation recognizing an existing African American entitlement to reparations and creating the process for "New Afrikan" sovereignty. Because the United States "has never accorded ultimate political justice" to slaves and the descendants of slaves, the draft legislation required that the federal government hold a plebiscite for African Americans. Among other things, blacks could vote to create a New Afrikan nation within the United States that would be supported by U.S. reparations payments of three billion dollars annually.

The proposed implementing legislation faced immediate political and legal obstacles. Politically, its unveiling revealed strong disagreement among the American populace about black reparations. The legislation also severely underestimated the logistical and financial difficulties of a nationwide plebiscite involving African slave descendants. Finally, the proposal overestimated African American desire to consider seriously some form of independent black government.

Equally important, N’COBRA’s narrow legal framing of an African American entitlement to reparations under the Thirteenth Amendment was easily undermined. As interpreted by the courts, the Thirteenth Amendment forbids slavery. It does not, however, embody an entitlement to reparations. Congress now could elect to confer reparations under the Amendment if it characterized past and current living conditions for many African Americans as "badges of slavery." Procedural legislation to implement a pre-existing entitlement appears unavailing.

107 Id.
109 Id. at 67.
110 Id. at 71-74. N’COBRA’s approach requires all African Americans ("Afrikans") to decide whether to accept the U.S. government’s offer of citizenship. Afrikans must decide either to (1) accept U.S. citizenship; (2) return to a country in Africa; (3) emigrate to a country outside Africa; or (4) create a New Afrikan nation-state in America. See id. at 73-74.
111 See id. at 70, 72-73.
113 See, e.g., Cato v. United States, 70 F.3d 1103, 1110 (9th Cir. 1995); Hohri v. United States, 586 F. Supp. 769, 782, aff’d, 847 F.2d 779 (D.C. Cir. 1988).
2. Civil Rights and Torts Claims Act

In the summer of 1997, N’COBRA announced a contemplated class action reparations lawsuit on behalf of all descendants of formerly enslaved Africans in America against the federal and state governments. A litigation committee comprised of lawyers, scholars, social scientists and community activists is researching possible legal claims and assessing political strategies. Traditional civil rights and tort claims, along with novel claims such as claims under the Fair Housing Act, are under consideration.114

The problems of a civil rights/tort claims litigation approach to reparations are revealed in the Ninth Circuit’s ruling in Cato v. United States.115 Cato consolidated two pro se lawsuits. Jewel, Joyce, Howard and Edward Cato and Leerma Patterson, Charles Patterson, and Bobbie Trice Johnson filed "nearly identical complaints ... against the United States for damages due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgment of discrimination, and for an apology."116 Specifically, the complaint sought compensation of:

114 See Interview with Adrienne Davis, Professor of Law, Litigation Committee member, in Miami, Fla. (May 9, 1998).
115 70 F.3d 1103. See generally Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L. REV. 1323 (1952). Himiya v. United States is relevant to Cato. See No. 94 C 4065, 1994 WL 376850 (N.D. Ill., July 15, 1994). Himiya sued the United States for "aiding, abetting and condoning the institution of slavery" and alleged that the "institution of slavery caused African Americans to lose their language, religion, culture and history." Id. at *1. Himiya sought "twenty million dollars in punitive damages, 150 acres of tax-exempt land of his choice, free health care coverage for the remainder of his life, costs necessary to trace his personal genealogy, and costs necessary to legally change his name." Id. The district court dismissed Himiya’s claims, finding them barred by the doctrine of sovereign immunity. In addition, the court dismissed his claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (negligence or wrongful act of an employee of government), because he did not “and cannot allege any wrongful act or omission of any employee of the government while acting within the scope of his office.” Id. As in Cato, the court concluded with a hint of regret:

Although it is extremely regrettable that this country’s history, as well as the history of many other countries, includes a significant history of slavery, the plaintiff does not have proper standing under the law to recover damages for this reprehensible time period. Instead, the citizens of the United States, acting through their congressional representatives, have determined that the remedy has been provided by the 13th, 14th and 15th Amendments to the United States Constitution, as well as our federal civil rights statutes.

Id. at *2.
116 Cato, 70 F.3d at 1105. Cato is a consolidation of two nearly identical complaints filed in forma pauperis. The district court dismissed the complaints in both cases, with prejudice, as groundless prior to service pursuant to 28 U.S.C. § 1915(d), but left open the opportunity to refile the action as a paid complaint. Id. at 1105 n.2.
$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character.\textsuperscript{117}

The complaint also requested that the "court order an acknowledgment of the injustice of slavery in the United States and in the [thirteen] American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present."\textsuperscript{118} Finally, and related to the acknowledgment, the complaint asked for a formal apology from the United States.\textsuperscript{119}

Plaintiffs' initial complaint thus described, in general terms, the horrors of slavery and current black/white disparities in employment, education and housing. The district court dismissed the complaint for failure to state a legal claim. On appeal, the plaintiffs' attorneys endeavored to recast the reparations claims in narrow civil rights and tort law terms. Even that constricted framing, however, fell short. Threshold procedural obstacles, including standing, subject matter jurisdiction, and the statute of limitations, blocked plaintiffs' reparations claims at every turn.

In affirming dismissal of the complaint, the Ninth Circuit Court of Appeals first noted that the district court described the suit as "patterned after the reparations authorized by Congress for individuals of Japanese ancestry who were forced into internment camps during WWII."\textsuperscript{120} The court then expressed empathy for the suffering slavery inflicted upon African Americans. It nevertheless agreed with the following statement of the district court, finding that there was no legally cognizable claim:

Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking

\textsuperscript{117} Id. at 1106.

\textsuperscript{118} Id.

\textsuperscript{119} See id.

\textsuperscript{120} Id.
redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief.\textsuperscript{121}

The Ninth Circuit therefore concurred with the district court's conclusion that "the legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."\textsuperscript{122}

More specifically, the court held that it lacked subject matter jurisdiction over Federal Torts Claims Act claims because the Act only applies to claims against the United States accruing after January 1, 1945 and to claims brought within two years of accrual.\textsuperscript{123} The court concluded that the Act did not provide a waiver of the United States' sovereign immunity from slavery-related damage claims accruing in the 1800s.\textsuperscript{124} The court also implied that even if the Act did operate as a waiver of governmental immunity, the statute of limitations would have undermined African American damage claims based on the harms of slavery and legalized segregation.\textsuperscript{125}

Moreover, the court rejected the possibility of amending the plaintiffs' complaint in order to assert a civil rights statutory claim and a Thirteenth Amendment reparations claim.\textsuperscript{126} The court adopted the district court's reasoning that section 1981(a) of the 1866 Civil Rights Act\textsuperscript{127} (pertaining to contractual relationships) does not waive the federal government's immunity from slavery-based claims.\textsuperscript{128} The court also recognized that the Thirteenth Amendment does not authorize individual damage claims against the government.\textsuperscript{129} In addition, the

\textsuperscript{121} Cato, 70 F.3d at 1105.
\textsuperscript{122} Id.
\textsuperscript{123} See id. at 1107.
\textsuperscript{124} Id.
\textsuperscript{125} See id. at 1108.
\textsuperscript{126} See id. at 1109. The Supreme Court has ruled that the Enabling Clause of the Thirteenth Amendment clothed "Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of SLAVERY in the United States." Cato at 1109 n.7 (quoting Jones v. Mayer Co., 392 U.S. 409, 439 (1968)).
\textsuperscript{127} The statute reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

\textsuperscript{128} See Cato, 70 F.3d at 1106.
\textsuperscript{129} See id. at 1110. Citing Hohri, 586 F. Supp. at 782, the court concluded that the Thirteenth Amendment itself does not provide grounds to sue for damages (i.e., it does not in and of itself waive sovereign immunity), nor is it self-enforcing as to anything beyond the actual act of slavery. In particular, the court held that the Amendment does not provide a right to damages on grounds...
court observed that even a claim solely for non-monetary relief (apology and acknowledgement) would not cure the complaint's deficiencies because (1) such a claim would be based on a "generalized, class-based grievance" and would not implicate the conduct of any specific official or program that caused a discrete injury, and (2) the individual plaintiffs would lack "standing to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination."130

Boris Bittker's thoughtful pro-reparations arguments also cast reparations claims narrowly as Section 1983 civil rights claims.131 In light of a bevy of technical legal problems, however, Bittker limited the claims to those arising from post-slavery discrimination against African Americans. Bittker turned his focus away from the slavery era—a period for which no living person is directly responsible—because civil rights slavery reparations claims against state and local officials create insurmountable legal hurdles that "stultify[ed] the discussion."132 He argued that post-Civil War wrongs against blacks were sufficient to support present-day reparations claims.133

Derrick Bell criticized Bittker for succumbing to narrow civil rights legalisms.134 First, by framing reparations as civil rights claims, African Americans still faced the legal obstacle of U.S. sovereign immunity. Second, by purposefully excluding claims for the entire period of slavery "there is a tactical loss[:] ... setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands."135 The narrow legal


130 Cato, 70 F.3d at 1109-10.
131 U.S.C. § 1983 provides in relevant part:
Every person who, under color of any statute ... of any state or Territory, subjects ... any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
132 BITTKER, supra note 52, at 9.
133 See Bell, Dissection of a Dream, supra note 54, at 158. See also BITTKER, supra note 52, at 9-10.
134 See Bell, Dissection of a Dream, supra note 54, at 158.
135 Id. In a footnote, Bell commented that Bittker might have explored the Thirteenth and Fourteenth Amendments as alternatives to 42 U.S.C. section 1983 as a jurisdictional basis for a federal reparations suit. Id. at 159 n.14. Bell also commented on the anticipated challenges to the use of the Thirteenth and Fourteenth Amendments and concluded that "[w]hether based on section 1983 or directly on constitutional amendments, reparations litigation, if attempted on a broad scale, faces an avalanche of procedural problems, including determining proper parties,
framing robbed the reparations claims of the heart of African American suffering—the continuing effects of slavery. For Bell, Bittker’s “exploratory surgery” of African American reparations “predictably exposes some serious legal and political difficulties while giving little attention to the pressures, moral and political, that, when applied by those whose faith in a cause exceeded their belief in the law, have spawned other legally [legislatively] acceptable reparations programs in this country and elsewhere.”

Legal obstacles, such as the statute of limitations, justiciability and causation, precluded Cato’s actual claims and undermined N’COBRA’s draft legislation as well as Bittker’s post-slavery civil rights arguments. The traditional common law paradigm of a legal claim, an individual wrongfully harmed by the specific actions of another in the recent past to recover demonstrable personal losses, did more than subvert legal claims for African American reparations. The traditional paradigm’s limitations also deprived the claims of their historical force and obscured their significance for a racially divided America.

3. International Human Rights Law

International human rights law is also a potential, albeit problematic, source of legal claims. In 1998, the Inter-American Commission of Human Rights determined that the United States violated international law through one of its court’s racially discriminatory treatment of William Andrews, an African American man convicted of murder in 1974 and executed in 1992. The Commission’s decision centered on a Utah court’s conviction and death penalty sentencing of Andrews despite ample evidence of a jury member’s overt racial bias. The

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136 Id. at 157–58 (citing Bittker’s detailed discussion of the Indian Claims Commission and Germany’s Federal Compensation Law, under which West Germany paid reparations to Nazi victims).

137 In Andrews v. United States, Report No. 57/96, Case No. 11.139, OEA/ser/L.VII.98, doc. 7 rev. (1998), William Andrews was convicted in Utah state court for the torture slayings of three people during an armed robbery, despite questions regarding the extent of his involvement in the killings. In 1973, Andrews, Pierre D. Selby and Keith Roberts robbed a stereo shop. Andrews and Roberts were outside the shop when Selby forced five people to drink drain cleaner, assaulted and shot them. See id.

138 Id. at 44. The Commission considered evidence that while jurors were sitting at lunch in a local restaurant during the guilt phase of Andrews’ trial, one of the jurors had handed the court bailiff a drawing on a napkin depicting a stick figure hanging from a gallows with the words, “Hang the Niggers.” The trial court made no effort to investigate the origins of the note, or who on the jury had seen it. The court merely admonished the jury to “ignore communications from
Commission's 1998 report on the case recommended that "[t]he United States . . . provide adequate compensation to Mr. William Andrews' next of kin for . . . violations" of Andrews' right to life and equality under law, his rights to an impartial hearing and his right to protection from cruel, infamous, or unusual punishment, pursuant to Articles I, II and XXVI of the American Declaration of the Rights and Duties of Man. 139

International human rights law is significant because of its articulation of global norms of governmental behavior. It is problematic because of the difficulty, if not impossibility, of enforcement of those norms in state and federal courts in the United States. The United States is a member of the Organization of American States, which operates the Commission, and is bound by the American Declaration of the Rights and Duties of Man. Despite the Commission's findings in Andrews, 140 the U.S. refused to comply with the Commission's recommendations, maintaining that "Mr. Andrews received an impartial trial free of racial bias. . . . [The U.S.] cannot agree with the Commission's findings, or carry out its recommendations." 141 Without significant political intervention, the U.S.'s refusal to formally recognize the international law decision ended the case. Neither the state nor federal courts have jurisdiction to enforce the Commission's decision.

My aim in identifying the obstacles to reparations claims raised by narrow legal framing is not to discourage the assertion of legal claims for reparations or the identification of legal bases for reparations. These tasks are necessary because reparations are bestowed through some formal instrument, and law (whether legislation, court pronouncement, executive order or international protocol) provides a recognizable vehicle. The tasks are also important because law and legal process, independent of formal outcome, can serve as generators of "cultural performances." They can provide an institutional public forum for calling powerful government and private actors to account. They can offer opportunity to develop and communicate counter-nar-

foolish people." Id. at 5. Moreover, the Commission found that Andrews was "tried by an all white jury some of whom were members of the Mormon Church and adhered to its teachings that black people were inferior beings." Id. at 44-45.

139 See id. at 49.

140 The Commission found that the United States violated Andrews' right to life, right to equality at law, rights to an impartial hearing and not to receive cruel, infamous, or unusual punishment pursuant to Articles I, II and XXVI, respectively, of the American Declaration of Rights and Duties of Man. Id.

141 Id. at 50.
ratives to prevailing stories about minority communities. And they can help focus community education and political organizing efforts.142

My point is that claims of legal entitlement are integral to a reparations movement; they should not, however, be the primary emphasis of a reparations strategy. Legal claims and arguments need to be carefully framed and employed in light of their limitations in order to further the movement’s larger political goals. Thus, although the international commission’s decision in Andrews may be unenforceable in the U.S., if aptly framed and publicized, it may serve the reparations movement’s larger political goal of recasting domestic civil rights claims as international human rights claims.143 The concluding section of this article sets forth an alternative look at strategic framing.

B. Dilemma of Reparations

Earlier I introduced the dilemma of reparations as part of the darker side of the transformative potential of reparations. When reparations are taken seriously they tend to recreate victimhood by inflaming old wounds and triggering regressive reaction. In a recent study, Jewish recipients of German reparations for Holocaust horrors attest

142 See generally Yamamoto, Cultural Performance, supra note 58. This political/cultural approach to law and legal process also serves as a foundation for environmental justice theory. See generally Luke Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 ECOL. L.Q. 619 (1992).

143 Haunani-Kay Trask asserts that the United States has deprived Native Hawaiians of their nation and land and denied the Hawaiians’ right to self-determination as a people, including control over aboriginal lands and natural resources. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (1993). These deprivations, she asserts, are violations of Articles 15, 17, 20, and 21 of the Universal Declaration of Human Rights, Article 1 of the International Covenant on Civil and Political Rights, Article 1 of the International Covenant on Economic, Social and Cultural Rights, and Article 20 of the American Convention on Human Rights. Id. at 34–36.


Some African American reparations claims asserted under international law are based on
to these problems.\textsuperscript{144} In the current movement for African American reparations, the potential victimization and backlash are apparent.

N’COBRA adopted a confrontational approach at its inception in 1987.\textsuperscript{145} With its support for a New Afrikan nationalism, N’COBRA recalls a kind of 1960s black nationalism\textsuperscript{146} then feared by many in the American mainstream. Some find N’COBRA’s approach now bracing, a wake-up call. Others twist lingering fears of black nationalism into a particular kind of backlash; for example, the “‘[t]alk of healing and reparations to African-Americans has provided the [Klu Klux] Klan with a recruitment tool in a time of decline.’”\textsuperscript{147}

Democratic Representatives John Conyers of Michigan and Tony Hall of Ohio have taken a kinder and gentler political and moral approach to African American reparations. Each year since 1989 Conyers has introduced legislation proposing an African American reparations study commission patterned after the study commission that uncovered facts essential to Japanese American reparations.\textsuperscript{148} The proposed commission, however, has received little congressional or presidential support.\textsuperscript{149} In June 1997, Hall introduced a highly controversial resolution calling for a simple United States apology to African Americans for slavery.\textsuperscript{150}

The N’COBRA and Conyers calls for African American reparations and the Hall apology resolution generated three types of negative reaction. First, much of the swift public opposition to Hall’s proposed resolution was steeped in hate and denial.\textsuperscript{151} The calls reopened old
wounds. Second, for some, the calls for an apology and reparations reinscribed victim status.

I don’t believe that we are so scarred by our history that we are incapable of finding creative ways to advance. Indeed, it is our endless preoccupation with governmental redress that partly robs us of the energy to find solutions to our problems. It enslaves us. As long as we sit around waiting on others to do for us what we should be doing for ourselves, nothing will ever get done.152

In addition, for some, the calls for reparations also painted blacks as pandering and overreaching. “Why should average tax-paying Asian Americans or Hispanic Americans or even European Americans (whose forebears [sic] owned no slaves) be asked to pay reparations to all black Americans, including the most wealthy?”153 Some
blacks reacted by saying that reparations claims unnecessarily mis-
cast blacks as continuing targets of government mistreatment when
blacks in the past have benefitted from Urban Renewal, Model
Cities, Community Block Grants, Urban Development Action
Grants, Enterprise Zones, Empowerment Zones and affirmative ac-
tion.154

The third type of negative reaction came from the other direction.
It addressed the perceived inadequacy155 of Conyers' study commission
approach—that this approach did not go far enough because it initially
asked only for a study, and that even if individual monetary payments
resulted, those payments would be mere tokens. "[R]eparations [need
to] come in a lump sum that would be funneled into the educational
system, social programs or loans for first time home buyers."156

Joe Singer asked, "[w]ill reparation[s] right a wrong" or "will it
create further victimization of the oppressed group" thus exacerbating
the wound?157 Some will answer affirmatively to the first question, some
affirmatively to the second, and some will say yes to both. The dilemma
of reparations, revealed here, argues not for retreat by reparations
proponents in light of ambiguous support and likely backlash, but for
tactical anticipation.

C. Ideology of Reparations

I introduced Derrick Bell's broadly conceived interest-conver-
gence thesis in Section III C of this article. According to Bell, African
Americans will only receive reparations for slavery when reparations
serve white Americans' larger political or economic interests. Bell
believes that ordinarily "[s]elf-interested whites who must make the
ultimate decision on whether or not to transfer property (land or
controlled welfare plantation, on which far too many poor black families are reliant.
In its place should be an empowerment system, which encourages and rewards
legitimate child birth, family cohesion, education, work and entrepreneurship.
These are the keys to upward mobility in America, as the thriving, successful black
middle and upper-middle classes have proven.

Id.

154 See Robinson, E., supra note 112.
155 Tony Hall's proposed apology also received some negative reaction stemming from its
perceived inadequacy. See Fletcher, supra note 151.
156 Rother, supra note 150, at 4. In response to the Hall apology resolution, Reverend Jesse
Jackson commented: "[i]t is like you drive over somebody with a car, leave the body mangled,
then you decide to come back later to apologize with no commitment to help them get on their
feet. There is something empty in that. It is just more race entertainment." Fletcher, supra note
151.
157 Singer, supra note 60, at 3.
currency) to African-Americans have no incentive to make such self-defeating decisions.158 The interest-convergence thesis does not mean that African Americans must subordinate their interests to those of white Americans. Rather, it means that blacks must devise a reparations strategy that primarily serves African American interests while furthering, or appearing to further in some important way, mainstream interests. Those interests, as traditionally described, include the United States’ international and domestic reputation on human rights issues, peace in American cities and bolstering the American economy.159

From this vantage point, until mainstream America perceives self-interest in N’COBRA’s position or the Conyers/Hall legislation, the political movements for reparations will have little resonance.160 As one commentator observes:

[w]e could organize ’til the cows came home and make a unified, resounding demand for reparations, and I just don’t think that in this climate it would be taken seriously. . . . This is not a black question. This is a white question. The question ought to be: “What will bring whites to apologize for the sin and the crime of slavery and to make the just recompense for it?”161

Tellingly, Representative Conyers did not expect to find support for an apology to African Americans in the current Republican-majority Congress.162

In America’s volatile racial climate, supporters of African American reparations have yet to frame a compelling interest-convergence.

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158 Magee, supra note 37, at 908.

159 See Yamamoto, Social Meanings of Redress, supra note 4, at 231; Bell, Interest-Convergence Dilemma, supra note 82, at 524; Mary Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 113–14 (1988).

160 The Reverend Jesse Jackson has attempted to lay an interest-convergence foundation for African American reparations. In one instance, he commented that an apology by President Clinton to African Americans would not be enough, and that the United States would also have to pay reparations. Reverend Jackson then praised an effort by President Clinton, who is preparing for a trade mission to southern Africa. He noted that the United States is seeking better trade relations with southern Africa, an effort he considered unprecedented. “The U.S. has interests in southern Africa, and southern Africa has an interest in shoring up its trade relations with America. So this is not a gift but an investment in Africa,” Mr. Jackson said, comparing the effort to the Marshall Plan for Europe after World War II.


161 Robinson, L., supra note 11.

162 See id.
Proponents of a confrontational black nationalism in the 1960s coalesced with anti-war and social justice activists and spurred mainstream accommodation in the form of affirmative action and government entitlements. N’COBRA’s black nationalism takes the position that the reparations movement is a “war” and should always be presented as “militant, strong, [and] uncompromising.”163 This aggressive approach to reparations in post-civil rights era America, however, has played out quietly for the most part. N’COBRA has not attracted the kind of kinetic community and media attention once garnered by James Forman, Malcolm X and the Black Panthers. The 1960s black nationalism in the streets and schools created a sense of urgency in mainstream America; its 1990s version is comparatively unobtrusive.

Nor has the Conyers study commission approach appealed to the now politically conservative American mainstream. This approach adopts the blueprint for Japanese American redress. In 1988, based on a congressional commission’s recommendations and in light of the court rulings in the coram nobis cases, the United States paid $20,000 to each Japanese American internee survivor, totaling over $1.6 billion dollars.164 The payments, although substantial, were a small blip on the radar of the American economy. By contrast, similar reparations for African Americans would impact the economy: 20 million descendants of Africans enslaved in the United States between 1619 and 1865, multiplied by $20,000, would total 400 billion dollars in reparations. Opponents of African American redress are likely to cite these figures in playing the class card. Tapping into public concerns about expenditure of taxpayer dollars, they will argue both the overinclusiveness and underinclusiveness of racial reparations; overinclusive in that some not economically disadvantaged will benefit, underinclusive because other needy groups will be left out.

Also, in contrast with Japanese American redress, African American interests in reparations are not as easily squared with mainstream America’s current interests. First, when Japanese Americans received reparations the United States was fighting to win the Cold War and needed to be perceived as liberators. Although the United States recently has sought to expand its political influence into China, the Middle East and central Europe,165 an American interest internation-

163 Kalifah, supra note 145, at 22.
165 See George Melloan, China’s Balance of Power Politics in Asia, WALL ST. J., Jan. 20, 1997, at A15, available in 1997 WL 2406221 (linking President Clinton’s visit to China with U.S. political
ally in African American "liberation" through reparations has not been clearly articulated. There also has been no development of a cogent vision of far-reaching domestic benefits for the American polity.

Second, politicians from both parties, lobbyists and media shaped the debate on reparations for Japanese Americans so that Congress ultimately bestowed reparations upon a "worthy" racial minority—the "superpatriotic" even in the wake of oppression, the "model minority" that pulled itself up by the bootstraps. Chris Iijima characterized this reparations narrative as a celebration of "blind obedience" to injustice. This narrative, he suggests, sent a pointed ideological message to those subject to racial and other forms of aggression in America—be "patriotic," do not complain, succeed on your own and you may be rewarded later. Or, conversely, if your group's "character" marks it as "unworthy," do not come to Congress seeking reparations.

Thus, although the moral justification for Japanese American redress applies many times over to African American claims, the economics and rhetorical strategies of 1980s Japanese American redress do not translate readily into African American reparations in a conservative political environment. How African American reparations proponents handle superpatriot/model minority narrative and its linkage to the social justification for reparations may be key, particularly in light of the Republican Party's casting of African Americans in recent years as undeserving of "special" government benefits. Will the rise in overt white racism, the abolition of affirmative action, glass ceiling discrimi-
nation, the high black male incarceration rate and the cutbacks in social programs and public assistance generate enough black anger and mainstream anxiety to create a national interest in black reparations? Will the "resegregation of America"—President Clinton's words—detract from America's capacity to police global democracy and thereby create impetus for black reparations? Will Japanese American redress beneficiaries disavow the singular superpatriot/model minority narrative of reparations worthiness and publicly support African American justice claims? The ideology of reparations poses these questions to Japanese Americans, African Americans, other groups seeking redress and the American polity as a whole.

In sum, at the turn of the millennium, how might the African American reparations movement navigate its way through obstacles generated by the narrow legal framing of reparations claims, the reparations dilemma and the ideology of reparations? How might it translate the moral power of its claims into politically viable action? There is, of course, no single, encompassing answer. No magic words.

What I offer in the concluding section are not specific arguments for African American reparations. Rather, I offer an altered conception of reparations to assist in the formulation of those arguments as part of a larger political strategy of "repair."

V. REPARATIONS AS REPAIR

Notwithstanding legal and political objections and the dilemma and ideology of reparations, reparations have been offered and accepted in recent years. The socio-psychological benefits of apologies and reparations are often significant for recipients. As previously mentioned, one woman said the Japanese American redress process had "freed her soul." Other beneficiaries responded with a collective sigh of relief. Ben Takeshita, for instance, expressed the sentiments of

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170 See Yamamoto, Race Apologies, supra note 9, at 47-48.
171 According to clinical psychologist Susan Heitler, "[a]n apology is a much more complex and powerful phenomenon than most people realize[.]" Fletcher, supra note 151. Additionally, psychologist Susan T. Fisk observes,
   An apology for slavery would say it may not have been me, but it was my people or my government that did this and we now see that it was really a crime and sin.
   It is potentially healing. It shares responsibility for ending racism and it acknowledges that slavery has some relevance to today.
   Id. See also Sharon Cohen, Americans to be Compensated for Horrors of Holocaust: Survivors Say Reparations Won't End Nightmares, SAN DIEGO UNION-TRIB., Apr. 6, 1997, available in 1997 WL 3126022 (for concentration camp survivor, "[r]eceiving reparations . . . would be a psychological boost").
172 Yamamoto, Social Meanings of Redress, supra note 4, at 227.
many when he said that although monetary payments "could not begin to compensate . . . for his . . . lost freedom, property, livelihood, or the stigma of disloyalty," the reparations demonstrated the sincerity of the government's apology. 173

In light of both the dangers and the transformative potential of reparations, I offer two insights into specific reparations efforts, insights drawn from Japanese American redress that bear on the shape of African American reparations claims and strategy. One is normative: reparations by government or groups should be aimed at a restructuring of the institutions and relationships that gave rise to the underlying justice grievance. Otherwise, as a philosophical and practical matter, reparations cannot be effective in addressing root problems of misuse of power, particularly in the maintenance of oppressive systemic structures, or integrated symbolically into a group's (or government's) moral foundation for responding to intergroup conflicts or for urging others to restructure oppressive relationships. This means that monetary reparations are important, but not simply as individual compensation. Money is important to facilitate the process of personal and community "repair" discussed below.

A second insight is descriptive: restructuring those institutions and changing societal attitudes will not flow naturally and inevitably from reparations itself. Dominant interests, whether governmental or private, will cast reparations in ways that tend to perpetuate existing power structures and relationships. Indeed, traditionally framed, American interests in racial reparations, including international credibility and domestic peace, tend to reinforce the social status quo.

Those seeking reparations need to draw on the moral force of their claims (and not frame it legally out of existence) while simultaneously radically recasting reparations in a way that both materially benefits those harmed and generally furthers some larger interests of mainstream America. Moreover, those benefiting from reparations in the past need to draw upon the material benefits of reparations and the political insights and commitments derived from their particular reparations process and join with others to push for bureaucratic, legal and attitudinal restructuring—to push for material change. And their efforts must extend beyond their own reparations to securing reparations for others.

These insights point toward a reframing of the prevailing reparations paradigm—a new framing embracing the notion of reparations

as "repair." Indeed, reparation, in singular, means repair. It encompasses both acts of repairing damage to the material conditions of racial group life—distributing money to those in need and transferring land ownership to those dispossessed, building schools, churches, community centers and medical clinics, creating tax incentives and loan programs for businesses owned by inner city residents—and acts of restoring injured human psyches—enabling those harmed to live with, but not in, history. Reparations, as collective actions, foster the mending of tears in the social fabric, the repairing of breaches in the polity.

For example, slavery, Jim Crow apartheid and mainstream resistance to integration inflicted horrendous harms upon African American individuals and their communities, harms now exacerbated by the increasing resegregation of America.\textsuperscript{174} Reparations directly improving the material conditions of life for African Americans and their communities are especially appropriate. In addition, the racial harm to African Americans also wounded the American polity. It grated on America's sense of morality (do we really believe in freedom, equality and justice?), destabilized the American psyche (are we really oppressors?), generated personal discomfort and fear in daily interactions (will there be retribution?), and continues to do so. As Harlon Dalton observes, "perpetuating racial hierarchy in a society that professes to be egalitarian is destructive of the spirit as well as of the body politic."\textsuperscript{175} Reparations for African Americans, conceived as repair, can help mend this larger tear in the social fabric for the benefit of both blacks and mainstream America.

So viewed, reparations are potentially transformative. Reparations can avoid "the traps of individualism, neutrality and indeterminacy that plague many mainstream concepts of rights or legal principles."\textsuperscript{176} Reparations are grounded in group, rather than individual, rights and responsibilities and provide tangible benefits to those wronged by those in power. As Mari Matsuda observes, properly cast, reparations target substantive barriers to liberty and equality.\textsuperscript{177} In addition, coupled with acknowledgment and apology, reparations are potentially transformative because of what they symbolize for both bestower and

\textsuperscript{174} See generally Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal (1992).
\textsuperscript{175} Harlon L. Dalton, Racial Healing: Confronting the Fear Between Blacks and Whites 4 (1995).
\textsuperscript{176} Matsuda, Looking to the Bottom, supra note 38, at 393-94.
\textsuperscript{177} See id. at 391. See also Magee, supra note 37, at 913 ("[r]eparations would be powerful symbols of white group responsibility for the continued degradation of African-American life and
beneficiary: reparations “condemn exploitation and adopt a vision of a more just world.”

For these reasons, some argue that reparations—in the sense of repair rather than compensation—are essential to mending racial breaches in the American polity. Manning Marable contends that the post-Civil War Reconstruction eventually failed because the federal government refused to support broad land grant reparations to African Americans. Without large-scale land redistribution (forty acres and a mule), the emancipation, the Fourteenth Amendment and civil rights statutes failed to uplift blacks socially and economically. Marable observes that because economic power was held by whites, equality in political and social relations was an illusion.

As Marable implies, without change in the material conditions of racial group life, reparations are fraught with regressive potential. Without attitudinal and social structural transformation of a sort meaningful to recipients, reparations may be illusory, more damaging than healing. No repair. Cheap grace.

Native Hawaiians voice these concerns in their drive for reparations. Hawaiians are seeking reparations from the United States and the State of Hawai‘i in the form of money, homelands and Hawaiian self-governance. Repairing cultural wounds, restoring a land base and altering governance structures are perceived by increasing numbers of Hawaiians as essential to functioning relationships among in-

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178 Matsuda, Looking to the Bottom, supra note 38, at 394.
180 See id. at 6.
181 A few legal claims for Hawaiian reparations have achieved some success. These claims were resolvable in part because they were based on specific provisions in Hawai‘i’s Constitution that recognize the state’s trust relationship with Hawaiians. See Ka‘ai’ai, Civil No. 92-3742-10 (1st Cir. Haw., Oct. 1992) (after successful lobbying by the core group, the 1995 legislature committed $30 million a year for 20 years, $600 million total, to the Homelands Trust); Office of Hawaiian Affairs v. State of Hawai‘i, Civ. No. 94-0205-01, appeal docketed, No. 20281 (1998). See also Haw. Const. art. 16, § 7; Haw. Const. art. 12, § 4; Haw. Const. art. 12, § 7.
digienous Hawaiians, the federal and state governments and their non-
Hawaiian citizens. Thus, while monetary compensation may be an
appropriate form of reparations in some instances, it is not, alone,
demed sufficiently reparatory by most Hawaiians. For some, monetary
payment alone would not bring material change; it would likely gen-
erate only illusions of progress and "throwing money at old wounds
would do little to heal them."182

Symbolic compensation without accompanying efforts to repair
damaged conditions of racial group life is likely to be labeled "insin­
cere." For instance, despite modest monetary restitution, the Japanese
government’s refusal to acknowledge responsibility for World War II
crimes or take active measures to rehabilitate surviving victims has
generated charges of insincerity and foot-dragging. For many, the
Japanese government’s refusal to express regret undermines the pos­sibility of forgiveness and prospects for healing.183 By contrast, Ger­
many’s efforts to heal the wounds of Jewish Holocaust survivors extend
beyond monetary reparations. The German government has also un­
dertaken disclosure of war archives, passed legislation barring race
hatred, overhauled Holocaust educational materials and commemo­
rated war victims.184

Reparations, as repair, therefore aim for more than a temporary
monetary salve for those hurting. Reparations are a vehicle, along
with an apology, for groups in conflict to rebuild their relationships
through attitudinal changes and institutional restructuring.185 In terms
of changed attitudes, making apologies a part of a group’s public
history—as the Southern Baptists did through their formal apology to
African Americans186—is one means of reparation. Committing to end
derogatory stereotyping of racial "others" is another. In terms of dis­
mantling disabling social structures or supporting empowering ones,
reparations might mean, as in South Africa, the government’s new

182 Magee, supra note 37, at 879 (citing subcommittee members’ comment on Conyers’
reparations study bill, Commission to Study Reparation Proposals for African Americans Act, H.R.
1684, 102 Cong., (1991)).

183 See, e.g., Tong Yu, Comment, Reparations for Former Comfort Women of World War II, 36

184 See id. at 538 (citing “Forgive Us: East Germany Faces the Truth, Apologizes for the Holo­
caust—A Profound First Act, NEWSDAY, Apr. 15, 1990, at 3).

185 See John Stevens Keali’iwahamana Hoag, The Moral, Historical and Theoretical Frame­
work for Restitution and Reparations for Native Hawaiians 19 (Apr. 28, 1995) (unpublished
manuscript, on file with author). Elazar Barkan observes that injured groups often seek to achieve
a more moderate goal than full retroactive justice, such as lessening conflict or improving their
economic condition. See Elazar Barkan, Payback Time: Restitution and the Moral Economy of

186 See Vincent F.A. Golphin, Southern Baptists Apologize for Past Racism, SYRACUSE HERALD-J.,
struggling but active Reconstruction and Development Programme aimed at redistributing land, changing education, health and housing policies and establishing public and private affirmative action programs.\textsuperscript{187}

This repair paradigm of reparations redirects attention away from individual rights (recognized by law) and legal remedies (monetary compensation). It focuses instead on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease—a breach in the polity.\textsuperscript{188} Within this framework, reparations by the polity and for the polity are justified on moral and political grounds—healing social wounds by bringing back into the community those wrongly excluded.\textsuperscript{189}

How Japanese Americans respond to African American reparations claims in the new millennium, and whether Japanese Americans

\textsuperscript{187} See generally John W. DeGruchy, The Dialectic of Reconciliation: Church and the Transition to Democracy in South Africa, in THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES 16 (Gregory Baum & Harold Wells eds., 1997).

\textsuperscript{188} See generally Yamamoto, Race Apologies, supra note 9. Mari Matsuda has proposed a legal group-based, victim-conscious reparations model that generally embraces these ideas. The model expands the narrow definition of a legal relationship to include victim groups, perpetrator descendants and current beneficiaries. See Matsuda, Looking to the Bottom, supra note 38, at 375. Group damage brought about by past wrongs provides a horizontal connection within victim groups. See id. at 377. Group members think of themselves as a group because they are treated as a group. For them, group experiences with racism and discrimination are "raw, close and real." Id. at 379. A horizontal connection likewise exists within the perpetrator group because dominant groups have benefitted and continue to benefit from past wrongs, even if members of this group deny any personal involvement. See id.

The expanded paradigm also departs from the classical legal notions of time-bar and proximate cause. See Matsuda, Looking to the Bottom, supra note 38, at 381. Reparation itself is necessary because a nation takes such a long period of time to recognize historical wrongs against a victim group. Reparations claims are instead based upon ongoing stigma, discrimination and harm. See id. at 381–82. A victim perspective offers an alternative time-bar. Under the expanded paradigm, "[t]he outer limit should be the ability to identify a victim class that continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question." Id. at 385. And where the continuing effects of the wrongs are acute, the passage of time should not be a waiver of the wrong. See LAWRENCE & MATSUDA, supra note 38, at 240.

Matsuda suggests that victim group members should also participate in the identification of those entitled to relief and the nature and disbursement of the reparation awards. See Matsuda, Looking to the Bottom, supra note 38, at 387. Consultation of victims respects their self-determination and personhood. See id. Under this expanded group-based legal paradigm, groups, both victims and perpetrators, are thus treated collectively rather than individually. See id. at 380.

participate in the repair of other groups' wounds and the mending of tears in society's fabric, may well determine the legacy of Japanese American redress.
CHAPTER 2

History

A. Asian Americans: A History of Prejudice and Exclusion

We pride ourselves on being a nation of laws—laws that require fair process before depriving individuals of their liberty, as well as laws that prohibit government actions that harm individuals based on their race, religion, national origin, or membership in another similar class. If that is how we view ourselves, as well as what our laws require, how could we have incarcerated nearly 120,000 Japanese Americans during World War II? What causes us to compromise fundamental ideals and the rule of law upon which this nation was founded?

The answers to these questions are complicated, but in many instances of past injustice against minority communities we see a pattern: a toxic mix in which ignorance about, and hostility against, those communities combine with a perceived threat to security or safety that makes us willing to sacrifice the rule of law. We have seen this happen throughout history. Unpopular minorities are cast as foreign, different, and unassimilable, and, viewing them as dangerous to the well-being of society, government seeks to control, criminalize, or expel them. Perceived need to protect ourselves justifies sacrificing fundamental freedoms and due process. Our fundamental freedoms are no longer fundamental; they are denied to individuals based on stereotype and historical discrimination. When government actors are allowed to act on their prejudices, they act outside of their constitutional authority, which, in turn, severely tests the bulwark of our system of checks and balances in which the legislative, executive, and judicial branches are expected to ensure that no one of them exceeds their constitutional authority. When we allow prejudice and fear to govern decision- and policy-making, we are no longer a country governed by the rule of law.

The Japanese American incarceration provides a powerful example in which the country compromised the rule of law in the name of national security. In order to understand that incarceration, it is essential to understand the historical and political context leading up to it. That context started nearly a century before the Second World War, in the larger history of how Asian peoples arrived in the United States and came to be treated. What follows is a brief summary of Asian
American history prior to World War II, with emphasis on how fear of Asian Americans as a threat to national security led to their exclusion from society and, in the case of Japanese Americans, removal and imprisonment.

The first section, called “Unopen Door,” focuses on how Asians were excluded from America, through laws limiting both their immigration and naturalization. The second section, called “Second Class Status,” explores the ways in which those Asian Americans who gained admission to the country were still excluded from society. Although this book focuses on the incarceration of persons of Japanese ethnicity, this chapter goes beyond the Japanese American experience. It does so because understanding the experience of other Asian ethnicities, similarly perceived as “Oriental,” helps explain how and why the public and its political representatives demanded incarceration and how the courts responded.

B. Unopen Door

1. Immigration

a. A Brief History of Asian Immigration to the United States

Asian American legal history begins with a story of a labor force—needed, but never accepted—that took place within the context of manifest destiny. European settlers viewed America as a terrain to be transformed and claimed physically, culturally, and economically. Yet the various agricultural and industrial projects of the Pacific frontier required an influx of non-European labor. Asians first began to arrive in the United States in substantial numbers in the mid-19th century.

The Chinese experience. Initially, these were Chinese immigrants, almost all adult males, who landed on the shores of Hawai‘i and California. Many were pushed out of China, from the Guangdong province, by conditions of war, economic depression, and the declining Qing dynasty. At the same time, they were pulled to America by the hope and promise of economic opportunity. Initially, they were drawn to the United States by the allure of California’s Gold Rush. Later, they were recruited as cheap labor—for example, to work the labor-intensive sugar plantations in Hawai‘i and to lay down the first inter-continental railroad. As Asian American historian Ronald Takaki states, “They were brought here to serve as an ‘internal colony’—non-whites allowed to enter as ‘cheap’
migratory laborers and members of a racially subordinated group, not future citizens of American society.” Between 1840 and 1880, approximately 370,000 Chinese arrived in the United States. To get some sense of the relative size of the Chinese population in the West, consider the following numbers: In 1870, the Chinese constituted 29 percent of the population in Idaho, 10 percent in Montana, and 9 percent in California. In California, they amounted to 25 percent of the workforce.

When the economy was booming, the Chinese were treated tolerably—as necessary, indeed useful, workers. The federal government’s stance toward Chinese immigration was favorable. In 1868, China and the United States signed the Burlingame Treaty, which recognized the mutual advantage of free migration for the purposes of curiosity and trade and allowed immigrants to become permanent residents. But when the economy collapsed, as it did in 1873-1877 and 1883-1886, White American workers quickly scapegoated the “yellow” invasion of “coolie” labor. They complained that White American labor was debased by the Chinese, who were willing and able to work under horrendous conditions for little pay. Intolerant individuals took matters into their own violent hands. By one count, at least 300 murders of Chinese were documented in the West between 1860 and 1887. One historian notes that 88 Chinese were murdered in California in a single year, 1862. It is not known how many other deaths went unrecorded.

At other times, intolerance was expressed through local civic and political institutions, which attempted to make the lives of the Chinese so miserable that they would leave or not come in the first place. But state and federal courts sometimes struck down these attempts for violating federal treaties with China or trespassing on those foreign affairs and immigration powers reserved exclusively to the federal government. For example, in Chy Lung v. Freeman, the U.S. Supreme Court struck down a California immigration statute on federal supremacy grounds. In other words, California was deemed to be meddling in affairs that only the federal government could regulate.
Chinese movement were to succeed, it had to shift from local and state levels to the federal plane.

In 1882, the movement succeeded in the enactment of the Chinese Exclusion Act,\(^1\) which halted the immigration of Chinese laborers for ten years. The Exclusion Act was arguably the first federal law to restrict immigration on the basis of race.\(^2\) Amendments and expansions of the Exclusion Act—passed in 1884, 1888 (Scott Act), 1892 (Geary Act), 1902, and finally 1904—resulted in the permanent exclusion of Chinese laborers and the summary deportation of Chinese in America found without proper identification. These attempts to stop Chinese immigration generated innumerable habeas corpus petitions—requests to release someone unlawfully detained—including two cases discussed below, *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.\(^3\) While federal district courts initially granted a number of these petitions,\(^4\) cases like *Chae Chan Ping* upheld the exclusion of Chinese Americans from immigration, reasoning that the government possessed inherent power to protect the security of the country from the purported “vast hordes crowding in upon us.”\(^5\) That reasoning embedded the view of Asian Americans as foreign, unassimilable threats into American jurisprudence. The cases raised fundamental questions about federalism—the vertical division of power between federal and state governments—and separation

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\(^{2}\) Professor Leti Volpp considers the Page Act (1875) to be the first such law. The Page Act prevented entry of women suspected to be prostitutes, without directly mentioning race. However, in the preamble, the law’s purpose was specified as detecting whether “immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary.” See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 465-67 (2005). See also Rose Cuisin Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011).


\(^{4}\) Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889) [hereinafter *Chinese Exclusion Case*]. As Professor Robert Chang notes, *Chae Chan Ping v. United States* came to be known as the *Chinese Exclusion Case* and is referred to that way in a number of cases, including in recent decisions. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 695 (2001); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); United States v. Curtis-Wright Export Corp., 299 U.S. 304, 317 (1936). Further, while many courts and scholars refer to the case as *Chae Chan Ping v. United States*, Ping is a surname, so the case should be cited as *Ping v. United States*. Robert S. Chang, Whitewashing Precedent: From the Chinese Exclusion Case to *Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1222, n.13 (2018) [hereinafter Chang, Whitewashing Precedent].

\(^{5}\) For example, between 1882 and 1890, the Northern District of California heard over 7,000 habeas cases. Christian G. Fritz, A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California, 32 AM. J. LEGAL HISTORY 347, 348 (1988). Between 1888-1890, 86 percent of the petitions were granted. Id. at 371.

\(^{16}\) *Chinese Exclusion Case*, 130 U.S. at 606.
of powers—the horizontal division of power between the judicial as opposed to the political branches (the executive and the legislative).

*The Japanese experience.* These exclusionary laws had their intended effect, and Chinese immigration abated from the 1880s onward. Employers, especially Hawaiian plantation owners, who had relied on Chinese workers, needed another source of cheap, dependable labor. That source would be another Asian country, Japan. From 1880 to 1910, approximately 400,000 Japanese entered America (including Hawai‘i, which was annexed as a territory in 1898). Despite their different ethnicities and nationalities, Japanese and Chinese were viewed by most Americans as fungible, clumped together in a broader, racialized class—the “Oriental.” Similar to what happened to the Chinese, resentment against the Japanese grew.

In May 1900, various labor organizations convened the first large-scale protest against Japanese in California. San Francisco Mayor James Duval Phelan addressed the meeting:

> The Japanese are starting the same tide of immigration which we thought we had checked twenty years ago. . . . The Chinese and Japanese are not bona fide citizens. They are not the stuff of which American citizens can be made. . . . Personally we have nothing against Japanese, but as they will not assimilate with us and their social life is so different from ours, let them keep at a respectful distance.

Phelan’s complaint that the Japanese did not assimilate with the rest of “us” would continue to echo for decades and be used 40 years later to justify their mass incarceration during World War II. While many Japanese Americans may have congregated because of their common culture, their social isolation was not self-imposed. Instead, racism, discriminatory practices, and laws that denied them from the incidents of full citizenship excluded them from mainstream society.


17 CHAN, supra, at 3.  
19 DANIELS, POLITICS, at 21 (quoting S.F. EXAMINER, May 8, 1900; S.F. CHRONICLE, May 8, 1900).  
20 In 1943, the United States Supreme Court noted that the failure of Japanese Americans to assimilate supported to the argument that they posed a risk of espionage and sabotage during World War II. See Hirabayashi v. United States, 320 U.S. 81, 96-98 (1943) [hereinafter Hirabayashi I].  
21 DANIELS, POLITICS, at 25 (quoting S.F. CHRONICLE, Feb. 23, 1905).
Men an Evil in the Public Schools;” and “The Yellow Peril– How Japanese Crowd Out the White Race.”22

In May 1905, delegates from 67 organizations met in San Francisco to form the Japanese and Korean Exclusion League.23 The League argued for the exclusion of the Japanese as threats to white society and its economic well-being: “[w]e cannot assimilate with them without injury to ourselves . . . [w]e cannot compete with a people having a low standard of civilization, living and wages.”24

In 1907, the exclusionists won a ban on the further entry of young laborers from Japan.25 The stage was set in 1906 when the San Francisco School Board ordered Japanese American children into its segregated “Oriental” school,26 sparking an international crisis with Japan. President Theodore Roosevelt could not casually dismiss Japan’s protests because Japan had become a world-class military power. In the end, Roosevelt struck a political compromise with San Francisco: the Japanese pupils would be allowed to attend White American schools in exchange for Roosevelt’s promise to decrease Japanese immigration. Roosevelt kept his promise and negotiated in 1907 and 1908 a “Gentlemen’s Agreement”27 that limited the immigration of Japanese laborers, through informal arrangements, without passage of express (and thus more insulting) legislation.

The experience of other Asian groups. Most Asian ethnic groups experienced hostility similar to the Chinese and Japanese immigrants. During the early 1900s, about 7,000 Asian Indians arrived in Hawai’i and the mainland.28 In early 1908, a mob drove approximately 100 Asian Indian farmworkers out of their camp north of Sacramento, California, and set it on fire.29 Korean immigrants, whose numbers were about the same,30 received no better treatment. In an incident in June 1913, 15 Korean immigrants hired to pick fruit on a farm in Hemet, California, were surrounded by a several hundred unemployed Whites who told them to leave.31 Immigration from the Philippines started in 1900 and continued into the 1930s, for a total of approximately 180,000 persons.32 In 1928, a mob of 400 beat up dozens

24 DANIELS, POLITICS, at 28 (quoting Asiatic Exclusion League, Proceedings (San Francisco, 1907-12), May 1910, pp.13-14).
25 DANIELS, POLITICS, at 44.
26 DANIELS, POLITICS, at 32-34 (quoting Board resolution on p.5 of report of Victor H. Metcalf, Roosevelt’s Secretary of Commerce and Labor, U.S. Congress, Senate, Japanese in the City of San Francisco, Cal., 59th Cong., 2d sess., Doc. 147 (Washington, 1907)).
27 See 65 CONG. REC. 6073-74 (1924) (reprinting letter from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes, Apr. 10, 1924) (summarizing terms of the agreement).
28 CHAN, supra, at 3.
29 CHAN, supra, at 52.
30 CHAN, supra, at 3.
31 CHAN, supra, at 52.
32 CHAN, supra, at 3.
of Filipinos and killed one in an attack on the Northern Monterey Filipino Club.\textsuperscript{33}

\textit{A racial bar to Asian immigrants}. Asian immigration largely ended with the Immigration Act of 1917,\textsuperscript{34} which excluded immigrants in the Asiatic Barred Zone, encompassing India, Southeast Asia, and the Pacific Islands. Japanese and Chinese laborers had already been excluded under the Gentleman’s Agreement and the Chinese Exclusion Act. Migrants from the Philippines were exempt from this exclusion law since they lived under the jurisdiction of the U.S., given that the Philippines was a U.S. insular territory and they were thus classified as U.S. nationals.

Seven years later, Congress took a more drastic step in enacting the Immigration Act of 1924.\textsuperscript{35} Significantly, the Act barred entry of all “aliens ineligible for citizenship.” Since only Whites, persons of African descent, and certain Mexicans\textsuperscript{36} were at that time eligible for citizenship, this law effectively barred entry of Asians. In support of the legislation, V.S. McClatchy, the influential former publisher of the Sacramento Bee stated:

\begin{quote}
Of all the races ineligible for citizenship under our law, the Japanese are the least assimilable and the most dangerous to this country. . . . They come here specifically and professedly for the purpose of colonizing and establishing here the proud Yamato race. . . . In pursuit of their intent to colonize this country with that race they seek to secure land and found large families. . . . They have greater energy, greater determination, and greater ambition than the other yellow and brown races ineligible to citizenship, and with the same low standard of living, hours of labor, use of women and child labor, they naturally make more dangerous competitors in an economic way.\textsuperscript{37}
\end{quote}

The law cut off the substantial stream of Japanese immigration—principally wives and children of male laborers already in the United States—that had continued despite the Gentlemen’s Agreement. In 1934, the Tydings-McDuffie Act stripped all Filipinos of national status and declared them aliens, which immediately subjected them to the exclusionary 1924 Act.\textsuperscript{38}

At the time of World War II, these Asian ethnicities—Chinese, Japanese, Korean, South Asian, and Filipino—were the only ones present in any appreciable numbers in the United States. All others were kept out.

\begin{footnotes}
\item[33] CHAN, \textit{supra}, at 53.
\item[34] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1943).
\item[37] Hearings before the U.S. Senate Committee on Immigration on S. 2576, 68th Cong., 1st sess., at 5-6 (March 11, 1924, Washington, DC), pp. 5-6, 34 (quoted in DANIELS, POLITICS, at 99).
\item[38] In exchange, the Act promised Filipino independence 12 years later. Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456 (1934).
\end{footnotes}
The modern context. These exclusionary laws did not loosen until the mid-20th century. In 1952, Congress passed the McCarran–Walter Act, which erased some of the color bar from our immigration laws. But explicit racial discrimination against Asians did not end until the comprehensive 1965 immigration law reform, which abolished the 1924 national origins quota system and adopted uniform country quotas for immigration. And that is when the demographics of Asian America begin to change radically, in absolute size and composition. To get some sense of the magnitude of change, consider the following data: in 1965, Asian Americans numbered 1 million; by 2010, they numbered almost 14.7 million (4.8 percent of the national population).

b. Chinese Exclusion

With this brief historical overview, we can now return to examine a set of crucial immigration cases decided in the late 19th century. At that time, the visage of the illegal or unwanted immigrant on the West Coast was distinctly Chinese. As mentioned earlier, the federal government initially looked upon Chinese immigration favorably. Pursuant to the 1868 Burlingame Treaty, Chinese immigrants could freely migrate in and out of the country.

However, after domestic economic and cultural pressures to exclude the Chinese increased, the Burlingame Treaty was renegotiated in 1880 to allow the United States to restrict, but not completely ban, the immigration of laborers. Two years later, Congress exercised the option created by the 1880 renegotiation and passed the Chinese Exclusion Act, which barred entry of laborers for ten years.

Unfortunately for the Chinese exclusionists, the 1882 Act continued to allow those Chinese in the United States as of November 17, 1880—the date the 1880 treaty was signed—to go back and forth freely between the countries. Chinese who were stopped at the border claimed that they had resided in the United States before November 17, 1880. Thus, under the express terms of the 1882 Act, they had the right to reenter.

To close this loophole, in 1884 Congress passed a law that required a specific

41 Beginning with the 2000 census, people were given the opportunity to report more than one race. The 14.7 million figure in 2010 measures those reporting only one race, “Asian.” For those who marked “Asian” and some other race, the figure rises to 17.3 million (5.6% of the population). Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, U.S. CENSUS BUREAU (Mar. 2011), available at http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.
42 Treaty Between the United States of America and the Ta-Tsing Empire, U.S.-China, June 18, 1858, 16 Stat. 739, available at http://content.cdlib.org/ark:/13030/hb4m3nb03h/?order=2&brand=calisphere [Burlingame Treaty, also known as the Burlingame-Seward Treaty of 1868].
“reentry certificate” as the sole evidence of having been present in the United States as of the treaty’s signing. But this attempted solution failed. Chinese claimed—and it is hard to know what percentage truthfully—that they had resided in the United States as of November 17, 1880, but had departed to China before the reentry certificate requirement had been instituted in 1884. Thus they could not possibly possess a certificate that had not existed when they had departed. In *Chew Heong v. United States*, the U.S. Supreme Court accepted this argument and explained that there would be no greater injustice than demanding the impossible.

### i. Re-entry certificates

Increasingly irritated by the Chinese immigration problem, in 1888 Congress passed the drastic Scott Act, which barred the reentry of Chinese who had lived in the United States, even if they held a reentry certificate. The validity of the Scott Act was the subject of the following excerpted case.

**Chae Chan Ping v. United States**

(“The Chinese Exclusion Case”)

130 U.S. 581 (1889)

**Mr. Justice FIELD delivered the opinion of the Court.**

The appellant is a subject of the emperor of China, and a laborer by occupation. He resided at San Francisco, Cal., following his occupation, from some time in 1875 until June 2, 1887, when he left for China. . . . On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steam-ship Belgic, which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of congress approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled, and his right to land abrogated, and he had been thereby forbidden again to enter the United States. 25 St. p. 504, c. 1064. * * *

The appeal involves a consideration of the validity of the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return.

[After discussing prior treaties between the United States and China that expressed “the general desire that the two nations and their peoples should be drawn closer together,” the Court addressed the development of a more recent

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45 112 U.S. 536 (1884).
“well-founded apprehension . . . that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there.”]

A few words on this point may not be deemed inappropriate here, they being confined to matters of public notoriety, which have frequently been brought to the attention of congress.

The discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers, for whose benefit they worked. These laborers readily secured employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful. For some years little opposition was made to them except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field.

The competition steadily increased as the laborers came in crowds on each steamer that arrived from China, or Hong Kong, an adjacent English port. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.

The differences of race added greatly to the difficulties of the situation. Notwithstanding the favorable provisions of the new articles of the treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to citizens or subjects of the most favored nation, they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.

In December, 1878, the convention which framed the present constitution of California, being in session, took this subject up, and memorialized Congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their
immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions; and praying Congress to take measures to prevent their further immigration. This memorial was presented to Congress in February, 1879.

So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific Coast and from private individuals, that Congress was impelled to act on the subject. [The Court related the problem that Chinese immigrants seeking to reenter the country were fraudulently stating they had departed the country prior to May 1882 and thus had no reentry certificate. In response to this problem, Congress passed new legislation on October 1, 1888, which the Court discussed as follows.]

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time hereofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.[“]

“SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.[“]

“SEC. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed.[“]

The validity of this act, as already mentioned, is assailed, as being in effect an expulsion from the country of Chinese laborers in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress. . . . It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of congress. * * *

The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. * * *

This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination. Congress has the power under the
Race, Rights, and National Security

The propriety and wisdom and justice of its action were vehemently assailed by some of the ablest and best men in the country, but no one doubted the legality of the proceeding, and any imputation by this or any other court of the United States upon the motives of the members of Congress who in either case voted for the declaration, would have been justly the cause of animadversion. . . . [T]he province of the courts is to pass upon the validity of laws, not to make them, and when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain.

There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. * * *

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. * * *

constitution to declare war, and in two instances where the power has been exercised—in the war of 1812 against Great Britain, and in 1846 against Mexico—the propriety and wisdom and justice of its action were vehemently assailed by some of the ablest and best men in the country, but no one doubted the legality of the proceeding, and any imputation by this or any other court of the United States upon the motives of the members of Congress who in either case voted for the declaration, would have been justly the cause of animadversion.
The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.

Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. * * *

Order affirmed.

Notes & Questions

1. *The Scott Act’s impact.* The enforcement of the Scott Act prevented between 20,000 and 30,000 Chinese—who had reasonably relied on their ability to return to America—from reentering the United States. Those with immediate family or more than $1,000 of property in the United States were allowed to return six years later, pursuant to an 1894 treaty.

2. *Race and legal analysis.* Justice Field, who authored the unanimous opinion, made clear that “[t]he differences of race added greatly to the difficulties of the situation.” In other words, the Chinese immigration issue was not only about economic competition or political relations between China and the United States. It was also about race.

In providing the history and context of this case, how does the U.S. Supreme Court characterize the Chinese “race”? What are the core qualities of the Chinese, both positive and negative? Pay close attention to the language used and the characteristics emphasized. Does Justice Field rely on any evidence to support his discussion of those characteristics? If not, would there have been any reliable evidence that could support those characteristics?
3. National security issues. The U.S. Supreme Court concluded that Congress had the power to enact the Scott Act. Specifically, that power is located in Congress’s ability to exclude aliens in the pursuit of national security.

a. Framing the debate: Is it odd that an immigration case decided neither during wartime nor under any military urgency is framed in national security terms? In the Court’s view, does “national security” encompass more than the protection of the country during time of declared war?

b. Racial threat: Try to link up how the Chinese were racialized and the Court’s anxieties about national security. What specific aspects about the Chinese make them such potent threats?

c. Judicial deference to national security assessments: What is the Court’s stance toward reviewing Congressional decisions about national security? Is this a practical, sensible view given the institutional limitations of the judiciary? Recall that courts typically find facts pursuant to an elaborate process, which includes complicated rules of procedure, rules of evidence, and burdens of proof—all driven by the adversarial process of dueling parties. In addition, judges are not military experts, cannot independently investigate facts, and cannot receive information in real time. Keep these factors in mind, for they resurface prominently in the Japanese American incarceration cases.

4. Have things changed? To what extent have the racial meanings ascribed to the Chinese or other Asian ethnicities changed after more than a century? For example, are Asian Americans still viewed as forever foreign? Asian Americans frequently comment that they are asked “where are you from?” and the questioner often demands the name of an Asian country. Consider these examples:

- Rush Limbaugh radio program 2011: Rawlein Soberano reported that, when Chinese President Hu Jintao visited Washington in January 2011, conservative radio show host Rush Limbaugh tried to mimic him: “Hu Jintao just got going ching, chong, ching, chong, cha.” Several lawmakers and a number of civil rights groups demanded that Limbaugh apologize for what they called blatant racism. Sen. Leland Yee of California, Chairman of the California Senate’s Committee on Asian-Pacific Islander Affairs, was one of the first to call Limbaugh for an apology. Less than a week later, Yee reported numerous racially charged death threats.

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47 Thessaly La Force, Why Do Asian-Americans Remain Largely Unseen in Film and Television?, N.Y. TIMES: T MAGAZINE (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/t-magazine/asian-american-actors-representation.html (stating, in addressing the lack of Asian Americans in film, “But even if we can prove to you that we are as good as you, the underlying message we get from the culture is that there is something else that separates us.”).
including one fax addressed to “Fish Head Leland Yee” that stated in part: “Rush Limbaugh will kick your Chink ass and expose you for the fool you are.”

- In May 2018, U.S. Senate candidate Don Blankenship issued a campaign ad attacking Majority Leader Mitch McConnell and his wife Elaine Chao, a Chinese American, saying McConnell has a “China family” and that he created jobs for “China people.”

- In March 2018, while testifying at a hearing on funding to preserve World War II Japanese American camps, Interior Secretary Ryan Zinke greeted Rep. Colleen Hanabusa, a fourth-generation Japanese American, with “konnichiwa,” the Japanese word for “good afternoon.” Zinke’s remark was criticized as a flippant and insensitive failure to distinguish between an American of Japanese ancestry and a citizen of Japan.

5. The importance of process—judicial versus administrative review. Oftentimes, not surprisingly, the outcomes in cases are influenced not only by the substantive law, but also by the procedure used in deciding the cases: who decides the case and the process governing the way the case is decided. In many of the early immigration cases, an important issue was whether an immigration official’s decision about entry was final or whether the decision was reviewable by a court of law. In Nishimura Ekiu v. United States, the Commissioner of Immigration of the State of California refused to let a Japanese woman land because he determined that she would become a “public charge.” At that time, federal law instructed that “persons likely to become a public charge” be sent back to their country of origin. Nishimura filed a habeas corpus petition, which is a request to a court to free the petitioner from illegal governmental detention. She argued that


51Nishimura Ekiu v. United States, 142 U.S. 651 (1892). While Nishimura Ekiu’s last name is likely Nishimura and this case should, therefore, probably be referred to as Nishimura v. United States, not Nishimura Ekiu v. United States, it, like other older cases involving Asian parties, is commonly referred to by including the party’s full name. We will refer to her case the way it is referred to in the case and by later commentators (with her full name), with due concern, however, that full names were used to emphasize the foreignness of Asians.
she was eligible to enter the United States and that letting the Commissioner of Immigration make the final judgment of whether she was or was not likely to be a “public charge,” without any possibility of judicial review, violated her constitutional due process rights.

The U.S. Supreme Court rejected Nishimura’s petition. It held that Congress, by statute, had made the Commissioner of Immigration the sole and exclusive judge of whether someone was a “public charge.” Moreover, doing so was perfectly constitutional:

It is not within the province of the judiciary to order that foreigners who had never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within the powers expressly conferred by Congress, are due process of law.52

*Nishimura Ekiu* is an important addition to *Chae Chan Ping*. In *Chae Chan Ping*, the Court held that Congress and the executive branch had power over substantive immigration policies, such as whether to exclude Chinese laborers. In *Nishimura Ekiu*, the Court held that Congress and the executive branch also enjoyed power over the fact-finding procedures critical to determining whether a person has the right to land under substantive immigration law. Federal power over both substantive and procedural aspects of immigration was exercised in overtly biased ways to prevent immigration of Asians, whether from China or Japan.

**ii. Registration certificates**

In 1892, the same year *Nishimura Ekiu* was decided, Congress passed the Geary Act,53 which extended the 1882 Exclusion Act for another ten years. It also created a registration requirement for all Chinese laborers within the United States. Those found without a certificate of residence from the collector of internal revenue bore the burden of demonstrating through “at least one credible white witness” that they were legal residents. The Chinese community engaged in civil disobedience; nationwide only 20 percent (less than 2 percent in San Francisco54) complied with the certificate requirements. Three Chinese immigrants challenged the draconian law, resulting in the following case. Two had been arrested for failure to have certificates of residence. The third had applied for a certificate, which was denied because the witnesses he produced were Chinese, not White.55 All three faced deportation and appealed the denials of their

52 Id. at 651, 660.
53 Act of May 5, 1892, ch. 60, § 1, 27 Stat. 25 (repealed 1943).
54 HIROSHI MOTOMURA, AMERICANS IN WAITING 35 (2006).
55 Fong Yue Ting v. United States, 149 U.S. 698, 699 (1893).
requests for freedom.

**Fong Yue Ting v. United States**

149 U.S. 698 (1893)

Mr. Justice GRAY, after stating the facts, delivered the opinion of the Court.

[After discussing Nishimura Ekiu v. United States and Chae Chan Ping v. United States, the Court continued]. The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the constitution. * * *

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government. * * *

In Nishimura Ekiu’s case, it was adjudged that, although congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien’s right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency. * * *

The power of congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien’s right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides. * * *

This section [6 of the 1892 Act] proceeds to enact that any Chinese laborer within the limits of the United States, who shall neglect, fail or refuse to apply for a certificate of residence within the year, or who shall afterwards be found within the jurisdiction of the United States without such a certificate, “shall be deemed and adjudged to be unlawfully within the United States.” The meaning of this clause, as shown by those which follow, is not that this fact shall thereupon be held to be conclusively established against him, but only that the want of a certificate shall be prima facie evidence that he is not entitled to remain in the
United States; for the section goes on to direct that he “may be arrested . . . [and] deported . . . unless he shall establish clearly, to the satisfaction of said judge, that by . . . unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act. * * *

The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, “by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act,” is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, “by at least one credible white witness,” may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping’s case that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, “was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.” And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, “by the oath or affirmation of citizens of the United States.” Acts of March 22, 1816, c. 32, § 2, 3 Stat. 259. * * *

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

Mr. Justice BREWER dissenting.

I rest my dissent on three propositions: First, that the persons against whom the penalties of section 6 of the act of 1892 are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the Constitution, and secured by its guarantees against oppression
and wrong; and, third, that section 6 deprives them of liberty and imposes punishment without due process of law, and in disregard of constitutional guarantees, especially those found in the 4th, 5th, 6th, and 8th articles of the amendments. * * *

[No act has [yet] been passed, denying the right of those laborers who had once lawfully entered the country to remain, and they are here not as travelers or only temporarily. We must take judicial notice of that which is disclosed by the census, and which is also a matter of common knowledge. There are 100,000 and more of these persons living in this country, making their homes here, and striving by their labor to earn a livelihood. They are not travelers, but resident aliens. * * *

These appellants, therefore, are lawfully within the United States, and are here as residents, and not as travelers. They have lived in this country, respectively, since 1879, 1877, and 1874—almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion.

That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations. * * *

It is said that the power here asserted [to deport summarily] is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

Whatever may be true as to exclusion, and as to that see Chinese Exclusion case and Nishimura Ekiu v. United States, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions; and it may be that the national government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders, and absolutely forbid aliens to enter. But the constitution has potency everywhere within the limits of our territory, and the powers which the national government
may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the constitution.

I pass, therefore, to the consideration of my third proposition: Section 6 deprives of “life, liberty, and property without due process of law.” It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another.

Once more: Supposing a Chinaman from San Francisco, having obtained a certificate, should go to New York or other place in pursuit of work, and on the way his certificate be lost or destroyed. He is subject to arrest and detention, the cost of which is in the discretion of the court, and judgment of deportation will be suspended a reasonable time to enable him to obtain a duplicate from the officer granting it. In other words, he cannot move about in safety without carrying with him this certificate. The situation was well described by Senator Sherman in the debate in the Senate: “They are here ticket-of-leave men; precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession.” And he added: “This inaugurates in our system of government a new departure; one, I believe, never before practised, although it was suggested in conference that some rules had been adopted in slavery times to secure the peace of society.”

It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guarantees of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?

In the Yick Wo case [(1886)], in which was presented a municipal ordinance, fair on its face, but contrived to work oppression to a few engaged in a single occupation, this court saw no difficulty in finding a constitutional barrier to such injustice. But this greater wrong, by which a hundred thousand people are subject to arrest and forcible deportation from the country, is beyond the reach of the protecting power of the constitution.

In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?

Mr. Justice FIELD dissenting.

I had the honor to be the organ of the court in announcing this opinion and judgment [in Chae Chan Ping, affirming Congress’s power to exclude Chinese aliens]. I still adhere to the views there expressed in all particulars; but between legislation for the exclusion of Chinese persons—that is, to prevent them from entering the country—and legislation for the deportation of those who have
acquired a residence in the country under a treaty with China, there is a wide and essential difference.

[Justice Field proceeded to criticize the Alien and Sedition Acts of 1798.] I repeat the statement, that in no other instance has the deportation of friendly aliens been advocated as a lawful measure by any department of our government. And it will surprise most people to learn that any such dangerous and despotic power lies in our government—a power which will authorize it to expel at pleasure, in time of peace, the whole body of friendly foreigners of any country domiciled herein by its permission, a power which can be brought into exercise whenever it may suit the pleasure of Congress, and be enforced without regard to the guarantees of the Constitution intended for the protection of the rights of all persons in their liberty and property. Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized? * * *

Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent—and such consent will always be implied when not expressly withheld, and in the case of the Chinese laborers before us was in terms given by the treaty referred to—he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our constitution. * * *

Let us test this doctrine by an illustration. If a foreigner who resides in the country by its consent commits a public offense, is he subject to be cut down, maltreated, imprisoned, or put to death by violence, without accusation made, trial had, and judgment of an established tribunal following the regular forms of judicial procedure? If any rule in the administration of justice is to be omitted or discarded in his case, what rule is it to be? If one rule may lawfully be laid aside in his case, another rule may also be laid aside, and all rules may be discarded. In such instances a rule of evidence may be set aside in one case, a rule of pleading in another; the testimony of eye-witnesses may be rejected and hearsay adopted, or no evidence at all may be received, but simply an inspection of the accused, as is often the case in tribunals of Asiatic countries where personal caprice and not settled rules prevail. That would be to establish a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its
consent, and such an exercise of power is not permissible under our Constitution. Arbitrary and tyrannical power has no place in our system. * * *

There is no dispute about the power of congress to prevent the landing of aliens in the country; the question is as to the power of Congress to deport them without regard to the guaranties of the Constitution. The statement that in England the power to expel aliens has always been recognized and often exercised, and the only question that has ever been as to this power is whether it could be exercised by the King without the consent of Parliament, is, I think, not strictly accurate. It may be admitted that the power had been exercised by the various governments of Europe. Spain expelled the Moors; England in the reign of Edward I, banished fifteen thousand Jews; and Louis XIV, in 1685, by revoking the Edict of Nantes, which gave religious liberty to Protestants in France, drove out the Huguenots. Nor does such severity of European governments belong only to the distant past. Within three years Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race—an act of barbarity which has aroused the indignation of all Christendom. . . . [A]ll the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetuate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the constitution. * * *

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offence. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, family and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. * * *

I cannot but regard the decision as a blow against constitutional liberty, when it declares that congress has the right to disregard the guaranties of the Constitution intended for the protection of all men, domiciled in the country with the consent of the government, in their rights of person and property. How far will its legislation go? The unnaturalized resident feels it today, but if Congress can disregard the guaranties with respect to any one domiciled in this country with its consent, it may disregard the guaranties with respect to naturalized citizens. What assurance have we that it may not declare that naturalized citizens of a particular country cannot remain in the United States after a certain day, unless they have in their possession a certificate that they are of good moral character and attached to the principles of our Constitution, which certificate they must obtain from a collector of internal revenue upon the testimony of at least one competent witness of a class or nationality to be designated by the government?

What answer could the naturalized citizen in that case make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of today?
1. **Understanding the Geary Act.** What precisely did the Geary Act accomplish in substance and in procedure? In what ways did it differ from the Scott Act passed four years earlier?

2. **Substantive power.** One way to challenge a statute is to argue that Congress lacked the constitutional power to enact the statute. Contrary to the states, which enjoy a general “police power,” our federal government is a government of “limited powers.” Accordingly, for every exercise of federal power, there must be some source of that power in the U.S. Constitution. So, from where did the majority of the U.S. Supreme Court locate Congress’s power to deport aliens? Is this the same source as the power to exclude aliens? What were the dissenting Justices’ views on this issue?

3. **Chinese as a race, revisited.** Recall how the Chinese were constructed as a racial group back in *Chae Chan Ping*. We see similar constructions in the majority opinion, but surprisingly different ones in the dissenting opinions. Try to identify relevant language in all three opinions.

   a. **The puzzling Justice Field:** It would be error to think that the dissenters thought that the Chinese were equal to White Americans. For example, although Justice Field dissented in this case, he authored the majority opinion in *Chae Chan Ping*, which shut out tens of thousands of Chinese from reentry. His true feelings about the Chinese were displayed in private correspondence to John Norton Pomeroy in 1882:

   The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be at all times conflicts arising out of the antagonism of the races which would only tend to disturb public order and mar the progress of the country. . . . I belong to the class, who repudiate the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race—the Caucasian race. 56

   What then could explain the following language in Justice Field’s dissent?

   As men having our common humanity, [the Chinese] are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the

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practice of our government, and the language of our Constitution.57

b. Reconciling Chae Chan Ping and the dissents: In fact, all dissenters in this case joined the unanimous majority in Chae Chan Ping. Why might they have had radically disparate responses to the exclusion at issue in Chae Chan Ping compared to the deportation at issue in Fong Yue Ting? In other words, for the dissenters, is there some moral or practical principle, formal rule of law, or political explanation that distinguished Chae Chan Ping from Fong Yue Ting? Should legal protections depend so much on whether an individual has gained a physical toehold in the United States, as the dissenters suggested?

4. Fair process. In Fong Yue Ting, what procedures were envisioned in the deportation process? According to the Court’s majority, were these procedures adequate to the task? Again, what did the dissenting Justices think?

In 1903, Yamataya v. Fisher58 (the Japanese Immigrant Case), the Court again addressed the scope of an immigrant’s procedural rights. Yamataya had somehow entered the United States but was soon captured by the immigration inspector. The inspector determined that she was a “public charge” and ordered her deported. Yamataya filed a habeas corpus petition with the federal district court, in which she argued that she was lawfully in the United States and that the inspector’s findings were made without procedural due process (that is, without adequate procedural safeguards for accuracy). On appeal, the U.S. Supreme Court pulled slightly back from its earlier holding in Nishimura Ekiu. At least for those persons already in the United States, the Court found that some minimal amount of process is constitutionally required for a deportation hearing. As the Court wrote:

[1]It is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.59

Nevertheless, the Court held that Yamataya was given a sufficient opportunity to be heard, despite her lack of legal counsel and her inability to understand English. According to the Court, if her lack of English skills “put her at some disadvantage . . . that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus.”60

57 Fong Yue Ting, 149 U.S. at 754 (1893) (Field, J. dissenting).
59 Id. at 101.
60 Id. at 102.
5. Lasting precedent—The plenary power doctrine. These four cases—Chae Chan Ping, Nishimura Ekiu, Fong Yue Ting, and Yamataya—constitute the original case-law foundations of the “plenary power doctrine.” As described by immigration scholar Hiroshi Motomura, the plenary power doctrine’s contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.\(^{61}\)

The government has continued to assert that it has wide latitude on matters involving immigration, relying on precedent developed in the early Chinese exclusion cases. See Chapter 8 for discussion of how cases like Chae Chin Ping form the basis for government’s national security arguments today, even if the government does not explicitly cite them.\(^{62}\) Should we be concerned that cases like Chae Chan Ping are read to require courts to defer to the government on matters involving immigration or national security? Why?

In sum, these immigration cases are not only important markers in Asian American legal history but are the building blocks of an important, controversial power still exercised by the federal government.

2. Citizenship

Despite the laws that excluded Asians from American shores, many persons of Asian descent gained entry into the United States. To enter the political community, however, they needed citizenship. Citizenship on the federal and state levels determined whether one could vote, hold political office, and have access to courts. There are two principal ways to obtain federal citizenship: by naturalization and by birth on American soil.

a. Naturalization

Article II of the U.S. Constitution delegates to Congress the power to create uniform rules of naturalization.\(^{63}\) Congress exercised this power in 1790 when it enacted the first federal naturalization statute. This statute restricted naturalization to only “free White persons.”\(^{64}\) But did Asians fit into this category? A pair of cases that reached the U.S. Supreme Court in 1922 and 1923, Ozawa v. United States and United States v. Thind, provided decisive answers.

\(^{62}\) See, e.g., Chang, Whitewashing Precedent, 68 CASE WESTERN L. REV. 1183.
\(^{63}\) U.S. CONST. art. II § 8.
\(^{64}\) Naturalization Act of 1790, ch. 3, 1 STAT. 103 (repealed 1795).
Before turning to these two cases, it may be helpful to consider some current scholarly ideas about race.

**Note: Race as a Social Construction**

The naturalization cases required courts to determine who was “White.” As seen in the prior cases, judges did not distinguish much, if at all, between race as grounded in physical difference and race as grounded in cultural difference. In the so-called “Chinese Exclusion case” of *Chae Chan Ping*, the U.S. Supreme Court complained of “foreigners of a different race in this country, who will not assimilate with us.”

Further, the Court did not inquire into the barriers to assimilation faced by Chinese immigrants. Nor was the Court later able to accept that a Japanese immigrant such as Ozawa who had deliberately assimilated himself into White American culture (by speaking English, etc.) could be thought of as “White.” Immigrants from Asia were thought to be physically different from, and hence culturally unassimilable to, European immigrants—and that was that. The legal system reinforced the idea that race was the extrapolation of physical differences to seemingly “natural” cultural traits and social hierarchies. While this strand of racial thinking is associated with the 19th century, it persists today under the rubric of “scientific racism.”

By the early 20th century, social scientists such as Franz Boas had challenged if not completely discredited this view of race by arguing that culture rather than biology best explained human difference. The scientific project of identifying mutually exclusive racial categories ultimately faltered due to internal illogic. As legal historian Peggy Pascoe points out, “culturalists delighted in pointing out the discrepancies between them, showing that scientific racists could not agree on such seemingly simple matters as how many races there were or what criteria—blood, skin color, hair type—best indicated race.” Legal cases testing the meaning of “White” in various federal and state laws highlighted the absurdities of scientific racial classification (such as questions over whether dark-skinned Aryans such as South Asians were “White”) as well as the obvious racism embodied in the biological race approach.

The early 21st century approach toward race is arguably dominated by the “social construction” view. That is, race is not largely determined by biology or genetics; instead, race should be understood as a social, historical, and cultural construction, which is the product of human choice. On the one hand, this seems

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65 *Chinese Exclusion Case*, 130 U.S. at 606.
68 Id. at 54.
69 See id. at n.22.
to be a more sophisticated understanding of race. On the other hand, what does it really mean to be a “social construction?” Isn’t everything arguably a social construction—for example, New York, beauty, war? If so, then what is helpful about pointing out that race specifically is a “social construction?” The next excerpt provides greater precision and clarity about this term, albeit through a slightly unexpected framing.

Jerry Kang, *Cyber-race*


Race continues to be a fundamental axis of social, economic, cultural, and political organization. Race affects both the symbolic and material realms of our lives, shaping our self-conceptions and altering our life-chances. Race affects who we befriend, date, and marry. Race affects our purchases. Race affects our vote. Race affects our relationship with law enforcement. How does race structure our lives so powerfully?

Different theories approach this question in different ways to provide different insights. . . . Among possible candidates, one promising method is the social cognitive approach, which is empirically well grounded and has impressive explanatory and critical power. Applying this method, [here is a] descriptive model of racial mechanics: In any social interaction, we map each other into racial categories that trigger associated racial meanings. These meanings influence the terms, nature, and evolution of the interaction. As shorthand, I coin the term “racial schema” to refer to all three elements: (i) racial categories, through which the basic concept of race is understood; (ii) rules of racial mapping, which are used to classify individuals into categories; (iii) racial meanings, which are cognitive beliefs about and affective reactions to the categories.

To elaborate each element, I employ the following fictional stories:

Late-night Walk: After a long conference, I am walking in a strange downtown, late at night, looking for a taxi. I see two people approaching me. From a distance, I ascertain their rough size. From their clothing and body shape, I guess that they are male. As they walk closer, I see that they are Black. For reasons I cannot explain, my heartbeat quickens, and I become anxious, glancing around for other people. I begin taking a few steps to cross to the other side of the street but decide against it. Instead, I grip my briefcase more tightly, closer to my body, then walk at a faster pace. As I pass the Black men, I peek over my shoulder just to make sure that they have walked on by.

Personal Ads: I am searching the personal classifieds for advertisements placed by Asian American women. Thankfully, the ads not only provide racial self-identifications but also state the specific races that the person is willing to date. A friend asks me why I am searching so narrowly. I respond, defensively, with many reasons. Some of the reasons are assumptions about Asian American women—their appearance, their personality, their likely interest in an Asian American man. I say, “I know this is a generalization, but we will probably have
more in common.” I also explain that an Asian male/Asian female couple does not raise eyebrows although other matches might.

Race is a familiar concept within our culture. Although most Americans cannot rattle off a crisp definition, we know “race” when we see it. Most people understand race as a biological characteristic, inherited from our parents and manifested in physical appearance. Integral to the concept of race is the typology of racial categories. In fact, the way that many people define race is simply to list categories, such as White, Black, Asian, Latino/a, and American Indian. Sometimes, we are not exactly sure whether a particular category counts as a race as opposed to a nationality, ethnicity, or religion. But we should not be chided for such imprecision because racial categories reflect fickle social conventions, not good science.

Upon encountering an individual, we collect data through our senses to map the individual to a racial category. In the Late-night Walk, such racial mapping is based on physical appearance. By looking at the men’s skin color, hair, and facial features, I automatically map them into the “African American” racial category. The architecture of a face-to-face interaction permits this classification. . . . Racial mapping can also take place discursively, as in the Personal Ads. The advertisement could have been silent on race. . . . But in the marketplace for romance, disclosing race is the current fashion, and neither public morality nor law protests.

Racial mapping triggers racial meanings—cognitive beliefs about and affective reactions to—people in these racial categories. * * *

Racial meanings are triggered, often automatically, without self-awareness, and once triggered, they alter our behavior. In some cases, the change seems trivial, as in the Late-night Walk. But my change in body language will be noticed by the African American men. If they intended me no harm, my reaction is a palpable insult. . . . In the Personal Ads, by focusing narrowly on Asian American female companions, I cut myself off from possible intimacies with women of other races. What would happen if classified advertisements were colorblind, if they operated under a racial veil?

In these ways, racial mechanics alter interpersonal interactions. These microlevel changes accumulate over time and people to produce enduring macrolevel effects on our culture, economics, and politics. What is more, racial mechanics may be self-reinforcing. For example, if the racial meanings associated with Black men include aggressiveness, I will react accordingly. Not surprisingly, Black men will perceive these behavioral cues, and, fed up with paying this Black Tax, may convey hostility in their body language or speech, thereby reinforcing my racial meanings.

[T]he description of racial mechanics I offer—because of its simplicity—gives us practical tools with which to solve problems. . . . This social cognitive model also particularizes a fundamental theme of Critical Race Theory that “race is a social construction.” “Race,” in the sense of its racial categories, is a social construction, which lacks meaningful biological bases; the same is true for the
rules of racial mapping and the social meanings we infuse into racial categories.

**Notes & Questions**

1. *Racial schema.* The picture below summarizes how racial schemas work:

   The basic point is that all the ovals in the diagram—the racial *mapping rules*, the racial *categories* themselves, and the racial *meanings*—are all socially constructed. Human beings, exercising their agency, make them up. Racial schemas and their elements provide us a vocabulary with which to describe cases we have already studied.

2. *Racial meanings.* Consider the first set of cases we read in this chapter, such as *Chae Chan Ping* and *Fong Yue Ting*. One reason why they are interesting is because they bluntly revealed the racial meanings that judges (and much of America) then had about the Chinese people. Can you list these stereotypes and prejudices? Moreover, the judges did not believe that these meanings were due to trivial differences in environment or culture. Rather, they believed them to be inherent, essential, and fundamentally biological. So, when people say, “race is a social construction,” quite often they mean to challenge (negative) racial meanings that are assumed to be both accurate and biologically determined.

3. *Racial mapping rules.* The following two opinions, the naturalization cases, are slightly different in that they focus more on the rules by which we classify individuals or entire groups into preexisting racial categories. Again, by demonstrating the arbitrariness or social and historical contingency of these classifications, one can show that “race is a social construction.”

4. *Racial categories.* Finally, what about racial categories? Should ethnicities as different as Chinese, Japanese, or South Asian be classified into a single racial category called “Asian”? If so, who decides? Consider also how even the racial
terminology for this category has changed over time: “yellow,” “Mongolian,” “Asiatic,” “Oriental,” “Asian,” “Asian American,” or “Asian Pacific American”?

5. Richard Posner as a social constructionist? Judge Richard Posner, typically associated with conservative and libertarian views, addressed whether discrimination on the basis of being Iranian might count as racial discrimination under a civil rights statute, 42 U.S.C. § 1981. He wrote:

Race, nationality, and ethnicity are sometimes correlated, but they are not synonyms. A racial group as the term is generally used in the United States today is a group having a common ancestry and distinct physical traits. The largest groups are whites, blacks, and East Asians. Iran is a country, not a race, and an “Iranian” is simply a native of Iran. Iranians and other Central Asians are generally regarded as “white,” whatever their actual skin color; many Indians, for example, are dark. Some Central Asians are indistinguishable in appearance from Europeans, or from Americans whose ancestors came from Europe, while others (besides Indians), for example Saudi Arabians, would rarely be mistaken for Europeans. Some Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke the kind of hostility associated with racism. Yet hostility to an Iranian might instead be based on the fact that Iran is regarded as an enemy of the United States, though most immigrants to the United States from Iran are not friends of the current regime. So one would like to know whether the plaintiff is charging that the discrimination against her is based on politics or on her seeming to be member of a foreign “race.” (Her brief is unclear on the point.)

Is this judicial analysis based upon a social constructionist view of race?

As you read the next two cases, reconsider the historical context in the early 20th century. Anti-Asian sentiments abounded. In 1917, the Asiatic Barred Zone ended immigration from various Asian nations such as India. And in 1924 (two years after Ozawa, one year after Thind), Congress adopted the national origins quota system, which ended nearly all legal Asian immigration.

Ozawa v. United States
260 U.S. 178 (1922)

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant is a person of the Japanese race born in Japan. He applied, on October 16, 1914, to the United States District Court for the Territory of Hawaii to be admitted as a citizen of the United States. His petition was opposed by the

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70 Abdullahi v. Prada USA Corp., 520 F.3d 710, 712 (7th Cir. 2008).
United States District Attorney for the District of Hawaii. Including the period of his residence in Hawaii, appellant had continuously resided in the United States for twenty years. He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded. * * *

These questions for purposes of discussion may be briefly restated:

1. Is the Naturalization Act of June 29, 1906, limited by the provisions of § 2169 of the Revised Statutes of the United States?
2. If so limited, is the appellant eligible to naturalization under that section?

* * * [Ozawa’s first argument was that the comprehensive Naturalization Act of 1906 instituted uniform rules of naturalization, without any racial restriction. Although § 2169 of the Revised Statutes did contain a racial restriction, Ozawa argued that by its very terms, that section applied only to Title XXX, of which the 1906 Act was not a part. The Court rejected that argument:] In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was confined to “White persons” (with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms. . . . We are, therefore, constrained to hold that the Act of 1906 is limited by the provisions of § 2169 of the Revised Statutes.

Second. This brings us to inquire whether, under § 2169, the appellant is eligible to naturalization. * * *

On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that these two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. * * *

If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation “white” were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable
them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

The question then is, Who are comprehended within the phrase “free white persons?” Undoubtedly the word “free” was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

We have been furnished with elaborate briefs in which the meaning of the words “white person” is discussed with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.

Beginning with the decision of Circuit Judge Sawyer, in In re Ah Yup, 5 Sawy. 155 (1878), the federal and state courts, in an almost unbroken line, have held that the words “white person” were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see for example: In re Camille, 6 Fed. 256 [(1880)]; In re Saito, 62 Fed. 126 [(1894)]; In re Nian, 6 Utah 259 [(1889)]; In re Kumagai, 163 Fed. 922 [(1908)]; In re Yamashita, 30 Wash. 234, 237 [(1902)]; In re Ellis, 179 Fed. 1002 [(1910)]; In re Mozumdar, 207 Fed. 115, 117 [(1931)]; In re Singh, 257 Fed. 209, 211-212 [(1919)]; and Petition of Charr, 273 Fed. 207 [(1921)]. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested.

The determination that the words “white person” are synonymous with the words “a person of the Caucasian race” simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words “white person” mean a Caucasian is not to
establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection “the gradual process of judicial inclusion and exclusion.”

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

United States v. Thind

261 U.S. 204 (1923)

Mr. Justice SUTHERLAND delivered the opinion of the Court.

[The central question presented was: “Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?”]

Section 2169, Revised Statutes (Comp. St. § 4358), provides that the provisions of the Naturalization Act “shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent.”

If the applicant is a white person within the meaning of this section he is entitled to naturalization; otherwise not. In Ozawa v. United States, we had occasion to consider the application of these words to the case of a cultivated Japanese and were constrained to hold that he was not within their meaning. . . . Following a long line of decisions of the lower Federal courts, we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is popularly known as the Caucasian race. But as there pointed out, the conclusion that the phrase “white persons” and the word “Caucasian” are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to
be dealt with, in doubtful and different cases, by the “process of judicial inclusion and exclusion.” Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not ipso facto and necessarily conclude the inquiry. “Caucasian” is a conventional word of much flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words “white persons” are treated as synonymous for the purposes of that case, they are not of identical meaning.

In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word “Caucasian” but the words “white persons,” and these are words of common speech and not of scientific origin. The word “Caucasian” not only was not employed in the law but was probably wholly unfamiliar to the original framers of the statute in 1790. When we employ it we do so as an aid to the ascertainme of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear and the use of it in its scientific sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.

They imply, as we have said, a racial test; but the term “race” is one which, for the practical purposes of the statute, must be applied to a group of living persons now possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for determination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a
statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words “white persons” to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. * * *

The term “Aryan” has to do with linguistic and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. . . . Our own history has witnessed the adoption of the English tongue by millions of Negroes, whose descendants can never be classified racially with the descendants of white persons notwithstanding both may speak a common root language.

The word “Caucasian” is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin, which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, (The World’s Peoples, 24, 28, 307, et seq.) it includes not only the Hindu but some of the Polynesians, (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasian cast of their features, though in color they range from brown to black. We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.

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2 Encyclopaedia Britannica (11th Ed.) p. 113: “The ill-chosen name of Caucasian, invented by Blumenbach in allusion to a South Caucasian skull of specially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races. Again, two of the best marked varieties of mankind are the Australians and the Bushmen, neither of whom, however, seems to have a natural place in Blumenbach's series.”

4 Keane himself says that the Caucasian division of the human family is ‘in point of fact the most debatable field in the whole range of anthropological studies.’ Man: Past and Present, p. 444.

And again: ‘Hence it seems to require a strong mental effort to sweep into a single category, however elastic, so many different peoples—Europeans, North Africans, West Asiatics, Iranians, and others all the way to the Indo-Gangetic plains and uplands, whose complexion presents every shade of color, except yellow, from white to the deepest brown or even black.

‘But they are grouped together in a single division, because their essential properties are one, . . . their substantial uniformity speaks to the eye that sees below the surface . . . we recognize a common racial stamp in the facial expression, the structure of the hair, partly also the bodily proportions, in all of which points they agree more with each other than with the other main divisions. Even in the case of certain black or very dark races, such as the Bejas, Somali, and a few other Eastern
The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine. The explanation probably is that “the innumerable varieties of mankind run into one another by insensible degrees,” and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. * * *

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under § 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white.

The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come. When they extended the privilege of American citizenship to “any alien, being a free white person,” it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when § 2169, reenacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning. * * *

What we now hold is that the words “free white persons” are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word “Caucasian” only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Hamites, we are reminded instinctively more of Europeans or Berbers than of thanks to their more regular features and brighter expression.’
It is not without significance in this connection that Congress, by the Act of February 5, 1917, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the Congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

**Notes & Questions**

1. *Doctrinal consistency.* In both Ozawa and Thind, the Court struggled with the relationship between the word “White” in the naturalization statute and the pseudo-scientific classification “Caucasian.” Was the Court’s analysis of this relationship the same in both cases?

2. *Legal definition of “race.”* After Ozawa and Thind, what is the judicial definition of “race” under the federal naturalization statute? Is it essentially phenotype (skin color, rough morphology), genotype (genetic ancestry), behavior (culture, traditions), ideology (religion, political beliefs), or some combination of all of these?

3. *Separate but equal.* In both Ozawa and Thind, the Court declared that it meant no disrespect in concluding that Japanese and Indians are not White and thus ineligible for naturalization. For example, in Ozawa, the Court stated: “Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.”

   Similarly, in Thind, the Court announced:

   It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize[s] it and reject[s] the thought of assimilation.

   Why did the Court include these disclaimers? Should it matter whether denying naturalization to Ozawa and Thind had nothing to do with racial inferiority? Given the earlier case law involving persons of Asian descent, does it seem truthful to say that the naturalization laws were not motivated by an assumption of racial inferiority?

4. *Tails I win, heads you lose.* Note the legal arguments regarding assimilation that Takao Ozawa made on his own behalf. Could he have provided

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any additional evidence that would have persuaded the Court of his sincere desire to reject being Japanese in favor of being American? Or was Ozawa’s intent to be American fundamentally irrelevant?

In his argument to be classified as White, Ozawa emphasized that

[in name, General Benedict Arnold was an American, but at heart he was a traitor. In name, I am not an American, but at heart I am a true American. I set forth the following facts which will sufficiently prove this. (1) I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu; notwithstanding all Japanese subjects are requested to do so. These matters were reported to the American government. (2) I do not have any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere. (3) I am sending my children to an American church and American school in place of a Japanese one. (4) Most of the time I use the American (English) language at home, so that my children cannot speak the Japanese language. (5) I educated myself in American schools for nearly eleven years by supporting myself. (6) I have lived continuously within the United States for over twenty-eight years. (7) I chose as my wife one educated in American schools . . . instead of one educated in Japan. (8) I have steadily prepared to return the kindness which our Uncle Sam has extended me . . . so it is my honest hope to do something good to the United States before I bid a farewell to this world.]

These arguments were to no avail. Later, in the wartime incarceration cases, the U.S. Supreme Court would rely on evidence of Japanese schools in the United States and Japanese education abroad as indicia of possible disloyalty. Why would the judiciary ignore such evidence (i.e., not sending one’s children to Japanese schools in the United States) in the context of naturalization but rely on such evidence (i.e., sending one’s children to Japanese schools in the United States) in the context of the incarceration? Do these pose indistinguishable legal questions?

5. Hard cases then—Armenians. If you think that persons of Japanese and Indian descent are easy cases (in other words, they are clearly not White), what do you think about Armenians? In In re Halladjian, the United States contended that the Armenian petitioners belonged to the “Yellow” race. The court showed remarkably sophisticated skepticism about the very existence of a European or Yellow race. Nonetheless, when push came to shove, it found persuasive what it considered to be unanimous ethnographic consensus that Armenians were White. Interestingly, the court also appealed to the original meaning of the term “White”

75 Hirabayashi I, 320 U.S. at 97.
in the naturalization statute. It concluded as follows:

From all these illustrations, which have been taken almost at random, it appears that the word “white” has been used in colonial practice, in the federal statutes, and in the publication of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where “French neutrals” are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a Negro or an Indian was classed as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, “white” is still the catch-all word which includes all persons not otherwise classified.

What does this passage suggest about how society constructs and manipulates racial categories? Can a whole race of people pass from White to non-White? Can you think of examples of the reverse transformation?

6. Removing the racial bar. Eventually, naturalization rights were granted to Asians in the mid-20th century. They were extended in 1943 to Chinese, in 1946 to Asian Indians and Filipinos, and in 1952 (McCarran-Walter Act) to all other Asians. The granting of these naturalization rights was prompted at least partly, perhaps mostly, by the political context of World War II and the Cold War. In World War II, China was an important ally, whereas Japan was an enemy. In its propaganda, Japan highlighted how persons of Asian descent were mistreated in America. It grew increasingly difficult for the United States to rebut such claims when federal law clearly exhibited racism against Asians, including its allied Chinese. When signing the 1943 Chinese Repealer (which repealed the Chinese

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77 Id. at 843-44.
Exclusion Acts and allowed Chinese to naturalize), President Franklin Roosevelt made clear that doing so was “important in the cause of winning the war.”

b. Citizenship via Birth

Although the racial bar on naturalization was lifted only in the 1940s and 50s, U.S. citizens of Asian descent existed prior to the mid-20th century. This was due to another path to citizenship: birthright citizenship. The first sentence of the Fourteenth Amendment of the U.S. Constitution reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Remarkably, the original Constitution failed to define a concept as fundamental as citizenship. It was not until the ratification of the Fourteenth Amendment after the Civil War that “citizenship” was introduced constitutionally.

To understand its significance, one must understand this clause’s relationship to the infamous Dred Scott v. Sanford. Scott, whose slavery status was at issue, claimed that he became a free man by being brought into the free territory of Illinois. He sued for freedom in federal court. Federal courts, however, are courts of limited subject matter jurisdiction. They can only hear certain types or cases outlined in Article III of the Constitution and in various federal statutes. Subject matter jurisdiction in this case was alleged on diversity of citizenship (i.e., a citizen of one state was suing a citizen of another state). Scott claimed to be a citizen of Illinois, the defendant Sanford a citizen of New York.

The U.S. Supreme Court ruled that no subject matter jurisdiction existed because no African American person such as Scott could be a “citizen” as understood in the Constitution. After this threshold ruling that the Court lacked power to decide this case, the Court did not have to go any further. Indeed, courts generally refrain from addressing issues that are unnecessary to deciding a case. The Court reached the merits of the dispute anyway, striking down the Missouri Compromise.

The Civil War raged from 1861 to 1865. At its end, Reconstruction began. One legal element of Reconstruction was the passage of the Civil Rights Act of 1866.

The Act made clear that a human being such as Scott was a U.S. citizen by virtue of his birth on American soil. For fear that the Act would be deemed
unconstitutional, among other reasons, the Fourteenth Amendment was crafted and ratified in 1868.\textsuperscript{86}

Although the wording concerning citizenship by birth was changed slightly from the Civil Rights Act to the Fourteenth Amendment, the purpose was the same. How, then, would this clause be applied to Asians? Would Asians born on American soil be allowed to join the political community?

\textit{United States v. Wong Kim Ark}

169 U.S. 649 (1898)

\textbf{Mr. Justice GRAY, after stating the case, delivered the opinion of the Court.}

Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom.

In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress,

\textsuperscript{86} U.S. CONG. amend XIV, §§ 1, 5. The relevant portions of the Fourteenth Amendment are:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
known as the “Chinese Exclusion Acts,” prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him. * * *

V.

In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-Ninth congress, began by enacting that “all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” * * *

The first section of the fourteenth amendment of the constitution begins with the words, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” . . . Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v. Sandford, (1857); and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. But the opening words, “All persons born,” are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in . . . The Slaughterhouse Cases. * * *

Mr. Justice Miller, delivering the [Slaughterhouse] opinion of the majority of the court, after observing that the thirteenth, fourteenth, and fifteenth articles of amendment of the constitution were all addressed to the grievances of the negro race, and were designed to remedy them, continued as follows: “We do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth articles, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the states, which properly and necessarily fall within the protection of these
articles, that protection will apply, though the party interested may not be of African descent.”

The only adjudication that has been made by this court upon the meaning of the clause, “and subject to the jurisdiction thereof,” in the leading provision of the fourteenth amendment, is Elk v. Wilkins, 112 U.S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, “and subject to the jurisdiction thereof,” within the meaning of the clause in question.

That decision was placed upon the grounds [that] . . . “Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more ‘born in the United States, and subject to the jurisdiction thereof,’ within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations.”

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country.

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.
VI.

* * * Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are “subject to the jurisdiction thereof,” in the same sense as all other aliens residing in the United States. * * *

In Yick Wo v. Hopkins, the decision was that an ordinance of the city of San Francisco [discriminated against] natives of China, still subjects of the emperor of China, but domiciled in the United States * * * was contrary to the fourteenth amendment of the constitution. Mr. Justice Matthews, in delivering the opinion of the court, said: “The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.” “The fourteenth amendment to the constitution is not confined to the protection of citizens. It says, ‘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.’ These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . . [Further, i]t is accordingly enacted by section 1977 of the Revised Statutes that ‘all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.’” * * *

The decision in Yick Wo v. Hopkins, indeed, did not directly pass upon the effect of [the words “subject to the jurisdiction thereof” in the first clause of] the fourteenth amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, “subject to the jurisdiction thereof” (that is to say, of the United States), at the beginning, a less comprehensive meaning than to the words “within its jurisdiction” (that is, of the state), at the end of the same section; or to hold that persons, who are indisputably “within the jurisdiction” of the state, are not “subject to the jurisdiction” of the nation.

During the debates in the Senate in January and February, 1866, upon the Civil Rights Bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read, “All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color.” Mr. Cowan, of Pennsylvania, asked, “Whether it will not have the effect of naturalizing the children of Chinese and Gypsies, born in this country?” Mr. Trumbull answered, “Undoubtedly;” and asked, “Is not the child born in this country of German parents a citizen?” Mr. Cowan replied, “The children of German parents are citizens; but Germans are not Chinese.” Mr. Trumbull rejoined: “The law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a
European. “Mr. Reverdy Johnson suggested that the words, “without distinction of color,” should be omitted as unnecessary; and said: “The amendment, as it stands, is that all persons born in the United States, and not subject to a foreign power, shall, by virtue of birth, be citizens. To that I am willing to consent; and that comprehends all persons, without any reference to race or color, who may be so born.” And Mr. Trumbull agreed that striking out those words would make no difference in the meaning, but thought it better that they should be retained, to remove all possible doubt.

The fourteenth amendment of the constitution, as originally framed by the house of representatives, lacked the opening sentence. When it came before the Senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form, (less the words “or naturalized,”) and reading, “All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Mr. Cowan objected, upon the ground that the Mongolian race ought to be excluded, and said, “Is the child of the Chinese immigrant in California a citizen?” “I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that State and the other Pacific States to manage them as they may see fit, they may be useful; but I would not tie their hands by the Constitution of the United States as to prevent them hereafter from dealing with them as in their wisdom they see fit.” Mr. Conness, of California, replied: “The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States. . . . We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the constitution of the United States to be entitled to civil rights and to equal protection before the law with others.” It does not appear to have been suggested, in either house of congress, that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the fourteenth amendment.

Doubtless, the intention of the congress which framed, and of the states which adopted, this amendment of the constitution, must be sought in the words of the Amendment, and the debates in congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves, and are, at the least, interesting as showing that the application of the Amendment to the Chinese race was considered and not overlooked. * * * *
power to confer citizenship, not a power to take it away. . . . The fourteenth amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. * * *

VII.

Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. * * *

Order affirmed.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN, dissenting.

* * * [The opinion begins with commentators on the law of nations, rejecting the notion that a child’s place of birth should determine his citizenship: “[T]he true bond which connects the child with the body politic is not the matter of inanimate piece of land, but the moral relations of his parentage. . . . The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction.”]

* * *

[I]n Elk v. Wilkins, 112 U.S. 94, 101, [the Court said that the phrase “subject to the jurisdiction thereof,” is] not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance[.]

To be “completely subject” to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

Now I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.

Generally speaking, I understand the subjects of the emperor of China—that ancient empire, with its history of thousands of years and its unknown continuity in belief, transitions, and government, in spite of revolutions and changes of dynasty—to be bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance, and their abettors, and, in effect, held
the relatives at home of Chinese in foreign lands as hostages for their loyalty. And . . . they seem in the United States to have remained pilgrims and sojourners as all their fathers were. At all events, they have never been allowed by our laws to acquire our nationality, and, except in sporadic instances, do not appear ever to have desired to do so.

The fourteenth amendment was not designed to accord citizenship to persons so situated, and to cut off the legislative power from dealing with the subject.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of a country is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

But can the persons expelled be subjected to “cruel and unusual punishments” in the process of expulsion, as would be the case if children born to them in this country were separated from them on their departure, because citizens of the United States? Was it intended by this amendment to tear up parental relations by the roots? * * *

It is not to be admitted that the children of persons so situated [the Chinese] become citizens by the accident of birth. On the contrary, I am of opinion that the president and senate by treaty, and the congress by legislation, have the power, notwithstanding the fourteenth amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this country under such consent, in spite of treaty and statute.

In other words, the fourteenth amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens.

Tested by this rule, Wong Kim Ark never became and is not a citizen of the United States, and the order of the district court should be reversed.

I am authorized to say that Mr. Justice Harlan concurs in this dissent.

Notes & Questions

1. Interpreting text. Both the majority and dissenting opinions seek to discern the Fourteenth Amendment’s declaration that “citizens” include “all persons born or naturalized in the United States, and subject to the jurisdiction thereof.” What this phrase means may turn on the interpretive methodology used to divine its meaning. Consider, for example, how judges interpret statutes passed by legislatures. Often, they rely on the plain language of the statutory text (referred to as the plain-meaning approach). Another method looks at other court decisions interpreting the same statute (known as judicial precedent). Courts also sometimes rely on statements of record made during the legislature’s deliberations prior to
enacting the statute into law (known as legislative history). They will additionally try to interpret statutes to further the social policies that they think underlie the particular legislation and to avoid undesirable policy consequences.

At issue here is not a statute but a constitutional amendment, which might lend itself to still other methods of interpretation. For example, some judges embrace various forms of originalism—that the meaning of a constitutional provision is fixed at the date at which the provision was adopted and does not change. Other judges opt for various forms of interpretivism—that the meaning of constitutional provisions, especially vague phrases that gesture to values and ideals, must always be interpreted in context, which include evolving social, economic, and political norms and conditions. In this case, which interpretive methodology (or methodologies) did the Court emphasize?

2. The dissent. In your own words, articulate the main argument that the dissenting Justices had against Wong Kim Ark’s claim to citizenship. As a factual matter, it was uncontested that Wong Kim Ark was born on American soil. But why then was he not subject to the jurisdiction of the United States?

3. Continuing challenges to citizenship. You might think that Wong Kim Ark settled the issue of birthright citizenship once and for all. But whenever xenophobia crests, the matter resurfaces. For instance, during World War II, the Native Sons of the Golden West petitioned to strike from the voter rolls all persons born in the United States to Japanese alien parents. Indeed, according to historian Greg Robinson, the “openly expressed purpose [of the Native Sons of the Golden West] was to erase the citizenship of all Asian Americans, as descendants of ‘immigrants ineligible to citizenship.’” At this time, anti-Japanese sentiments were rabid, and the incarceration had already begun. The district court rejected the plaintiff’s request on the clear authority of Wong Kim Ark.

4. Current debates. Citizenship by birth has been challenged even more recently. For example, H.R. 1868, the “Birthright Citizenship Act of 2009,” introduced by Georgia House Representative Nathan Deal proposed to amend the Immigration and Nationality Act so as to limit the number of individuals who would qualify for birthright citizenship. Specifically, the Act would have restricted birthright citizenship to individuals whose parents are either “(1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the armed forces.”

87 See Regan v. King, 49 F. Supp. 222 (N.D. Cal. 1942), aff’d, 134 F.2d 413 (9th Cir. 1942).
89 Id.
Supporters of the measure alleged economic rationales. For instance, then House Minority Leader John Boehner argued that a change to the Constitution is worth considering because “[i]n certain parts of our country, clearly our schools, our hospitals are being overrun by illegal immigrants—a lot of whom came here just so their children could become U.S. citizens.”

On October 30, 2018, President Trump announced his plan to issue an executive order doing away with birthright citizenship to children of undocumented immigrants. Vice President Mike Pence defended the president’s actions: "We all know what the 14th Amendment says. We all cherish the language of the 14th Amendment," Pence said, "But the Supreme Court of the United States has never ruled on whether or not the language of the 14th Amendment, subject to the jurisdiction thereof, applies specifically to people who are in the country illegally."

If you were deciding this issue, and based on existing precedent, would you conclude that the Fourteenth Amendment guarantees citizenship to all children born on U.S. soil, regardless of the citizenship status of their parents? Would your decision be different if there was proof that such a limit is necessary to preserve our country’s resources? Would your decision be different if there was evidence that such a limit was grounded in hostility against Mexican immigrants?

C. Second Class Status

So far, we have discussed how Asians, viewed as unassimilable, undesirable foreigners, faced partially closed doors to America by being physically excluded at the border and politically excluded from the community of equal citizenship. Many Asians still managed to find their way into the United States, however, and to set down roots through work, play, marriage, education, and civic life. This section addresses just some of the ways in which Asian Americans were discriminated against in their daily lives and excluded from full participation in American society.

1. Alien Land Laws

From early on, Asian immigrants were barred from owning land. Early land laws passed in the 19th century targeted the Chinese. For example, the 1859


Oregon Constitution stated explicitly: “No Chinaman, not a resident of the state at the adoption of [this] Constitution, shall ever hold any real estate or mining claim.”93 In 1879, the California Constitution extended land rights to aliens who were of the “white race or of African descent” but left the rights of those ineligible for citizenship unprotected by the state constitution.94 Similarly, motivated by anti-Chinese sentiment, the territorial legislature of Washington in 1886 ensured broad property rights to aliens except to those aliens incapable of becoming citizens.95

But the most important judicial opinions addressing Asians and the right to own property arise from the Japanese experience. In the early 20th century in California, Japanese Americans enjoyed great success in certain forms of intensive truck farming. As they purchased more land and flourished economically, White American resentment began to increase. From 1907 to 1911, the California legislature considered numerous bills to constrain alien ownership of land. Political pressure from Presidents Theodore Roosevelt and William Howard Taft kept the bills from being enacted into law. However, by 1913, the resentment had grown too strong for then President Woodrow Wilson to stop the passage of California’s alien land law.

The 1913 California statute thus became the first alien land law in the nation motivated by anti-Japanese sentiments.96 The law granted all aliens eligible for citizenship plenary property rights but permitted aliens ineligible for citizenship (that is, those who could not be naturalized as “free White persons”) to enjoy only those property rights guaranteed by treaty. Not coincidentally, the Treaty of 1911 between the United States and Japan made no mention of protecting the agricultural property rights of the Japanese residing in the United States.

To get some sense of the motivations of the alien land law, consider the public comments of Attorney General Ulysses S. Webb, one of the authors of the law, in a 1913 speech before the Commonwealth Club of San Francisco:

> The fundamental basis of all legislation upon this subject, State and Federal, has been, and is, race undesirability. It is unimportant and foreign to the question under discussion whether a particular race is inferior. The simple and single question is, is the race desirable? [The alien land law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land. And it seeks to limit the numbers who will come by limiting the opportunities for their activity

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94 See id. at 216 (quoting Cal. Const. art. I, § 17 (1879, amended 1954, repealed 1974)).
95 When Washington joined the Union in 1889, its constitution severely constrained ownership of property by aliens except by those who in good faith had declared their intention to become citizens. One commentator has argued, however, that this provision was less motivated by race than by the general fear of nonresident alien land holdings. See id. at 232-33.
here when they arrive.97

In addition to racial undesirability, naked economic self-interest also played an important role. Consider, again, the comments Webb made to the U.S. Supreme Court in his brief in Frick v. Webb:98

It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship,—in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer.99

In 1920, Californians voted by popular initiative to close certain loopholes left open in the 1913 law.100 Legal scholar Keith Aoki noted that this initiative “passed with a decisive majority in every county in California,” and “barred guardianships and trusteeships in the name of ‘aliens ineligible to citizenship,’ . . . barred all leases of agricultural land, barred corporations with a majority of shareholders who were ‘aliens ineligible to citizenship’ from owning agricultural land and classified sharecropping contracts as ‘interests in land.’” It drastically reduced Japanese-owned acreage.101

By 1925, Arizona (1917), Louisiana (1921), Washington (1921), New Mexico (1922), Idaho, Montana, Oregon (1923), and Kansas (1925) had all passed alien land laws. The U.S. Supreme Court upheld the constitutionality of these land laws in Terrace v. Thompson, 263 U.S. 197 (1923).

Adding insult to injury—escheat actions: While Japanese Americans were incarcerated during World War II, three more states passed alien land laws—Utah, Wyoming, and Arkansas. The Arkansas legislature did not bother using the code phrase “aliens ineligible for citizenship.” Instead, they stated bluntly that “no Japanese or a descendent of a Japanese shall ever purchase or hold title to any lands in the State of Arkansas.”103 Moreover, many states’ attorneys general commenced escheat actions—lawsuits to revert real property to state ownership because of the lack of a lawful owner—while Japanese American owners were locked up in distant camps.

These alien land laws would not be struck down or repealed until after World War II, when the U.S. Supreme Court signaled constitutional concerns about them in the 1948 decision of Oyama v. California.104

98 263 U.S. 326 (1923).
102 The 1921 Act closed various loopholes in the 1889 state constitution. As to the 1921 statute, there is no doubt that the “Japanese problem” was foremost in the legislators’ minds.
In *Oyama*, the Court struck down a California law that created a presumption of intending to evade escheat actions if an alien “ineligible for citizenship” (i.e., Japanese parent) bought land and transferred it to a citizen (child). The Court focused on the rights not of the alien father but of the citizen son, and held that his equal protection rights had been violated. The Court did not, however, strike down the alien land law in its entirety. It ruled only on this evidentiary presumption, which harmed citizens.

Noting this attitudinal shift, various state courts in California, Montana, and Oregon started to strike down their alien land laws as violating federal equal protection rights of aliens. Also, in 1952, Congress removed the racial bar on naturalization, which declawed legal discrimination against “aliens ineligible for citizenship.” Interestingly, Washington state did not repeal its law until 1966, through a ballot initiative won by an underwhelming majority vote of 430,984 (50.94 percent) to 415,082 (49.06 percent).

The early 21st century has seen the repeal of several states’ alien land laws. Working in conjunction with teams of students, Professor Gabriel “Jack” Chin authored recommendations for the repeal of such laws in Florida, New Mexico, Wyoming, and Kansas. While the recommendations passed in Wyoming, New Mexico, and Kansas, Florida voters rejected the recommendation when it appeared on the ballot in 2008.

### 2. Anti-Miscegenation Statutes

At various points, as many as 38 states had anti-miscegenation statutes prohibiting interracial marriage. As Professor Rachel Moran explains, anti-miscegenation statutes “confirmed [the] status [of Asians] as unassimilable foreigners” and grew out of fear that Asian men would covet white women. The statutes were based on the view of Asian Americans as unclean and diseased: “Chinese were assumed by most of the delegates [at the California State Constitutional Convention] to be full of filth and disease. . . . American institutions and culture would be overwhelmed by the habits of people thought to be sexually

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promiscuous, perverse, lascivious, and immoral.” And advocates of the laws feared the “mongrel” children that would result from a union between races: “Were the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth.”

It was not until the 1967 case of Loving v. Virginia, 388 U.S. 1 (1967), that the Supreme Court struck down anti-miscegenation statutes as invalid under the federal Constitution.

3. Segregated Schools

School segregation meant that Japanese American children could not learn next to White Americans, or, more important, they could not take advantage of educational resources reserved solely for White Americans. California law allowed school boards to “exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent.” In May of 1905, the San Francisco School Board announced plans to place Chinese and Japanese students in separate schools, “not only for the purpose of relieving the congestion . . . in our schools, but also for the higher end that our children should not be placed in any position where the youthful impressions may be affected by association with persons of the Mongolian race.”

In 1927, Gong Lum brought suit after his nine-year-old, American-born daughter, Martha Lum, was denied entry to a white school in the Rosedale consolidated school district in Mississippi. The Court affirmed her exclusion, based on its line of cases approving “separate, but equal” schools for blacks:

Most of the cases cited [including Plessy v. Ferguson] arose, it is true, over the establishment of separate schools as between white pupils and black pupils; but we cannot think that the question is any different, or that any different result can be reached, assuming the cases above cited

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113 David Brudnoy, Race and the San Francisco School Board Incident: Contemporary Evaluations, 50 CAL. HIST. Q. 295, 296 (1971) (quoting John P. Young, The Support of the Anti-Oriental Movement, 34 Annals Am. Acad. Pol. & Soc. Sci. 231, 236 (1989)). As mentioned earlier, the school board’s actions led to an international incident in which Roosevelt had to appease both the angered Japanese government and the exclusionists at home. The exclusionists eventually won the end of the entry of laborers from Japan.
114 Gong Lum v. Rice, 275 U.S. 78, 87 (1927).
to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.\textsuperscript{115}

4. Inability to Act as Witnesses

Racist rules of evidence meant that Asian immigrants could not testify against White Americans in a court of law. In the 1854 case of \textit{People v. Hall}, the California Supreme Court held that Chinese witnesses could not testify against a white murder defendant under a statute that provided “No Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man.”\textsuperscript{116} Like the other legislation discussed in this chapter, these laws were also grounded in racist attitudes about immigrants and communities of color. The purpose of the statutes barring testimony from Chinese, the court noted, was to “throw around the citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes.”\textsuperscript{117}

The court warned:

The same rule which would admit them to testify would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.\textsuperscript{118}

Arizona’s law was broader than California, prohibiting any “black or mulato, [sic] or Indian, Mongolian or Asiatic” from testifying against a white person.\textsuperscript{119}

\begin{itemize}
\item[115] Id.
\item[116] People v. Hall, 4 Cal. 399 (1854) (quoting Act concerning Crimes and Punishments, 1850 Cal. Stat. 240, § 14 (repealed by CAL. CIV. PROC. CODE § 18 (West 1872))).
\item[117] Id. at 403.
\item[118] Id. at 404-05.
\end{itemize}
The inability of Asian Americans to testify against Whites made it difficult, if not impossible, to enforce the few rights they formally possessed.

The Voting Rights Act of 1870 put an end to the exclusion of Asians as witnesses, stating that “all persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence . . . as is enjoyed by white citizens.”

5. Other Forms of Discrimination and Exclusion

Asian Americans were discriminated against, isolated, vilified, and excluded from participation in numerous other ways. Because Asian immigrants were barred from citizenship, they were unable to vote. And Asian immigrants and their American citizen children experienced discrimination in just about every aspect of their daily lives, including in housing, employment, and places of public accommodation.

Fred Korematsu, who challenged the orders removing Japanese Americans from the West Coast, recalled:

In high school, [I] felt equal, but on the outside, going out in public, after school, people stare at you because I’m different. I’m Asian, so they assumed I’m not an American and that I come from Japan. Restaurants would refuse to serve me and places would refuse to give you a haircut. I had to go to Chinatown, and that was the only place that would give you a haircut. And when I’d go there, there’d be 20 people waiting, all Asians, to get a haircut.

6. Forever Foreign

After reading the early history of discriminatory laws discussed in this chapter, think about whether the racist stereotypes upon which they were based persist. If so, do they continue to infect government policy? How?

As this book is being written in 2020, there has been a significant increase in attacks on Asian Americans by people who identify them and China as causing the COVID-19 coronavirus pandemic. Those attacks include demeaning, racist, and threatening statements and assaults. “Asian Americans across the country said they were afraid—to go grocery shopping, to travel alone on subways or buses, to let their children go outside.” On May 13, 2020, the nonprofit group Stop AAPI Hate stated that it received over 1,700 reports from Asian Americans of

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121 Fred Korematsu, address to public school, transcribed for Of Civil Wrongs and Rights: The Fred Korematsu Story, documentary, produced by Eric Paul Fournier and Ken Korematsu.
coronavirus discrimination in the two months since it started a reporting center.\textsuperscript{123} Incidents reported in the popular press included the following:

- On March 9, 2020, 26-year-old Yuanyuan Zhu was walking to her gym in San Francisco, California, when she saw a man yell an expletive about China and then scream at a passing bus to “run them over.” He then spit on her. After hiding herself in a corner, she quietly cried.\textsuperscript{124}

- A 16-year-old was attacked at his school in the San Fernando Valley in California by bullies who accused him of having the virus.\textsuperscript{125}

- After an Asian woman pressed an elevator button with her elbow, a man in the elevator said, “Don’t bring that Chink virus here.”\textsuperscript{126}

- In late March, Tony Yan and his wife Lisa Li found their Yakima, Washington, restaurant vandalized. Spray-painted outside was, “Take the corona Back you chink.”\textsuperscript{127}

On March 16, 2020, President Trump began to refer to the COVID-19 virus as a “Chinese virus,” although public health experts explicitly warned against naming viruses after geographic locations or groups of people.\textsuperscript{128} Despite his later statement that he did not intend to disparage Asian Americans,\textsuperscript{129} he continued to be questioned about stereotyping, and hostility against, them.\textsuperscript{130}

Professor Grace Kao observed, “With something like COVID-19, where


\textsuperscript{124} Tavernise & Öppel, supra.


\textsuperscript{129} Id.

\textsuperscript{130} Oliver Darcy, Trump abruptly ends press conference after contentious exchange with reporters, CNN BUSINESS (May 12, 2020), https://www.cnn.com/2020/05/11/media/trump-press-briefing-weijia-jian-kaitylan-collins/index.html (reporting that when Asian American reporter Weijia Jiang asked President Trump why he saw coronavirus testing as a global competition given that 80,000 Americans had died, he responded, “Maybe that’s a question you should ask China. . . . Don’t ask me. Ask China that question, OK?”).
everyone is scared of catching it, Asian Americans become the physical embodiment of disease, so we're seen with great suspicion. I'm a little scared to go outside, frankly, especially if I start coughing.”

Is this type of race-based hostility always present—at times overt, but always just under the surface? What kinds of abusive actions—private or governmental—might be triggered by the stereotype of Asian Americans as dangerous and forever foreign?

D. Some Early Asian American Success as Civil Rights Plaintiffs

Asian immigrants were successful in fighting discrimination in some cases. Starting in 1873, as a large number of Chinese immigrants established small laundries, the City of San Francisco passed ordinances targeting them. By 1900, the census reported that 25 percent of all employed Chinese males in the United States were launderers, with 18 percent in agriculture and 14 percent working as household servants. These laundry ordinances were worded neutrally, without specific mention of the Chinese. For example, they taxed all laundries that did not use a horse and wagon, or they required all laundries made of wooden structures to undergo special licensing procedures. In practice, however, these facially neutral ordinances were crafted specifically to harass the Chinese and were enforced accordingly.

Some of these ordinances were accepted as reasonable exercises of a state’s police power. For example, in Soon Hing v. Crowley, the U.S. Supreme Court addressed an ordinance that required laundries to close at night. The Court accepted the general rule as one enacted without racial animus, and found that it was a reasonable police regulation for the city’s safety and welfare.

Another such ordinance, which required all laundries housed in wooden buildings to receive a license from the San Francisco board of supervisors, was the subject of the well-known Yick Wo v. Hopkins case. The Court held that enforcement of the ordinance violated the Equal Protection Clause of the Fourteenth Amendment:

[B]oth petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will

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131 Somvichian-Clausen, supra.
133 Soon Hing v. Crowley, 113 U.S. 703 (1885).
of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. . . . [W]hile this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.135

You might wonder how the plaintiffs in Yick Wo were able to mount a legal challenge all the way up to the U.S. Supreme Court. In fact, a laundry guild called the Tung Hing Tong provided the resources. This guild regulated the Chinese laundries and by 1885 represented 300 of them. The guild retained prominent, well-paid, White American attorneys to argue their cases, a tactic that flustered the city’s attorneys. Consider, for example, the briefing of the case in the Court. Yick Wo’s brief was a lean 13 pages. The city’s brief was a meandering 111 pages with the following apologia and accusations:

Were it not for the wealth and power of the Tung Hing Tong and the brilliant talent of opposing counsel, this argument should have been much shorter. It is not the fault of the respondent that the petitioner has hung the dragon flag of the Chinese empire over his door, and dared the municipality of San Francisco to touch it. . . . Strip this case of its imported features; disconnect it with the Tung Hing Tong; remove the disturbing elements of luminaries of the law of superior ability distributing themselves on . . . pages of printed matter, and we might have submitted our case without briefs and without argument.

Against the background of this historical and contextual summary, the next two chapters detail the legal rationales for the wartime incarceration of West Coast Japanese Americans.

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135 Id. at 374.
No. 3:16-CV-595-CWR-LRA

CLARENCE JAMISON,

Plaintiff,

v.

NICK MCCLENDON,

In his individual capacity,

Defendant.

ORDER GRANTING QUALIFIED IMMUNITY

Before CARLTON W. REEVES, District Judge.

Clarence Jamison wasn’t jaywalking.1
He wasn’t outside playing with a toy gun.2

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1 That was Michael Brown. See Max Ehrenfreund, The risks of walking while black in Ferguson, WASH. POST (Mar. 4, 2015).
2 That was 12-year-old Tamir Rice. See Zola Ray, This Is The Toy Gun That Got Tamir Rice Killed 3 Years Ago Today, NEWSWEEK (Nov. 22, 2017).
He didn’t look like a “suspicious person.”

He wasn’t suspected of “selling loose, untaxed cigarettes.”

He wasn’t suspected of passing a counterfeit $20 bill.

He didn’t look like anyone suspected of a crime.

He wasn’t mentally ill and in need of help.

He wasn’t assisting an autistic patient who had wandered away from a group home.

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3 That was Elijah McClain. See Claire Lampen, What We Know About the Killing of Elijah McClain, THE CUT (July 5, 2020).

4 That was Eric Garner. See Assoc. Press, From Eric Garner’s death to firing of NYPD officer: A timeline of key events, USA TODAY (Aug. 20, 2019).

5 That was George Floyd. See Jemima McEvoy, New Transcripts Reveal How Suspicion Over Counterfeit Money Escalated Into The Death Of George Floyd, FORBES (July 8, 2020).

6 That was Philando Castile and Tony McDade. See Andy Mannix, Police audio: Officer stopped Philando Castile on robbery suspicion, STAR TRIB. (July 12, 2016); Meredith Deliso, LGBTQ community calls for justice after Tony McDade, a black trans man, shot and killed by police, ABC NEWS (June 2, 2020).

7 That was Jason Harrison. See Byron Pitts et al., The Deadly Consequences When Police Lack Proper Training to Handle Mental Illness Calls, ABC NEWS (Sept. 30, 2015).

8 That was Charles Kinsey. See Florida policeman shoots autistic man’s un-armed black therapist, BBC (July 21, 2016).
He wasn’t walking home from an after-school job.\textsuperscript{9}

He wasn’t walking back from a restaurant.\textsuperscript{10}

He wasn’t hanging out on a college campus.\textsuperscript{11}

He wasn’t standing outside of his apartment.\textsuperscript{12}

He wasn’t inside his apartment eating ice cream.\textsuperscript{13}

He wasn’t sleeping in his bed.\textsuperscript{14}

He wasn’t sleeping in his car.\textsuperscript{15}

\textsuperscript{9} That was 17-year-old James Earl Green. See Robert Luckett, \textit{In 50 Years from Gibbs-Green Deaths to Ahmaud Arbery Killing, White Supremacy Still Lives}, JACKSON FREE PRESS (May 8, 2020); see also Robert Luckett, \textit{50 Years Ago, Police Fired on Students at a Historically Black College}, N.Y. TIMES (May 14, 2020); Rachel James-Terry & L.A. Warren, ‘All hell broke loose’: Memories still vivid of Jackson State shooting 50 years ago, CLARION LEDGER (May 15, 2020).


\textsuperscript{11} That was Phillip Gibbs. See James-Terry & Warren, \textit{supra}.

\textsuperscript{12} That was Amadou Diallo. See Police fired 41 shots when they killed Amadou Diallo. His mom hopes today’s protests will bring change., CBS NEWS (June 9, 2020).

\textsuperscript{13} That was Botham Jean. See Bill Hutchinson, \textit{Death of an innocent man: Timeline of wrong-apartment murder trial of Amber Guyger}, ABC NEWS (Oct. 2, 2019).

\textsuperscript{14} That was Breonna Taylor. See Amina Elahi, ‘Sleeping While Black’: Louisville Police Kill Unarmed Black Woman, NPR (May 13, 2020).

\textsuperscript{15} That was Rayshard Brooks. See Jacob Sullum, \textit{Was the Shooting of Rayshard Brooks ’Lawful but Awful’?}, REASON (June 15, 2020).
He didn’t make an “improper lane change.”  
He didn’t have a broken tail light.  
He wasn’t driving over the speed limit.  
He wasn’t driving under the speed limit.
No, Clarence Jamison was a Black man driving a Mercedes convertible.
As he made his way home to South Carolina from a vacation in Arizona, Jamison was pulled over and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs.
Nothing was found. Jamison isn’t a drug courier. He’s a welder.
Unsatisfied, the officer then brought out a canine to sniff the car. The dog found nothing. So nearly two hours after it started, the officer left Jamison by the side of the road to put his car back together.

17 That was Walter Scott. See Michael E. Miller et al., How a cellphone video led to murder charges against a cop in North Charleston, S.C., WASH. POST (Apr. 8, 2015).
18 That was Hannah Fizer. See Luke Nozicka, ‘Where’s the gun?’: Family of Sedalia woman killed by deputy skeptical of narrative, KANSAS CITY STAR (June 15, 2020).
19 That was Ace Perry. See Jodi Leese Glusco, Run-in with Sampson deputy leaves driver feeling unsafe, WRAL (Feb. 14, 2020).
Thankfully, Jamison left the stop with his life. Too many others have not.20

The Constitution says everyone is entitled to equal protection of the law – even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called “qualified immunity.” In real life it operates like absolute immunity.

In a recent qualified immunity case, the Fourth Circuit wrote:

> Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives.21

This Court agrees. Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise.22 Countless more have suffered from other

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20 See, e.g., Mike Baker et al., Three Words. 70 cases. The tragic History of ‘I Can’t Breathe.’, N.Y. TIMES (June 29, 2020) (discussing the deaths of Eric Garner, George Floyd, and 68 other people killed while in law enforcement custody whose last words included the statement, “I can’t breathe.”).

21 Estate of Jones v. City of Martinsburg, W. Virginia, 961 F.3d 661, 673 (4th Cir. 2020), as amended (June 10, 2020).

22 Mark Berman et al., Protests spread over police shootings. Police promised reforms. Every year, they still shoot and kill nearly 1,000 people., WASH. POST (June 8, 2020) (“Since 2015, police have shot and killed 5,400 people.”); see also Alicia Victoria Lozano, Fatal Encounters: One man is tracking every officer-involved killing in the U.S., NBC NEWS (July 11, 2020), (“As of July 10, Fatal Encounters lists more than 28,400 deaths dating to Jan. 1, 2000. The entries include both headline-making cases and thousands of lesser-known deaths.”).
forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability.

This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer’s motion seeking as much is therefore granted.

But let us not be fooled by legal jargon. Immunity is not exoner-ation. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.

As the Fourth Circuit concluded, “This has to stop.”

I. Factual and Procedural Background

On July 29, 2013, Clarence Jamison was on his way home to Neeses, South Carolina after vacationing in Phoenix, Arizona. Jamison was driving on Interstate 20 in a 2001 Mercedes-Benz CLK-Class convertible. He had purchased the vehicle 13 days before from a car dealer in Pennsylvania.

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23 See, e.g., Jamie Kalven, Invisible Institute Relaunches The Citizens Police Data Project, THE INTERCEPT (Aug. 16, 2018) (discussing “a public database containing the disciplinary histories of Chicago police officers . . . . It includes more than 240,000 allegations of misconduct involving more than 22,000 Chicago police officers over a 50-year period.”); Andrea J. Ritchie, How some cops use the badge to commit sex crimes, WASH. POST (Jan. 12., 2018) (“According to a 2010 Cato Institute review, sexual misconduct is the second-most-frequently reported form of police misconduct, after excessive force.”).

24 Estate of Jones, 961 F.3d at 673.

25 The facts are drawn from the parties’ depositions.
As Jamison drove through Pelahatchie, Mississippi, he passed Officer Nick McClendon, a white officer with the Richland Police Department, who was parked in a patrol car on the right shoulder.\textsuperscript{26} Officer McClendon says he decided to stop Jamison because the temporary tag on his car was “folded over to where [he] couldn’t see it.” Officer McClendon pulled behind Jamison and flashed his blue lights. Jamison immediately pulled over to the right shoulder.\textsuperscript{27}

As Officer McClendon approached the passenger side of Jamison’s car, Jamison rolled down the passenger side window. Officer McClendon began to speak with Jamison when he reached the window. According to McClendon, he noticed that Jamison had recently purchased his car in Pennsylvania, and Jamison told him that he was traveling from “Vegas or Arizona.”

Officer McClendon asked Jamison for “his license, insurance, [and] the paperwork on the vehicle because it didn’t have a tag.” Jamison provided his bill of sale, insurance, and South Carolina driver’s license. Officer McClendon returned to his car to conduct a background check using the El Paso Intelligence Center (“EPIC”). The EPIC check came back clear immediately. Officer McLendon then contacted the National Criminal Information Center (“NCIC”) and asked the dispatcher to run a criminal history on Jamison as well as the VIN on his car.

\textsuperscript{26} That night, Officer McClendon was working in Pelahatchie pursuant to an interlocal agreement between the Richland and Pelahatchie Police Departments.

\textsuperscript{27} Jamison testified that there were two other officers on the scene. The record does not contain any evidence from these individuals.
According to Officer McClendon, he walked back to the passenger side of Jamison’s car before hearing from NCIC. He later admitted in his deposition that his goal when he returned to Jamison’s car was to obtain consent to search the car. Once he reached the passenger side window, Officer McClendon returned Jamison’s documents and struck up a conversation without mentioning that the EPIC background check came back clear. Thinking he was free to go after receiving his documents, Jamison says he prepared to leave.

This is where the two men’s recounting of the facts diverges. According to Officer McClendon, he asked Jamison if he could search his car. Jamison asked him, “For what?” Officer McClendon says he responded, “to search for illegal narcotics, weapons, large amounts of money, anything illegal,” and that Jamison simply gave his consent for the search.

According to Jamison, however, as he prepared to leave, Officer McClendon put his hand over the passenger door threshold of Jamison’s car and told him to, “Hold on a minute.” Officer McClendon then asked Jamison – for the first time – if he could search Jamison’s car. “For what?” Jamison replied. Officer McClendon changed the conversation, asking him what he did for a living. They discussed Jamison’s work as a welder.

Officer McClendon asked Jamison – for the second time – if he could search the car. Jamison again asked, “For what?” Officer McClendon said he had received a phone call reporting

28 This part of Officer McClendon’s testimony is undisputed. Jamison testified that he did not know if Officer McClendon heard back from NCIC prior to returning to Jamison’s car.
that there were 10 kilos of cocaine in Jamison’s car. 29 That was a lie. Jamison did not consent to the search.

Officer McClendon then made a third request to search the car. Jamison responded, “there is nothing in my car.” They started talking about officers “planting stuff” in people’s cars.

At this point, Officer McClendon “scrunched down,” placed his hand into the car, and patted the inside of the passenger door. As he did this, Officer McClendon made his fourth request saying, “Come on, man. Let me search your car.” Officer McClendon moved his arm further into the car at this point, while patting it with his hand.

As if four asks were not enough, Officer McClendon then made his fifth and final request. He lied again, “I need to search your car... because I got the phone call [about] 10 kilos of cocaine.”

Jamison would later explain that he was “tired of talking to [Officer McClendon].” Jamison kept telling the officer that there was nothing in the car, and the officer refused to listen.

Officer McClendon kept at it. He told Jamison that even if he found a “roach,”30 he would ignore it and let Jamison go. The conversation became “heated.” Jamison became frustrated and gave up. He told Officer McClendon, “As long as I can see what you’re doing you can search the vehicle.”

Officer McClendon remembers patting Jamison down after he exited the car. Both agree that Officer McClendon directed Jamison to stand in front of the patrol car, which allowed

29 Officer McClendon denies saying such a thing.

30 “A ‘roach’ is what remains after a joint, blunt, or marijuana cigarette has been smoked. It is akin to a cigarette butt.” United States v. Abernathy, 843 F.3d 243, 247 n.1 (6th Cir. 2016) (citation omitted).
Jamison to see the search. As Jamison walked from his vehicle to the patrol car parked behind, he remembers asking Officer McClendon why he was stopped. Officer McClendon said it was because his license plate – a cardboard temporary tag from the car dealership – was “folded up.” In his deposition, the Officer would later explain, “When you got these two bolts in and you’re driving 65 miles an hour down the highway, it’s going to flap up where you can’t see it.” Jamison testified, however, that it was not curled up and “had four screws in it.”

Officer McClendon later testified that he searched Jamison’s car “from the engine compartment to the trunk to the undercarriage to underneath the engine to the back seats to anywhere to account for all the voids inside the vehicle.”

As he started the search, NCIC dispatch called and flagged a discrepancy about whether Jamison’s license was suspended. Officer McClendon told the dispatcher to search Jamison’s driving history, which should have told them the status of Jamison’s license. NCIC eventually discovered that Jamison’s license was clear, although it is not apparent from the record when Officer McClendon heard back from the dispatcher.

According to Jamison, Officer McClendon continued speaking to Jamison during the search. He brought up “the 10 kilos of cocaine,” asserted that the car was stolen, asked Jamison how many vehicles he owned, and claimed that Jamison did not have insurance on the car. Jamison kept saying that there was nothing in his car. At one point, Jamison heard a “pow”

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31 When Officer McClendon was shown the cardboard tag during his deposition, it showed no signs of being creased. The officer claimed that it either could have folded without creasing or that someone had ironed out the crease.
that “sounded like a rock” coming from inside the car, so he walked up to the car to see what had caused the noise. Officer McClendon told him to “Get back in front of my car.” During the search, Jamison also requested to go to the bathroom several times, which Officer McClendon allowed.

Officer McClendon admitted in his deposition that he did not find “anything suspicious whatsoever.” However, he asked Jamison if he could “deploy [his] canine.” Jamison says he initially refused. Officer McClendon asked again, though, and Jamison relented, saying “Yes, go ahead.” Officer McClendon “deployed [his] dog around the vehicle.” The dog gave no indication, “so it confirmed that there was nothing inside the vehicle.”

Before leaving, Officer McClendon asked Jamison to check his car to see if there was any damage. He gave Jamison a flashlight and told Jamison that he would pay for anything that was damaged. Jamison – who says he was tired – looked on the driver’s side of the car and on the backseat, told Officer McClendon that he did not see anything, and returned the flashlight within a minute.

In total, the stop lasted one hour and 50 minutes.\(^{32}\)

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\(^{32}\) This explains why he was tired. Here he was, standing on the side of a busy interstate at night for almost two hours against his will so Officer McClendon could satisfy his goal of searching Jamison’s vehicle. In that amount of time, Dorothy and Toto could have made it up and down the yellow brick road and back to Kansas. See Lee Pfeiffer, *The Wizard of Oz*, *Encyclopedia Britannica* (Mar. 19, 2010) (noting the 101-minute run time of the 1939 film). If Jamison was driving at 70 MPH before being stopped, in the 110 minutes he was held on the side of the road he would have gotten another 128 miles closer to home, through Rankin, Scott, Newton, and Lauderdale counties and more than 40 miles into Alabama.
Jamison subsequently filed this lawsuit against Officer McClendon and the City of Pelahatchie, Mississippi. He raised three claims.

In “Claim 1,” Jamison alleged that the defendants violated his Fourth Amendment rights by “falsely stopping him, searching his car, and detaining him.” Jamison’s second claim, brought under the Fourteenth Amendment, stated that the defendants should be held liable for using “race [as] a motivating factor in the decision to stop him, search his car, and detain him.” Jamison’s third claim alleged a violation of the Fourth Amendment by Officer McClendon for “recklessly and deliberately causing significant damage to Mr. Jamison’s car by conducting an unlawful search of the car in an objectively unreasonable manner amounting to an unlawful seizure of his property.”

Jamison sought actual, compensatory, and punitive damages against Officer McClendon. He testified that he received an estimate for almost $4,000 of physical damage to his car. He described the damage as requiring the replacement of the “whole top” of the car and re-stitching or replacement of his car seats. In his deposition, Jamison said he provided pictures and the estimates to Officer McClendon’s counsel.

Jamison also sought damages for the psychological harm he sustained. During his deposition, he described the emotional toll of the traffic stop and search in this way:

When I first got home, I couldn’t sleep. So I was up for like – I didn’t even sleep when I got home. I think I got some rest the next day because I was still mad just thinking about it and then when all this killing and stuff come on TV, that’s like a flashback. I said, man, this could
have went this way. It had me thinking all kind of stuff because it was not even called for. . . .

Then I seen a story about the guy in South Carolina, in Charleston, a busted taillight. They stopped him for that and shot him in the back, and all that just went through my mind . . . .

I don’t even watch the news no more. I stopped watching the news because every time you turn it on something’s bad.

On December 1, 2017, the defendants filed a motion for summary judgment. The motion said it would explain “why all claims against all defendants should be dismissed as a matter

33 Given the timeline – Jamison filed this suit in 2016 – he may be referring to the 2015 killing of Walter Scott by former South Carolina policeman Michael Slager. A bystander captured video of Slager shooting Scott in the back as he ran away, leading to “protests across the U.S. as demonstrators said it was another example of police officers mistreating Blacks.” Meg Kinnard, South Carolina officer loses appeal over shooting conviction, ASSOC. PRESS (Jan. 8, 2019). Another news source noted that Scott was shot in the back five times. Meredith Edward & Dakin Andone, Ex-South Carolina Cop Michael Slager gets 20 years for Walter Scott Killing, CNN (Dec. 7, 2017). “At the time of the shooting, Scott was only the latest black man to be killed in a series of controversial officer-involved shootings that prompted ‘Black Lives Matter’ protests and vigils.” Id. Slager pleaded guilty to federal criminal charges that he deprived of Scott of his civil rights and was sentenced to serve 20 years in prison. State murder charges were dropped. The fact that Slager was convicted is an anomaly; law enforcement officers are rarely charged for on-duty killings, let alone convicted. See generally Janell Ross, Police officers convicted for fatal shootings are the exception, not the rule, NBC NEWS (Mar. 13, 2019); Jamiles Lartey et al., Former officer Michael Slager sentenced to 20 years for murder of Walter Scott, THE GUARDIAN (Dec. 7, 2017).
of law.” The motion, however, failed to provide an argument as to Jamison’s third claim.

Prior to the completion of briefing on the motion, the parties agreed to dismiss the City of Pelahatchie from the case.

On September 26, 2018, the Court entered an order granting in part and deferring in part the motion for summary judgment. The Court found that Officer McClendon had shown he was entitled to summary judgment as to Jamison’s Fourteenth Amendment claim for a racially-motivated stop. The Court also found that Officer McClendon was protected by qualified immunity as to Jamison’s claims that Officer McClendon did not have reasonable suspicion to stop him. However, after a hearing, the Court requested supplemental briefing to “help . . . determine if McLendon is entitled to qualified immunity on Jamison’s lack of consent and prolonged stop claims.” The present motion followed.

II. Legal Standard

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” A dispute is genuine “if the evidence supporting” the non-movant, “together with any inferences in such party’s favor that the evidence allows, would be sufficient to support a verdict in

34 Docket No. 62.

35 Jamison provided no evidence of comparative discriminatory treatment of those among similarly-situated individuals of different classes. See id at 7–8.

favor of that party.” 37 A fact is material if it is one that might affect the outcome of the suit under the governing law. 38

A party seeking to avoid summary judgment must identify admissible evidence in the record showing a fact dispute. 39 That evidence may include “depositions, . . . affidavits or declarations, . . . or other materials.” 40

When evaluating a motion for summary judgment, courts are required to view all evidence in the light most favorable to the non-moving party and must refrain from making credibility determinations. 41

III. Historical Context

In accordance with Supreme Court precedent, we begin with a look at the “origins” of the relevant law. 42

A. Section 1983: A New Hope

Jamison brings his claims under 42 U.S.C. § 1983, a statute that has its origins in the Civil War and “Reconstruction,” the brief era that followed the bloodshed. If the Civil War was the only war in our nation’s history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too. "Reconstruction was the

37 St. Amant v. Benoit, 806 F.2d 1294, 1297 (5th Cir. 1987) (citation omitted).
40 Id. at 56(c)(1)(A).
41 Strong v. Dep’t of Army, 414 F. Supp. 2d 625, 628 (S.D. Miss. 2005).
essential sequel to the Civil War, completing its mission.”43 During Reconstruction, the abolitionists and soldiers who fought for emancipation sought no less than “the reinvention of the republic and the liberation of blacks to citizenship and Constitutional equality.”44

The Reconstruction-era Congress passed “legislation to protect the freedoms granted to those who were recently enslaved.”45 One such piece of legislation created the Freedman’s Bureau, a War Department agency that educated the formerly enslaved, provided them with legal protection, and “relocate[ed] them on more than 850,000 acres of land the federal government came to control during the war.”46 Another successful legislative effort was the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the “Reconstruction Amendments.”47

43 RON CHERNOW, GRANT 706 (2017); see also Stephen Cresswell, Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi 1870-1890, 53 J. S. HIST. 421, 421 (Aug. 1987), http://www.jstor.org/stable/2209362 (describing the era as Mississippi’s first civil rights struggle and noting that the federal government sought to “secure black civil and political equality in the years after the Civil War.”).


45 Katherine A. Macfarlane, Accelerated Civil Rights Settlements in the Shadow of Section 1983, 2018 UTAH L. REV. 639, 660 (2018) (citation omitted); see BLIGHT, supra at 47.

46 CHERNOW, supra at 562.

47 United States v. Cannon, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., concurring).
The Thirteenth Amendment “represented the Union’s deep seated commitment to end the ‘badges and incidents of servitude,’ [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain.” 48 The Fourteenth Amendment reversed Dred Scott v. Sanford. 49 While the amendment was “unpassable as a specific protection for black rights,” 50 it made all persons born in the United States citizens of this country and guaranteed due process and equal protection of the law. “The main object of the amendment was to enforce absolute equality of the races.” 51 President Grant called the Fifteenth Amendment “the most important event that has occurred[] since the nation came into life . . . the realization of the Declaration of Independence.” 52 “Each Amendment authorized Congress to pass appropriate legislation to enforce it.” 53 Taken together, “Reconstruction would mark a revolutionary change in the federal system, with the national


49 60 U.S. 393 (1857).


52 CHERNOW, supra at 685–86.

53 THE OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES 442 (Kermit L. Hall et al. eds., 2d ed. 2005).
government passing laws forcing the states to fulfill their constitutional responsibilities.”

For the first time in its history, the United States saw a Black man selected to serve in the United States Senate (two from Mississippi, in fact – Hiram Revels and Blanche K. Bruce), the establishment of public school systems across the South, and increased efforts to pass local anti-discrimination laws. It was a glimpse of a different America.

These “emancipationist” efforts existed alongside white supremacist backlash, terror, and violence. “In Mississippi, it

\[\text{Id.}\]

\[\text{ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877 353–57 (1988). Black Mississippians were also elected to local, state, and federal posts. John R. Lynch, a former slave, would serve as Speaker of the House in the Mississippi Legislature and would later represent Mississippi in Congress. See JOHN R. LYNCH, REMINISCENCES OF AN ACTIVE LIFE: THE AUTOBIOGRAPHY OF JOHN ROY LYNCH xii–xv (1970). James Hill, also formerly enslaved, would too serve as Speaker of the House and was later elected as Mississippi’s Secretary of State. See GEORGE A. SEWELL & MARGARET L. DWIGHT, MISSISSIPPI BLACK HISTORY MAKERS 48 (2d ed. 1984).}\]

\[\text{FONER, supra at 365–67. During this period, Mississippi’s Superintendent of Education was Thomas Cardozo, a Black man. See History, THOMAS CARDOZO MIDDLE SCHOOL, https://www.jackson.k12.ms.us/domain/616 (last visited July 10, 2020).}\]

\[\text{FONER, supra at 368–71.}\]

\[\text{The chasm between these two visions of America was embodied by President Johnson, who in his official capacity led a nation founded in the belief “that all men are created equal,” yet in his individual capacity “side[d] with white supremacists,” “privately referred to blacks as ‘nig-}\]
became a criminal offense for blacks to hunt or fish,"59 and a
U.S. Army General reported that “white militias, with telltale
names such as the Jeff Davis Guards, were springing up
across” the state.60 In Shreveport, Louisiana, more than 2,000
black people were killed in 1865 alone.61 “In 1866, there were
riots in Memphis and New Orleans; more than 30 African-
Americans were murdered in each melee.”62

“The Ku Klux Klan, formed in 1866 by six white men in a Pu-
laski, Tennessee law office, ‘engaged in extreme violence
against freed slaves and Republicans,’ assaulting and mur-
dering its victims and destroying their property.”63 The Klan
“spread rapidly across the South” in 1868,64 orchestrating a
“huge wave of murder and arson” to discourage Blacks from
discourage voting.65 “[B]lack schools and churches were burned with im-
punity in North Carolina, Mississippi, and Alabama.”66

The terrorism in Mississippi was unparalleled. During the
first three months of 1870, 63 Black Mississippians “were

59 CHERNOW, supra at 563.
60 Id.
61 Id. at 568.
62 See, well, Moore v. Bryant, 205 F. Supp. 3d 834, 840 (S.D. Miss. 2016) (citation
omitted).
63 Macfarlane, supra at 660.
64 CHERNOW, supra at 588.
65 Id. at 621.
66 Id. at 571, 703.
murdered . . . and nobody served a day for these crimes.” 67 In 1872, the U.S. Attorney for Mississippi wrote that Klan violence was ubiquitous and that “only the presence of the army kept the Klan from overrunning north Mississippi completely.” 68

Many of the perpetrators of racial terror were members of law enforcement. 69 It was a twisted law enforcement, though, as it prevented the laws of the era from being enforced. 70 When the Klan murdered five witnesses in a pending case, one of Mississippi’s District Attorneys complained, “I cannot get witnesses as all feel it is sure death to testify.” 71 White suprema-

67 Id. at 703.

68 Cresswell, supra at 426.

69 See Robin D. Barnes, Blue by Day and White by (k)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel, 81 IOWA L. REV. 1079, 1099 (1996); Randolph M. Scott-McLaughlin, Bray v. Alexandria Women’s Health Clinic: The Supreme Court’s Next Opportunity to Unsettle Civil Rights Law, 66 TUL. L. REV. 1357, 1371 (1992); Alfred L. Brophy, Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma, 20 HARV. BLACKLETTER L.J. 17, 24–25 (2004); see also Sherrilyn A. Ifill, On the Courthouse Lawn: Confronting the Legacy of Lynching in the 21st Century 77–84 (2007); Foner, supra at 434 (“Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.”).

70 See Barnes, supra at 1094.

71 Chernow, supra at 702; see also Cresswell, supra at 432 (“Attorneys, marshals, witnesses and jurors suffered abuse and assault, were ostracized by the white community, and some were even murdered.”).
cists and the Klan “threatened to unravel everything . . . Union soldiers had accomplished at great cost in blood and treasure.”

Professor Leon Litwack described the state of affairs in stark words:

How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known. Nor could any accurate body count or statistical breakdown reveal the barbaric savagery and depravity that so frequently characterized the assaults made on freedmen in the name of restraining their savagery and depravity – the severed ears and entrails, the mutilated sex organs, the burnings at the stake, the forced drownings, the open display of skulls and severed limbs as trophies.

“Congress sought to respond to ‘the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.’” It passed The Ku Klux Act of 1871,

72 CHERNOW, supra at 707.

73 At least 2,000 Black women, men, and children were killed by white mobs in racial terror lynchings during Reconstruction. See Reconstruction in America, EQUAL JUST. INITIATIVE, https://eji.org/report/reconstruction-in-america/ (last visited July 16, 2020). “Thousands more were assaulted, raped, or injured in racial terror attacks between 1865 and 1877.” Id.


which “targeted the racial violence in the South undertaken by the Klan, and the failure of the states to cope with that violence.” 76

The Act’s mandate was expansive. Section 2 of the Act provided for civil and criminal sanctions against those who conspired to deprive people of the “equal protection of the laws.” 77 “Sections 3 and 4 authorized the use of federal force to redress a state’s inability or unwillingness to deal with Klan or other violence.” 78 “The Act was strong medicine.” 79

Section 1 of the Ku Klux Act, now codified as 42 U.S.C. § 1983, uniquely targeted state officials who “deprived persons of their constitutional rights.” 80 While the Act as a whole “had the Klan ‘particularly in mind,’” Section 1 recognized the local officials who created “the lawless conditions” that plagued “the South in 1871.” 81 Thus, the doors to the courthouse were opened to “any person who ha[d] been deprived of her federally protected rights by a defendant acting under color of state


78 Id.

79 Id.

80 Id.

81 Monroe, 365 U.S. at 174.
The Act reflected Congress’s recognition that – to borrow the words of today’s abolitionists – “the whole damn system [was] guilty as hell.”

Some parts of the Act were fairly successful. Led by federal prosecutors at the Department of Justice, “federal grand juries, many interracial, brought 3,384 indictments against the KKK, resulting in 1,143 convictions.”

One of Mississippi’s U.S. Senators reported that the Klan largely “suspended their operations” in most of the State. Frederick Douglass proclaimed that “peace has come to many places,” and the “slaughter of our people have so far ceased.”

Douglass had spoken too soon. “By 1873, many white Southerners were calling for ‘Redemption’ – the return of white supremacy and the removal of rights for blacks – instead of Reconstruction.” The federal system largely abandoned the emancipationist efforts of the Reconstruction Era. And the violence returned. “In 1874, 29 African-Americans were massacred in Vicksburg, according to Congressional investigators. The next year, amidst rumors of an African-American

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83 @ignitekindred, TWITTER (Apr. 25, 2016, 6:39 PM) https://twitter.com/ignitekindred/status/724744680878039040.
84 CHERNOW, supra at 708.
85 Id. at 710.
86 Id. at 709.
87 Reconstruction vs. Redemption, NAT’L ENDOWMENT HUMAN. (Feb. 11, 2014); see also BLIGHT, supra at 101–02.
88 BLIGHT, supra at 137–39.
plot to storm the town, the Mayor of Clinton, Mississippi gathered a white paramilitary unit which hunted and killed an estimated 30 to 50 African-Americans.”89 And in 1876, U.S. Marshal James Pierce said, “Almost the entire white population of Mississippi is one vast mob.”90

Federal courts joined the retreat and decided to place their hand on the scale for white supremacy.91 As Katherine A. Macfarlane writes:

In several decisions, beginning with 1873’s Slaughter-House Cases, the Supreme Court limited the reach of the Fourteenth Amendment and the statutes passed pursuant to the power it granted Congress. By 1882, the Court had voided the Ku Klux Act’s criminal conspiracy section, a provision “aimed at lynchings and other mob actions of an individual or private nature.”

89 Moore, 205 F. Supp. 3d at 840 (quotations, citations, and brackets omitted).

90 Cresswell, supra at 429.

91 That is not surprising since many of these judges were members of the Klan, supporters of the Confederacy, or both. See Barnes, supra at 1099 (“judges, politicians, and law enforcement officers were fellow Klansmen”); Peter Charles Hoffer et al., The Federal Courts: An Essential History 193 (2016) (“a near majority” of Article III judges appointed in the wake of Reconstruction were former Confederates). L.Q.C. Lamar, the only Mississippian to ever serve on the Supreme Court, was on the side of these renegades. See generally Dennis J. Mitchell, A New History of Mississippi 199–200 (2014). As an attorney, Lamar was noted for “wielding a chair” in open court and attacking a U.S. Marshal, “breaking a small bone at the cap of the [Marshal’s] eye.” Cresswell, supra at 434.
As a result of the Court’s narrowed construction of both the Fourteenth Amendment and the civil rights statutes enacted pursuant to it, the Ku Klux Act’s “scope and effectiveness” shrunk. The Court never directly addressed Section 1 of the Act, but those sections of the Act [were] left “largely forgotten.”

For almost a century, Redemption prevailed. “Lynchings, race riots and other forms of unequal treatment were permitted to abound in the South and elsewhere without power in the federal government to intercede.” Jim Crow ruled, and Jim Crow meant that “[a]ny breach of the system could mean one’s life.” While Reconstruction “saw the basic rights of blacks to citizenship established in law,” our country failed “to ensure their political and economic rights.” Our courts’ “involvement in that downfall and its consequences could not have been greater.”

Though civil rights protection was largely abandoned at the federal level, activists continued to fight to realize the broken promise of Reconstruction. The Afro-American League, the Niagara Movement, the National Negro Conference (later renamed the NAACP) and other civil rights groups formed to

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92 Macfarlane, supra at 661–62 (citations omitted).
93 Id. at 662.
94 Id.
95 BELL, supra at 48.
96 Id. at 49.
challenge lynching and the many oppressive laws and practices of discrimination. One group’s efforts – the Citizens’ Committee – led to a lawsuit designed to create an Equal Protection Clause challenge to Louisiana’s segregationist laws on railroad cars. Unfortunately, the ensuing case, Plessy v. Ferguson, resulted in the Supreme Court’s decision to affirm the racist system of “separate but equal” accommodations. Despite this setback, civil rights activism continued, intensifying after the Supreme Court’s Brown v. Board decision and resulting in many of the civil rights laws we have today.

It was against this backdrop that the Supreme Court attempted to resuscitate Section 1983. In 1961, the Court decided Monroe v. Pape, a case where “13 Chicago police officers broke into [a Black family’s] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers.” The Justices held that Section 1983 provides a remedy for people deprived of their constitutional rights by state officials. Accordingly, the Court found that

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97 Macfarlane, supra at 663.


99 See generally Macfarlane, supra at 665.


101 365 U.S. at 169.

102 Id. at 187.
the Monroe family could pursue their lawsuit against the officers.103

Section 1983’s purpose was finally realized, namely “to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.” 104 The statute has since become a powerful “vehicle used by private parties to vindicate their constitutional rights against state and local government officials.” 105

Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .106

Invoking this statute, Jamison contends that Officer McClendon violated his Fourth Amendment right to be free from unreasonable searches and seizures.

103 Id.


B. Qualified Immunity: The Empire Strikes Back

Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape*.\(^{107}\)

The doctrine of qualified immunity is perhaps the most important limitation.

Although Section 1983 made no “mention of defenses or immunities, ‘[the Supreme Court] read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.’”\(^{108}\) It reasoned that “[c]ertain immunities were so well established in 1871... that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.”\(^{110}\)

On that presumption the doctrine of qualified immunity was born, with roots right here in Mississippi. In *Pierson v. Ray*, “15 white and Negro Episcopal clergymen... attempted to

\(^{107}\) See John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 803 (2003) (noting that we “have witnessed the restriction of rights developed during” the Civil Rights Movement, including Section 1983).


\(^{109}\) Several scholars have shown that history does not support the Court’s claims about qualified immunity’s common law foundations. See, e.g., Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) [hereinafter *The Case Against Qualified Immunity*].

\(^{110}\) *Ziglar*, 137 S. Ct. at 1870 (citations omitted).
use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961.” The clergymen were arrested and charged with violation of a Mississippi statute – later held unconstitutional – that made it a misdemeanor “to congregate[] with others in a public place under circumstances such that a breach of the peace” may occur and to “refuse[] to move on when ordered to do so by a police officer.” The clergymen sued under Section 1983. In their defense, the officers argued that “they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid.”

The Supreme Court agreed. It held that officers should be shielded from liability when acting in good faith – at least in the context of constitutional violations that mirrored the common law tort of false arrest and imprisonment.

Subsequent decisions “expanded the policy goals animating qualified immunity.” The Supreme Court eventually characterized the doctrine as an “attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public

111 386 U.S. 547, 549 (1967).
112 Id.
113 Id. at 555.
114 Id. (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”).
interest in encouraging the vigorous exercise of official authority.”  

A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog;\(^\text{117}\) prison guards who forced a prisoner to sleep in cells “covered in feces” for days;\(^\text{118}\) police officers who stole over $225,000 worth of property;\(^\text{119}\) a deputy who bodyslammed a woman after she simply “ignored [the deputy’s] command and walked away”;\(^\text{120}\) an officer who seriously burned a woman after detonating a “flashbang” device in the bedroom where she was sleeping;\(^\text{121}\) an officer who deployed a dog against a suspect who “claim[ed] that he surrendered by raising his hands in the air”;\(^\text{122}\) and an officer who shot an


\(^{118}\) Taylor v. Stevens, 946 F.3d 211, 220 (5th Cir. 2019).


\(^{120}\) Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019), cert. denied, No. 19-682, 2020 WL 2515455 (U.S. May 18, 2020).

\(^{121}\) Dukes v. Deaton, 852 F.3d 1035, 1039 (11th Cir. 2017).

\(^{122}\) Baxter v. Bracey, 751 F. App’x 869, 872 (6th Cir. 2018), cert. denied, 140 S. Ct. 1862 (2020).
unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother.\textsuperscript{123}

If Section 1983 was created to make the courts “guardians of the people’s federal rights,” what kind of guardians have the courts become?\textsuperscript{124} One only has to look at the evolution of the doctrine to answer that question.

Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not “clearly established.”

This “clearly established” requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982.\textsuperscript{125} In 1986, the Court then “evolved” the qualified immunity defense to spread its blessings “to all but the plainly incompetent or those who knowingly violate the law.”\textsuperscript{126} It further ratcheted up the standard in 2011, when it added the

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\textsuperscript{123} Willingham v. Loughman, 261 F.3d 1178, 1181 (11th Cir. 2001), cert. granted, judgment vacated, 537 U.S. 801 (2002).
\textsuperscript{124} Haywood, 556 U.S. at 735 (citation omitted).
\textsuperscript{125} See Harlow, 457 U.S. at 818; see also William Baude, Is Qualified Immunity Unlawful?, 106 CAL. L. REV. 45, 81 (2018). Previously, the Court had used “clearly established” as an explanatory phrase to better understand good faith. See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975) (finding compensatory damages “appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student’s clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.”).
\textsuperscript{126} Malley, 475 U.S. at 341; see also Pamela S. Karlan, Foreword: Democracy and Disdain, 126 HARV. L. REV. 1, 61 (2012). Malley was also the first time “objectively unreasonable” appeared in a Supreme Court qualified immunity decision.
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words “beyond debate.” In other words, “for the law to be clearly established, it must have been ‘beyond debate’ that [the officer] broke the law.” An officer cannot be held liable unless every reasonable officer would understand that what he is doing violates the law. It does not matter, as the Fifth Circuit has explained, “that we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct . . . [because it] does not mean necessarily that the officials should have realized that [the conduct] violated a

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128 McCoy v. Alamu, 950 F.3d 226, 233 (5th Cir. 2020) (citation omitted). That leads us to another rabbit hole. A district court opinion doesn’t clearly establish the law in a jurisdiction. Id. at 233 n.6 (citation omitted). Nor does a circuit court opinion, if the judges designate it as “unpublished.” Id. Only published circuit court decisions count. See id. Even then, the Supreme Court has “expressed uncertainty” about whether courts of appeals may ever deem constitutional law clearly established. Cole, 935 F.3d at 460 n.4 (Jones, J., dissenting) (collecting cases).

129 al-Kidd, 563 U.S. at 741. As Professor John Jeffries explains, “[t]he narrower the category of cases that count, the harder it is to find a clearly established right.” John C. Jeffries, Jr., What’s Wrong with Qualified Immunity?, 62 FLA. L. REV. 851, 859 (2010) [hereinafter What’s Wrong with Qualified Immunity?]. This restrictive approach bulks up qualified immunity and makes its protections difficult to penetrate. When combining the narrow view of relevant precedent to the demand for “extreme factual specificity in the guidance those precedents must provide, the search for ‘clearly established’ law becomes increasingly unlikely to succeed, and ‘qualified’ immunity becomes nearly absolute.” Id.
constitutional right.” 130 Even evidence that the officer acted in bad faith is now considered irrelevant.131

The Supreme Court has also given qualified immunity sweeping procedural advantages. “Because the defense of qualified immunity is, in part, a question of law, it naturally creates a ‘super-summary judgment’ right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits – because the plaintiff has stated a proper claim and genuine issues of fact exist – summary judgment can still be granted when the law is not reasonably clear.” 132

And there is more. The Supreme Court says defendants should be dismissed at the “earliest possible stage” in the proceedings to not be burdened with the matter.133 The earliest possible stage may include a stage in the case before any discovery has been taken and necessarily before a plaintiff has obtained all the relevant facts and all (or any) documents.134 If a court denies a defendant’s motion seeking dismissal or summary judgment based on qualified immunity, that decision is

130 Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994) (quotations and citation omitted).


134 See Bosarge v. Mississippi Bureau of Narcotics, 796 F.3d 435, 443 (5th Cir. 2015) (citation omitted) (“[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming and intrusive.”); see also Lass, supra, at 188.
also immediately appealable. Those appeals can lead all the way to the United States Supreme Court even before any trial judge or jury hears the merits of the case. Qualified immunity’s premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial.

Each step the Court has taken toward absolute immunity heralded a retreat from its earlier pronouncements. Although the Court held in 2002 that qualified immunity could be denied “in novel factual circumstances,” the Court’s track record in the intervening two decades renders naïve any judges who believe that pronouncement.

Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established “beyond debate” at the time an officer broke it. But it is a fool’s errand to ask people who love to debate whether something is debatable.

136 Brown, supra at 196.
138 See generally Baude, supra at 83 (“[A]ll but two of the [Supreme] Court’s awards of qualified immunity reversed the lower court’s denial of immunity below. In other words, lower courts that follow Supreme Court doctrine should get the message: think twice before allowing a government official to be sued for unconstitutional conduct.”); see also Mullenix, 136 S. Ct. at 310 (reversing and reminding lower courts that the Supreme Court “has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity”); White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) (reversing and chastising the appellate court for “misunderstanding the ‘clearly established’ analysis”).
Consider *McCoy v. Alamu*, a 2020 case in which a correctional officer violated a prisoner’s Constitutional rights when he sprayed a chemical agent in the prisoner’s face, without provocation.\(^{139}\)

The Fifth Circuit then asked if the illegality of the use of force was clearly established beyond debate. The prison didn’t think the use of force was debatable: it found the spraying unnecessary and against its rules. It put the officer on three months’ probation.\(^{140}\) Yet the appellate court disregarded the warden’s judgment and held for the officer. The case involved only a “single use of pepper spray,” after all, and the officer hadn’t used “the full can.”\(^{141}\) Based on these factual distinctions, the court concluded that “the spraying crossed that line. But it was not *beyond debate* that it did, so the law wasn’t clearly established.”\(^{142}\)

These kinds of decisions are increasingly common. Consider another Fifth Circuit case, this time from 2019, in which Texas prisoner Trent Taylor claimed that the conditions of his prison cells violated the Constitutional minimum:

> Taylor stayed in the first cell starting September 6, 2013. He alleged that almost the entire surface—including the floor, ceiling, window, walls, and water faucet—was covered with “massive amounts” of feces that emitted a

\(^{139}\) 950 F.3d at 231.

\(^{140}\) *Id*.

\(^{141}\) *Id*. at 233.

\(^{142}\) *Id*. A dissent argued that the majority was stretching qualified immunity to rule for the officer, since it was already clearly established that correctional officers couldn’t use their fists, a baton, or a taser to assault an inmate without provocation. *Id*. at 234–35 (Costa, J., dissenting).
“strong fecal odor.” Taylor had to stay in the cell naked. He said that he couldn’t eat in the cell, because he feared contamination. And he couldn’t drink water, because feces were “packed inside the water faucet.” Taylor stated that the prison officials were aware that the cell was covered in feces, but instead of cleaning it, [Officers] Cortez, Davison, and Hunter laughed at Taylor and remarked that he was “going to have a long weekend.” [Officer] Swaney criticized Taylor for complaining, stating “dude, this is Montford, there is shit in all these cells from years of psych patients.” On September 10, Taylor left the cell.

A day later, September 11, Taylor was moved to a “seclusion cell,” but its conditions were no better. It didn’t have a toilet, water fountain, or bunk. There was a drain in the floor where Taylor was ordered to urinate. The cell was extremely cold because the air conditioning was always on. And the cell was anything but clean. Taylor alleged that the floor drain was clogged, leaving raw sewage on the floor. The drain smelled strongly of ammonia, which made it hard for Taylor to breathe. Yet, he alleged, the defendants repeatedly told him that if he needed to urinate, he had to do so in the clogged drain instead of being escorted to the restroom. Taylor refused. He worried that, because the drain was clogged, his urine would spill onto the already-soiled floor, where he had to sleep because he lacked a bed. So, he held his urine
for twenty-four hours before involuntarily urinating on himself. He stayed in the seclusion cell until September 13. Prison officials then tried to return him to his first, feces-covered cell, but he objected and was permitted to stay in a different cell.\footnote{Taylor, 946 F.3d at 218–19 (brackets and footnotes omitted).}

Taylor spent a total of six days in feces-covered cells.\footnote{Id. at 218 & n.6.} To make matters worse, the trial court found that Taylor “was not allowed clothing and forced to endure the cold temperatures with nothing but a suicide blanket.”\footnote{Taylor v. Williams, No. 5:14-CV-149-BG, 2016 WL 8674566, at *3 (N.D. Tex. Jan. 22, 2016), report and recommendation adopted, No. 5:14-CV-149-C, 2016 WL 1271054 (N.D. Tex. Mar. 29, 2016), aff’d in part, vacated in part, remanded, 715 F. App’x 332 (5th Cir. 2017).}

The correctional officers didn’t submit much to contradict Taylor’s evidence of filth.\footnote{Taylor, 946 F.3d at 219.} Yet they were granted qualified immunity because it “wasn’t clearly established” that “only six days” of living in a cesspool of human waste was unconstitutional.\footnote{Id. at 222.} The Fifth Circuit reasoned, “[t]hough the law was clear that prisoners couldn’t be housed in cells teeming with human waste for months on end, we hadn’t previously held that a time period so short violated the Constitution. . . .

143 Taylor, 946 F.3d at 218–19 (brackets and footnotes omitted).

144 Id. at 218 & n.6.


146 Taylor, 946 F.3d at 219.

147 Id. at 222.
It was therefore not ‘beyond debate’ that the defendants broke the law.”

Never mind the 50 years of caselaw holding that “[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted.” Never mind the numerous Fifth Circuit decisions concluding that prisoners who live in “filthy, sometimes feces-smeared, cells” can bring a Constitutional claim. Never mind that in other states, it is clearly established that

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148 Id. (citations omitted). It would appear that correctional officers in this Circuit can now just put inmates in feces-covered cells for five days or less and escape liability.

149 LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972).

150 Bienvenu v. Beauregard Par. Police Jury, 705 F.2d 1457, 1460 (5th Cir. 1983) (“Bienvenu’s statements that the defendant . . . intentionally subjected him to a cold, rainy, roach-infested facility and furnished him with inoperative, scum-encrusted washing and toilet facilities sufficiently alleges a cause of action cognizable under 42 U.S.C. § 1983.”)

151 Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (concluding that plaintiff stated a Constitutional claim when “his only option was to urinate and defecate in the confined area that he shared with forty-eight other inmates”).

152 Gates v. Cook, 376 F.3d 323, 338 (5th Cir. 2004) (affirming injunction where “cells were ‘extremely filthy’ with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles”).

153 Cowan v. Scott, 31 F. App’x 832, at *2 (5th Cir. 2002) (finding that prisoner stated a Constitutional claim when he alleged that “he was forced to lie in feces for days without access to a shower”).

only three days of living in feces-covered cells is unconstitutional. And never mind that the Supreme Court had acknowledged warmth as an “identifiable human need” and that “a low cell temperature at night combined with a failure to issue [a] blanket[]” may deprive an inmate of such. None of that mattered after 2011, the year the Supreme Court ratcheted up the standard to require that the unlawfulness be “beyond debate.”

Fifth Circuit Judge Don Willett has succinctly explained the problem with the clearly established analysis:

Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one’s answered them before. Courts then rely on that judicial silence to conclude there’s no

155 See, e.g., McBride v. Deer, 240 F.3d 1287, 1291 (10th Cir. 2001); Sperow v. Melvin, 182 F.3d 922 (7th Cir. 1999); see also Fruit v. Norris, 905 F.2d 1147, 1151 (8th Cir. 1990) (holding that “forcing inmates to work in a shower of human excrement without protective clothing and equipment” for as little as 10 minutes stated a claim). Judge Wilson of the Eleventh Circuit once wrote that “there is remarkably little consensus among the United States circuit courts concerning how to interpret the term ‘clearly established.’” Charles R. Wilson, “Location, Location, Location”: Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). “One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.” Karen M. Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (collecting cases).


157 al-Kidd, 563 U.S. at 741.
equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.\textsuperscript{158}

To be clear, it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court, and the Supreme Court’s summary reversals of qualified immunity cases are ever-more biting.\textsuperscript{159} If you’ve been a Circuit Judge since 1979—sitting on the bench longer than any current Justice—you might expect a more forgiving reversal.\textsuperscript{160} Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established Constitutional violation to force a prisoner to eat, sleep, and live in prison cells swarming in feces for six days.

It is also unnecessary to blame the doctrine of qualified immunity on ideology. “Although the Court is not always unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court.”\textsuperscript{161} Judges disagree in these cases no matter which President appointed them.\textsuperscript{162} Qualified immunity is

\textsuperscript{158} Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurred in part and dissenting in part).

\textsuperscript{159} See, e.g., White, 137 S. Ct. at 552 (per curiam) (chastising the appellate court for “misunderstand[ing] the ‘clearly established’ analysis”). Professor Baude says the Court has been on a “crusade.” Baude, supra at 61.

\textsuperscript{160} See White, 137 S. Ct. at 552.


\textsuperscript{162} See, e.g., Pratt v. Harris Cty., Tex., 822 F.3d 174, 186 (5th Cir. 2016).
one area proving the truth of Chief Justice Roberts’ statement, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”\textsuperscript{163}

There are numerous critiques of qualified immunity by lawyers,\textsuperscript{164} judges,\textsuperscript{165} and academics.\textsuperscript{166} Yet qualified immunity is the law of the land and the undersigned is bound to follow its terms absent a change in practice by the Supreme Court.

Here is the exact legal standard applicable in this circuit:

There are generally two steps in a qualified immunity analysis. “First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional


\textsuperscript{165} See, e.g., \textit{Horvath v. City of Leander}, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part); \textit{Zadeh}, 928 F.3d at 474 (Willett, J., concurring in part and dissenting in part); \textit{Manzanares v. Roosevelt Cty. Adult Det. Ctr.}, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); \textit{Estate of Smart v. City of Wichita}, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018); \textit{Thompson v. Clark}, No. 14-CV-7349, 2018 WL 3128975, at *10 (E.D.N.Y. June 26, 2018); \textit{Baldwin v. City of Estherville}, 915 N.W.2d 259, 283 (Iowa 2018) (Appel, J., dissenting); James A. Wynn, Jr., \textit{As a judge, I have to follow the Supreme Court. It should fix this mistake}, WASH. POST (June 12, 2020).

\textsuperscript{166} See, e.g., \textit{The Case Against Qualified Immunity}, supra; \textit{Baude}, supra; Fred O. Smith, Jr., \textit{Abstention in the Time of Ferguson}, 131 HARV. L. REV. 2283, 2305 (2018); \textit{What’s Wrong with Qualified Immunity?}, supra; Christina Brooks Whitman, \textit{Emphasizing the Constitutional in Constitutional Torts}, 72 CHI.-KENT L. REV. 661, 678 (1997).
right. Second . . . the court must decide whether the right at issue was clearly established at time of the defendant’s alleged misconduct.” However, we are not required to address these steps in sequential order.

In Fourth Amendment cases, determining whether an official violated clearly established law necessarily involves a reasonableness inquiry. In Pearson, the Supreme Court explained that [an] officer is “entitled to qualified immunity where clearly established law does not show that the conduct violated the Fourth Amendment,” a determination which “turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.” However, “a reasonably competent public official should know the law governing his conduct.” In general, “the doctrine of qualified immunity protects government officials from . . . liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question beyond debate.”

The Court will now consider Jamison’s claims under these two steps.

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167 Heaney v. Roberts, 846 F.3d 795, 801 (5th Cir. 2017) (citations and brackets omitted).
IV. Qualified Immunity Analysis

A. Violation of a Statutory or Constitutional Right

The Court has already determined that Officer McClendon is entitled to qualified immunity for his decision to pull over Jamison.168 The Court now turns to the stop itself.

1. Physical Intrusion

“In a valid traffic stop, an officer may request a driver’s license and vehicle registration and run a computer check.”169 Officers are also permitted “to require passengers to identify themselves,” and “[w]hile waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop.”170

Officers are not allowed to unreasonably intrude into a person’s vehicle. “While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one’s home, a car’s interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police.”171 It follows that an “officer’s intrusion into the interior of [a] car constitute[s] a search.”172

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168 See Docket No. 62.

169 United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006) (citation omitted).

170 United States v. Spence, 667 F. App’x 446, 447 (5th Cir. 2016) (citations omitted).


172 United States v. Pierre, 958 F.2d 1304, 1309 (5th Cir. 1992); see also United States v. Ryles, 988 F.2d 13, 15 (5th Cir. 1993).
“[T]he intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as ‘reasonable.’”

Accordingly, “the key inquiry” in these cases is whether the officer “acted reasonably” when he intruded. The question is highly dependent on the facts of each case.

Here, Jamison argues that Officer McClendon “physically prevent[ed] Mr. Jamison from resuming his travel by placing his arm inside Mr. Jamison’s automobile.” Viewing the evidence in the light most favorable to the non-movant, the Court must conclude for present purposes that the stop happened in this way. Officer McClendon’s insertion of his arm into Jamison’s vehicle is an “intru[sion] inside a space that, under most circumstances, is protected by a legitimate expectation of privacy.” The Court must therefore consider whether Officer McClendon acted reasonably when he intruded.

In United States v. Pierre, Border Patrol Agent Lonny Hillin stopped a GMC Jimmy at a fixed checkpoint in Texas. The Jimmy was a “two-door vehicle . . . equipped with tinted fixed rear windows.” The defendant, Pierre, “was lying down in

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173 Pierre, 958 F.2d at 1309 (citation omitted).
174 Id.
175 See id.
176 Docket No. 68 at 21.
177 Ryles, 988 F.2d at 15 (citations omitted).
178 Pierre, 958 F.2d at 1307.
179 Id.
the back seat.” 180 During the stop, Agent Hillin “ducked his head in the window to get a clear view of the back seat and to talk to Pierre about his citizenship.” 181 The Fifth Circuit considered the following to determine if the agent’s intrusion was reasonable: (1) whether the officer intruded upon an area for which there is a reasonable expectation of privacy; (2) whether the officer’s “actions were no more intrusive than necessary to accomplish his objective”; and (3) whether the intrusion was reasonable to ensure the safety of the officer. 182

As to the first consideration, the Fifth Circuit found that “passengers of vehicles at fixed checkpoints near the border of the United States do not have a reasonable expectation of privacy in not being stopped and questioned about their citizenship.” 183 The court reasoned that “occupants of a vehicle stopped at a checkpoint have no expectancy that they will not be required to look an agent in the eye and answer questions about their citizenship.” 184 In Pierre, the “physical features of the Jimmy made it difficult for Agent Hillin to speak with Pierre and verify his citizenship.” 185 These considerations weighed toward finding that the agent’s intrusion – in this case, sticking his head into the car – was reasonable. 186

180 Id.
181 Id. (quotations and brackets omitted).
182 Id. at 1309–10.
183 Id. at 1309.
184 Id. at 1310.
185 Id. at 1309.
186 Id. at 1310.
The Fifth Circuit also found that the sole purpose of Agent Hillin’s intrusion was to ask about the passenger’s citizenship. Again, the Court noted that vehicle’s physical features did not allow Agent Hillin “to see and communicate with Pierre.”\(^{187}\) The court observed that “Agent Hillin's action in sticking his head in the driver’s window was certainly less intrusive than requiring Pierre to get out of the vehicle.”\(^{188}\)

Finally, “in evaluating the reasonableness of the search,” the Fifth Circuit “considered the safety of the officer.”\(^{189}\) It held that “[a]n agent at a checkpoint, for his own safety, would have good reason to position himself so he could see the person with whom he is speaking.”\(^{190}\)

Here, Jamison had no reasonable expectation of privacy as to being questioned during a lawful stop.\(^{191}\) However, there is no evidence that the physical features of Jamison’s car or any other circumstance made it difficult for Officer McClendon to question Jamison. Accordingly, this first consideration weighs against finding that Officer McClendon acted reasonably when he put his arm into Jamison’s car.

Turning to the second consideration, Officer McClendon admitted that his objective was to get Jamison’s consent to search the car. He had no reason to physically put his arm into

\(^{187}\) Id.

\(^{188}\) Id.

\(^{189}\) Id. (citation omitted).

\(^{190}\) Id.

\(^{191}\) See Spence, 667 F. App’x at 447.
the car to accomplish that objective. This situation is inappo-
site to Pierre, where the agent had to intrude in to the car to
“see and communicate with Pierre.”

As to the third consideration, the same principle discussed in
Pierre obviously applies here: officers have good reason to see
the person they have pulled over. Officer McClendon, how-
ever, could already see Jamison. There was no reason to put
his arm into Jamison’s car to request that he consent to a
search, and nothing in this record or the parties’ briefs at-
ttempts to support that view.

In Pierre, the Fifth Circuit emphasized that officers do not
have “carte blanche authority” to intrude into vehicles. All
of the considerations discussed in Pierre point toward a find-
ing that Officer McClendon acted unreasonably.

For these reasons, Officer McClendon’s physical intrusion
into Jamison’s car was an unreasonable search in violation of
the Fourth Amendment.

2. Subsequent Vehicle Search

Officer McClendon then argues that Jamison consented to the
search of his car. Jamison concedes that he “consented” but
argues that his consent was involuntary.

“Consent is valid only if it is voluntary.” “Furthermore, if
an individual gives consent after being subject to an initial un-

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192 Pierre, 958 F.2d at 1310.
193 Id.
194 United States v. Gomez-Moreno, 479 F.3d 350, 357 (5th Cir. 2007) (citation
omitted), overruled on other grounds by Kentucky v. King, 563 U.S. 452 (2011).
constitutional search, the consent is valid only if it was an independent act of free will, breaking the causal chain between the consent and the constitutional violation." Factors that inform whether the consent was an independent act of free will include the “temporal proximity of the illegal conduct and the consent,” whether there were any intervening circumstances, and “the purpose and flagrancy” of the misconduct.

The Court has found a constitutional violation in Officer McClendon’s intrusion into Jamison’s vehicle. Jamison’s “consent to search . . . was contemporaneous with the constitutional violation, and there was no intervening circumstance.” Viewing the evidence in the light most favorable to Jamison, as the legal standard requires, he relented and agreed to the search only after Officer McClendon escalated his efforts and placed his arm inside the car. Officer McClendon’s intrusion into Jamison’s car was a purposeful and unreasonable entry into an area subject to Fourth Amendment protection. “Thus, under the circumstances of this case, the consent to search was not an independent act of free will, but rather a product of” an unconstitutional search.

Even absent the initial constitutional violation, there is a factual dispute as to whether Jamison’s consent was voluntary.

195 Id. (quotations and citation omitted).
197 United States v. Santiago, 310 F.3d 336, 343 (5th Cir. 2002) (citations omitted).
198 Id.
“The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances.”199 To determine whether a person’s consent was voluntary, the Court considers six factors: “(1) the voluntariness of the suspect’s custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect’s cooperation; (4) the suspect’s awareness of his right to refuse consent; (5) the suspect’s education and intelligence; and (6) the suspect’s belief that no incriminating evidence will be found.”200 “In this analysis, no single factor is determinative” 201 and courts consider other factors relevant to the inquiry.202

Viewing the evidence in the light most favorable to Jamison, three factors weigh toward finding voluntary consent. Jamison was aware of his right to refuse consent; he refused to give consent after being asked four times by Officer McClendon. Jamison graduated from high school and there is nothing in the record showing that he “lack[ed] the requisite education or intelligence to give valid consent to the search.”203 Finally, Jamison believed – rightly so – that no incriminating evidence would be found.

The remaining factors weigh against finding voluntary consent. Jamison’s custodial status was not voluntary: he was not

199 United States v. Shabazz, 993 F.2d 431, 438 (5th Cir. 1993) (quotations and citation omitted).
200 United States v. Escamilla, 852 F.3d 474, 483 (5th Cir. 2017) (citation omitted).
201 United States v. Macias, 658 F.3d 509, 523 (5th Cir. 2011) (citation omitted).
202 United States v. Tompkins, 130 F.3d 117, 122 (5th Cir. 1997) (citation omitted).
203 United States v. Cooper, 43 F.3d 140, 148 (5th Cir. 1995).

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free to leave. Jamison was also polite but unwilling to let Officer McClendon search his car the first four times the Officer asked. It is difficult to accept that Jamison truly wanted to give consent, since the exchange became “heated.” Moreover, when Officer McClendon brought out his canine, Jamison says that he initially refused to consent to the dog sniff.

The parties disagree about whether Officer McClendon’s actions were coercive. Jamison mainly points to Officer McClendon’s intrusion into the car and repeated requests for consent. Officer McClendon, on the other hand, points to a number of cases where (he claims) other courts cleared officers who used greater restraints on a person’s freedom.204

Jamison also points to “promises” and other “more subtle forms of coercion” that might have affected his judgment.205 The existence of a promise indeed constitutes a relevant factor in the Court’s determination.206

There is a genuine factual dispute about whether Officer McClendon’s actions amount to coercive procedures. There is evidence of omissions, outright lies, and promises by the officer: he did not inform Jamison that the EPIC check had come back clear, he lied about a call saying Jamison was transporting drugs, and he promised Jamison that he would allow him to leave if he found a roach in the car. A jury could reasonably conclude that Officer McClendon’s lies reasonably caused Jamison to fear that the officer would plant drugs in his car, or worse. McClendon’s statement to “Hold on a minute” and

204 See, e.g., Tompkins, 130 F.3d at 122; United States v. Olivarria, 781 F. Supp. 2d 387, 395 (N.D. Miss. 2011).

205 United States v. Hall, 565 F.2d 917, 921 (5th Cir. 1978).

206 See United States v. Fernandes, 285 F. App’x 119, 124 (5th Cir. 2008).
his physical intrusion into the interior of Jamison’s car, while separately a constitutional violation, had the effect of physically expressing to Jamison that he was not free to leave – even though Jamison reasonably believed he could go after Officer McClendon returned his documents.

For these reasons, the Court finds a genuine factual dispute about whether Jamison voluntarily consented to the search.

A reader would be forgiven for pausing here and wondering whether we forgot to mention something. When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon’s actions were coercive?

Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. Pelahatchie is an hour south of Philadelphia, a town made infamous after a different kind of traffic stop resulted in the brutal lynching of James Chaney, Michael Schwerner, and Andrew Goodman. Pelahatchie is

207 Cf. Cynthia Lee, Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis, 81 MISS. L.J. 1133, 1151 n.81 (2012) (identifying cases in which the Supreme Court failed to recognize the potential impact of race and racism).

208 Cf. United States v. Mendenhall, 446 U.S. 544, 558 (1980) (noting that the race, gender, age, and education of a young Black woman who “may have felt unusually threatened by the officers, who were white males” were all relevant factors in determining whether the woman voluntarily consented to a seizure).

also less than 30 minutes east of Jackson, where on June 26, 2011, a handful of young white men and women engaged in some old-fashioned Redemption and murdered James Craig Anderson, a 47-year old Black, gay man. Pelahatchie is also in Rankin County, the same county the young people called home. Only a few miles separate the two communities.

For Black people, this isn’t mere history. It’s the present.

By the time Jamison was pulled over, more than 600 people had been killed by police officers in 2013 alone. Jamison was stopped just 16 days after the man who killed Trayvon Martin was acquitted. On that day, Alicia Garza wrote a Facebook post that said, “Black people. I love you. I love us. We matter. Our lives matter, Black lives matter.” And that week, “thousands of demonstrators gathered in dozens of cities” to commemorate Martin “and to add their voices to a debate on race

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that his death . . . set off.”214 A movement was in its early stages that would shine a light on killings by police and police brutality writ large – a problem Black people have endured since “states replaced slave patrols with police officers who enforced ‘Black codes.’”215

Jamison’s traffic stop cannot be separated from this context. Black people in this country are acutely aware of the danger traffic stops pose to Black lives.216 Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike.217 United States

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Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as “the world’s greatest deliberative body.” The “vast majority” of the stops were the result of “nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.”

In a moving speech delivered from the Senate floor just last month, Senator Scott said,

> As a black guy, I know how it feels to walk into a store and have the little clerk follow me around, even as a United States Senator. I get that. I’ve experienced that. I understand the traffic stops. I understand that when I’m walking down the street and some young lady clutches on to her purse and my instinct is to get a little further away because I don’t want any issues with anybody, I understand that.


218 Tim Scott, GOP Sen. Tim Scott: I’ve choked on fear when stopped by police. We need the JUSTICE Act., USA TODAY (June 18, 2020).

219 Nelson, supra (“Scott also shared the story of a former staffer of his who drove a Chrysler 300, ‘a nice car without any question, but not a Ferrari.’ The staffer wound up selling that car out of frustration after being pulled over too often in Washington, D.C., ‘for absolutely no reason other than for driving a nice car.’ He told a similar story of his brother, a command sergeant major in the U.S. Army, who was pulled over by an officer suspicious that the car Scott’s brother was driving was stolen because it was a Volvo. . . . Scott pleaded in his remarks that the issues African-Americans face in dealing with law enforcement not be ignored.”).
The situation is not getting better. The number of people killed by police each year has stayed relatively constant,²²⁰ and Black people remain at disproportionate risk of dying in an encounter with police.²²¹ It was all the way back in 1968 when Nina Simone famously said that freedom meant “no fear! I mean really, no fear!”²²² Yet decades later, Black male teens still report a “fear of police and a serious concern for their personal safety and mortality in the presence of police officers.”²²³

In an America where Black people “are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,”²²⁴ who can say that Jamison felt free that night on the side of Interstate 20? Who can say that he felt free to say no to an armed Officer McClendon?

²²⁰ See, e.g., John Sullivan et al., Four years in a row, police nationwide fatally shoot nearly 1,000 people, WASH. POST (Feb. 12, 2019).

²²¹ Niall McCarthy, Police Shootings: Black Americans Disproportionately Affected [Infographic], FORBES (May 28, 2020) (“Black Americans . . . are shot and killed by police [at] more than twice . . . the rate for white Americans.”).


²²³ Smith Lee & Robinson, That’s My Number One Fear in Life. It’s the Police”: Examining Young Black Men’s Exposures to Trauma and Loss Resulting From Police Violence and Police Killings, 45 J. BLACK PSYCH. 143, 146 (2019) (citation omitted).

²²⁴ Curry, 2020 WL 3980362, at *14 (Gregory, C.J., concurring).
It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison’s car. It was upon this history that Jamison said he was tired. These circumstances point to Jamison’s consent being involuntary, a situation where he felt he had “no alternative to compliance” and merely mouthed “pro forma words of consent.”

Accordingly, Officer McClendon’s search of Jamison’s vehicle violated the Fourth Amendment.

B. Violation of Clearly Established Law

The Court must now determine whether Officer McClendon “violated clearly established constitutional rights of which a reasonable person would have known.”

“A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’” “Clearly established law must be particularized to the facts of a case. Thus, while a case need not be directly on point, precedent must still put the underlying question beyond debate.” District courts in this Circuit have been told that “clearly established law comes from holdings, not dicta.” We “are to pay close attention to

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225 United States v. Ruigomez, 702 F.2d 61, 65 (5th Cir. 1983).

226 Samples v. Vadzemenieks, 900 F.3d 655, 662 (5th Cir. 2018) (quotations, citations, and ellipses omitted).

227 Mullenix, 136 S. Ct. at 308 (citation omitted).

228 Id. (quotations and citation omitted).

229 Morrow v. Meachum, 917 F.3d 870, 875 (5th Cir. 2019) (citations omitted).
the specific context of the case” and not “define clearly established law at a high level of generality.”

“It is the plaintiff’s burden to find a case in his favor that does not define the law at a high level of generality.” To meet this high burden, the plaintiff must “point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.”

It is here that the qualified immunity analysis ends in Officer McClendon’s favor.

Viewing the facts in the light most favorable to Jamison, the question in this case is whether it was clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person’s car during a traffic stop while awaiting background check results has violated the Fourth Amendment. It is not.

Jamison identifies a Tenth Circuit case finding that an officer unlawfully prolonged a detention “after verifying the temporary tag was valid and properly displayed.” That court wrote that “[e]very temporary tag is more difficult to read in

230 Anderson v. Valdez, 913 F.3d 472, 476 (5th Cir. 2019) (quotations and citations omitted).

231 Rich v. Palko, 920 F.3d 288, 294 (5th Cir. 2019) (quotations and citation omitted).

232 McLin v. Ard, 866 F.3d 682, 696 (5th Cir. 2017) (quotations and citation omitted).

233 Docket No. 68 at 20 (citing United States v. Edgerton, 438 F.3d 1043, 1051 (10th Cir. 2006)).
the dark when a car is traveling 70 mph on the interstate. But that does not make every vehicle displaying such a tag fair game for an extended Fourth Amendment seizure.”\textsuperscript{234} Aside from the fact that a Tenth Circuit case is not “controlling authority” nor representative of “a robust consensus of persuasive authority,”\textsuperscript{235} the case is unavailing here since Officer McClendon was awaiting NCIC results when he began to question Jamison. As discussed above, questioning while awaiting results from an NCIC check is “not inappropriate.”\textsuperscript{236} Officer McClendon’s initial questioning was not in and of itself a Fourth Amendment violation.

As to Officer McClendon’s “particular conduct” of intruding into Jamison’s vehicle, making promises of leniency, and repeatedly questioning him, Jamison primarily argues that “a genuine issue of material fact exists regarding the voluntariness of Mr. Jamison’s alleged consent to allow the Defendant McLendon to search his car.”\textsuperscript{237} He contends that a grant of “qualified immunity [is] inappropriate based on those factual conflicts.”\textsuperscript{238}

\textsuperscript{234} Edgerton, 438 F.3d at 1051.
\textsuperscript{235} Palko, 920 F.3d at 294.
\textsuperscript{236} United States v. Zucco, 71 F.3d 188, 190 (5th Cir. 1995).
\textsuperscript{237} Docket No. 68 at 23.
\textsuperscript{238} Id. at 24 (citing Jordan v. Wayne Cty., Miss., No. 2:16-CV-70-KS-MTP, 2017 WL 2174963, at *5 (S.D. Miss. May 17, 2017)).
To prevail with this argument, Jamison must show that the factual dispute is such that the Court cannot “settl[e] on a coherent view of what happened in the first place.”\(^\text{239}\) Further, “[Jamison’s] version of the violations [should] implicate clearly established law.”\(^\text{240}\) That is not the case here.

While Jamison and Officer McClendon’s recounting of the facts differs, the Court is able to settle on a coherent view of what occurred based on Jamison’s version of the facts.\(^\text{241}\) Considering the evidence in a light “most favorable” to Jamison,\(^\text{242}\) Jamison has failed to show that Officer McClendon acted in an objectively unreasonable manner. An officer’s “acts are held to be objectively reasonable unless all reasonable officials in the defendant’s circumstances would have then known that the defendant’s conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.”\(^\text{243}\)

While Jamison contends that Officer McClendon’s intrusion was coercive, Jamison fails to support the claim with relevant precedent. He cites to this Court’s opinion in United States v. Alvarado, which found it unreasonable to detain a person on the side of the highway for an hour “for reasons not tied to reasonable suspicion that he had committed a crime or was

\(^{239}\) Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993); see also Mangieri v. Clifton, 29 F.3d 1012, 1016 (5th Cir. 1994).

\(^{240}\) Johnston v. City of Houston, Tex., 14 F.3d 1056, 1061 (5th Cir. 1994).

\(^{241}\) Contra Lampkin, 7 F.3d at 435 (“The facts leading up to these mistakes are not consistent among various officers’ testimony and affidavits.”).

\(^{242}\) Id.

\(^{243}\) Thompson v. Upshur Cty., TX, 245 F.3d 447, 457 (5th Cir. 2001).
engaged in the commission of a crime."\textsuperscript{244} However, this Court’s opinions cannot serve as “clearly established” precedent.\textsuperscript{245} Moreover, the facts of that case are distinguishable since the defendant in \textit{Alvarado} was unlawfully held after background checks came back clear.\textsuperscript{246}

The cases the Court cited above regarding physical intrusions – \textit{United States v. Pierre} and \textit{New York v. Class} – are also insufficient. While it has been clearly established since at least 1986 that an officer may be held liable for an unreasonable “intrusion into the interior of [a] car,”\textsuperscript{247} this is merely a “general statement[] of the law.”\textsuperscript{248} “[C]learly established law must be particularized to the facts of the case.”\textsuperscript{249}

In \textit{Pierre}, the officer could not see into the suspect’s back seat and had to put his head inside to speak to the suspect. In \textit{Class}, the suspect had been removed from his car and the officer put his hand inside to move papers so that he could see the car’s VIN. Neither case considered a police officer putting his arm inside a car while trying to get the driver to consent to a search. Both cases also found the officer’s conduct to be reasonable, thus not providing “fair and clear warning” of what constitutes an unreasonable intrusion into a car.

\textsuperscript{244} \textit{United States v. Alvarado}, 989 F. Supp. 2d 505, 522 n.21 (S.D. Miss. 2013).

\textsuperscript{245} See \textit{McCoy}, 950 F.3d at 233 n.6.

\textsuperscript{246} \textit{Alvarado}, 989 F. Supp. 2d at 522.

\textsuperscript{247} \textit{Pierre}, 958 F.2d at 1309; see also \textit{Class}, 475 U.S. at 114–15.

\textsuperscript{248} \textit{White}, 137 S. Ct. at 552 (quotations and citation omitted).

\textsuperscript{249} \textit{Id.} (quotations and citation omitted).
Given the lack of precedent that places the Constitutional question “beyond debate,” Jamison’s claim cannot proceed.\(^{250}\) Officer McClendon is entitled to qualified immunity as to Jamison’s prolonged detention and unlawful search claims.

V. Jamison’s Seizure of Property & Damage Claim

Jamison’s complaint pleads a separate claim for the “reckless[ and deliberate[” damage to his car he alleges occurred during Officer McClendon’s search. Jamison points out, however, that although Officer McClendon sought summary judgment as to all claims and an entry of final judgment, neither his original nor his renewed motion for summary judgment provided an argument as to this third claim.

Jamison is correct. Officer McClendon’s failure to raise the argument in his motions for summary judgment means he has forfeited its resolution at this juncture.\(^{251}\) And his attempt to shoehorn it into his reply in support of his renewed motion for summary judgment was too late, since “[a]rguments

\(^{250}\) Id. at 551 (quotations and citation omitted).

\(^{251}\) See Bank of Am. Nat’l Ass’n v. Stauffer, 728 F. App’x 412, 413 (5th Cir. 2018). The situation is inapposite to the cases in Officer McClendon’s reply brief. Both Vela v. City of Houston, 276 F.3d 659 (5th Cir. 2001), and Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1156 (5th Cir. 1983), concerned cases in which a party argued for summary judgment on claims and the opposing party failed to address at least one of the theories of recovery in its response. In such cases, the Fifth Circuit held that the nonmoving party “abandoned its alternative theories of recovery [or defenses] by failing to present them to the trial court.” Vela, 276 F.3d at 678–79. Here, however, Officer McClendon failed to raise an argument in his original brief as to Jamison’s third claim.
raised for the first time in a reply brief are waived.”252 The question of whether to grant or deny summary judgment as to Jamison’s “Seizure of Property & Damage Claim” is simply not before the court. Accordingly, the claim will be set for trial.

VI. The Return of Section 1983

Our nation has always struggled to realize the Founders’ vision of “a more perfect Union.”253 From the beginning, “the Blessings of Liberty” were not equally bestowed upon all Americans.254 Yet, as people marching in the streets remind us today, some have always stood up to face our nation’s failings and remind us that “we cannot be patient.”255 Through their efforts we become ever more perfect.

The U.S. Congress of the Reconstruction era stood up to the white supremacists of its time when it passed Section 1983. The late Congressman John Lewis stared down the racists of his era when he marched over the Edmund Pettus Bridge. The Supreme Court has answered the call of history as well, most famously when it issued its unanimous decision in Brown v.

252 Dixon v. Toyota Motor Credit Corp., 794 F.3d 507, 508 (5th Cir. 2015); see also Dugger v. Stephen F. Austin State Univ., 232 F. Supp. 3d 938, 957 (E.D. Tex. 2017) (collecting cases demonstrating that “courts disregard new evidence or argument offered for the first time in the reply brief”).

253 U.S. CONST. pmbl.

254 Id.

Board of Education and resigned the “separate but equal” doctrine to the dustbin of history.

The question of today is whether the Supreme Court will rise to the occasion and do the same with qualified immunity.

A. The Supreme Court

That the Justices haven’t acted so far is perhaps understandable. Not only would they likely prefer that Congress fixes the problem, they also value stare decisis, the legal principle that means “fidelity to precedent.”

Stare decisis, however, “isn’t supposed to be the art of methodically ignoring what everyone knows to be true.” From TikTok to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our system of justice.

Justice Kennedy “complained” as early as 1992 that in qualified immunity cases, “we have diverged to a substantial degree from the historical standards.” Justice Scalia admitted that the Court hasn’t even “purported to be faithful to the

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257 Ramos, 140 S. Ct. at 1405 (citation omitted).

258 See, e.g., @thekaranmenon, TikTok (June 7, 2020), https://vm.tiktok.com/JLVfBkn/.

259 That’s Professor Baude’s word, not mine. Baude, supra at 61.

common-law immunities that existed when § 1983 was enact-ed.”261 Justice Thomas wrote there is “no basis” for the “clearly established law” analysis262 and has expressed his “growing concern with our qualified immunity jurispru-dence.”263 Justice Sotomayor has noted that her colleagues were making the “clearly established” analysis ever more “onerous.”264 In her view, the Court’s doctrine “tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”265 It remains to be seen how the newer additions to the Court will vote.266

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262 Baxter, 140 S. Ct. at 1864 (Thomas, J., dissenting from the denial of certiorari).
263 Ziglar, 137 S. Ct. at 1870 (Thomas, J., concurring in part).
265 Id. at 1162.
266 According to one analysis, Justice Gorsuch’s record on the Tenth Circuit signaled that he “harbors a robust—though not boundless—vision of qualified immunity” and “is sensitive to the practical concerns qualified immunity is meant to mollify—namely, the realities of law enforcement.” Shannon M. Grammel, Judge Gorsuch on Qualified Immunity, 69 STAN. L. REV. ONLINE 163 (2017). On the Court of Appeals, however, those were the concerns then-Judge Gorsuch was supposed to honor. The genius of the law is that, as now-Justice Gorsuch observed in 2019, “[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” Gamble v. United States, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting) (quoting Justice Brandeis).

So what is there to do?

I do not envy the Supreme Court’s duty in these situations. Nor do I have any perfect solutions to offer. But a Fifth Circuit case about another Reconstruction-era statute, 42 U.S.C. § 1981, suggests vectors of change. The case has been lost to the public by a fluke of how it was revised. I share its original version here to give a tangible example of how easily legal doctrine can change.

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Sometimes our understanding of words changes, too, as we glean new insight into the meaning of an authoritative text. See, e.g., *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). Justice Gorsuch’s majority opinion in *Bostock* emphasized that “no court should ever” dispense with a statutory text “to do as we think best,” adding, “the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.” Id. at 1753. Yet that is exactly what the Court has done with § 1983.

B. Section 1981 and Mr. Dulin

Section 1981 “prohibits racial discrimination in making and enforcing contracts.” It reads,

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

You don’t need a lawyer to understand this statute. The language is simple and direct. It calls for “full and equal benefit of all laws and proceedings” regardless of race.

A few years ago, George Dulin invoked this law in a suit he brought against his former employer. Dulin was a white attorney in the Mississippi Delta. He had represented the local hospital board for 24 years. When he was replaced by a Black woman, Dulin claimed that the Board had discriminated against him on the basis of race. He said that no Board member had complained about his job performance, some of the

268 White Glove Staffing, Inc. v. Methodist Hosps. of Dallas, 947 F.3d 301, 308 (5th Cir. 2020) (citation omitted).

269 42 U.S.C. § 1981(a). “[W]hile the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons.” McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976).
Board members had made racist remarks, and he was better qualified than his replacement.270

Despite being simply stated, Section 1981 is not simply enforced. In Section 1981, as with its cousin Section 1983, federal judges have invented extra requirements for plaintiffs to overcome before they may try their case before a jury.

In Dulin’s case, the trial judge and two appellate judges thought he couldn’t overcome those extra hurdles. Specifically, the Fifth Circuit majority explained that although some evidence showed that no one complained about Dulin’s job performance, other evidence revealed that the Board was silently dissatisfied with his work.271 They held that Dulin’s evidence of racist remarks was from too long ago—it failed the “temporal proximity” requirement.272 Then they found that his evidence of superior qualifications could not overcome a legal standard which says that “differences in qualifications are generally not probative evidence of discrimination unless those disparities are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.”273 For the moment, Dulin had lost.


271 See George Dulin v. Bd. of Comm’rs of Greenwood Leflore Hosp., No. 10-60095, slip op. at 6 (5th Cir. July 8, 2011).

272 Id. at 7.

273 Id. at 11 (quotations and citation omitted). This standard is awfully subjective.
To be clear, these judges in the majority hadn’t “gone rogue.” They were simply attempting to follow precedent that had long since narrowed the scope of Section 1981.

Judge Rhesa Barksdale filed a 22-page dissent. He argued that the many factual disputes should be resolved by a jury, given the Seventh Amendment right to jury trials. He wrote that the temporal proximity test was too stringent since a savvy Board could have “purposely waited a year to terminate Dulin in order for that decision not to appear to be motivated by race.” He noted the evidence suggesting that the Board was lying about its motives, since “the Board never discussed Dulin’s claimed poor performance.” Judge Barksdale then flatly disagreed that the court “must apply the superior-qualifications test,” given evidence that the Board never cared to even discuss the qualifications of Dulin’s replacement. He “urged” the full court to rehear the case en banc.

Judges err when we “impermissibly substitute[]” a jury determination with our own—the Seventh Amendment tells us so. We err again when we invent legal requirements that are untethered to the complexity of the real world. The truth is,

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274 Id. at 13-14 (Barksdale, J., dissenting).
275 Id. at 26.
276 Id. at 30.
277 Id. at 32–33.
278 Id. at 34.
280 The most confounding made-up standard might have been from the Eleventh Circuit. For years, that court held that a plaintiff could prove discrimination based on her superior qualifications “only when the disparity
Section 1981 doesn’t have a “temporal proximity” requirement. It says everyone in this country has “the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property.” We should honor it.

Judge Barksdale’s powerful defense of the Seventh Amendment eventually persuaded his colleagues. They withdrew their opinion and issued in its place a two-paragraph, per curiam order directing the district court to hold a full trial on Dulin’s claims. Dulin subsequently presented his case to a jury of his peers, and the judiciary didn’t collapse under a flood of follow-on litigation. That he won his trial hardly matters: the case affirmed Judge Browning’s point that “jury trials are the most democratic expression” of which official acts are reasonable and which are excessive.

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281 See Dulin v. Bd. of Comm’rs of Greenwood Leflore Hosp., 657 F.3d 251, 251 (5th Cir. 2011).

282 We have many tools at our disposal to stop frivolous suits at any stage of litigation. See, e.g., 28 U.S.C. § 1915; Fed. R. Civ. P. 11, 12, 37, and 56; Link v. Wabash R. Co., 370 U.S. 626, 629 (1962). Even after a jury has reached a verdict, a judge may set aside the decision or take other corrective actions if the judge believes a reasonable jury could not have reached the decision. See, e.g., Fed. R. Civ. P. 50, 59 and 60. And where the trial court errs, the appellate court is given the opportunity to correct.

283 Manzanares, 331 F. Supp. 3d at 1294 n.10.

284 The Court recognizes that juries have not always done the right thing. As the Supreme Court noted in Ramos, some states created rules regarding jury verdicts that can be “traced to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities’” on their
I have told this story today because of its obvious parallels with § 1983. In both situations, judges took a Reconstruction-era statute designed to protect people from the government, added in some “legalistic argle-bargle,” and turned the statute on its head to protect the government from the people. We read § 1983 against a background of robust immunity instead of the background of a robust Seventh Amendment. Then we added one judge-made barrier after another. Every hour we spend in a § 1981 case trying to parse “temporal proximity” is a distraction from the point of the statute: to determine if there was unlawful discrimination. Just as every hour we spend in a § 1983 case asking if the law was “clearly established” or “beyond debate” is one where we lose sight of why

juries. 140 S. Ct. at 1394. As other courts have noted, “racial discrimination remains rampant in jury selection.” State v. Saintcalle, 178 Wash. 2d 34, 35 (2013), abrogated on other grounds by City of Seattle v. Erickson, 188 Wash. 2d 721 (2017). Like any actor in our legal system, juries may succumb to “unintentional, institutional, or unconscious” biases. Id. at 36. However, the federal courts’ adoption and expansion of qualified immunity evinces an obvious institutional bias in favor of state actors. With its more diverse makeup relative to those of us who wear the robe, a jury is best positioned to “decide justice.” Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 701-02 (1995) (citation omitted); see also Danielle Root et al., Building a More Inclusive Federal Judiciary, CTR. FOR AM. PROGRESS (Oct. 3, 2019) (“Today, more than 73 percent of sitting federal judges are men and 80 percent are white. Only 27 percent of sitting judges are women . . . . while Hispanic judges comprise just 6 percent of sitting judges on the courts. Judges who self-identify as LGBTQ make up fewer than 1 percent of sitting judges.”) (citations omitted).


Congress enacted this law those many years ago: to hold state actors accountable for violating federally protected rights.

There is another, more difficult reason I have told this story, though. When the Fifth Circuit withdrew its first opinion, Westlaw deleted it and the accompanying dissent. Other attorneys and judges have thus never had the benefit of Judge Barksdale’s analysis and defense of the Seventh Amendment—one forceful enough to persuade his colleagues to reverse themselves.287 That is a loss to us all.

And, although the panel in Dulin ultimately permitted the case to proceed to a jury trial, this fell short of equal justice under the law. Instead of seeking en banc review to eliminate the judge-created rules that prohibited Mr. Dulin’s case from moving forward, the panel simply decided his case would be an exception to the rules. They provided no explanation as to why an exception, rather than a complete overhaul, was appropriate. The “temporal proximity” requirement still applies to § 1981 claims in the Fifth Circuit today. Dulin shows us an example of judges recognizing the inconsistencies and impracticalities of an invented doctrine, but not going far enough to correct the wrong.

In Dulin, federal judges decided that a Reconstruction-era law could accommodate the claims of an older, white, male attorney. They had the imagination to see how their constricting view of § 1981 harmed someone who shared the background of most federal judges. That same imagination must be used to resuscitate § 1983 and remove the impenetrable shield of protection handed to wrongdoers.

287 Fortunately, the dissent is readily found on Google searches and an official copy was preserved on the District Court’s docket.
Instead of slamming shut the courthouse doors, our courts should use their power to ensure Section 1983 serves all of its citizens as the Reconstruction Congress intended. Those who violate the constitutional rights of our citizens must be held accountable. When that day comes we will be one step closer to that more perfect Union.

VII. Conclusion

Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of “separate but equal,” so too should it eliminate the doctrine of qualified immunity.

Earlier this year, the Court explained something true about wearing the robe:

Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.288

Let us waste no time in righting this wrong.

Officer McClendon’s motion is GRANTED, and the remaining claim in this matter will be set for trial in due course.

SO ORDERED, this the 4th day of August, 2020.

s/ CARLTON W. REEVES
United States District Judge

288 Ramos, 140 S. Ct. at 1408.
Dear Members of the Judiciary and the Legal Community:

We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community.

The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation’s founding. But recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.

As judges, we must recognize the role we have played in devaluing black lives. This very court once held that a cemetery could lawfully deny grieving black parents the right to bury their infant. We cannot undo this wrong—but we can recognize our ability to do better in the future. We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole.

As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a justice system must operate. Too often in the legal profession, we feel bound by tradition and the way things have “always” been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly.
Finally, as individuals, we must recognize that systemic racial injustice against black Americans is not an omnipresent specter that will inevitably persist. It is the collective product of each of our individual actions—every action, every day. It is only by carefully reflecting on our actions, taking individual responsibility for them, and constantly striving for better that we can address the shameful legacy we inherit. We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.

As we lean in to do this hard and necessary work, may we also remember to support our black colleagues by lifting their voices. Listening to and acknowledging their experiences will enrich and inform our shared cause of dismantling systemic racism.

We go by the title of “Justice” and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.

Sincerely,

Debra L. Stephens, Chief Justice
Charles W. Johnson, Justice
Barbara A. Madsen, Justice
Susan Owens, Justice
Steven C. González, Justice
Sheryl Gordon McCloud, Justice
Mary I. Yu, Justice
Raquel Montoya-Levits, Justice
G. Helen Whitener, Justice
Syllabus

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a
provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, inter alia, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

*Held:* The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions. affirmed in part and reversed in part.

Mr. Justice POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2744–2747.
2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 2747–2764.
3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 2764.

Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2768–2781.
2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 2782–2794.
Mr. Justice STEVENS, joined by THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concedes in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 2809–2815.

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant. *

It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude, for the reasons stated in the following opinion, that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical
School class. [Footnote 1] The special program consisted of a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications, [Footnote 2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. Id. at 63. About one out of six applicants was invited for a personal interview. Ibid. Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. Id. at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis. [Footnote 3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." Id. at 63-64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. Id. at 163. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." Id. at 65-66, 146, 197, 203-205, 216-218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged" was ever produced, id. at 163-164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. [Footnote 4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974. [Footnote 5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, id. at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. Id. at 171-172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. Id. at 164, 166.

From the year of the increase in class size -- 1971 -- through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63
minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, and 37 Asians, for a total of 44 minority students. [Footnote 6] Although disadvantaged whites applied to the special program in large numbers, see n 5, supra, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years, Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." Id. at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. Id. at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. Id. at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. Id. at 259.

Bakke's 1974 application was completed early in the year. Id. at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." Id. at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession, and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." Id. at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. Id. at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. Id. at 64. In both years, applicants were admitted under the special program with grade point averages, MCT scores, and benchmark scores significantly lower than Bakke's. [Footnote 7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California. [Footnote 8] He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. [Footnote 9] Art. I, § 21, of the California Constitution, [Footnote 10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d. [Footnote 11] The University cross-complained for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. Id. at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that
he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal. 3d 34, 39, 553 P.2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program. [Footnote 12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. Id. at 49, 553 P.2d at 1162-1163. It then turned to the goals of the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, id. at 53, 553 P.2d at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or federal statutory grounds cited in the trial court's judgment, the California court held that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." Id. at 55, 553 P.2d at 1166.

Turning to Bakke's appeal, the court ruled that, since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. [Footnote 13] Id. at 63-64, 553 P.2d at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1970 ed., Supp. V), see, e.g., Franks v. Bowman Transportation Co., 424 U. S. 747, 424 U. S. 772 (176). 18 Cal. 3d at 64, 553 P.2d at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 4. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19-A20. [Footnote 14] The California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal. 3d at 64, 553 P.2d at 1172. That order was stayed pending review in this Court. 429 U.S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090 (1977).

II

In this Court, the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see Ashwander v. TVA, 297 U. S. 288, 297 U. S. 346-348 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900 (1977).
A

[The Court assumed, for the purposes of this case, that respondent has a right of action under Title VI].

B

The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for, as Mr. Justice Holmes declared,

"[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."

Towne v. Eisner, 245 U. S. 418, 245 U. S. 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. Train v. Colorado Public Interest Research Group, 426 U. S. 1, 426 U. S. 10 (1976), quoting United States v. American Trucking Assns., 310 U. S. 534, 310 U. S. 543-544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, [Footnote 19] without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n19 generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. [Footnote 20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:
"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles. [Footnote 21] In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." Id. at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." Id. at 13333. Other Senators expressed similar views. [Footnote 22]

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, [Footnote 23] but proponents of the bill merely replied that the meaning of "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens -- Negroes -- the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." Id. at 6553. [Footnote 24]

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, e.g., Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938); Sipuel v. Board of Regents, 332 U. S. 631 (1948); Sweatt v. Painter, 339 U. S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are per se invalid. See, e.g., Hirabayashi v. United States, 320 U. S. 81 (1943); Korematsu v. United States, 323 U. S. 214 (1944); Lee v. Washington, 390 U. S. 333, 390 U. S. 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); United Jewish Organizations v. Carey, 430 U. S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular
minorities." See United States v. Carolene Products Co., 304 U. S. 144, 304 U. S. 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "lights established [by the Fourteenth Amendment] are personal rights." Shelley v. Kraemer, 334 U. S. 1, 334 U. S. 22 (1948).

En route to this crucial battle over the scope of judicial review, [Footnote 25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota. [Footnote 26]

This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. [Footnote 27]

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," Shelley v. Kraemer, supra at 334 U. S. 22. Accord, Missouri ex rel. Gaines v. Canada, supra at 305 U. S. 351; McCabe v. Atchison, T. & S.F. R. Co., 235 U. S. 151, 235 U. S. 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. Carolene Products Co., supra at 304 U. S. 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. [Footnote 28] See, e.g., Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 316 U. S. 541 (1942); Carrington v. Rash, 380 U. S. 89, 380 U. S. 96-97 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U. S. 307, 427 U. S. 313 (1976) (age); San Antonio Independent School Dist. v. Rodriguez, 411 U. S. 1, 411 U. S. 28 (1973) (wealth); Graham v. Richardson, 403 U. S. 365, 403 U. S. 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:
"Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi, 320 U.S. at 320 U. S. 100.

"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." Korematsu, 323 U.S. at 323 U. S. 216. The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made Freeman and citizen from the oppressions of those who had formerly exercised dominion over him." Slaughter-House Cases, 16 Wall. 36, 83 U. S. 71 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [Footnote 29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, e.g., Mugler v. Kansas, 123 U. S. 623, 123 U. S. 661 (1887); Allgeyer v. Louisiana, 165 U. S. 578 (1897); Lochner v. New York, 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, e.g., Plessy v. Ferguson, 163 U. S. 537 (1896). It was only as the era of substantive due process came to a close, see, e.g., 291 U. S. New York, 291 U. S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, e.g., United States v. Carolene Products, 304 U. S. 144 (1938); Skinner v. Oklahoma ex rel. Williamson, supra.

By that time, it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. [Footnote 30] Each had to struggle [Footnote 31] -- and, to some extent, struggles still [Footnote 32] -- to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said -- perhaps unfairly, in many cases -- that a shared characteristic was a willingness to disadvantage other groups. [Footnote 33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See Stroud v. West Virginia, 100 U. S. 303, 100 U. S. 308 (1880) (Celtic Irishmen) (dictum); Yick Wo v. Hopkins, 118 U. S. 356 (1886) (Chinese); Truax v. Raich, 239 U. S. 33, 239 U. S. 41 (1915) (Austrian resident aliens); Korematsu, supra, (Japanese); Hernandez v. Texas, 347 U. S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in Yick Wo, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S. at 118 U. S. 369.
Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases*, *supra*, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U. S. 273, 427 U. S. 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. *See Runyon v. McCrory*, 427 U. S. 160, 427 U. S. 192-202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that, among the Framers, were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. *See, e.g.*, Cong.Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.* at 2891-2892 (remarks of Sen. Conness); *id.* 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). *See also* Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60-63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of equal laws," *Yick Wo, supra* at 118 U. S. 369, in a Nation confronting a legacy of slavery and racial discrimination. *See, e.g.*, *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Brown v. Bard of Education*, 347 U. S. 483 (1954); *Hills v. Gautreaux*, 425 U. S. 284 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that, "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U. S. 1, 388 U. S. 11 (1967), quoting *Hirabayashi*, 320 U.S. at 320 U. S. 100.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause, and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." *Footnote 34*. The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education, supra* at 347 U. S. 492; *accord, Loving v. Virginia supra* at 388 U. S. 9. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. *Footnote 35* "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' -- that is, bad upon differences between 'white' and Negro." *Hernandez*, 347 U.S. at 347 U. S. 478.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed
above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. [Footnote 36] Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable. [Footnote 37]

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is, in fact, benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See United Jewish Organizations v. Carey, 430 U.S. at 430 U. S. 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See DeFunis v. Odegaard, 416 U. S. 312, 416 U. S. 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms, rather than alleviate them. United Jewish Organizations, supra at 430 U. S. 173-174 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 157 U. S. 650-651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." A. Cox, The Role of the Supreme Court in American Government 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than
the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U. S. 214 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. [Footnote 38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S. at 334 U. S. 22; *Missouri ex rel. Gaines v. Canada*, 305 U.S. at 305 U. S. 351.

C

[The Court rejected Petitioner's argument that it should apply a lesser degree of scrutiny].

IV

We have held that, in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U. S. 717, 413 U. S. 721-722 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S. at 388 U. S. 11; *McLaughlin v. Florida*, 379 U. S. 184, 379 U. S. 196 (1964). The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; [Footnote 43] (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E.g.*, *Loving v. Virginia*, supra at 388 U. S. 11; *McLaughlin v. Florida*, supra at 379 U. S. 198; *Brown v. Board of Education*, 347 U. S. 483 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial
discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e.g., Teamsters v. United States, 431 U. S. 324, 431 U. S. 367-376 (1977); United Jewish Organizations, 430 U.S. at 430 U. S. 155-156; South Carolina v. Katzenbach, 383 U. S. 301, 383 U. S. 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, [Footnote 44] it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in 438 U. S. isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. [Footnote 45] Cf. Hampton v. Mow Sun Wong, 426 U. S. 88 (1976); n. 41, supra. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, e.g., Califano v. Webster, 430 U.S. at 430 U. S. 316-321; Califano v. Goldfarb, 430 U.S. at 430 U. S. 212-217. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. Pasadena Cty Board of Education v. Spangler, 427 U. S. 424 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. It may be assumed that, in some situations, a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that
petitioner's special admissions program is either needed or geared to promote that goal. [Footnote 46] The court below addressed this failure of proof:

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority communities than the average white doctor. (See Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role (1975) 42 U.Chi.L.Rev. 653, 688.) Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal. 3d at 56, 553 P.2d at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem. [Footnote 47]

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" Sweezy v. New Hampshire, 354 U. S. 234, 354 U. S. 263 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in Keyishian v. Board of Regents, 385 U. S. 589, 385 U. S. 603 (1967):

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' United States v. Associated Press, 52 F. Supp. 362, 372."
The atmosphere of "speculation, experiment and creation" -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. [Footnote 48] As the Court noted in Keyishian, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school, where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In Sweatt v. Painter, 339 U.S. at 339 U. S. 634, the Court made a similar point with specific reference to legal education:

"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law, would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. [Footnote 49]

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges -- and the courts below have held -- that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest. In re Griffiths, 413 U.S. at 413 U. S. 721-722.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense, the
argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity. [Footnote 50]

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multi-track program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

"In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . ."

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . . [See 438 U.S. 265 app|>Appendix hereto.]

"In Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that, in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students." App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3.

In such an admissions program, [Footnote 51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive.
when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. [Footnote 52]

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program, and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U. S. 327, 322 U. S. 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, e.g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); *Washington v. Davis*, 426 U. S. 229 (1976); *Swain v. Alabama*, 380 U. S. 202 (165). [Footnote 53]

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 334 U. S. 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed. [Footnote 54]

[APPENDIX TO OPINION OF POWELL, J., Harvard College Admissions Program [Footnote 55], omitted]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR, JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented -- whether government may use race-conscious programs to redress the continuing effects of past discrimination -- and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, prohibits programs such as that at the Davis Medical School. On this statutory
theory alone, they would hold that respondent Allan Bakke's rights have been violated, and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172 (1976).

We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative action programs that take race into account. See ante at 438 U. S. 271 n. Since we conclude that the affirmative admissions program at the Davis Medical School is constitutional, we would reverse the judgment below in all respects. MR. JUSTICE POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future. [Footnote 2/1]

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known, and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund, so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." Buck v. Bell, 274 U. S. 200, 274 U. S. 208 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" [Footnote 2/2] status before the law, a status always separate but seldom equal. Not until 1954 -- only 24 years ago -- was this odious doctrine interred by our decision in Brown v. Board of Education, 347 U. S. 483 (Brown I), and its progeny, [Footnote 2/3] which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then, inequality was not eliminated with "all deliberate speed." Brown v. Board of Education, 349 U. S. 294, 349 U. S. 301 (1955). In 1968 [Footnote 2/4] and again in 1971, [Footnote 2/5] for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket [Footnote 2/6] and at dockets of lower courts will show that, even today, officially sanctioned discrimination is not a thing of the past.
Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration, rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot -- and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds -- let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination. [Footnote 2/7] We join Parts I and V-C of our Brother POWELL's opinion, and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI. [Footnote 2/8]

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remediing past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

A

The history of Title VI -- from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals -- reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964. [Footnote 2/9] Representative Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action.
"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of higher education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964).

[The Court’s further discussion of the purpose of Title VI is omitted].

Respondent's contention that Congress intended Title VI to bar affirmative action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:

"Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools."

"* * * *

"Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only or Negroes only. . . ."

"In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions."

"Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . ."

". . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like." Id. at 6543-6544.

See also the remarks of Senator Pastore (id. at 7054-7055); Senator Ribicoff (id. at 7064-7065); Senator Clark (id. at 5243, 9086); Senator Javits (id. at 6050, 7102). [Footnote 2/12]
The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments, but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth Amendments. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course, it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition of race-conscious action. But there are three compelling reasons to reject such a hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See infra at 438 U. S. 355-356.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment. [Footnote 2/13] See § 602 of the Act, 42 U.S.C. § 2000d-1 (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 25 (1963); 110 Cong Rec. 13700 (1964) (Sen. Pastore); id. at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that, under certain circumstances, the remedial use of racial criteria is not only permissible, but is constitutionally required to eradicate constitutional violations. For example, in Board of Education v. Swann, 402 U. S. 43 (1971), the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system:
"Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." Id. at 402 U. S. 46. Surely Congress did not intend to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution, rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

"The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent." 110 Cong.Rec. 5612 (1964).

See also remarks of Representative Abernethy (id. at 1619); Representative Dowdy (id. at 1632); Senator Talmadge (id. at 5251); Senator Sparkman (id. at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution, and one that could and should be administratively and judicially applied. See remarks of Senator Humphrey (id. at 5253, 6553); Senator Ribicoff (id. at 7057, 13333); Senator Pastore (id. at 7057); Senator Javits (id. at 5606-5607, 6050). [Footnote 2/14] Indeed, there was a strong emphasis throughout Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another, so that the term would assume different meanings in different contexts. [Footnote 2/15] This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56-29 vote, on the ground that federal administrators could be trusted to act
reasonably, and that there was no danger that they would prohibit the use of racial criteria under such circumstances. *Id.* at 13695.

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the Equal Protection Clause to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the Fourteenth Amendment barred only *de jure* discrimination or, in at least some circumstances, reached *de facto* discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolutionary change that constitutional law in the area of racial discrimination was undergoing in 1964. [Footnote 2/16]

In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevailing use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that, "'[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law' which forbids its use, however clear the words may appear on `superficial examination.'" *Train v. Colorado Public Interest Research Group*, 426 U. S. 1, 426 U. S. 10 (1976), quoting *United States v. American Trucking Assns.*, 310 U. S. 534, 310 U. S. 544-544 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose. [Footnote 2/17]

B

Section 602 of Title VI, 42 U.S.C. § 2000d-1, instructs federal agencies to promulgate regulations interpreting Title VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, e.g., *414 U. S. Nichols*, 414 U. S. 563 (1974); *Mourning v. Family Publications Service, Inc.*, 411 U. S. 356, 411 U. S. 369 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 395 U. S. 381 (1969). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations requiring affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and authorizing the voluntary undertaking of affirmative action programs by federally funded institutions that have not been guilty of prior discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.
Title 45 FR § 80.3(b)(6)(i) (1977) provides:

"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Title 45 CFR § 80.5(i) (1977) elaborates upon this requirement:

"In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that, where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted, but required, to accomplish the remedial objectives of Title VI. [Footnote 2/18] Of course, there is no evidence that the Medical School has been guilty of past discrimination, and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title I, however, much less from its legislative history, why the statute compels race-conscious remedies where a recipient institution has engaged in past discrimination, but prohibits such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

Title 45 CFR § 80.3(b)(6)(ii) (1977) provides:

"Even in the absence of such prior discrimination, a recipient, in administering a program, may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3(b)(6)(ii) contemplates includes the use of racial preferences:

"Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not, in fact, be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a
university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service."

45 CFR § 80.5(j) (1977) This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an agency [Footnote 2/19] responsible for achieving its objectives. [Footnote 2/20]

The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 395 U. S. 381; Zemel v. Rusk, 381 U. S. 1, 381 U. S. 11-12 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use of race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that "[n]one of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age." 123 Cong.Rec. 19715 (1977). In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action, and that this was a creation of the bureaucracy. Id. at 19722. He explicitly stated, however, that he favored permitting universities to adopt affirmative action programs giving consideration to racial identity, but opposed the imposition of such programs by the Government. Id. at 19715. His amendment was itself amended to reflect this position by only barring the imposition of race-conscious remedies by HEW:

"None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." Id. at 19722.

This amendment was adopted by the House. Ibid. The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies, and the Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill. [Footnote 2/21] More significant for present purposes, however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational institutions voluntarily to extend preferences to racial minorities.

Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit,
and does not now believe that Title VI prohibits, the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year, Congress enacted legislation [Footnote 2/22] explicitly requiring that no grants shall be made "for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

The statute defines the term "minority business enterprise" as a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit compliance with the quota provisions of the legislation. [Footnote 2/23]

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises. [Footnote 2/24] It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprises. 123 Cong.Rec. 5327 (1977) (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that, although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 42 U.S.C. § 6709 (1976 ed.). Thus Congress, was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 395 U. S. 380-381; Erlenbaugh v. United States, 409 U. S. 239, 409 U. S. 243-244 (1972). See also United States v. Stewart, 311 U. S. 60, 311 U. S. 64-65 (1940). [Footnote 2/25]
Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau v. Nichols*, 414 U. S. 563 (1974), the Court held that the failure of the San Francisco school system to provide English language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon an HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR § 80.3(b)(2) (1977). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese-speaking students as to English-speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

*Lau* is significant in two related respects. First, it indicates that, in at least some circumstances, agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of color blindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking race-conscious action designed to remedy the exclusion of significant numbers of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession. [Footnote 2/26] It would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors, but a result of the lingering effects of past societal discrimination.

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, 46 U. S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau*'s implication that impact alone is, in some contexts, sufficient to establish a *prima facie* violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least.
First, for the reasons discussed supra at 438 U. S. 336-350, regardless of whether Title VI's prohibitions extend beyond the Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, Lau itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a *prima facie* Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

The Court has also declined to adopt a "colorblind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that, where employment requirements have a disproportionate impact upon racial minorities, they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job. [Footnote 2/27] More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent. [Footnote 2/28] Finally, we have construed the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1970 ed. and Supp. V), which contains a provision barring any voting procedure or qualification that denies or abridges "the right of any citizen of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others. [Footnote 2/29]

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to attain this objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the Equal Protection Clause of the Fourteenth Amendment.

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," *Edwards v. California*, 314 U. S. 160, 314 U. S. 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy v. Ferguson*, 163 U. S. 537, 163 U. S. 559 (1896) (Harlan, J., dissenting), has never been adopted
by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," McLaughlin v. Florida, 379 U. S. 184, 379 U. S. 192 (1984), could be found that would justify racial classifications. See, e.g., ibid.; Loving v. Virginia, 388 U. S. 1, 388 U. S. 11 (1967); Korematsu v. United States, 323 U. S. 214, 323 U. S. 216 (1944); Hirabayashi v. United States, 320 U. S. 81, 320 U. S. 100-101 (1943). More recently, in McDaniel v. Barresi, 402 U. S. 39 (1971) this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was per se invalid because it was not colorblind. And in North Carolina Board of Education v. Swann, we held, again unanimously, that a statute mandating colorblind school assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of Brown I." 402 U. S. at 402 U. S. 45-46.

We conclude, therefore, that racial classifications are not per se invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect, and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial classifications used by its program are reasonably related to what it tells us are its benign purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny," and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. [Footnote 2/30] See, e.g., San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 411 U. S. 16-17 (1973); Dunn v. Blumstein, 405 U. S. 330 (1972). But no fundamental right is involved here. See San Antonio, supra at 422 U. S. 29-36. Nor do whites, as a class, have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id. at 422 U. S. 28; see United States v. Carolene Products Co., 304 U. S. 144, 304 U. S. 152 n. 4 (1938). [Footnote 2/31]

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant, and therefore prohibited." Hirabayashi, supra at 320 U. S. 100. Nor has anyone suggested that the University's purposes contravene the cardinal principle that
racial classifications that stigmatize -- because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism -- are invalid without more. See Yick Wo v. Hopkins, 118 U. S. 356, 118 U. S. 374 (1886); [Footnote 2/32] accord, Strauder v. West Virginia, 100 U. S. 303, 100 U. S. 308 (1880); Korematsu v. United States, supra at 323 U. S. 223; Oyama v. California, 332 U. S. 633, 332 U. S. 663 (1948) (Murphy, J., concurring); Brown I, 347 U. S. 483 (1954); McLaughlin v. Florida, supra, at 379 U. S. 191-192; Loving v. Virginia, supra, at 388 U. S. 11-12; Reitman v. Mulkey, 387 U. S. 369, 387 U. S. 375-376 (1967); United Jewish Organizations v. Carey, 430 U. S. 144, 430 U. S. 165 (1977) (UJO) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); id. at 430 U. S. 169 (opinion concurring in part). [Footnote 2/33]

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational basis standard of review that is the very least that is always applied in equal protection cases. [Footnote 2/34] "'[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purpose underlying a statutory scheme.'" Califano v. Webster, 430 U. S. 313, 430 U. S. 317 (1977), quoting Weinberger v. Wiesenfeld, 420 U. S. 636, 420 U. S. 648 (1975). Instead, a number of considerations -- developed in gender discrimination cases but which carry even more force when applied to racial classifications -- lead us to conclude that racial classifications designed to further remedial purposes "must serve important governmental objectives, and must be substantially related to achievement of those objectives." Califano v. Webster, supra at 430 U. S. 317, quoting Craig v. Boren, 429 U. S. 190, 429 U. S. 197 (1976). [Footnote 2/35]

First, race, like, "gender-based classifications, too often [has] been inexusably utilized to stereotype and stigmatize politically powerless segments of society." Kahn v. Shevin, 416 U. S. 351, 357 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see Califano v. Webster, supra; Schlesinger v. Ballard, 419 U. S. 498 (1975); Kahn v. Shevin, supra, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear, and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. Schlesinger v. Ballard, supra at 419 U. S. 508; UJO, supra at 430 U. S. 174, and n. 3 (opinion concurring in part); Califano v. Goldfarb, 430 U. S. 199, 430 U. S. 223 (1977) (STEVENS, J., concurring in judgment). See also Stanton v. Stanton, 421 U. S. 7, 421 U. S. 14-15 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See UJO, supra at 430 U. S. 172 (opinion concurring in part); ante at 438 U. S. 298 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see Weber v. Aetna Casualty & Surety Co., 406 U. S. 164 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not per se invalid because it divides classes on the basis of an immutable characteristic, see supra at 438 U. S. 355-356, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to
individual responsibility or wrongdoing," *Weber, supra* at 406 U. S. 175; *Frontiero v. Richardson*, 411 U. S. 677, 411 U. S. 686 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual. See *UJO*, 430 U. S. at 430 U. S. 173 (opinion concurring in part); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U. S. 552, 330 U. S. 566 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted, it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: the "natural consequence of our governing processes [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination." *UJO, supra* at 430 U. S. 174 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, e.g., *Weber, supra*. Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See *Lucas v. Colorado General Assembly*, 377 U. S. 713, 377 U. S. 736 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification, an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be strict -- not "strict in theory and fatal in fact," [Footnote 2/36] because it is stigma that causes fatality -- but strict and searching nonetheless.

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

A

At least since *Green v. County School Board*, 391 U. S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and its companion cases, *Davis v. School Comm'rs of Mobile County*, 402 U. S. 33 (1971); *McDaniel v. Barresi*, 402 U. S. 39 (1971); and *North Carolina Board of Education v. Swann*, 402 U. S. 43 (1971), reiterated that racially neutral remedies for
past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, e.g., Charlotte-Mecklenburg, supra at 402 U. S. 28. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, Charlotte-Mecklenburg, supra; Davis, supra; United States v. Montgomery County Board of Ed., 395 U. S. 225 (1969), and that local school boards could voluntarily adopt desegregation plans which made express reference to race if this was necessary to remedy the effects of past discrimination. McDaniel v. Barresi, supra. Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. Charlotte-Mecklenburg, supra at 402 U. S. 16. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," Green, supra at 391 U. S. 438, was recognized as a compelling social goal justifying the overt use of race.

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See Franks v. Bowman Transportation Co., 424 U. S. 747 (1976); Teamsters v. United States, 431 U. S. 324 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See id. at 431 U. S. 357-362. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See Franks, supra. In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants vis-à-vis nonminority applicants, even if this means interpreting the qualifications of an applicant in light of his race. See Albemarle Paper Co. v. Moody, 422 U. S. 405, 422 U. S. 435 (1975). [Footnote 2/37]

These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. McDaniel v. Barresi, supra; UJO; see Califano v. Webster, 430 U. S. 313 (1977); Schlesinger v. Ballard, 419 U. S. 498 (1975); Kahn v. Shevin, 416 U. S. 351 (1974). See also Katzenbach v. Morgan, 384 U. S. 641 (1966). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remediing of its effects, rather than a prerequisite to action. [Footnote 2/38] Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious
remedies have been approved where this is not the case. See *UJO*, 430 U.S. at 430 U.S. 157 (opinion of WHITE, J., joined by BRENAN, BLACKMUN, and STEVENS, JJ.); [Footnote 2/39] id. at 430 U.S. 167 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); [Footnote 2/40] cf. *Califano v. Webster*, *supra*, at 430 U.S. 317; *Kahn v. Shevin*, *supra*. Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in *Franks v. Bowman Transportation Co.*, *supra*, in which the employer had violated Title VII, for, in each case, the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see *Franks, supra* at 424 U.S. 776, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, than there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program. [Footnote 2/41]

Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. [Footnote 2/42]

Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment. [Footnote 2/43] Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions such a *Franks* and *Teamsters v. United States*, 431 U.S. 324 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment, and therefore with the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional preemption of the
subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment
or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the
fundamental purpose of equal opportunity to which the Amendment and these Acts are
addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal
opportunity have been recognized to be essential to its attainment. "To use the Fourteenth
Amendment as a sword against such State power would stultify that Amendment." Railway Mail

We therefore conclude that Davis' goal of admitting minority students disadvantaged by the
effects of past discrimination is sufficiently important to justify use of race-conscious admissions
criteria.

B

Properly construed, therefore, our prior cases unequivocally show that a state government may
adopt race-conscious programs if the purpose of such programs is to remove the disparate racial
impact its actions might otherwise have, and if there is reason to believe that the disparate impact
is itself the product of past discrimination, whether its own or that of society at large. There is no
question that Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had a
sound basis for believing that the problem of underrepresentation of minorities was substantial
and chronic, and that the problem was attributable to handicaps imposed on minority applicants
by past and present racial discrimination. Until at least 1973, the practice of medicine in this
country was, in fact, if not in law, largely the prerogative of whites. [Footnote 2/45] In 1950, for
example, while Negroes constituted 10% of the total population, Negro physicians constituted
only 2.2% of the total number of physicians. [Footnote 2/46] The overwhelming majority of
these, moreover, were educated in two predominantly Negro medical schools, Howard and
Meharry. [Footnote 2/47] By 1970, the gap between the proportion of Negroes in medicine and
their proportion in the population had widened: the number of Negroes employed in medicine
remained frozen at 2.2% [Footnote 2/48] while the Negro population had increased to 11.1%.
[Footnote 2/49] The number of Negro admittees to predominantly white medical schools,
moreover, had declined in absolute numbers during the years 1955 to 1964. Odegaard 19.

Moreover, Davis had very good reason to believe that the national pattern of underrepresentation
of minorities in medicine would be perpetuated if it retained a single admissions standard. For
example, the entering classes in 1968 and 1969, the years in which such a standard was used,
included only 1 Chicano and 2 Negroes out of the 50 admittees for each year. Nor is there any
relief from this pattern of underrepresentation in the statistics for the regular admissions program
in later years. [Footnote 2/50]

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in
medicine depicted by these statistics is the result of handicaps under which minority applicants
labor as a consequence of a background of deliberate, purposeful discrimination against
minorities in education and in society generally, as well as in the medical profession. From the
inception of our national life, Negroes have been subjected to unique legal disabilities impairing
access to equal educational opportunity. Under slavery, penal sanctions were imposed upon
anyone attempting to educate Negroes. [Footnote 2/51] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, Brown I, 347 U. S. 483 (1954), that relegated minorities to inferior educational institutions, [Footnote 2/52] and that denied them intercourse in the mainstream of professional life necessary to advancement. See Sweatt v. Painter, 339 U. S. 629 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. Berea College v. Kentucky, 211 U. S. 45. See also Plessy v. Ferguson, 163 U. S. 537 (1896).

Green v. County School Board, 391 U. S. 430 (1968), gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately dissipated when Brown I, supra, announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in the professions. The generation of minority students applying to Davis Medical School since it opened in 1968 -- most of whom were born before or about the time Brown I was decided -- clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants; [Footnote 2/53] many minority group members living in California, moreover, were born and reared in school districts in Southern States segregated by law. [Footnote 2/54] Since separation of schoolchildren by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," Brown I, supra at 347 U. S. 494, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of de jure segregation, the resistance to Brown I, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. Reitman v. Mulkey, 387 U. S. 369 (1967), and yet come to the starting line with an education equal to whites. [Footnote 2/55]

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see supra at 438 U. S. 341-343, has also reached the conclusion that race may be taken into account in situations where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See supra at 438 U. S. 344-345, discussing 45 CFR §§ 80.3(b)(6)(ii) and 80.5(j) (1977). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See supra at 438
Indeed, although an amendment to an appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See ibid. In these circumstances, the conclusion implicit in the regulations -- that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities -- deserves considerable judicial deference. See, e.g., Katzenbach v. Morgan, 384 U. S. 641 (1966); UJO, 430 U.S. at 430 U. S. 175-178 (opinion concurring in part). [Footnote 2/56]

C

The second prong of our test -- whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives -- is clearly satisfied by the Davis program.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage -- less than their proportion of the California population [Footnote 2/57] -- of otherwise underrepresented qualified minority applicants. [Footnote 2/58]

Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in Brown I would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that, wherever they go or whatever they do, there is a significant likelihood that they will be treated as second-class citizens because of their color.

[rest of discussion of this issue omitted].

D

[The opinion then addresses how the Davis program's use of race was reasonable in light of its objectives.]

E
The opinion then explained how the Davis program “cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants, rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants.”

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

MR. JUSTICE WHITE. [Opinion addressing whether a private right of action exists under Title VI omitted].

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave. [Footnote 4/1]

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

"[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them
into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that, when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans "proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks." Franklin 100.

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in Dred Scott v. Sandford, 19 How. 393 (1857), holding that the Missouri Compromise -- which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri -- was unconstitutional because it deprived slave owners of their property without due process. The Court declared that, under the Constitution, a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States. . . ." Id. at 60 U. S. 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution, but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect . . . ." Id. at 60 U. S. 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." Slaughter-House Cases, 16 Wall. 36, 83 U. S. 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the
State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to reenslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and, finally, the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time, it seemed as if the Negro might be protected from the continued denial of his civil rights, and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, e.g., Slaughter-House Cases, supra; United States v. Reese, 92 U. S. 214 (1876); United States v. Cruikshank, 92 U. S. 542 (1876). Then, in the notorious Civil Rights Cases, 109 U. S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases, the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." Id. at 109 U. S. 10. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. Id. at 109 U. S. 24-25. "When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws. . . ." Id. at 109 U. S. 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. Id. at 109 U. S. 61.
The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson*, 163 U. S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.* at 163 U. S. 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

*Id.* at 163 U. S. 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.* at 163 U. S. 560. He expressed his fear that, if like laws were enacted in other States, "the effect would be in the highest degree mischievous." *Id.* at 163 U. S. 563. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens. . . ." *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy*, many States expanded their Jim Crow laws, which had, up until that time, been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy*, the Charlestown News and Courier printed a parody of Jim Crow laws:

"If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court -- and a Jim Crow Bible for colored witnesses to kiss." Woodward 68.

The irony is that, before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice -- down to and including the Jim Crow Bible." *Id.* at 69.

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries,
and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was "not humiliating, but a benefit," and that he was "rendering [the Negroes] more safe in their possession of office, and less likely to be discriminated against." Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were, for the most part, confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools -- and thereby denied the opportunity to become doctors, lawyers, engineers, and the like is also well established. It is, of course, true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to Brown v. Board of Education, 347 U. S. 483 (1954). See, e.g., Morgan v. Virginia, 328 U. S. 373 (1946); Sweatt v. Painter, 339 U. S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. [Footnote 4/2] The Negro child's mother is over three times more likely to die of complications in childbirth, [Footnote 4/3] and the infant mortality rate for Negroes is nearly twice that for whites. [Footnote 4/4] The median income of the Negro family is only 60% that of the median of a white family, [Footnote 4/5] and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites. [Footnote 4/6]

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, [Footnote 4/7] and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. [Footnote 4/8] A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. [Footnote 4/9] Although Negroes represent 11.5% of the population, [Footnote 4/10] they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors. [Footnote 4/11]
The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy. . . ." Slaughter-House Cases, 16 Wall. at 83 U. S. 72. It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see supra at 438 U. S. 391. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons. . . ." Cong.Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also id. at 634-635 (remarks of Rep. Chandler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior . . ., and gives them favors that the poor white boy in the North cannot get." Id. at 401 (remarks of Sen. McDougall). See also id. at 319 (remarks of Sen. Hendricks); id. at 362 (remarks of Sen. Saulsbury); id. at 397 (remarks of Sen. Willey); id. at 544 (remarks of Rep. Taylor). The bill's supporters defended it not by rebutting the claim of special treatment, but by pointing to the need for such treatment:

"The very discrimination it makes between 'destitute and suffering' negroes and destitute and suffering white paupers proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." Id. at App. 75 (remarks of Rep. Phelps).
Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. \textit{Id.} at 421, 688. President Johnson vetoed this bill, and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill’s opponents, Congress overrode the President’s second veto. Cong.Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," \textit{Railway Mail Assn. v. Corsi}, 326 U. S. 88, 326 U. S. 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

\textit{B}

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that, even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school assignment decisions. \textit{See Swann v. Charlotte-Mecklenburg Board of Education}, 402 U. S. 1, 402 U. S. 16 (1971); \textit{McDaniel v. Barresi}, 402 U. S. 39, 402 U. S. 41 (1971). We noted, moreover, that a "flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in \textit{Swann}, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device -- even as a starting point -- contravenes the implicit command of \textit{Green v. County School Board}, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." \textit{Board of Education v. Swann}, 402 U. S. 43, 402 U. S. 46 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." \textit{McDaniel v. Barresi, supra} at 402 U. S. 41.

Only last Term, in \textit{United Jewish Organizations v. Carey}, 430 U. S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in \textit{UJO} to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, \textit{Califano v. Webster}, 430 U. S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women." Id. at 430 U. S. 317, quoting \textit{Califano v. Goldfarb}, 430 U. S. 199, 430 U. S. 209 n. 8
We thus recognized the permissibility of remediying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination. [Footnote 4/12] It is true that, in both UJO and Webster, the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination without the need for a finding that those benefited were actually victims of that discrimination.

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that, for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the Civil Rights Cases, supra, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S. at 109 U. S. 25; see supra at 438 U. S. 392. We cannot, in light of the history of the last century, yield to that view. Had the Court, in that decision and others, been willing to "do for human liberty and the fundamental rights of American citizenship what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," 109 U.S. at 109 U. S. 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in Plessy v. Ferguson, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter. 163 U.S. at 163 U. S. 559. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from Plessy to Brown v. Board of Education, ours was a Nation where, by law, an individual could be given "special" treatment based on the color of his skin.
It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take "affirmative action to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin."

Supplemental Brief for United States as Amicus Curiae 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War, our Government started several "affirmative action" programs. This Court, in the Civil Rights Cases and Plessy v. Ferguson, destroyed the movement toward complete equality. For almost a century, no action was taken, and this nonaction was with the tacit approval of the courts. Then we had Brown v. Board of Education and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.

MR. JUSTICE BLACKMUN.

I participate fully, of course, in the opinion, ante p. 438 U. S. 324, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race-conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade, at the most. But the story of Brown v. Board of Education, 347 U. S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line
is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive, but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many qualified persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination, and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84-16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception, and not the rule.

II

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinctions, where they are stereotypes, are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 concept, and now is recognized to have reached a point where, as MR. JUSTICE POWELL states, ante at 438 U. S. 293, quoting from the Court's opinion in McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273, 427 U. S. 296 (1976), it embraces a "broader principle."
This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in *Lau v. Nichols*, 414 U. S. 563 (1974), and in *United Jewish Organizations v. Carey*, 430 U. S. 144 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in *United Jewish Organizations* certainly complained bitterly of their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as MR. JUSTICE POWELL describes it, *ante* at 438 U. S. 305. And surely, in *Lau v. Nichols*, we looked to ethnicity.

I am not convinced, as MR. JUSTICE POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound, or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced, as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that, under a program such as Harvard's, one may accomplish covertly what Davis concedes it does openly. I need not go that far, for, despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in *United Jewish Organizations*, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist, and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in the administration
of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: among the qualified, how does one choose?

A long time ago, as time is measured for this Nation, a Chief Justice, both wise and far-sighted, said:

"In considering this question, then, we must never forget, that it is a constitution we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 17 U. S. 407 (1819) (emphasis in original).

In the same opinion, the Great Chief Justice further observed:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 17 U. S. 421.

More recently, one destined to become a Justice of this Court observed:

"The great generalities of the constitution have a content and a significance that vary from age to age." B. Cardozo, The Nature of the Judicial Process 17 (1921).

And an educator who became a President of the United States said:

"But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age." W. Wilson, Constitutional Government in the United States 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a Constitution. The same principles that governed McCulloch's case in 1819 govern Bakke's case in 1978. There can be no other answer.

**MR. JUSTICE STEVENS,** with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.
It is always important at the outset to focus precisely on the controversy before the Court. [Footnote 5/1] It is particularly important to do so in this case, because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. The California Supreme Court upheld his challenge and ordered him admitted. If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the Medical School because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical importance. [Footnote 5/2] Paragraph 3 declared that the University's special admissions program violated the Fourteenth Amendment, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke, because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment, it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of Bakke's application. [Footnote 5/3] Because the University has since been ordered to admit Bakke, paragraph 2 of the trial court's order no longer has any significance.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admissions program did not result in Mr. Bakke's failure to be admitted." [Footnote 5/4] Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission. [Footnote 5/5] Since that order superseded paragraph 2 of the trial court's judgment, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate. [Footnote 5/6]

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground.
"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." Spectro Motor Co. v. McLaughlin, 323 U. S. 101, 323 U. S. 105. [Footnote 5/7] The more important the issue, the more force there is to this doctrine. [Footnote 5/8] In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

III

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. [Footnote 5/9] The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," [Footnote 5/10] and, with respect to Title VI, the federal funding of segregated facilities. [Footnote 5/11] The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273, 427 U. S. 279, [Footnote 5/12] so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of any individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that no person . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 25 (1963) (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act. [Footnote 5/13]

Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language
of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation, and then only by way of a discussion of the meaning of the word "discrimination." [Footnote 5/14] The opponents feared that the term "discrimination" would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this possibility. [Footnote 5/15] In response, the proponents of the legislation gave repeated assurances that the Act would be "colorblind" in its application. [Footnote 5/16] Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

"[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . ."

"The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else." 110 Cong.Rec. 5864 (1964).

"[I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that, we would not need to worry about discrimination." Id. at 5866.

In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government, [Footnote 5/17] but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution, and they sought to provide an effective weapon to implement that view. [Footnote 5/18] As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution. [Footnote 5/19]

As with other provisions of the Civil Rights Act, Congress' expression of it policy to end racial discrimination may independently proscribe conduct that the Constitution does not. [Footnote 5/20] However, we need not decide the congruence -- or lack of congruence -- of the controlling statute and the Constitution since the meaning of the Title VI ban on exclusion is crystal clear: race cannot be the basis of excluding anyone from participation in a federally funded program.

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that
of a constitutional appendage. [Footnote 5/21] In unmistakable terms, the Act prohibits the exclusion of individuals from federally funded programs because of their race. [Footnote 5/22] As succinctly phrased during the Senate debate, under Title VI, it is not "permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin." [Footnote 5/23]

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute. [Footnote 5/24] Its view during state court litigation was that a private cause of action does exist under Title VI. Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See McGoldrick v. Companie Generale Transatlantique, 309 U. S. 430, 309 U. S. 434. Even if it were, petitioner's original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI. [Footnote 5/25] The United States has taken the same position; in its amicus curiae brief directed to this specific issue, it concluded that such a remedy is clearly available. [Footnote 5/26] and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action. [Footnote 5/27] The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself. [Footnote 5/28] In short, a fair consideration of petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.

The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

Footnotes to Justice Powell's Opinion of the Court

[Footnote 1]

Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short-range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students."

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee."
"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups."

"Applications for financial aid are available only after the applicant has been accepted, and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program."

Applications for Admission are available from:

Admissions Office

School of Medicine

University of California

Davis, California 95616

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

[Footnote 2]

For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.* at 117. For the 1974 entering class, 3,737 applications were submitted. *Id.* at 289.

[Footnote 3]

That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. *Id.* at 64.

[Footnote 4]

The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.* at 666.

[Footnote 5]

For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.* at 133-134.

[Footnote 6]

The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

bwm:
### Special Admissions Program

<table>
<thead>
<tr>
<th>Year</th>
<th>Blacks</th>
<th>Chicanos</th>
<th>Asians</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>5</td>
<td>3</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>1971</td>
<td>4</td>
<td>9</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td>1972</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>16</td>
</tr>
<tr>
<td>1973</td>
<td>6</td>
<td>8</td>
<td>2</td>
<td>16</td>
</tr>
<tr>
<td>1974</td>
<td>6</td>
<td>7</td>
<td>3</td>
<td>16</td>
</tr>
</tbody>
</table>

**additional text**

Id. at 216-218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

[Footnote 7]

The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

<table>
<thead>
<tr>
<th>Class Entering in 1973</th>
<th>MCAT (Percentiles)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quanti- Gen.</td>
</tr>
<tr>
<td></td>
<td>SGPA OGPA Verbal tative Science Infor.</td>
</tr>
<tr>
<td>Bakke</td>
<td>3.44 3.46 96 94 97 72</td>
</tr>
<tr>
<td>Average of regular</td>
<td>3.51 3.49 81 76 83 69</td>
</tr>
<tr>
<td>Average of special</td>
<td>2.62 2.88 46 24 35 33</td>
</tr>
</tbody>
</table>

Class Entering in 1974

MCAT (Percentiles)
Quanti- Gen.

SGPA OGPA Verbal tative Science Infor.

Bakke: . . . . . 3.44 3.46 96 94 97 72

Average of regular

admittees: . . . . 3.36 3.29 69 67 82 72

Average of special

admittees: . . . . 2.42 2.62 34 30 37 18

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." Id. at 181, 388.

[Footnote 8]

Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. Id. at 259-269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several amici imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School, or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

[Footnote 9]

"[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[Footnote 10]

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed, and its provisions added to Art. I, § 7, of the State Constitution.

[Footnote 11]

Section 601 of Title VI, 78 Stat. 252, provides as follows:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[Footnote 12]
Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal. 3d at 44, 553 P.2d at 1159.

[Footnote 13]

Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

[Footnote 14]

Several amici suggest that Bakke lacks standing, arguing that he never showed that his injury -- exclusion from the Medical School -- will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. Warth v. Seldin, 422 U. S. 490, 422 U. S. 498 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence, the constitutional requirements of Art. III were met. The question of Bakke's admission vel non is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

[Footnote 15]


[Footnote 16]


[Footnote 17]

Section 602, as set forth in 42 U.S.C. § 2000d-1, reads as follows:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under..."
such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

[Footnote 18]

Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim."


[Footnote 19]

For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not."

Id. at 6547. See also id. at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). But see id. at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

[Footnote 20]


[Footnote 21]


[Footnote 22]

See, e.g., id. at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062-7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

[Footnote 23]
See, e.g., id. at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

[Footnote 24]

See also id. at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606-5607 (remarks of Sen. Javits); 5253, 5863-5864, 13442 (remarks of Sen. Humphrey).

[Footnote 25]


[Footnote 26]

Petitioner defines "quota" as a requirement which must be met, but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis, the special admissions program does not meet petitioner's definition of a quota.

The court below found -- and petitioner does not deny -- that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal. 3d at 44, 553 P.2d at 1159. Both courts below characterized this as a "quota" system.

[Footnote 27]

Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 429 U.S. 264-265 (1977); Washington v. Davis, 426 U.S. 229, 426 U.S. 242 (1976); see Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[Footnote 28]


[Footnote 29]

[Footnote 30]

M. Jones, American Immigration 177-246 (1960).

[Footnote 31]


[Footnote 32]

"Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin."


[Footnote 33]

E.g., P. Roberts, supra, n 31, at 75; G. Abbott, supra, n 31, at 270-271. See generally n 31, supra.

[Footnote 34]

In the view of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications, see, e.g., post at 438 U. S. 361, 438 U. S. 362. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived, and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority, and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere post hoc declarations by an isolated state entity -- a medical school faculty -- unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

[Footnote 35]

Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation -- discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned, and we are told that this is not a matter of fundamental principle, but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."

[Footnote 36]

As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See 438 U. S. infra. But I disagree with much that is said in their opinion.

They would require, as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," post at 438 U. S. 369 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program."

_post at 438 U. S. 365-366._

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants -- nothing is said about Asians, _cf_. _e.g._, _post at 438 U. S. 374 n. 57_ -- would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since, if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it in any area of social intercourse. See 438 U. S. _infra._

[Footnote 37]

Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. _Plessy v. Ferguson_, 163 U. S. 537, 163 U. S. 549, 163 U. S. 552 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled _Sweatt v. Painter_, 339 U. S. 629, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that, had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard, the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, _e.g._, _Yick Wo v. Hopkins_, 118 U. S. 356; _Terrace v. Thompson_, 263 U. S. 197; _Oyama v. California_, 332 U. S. 633. This Court has not sustained a racial
classification since the wartime cases of *Korematsu v. United States*, 323 U. S. 214, and *Hirabayashi v. United States*, 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans."

"Nor, obviously, will the problem be solved if, next year, the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints."


[Footnote 38]


[Footnote 39]

Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann v. Nitkowski*, 378 F.2d 22 (CA2 1967); *Wanner v. County School Board*, 357 F.2d 452 (CA4 1966); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (CA 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d at 454. Cf. *United Jewish Organizations v. Carey*, 430 U. S. 144 (1977).

In *Barksdale* and *Offermann*, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes v. School District No. 1*, 413 U. S. 189, 413 U. S. 240-250 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission, and may have deprived him altogether of a medical education.

[Footnote 40]


[Footnote 41]

This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, e.g., *South Carolina v. Katzenbach*, 383 U. S. 301, 383 U. S. 308-310 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. *See Hampton v. Mow Sun Wong*, 426 U. S. 88, 426 U. S. 103 (1976).
Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan*, 384 U. S. 641 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

[Footnote 42]

Petitioner also cites our decision in *Morton v. Mancari*, 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis.* *Id.* at 417 U. S. 554. Indeed, we found that the preference was not racial at all, but

"an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion."


[Footnote 43]

A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra*, n 25, at 581-586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, *The Case for Black Reparations* (1973). That justification for racial or ethnic preference has been subjected to much criticism. E. Greenawalt, *supra*, n 25, at 581; Posner, *supra*, n 25, at 16-17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra*, n 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased, or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

[Footnote 44]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post* at 438 U. S. 363-366, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."
Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," ibid., or lacks "a manifest relationship to the employment in question," ibid. at 401 U. S. 432. See also McDonnell Douglas Corp. v. Green, 411 U. S. 792, 411 U. S. 802-803, 411 U. S. 805-806 (1973). Nothing in this record -- as opposed to some of the general literature cited by MR. JUSTICE BRENNAN, MR JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN -- even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n 7, supra, is without educational justification.

Moreover, the presumption in Griggs -- that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute -- was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Griggs, supra at 401 U. S. 429-430. See, e.g., H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). See generally Vaas, Title VII: The Legislative History, 7 B. C. Ind. & Com.L.Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group."

401 U.S. at 401 U. S. 430-431. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

For example, the University is unable to explain its selection of only the four favored groups -- Negroes, Mexican-Americans, American Indians, and Asians -- for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n 37, supra.

The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

The president of Princeton University has described some of the benefits derived from a diverse student body:
"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'"

"* * * *"

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth."


[Footnote 49]

Graduate admissions decisions, like those at the undergraduate level, are concerned with

"assessing the potential contributions to the society of each individual candidate following his or her graduation -- contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keest critic of all things organized, the solitary scholar and the concerned parent."

Id. at 10.

[Footnote 50]


[Footnote 51]

The admissions program at Princeton has been described in similar terms:

"While race is not, in and of itself, a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations, race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished -- and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own."

Bowen, supra, n 48, at 8-9.

For an illuminating discussion of such flexible admissions systems, see Manning, supra, n 50, at 57-59.

[Footnote 52]

The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR JUSTICE BLACKMUN is this denial even addressed.
[Footnote 53]

Universities, like the prosecutor in Swain, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally, as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." Offutt v. United States, 348 U. S. 11, 348 U. S. 14 (1954).

[Footnote 54]

There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in 438 U. S. supra. Cf. Mt. Healthy City Board of Ed. v. Doyle, 429 U. S. 274, 429 U. S. 284-287 (1977). In Mt. Healthy, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection -- purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 429 U. S. 265-266. No one can say how -- or even if -- petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in Mt. Healthy. In sum, a remand would result in fictitious recasting of past conduct.

[Footnote 55]

This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae.

Footnotes to the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

[Footnote 2/1]

We also agree with MR. JUSTICE POWELL that a plan like the "Harvard" plan, see ante at 438 U. S. 316-318, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

[Footnote 2/2]

See Plessy v. Ferguson, 163 U. S. 537 (1896).

[Footnote 2/3]

[Footnote 2/4]


[Footnote 2/5]


[Footnote 2/6]


[Footnote 2/7]

Section 601 of Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."


[Footnote 2/8]

MR. JUSTICE WHITE believes we should address the "private right of action" issue. Accordingly, he has filed a separate opinion stating his view that there is no private right of action under Title VI. See post, p. 438 U. S. 379.

[Footnote 2/9]

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also. . . ."

"Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining -- which might be used to withhold funds if discrimination were not ended -- is, at best, questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally -- as is often proposed -- the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites, for this may only penalize those who least deserve it without ending discrimination."

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance -- by way of grant, loan,
contract, guaranty, insurance, or otherwise -- to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein -- but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices."


[Footnote 2/10]

See, e.g., 110 Cong.Rec. 2732 (1964) (Rep. Dawson); id. at 2481-2482 (Rep. Ryan); id. at 2766 (Rep. Matzunaga); id. at 2595 (Rep. Donahue).

[Footnote 2/11]

There is also language in 42 U.S.C. § 2000d-5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. Section 2000d-5 provides that,

"for the purpose of determining whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned."

This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

[Footnote 2/12]

As has already been seen, the proponents of Title VI in the House were motivated by the identical concern. See remarks of Representative Celler (110 Cong.Rec. 2467 (1964)); Representative Ryan (id. at 1643, 2481-2482); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, Additional Views of Seven Representatives 2425 (1963).

[Footnote 2/13]

See separate opinion of MR. JUSTICE WHITE, post at 438 U. S. 382-383, n. 2.

[Footnote 2/14]

These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their concern -- the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs -- was clear. See supra at 438 U. S. 333-336; infra at 438 U. S. 340-342, n. 17.

[Footnote 2/15]


[Footnote 2/16]
Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See id. at 6547 (Sen. Humphrey); id. at 6047, 7055 (Sen. Pastore); id. at 12675 (Sen. Allott); id. at 6561 (Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination. In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroses in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context, there can be no doubt that the Fourteenth Amendment does command color blindness, and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color.

Significantly, one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See supra at 438 U. S. 339-340; 110 Cong.Rec. 6562 (1964). See also id. at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor to prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill, we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically."

Id. at 15893. Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI, but was rather left to the judgment of state and local communities. See, e.g., id. at 10920 (Sen. Javits); id. at 5807, 5266 (Sen. Keating); id. at 13821 (Sens. Humphrey and Saltonstall). See also id. at 6562 (Sen. Kuchel); id. at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. V), which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U.S.C. § 2000e-2(a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin. . . ."), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute, and might in fact violate it. See, e.g., 110 Cong.Rec. 7214 (1964) (Sens. Clark and Case); id. at 6549 (Sen. Humphrey); id. at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their workforce as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the Fourteenth Amendment (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed infra at 438 U. S. 353, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. Franks v. Bowman Transportation Co., 424 U. S. 747, 424 U. S. 767-768 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See id. at 424 U. S. 762-770; Albemarle Paper Co. v. Moody, 422 U. S. 405, 422 U. S. 418 (1975). There is no more indication in the

See, e.g., 110 Cong.Rec. 6544, 13820 (1964) (Sen. Humphrey); id. at 6050 (Sen. Javits); id. at 12677 (Sen. Allott).

[Footnote 2/17]
legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See infra at 438 U. S. 353-355, and n. 28.

[Footnote 2/18]

HEW has stated that the purpose of these regulations is

"to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination."

36 Fed.Reg. 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for United States as Amicus Curiae 16 n. 14.

[Footnote 2/19]

Moreover, the President has delegated to the Attorney General responsibility for coordinating the enforcement of Title VI by federal departments and agencies, and has directed him to "assist the departments and agencies in accomplishing effective implementation." Exec.Order No. 11764, 3 CFR 849 (1971-1975 Comp.). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect.

[Footnote 2/20]

HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the Office of Management and Budget, 1977 Catalogue of Federal Domestic Assistance 205-206, 401-402. The first program, No. 13.375, "Minority Biomedical Support," has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total $9,711,000 for 1977.

The second program, No. 13.880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

[Footnote 2/21]


[Footnote 2/22]

In addition to the enactment of the 10% quota provision discussed supra, Congress has also passed other Acts mandating race-conscious measures to overcome disadvantages experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some circumstances. This, in turn, undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7(a) of the National Science Foundation Authorization Act, 1977, provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation."

90 Stat. 2056, note following 42 U.S.C. 1873 (1976 ed.). Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. Section 7(C)(2) of the Act, 90 Stat. 2056, requires that these Centers:

"(A) have substantial minority student enrollment;"

"(B) are geographically located near minority population centers;"

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;"

"* * * *"

"(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and"

"(G) will develop joint educational programs with nearby undergraduate institutions of higher education which have a substantial minority student enrollment."

Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And, once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely colorblind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 et seq. (1976 ed.); 49 U.S.C. § 1657a et seq. (1976 ed.); the Emergency School Aid Act, 20 U.S.C. § 1601 et seq. (1976 ed.).

[Footnote 2/27]


[Footnote 2/28]


"It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit, obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria."

42 Op. Atty.Gen. 405, 411 (1969). The federal courts agreed. See, e.g., Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854 (1971) (which also held, 442 F.2d at 173, that race-conscious affirmative action was permissible under Title VI); Southern Illinois Builders Assn. v. Ogilvie, 471 F.2d 680 (CA7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Exec.Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 747-757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Conference Committee Report on H.R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:

"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."


[Footnote 2/29]


[Footnote 2/30]

We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.
Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. Castaneda v. Partida, 430 U.S. 482, 430 U. S. 499-500 (1977); id. at 430 U. S. 501 (MARSHALL, J., concurring).

"[T]he conclusion cannot be resisted, that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which the petitioners belong. . . . The discrimination is, therefore, illegal. . . ."

Indeed, even in Plessy v. Ferguson, the Court recognized that a classification by race that presumed one race to be inferior to another would have to be condemned. See 163 U.S. at 163 U. S. 544-551.

Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, Hirabayashi v. United States, 320 U. S. 81 (1943), and Korematsu v. United States, 323 U. S. 214 (1944). In Hirabayashi, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U.S. at 320 U. S. 101. A similar mode of analysis was followed in Korematsu, see 323 U.S. at 323 U. S. 224, even though the Court stated there that racial classifications were "immediately suspect," and should be subject to "the most rigid scrutiny." Id. at 323 U. S. 216.

We disagree with our Brother POWELL's suggestion, ante at 438 U. S. 303, that the presence of "rival groups which can claim that they, too, are entitled to preferential treatment" distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.

But, were we asked to decide whether any given rival group -- German-Americans for example -- must constitutionally be accorded preferential treatment, we do have a "principled basis," ante at 438 U. S. 296, for deciding this question, one that is well established in our cases: the Davis program expressly sets out four classes which receive preferred status. Ante at 438 U. S. 274. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252, 429 U. S. 264-265 (1977); Washington v. Davis, 426 U. S. 229, 426 U. S. 238-241 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," Katzenbach v. Morgan, 384 U. S. 641, 384 U. S. 657 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See ibid.; San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 411 U. S. 38-39 (1973) (applying Katzenbach test to state action intended to remove discrimination in educational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

[Footnote 2/37]

In Albemarle, we approved "differential validation" of employment tests. See 422 U.S. at 422 U. S. 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

[Footnote 2/38]

Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See supra at 438 U. S. 336-338. And, significantly, the Equal Employment Opportunity Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII. See 42 Fed.Reg. 64826 (1977).

[Footnote 2/39]

"[T]he [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionment.

[Footnote 2/40]

"[T]he State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

[Footnote 2/41]

Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." Ante at 438 U. S. 304. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and UJO deprived the Hassidim of bloc-voting strength. Each of these injuries was constitutionally cognizable as is respondent's here.

[Footnote 2/42]

We do not understand MR. JUSTICE POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See ante at 438 U. S. 305. Yet, because petitioner is a corporation administering a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations." Ante at 438 U. S. 307. While we agree that reversal in this case would follow a fortiori had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from applying any admissions policy that had a disparate and unjustified racial impact, see, e.g., McDaniel v. Barresi, 402 U. S. 39 (1971); Franks v. Bowman Transportation Co., 424 U. S. 747 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. Sweezy v. New Hampshire, 354 U. S. 234, 354 U. S. 256 (1957) (Frankfurter, J., concurring in result). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board
of Regents. See Cal. Const., Art. 9, § 9(a). Control over the University is to be found not in the legislature, but rather in the Regents who have been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See ibid.; Ishimatsu v. Regents, 266 Cal. App. 2d 854, 863-864, 72 Cal. Rptr. 756, 762-763 (1968); Goldberg v. Regents, 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 468 (1967); 30 Op.Cal. Atty. Gen. 162, 166 (1957) (“The Regents, not the legislature, have the general rulemaking or policymaking power in regard to the University”). This is certainly a permissible choice, see Sweezy, supra, and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the Equal Protection Clause required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See infra at 438 U. S. 370.

[Footnote 2/43]


[Footnote 2/44]

Railway Mail Assn. held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association's due process rights secured by the Fourteenth Amendment, because that result "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."

326 U.S. at 326 U. S. 94. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

[Footnote 2/45]

According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-1976, p. 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M.D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexican-American, American Indian, and mainland Puerto Rican graduates were also recorded during those years. Id. at 40.

The statistical information cited in this and the following notes was compiled by Government officials or medical educators, and has been brought to our attention in many of the briefs. Neither the parties nor the amici challenge the validity of the statistics alluded to in our discussion.

[Footnote 2/46]

D. Reitzes, Negroes and Medicine, pp. xxvii, 3 (1958).
Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard 19.


For example, over 40% of American-born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the statistic for females was over 48%. These statistics were computed from data contained in Census, supra, 438 U.S. 265fn2/49>n. 49, pt. 6, California, Tables 139, 140.


Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality, because of the effects of past and present discrimination. See supra at 438 U. S. 348-349.
Negroes and Chicanos alone constitute approximately 22% of California's population. This percentage was computed from data contained in Census, supra, 438 U.S. 265fn2/49|>n. 49, pt. 6, California, sec. 1.6-4, and Table 139.

[Footnote 2/58]

The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see ibid., and to those minority applicants deemed qualified for admission and deemed likely to contribute to the Medical School and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admits is unconstitutionally high.

[Footnote 2/59]


[Footnote 2/60]

This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U.S. Medical Schools 34 (Table A-15), 42 (Table A-23) (Association of American Medical Colleges 1977).

[Footnote 2/61]

This figure was computed from data contained in Census, supra, 438 U.S. 265fn2/49|>n. 49, pt. 1, United States Summary, Table 209.

[Footnote 2/62]

See Waldman, supra, 438 U.S. 265fn2/60|>n. 60, at 10-14 (Figures 1-5).

[Footnote 2/63]

The excluded white applicant, despite MR. JUSTICE POWELL's contention to the contrary, ante at 438 U. S. 318 n. 52, receives no more or less “individualized consideration” under our approach than under his.

Footnotes to Justice Marshall's opinion

[Footnote 4/1]

[Footnote 4/2]

[Footnote 4/3]
Id. at 70 (Table 102).

[Footnote 4/4]
Ibid.

[Footnote 4/5]
U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 107, p. 7 (1977) (Table 1).

[Footnote 4/6]
Id. at 20 (Table 14).

[Footnote 4/7]

[Footnote 4/8]
Ibid.

[Footnote 4/9]

[Footnote 4/10]
U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract, supra, at 25 (Table 24).

[Footnote 4/11]
Id. at 407-408 (Table 662) (based on 1970 census).

[Footnote 4/12]
Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3(b)(6)(ii) (1977).

**Footnotes to Justice Stevens's opinion**
Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, ante at 438 U. S. 324-325. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

The judgment first entered by the trial court read, in its entirety, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:"

"1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;"

"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;"

"3. Cross-defendant Allan Bakke have judgment against cross-complaint, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. § 2000d];"

"4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35."

Append. to Pet. for Cert. 120a.

In paragraph 2, the trial court ordered that

"plaintiff [Bakke] is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission."

See 438 U.S. 265fn5/2\supra, n. 2, supra, (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

Appendix B to Application for Stay A19-A20.

18 Cal. 3d 34, 64, 553 P.2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:
"IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted. 'Bakke shall recover his costs on these appeals.'"

[Footnote 5/6]

"This Court . . . reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U. S. 292, 351 U. S. 297.

[Footnote 5/7]

"From Hayburn's Case, 2 Dall. 409, to Alma Motor Co. v. Timken-Detroit Axle Co. [, 329 U. S. 129,] and the Hatch Act case [United Public Workers v. Mitchell, 330 U. S. 75,] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U.S.Const., Art. III. . . ."

"The policy, however, has not been limited to jurisdictional determinations. For, in addition,"

"the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

"Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided."


[Footnote 5/8]

The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, The Least Dangerous Branch 131 (1962).

[Footnote 5/9]

Record 29.

[Footnote 5/10]


[Footnote 5/11]
It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, e.g., 110 Cong.Rec. 1521 (1964) (remarks of Rep. Celler); id. at 6544 (remarks of Sen. Humphrey).

[Footnote 5/12]

In *McDonald v. Santa Fe Trail Transp. Co.*, the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes. . . ." 427 U.S. at 427 U. S. 280. Quoting from our earlier decision in *Griggs v Duke Power Co.*, 401 U. S. 424, 401 U. S. 431, the Court reaffirmed the principle that the statute "prohibit[s] [discriminatory preference for any [racial] group, minority or majority." 427 U.S. at 427 U. S. 279 (emphasis in original).

[Footnote 5/13]

See, e.g., 110 Cong.Rec. 1520 (1964) (remarks of Rep. Celler); id. at 5864 (remarks of Sen. Humphrey); id. at 6561 (remarks of Sen. Kuchel); id. at 7055 (remarks of Sen. Pastore). (Representative Celler and Senators Humphrey and Kuchel were the House and Senate floor managers for the entire Civil Rights Act, and Senator Pastore was the majority Senate floor manager for Title VI.)

[Footnote 5/14]

Representative Abernethy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill. . . ."

"It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . ."

"* * * *

"Presumably, the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria. . . ."

"The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual. . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction. . . ."

*Id.* at 1619. See also, e.g., *id.* at 5611-5613 (remarks of Sen. Ervin); *id.* at 9083 (remarks of Sen. Gore).

[Footnote 5/15]

*E.g.*, *id.* at 5863, 5874 (remarks of Sen. Eastland).

[Footnote 5/16]

See, e.g., *id.* at 8364 (remarks off Sen. Proxmire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); *id.* at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed Federal and State administrators who are equally colorblind"); and *id.* at 6543 (remarks of Sen. Humphrey) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination") (quoting from President Kennedy's Message to Congress, June 19, 1963).

[Footnote 5/17]
See, e.g., 110 Cong.Rec. 5253 (1964) (remarks of Sen. Humphrey); and id. at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the immediate goal of the Act -- an end to federal funding of "separate but equal" facilities.

[Footnote 5/18]

"As in Monroe v. Pape, 365 U. S. 167], we have no occasion here to"

"reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals."

"365 U.S. at 365 U. S. 191. For in interpreting the statute, it is not our task to consider whether Congress was mistaken in 1871 in its view of the limit of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did, in fact, act, see Ries v. Lynskey, 452 F.2d at 175."

*Moor v. County of Alameda, 411 U. S. 693, 411 U. S. 709.*

[Footnote 5/19]

Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of individual equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See Los Angeles Dept. of Water & Power v. Manhart, 435 U. S. 702, 435 U. S. 709 ("[T]he basic policy of the statute [Title VII] requires that we focus on fairness to individuals, rather than fairness to classes"). This same principle of individual fairness is embodied in Title VI.

"The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition. . . ."

"* * * *

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in Plessy v. Ferguson, 163 U. S. 537, 163 U. S. 559:"

"Our Constitution is color-blind."

"So -- I say to Senators -- must be our Government. . . ."

"Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values. . . ."

"Title VI offers a place for the meeting of our minds as to Federal money."

110 Cong.Rec. 7063-7064 (1964) (remarks of Sen. Pastore). Of course, one of the reasons marshaled in support of the conclusion that Title VI was "noncontroversial" was that its prohibition was already reflected in the law. See *ibid.* (remarks of Sen. Pell and Sen. Pastore).

[Footnote 5/20]
For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the Fifth and Fourteenth Amendments which are directed only to governmental action.

In *Lau v. Nichols*, 414 U. S. 563, the Government's brief stressed that

"the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [T]he statute independently proscribes the conduct challenged by petitioners, and provides a discrete basis for injunctive relief."


[Footnote 5/21]

As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional and moral understanding of the times.

"The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances, the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation."

110 Cong.Rec. 6544 (1964) (emphasis added).

[Footnote 5/22]

Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5(j) (1977). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.

[Footnote 5/23]


[Footnote 5/24]

Record 30-31.

[Footnote 5/25]

*See, e.g., Lau v. Nichols, supra; Bossier Parish School Board v. Lemon*, 370 F.2d 847 (CA5 1967), cert. denied, 388 U.S. 911; *Uzzell v. Friday*, 547 F.2d 801 (CA4 1977), opinion on rehearing en banc, 558 F.2d 727, cert. pending, No. 77-635; *Serna v. Portales*, 499 F.2d 1147 (CA10 1974); *cf. Chambers v. Omaha Public School District*, 536 F.2d 222, 225 n. 2 (CA8 1976) (indicating doubt over whether a money judgment can be obtained under Title VI). Indeed, the Government's brief in *Lau v. Nichols*, *supra*, succinctly expressed this common assumption: "It is settled that petitioners . . . have standing to enforce Section 601 . . . ." Brief for United States as *Amicus Curiae* in *Lau v. Nichols*, O.T. 1973, No. 72-6520, p. 13 n. 5.
Supplemental Brief for United States as Amicus Curiae 24-34. The Government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. Id. at 28-30. Section 601 is specifically addressed to personal rights, while § 602 -- the fund cutoff provision -- establishes "an elaborate mechanism for governmental enforcement by federal agencies." Supplemental Brief, supra at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of MR. JUSTICE WHITE, ante at 438 U. S. 380-383. But Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:

"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602, . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602."

Supplemental Brief, supra at 30 n. 25.

The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See Rosado v. Wyman, 397 U. S. 397, 397 U. S. 420.

[Footnote 5/27]


[Footnote 5/28]

Framing the analysis in terms of the four-part Cort v. Ash test, see 422 U. S. 66, 422 U. S. 78, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the "class for whose especial benefit the statute was enacted," ibid. (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." Ibid. (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of MR. JUSTICE POWELL, ante at 438 U. S. 283 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent with, if not essential to, the legislative scheme. See, e.g., remarks of Senator Ribicoff:

"We come then to the crux of the dispute -- how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: first, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable, since that reaches the objective of extending the funds on a nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?"
The congressional debates thus show a clear understanding that the principle embodied in § 601 involves personal federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1970 ed. and Supp. V), is clear. Both that Act and Title VI are broadly phrased in terms of personal rights (“no person shall be denied . . .”); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See Allen v. State Bd. of Elections, 393 U. S. 544, 393 U. S. 556. In Allen, of course, this Court found a private right of action under the Voting Rights Act.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRED TOYOSABURO KOREMATSU, Petitioner, Crim. No. 27635-W

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF ERROR CORAM NOBIS

Fred T. Korematsu ("Petitioner") alleges as follows:

PARTIES
A. Petitioner
Petitioner FRED TOYOSABURO KOREMATSU is a citizen of the United States and a resident of San Leandro, California.

B. Respondent
Respondent is the UNITED STATES OF AMERICA.

INTRODUCTION
By this petition for writ of error coram nobis, Petitioner seeks to vacate his conviction in 1942 before this court for violation of Public Law 503. His conviction was upheld by the United States Supreme Court in 1944. Petitioner has recently discovered evidence that his prosecution was tainted, both at trial and during the appellate proceedings that followed, by numerous and related acts of governmental misconduct. Both separately and cumulatively, these acts of misconduct constituted fundamental error and resulted in manifest injustice to Petitioner, depriving him of rights guaranteed by the Fifth Amendment to the Constitution of the United States.
A. Relation of This Petition to Those Filed on Behalf of Gordon Hirabayashi and Minoru Yasui

This is an extraordinary petition in many ways.

First, it seeks to vacate a conviction that led to a historic and widely cited and debated opinion of the Supreme Court. Second, the allegations of governmental misconduct made below raise the most fundamental questions of the ethical and legal obligations of government officials. Third, the alleged misconduct was committed not only before this court but also before the United States Supreme Court. Fourth, this petition is identical to separate petitions being filed on behalf of Gordon Hirabayashi and Minoru Yasui in the federal district courts in Seattle, Washington and Portland, Oregon, respectively. Hirabayashi and Yasui were also convicted in 1942 of violation of Public Law 503 and their convictions were upheld by the Supreme Court in 1943. * * *
C. Summary of Acts of Governmental Misconduct Alleged by Petitioners

* * *

Point One: Officials of the War Department altered and destroyed evidence and withheld knowledge of this evidence from the Department of Justice and the Supreme Court. In April 1943, General John L. DeWitt, who headed the Western Defense Command and issued the military orders at issue in Petitioners’ cases, submitted an official report to the War Department on the evacuation and incarceration program. Justice Department officials had requested access to this Final Report for use in the government’s Supreme Court briefs in Hirabayashi and Yasui. When War Department officials discovered that the report contained statements contradicting representations made by the Justice Department to the courts, they altered these statements. They subsequently concealed records of the report’s receipt, destroyed records of its preparation, created records that falsely identified a revised version as the only report, and withheld the original version from the Justice Department. These acts were committed with knowledge that the contents of this report were material to the cases pending before the Supreme Court.

Point Two: Officials of the War Department and the Department of Justice suppressed evidence relative to the loyalty of Japanese Americans and to the alleged commission by them of acts of espionage. The government relied in Petitioners’ cases on purported evidence of widespread disloyalty among the Japanese Americans and the alleged commission by them of acts of espionage. Presented to the courts as justification of the curfew and exclusion orders at issue, these claims were made in the Final Report of General DeWitt. Responsible officials knew that these claims were false. Reports of the Office of Naval Intelligence directly refuted DeWitt’s disloyalty claims, while reports of DeWitt’s own intelligence staff and of the Federal Bureau of Investigation and the Federal Communications Commission directly refuted DeWitt’s espionage claims. Although the Final Report was before the Supreme Court in Petitioners’ cases, these exculpatory reports were withheld from the Court despite the protest of government attorneys that such action constituted “suppression of evidence.”

Point Three: Government officials failed to advise the Supreme Court of the falsity of the allegations in the Final Report of General DeWitt. When certain Justice Department attorneys learned of the exculpatory evidence discussed in Point Two [supra], they attempted to alert the Supreme Court to its existence and the falsity of the Final Report of General DeWitt. Their effort took the form of a crucial footnote in the government’s Korematsu brief to the Court. This footnote explicitly repudiated DeWitt’s espionage claims and advised the Court of the existence of countering evidence. Before submission of the brief, War Department officials intervened with the Solicitor General and urged removal of the footnote. As a result of this intervention, the Solicitor General halted printing of the brief and directed that the footnote be revised to the War Department’s satisfaction. The Korematsu brief accordingly failed to advise the Court of the falsity of DeWitt’s claims and thus misled the Court.

Point Four: The government’s abuse of the doctrine of judicial notice and the manipulation of amicus briefs constituted a fraud upon the courts. Justice Department and War Department officials undertook separate but related efforts to present a false and misleading record to the courts in Petitioners’ cases.

Even before trial of these cases, Justice Department officials decided
to utilize the doctrine of judicial notice in presenting “evidence” that
the “racial characteristics” of Japanese Americans predisposed them to
disloyalty. Despite the rebuff of one trial judge, and knowledge by Justice
Department attorneys that countering evidence existed, such tainted
“evidence” was included in the Supreme Court briefs in Petitioners’
cases. In addition, War Department officials made available to the
attorneys general of the West Coast states the Final Report withheld from
the Justice Department, and delegated a military officer to assist in
preparing the amicus briefs submitted by these states to the Supreme Court.
Justice Department attorneys later learned of these acts and concluded they
were unlawful, but failed to report these acts to the Supreme Court.

Point Five: Petitioners are also entitled to relief on the ground
that their convictions are based on governmental orders that violate
current constitutional standards. The acts of misconduct alleged in the
preceding Points provide ample ground for the vacation of Petitioners’
convictions. With Petitioners’ cases before this Court through the instant
petition, the application of current constitutional standards provides an
additional ground for vacation. The racial classification involved in the
military orders at issue is subject to the “strict scrutiny” standard
laid out in subsequent Supreme Court opinions. The government now has the
task of proving that such a racial classification is essential to fulfill
a compelling governmental interest and that no less restrictive alternative
is available. Petitioners argue that application of this standard requires
vacation of their convictions. * * *

Prayer for Relief

Petitioners respectfully submit that it would be impossible to find
any other instance in American history of such a long standing, pervasive
and unlawful governmental scheme designed to mislead and defraud the courts
and the nation. By the misconduct set forth in detail above, the United
States deprived petitioners of their rights to fair judicial proceedings
guaranteed by the Fifth Amendment to the United States Constitution.
Although successful to date, this fundamental and egregious denial of civil
liberties cannot be permitted to stand uncorrected.

Wherefore, petitioner Fred Toyosaburo Korematsu respectfully prays:
1. That judgment of conviction be vacated;
2. That the military orders under which he was convicted be declared
unconstitutional;
3. That his indictment be dismissed;
4. For costs of suit and reasonable attorneys’ fees;
5. For such other relief as may be just and proper.

Dated: January 19, 1983

Respectfully submitted,
By: Peter Irons
By: Dale Minami
Minami, Tomine & Lew

[Eds.: Other attorneys of record for Fred Korematsu included Dennis W. Hayashi, Donald K. Tamaki, and Michael J. Wong of the
Asian Law Caucus; Robert L. Rusky of Hanson, Bridgett, Marcus, Vlahos & Stromberg; Peter Irons; Karen N. Kai; Russell
Matsumoto of Maniw & Matsumoto; Dale Minami and Lorraine K. Bannai of Minami, Tomine & Lew; Eric K. Yamamoto,
formerly of Case, Kay and Lynch, Honolulu, Hawai’i; and Edward Chen of Coblentz, Cahen, McCabe & Breyer.]
Carvings and barbed wire illustrate the Bainbridge Island Japanese American Exclusion Memorial on Bainbridge Island, Wash. The site, designed by architect Johnpaul Jones, opened in 2011.

July 17, 2019 7.04pm EDT

Coates asked for $12-15 trillion, which is unreasonable. For example, if all descendants are considered worthy of reparations, there is no single individual who can be considered symbolic of the family as a whole. None of the direct victims of enslavement are still alive. And if all descendant in the U.S. today are the descendants of enslaved people, it is impractical to discuss reparations for their ancestors' enslavement or for other crimes the ancestors committed or committed by their predecessors. It is di...
Recommendations of the Commission on Wartime Relocation and Internment of Civilians:

The Commission makes the following recommendations for remedies in several forms as an act of national apology.

1. The Commission recommends that Congress pass a joint resolution, to be signed by the President, which recognizes that a grave injustice was done and offers the apologies of the nation for the acts of exclusion, removal and detention.

2. The Commission recommends that the President pardon those who were convicted of violating the statutes imposing a curfew on American citizens on the basis of their ethnicity and requiring the ethnic Japanese to leave designated areas of the West Coast to report to assembly centers. The Commission further recommends that the Department of Justice review other wartime convictions of ethnic Japanese and recommend to the President that he pardon those whose offenses were grounded in a refusal to accept treatment that discriminated among citizens on the basis of race and ethnicity. Both recommendations are made without prejudice to cases currently before the courts.

3. The Commission recommends that Congress direct the Executive agencies to which Japanese Americans may apply for the restitution of positions, status or entitlements lost in whole or in part because of acts or events between December 1941 and 1945 to review such applications with liberality giving full consideration to the historical findings of the Commission. For example, the responsible divisions of the Department of Defense should be instructed to review cases of less than honorable discharge of Japanese Americans from the armed services during World War II over which disputes remain, and the Secretary of Health and Human Services should be directed to instruct the Commissioner of Social Security to review any remaining complaints of inequity in entitlements due to the wartime detention.

4. The Commission recommends that Congress demonstrate official recognition of the injustice done to American citizens of Japanese ancestry and Japanese resident aliens during the Second World War, and that it recognize the nation’s need to make redress for these events, by appropriating monies to establish a special foundation.

The Commissioners all believe a fund for educational and humanitarian purposes related to the wartime events is appropriate, and all agree that no fund would be sufficient to make whole again the lives damaged by the exclusion and detention. The Commissioners agree that such a fund appropriately addresses an injustice suffered by an entire ethnic group, as distinguished from individual deprivations.

Such a fund should sponsor research and public educational activities so that the events which were the subject of this inquiry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood. A nation which wishes to remain just to its citizens must not forget its lapses. The recommended foundation might appropriately fund comparative studies of similar civil liberties abuses or of the effect upon particular groups of racial prejudice embodied by government action in times of national stress; for example, the fund’s public educational activity might include preparing and distributing the Commission’s findings about these events to textbook publishers, educators and libraries.

5. The Commissioners, with the exception of Congressman Lungren, recommend that Congress establish a fund which will provide personal redress to those who were excluded, as well as serve the purposes set out in Recommendation 4. Appropriations of $1.5 billion should be made to the fund over a reasonable period to be determined by Congress. This fund should be used, first, to provide a one-time per capita compensatory payment of $20,000 to each of the approximately 60,000 surviving persons excluded from their places of residence pursuant to Executive Order 9066.1

1 PERSONAL JUSTICE DENIED RECOMMENDATIONS.
failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

(b) With respect to the Aleuts.—The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, the Aleut civilian residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island were relocated during World War II to temporary camps in isolated regions of southeast Alaska where they remained, under United States control and in the care of the United States, until long after any potential danger to their home villages had passed. The United States failed to provide reasonable care for the Aleuts, and this resulted in widespread illness, disease, and death among the residents of the camps; and the United States further failed to protect Aleut personal and community property while such property was in its possession or under its control. The United States has not compensated the Aleuts adequately for the conversion or destruction of personal property, and the conversion or destruction of community property caused by the United States military occupation of Aleut villages during World War II. There is no remedy for injustices suffered by the Aleuts during World War II except an Act of Congress providing appropriate compensation for those losses which are attributable to the conduct of United States forces and other officials and employees of the United States.

SEC. 186. RESTITUTION.

(a) Location and Payment of Eligible Individuals.—

(1) In General.—Subject to paragraph (6), the Attorney General shall, subject to the availability of funds appropriated to the Fund for such purpose, pay out of the Fund to each eligible individual the sum of $20,000, unless such individual refuses, in the manner described in paragraph (4), to accept the payment.

(5) Payment in Full Settlement of Claims Against the United States.—The acceptance of payment by an eligible individual under this section shall be in full satisfaction of all claims against the United States arising out of acts described in section 1082(b). This paragraph shall apply to any eligible individual who does not refuse, in the manner described in paragraph (4), to accept payment under this section within 18 months after receiving the notification from the Attorney General referred to in paragraph (3).

***

2 Civil Liberties Act, supra.
SEC. 106. BOARD OF DIRECTORS OF THE FUND.

(a) Establishment.—There is established the Civil Liberties Public Education Fund Board of Directors, which shall be responsible for making disbursements from the Fund in the manner provided in this section.

(b) Uses of Fund.—The Board may make disbursements from the Fund only—

(1) to sponsor research and public educational activities, and to publish and distribute the hearings, findings, and recommendations of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood; and

(2) for reasonable administrative expenses of the Board, including expenses incurred under subsections (c)(3), (d), and (e).