

Winter 2024

Individual Dignity as the Foundation of an Inclusive Society

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Recommended Citation

Cory R. Liu & Anthony Pericolo, *Individual Dignity as the Foundation of an Inclusive Society*, 77 SMU L. REV. 219 (2024)

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INDIVIDUAL DIGNITY AS THE FOUNDATION OF AN INCLUSIVE SOCIETY

Cory R. Liu* & Anthony Pericolo**

ABSTRACT

In Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, the Supreme Court considered voluminous evidence that Harvard discriminated against Asian Americans to keep the racial composition of its student body similar year after year. The Court held that Harvard engaged in unlawful discrimination, providing clarity to an area of the law that was filled with ambiguities and self-contradictions. The Court's decision made clear that discrimination in favor of some racial groups necessarily inflicts discriminatory, race-based harms on others.

This Article explores how Fair Admissions sheds light on the failure of identity politics to create a genuinely inclusive, egalitarian society. Practitioners of identity politics, whom this Article refers to as identitarians, argue that all “people of color” in the United States have a common political interest in uniting against the hegemony of the White majority. In reality, racial minorities experience both positive and negative interactions with members of the White majority and other racial minorities. Fair Admissions revealed how, in some circumstances, members of the White majority may unite with some racial minorities to perpetrate discrimination against other minorities. Identitarianism provides no account of how society should weigh the competing interests of different minorities in a manner that best serves the common good. Nor does it offer a vision for how the White majority and racial minorities can and should strive to live together in harmony and cooperation.

This Article argues for an alternative theoretical framework for civil rights advocacy rooted in individual dignity. It argues that society should banish arbitrary racial categories from public life, enforce bans on discrimination against both overt and covert discrimination when justified by the evidence, foster talent-based institutions that are inclusive of all people, and promote honest discourse about race. Only a society that values and respects the dignity of the individual can be genuinely inclusive and egalitarian.

<https://doi.org/10.25172/smldr.771.8>

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INTRODUCTION

AFTER the Civil Rights Act of 1964 outlawed racial discrimination in the United States, civil rights advocates have pursued a variety of goals without a coherent theoretical framework to guide their efforts. One set of goals focuses on ensuring respect for and compliance with non-discrimination laws. Another focuses on identifying and drawing public attention to forms of discrimination that previously went unrecognized. Yet another arises from internal conversations among members of racial minority groups about improving their lives and thriving in a racially diverse but majority-White country. Finally, another set of goals can be broadly described as persuading institutional decision-makers to achieve racial representation in various aspects of American life.

Many civil rights advocates in the late Twentieth and early Twenty-First Century sought to unify their efforts through identity politics. According to practitioners of identity politics, whom this Article refers to as identitarians,¹ all “people of color” in the United States purportedly have

1. The word identitarian is used here in the same manner that progressive writer Matt Bruenig uses it in his critique of “identitarian deference,” which he defines as the concept that “privileged individuals should defer to the opinions and views of oppressed individuals, especially on topics relevant to those individuals’ oppression.” Matt Bruenig, *Identitarian Deference Continues to Roil Liberalism*, MEDIUM (July 17, 2020), <https://mattbruenig.medium.com/identitarian-deference-continues-to-roil-liberalism-6a1fc88e7f34> [https://perma.cc/MGB3-SRZR]. The challenge with identitarianism is “to figure out which oppressed voices

a common political interest in uniting against the hegemony of the White majority. Though the identitarian framework has come to predominate civil rights discourse in the Twenty-First Century, it provides no account of how society should weigh the competing interests of different groups in a manner that best serves the common good. Nor does it offer a vision for how the White majority and racial minorities can and should strive to live together in harmony and cooperation.

The case of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*² exposed the limits of identitarianism. *Fair Admissions* involved Asian students who challenged Harvard's admissions system, which made it harder for Asian students to gain admission than students of any other race, including White students.³ *Fair Admissions* showed how, in some circumstances, members of the White majority may unite with some racial minorities to perpetrate discrimination against other minorities. It revealed that, despite purporting to represent all "people of color," identitarians may not serve the interests of all minorities equally and may even conspire to harm politically unpopular minorities. Instead of expressing concern about discrimination against Asian Americans, identitarians lashed out against Asian Americans who supported the litigation for breaking ranks with their purported coalition of "people of color." Such Asian Americans were treated as uncouth immigrants who too eagerly spoke their minds and advocated for their children's interests. They were even accused of complicity in White supremacy.⁴

The reality is that issues of race in the United States are far more complex than a binary conflict between "people of color" and the White majority. Each racial group in America has its own unique history, including a tremendous diversity of experiences and challenges within each group. The definitions of the racial categories have changed over time, and so have people's experiences of discrimination. People from each racial group in America will, throughout their lives, face discrimination from, but also form beneficial relationships with, people of other races. The identitarian framework is too reductionistic and undermines the overarching goal of civil rights law—ensuring equal dignity, treatment, and opportunity for all Americans.

Drawing from the lessons of the Supreme Court's *Fair Admissions* decision, this Article proposes an alternative theoretical framework for the pursuit of racial equality that is rooted in the dignity of the individual rather

to defer to." Matt Bruenig, *What Does Identitarian Deference Require?*, MATTBRUENIG.COM (Feb. 26, 2013), <https://mattbruenig.com/2013/02/26/what-does-identitarian-deference-require> [<https://perma.cc/YZ5Z-ZXAT>].

2. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

3. *See id.* at 194–98.

4. *See* Megan Lim, Sarah Handel & Juana Summers, *What Asian Americans Really Think of Affirmative Action*, NPR (June 30, 2023, 4:42 PM), <https://www.npr.org/2023/06/30/1185520446/what-asian-americans-really-think-of-affirmative-action> [<https://perma.cc/C8Z4-FEXA>] (claiming that "too many Asian Americans have been complicit with . . . white supremacy").

than group-based identity politics. Part I discusses the history of civil rights advocacy and civil rights law in the United States. Part II discusses the inadequacies of the predominant theoretical framework for modern civil rights advocacy: the identitarian framework. Part III proposes an alternative theoretical framework for a genuinely inclusive multiracial society that elevates the universal ideal of equality above interest-group politics. A brief conclusion follows.

I. CIVIL RIGHTS FROM THE FOUNDING TO THE TWENTIETH CENTURY

The Founders who issued the Declaration of Independence announced simple yet profound ideas that changed the course of human history: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”⁵ Though the Founders declared independence from monarchy, eliminated titles of nobility, and established a democratic republican form of government when they ratified the Constitution, the United States did not fully live up to the Declaration’s ideal of equality.⁶ “The institution of slavery persisted for nearly a century, and the United States Constitution itself included several provisions acknowledging the practice.”⁷

After fighting the Civil War, in which over 600,000 people lost their lives,⁸ the United States ratified the Thirteenth, Fourteenth, and Fifteenth Amendments, which abolished slavery, ensured equal protection of the laws, and guaranteed the right to vote, respectively.⁹ Even after this “Second Founding,”¹⁰ the United States still fell short of the Declaration of Independence’s ideal of equality due to *de jure* segregation. Though the Fourteenth Amendment guarantees equal protection of the laws, the Supreme Court stated in *Plessy v. Ferguson* that the Fourteenth Amendment “could not have been intended to abolish distinctions based upon color.”¹¹ The Court then upheld the constitutionality of racial segregation under the doctrine of “separate but equal.”¹²

In addition to facing state-imposed segregation, African Americans were the victims of horrific violence. In response to the emancipation of African Americans following the Civil War, a group of White supremacists formed the Ku Klux Klan.¹³ The Klan lynched African Americans, destroyed their

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

6. See *Fair Admissions*, 600 U.S. at 263 (Thomas, J., concurring).

7. *Id.*

8. Bob Zeller, *How Many Died in the American Civil War?*, HISTORY (Aug. 23, 2023), <https://www.history.com/news/american-civil-war-deaths> [<https://perma.cc/LY93-LVXT>].

9. U.S. CONST. amends. XIII–XV.

10. *Fair Admissions*, 600 U.S. at 230; see also *id.* at 231, 264 (Thomas, J., concurring).

11. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

12. *Id.* at 552 (Harlan, J., dissenting).

13. See Fergus M. Bordewich, *The Roots of America’s First Homegrown Terrorist Movement*, TIME (Oct. 19, 2023, 7:00 AM), <https://time.com/6325590/america-terrorist-movement-ku-klux-klan-history> [<https://perma.cc/GM5S-28L2>].

property, and intimidated supporters of civil rights.¹⁴ After the 1908 Springfield Race Riot in Illinois, when a mob burned down homes and lynched two elderly African Americans, the need for justice was clear.¹⁵ In 1909, White proponents of civil rights and prominent African American advocates, including W.E.B. Du Bois and Ida B. Wells-Barnett, founded the National Association for the Advancement of Colored People (NAACP) to achieve the legal equality promised in the Declaration of Independence.¹⁶

The NAACP sought to end laws and practices that treated African Americans differently than Whites solely because of the color of their skin. Its efforts included publishing a magazine called *The Crisis*,¹⁷ lobbying for anti-lynching legislation,¹⁸ and advocating for the desegregation of the military.¹⁹ In 1940, Thurgood Marshall founded the NAACP Legal Defense and Educational Fund and organized a litigation strategy to eliminate segregation by focusing on cases involving educational opportunity.²⁰ The Legal Defense Fund won victories in *Pearson v. Murray*,²¹ *Missouri ex rel. Gaines v. Canada*,²² and *Sweatt v. Painter*,²³ each finding a violation of the Fourteenth Amendment's Equal Protection Clause because the universities failed to offer African American students a legal education comparable to that offered to White students.²⁴ In *McLaurin v. Oklahoma State Regents for Higher Education*, the Supreme Court held that a university could not constitutionally admit a student to a graduate program but then treat him differently within the program because of his race.²⁵

Those cases were decided under the doctrine of "separate but equal" and concluded that there were constitutional violations because African American students were not offered separate educational opportunities that were "equal" to those offered to White students. The doctrine of "separate but equal" was overturned in 1954, when the Supreme Court held that racially segregated schools were unconstitutional in *Brown v. Board of Education*²⁶ and *Bolling v. Sharpe*.²⁷ The Court "overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination

14. *See id.*

15. *See Springfield Race Riot*, ENCYCLOPAEDIA BRITANNICA (Jan. 17, 2024), <https://www.britannica.com/event/Springfield-Race-Riot> [<https://perma.cc/V9T2-5VDH>]; *Our History*, NAACP, <https://naacp.org/about/our-history> [<https://perma.cc/2AU7-5WYQ>].

16. *National Association for the Advancement of Colored People*, ENCYCLOPAEDIA BRITANNICA (Feb. 1, 2024), <https://www.britannica.com/topic/National-Association-for-the-Advancement-of-Colored-People> [<https://perma.cc/5QG9-D6UB>].

17. *See History of The Crisis*, NAACP, <https://naacp.org/find-resources/history-explained/history-crisis> [<https://perma.cc/RKN8-PLXB>].

18. *See Our History*, *supra* note 15.

19. *See NAACP: A Century in the Fight for Freedom*, LIBR. OF CONG., <https://www.loc.gov/exhibits/naacp/world-war-ii-and-the-post-war-years.html> [<https://perma.cc/H9LY-RHDK>].

20. *Thurgood Marshall*, LEGAL DEF. FUND, <https://www.naacpldf.org/about-us/history/thurgood-marshall> [<https://perma.cc/5A6E-H886>].

21. *Pearson v. Murray*, 182 A. 590 (Md. 1936).

22. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

23. *Sweatt v. Painter*, 339 U.S. 629 (1950).

24. *Pearson*, 182 A. at 594; *Gaines*, 305 U.S. at 345; *Sweatt*, 339 U.S. at 636.

25. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950).

26. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

27. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

by the States and Federal Government.”²⁸ In 1962, the Court held in *Bailey v. Patterson* that segregated transportation facilities were unconstitutional.²⁹ In 1967, the Court held in *Loving v. Virginia* that bans on interracial marriage were unconstitutional.³⁰

The crowning legislative achievement of the civil rights movement was the Civil Rights Act of 1964, which outlawed racial discrimination in numerous areas of public life, including voting, public accommodations, public education, and employment.³¹ Title II of that law prohibits racial discrimination in places of public accommodation such as hotels, restaurants, and theaters.³² Title VII prohibits discrimination in employment practices by employers with fifteen or more employees.³³ Title VI requires non-discrimination in federally funded programs, stating: “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.”³⁴

Though the end of segregation was met with resistance, the principle of non-discrimination established in the Civil Rights Act of 1964 eventually became the norm in American life. Subsequent legislation strengthened protections against discrimination, including the Voting Rights Act,³⁵ Fair Housing Act,³⁶ and Civil Rights Act of 1991.³⁷ By the late Twentieth Century, Martin Luther King, Jr.’s “I Have a Dream” speech at the March on Washington had become one of the most iconic statements of the ideals of the civil rights movement. In that speech, he famously proclaimed: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”³⁸

Having secured legal equality for racial minorities, civil rights advocates in the late Twentieth and early Twenty-First Century began to focus their efforts on pursuing a variety of different goals purporting to help racial minorities but without an overarching theoretical framework.

28. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 203–04 (2023).

29. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (per curiam).

30. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

32. 42 U.S.C. § 2000a. The Supreme Court held that Title II was a constitutional exercise of Congress’s powers under the Interstate Commerce Clause in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

33. 42 U.S.C. § 2000e, e-2.

34. *Id.* § 2000d.

35. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301–14, 10501–08, 10701–02).

36. The Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619, 3631).

37. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

38. *Read Martin Luther King Jr.’s “I Have a Dream” Speech in Its Entirety*, NPR (Jan. 16, 2023, 10:32 AM), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> [https://perma.cc/Y69K-4A9X].

One set of goals involves ensuring respect for and compliance with non-discrimination laws. In the federal government, the Equal Employment Opportunity Commission, U.S. Department of Justice, and numerous cabinet-level agencies receive complaints, conduct investigations, and impose penalties for violations of civil rights laws. In addition, private causes of action enable individuals and organizations to bring civil litigation in courts to enforce civil rights laws. Businesses, government entities, and other organizations also proactively develop and implement policies and practices to ensure compliance with civil rights laws.

Another set of goals involves identifying and drawing public attention to previously unrecognized discrimination. Examples of these efforts include discussions about the experiences of smaller and less politically powerful minority groups³⁹ and the recent efforts to enact laws prohibiting discrimination against African American protective hairstyles.⁴⁰ Other efforts focus on using inclusive language, which can promote more respectful and sensitive discourse but can also reflect arbitrary and rapidly changing trends among cultural elites. For example, the term “Latinx” came into fashion as a gender-neutral alternative to “Latino” and “Latina” but was rejected by the League of United Latin American Citizens, whose president, Domingo Garcia, stated that “there is very little to no support for its use” and it is “seen as something used inside the Beltway or in Ivy League [ivory] tower settings.”⁴¹

Yet another set of goals arises from efforts to help minorities improve their lives and thrive in a racially diverse but majority-White country. Such conversations focus on the unique cultures, experiences, challenges, and needs of different minority groups, often revealing diverse perspectives. Booker T. Washington and W.E.B. Du Bois, for example, offered differing views about whether African Americans should prioritize business and trade skills to advance economically or liberal arts education to advance socially and politically.⁴² Similarly, Asian Americans have differing views among themselves about the relative advantages and disadvantages of pursuing occupations in science, technology, engineering, and math, given their overrepresentation in those fields and underrepresentation in others.

A final set of goals can be broadly described as seeking to persuade institutional decision-makers to achieve racial representation in various aspects of American life. These efforts can range from encouraging the consideration of minority candidates for professional opportunities to

39. See, e.g., Rebecca Nagle, *Invisibility is the Modern Form of Racism Against Native Americans*, TEEN VOGUE (Oct. 23, 2018), <https://www.teenvogue.com/story/racism-against-native-americans> [<https://perma.cc/6XNV-VPMB>].

40. See OFFICIAL CAMPAIGN OF THE CROWN ACT LED BY THE CROWN COALITION, THE CROWN ACT, thecrownact.com [<https://perma.cc/JMS7-WAJB>].

41. Suzanne Gamboa, *Latino Civil Rights Organization Drops ‘Latinx’ from Official Communication*, NBC NEWS (Dec. 9, 2021, 6:28 PM), <https://www.nbcnews.com/news/latino/latino-civil-rights-organization-drops-latinx-official-communication-rcna8203> [<https://perma.cc/E4PP-BQAH>].

42. See *The Debate Between W.E.B. Du Bois and Booker T. Washington*, PBS: FRONTLINE (Feb. 10, 1998), <https://www.pbs.org/wgbh/frontline/article/debate-w-e-b-du-bois-and-booker-t-washington> [<https://perma.cc/VUX6-BQCS>].

more heavy-handed efforts to achieve demographic targets. Policies aimed at achieving racial demographic targets have typically been held unlawful except when implemented as a temporary remedy in response to a specific finding of past discrimination. For example, in *Regents of the University of California v. Bakke*, the Court held that an admissions policy reserving 16 seats out of a class of 100 at the University of California, Davis School of Medicine for minority students was unlawful discrimination in violation of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.⁴³

These goals of civil rights advocates are not coextensive, and they can, at times, be at odds with each other. The last of these goals—racial representation—has proven to be especially controversial. The busing of public school students to achieve racial integration has been questioned by African Americans such as Derrick Bell, who argued that “[r]eliance on racial balance is wasteful” and “condemns thousands of black children to remain in racially isolated and educationally bankrupt schools” while “[t]housands of others are bused to schools miles from their homes in total disregard of the expressed preferences of their parents.”⁴⁴ Racial balancing can, therefore, run counter to the preferences and interests of racial minorities and inflict unlawful race-based harms in violation of the Civil Rights Act of 1964 and Equal Protection Clause.

One of the overlooked problems of racial balancing is that it is mathematically incompatible with the possibility that a racial minority could be overrepresented in, and even make up a plurality or majority of, an institution. In a free society, people of all races will seek the best opportunities to make the most of their talents, which will, for a variety of reasons, result in certain racial groups being overrepresented in some fields and underrepresented in others.⁴⁵ For example, African Americans are overrepresented in athletics and music, and Asian Americans are overrepresented in science, technology, engineering, and mathematics. Many immigrants gravitate towards owning small businesses such as convenience stores, motels, and dry cleaners, leading President Biden to observe: “You cannot go to a 7-Eleven or a Dunkin’ Donuts unless you have a slight Indian accent.”⁴⁶ The goal of ensuring that racial minorities are represented in all institutions in proportion to their share of the population is unrealistic, potentially at odds with the preferences of racial minorities, and most likely cannot be achieved without inflicting race-based harms. Hence, Justice Thomas in

43. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 270–71 (1978) (Powell, J., announcing the judgment of the Court).

44. Derrick A. Bell, Jr., *A Reassessment of Racial Balance Remedies—I*, 62 *PHI DELTA KAPPAN* 177, 177 (1980).

45. See generally THOMAS SOWELL, *DISCRIMINATION AND DISPARITIES* (rev. ed. 2019).

46. *Biden Explains Indian-American Remarks*, NBC NEWS (July 7, 2006, 3:46 PM), <https://www.nbcnews.com/id/wbna13757367> [<https://perma.cc/3RVK-U5YL>]; see also *Loc. 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part) (“[I]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.”).

Grutter v. Bollinger referred to racial balancing to achieve diversity as a “utopian”⁴⁷ enterprise based on the “faddish slogan of the cognoscenti.”⁴⁸

With so many disparate and contradictory goals, civil rights advocates would benefit from an overarching theoretical framework for determining which goals are worthy of pursuit. Unfortunately, the predominant framework for civil rights advocacy in the Twenty-First Century of identitarianism is deeply inadequate, as revealed by the reactions of identitarians to Harvard’s shameful discrimination against Asian Americans in *Fair Admissions*.

II. INADEQUACIES IN CIVIL-RIGHTS ADVOCACY IN THE EARLY TWENTY-FIRST CENTURY

The most influential theoretical framework for civil rights advocacy in the early Twenty-First Century is the identitarian framework, which posits that all “people of color” (i.e., non-White people) have a common interest due to their alienation from the White majority. The BIPOC Project, for example, asserts that the United States “is firmly entrenched in maintaining white supremacy” and seeks to build “lasting solidarity among Black, Indigenous, and People of Color (BIPOC).”⁴⁹ The American Civil Liberties Union states that “systemic racism and inequities that disadvantaged communities of color are still woven into the fabric of our institutions today.”⁵⁰ President Biden, on his first day in office, issued an executive order instructing agencies to evaluate whether their “programs and policies perpetuate systemic barriers to opportunities and benefits for people of color.”⁵¹

The identitarian framework is deeply flawed for several reasons. First, most racial minorities will experience both positive and negative interactions with White Americans throughout their lives. It would not be surprising to hear many racial minorities say, for instance, that they have received opportunities from—and experienced discrimination inflicted by—White Americans. White Americans owned slaves but also fought and died in the Civil War to abolish slavery. White Americans enforced segregation but also made up the unanimous Supreme Court that held segregation unconstitutional in *Brown*. The civil rights movement would not have been possible without the support of White Americans.⁵² It is reductionistic and unhelpful to treat White America as a monolithic group of racists in civil rights advocacy.

Second, given that the United States is a diverse, multiracial society, most racial minorities will also experience both positive and negative

47. *Grutter v. Bollinger*, 539 U.S. 306, 374 (2003) (Thomas, J., concurring in part and dissenting in part).

48. *Id.* at 350.

49. BIPOC PROJECT, <https://www.thebipocproject.org> [<https://perma.cc/T3WZ-8Q2T>].

50. *Racial Justice*, ACLU, <https://www.aclu.org/issues/racial-justice> [<https://perma.cc/2EMZ-LX47>].

51. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

52. See James Jeffrey, *The White Southerners Who Fought US Segregation*, BBC (Mar. 12, 2019, 3:24 AM), <https://www.bbc.com/news/world-us-canada-47477354> [<https://perma.cc/UJJ7-HLA6>].

interactions with other racial minorities.⁵³ It makes no sense to think that all “people of color” will unite in solidarity when, in reality, a significant amount of racism experienced by racial minorities is perpetrated by other racial minorities. Identitarians are often quick to condemn acts taken by White Americans against racial minorities as motivated by “White supremacy” but hesitant to ascribe similarly broad discriminatory motives to racial minorities for fear of causing division among “people of color.”⁵⁴ In doing so, identitarians unduly minimize the very real and painful experiences of discrimination that racial minorities often experience at the hands of other racial minorities.

A third and related problem with the identitarian framework is the tension that arises between different racial minorities in determining how limited resources and attention should be allocated among various racial minorities. Contrary to identitarians’ claim that all racial minorities share a common interest, different racial minority groups compete to demonstrate greater victimhood for increased access to resources and attention. For example, the acronym BIPOC emerged around May 2020 after the death of George Floyd specifically to emphasize that Black and Indigenous people face greater hardships than other racial minorities.⁵⁵ That view underlies the push for payment of reparations to African Americans in California, which most Hispanics and Asian Americans do not support.⁵⁶ Another illustration is the effort by Native Hawaiians and Pacific Islanders to be treated as a separate racial category from Asian Americans in order to highlight the particular disadvantages they face and avoid being associated with Asian Americans, whose experiences of discrimination are often overlooked by American society.⁵⁷ As idealistic as it may be to wish that all “people of color” would unite in solidarity, the practical reality is that some racial minorities will seek their advancement in ways that divert limited resources and attention away from other racial minorities.

Finally, more broadly, identitarianism provides no account of how society should weigh the competing interests of different groups in a manner that best serves the common good. Nor does it offer a vision for how the White

53. See Arun Venugopal, *When People of Color Commit Hate Crimes*, WNYC News (Apr. 11, 2019), <https://www.wnyc.org/story/when-people-color-commit-hate-crimes> [<https://perma.cc/HH5F-B5E7>].

54. See, e.g., Jerusalem Demsas & Rachel Ramirez, *The History of Tensions—and Solidarity—Between Black and Asian American Communities, Explained*, Vox (Mar. 16, 2021, 10:00 AM), <https://www.vox.com/22321234/black-asian-american-tensions-solidarity-history> [<https://perma.cc/V8ZH-6BP8>] (attributing racial tensions between African Americans and Asian Americans to White supremacy).

55. See Chevaz Clarke, *BIPOC: What Does It Mean and Where Does It Come From?*, CBS NEWS (July 2, 2020, 10:04 AM), <https://www.cbsnews.com/news/bipoc-meaning-where-does-it-come-from-2020-04-02> [<https://perma.cc/T8HQ-YMSC>].

56. See Emmanuel Felton, Rachel Hatzipanagos & Scott Wilson, *An Obstacle to Black Reparations in California: Convincing Latinos and Asians*, WASH. POST (June 29, 2023, 2:56 PM), <https://www.washingtonpost.com/nation/2023/06/29/california-reparations-black-latino-asian-support> [<https://perma.cc/4NWG-L6EX>].

57. See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997) (stating that “Native Hawaiians presented compelling arguments” for recognition as a distinct demographic group).

majority and racial minorities can and should strive to live together in harmony and cooperation. Indeed, the very notion of harmonious coexistence is orthogonal to identitarianism, which is fixated on continuously drawing attention to conflicts between the White majority and racial minorities. As Van Jones once acknowledged:

No ethnic majority group in 10,000 years of human history—that I could find—ever went from being a majority to being a minority and liked it. And that’s basically the request from the racial justice left, is that we want the White majority to go from being a majority to being a minority and like it. That’s a tough request.⁵⁸

The *Fair Admissions* case illustrates the flaws of the identitarian framework. In 2014, Students for Fair Admissions, a non-profit membership organization opposed to racial discrimination in school admissions, filed a 120-page complaint in the U.S. District Court for the District of Massachusetts arguing that Harvard discriminated against Asian Americans in its admissions process to increase representation of students of other racial groups.⁵⁹ The complaint cited, among other things:

- Statistics showing that of the applicants who sent SAT scores to Harvard, Asians made up more than 50% of those who had scores above 2300 on a 2400-point scale,⁶⁰ yet Asians were only approximately 17–18% of the undergraduate student body from 1992 to 2013.⁶¹
- Statistics showing that the overall racial makeup at Harvard remained roughly constant year after year in the decade leading up to the lawsuit’s filing.⁶²
- Evidence from a Department of Education investigation into Harvard’s admissions practices showing Harvard officials describing Asian students as “hard workers” who are “gifted in math” but “quiet,” “shy,” less capable “in English,” and comprising “so many kids in the pool that looked just like [one another].”⁶³

The district court held a three-week bench trial in October 2018, and the following facts were introduced into evidence:

- Looking at the average SAT score across sections for admitted students, Asian admits had an average score of 767 out of 800, White admits had an average score of 745, African American admits had

58. Morristown Green, *Van Jones: It’s Hard for the White Majority to Become a Minority*, YouTube (Feb. 12, 2021), <https://www.youtube.com/watch?v=CkELItZJWE> [https://perma.cc/ZV5V-VWHL] (starting at about the seven-second mark).

59. Complaint, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176).

60. *Id.* ¶ 220.

61. *Id.* ¶ 241.

62. *Id.* ¶¶ 290–91.

63. *Id.* ¶¶ 246–49; see also *Excerpts from Education Department Report on Harvard*, HARV. CRIMSON (Nov. 1, 1990), <https://www.thecrimson.com/article/1990/11/1/excerpts-from-education-department-report-on> [https://perma.cc/H2AV-UST6].

an average score of 704, and Hispanic admits had an average score of 718.⁶⁴

- “Every application is initially screened by a ‘first reader,’ who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall.”⁶⁵ “A rating of ‘1’ is the best; a rating of ‘6’ the worst.”⁶⁶ “A score of ‘1’ on the overall rating—a composite of the five other ratings—‘signifies an exceptional candidate’” with a chance of admission exceeding 90%.⁶⁷ In assigning the overall rating, the first readers take an applicant’s race into account.⁶⁸
- “Once the first read process is complete, Harvard convenes admissions subcommittees.”⁶⁹ Each subcommittee reviews applicants from a particular geographic area and makes recommendations to the full committee.⁷⁰ “The subcommittees can and do take an applicant’s race into account when making their recommendations.”⁷¹
- “The next step of Harvard’s process is the full committee meeting.”⁷² “At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race,” with the goal of ensuring that Harvard does not have “a dramatic drop-off” in minority admissions from the prior class.⁷³ The full committee discusses each applicant one by one, and “every member of the committee must vote on admission.”⁷⁴ “Only when an applicant secures a majority of the full committee’s votes is [the applicant] tentatively accepted for admission.”⁷⁵ “At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee.”⁷⁶
- “The final stage of Harvard’s process is called the ‘lop,’ during which the list of tentatively admitted students is winnowed further to arrive at the final class.”⁷⁷ “The full committee decides as a group which students to lop.”⁷⁸ “In doing so, the committee can and

64. Shera S. Avi-Yonah & Molly C. McCafferty, *Asian-American Harvard Admits Earned Highest Average SAT Score of Any Racial Group from 1995 to 2013*, HARV. CRIMSON (Oct. 22, 2018), <https://www.thecrimson.com/article/2018/10/22/asian-american-admit-sat-scores> [<https://perma.cc/8NP6-DADU>].

65. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 194 (2023).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 194–95.

75. *Id.* at 195.

76. *Id.*

77. *Id.*

78. *Id.*

does take race into account.”⁷⁹ “Once the lop process is complete, Harvard’s admitted class is set.”⁸⁰

- Throughout the admissions cycle, the Dean of Admissions received and shared with the full committee data from “one-pagers” describing the racial breakdown of the admitted class and comparing it to the prior year.⁸¹
- In a dataset that the district court examined, “more than 60% of Asian American applicants received academic ratings of 1 or 2, compared to 46% of white applicants, 9% of African American applicants, and 17% of Hispanic applicants.”⁸² More than 28% of Asian applicants received an extracurricular rating of 1 or 2, “compared to 25% of white applicants, 16% of African American applicants, and 17% of Hispanic applicants.”⁸³
- Even though a greater percentage of Asian applicants than White applicants had strong academic and extracurricular ratings of 1 or 2, Asian applicants were admitted at a lower rate than White applicants. One reason for this was that Harvard admissions officers gave Asian applicants the lowest personal ratings of any racial group.⁸⁴ The reading procedures for the personal rating were revised for the class of 2023 to explicitly state that the personal rating is a race-neutral examination of an applicant’s “qualities of character” such as courage, leadership, maturity, genuineness, selflessness, humility, resiliency, judgment, citizenship, and “spirit and camaraderie with peers.”⁸⁵ Although Harvard admissions officers gave Asian applicants the lowest personal ratings of any racial group, Harvard alumni interviewers—who met and spoke with applicants—assigned strong personal ratings to Asian and White applicants with similar frequency.⁸⁶
- In response to accusations publicized in the *New York Times* that Harvard discriminated against Asian Americans, the Dean of Admissions asked Harvard’s Office of Institutional Research to study Harvard’s admissions process.⁸⁷ The study found that being Asian reduced an applicant’s chance of admission to Harvard and calculated that if academics were the only consideration in admissions, Whites would be 38.37% of the admitted class, and Asian Americans would be roughly 43.04% of the admitted class instead of the

79. *Id.*

80. *Id.*

81. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 145–46 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023).

82. *Id.* at 161.

83. *Id.*

84. *Id.* at 162.

85. *Id.* at 141. Prior to the revision of the reading procedures for the class of 2023, there was little guidance on what qualities went into the personal rating score or whether it purported to be race neutral. *See id.*

86. *Id.* at 161–62.

87. *See id.* at 147–48.

17–18% observed from 1992 to 2013.⁸⁸ The study also found that legacy and athletic preferences decreased the number of Asian admittees and increased the number of admittees of all other races, though the beneficiaries of those preferences were predominantly White.⁸⁹

- In twenty states (Alabama, Alaska, Arizona, Arkansas, Idaho, Louisiana, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, Wyoming), which Harvard labeled “sparse country,” a White student with an SAT score of at least 1310 made Harvard’s “search list,” whereas “Asian American students from the same states needed to score 1350 or 1380, depending on their gender, to make the search list.”⁹⁰
- Race was a “determinative tip” for approximately 45% of all admitted African American and Hispanic applicants.⁹¹ “An African American student in the fourth lowest academic decile ha[d] a higher chance of admission (12.8%) than an Asian American in the top decile (12.7%).”⁹² African American applicants “in the top four academic deciles [were] between four and ten times more likely to be admitted . . . than Asian applicants in those deciles.”⁹³

These facts painted a clear picture of an admissions system in which Asian American applicants were consistently subjected to a tougher standard for admission than students of any other race. Less competitive applicants who were White, African American, Hispanic, Native American, Native Hawaiian, and Pacific Islander all benefited from Harvard’s decision to subject Asian Americans to uniquely difficult standards. The district court⁹⁴ and First Circuit⁹⁵ upheld Harvard’s admissions system under *Grutter v. Bollinger*, the Supreme Court’s 2003 precedent that allowed for the time-limited use of race as a factor in a holistic admissions process for higher education.⁹⁶ The Supreme Court granted review, consolidated the case with a parallel case against the University of North Carolina (UNC), and on June 29, 2023, issued a 6–3 opinion authored by Chief Justice Roberts, holding that Harvard and UNC engaged in unlawful discrimination

88. Plaintiff’s Memorandum of Reasons in Support of its Motion for Summary Judgment at 11–12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176), ECF No. 413.

89. *Id.*

90. *Fair Admissions*, 397 F. Supp. 3d at 153–54, 153 n.35.

91. *Id.* at 178.

92. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 197 n.1 (2023) (alterations removed) (citation omitted).

93. *Id.* (citation omitted).

94. *Fair Admissions*, 397 F. Supp. 3d at 185–89, 204–05.

95. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 204 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023).

96. *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

in violation of the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964.⁹⁷

The Court identified five problems with the admissions systems of Harvard and UNC that led to its conclusion that the policies were unlawful.

First, the purportedly compelling interest asserted by the universities could not be subjected to meaningful judicial review.⁹⁸ The Court made this point by asking a series of rhetorical questions:

How is a court to know whether leaders have been adequately “train[ed]”; whether the exchange of ideas is “robust”; or whether “new knowledge” is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?⁹⁹

The Court concluded its analysis with the observation that “the question in this context is not one of *no* diversity or of *some*: it is a question of degree.”¹⁰⁰ “How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.”¹⁰¹

Second, the universities failed to demonstrate a meaningful connection between the means they employed and the goals they pursued.¹⁰² The Court noted that the universities divided students into the following racial categories: “(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American.”¹⁰³ Some of these categories were “plainly overbroad,” while others were “underinclusive.”¹⁰⁴ The Court observed that these categories are “imprecise in many ways.”¹⁰⁵ For example, “grouping together all Asian students” is “plainly overbroad.”¹⁰⁶ The Court noted that when asked at oral argument how applicants of Middle Eastern ancestry were classified, UNC's counsel responded, “[I] do not know the answer to that question.”¹⁰⁷ The Court also cited Justice Gorsuch's concurrence, which further elaborated on how the racial categories furthered were “incoherent” and “irrational,”¹⁰⁸ and which this Article discusses in greater detail in Part III.A.

Third, the universities made race a negative factor for some applicants.¹⁰⁹ The Court cited the First Circuit's finding that Harvard's consideration of race led to an 11.1% decrease in the number of Asian American students that were admitted and the district court's finding that Harvard's

97. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230–31 (2023).

98. *Id.* at 214.

99. *Id.* (alteration in original) (citations omitted).

100. *Id.* at 215.

101. *Id.*

102. *Id.* at 215.

103. *Id.* at 216.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (alteration in original).

108. *Id.* (citing *id.* at 291–93 (Gorsuch, J., concurring)).

109. *See id.* at 218.

consideration of race resulted in fewer Asian American and White students being admitted.¹¹⁰ The Court stated that the universities' contention that race could only be a positive and not a negative "cannot withstand scrutiny" and was "hard to take seriously."¹¹¹ "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter," the Court explained.¹¹²

Fourth, the universities' admissions systems engaged in stereotyping.¹¹³ Quoting *Grutter*, the Court stated that universities may not operate their admissions systems on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."¹¹⁴ The Court observed that "by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* fore-swore: stereotyping."¹¹⁵ When "a university admits students 'on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike."¹¹⁶

Fifth, the universities' use of race in admissions lacked a "logical end point," which *Grutter* required.¹¹⁷ The Court in *Grutter* stated that the use of race had to be "limited in time"¹¹⁸ and "expect[ed] that 25 years from [the *Grutter* decision], the use of racial preferences will no longer be necessary."¹¹⁹ In *Fair Admissions*, the universities did not identify an end point for their use of race.¹²⁰ The Court noted that the argument that racial preferences would be needed until there is sufficiently "meaningful representation" of different racial groups on campus was akin to engaging in "racial balancing," which *Grutter* stated was "patently unconstitutional."¹²¹

Throughout the litigation, identitarians refused to condemn Harvard's discrimination against Asian Americans. Instead, they argued that Students for Fair Admissions used Asian Americans to divide "people of color" and promote White supremacy. Upon the filing of the lawsuit, the Leadership Conference Education Fund minimized the Asian Americans who opposed race-based admissions policies as "a small, but vocal group" and made the exaggerated claim that the hashtag "#IAmNotYourWedge" had "gone viral" in the Asian American community.¹²² When it was revealed that

110. *Id.*

111. *Id.*

112. *Id.* at 218–19.

113. *See id.* at 219–20.

114. *Id.* at 219 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

115. *Id.* at 220.

116. *Id.* at 220–21 (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995)).

117. *Id.* at 221 (quoting *Grutter*, 539 U.S. at 342).

118. *Grutter*, 539 U.S. at 342.

119. *Id.* at 343.

120. *Fair Admissions*, 600 U.S. at 225.

121. *Id.* at 221; *id.* at 223 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013)).

122. *See* Tara Yarlagadda, *#IAmNotYourWedge: Asian American Students Rally Against Anti-Affirmative Action Lawsuits*, LEADERSHIP CONF. EDUC. FUND (Dec. 19, 2014), <https://civilrights.org/edfund/resource/iamnotyourwedge-asian-american-students-rally-against-anti-affirmative-action-lawsuits> [<https://perma.cc/HN99-UPD4>].

the U.S. Department of Justice was planning to support Students for Fair Admissions, the Center for American Progress published an article stating that the lawsuit was an “effort to divide communities of color and shield white people from the specter of reverse discrimination.”¹²³ The ACLU described the lawsuit as a “cynical attempt to use members of the Asian American community” to “pit people of color against one another” and “reinforce[] the privileges of white applicants.”¹²⁴

The reality was that many Asian Americans were grateful that the lawsuit drew attention to their experiences of discrimination. The Asian American Coalition for Education filed an *amicus* brief on behalf of more than 300 organizations supporting Students for Fair Admissions¹²⁵ and organized a rally at the Supreme Court the day before the oral argument.¹²⁶ Professor Jeannie Suk Gersen, a Harvard Law School professor who attended the Harvard trial and Supreme Court oral argument, wrote numerous articles in *The New Yorker* recognizing Harvard’s discrimination against Asian Americans.¹²⁷ Jay Caspian Kang wrote in the *New York Times* that the “evidence against Harvard” was “overwhelming.”¹²⁸ In an op-ed titled “Harvard is Wrong That Asians Have Terrible Personalities,” Wesley Yang called Harvard’s defense of its personal rating a “carefully considered act of slander.”¹²⁹ The lawsuit gave many Asian Americans a historic

123. Connor Maxwell & Sara Garcia, *The Trump Administration is Escalating Its War on People of Color by Undermining Affirmative Action*, CTR. FOR AM. PROGRESS (Aug. 4, 2017), <https://www.americanprogress.org/article/trump-administration-escalating-war-people-color-undermining-affirmative-action> [https://perma.cc/7FZU-C5VX].

124. Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, ACLU (Oct. 18, 2018), <https://www.aclu.org/news/racial-justice/meet-edward-blum-man-who-wants-kill-affirmative-action-higher> [https://perma.cc/S6GV-QQF2].

125. Brief of *Amici Curiae* the Asian American Coalition for Education and the Asian American Legal Foundation in Support of Petitioner, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199).

126. *AACE and Partner Organizations Rallied in Front of the U.S. Supreme Court, Seeking the End of Using Race in College Admissions*, ASIAN AM. COAL. FOR EDUC. (Nov. 4, 2022), https://asianamericanforeducation.org/en/pr_20221104 [https://perma.cc/4PCC-7TL4].

127. See Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative-Action Case*, NEW YORKER (Mar. 23, 2023), <https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case> [https://perma.cc/5WLT-2LAM]; Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, Is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018), <https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case> [https://perma.cc/UL9A-8SSV]; Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian-Americans*, NEW YORKER (Aug. 10, 2017), <https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans> [https://perma.cc/4XFD-C494].

128. Jay Caspian Kang, *It’s Time for an Honest Conversation About Affirmative Action*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/opinion/affirmative-action-harvard.html> [https://perma.cc/76RJ-MX63]; see also Jay Caspian Kang, *Why the Champions of Affirmative Action Had to Leave Asian Americans Behind*, NEW YORKER (June 30, 2023), <https://www.newyorker.com/news/our-columnists/why-the-champions-of-affirmative-action-had-to-leave-asian-americans-behind> [https://perma.cc/T5YX-5ATM].

129. Wesley Yang, *Harvard is Wrong That Asians Have Terrible Personalities*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/opinion/harvard-asian-american-racism.html> [https://perma.cc/PVH9-3KV6].

opportunity to share their experiences of discrimination that had previously been ignored.¹³⁰

The failure of identitarians to acknowledge Harvard's discrimination against Asian Americans demonstrates that identitarians have fallen short of the ideal of advocating for the equality of all Americans. Succumbing to the limitations of identity politics, they purport to speak for all "people of color," but in practice they prioritize the interests of some minority groups over those of others. *Fair Admissions* shined a light on identitarians' blindness to their own support for racial discrimination, which must be eliminated in all its forms if our nation is to live up to the lofty ideal of equality embodied in our Constitution and civil rights laws. In light of these flaws with the identitarian framework, civil rights advocates need an alternative theoretical framework that places primacy on equality as a universal ideal, uncompromised by interest-group politics, and which is genuinely inclusive of all Americans.

III. PRINCIPLES FOR AN INCLUSIVE SOCIETY

The theoretical framework for civil rights advocacy proposed in this Article is not new.¹³¹ It is so simple, in fact, that one might consider it unremarkable. This Article proposes that all people should be afforded the dignity of being treated as an individual rather than as a member of a racial group. This view traces back to the Declaration of Independence, which proclaimed that "all men are created equal."¹³² In the Twentieth Century, it was most eloquently articulated by Martin Luther King Jr., who stated: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character."¹³³

Twenty-First Century identitarians reject the wise words of the Founders and Dr. King by practicing purportedly benign discrimination. These activists believe that it is helpful, even moral, to treat people as members of a racial group if it is done for benevolent reasons. Justices on the Supreme Court rejected the theory of benign discrimination long before *Fair Admissions*. In the words of Justice O'Connor in *City of Richmond v. J.A. Croson Co.*, "there is simply no way of determining what classifications" based on race are "benign" and "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."¹³⁴ As Justice Thomas wrote in *Adarand Constructors, Inc. v. Peña*, "whether a law relying

130. See, e.g., *How SCOTUS's Decision on Race-Based Admissions is Shaping University Policies: Hearing Before the Subcomm. on Higher Educ. & Workforce-Dev. of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) (statement of Yukong Zhao, President, Asian Am. Coal. for Educ.); KENNY XU, AN INCONVENIENT MINORITY: THE HARVARD ADMISSIONS CASE AND THE ATTACK ON ASIAN AMERICAN EXCELLENCE (2021).

131. See, e.g., Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053 (2009).

132. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

133. "I Have a Dream" Speech, *supra* note 38.

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

upon racial taxonomy is ‘benign’ or ‘malign’ either turns on ‘whose ox is gored’ or on distinctions found only in the eye of the beholder.”¹³⁵

In light of the politically corrupted state of civil rights discourse in the Twenty-First Century, it is worthwhile to re-examine the simple but forgotten moral precept that all people should be treated as individuals. This Article identifies four principles that serve as a roadmap for civil rights advocacy seeking to promote genuine inclusiveness through respect for individual dignity and avoidance of the divisive identity politics that plagues modern civil rights activism: (1) arbitrary racial distinctions must not be used in public life; (2) prohibitions on discrimination must be enforced against both overt and covert discrimination, though a finding of discrimination can occur only when it is justified by the evidence; (3) our society should foster inclusive, talent-based institutions that provide opportunities to people of all identities; and (4) our society should ensure honest discourse about race. Many of the goals of modern civil rights advocates are consistent with and serve to advance these principles. However, those that contradict them should be abandoned because they place primacy on interest-group politics over genuine inclusiveness and equality.

A. ELIMINATING THE USE OF ARBITRARY RACIAL DISTINCTIONS IN PUBLIC LIFE

Racial classifications have a long and controversial history in the United States. In *Plessy v. Ferguson*, the Supreme Court held that the State of Louisiana could constitutionally eject a man who was seven-eighths White and one-eighth African American from a Whites-only railcar.¹³⁶ In *United States v. Thind*, the Court rejected the claim of a man from India who argued that he was eligible for citizenship as a “white person” under racially exclusionary immigration laws even though South-Asians had been “classified by certain scientific authorities as of the Caucasian or Aryan race.”¹³⁷

Even in the late Twentieth and early Twenty-First Century, courts have struggled with arguments concerning the propriety of the racial categories used in the United States. For example, a circuit split exists on whether it is appropriate to include Europeans from the Iberian Peninsula as “Hispanic” for race-based preferences while excluding other European groups. “The Seventh Circuit held that Illinois violated the Equal Protection Clause by using an unconstitutionally overinclusive definition of ‘Hispanic’ as including Europeans for its minority business enterprise program.”¹³⁸ “By contrast, the Eleventh Circuit has held that a county fire department’s broad

135. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 n.* (1995) (Thomas, J., concurring in part and concurring in the judgment) (internal citations omitted).

136. *Plessy v. Ferguson*, 163 U.S. 537, 541, 552 (1896).

137. *United States v. Thind*, 261 U.S. 204, 210, 215 (1923).

138. Brief of Professor David E. Bernstein as *Amicus Curiae* in Support of Petitioner at 12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707) (citing *Builders Ass’n of Greater Chi. v. Cnty. of Cook*, 256 F.3d 642, 647–48 (7th Cir. 2001)).

definition of ‘Hispanic’ . . . as including Europeans does not run afoul of the Equal Protection Clause.”¹³⁹

The modern racial categories that are prevalent in the United States are arbitrary classifications that do not reflect the way many people self-identify, are not based on coherent scientific or anthropological principles, and have changed over time based on arbitrary political decisions. *Fair Admissions* took note of this, citing as examples the grouping of all Asians together into one category and the inability of UNC’s counsel to identify the racial category to which someone from the Middle East would belong.¹⁴⁰ The Court also cited to Justice Gorsuch’s concurring opinion,¹⁴¹ which expanded on the problems of the racial categories.

Drawing on the scholarship of Professor David Bernstein¹⁴² and the *amicus* brief that one of the authors of this Article co-authored and filed on his behalf,¹⁴³ Justice Gorsuch noted that a “federal interagency commission devised” the racial categories “in the 1970s to facilitate data collection.”¹⁴⁴ The commission acted “without any input from anthropologists, sociologists, ethnologists, or other experts,”¹⁴⁵ and “federal regulators cautioned that their classifications ‘should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program.’”¹⁴⁶ “Despite that warning, others eventually used this classification system for that very purpose—to ‘sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs . . . and university admissions.’”¹⁴⁷

Justice Gorsuch and the *amicus* brief of Professor Bernstein lay out in exhaustive detail numerous ways in which the aforementioned racial categories are arbitrary,¹⁴⁸ including that:

- The “Hispanic” category is defined as an ethnicity rather than a race and arbitrarily groups together Europeans from the Iberian Peninsula with people from Central and South America.¹⁴⁹

139. *Id.* (citing *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1559–60 (11th Cir. 1994)).

140. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 216 (2023).

141. *See id.* (citing *id.* at 291–93 (Gorsuch, J., concurring)).

142. *See* David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 196–202 (2021); *see also* DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA* (2022).

143. Brief of Professor Bernstein, *supra* note 138.

144. *Fair Admissions*, 600 U.S. at 291 (Gorsuch, J., concurring).

145. *Id.* (quoting Brief of Professor Bernstein, *supra* note 138, at 3).

146. *Id.* (emphasis omitted) (quoting Transfer of Responsibility for Certain Statistical Standards from OMB to Commerce, 43 Fed. Reg. 19,260, 19,269 (May 4, 1987)).

147. *Id.* (alterations in original) (quoting Hugh Davis Graham, *The Origins of Official Minority Designation*, in *THE NEW RACE QUESTION: HOW THE CENSUS COUNT MULTIRACIAL INDIVIDUALS* 288, 289 (Joel Perlmann & Mary C. Waters eds., 2002)).

148. *See id.* at 291–93.

149. *See id.* at 292; *see also* *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 304 (5th Cir. 2011) (Jones, J., dissenting from the denial of rehearing en banc).

- The “Asian” category, which groups together over 60% of the world’s population and includes disparate populations from a multitude of countries, is vastly overbroad.¹⁵⁰
- “Native Hawaiians” and “Pacific Islanders” have, in some circumstances, been disaggregated from Asians in order to avoid having their disadvantages overlooked.¹⁵¹
- The “African-American” category includes in a single category people who are descendants of slaves, people of multiracial ancestry who grew up in a predominantly White community, and people who recently immigrated to the United States from African countries.¹⁵²
- The “White” category groups together people of diverse European ancestry—many of whom previously experienced discrimination in the United States, such as Irish and Italian immigrants—and Middle Easterners who face forms of discrimination that people of European ancestry do not experience.¹⁵³

The problem of arbitrariness in the racial categories is not one of flawed design. Rather, it is endemic to the very task of racial classification itself. Every system of racial classifications is arbitrary. No matter how one seeks to draw the dividing lines between racial categories—geography, time period, physical appearance, degree of genetic relatedness, or culture—there will always be arbitrary determinations that must be made. The task of devising racial categories is inherently and inevitably arbitrary and divisive.

Such arbitrary racial categories must not be used to determine our destinies. To allow otherwise would be antithetical to the profoundly moral ideal of equality articulated in the Declaration of Independence and our Constitution. As the Court stated in *Fair Admissions*, quoting *Rice v. Cayetano*: “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”¹⁵⁴ “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.”¹⁵⁵ As Justice Thomas observed in *Adarand*, “every racial classification helps . . . some races and hurts others.”¹⁵⁶ Whether “benign” or “malicious,” in “each instance, it is racial discrimination, plain and simple.”¹⁵⁷

150. See *Fair Admissions*, 600 U.S. at 291–92 (Gorsuch, J., concurring); see also *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 414 (2016) (Alito, J., dissenting).

151. See *Fair Admissions*, 600 U.S. at 292 (Gorsuch, J., concurring); Brief of Professor Bernstein, *supra* note 138, at 9–10.

152. See *Fair Admissions*, 600 U.S. at 292 (Gorsuch, J., concurring); Brief of Professor Bernstein, *supra* note 138, at 15–16.

153. See *Fair Admissions*, 600 U.S. at 292 (Gorsuch, J., concurring); Brief of Professor Bernstein, *supra* note 138, at 14.

154. *Fair Admissions*, 600 U.S. at 220 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

155. *Id.* at 208 (quoting *Rice*, 528 U.S. at 517).

156. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 n.* (1995) (Thomas, J., concurring in part and concurring in the judgment).

157. *Id.* at 241.

The goal of eliminating racial distinctions from public life is not new. Contemporary efforts to ensure respect for and compliance with nondiscrimination laws and to draw attention to previously unrecognized discrimination support the same goals as 1960s-era civil rights advocacy. On the other hand, efforts to elevate racial grievances in society or to allow for the differential treatment of similarly situated candidates for opportunities based on race are contrary to this goal. Such efforts only heighten the salience of arbitrary racial categories in society and magnify the extent to which our immutable characteristics determine our fate.

Eliminating the use of racial categories in public life does not entail obliviousness to the continued challenges that racial minorities face in the Twenty-First Century. Rather, it is based on the recognition that racial categorization is too arbitrary and blunt an instrument to serve any constructive purpose in our society. Efforts to redress past grievances or provide opportunities to those who are underprivileged must be tailored to individual circumstances in order to be just and efficacious. As Chief Justice Roberts explained in *Fair Admissions*, there is a difference between discriminating “on the basis of race” and understanding the unique way in which a particular student’s race uniquely “affected his or her life.”¹⁵⁸ First and foremost, a civil rights advocate who seeks to promote racial equality and a genuinely inclusive society must be committed to the dignity of the individual and the elimination of the use of arbitrary racial distinctions in public life.

B. ELIMINATING COVERT DISCRIMINATION

Even when overt racial distinctions have been removed from public life, racial discrimination may still occur through covert means. The legal principles for analyzing claims of covert discrimination are discussed below and applied to several potential policies that have been discussed as ways for schools to continue racial balancing after *Fair Admissions*: induced disclosure of race, proxies for race, and second-order proxies. The discussion concludes with an analysis of Supreme Court cases discussing the circumstances under which disparate-impact liability can violate the Constitution’s guarantee of equality and itself perpetrate a form of covert discrimination.

1. *Covert Discrimination is Established Through Evidence of Discriminatory Purpose and Effects*

The Supreme Court’s precedents interpreting the Constitution’s guarantee of equal protection have held that a facially race-neutral policy is discriminatory when the evidence establishes a discriminatory purpose and effect. In 1886, the Supreme Court held in *Yick Wo v. Hopkins* that a permit requirement for laundries operating in wooden buildings was racially

158. *Fair Admissions*, 600 U.S. at 230–31.

discriminatory because permits were almost universally denied to Chinese applicants and granted to non-Chinese applicants.¹⁵⁹

While racial disparities in a policy's effects may be evidence of a potentially discriminatory purpose, the two inquiries are separate. A racial disparity alone without a discriminatory purpose is insufficient to establish discrimination under the Constitution. In *Washington v. Davis*, the Court stated that it had never held that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."¹⁶⁰ A disproportionate impact "alone" does "not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."¹⁶¹ The Court emphasized that allowing disproportionate impact alone to suffice in proving a racial classification "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes."¹⁶²

The Supreme Court reiterated this holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁶³ In that case, the Court considered a constitutional challenge to a city's decision not to rezone a tract of land from single-family use to multi-family use.¹⁶⁴ The Court reiterated "that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."¹⁶⁵ "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."¹⁶⁶

Arlington Heights articulated how a facially race-neutral policy can be proven to have a discriminatory purpose.¹⁶⁷ A "clear pattern, unexplainable on grounds other than race," as was the case in *Yick Wo*, can demonstrate an intent to discriminate.¹⁶⁸ Departures from past practices, including a departure from the normal procedural sequence for decision making, or a substantive departure from past practice, can be evidence of discriminatory intent.¹⁶⁹ The historical record of a legislative or administrative body is relevant, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."¹⁷⁰ Overall, *Arlington Heights* "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."¹⁷¹

In the wake of *Fair Admissions*, questions have arisen about what sorts of alternatives to race-based admissions policies can be used by schools

159. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

160. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

161. *Id.* at 242 (internal citation omitted).

162. *Id.* at 248.

163. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254–55 (1977).

164. *Id.*

165. *Id.* at 264–65.

166. *Id.* at 265.

167. *See id.* at 266–68.

168. *Id.* at 266 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

169. *Id.* at 267.

170. *Id.* at 268.

171. *Id.* at 266.

without running afoul of Title VI and the Equal Protection Clause.¹⁷² The answers to those questions will turn on the same analysis used to evaluate whether any facially race-neutral policy is discriminatory: Is there a discriminatory purpose and effect? Several potential changes to admissions policies that have received some attention are discussed below and analyzed using the principles set forth in *Washington v. Davis* and *Arlington Heights*.

a. Induced Disclosure of Race

Some have questioned whether, as a response to *Fair Admissions*, schools might implement changes to give the appearance of having abandoned race-based admissions policies, such as declining to collect data on self-identified race, but then inviting students to disclose their self-identified race in other parts of the application process.¹⁷³ Changes that are enacted to enable schools to continue engaging in unlawful discrimination through covert means are clearly illegal. It should go without saying that obscuring evidence of unlawful conduct while continuing to engage in the unlawful conduct does not render the conduct lawful.¹⁷⁴

The Court is and should be wary of any attempts by schools to continue engaging in racial discrimination. Near the end of the Court's opinion in *Fair Admissions*, Chief Justice Roberts stated that the Court was not prohibiting universities from considering applicants' discussions in application essays of how race affected their lives, but emphasized that "universities may not simply establish through application essays or other means the regime we hold unlawful today."¹⁷⁵ An open-ended essay asking applicants to talk about their life story will not necessarily elicit responses that involve discussions about race and thus could potentially be used lawfully after *Fair Admissions*.¹⁷⁶ On the other hand, a question asking applicants to talk about their racial identity specifically could be strong evidence of intent to discriminate.

In a highly publicized incident, Columbia Law School changed its admissions process to require applicants to submit a "90-second video statement to give the admissions committee greater 'insight' into their personal

172. See Sarah Wood, *What the Supreme Court's Affirmative Action Ban Means for College Admissions*, U.S. NEWS & WORLD REP. (June 29, 2023), <https://www.usnews.com/education/best-colleges/applying/articles/how-does-affirmative-action-affect-college-admissions> [<https://perma.cc/D8BT-9G5V>].

173. See, e.g., Steven McGuire, *Can Harvard Use Application Essays to Discriminate by Race?*, WALL ST. J. (Aug. 11, 2023, 3:01 PM), <https://www.wsj.com/articles/can-harvard-use-application-essays-to-discriminate-by-race-unc-fair-admission-5638086f> [<https://perma.cc/9CUL-EEE8>].

174. *But cf.* Association of American Law Schools, *AALS Conference on Affirmative Action: Panel 3*, YOUTUBE (Aug. 2, 2023), https://www.youtube.com/watch?v=1ShI_vJ0x14&t=636s [<https://perma.cc/6M7K-S5UD>] (starting at 10 minutes and 35 seconds) ("Whatever you do, you should be aware right now of the record you're creating; the record your faculties are creating.").

175. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

176. See *id.* at 230–31.

strengths and achievements.”¹⁷⁷ It is difficult to see how much the Columbia Law School admissions committee can learn about applicants’ personal strengths and achievements in such a short period of time, and people raised questions about whether the requirement was an attempt to covertly discern the race of applicants in violation of *Fair Admissions*.¹⁷⁸ When asked about the purpose behind the change in its admissions system, Columbia Law School said that the video-statement requirement was a mistake and removed the requirement the following day.¹⁷⁹

Similarly, the law firm Weil, Gotshal & Manges (Weil) sought to collect photographs of law students from Northwestern University’s Latino Law Students Association.¹⁸⁰ According to a student who emailed the affinity group on behalf of the firm, the photographs would be used to “assess” candidates for the firm’s diversity fellowship.¹⁸¹ Weil’s request came after the law firms Morrison & Foerster and Perkins Coie were sued for creating diversity fellowships that excluded certain applicants based on race, prompting the firms to expand their programs to be open to applicants of all races.¹⁸²

Induced disclosure of race gives rise to a strong inference of intent to discriminate. That is why, in the context of disability discrimination, the Americans with Disabilities Act prohibits employers from making pre-employment “inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”¹⁸³ After *Fair Admissions*, universities would be well advised not to solicit an applicant’s race to achieve what the Court declared to be unlawful discrimination.¹⁸⁴

b. Direct Proxy for the Prohibited Characteristic

Another proposed response to *Fair Admissions* is to use variables other than race to achieve diversity.¹⁸⁵ Though genuinely race-neutral policies

177. Kristine Parks, *Columbia University Claims “Video Requirement” on Application Was an Accident*, N.Y. POST (Aug. 1, 2023, 9:39 PM), <https://nypost.com/2023/08/01/columbia-university-claims-video-requirement-on-application-was-an-accident> [https://perma.cc/RVB2-ACLW].

178. *Id.*

179. *Id.*

180. Aaron Sibarium, *Top Law Firm Collects Photographs of Potential Applicants, Raising Discrimination Concerns*, WASH. FREE BEACON (Nov. 27, 2023), <https://freebeacon.com/campus/top-law-firm-collects-photographs-of-potential-applicants-raising-discrimination-concerns> [https://perma.cc/TMW2-HEKN].

181. *Id.*

182. See Nate Raymond, *Affirmative Action Opponent Drops Case Over Law Firm’s Diversity Fellowship*, REUTERS (Oct. 11, 2023, 12:19 PM), <https://www.reuters.com/legal/affirmative-action-opponent-drops-case-over-law-firms-diversity-fellowship-2023-10-11> [https://perma.cc/ZT6F-YU2Q].

183. 42 U.S.C. § 12112(d)(2)(A).

184. *Cf.* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 303 n.8 (2023) (Gorsuch, J., concurring) (showing internal commentary of admissions teams discussing student application in racial terms and classifying students by race).

185. See, e.g., Denise-Marie Ordway, *Race-Neutral Alternatives to Affirmative Action in College Admissions: The Research*, JOURNALIST’S RES. (June 29, 2023), <https://journalistsresource.org/education/race-neutral-alternatives-affirmative-action-college-diversity> [https://perma.cc/].

are lawful, a case involving a competitive public high school in Virginia, *Coalition for TJ v. Fairfax County Public Schools*, demonstrates the legal risks of using a proxy for race to achieve a racially discriminatory goal.¹⁸⁶

In the aftermath of the racial unrest that occurred following the death of George Floyd in 2020, school districts across the country sought to change the racial composition of elite schools in their districts.¹⁸⁷ The Fairfax County School Board (Board) changed the admissions requirements for Thomas Jefferson High School (TJ), the top rated public high school in the country, in order to change the racial demographics of its student body.¹⁸⁸ During the 2020–2021 school year, TJ’s students were “71.97% Asian American, 18.34% White, 3.05% Hispanic, and 1.77% Black.”¹⁸⁹

Before the Board’s fall 2020 changes, applicants to TJ who met certain minimum criteria “were administered three standardized tests: the Quant-Q, the ACT Inspire Reading, and the ACT Inspire Science.”¹⁹⁰ “[A]pplicants who achieved certain minimum scores on the tests advanced to a ‘semifinalist’ round.”¹⁹¹ Students were admitted “from the semifinalist pool based on a holistic review that considered GPA, test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay.”¹⁹²

The Board’s fall 2020 changes to TJ’s admissions system “removed the standardized tests” and changed the evaluation process “from a multi-stage process to a one-round holistic evaluation” that includes consideration of whether the applicant attended a historically underrepresented middle school.¹⁹³ Under the new policy, seats are guaranteed for students at each of Fairfax County’s public middle schools “equivalent to 1.5% of the school’s eighth grade class size, with seats offered in the first instance to the highest-evaluated applicants from each school.”¹⁹⁴ Then, “[a]fter the guaranteed seats are filled, about 100 unallocated seats remain for students who do not obtain an allocated seat.”¹⁹⁵

One of the reasons why the new admissions system decreased the number of admitted Asian American students was that a handful of middle schools were historically responsible for sending a large share of their

cc/YGV5-KJMB] (noting one common race-neutral approach includes using socioeconomic status because it is closely linked to a person’s race and ethnicity).

186. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022), *rev’d and remanded*, 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024).

187. *See* Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 627 F. Supp. 3d 253, 256 (S.D.N.Y. 2022), *appeal docketed*, No. 22-2649 (2d Cir. Oct. 17, 2022); Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Boston, No. 21-10330, 2021 WL 4489840, at *1 (D. Mass. Oct. 1, 2021), *aff’d*, 89 F.4th 46 (1st Cir. 2023); Ass’n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 560 F. Supp. 3d 929, 933, 953 (D. Md. 2021).

188. *See Coal. for TJ*, 2022 WL 579809, at *1–2.

189. *Id.* at *1.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at *2.

194. *Id.*

195. *Id.*

students to TJ.¹⁹⁶ Those middle schools, like TJ, selected gifted students and offered them academic programs more advanced than those offered by their zoned middle school.¹⁹⁷ A disproportionate number of the TJ applicants from those advanced middle schools were Asian American,¹⁹⁸ so the requirement that TJ draw a minimum number of students from other middle schools dramatically decreased the number of Asian American students admitted.

For the classes of 2020, 2021, 2022, 2023, and 2024, Asian American students earned approximately 69%, 75%, 65%, 73%, and 73% of the seats, respectively.¹⁹⁹ After the Board's admissions changes in fall 2020, however, the proportion of Asian American students admitted fell to about 54% for the class of 2025.²⁰⁰ Even though the Board increased TJ's class size by 64 students, "TJ admitted 56 fewer Asian American students."²⁰¹

The evidence in the record showed not only a statistical drop in the number of Asian American students offered admission but also racially discriminatory intent.²⁰² In the decade prior to 2020, the Board had implemented a series of changes to its admissions process to alter the racial makeup of its student body, but those efforts were deemed to be unsuccessful.²⁰³ Against this historical backdrop, it was clear that the changes to TJ's admissions process were racially motivated.²⁰⁴ During discussions leading up to the changes, two members of the Board called the school's racial composition "unacceptable."²⁰⁵ Another was "angry and disappointed" at the racial composition of TJ's admitted students.²⁰⁶ Several proposed changes to TJ's admissions process were accompanied with racial modeling to assess the impact of the proposed changes on TJ's racial composition.²⁰⁷ TJ Principal Ann Bonitatibus went so far as to cite what she thought was the proper racial composition at TJ: "180 black and 460 Hispanic students."²⁰⁸ One board member, in explaining her desire for "equity," stated that TJ's admissions process should "be clearly distinguished from equality."²⁰⁹ In a text exchange among Board members, one Board member stated that the new proposal would "whiten our schools and kick [out] Asians. How is that

196. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 900 (4th Cir. 2023) (Rushing, J., dissenting) (stating half of the offers extended for the class of 2024 came "from six feeder schools"), *cert. denied*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024).

197. *See Full-Time Advanced Academic Program, Grades 3-8 (Level IV)*, FAIRFAX CNTY. PUB. SCHS., <https://www.fcps.edu/academics/elementary/advanced-academic-programs/full-time-advanced-academic-program> [<https://perma.cc/K7P5-RJ28>].

198. *See Coal. for TJ*, 68 F.4th at 900 (Rushing, J., dissenting) (noting that a "significant majority of applicants from these feeder schools were Asian" and that for the class of 2024, "84% of the offers to TJ from these feeder schools went to Asian students").

199. *Coal. for TJ*, 2022 WL 579809, at *6.

200. *Id.* at *2, 6.

201. *Id.* at *2.

202. *Id.* at *5.

203. *Id.* at *6.

204. *Id.*

205. *Id.* at *7.

206. *Id.*

207. *See id.* at *7-9.

208. *Id.* at *2.

209. *Id.* at *10.

achieving the goals of diversity?”²¹⁰ “Another Board member replied, ‘I mean, there has been an anti [A]sian feel underlying some of this, hate to say it, lol!’”²¹¹

Judge Hilton of the U.S. District Court for the Eastern District of Virginia granted summary judgment to the Coalition for TJ, an organization representing the parents of children who applied to or planned to apply to TJ.²¹² The court found that “no dispute of material fact exists regarding any of the *Arlington Heights* factors, nor as to the ultimate question that the Board acted with discriminatory intent,” and the “Board’s overhaul of TJ admissions has had, and will have, a substantial disparate impact on Asian American applicants to TJ.”²¹³ A divided panel of the Fourth Circuit reversed.²¹⁴ Writing for the majority, Judge King held that the success of Asian American applicants compared to their share of the applicant pool was sufficient to foreclose liability for discrimination against Asian Americans.²¹⁵ In a dissenting opinion, Judge Rushing noted that the changes to TJ’s admissions system “reduced offers of enrollment to Asian students at TJ by 26% while increasing enrollment of every other racial group,” which “was no accident.”²¹⁶ The Supreme Court declined to review the case, but Justice Alito wrote a dissenting opinion joined by Justice Thomas, stating that the Fourth Circuit had approved of “intentional racial discrimination” in a manner that is “indefensible” and “cries out for correction.”²¹⁷ The Pacific Legal Foundation, which represented the Coalition for TJ, issued a press release noting that it had similar cases pending in Boston, New York City, and Montgomery County, Maryland, and would continue to litigate these issues up to the Supreme Court.²¹⁸ As *Coalition for TJ* shows, schools seeking to engage in racial discrimination through carefully crafted facially race-neutral policies that use proxies for race, such as middle school attendance, are at risk of having those policies declared unlawful.

c. Second-Order Proxies

After the *Fair Admissions* decision, the Biden Administration released guidance outlining a potential two-step process to avoid liability for

210. Suzanne Eckes, *Diversifying K-12 Public Schools: A Federal Court Finds Admission Plan Unconstitutional*, 70 UCLA L. REV. DISCOURSE 302, 314 (2023) (alteration in original) (quoting Plaintiff’s Memorandum in Support of Motion for Summary Judgment at 31, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022)).

211. *Id.* (alteration in original) (quoting Plaintiff’s Memorandum, *supra* note 210, at Ex. J).

212. *Coal. for TJ*, 2022 WL 579809, at *11.

213. *Id.* at *5.

214. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 870–71 (4th Cir. 2023).

215. *See id.* at 881–82.

216. *Id.* at 892 (Rushing, J., dissenting).

217. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659, at *1 (U.S. Feb. 20, 2024) (Alito, J., dissenting from the denial of certiorari).

218. *Supreme Court Refuses to Hear Case of K-12 Race-Based Discrimination*, PAC. LEGAL FOUND. (Feb. 20, 2024), <https://pacificlegal.org/press-release/supreme-court-refuses-to-hear-case-of-k-12-race-based-discrimination> [<https://perma.cc/V5VB-E2A2>].

discrimination.²¹⁹ First, the guidance advises that “[a]n institution may consider race” explicitly in “outreach and recruitment” for college admissions and pre-college pathway programs.²²⁰ Second, the guidance counsels that an “institution may give pathway program participants preference in its college admissions process,” though “institutions may not award slots in pathway programs based on an individual student’s race without triggering the strict scrutiny that [*Fair Admissions*] applied.”²²¹

Schools considering following the Biden Administration’s guidance should keep in mind that a facially race-neutral pathway program, if administered in a manner that is intentionally discriminatory, is discriminatory under *Arlington Heights*.²²² To the extent race is expressly considered in outreach and recruitment for pathway programs, such efforts could be interpreted as evidence of discrimination. Similarly, if a pathway program is discriminatory, a school’s preference for participants in the pathway program—particularly if combined with express consideration of race by the school in outreach and recruitment—could also be discriminatory. The school would be using a second-order proxy for race.

A school cannot escape liability for racial discrimination by laundering its consideration of race through a series of proxies that are ultimately designed to achieve a racial effect.²²³ Under *Arlington Heights*, intentional racial discrimination exists when race is a motivating factor—even if it is not necessarily a primary one—and racial discrimination is not excused merely because there are other non-racial motivations present.²²⁴ A racial purpose “implies that the decisionmaker . . . selected . . . a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²²⁵ A single racial purpose tainting a course of action is sufficient to trigger strict scrutiny and render the course of action unlawful.

2. Disparate-Impact Liability Can Perpetrate Discrimination

The *Arlington Heights* framework for evaluating constitutional claims of discrimination reasonably calls for an evidence-based, context-sensitive inquiry into whether a facially race-neutral policy is motivated by a discriminatory purpose and has a discriminatory effect.²²⁶ In interpreting certain statutes and regulations, however, some courts and agencies have held that policies that do not affect all racial groups in equal proportion are

219. DEP’T OF EDUC. & DEP’T OF JUST., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT’S DECISIONS IN *Students for Fair Admissions v. Harvard College and University of North Carolina* 3–4 (2023), https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf [<https://perma.cc/9KZG-LHWS>].

220. *Id.* at 4.

221. *Id.*

222. *See* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977).

223. *See id.*

224. *Id.* at 265–66.

225. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (alterations in original) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

226. *See Arlington Heights*, 429 U.S. at 266.

presumptively unlawful absent a sufficiently compelling justification for the policy, a theory of liability known as disparate-impact liability. Though the Supreme Court has allowed disparate-impact liability in certain circumstances, it has also recognized that, without appropriate checks, disparate-impact liability can inject race into decisions and force decision makers to engage in discriminatory racial balancing.

In *Griggs v. Duke Power Co.*, the Supreme Court held that in a Title VII employment-discrimination lawsuit, the “absence of discriminatory intent does not redeem employment procedures” because what matters is the “consequences of employment practices, not simply the motivation.”²²⁷ The Court stated that Congress “placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question,” which the Court referred to as the standard of “business necessity.”²²⁸ In *Smith v. City of Jackson*, the Court recognized disparate-impact liability could authorize recovery under the Age Discrimination in Employment Act of 1967.²²⁹ Similarly, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Court recognized disparate-impact liability in a claim arising under the Fair Housing Act.²³⁰

Against the backdrop of these decisions, agencies have issued rules and guidance elaborating on their understandings of the scope of disparate-impact liability. For example, the Uniform Guidelines on Employee Selection Procedures state the following: “A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact.”²³¹ In March 2023, the U.S. Department of Housing and Urban Development issued a final rule formalizing its interpretation of the Fair Housing Act as establishing liability “based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”²³²

As Gail Heriot has explained, when disparate-impact liability is taken to its logical conclusion, “everything or nearly everything has a disparate impact.”²³³ In the context of employment, for example, professional skills, interests, experiences, and education are not evenly distributed among all racial groups, and thus virtually any employment qualification will have a disparate impact on some racial group.²³⁴ When the public cannot reasonably tell what practices are unlawful, it has no fair notice of how to conduct

227. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

228. *Id.* at 431–32.

229. *See Smith v. City of Jackson*, 544 U.S. 228, 231–32 (2005).

230. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545–46 (2015).

231. 29 C.F.R. § 1607.4(D) (2022).

232. 24 C.F.R. § 100.500 (2023).

233. *See Gail L. Heriot, Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 39 (2020).

234. *See id.* at 34.

itself, and the government may exercise its enforcement discretion in a manner that is arbitrary, unpredictable, and political.

Furthermore, taken to its logical conclusion, disparate-impact liability arguably mandates racial balancing. In *Ricci v. DeStefano*, Justice Scalia raised the following question: “Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”²³⁵ As Justice Scalia observed, “Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory.”²³⁶ Judge Ho echoed these concerns in a Fifth Circuit concurring opinion, questioning whether disparate-impact liability runs afoul of the Constitution’s prohibition on racial balancing.²³⁷

By enforcing the constitutional prohibition on racial balancing, *Fair Admissions* further raises questions about the constitutionality of disparate-impact liability. Harvard’s efforts to ensure minimum representation of various racial groups, even when it required discrimination against Asian Americans, is similar to the sort of conduct that disparate-impact liability would seem to require of decision makers. As Judge Ho put it, disparate-impact liability “forces us to look at race” and arguably “means not only presuming discrimination, but requiring it.”²³⁸ Though statistical disparities can potentially be evidence of discrimination, treating disparities as presumptively unlawful would seem to impose on decision makers an obligation to engage in race-based decision making, prioritizing racial balancing above all other considerations.

The Supreme Court recognized these issues even as it approved of disparate-impact liability under the Fair Housing Act in *Inclusive Communities Project*, noting the “serious constitutional questions that might arise . . . for instance, if such liability were imposed based solely on a showing of a statistical disparity.”²³⁹ If “judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.”²⁴⁰ The Court instructed that “[c]ourts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”²⁴¹ These constitutional concerns led the Court to emphasize that courts must “give housing authorities and private developers leeway” to consider valid interests other than race

235. *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

236. *Id.*

237. *See* *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 648–49 (5th Cir. 2021) (Ho, J., concurring in part and concurring in the judgment).

238. *Id.*

239. *Tex. Dep’t of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015).

240. *Id.* at 542–43.

241. *Id.* at 543.

and must hold plaintiffs to a “robust causality requirement” to limit “abusive disparate-impact claims.”²⁴²

As the Court has recognized, abusive disparate-impact claims can themselves constitute a form of covert discrimination.²⁴³ In *Ricci*, the City of New Haven discarded the results of a firefighter-promotion test after some firefighters “threatened a discrimination lawsuit if the City made promotions based on the tests.”²⁴⁴ White and Hispanic firefighters who passed the test brought race-discrimination claims under Title VII, and the Court granted them summary judgment, finding that the “raw racial results” were “the predominant rationale for the City’s refusal to certify the results” of the test.²⁴⁵ The Court stated that if “after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability.”²⁴⁶ Defending against abusive disparate-impact claims and enforcing constitutional limits on disparate-impact liability are essential to the mission of eliminating covert discrimination. A society that genuinely values equality and inclusion cannot allow its antidiscrimination laws to be transformed into instruments of discrimination.

C. FOSTERING INCLUSIVE, TALENT-BASED INSTITUTIONS

In addition to eliminating overt and covert discrimination, a framework for civil rights advocacy should set forth an affirmative vision of how a society can be genuinely inclusive of all people. This Article posits that the only way a diverse, multiracial society can survive is to foster and sustain talent-based institutions that are radically inclusive of all people who demonstrate the ability and willingness to contribute to society. The concept of a talent-based institution as used in this Article draws on Jordan Peterson’s observation that well-functioning societies have organizational hierarchies based on competence, rather than dominance.²⁴⁷ A talent-based institution is one that strives, to the greatest extent possible, to maximize the effectiveness of its contributions to society, providing opportunities and assigning responsibilities to people based on their abilities.²⁴⁸

The Article avoids the term “meritocracy,” which has been used as a pejorative to refer to the reductionist view that society need not concern itself with anything other than competition, or the mistaken belief that it is possible to fashion a society in which there is no nepotism, corruption,

242. *Id.* at 541–42, 544.

243. *See id.* at 544.

244. *Ricci v. DeStefano*, 557 U.S. 557, 562 (2009).

245. *Id.* at 593.

246. *Id.*

247. JORDAN B. PETERSON, 12 RULES FOR LIFE: AN ANTIDOTE TO CHAOS 313 (2018) (“In societies that are well-functioning . . . *competence*, not power, is a prime determiner of status. Competence. Ability. Skill. Not *power*.”).

248. *See* Tarmo Strenze, *Allocation of Talent in Society and its Effect on Economic Development*, 41 INTEL. 193, 193–94 (2013).

or inequality stemming from circumstances outside of one's control.²⁴⁹ Fostering talent-based institutions is in harmony with—and provides the necessary preconditions for—creating a society that is compassionate toward and inclusive of those who are vulnerable or marginalized. Organizing institutions around talent is the only way for a multiracial society to live in harmony and cooperation. Doing so ensures that people of all identities have opportunities to excel, allows society to enjoy the productive fruits of its most talented members, and promotes cross-racial understanding by allowing people of all races to be appreciated for their contributions to society.

1. Opportunities to Excel

Inclusive, talent-based institutions provide opportunities to excel to deserving people without regard to race, class, or pedigree. Though standardized testing has recently come under criticism, Rob Henderson has noted that there “are poor kids who get bad grades but find a path upward because of standardized testing.”²⁵⁰ Henderson cites studies showing that a standardized test “administered to all students revealed that previously overlooked students from disadvantaged backgrounds qualified as academically gifted” and that test scores help to overcome teachers’ biased tendencies to view lower income students as less academically competent.²⁵¹ Whatever imperfections standardized testing may have, the goal of discovering the talents of people who might otherwise be overlooked because of biases is laudable. Providing opportunities to people based on talent, and talent alone, is radically egalitarian and inclusive.

When society rewards talent, people will be pushed to compete with themselves, and others, to be their best selves and unlock their potential. By contrast, when race plays a determinative role in gaining admission to a top school or a job offer, the effect of such a policy is to depress the spirit of pursuing excellence in both the purported beneficiary and the victim of racial discrimination. If an African American applicant can earn admission to Harvard with test scores and grades that would result in a rejection for an Asian American applicant, then there is no need for him to push himself to the full depths of his potential when a weaker academic performance is enough for him to achieve his goals. At the same time, an Asian American student whose accomplishments are deemed insufficient because of his race is told that his efforts to cultivate his talents are futile because of an arbitrary factor: the relatively strong academic performances of other Asian Americans.

249. See, e.g., MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* (2020); DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* (2019); ROBERT H. FRANK, *SUCCESS AND LUCK: GOOD FORTUNE AND THE MYTH OF MERITOCRACY* (2017).

250. Rob Henderson, *Dropping the SAT Requirement is a Luxury Belief*, ROB HENDERSON'S NEWSL. (Mar. 5, 2023), <https://www.robkhenderson.com/p/dropping-the-sat-requirement-is-a> [<https://perma.cc/K9ZN-WBMB>].

251. *Id.*

When the mere existence of performance gaps between races is seen as a reason to engage in racial balancing, pushing oneself for further success is not worth the personal cost and hurts others belonging to the same racial group. If a student pushes himself further, then he only makes it harder for people who look like him to get into college because that would be one step towards closing the achievement gap. In other words, so long as racial balancing is practiced, widespread success in a racial group punishes the entire racial group. Group victimization, not individual talent, is rewarded.²⁵² “Victimization, like implied inferiority, is what justifies preference, so that to receive the benefits of preferential treatment, one must, to some extent, become invested in the view of one’s self as a victim.”²⁵³ Racial preferences encourage dependency and reward people for identifying themselves as victims instead of cultivating their talents.²⁵⁴

Racial balancing also has the perverse effect of channeling people away from cultivating meaningful talents out of a desire to avoid discrimination. Prior to *Fair Admissions*, an entire industry developed to make college applicants seem less Asian.²⁵⁵ While consultants could not change the names or looks of college applicants, they encouraged parents to steer their children away from stereotypically Asian activities.²⁵⁶ When universities penalize Asian American students because of their race, those students are deterred from expressing their authentic selves in their college applications and in their own personal lives.

Amy Qin of the *New York Times* reported that a competitive chess player chose not to discuss her love of chess out of fear that college admissions officers would reject a student who was “too stereotypically Asian.”²⁵⁷ Aaron Mak of *Slate* recounted that in preparing to apply for college, “I’d held in my mind an image of Asian American identity and then ran as far away from it as I could.”²⁵⁸ He “quit piano, viewing the instrument as a totem of [his] race’s overeager striving in America,” and “avoided participating in the future doctors’ association, ping-pong club, the robotics team, and the Asian culture group.”²⁵⁹ “I enrolled in a Mandarin course during my senior year of high school, never having learned a Chinese dialect as a kid, but I dropped it a few weeks in,” he recalled.²⁶⁰ “I told people it was because I was too busy, but in actuality I didn’t want Mandarin on my transcript and as a second language on my application, which I feared could

252. See SHELBY STEELE, *Affirmative Action: The Price of Preference*, in THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 111, 118 (1990).

253. *Id.*

254. *See id.*

255. *See, e.g.*, Amy Qin, *Applying to College, and Trying to Appear “Less Asian”*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/12/02/us/asian-american-college-applications.html> [<https://perma.cc/BH4S-WFTZ>].

256. *See id.*

257. *Id.*

258. Aaron Mak, *The Price of Admission*, SLATE (Dec. 5, 2017, 5:55 AM), <https://slate.com/human-interest/2017/12/the-price-of-college-admission-for-asian-americans.html> [<https://perma.cc/WFD2-UFXR>].

259. *Id.*

260. *Id.*

be a red flag for the admissions committee,” he explained.²⁶¹ Reflecting on his decision to hide his identity in the hope that he would be mistaken for White, he concluded: “I may never be able to shake the thought nagging at the back of my mind: I’m a sellout.”²⁶²

There is a steep human cost to the “sordid business” of “divvying us up by race.”²⁶³ When society metes out educational and professional opportunities based on race, people are incentivized to manipulate their identities for gain, including by engaging in fraud or exaggeration.²⁶⁴ “Examples of fraud and exaggeration can be seen in [litigation] adjudicating dubious claims of minority status.”²⁶⁵ If we lived in a society that celebrated and encouraged the cultivation of talent without regard to race, more individuals would be free to live up to their God-given potential without being judged against racial stereotypes. Only a society with talent-based institutions that treats people with individual dignity can be genuinely egalitarian and inclusive.

2. *The Fruits of Excellence*

Inclusive, talent-based institutions strive to maximize the effectiveness of their contributions to society. All institutions—whether a hospital, a software company, a nation’s army, or an orchestra—should constantly aim to achieve their respective missions with excellence. To that end, decisions about who participates in and holds leadership responsibilities within the institution should be made based on talent, i.e., the ability to contribute to the success of the institution’s mission, regardless of race, class, or pedigree. Though there is no perfect measure of talent, even when measures to eliminate subjective bias such as standardized tests or blind auditions are adopted, institutions should strive to make their decisions about recruiting and promotion based on talent to the greatest extent possible. Any other standard for recruitment and promotion will inevitably suffer from bias and nepotism, and as a result, depress the pursuit of excellence within the institution and in society at large.

The spirit of pursuing excellence and the prevalence of talent-based institutions in the United States has enabled it to lead the world in economic prosperity, technological innovation, and military strength. By

261. *Id.*

262. *Id.*

263. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

264. See Brief of Professor Bernstein, *supra* note 138, at 17–21 (compiling examples of dubious claims of minority status); Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 369 (2006).

265. Brief of Professor Bernstein, *supra* note 138, at 17 (citing the following sources); see, e.g., *Orion Ins. Grp. v. Wash. State Off. of Minority & Women Bus. Enters.*, No. 16-5582, 2017 WL 3387344, at *8 (W.D. Wash. Aug. 7, 2017) (rejecting minority status for a person who presented DNA evidence showing he was 4% Sub-Saharan African and 6% Native American), *aff’d per curiam*, 754 F. App’x 556 (9th Cir. 2018); *Malone v. Civ. Serv. Comm’n*, 646 N.E.2d 150, 151–52 (Mass. App. Ct. 1995) (summarizing proceeding in which twin brothers were found to have “willfully and falsely” identified as Black to receive appointments as firefighters); *Lagrua v. Ward*, 519 N.Y.S.2d 98, 99 (N.Y. Sup. Ct. 1987) (holding that a police officer with a mother from Gibraltar was not Hispanic).

contrast, societies governed by nepotism—whether through hereditary monarchy, apartheid segregation, or political patronage—suffer from institutional decay that, when left unchecked, threatens their ability to provide for their people’s needs and results in talented people emigrating to other countries.²⁶⁶ Justice Kavanaugh, in an amicus brief that he filed in private practice on behalf of the Center for Equal Opportunity in *Rice v. Cayetano*, warned of the dangers of a “racial patronage and spoils system.”²⁶⁷ When institutions hold applicants for educational or professional opportunities to different standards based on race, that discrimination hurts not only the applicants, but also society at large.

To the extent the magnitude of differential treatment based on race results in individuals being placed into educational or professional opportunities in which they are not able to perform successfully, both the purported beneficiary of the policy and society as a whole suffer.²⁶⁸ A study in the *IZA Journal of Labor Economics* found that students who are admitted to colleges because of their race despite below-average grades and test scores are more likely to drop out of challenging majors in the natural sciences than their more academically competitive peers.²⁶⁹ Students entering these fields do so because of their desire to make a difference in the world, but racial preferences put them in positions where they are less likely to succeed in achieving their goals.²⁷⁰ From a societal perspective, when institutions misallocate educational or professional opportunities, they squander valuable resources and human potential, and they compromise their abilities to accomplish their missions.²⁷¹

3. Cross-Racial Trust, Understanding, and Harmony

In his memoir, Thomas Sowell wrote:

One of the ironies that I experienced in my own career was that I received more automatic respect when I first began teaching in 1962,

266. See Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* 372 (2012) (“Nations fail today because their extractive economic institutions do not create the incentives needed for people to save, invest, and innovate. Extractive political institutions support these economic institutions by cementing the power of those who benefit from the extraction.”).

267. Brief of *Amici Curiae* Center for Equal Opportunity et al. in Support of Petitioner at 6, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639.

268. See Elizabeth Slattery, *How Affirmative Action at Colleges Hurts Minority Students*, HERITAGE FOUND. (Dec. 2, 2015), <https://www.heritage.org/courts/commentary/how-affirmative-action-colleges-hurts-minority-students> [<https://perma.cc/RNK6-DRB5>].

269. See, e.g., Peter Arcidiacono, Esteban M. Aucejo & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 *IZA J. LAB. ECON.*, 2012, at 1–3; see also Catherine Riegle-Crumb, Barbara King & Yasmiyn Irizarry, *Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Post-secondary Fields*, 48 *EDUC. RESEARCHER* 133, 133–44 (2019).

270. See Slattery, *supra* note 268.

271. One economist studied the economic costs of racial preferences and found that after California passed Proposition 209, which eliminated racial preferences in California, a road construction project cost the government 5.6% less to complete, resulting in “significant” savings to California. Justin Marion, *How Costly is Affirmative Action? Government Contracting and California’s Proposition 209*, 91 *REV. ECONS. & STATISTICS* 503, 521 (2009).

as an inexperienced young man with no Ph.D. and few publications, than later in the 1970s, after accumulating a more substantial record. What happened in between was “affirmative action” hiring of minority faculty.²⁷²

Racial preferences engender mistrust and decrease cross-racial understanding. Institutions function as a matter of trust between strangers.²⁷³ Trust is the “disposition to engage in social exchanges that involve uncertainty and vulnerability, but that are also potentially rewarding.”²⁷⁴ For example, people who go to an operating room must trust their doctors before giving consent to a life-saving procedure. Yet the possibility that doctors of different races are being held to different academic and professional standards may have the perverse effect of decreasing trust in doctors of certain races.²⁷⁵ Dr. Michelle Ko described an instance in which an African American medical student was told, “You’re only here because you’re black!”²⁷⁶

The natural consequence of the mistrust engendered by racial preferences is that people will engage in demand-side discrimination. Demand-side discrimination occurs when a customer discriminates against a provider of services.²⁷⁷ The Civil Rights Act of 1964 addresses supply-side discrimination by prohibiting places of public accommodation from discriminating against customers,²⁷⁸ but federal law does not so clearly prohibit demand-side discrimination. Consumers may discriminate on the basis of race against sellers of goods or providers of services, as no one is compelled to enter into a business relationship or contract with another. The use of racial preferences raises questions in people’s minds about whether the recipients of those preferences were held to lower standards and causes people to draw a correlation between race and ability.²⁷⁹ Racial preferences thus

272. THOMAS SOWELL, *A PERSONAL ODYSSEY* 247 (2000).

273. See Pierre Lauret, *Why (and How to) Trust Institutions? Hospitals, Schools, and Liberal Trust*, 68 *RIVISTA DI ESTETICA* 41 (Charlotte Jestin trans. 2018).

274. Cristina Bicchieri, John Duffy & Gil Tolle, *Trust Among Strangers*, 71 *PHIL. OF SCI.* 286, 286 (2004).

275. See Michelle Ko, *Racism in My Medical Education*, 39 *HEALTH AFFS.* 1087, 1087–88 (2020).

276. *Id.* at 1088.

277. See *PRINCIPLES OF ECONOMICS* § 19.3: THE ECONOMICS OF DISCRIMINATION (2016), <https://open.lib.umn.edu/principleseconomics/chapter/19-3-the-economics-of-discrimination> [<https://perma.cc/FYA7-PZFK>].

278. See 42 U.S.C. § 2000a (prohibiting discrimination on the basis of race in places of public accommodation).

279. That an assumption of inferiority may underlie race-conscious efforts was recently documented by Professors Cydney Dupree and Susan Fiske in a paper published in the *Journal of Personality and Social Psychology*. See Isaac Stanley-Becker, *White Liberals Dumb Themselves Down When They Speak to Black People, a New Study Contends*, *WASH. POST* (Nov. 30, 2018), <https://www.washingtonpost.com/nation/2018/11/30/white-liberals-dumb-themselves-down-when-they-speak-black-people-new-study-contends> [<https://perma.cc/Z395-P37A>] (citing Cydney H. Dupree & Susan T. Fiske, *Self-Presentation in Interracial Settings: The Competence Downshift by White Liberals*, 117 *J. PERSONALITY & SOC. PSYCH.* 579 (2019)). The paper described evidence that White liberals consistently presented themselves as less competent to Black people than White people, a phenomenon the authors describe as a “competence downshift.” *Id.* “White liberals may unwittingly draw on negative stereotypes, dumbing themselves down in a likely well-meaning, ‘folksy,’ but ultimately patronizing, attempt to connect with the outgroup.” *Id.* (quoting Dupree & Fiske, *supra*, at 580).

impose stigmas on their recipients and increase the prevalence of demand-side discrimination.²⁸⁰ Justice Thomas described his painful experience with this phenomenon in his memoir, in which he detailed his reaction to the assumptions that others made about his abilities: “I peeled a fifteen-cent sticker off a package of cigars and stuck it on the frame of my law degree to remind myself of the mistake I’d made by going to Yale.”²⁸¹

Racial preferences also heighten cross-racial tensions and hostility. As Justice O’Connor once observed, race-based policies divide our nation “into racial blocs, thus contributing to an escalation of racial hostility and conflict.”²⁸² The lawsuits *Students for Fair Admissions* brought against Harvard and UNC are examples of such conflicts, each costing roughly \$25 million dollars to defend.²⁸³ As long as policies exist that divide people into racial categories, time, energy, and money will be spent in fights over whether those policies can and should be maintained. By contrast, when a society fosters talent-based institutions that do not discriminate based on race, those institutions create opportunities for mutual respect between people of different races and positive cross-racial interactions.

D. PROMOTING HONEST DISCOURSE ABOUT RACE

An essential, often overlooked aspect of civil rights advocacy is promoting honest discourse about race. One of *Grutter*’s great self-contradictions was that it purported to reject racial quotas as unconstitutional²⁸⁴ but allowed the University of Michigan Law School to pursue a “critical mass” of underrepresented minority students.²⁸⁵ As Justice Kennedy noted in dissent, “the concept of critical mass is a delusion used by the Law School to mask its attempt . . . to achieve numerical goals indistinguishable from quotas.”²⁸⁶ Chief Justice Rehnquist described the concept of a “critical mass” as a “veil” for a “naked effort to achieve racial balancing.”²⁸⁷ Justice Scalia called it a “sham to cover a scheme of racially proportionate

280. See generally PRINCIPLES OF ECONOMICS, *supra* note 277, § 19.3.

281. CLARENCE THOMAS, MY GRANDFATHER’S SON 99–100 (2007).

282. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting) (maintaining race-based policy “endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict”).

283. Travis Fain, *UNC’s Unsuccessful Race-Based Admissions Fight Cost \$25 Million*, WRAL NEWS (Sept. 18, 2023, 7:51 AM), <https://www.wral.com/story/unc-s-unsuccessful-race-based-admissions-fight-cost-25-million/21037612> [<https://perma.cc/VPF6-9H76>]; Nate Raymond, *Harvard Says Defense Costs Top \$25 million in Affirmative Action Case*, REUTERS (Sept. 20, 2021, 4:38 PM), <https://www.reuters.com/legal/government/harvard-says-defense-costs-top-25-million-affirmative-action-case-2021-09-20> [<https://perma.cc/8NV8-EEL8>].

284. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (stating that “outright racial balancing” is “patently unconstitutional”).

285. *Id.* (“Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.”).

286. *Id.* at 389 (Kennedy, J., dissenting).

287. *Id.* at 379 (Rehnquist, C.J., dissenting).

admissions.”²⁸⁸ And Justice Thomas described the distinction between pursuing a “critical mass” and racial balancing as “purely sophistic.”²⁸⁹

Another of *Grutter*’s self-contradictions was that it claimed to accept the purported educational benefits of diversity as a compelling interest for using racial classifications,²⁹⁰ but also required race-based admissions policies to be “limited in time.”²⁹¹ If the Court truly believed that diversity improved the educational experiences of all students, that would theoretically justify the indefinite use of race-based admissions policies. The *Grutter* Court’s requirement that such policies be limited in time suggests that its decision was motivated in significant part by a remedial rationale. In its precedents discussing the remedial rationale for race-based policies, the Court has stated that such policies must have a “logical stopping point” and cannot last “long past the point” at which they are necessary to remedy past discrimination.²⁹²

Exploiting *Grutter*’s mixed messages, Harvard sought to engage in racial balancing indefinitely while dishonestly claiming not to do so in court.²⁹³ The evidence showed that Harvard intentionally maintained approximately the same racial composition in its student body year after year, which required it to impose limits on the number of Asian students it was admitting.²⁹⁴ But Harvard claimed in court that race played only a small part in its holistic review and could only serve as a positive factor for an applicant.²⁹⁵ Harvard claimed it was following *Grutter*’s requirement of a time limit, but it argued that it would stop considering race only when it could achieve sufficient representation of different racial groups on campus without racial preferences, which could theoretically justify racial balancing indefinitely.²⁹⁶

This dishonesty contributed to Harvard’s demise. As the Court explained in *Fair Admissions*, although Harvard and UNC claimed “that an individual’s race is never a negative factor in their admissions programs,” “that assertion cannot withstand scrutiny” and “is hard to take seriously” because a preference given to some applicants necessarily disadvantages other applicants.²⁹⁷ In response to their argument that they should be allowed to use racial preferences until their desired levels of diversity could be achieved without racial preferences, the Court rightly treated that

288. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

289. *Id.* at 354–55 (Thomas, J., concurring in part and dissenting in part).

290. *See id.* at 330.

291. *Id.* at 342.

292. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–78 (1986) (discussing the remedial rationale).

293. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 225 (2023) (discussing Harvard’s and UNC’s argument that their programs need not have a definite end point because they “frequently review them to determine whether they remain necessary”).

294. *See id.* at 194.

295. *Id.* at 218.

296. *See id.* at 223–24.

297. *Id.* at 218.

argument as an admission that the universities were engaging in unlawful racial balancing.²⁹⁸

The moral failure of Harvard went beyond its differential treatment of Asian Americans in its admissions process. Harvard not only discriminated against Asian Americans but lied to their faces by telling them that their rejections were due to their own personal inadequacies.²⁹⁹ By telling Asian Americans with strong academic performances that admission was about more than academics, Harvard had them believe that once admissions officers got to know who they were as individuals, they failed to measure up to Harvard's standards. By insisting that its personal rating was a race-neutral criterion, Harvard told Asian Americans that they were fairly and objectively assessed as having the worst personal qualities of any racial group, "stamp[ing] them with a badge of inferiority."³⁰⁰

Shining a spotlight on the dishonest concealment of racial discrimination is an essential part of civil rights advocacy. Equally important, however, is the need to reject dishonest accusations of racial discrimination. Our systems of civil and criminal justice depend on the adversarial process to fulfill their truth-seeking functions, and that is no different in the context of civil-rights law. As is the case in many other contexts, false accusations of wrongdoing can be weaponized to obtain financial or political gain, to divert attention away from one's own misdeeds, or to harm another in an act of bullying.

False accusations of racial discrimination can destroy reputations, waste time and money, and dilute the gravitas of actual instances of discrimination.³⁰¹ Accusing an innocent person of racism and punishing him—in a court of law or in the court of public opinion—undermines public confidence in efforts to enforce civil rights laws and may trigger a backlash against such efforts.³⁰² Legal sanctions exist for those who make false police

298. *See id.* at 223–24.

299. *See* Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL. 317, 334 (2018).

300. *Id.* at 330.

301. To quote the philosopher Sidney Hook:

As morally offensive as is the expression of racism wherever it is found, a false charge of racism is equally offensive, perhaps even more so, because the consequences of a false charge of racism enables an authentic racist to conceal his racism by exploiting the loose way the term is used to cover up his actions. The same is true of a false charge of sexism or anti-Semitism. This is the lesson we should all have learned from the days of Senator Joseph McCarthy. Because of his false and irresponsible charges of communism against liberals, socialists, and others among his critics, many communists and agents of communist influence sought to pass themselves off as Jeffersonian democrats or merely idealistic reformers.

SIDNEY HOOK, *CONVICTIONS* 135 (1990).

302. *Cf.* *Shelby Cnty. v. Holder*, 570 U.S. 529, 545–49 (2013) (invalidating preclearance provision of the Voting Rights Act because use of outdated data implied all voting changes had racial intent).

reports,³⁰³ file frivolous lawsuits,³⁰⁴ or make defamatory statements,³⁰⁵ and such sanctions can and should be enforced against those who falsely accuse others of racial discrimination.

Consider the story of Allyn Gibson Sr., who owned Gibson’s Bakery with his son David Gibson in Oberlin, Ohio, and for whom a false accusation of racism meant the possibility of dying with a tarnished legacy.³⁰⁶ In November 2016, Elijah Aladin (Aladin), an African American teenager attending Oberlin College, tried to steal bottles of wine from Gibson’s Bakery.³⁰⁷ Allyn Gibson Jr. (Gibson Jr.), Allyn Gibson Sr.’s grandson, was working at the bakery as a clerk.³⁰⁸ He confronted Aladin and took out his phone to take a photo.³⁰⁹ Aladin slapped the phone away and ran out of the store.³¹⁰ Gibson Jr. chased Aladin to a park, where two other African American students intervened to stop him.³¹¹ When the police arrived, they arrested the three teenagers.³¹²

Oberlin College was aware of the theft that gave rise to the confrontation.³¹³ A member of Oberlin College’s Board of Trustees paid for Aladin’s criminal defense, and Oberlin College paid for Aladin’s limousine to visit his attorney.³¹⁴ All three defendants pleaded guilty to attempted theft and aggravated trespass in August 2017.³¹⁵ Aladin confessed to his attempt

303. See, e.g., Press Release, *Cincinnati Woman Charged with Crimes Related to Making False Racial Discrimination Claims Against Landlord*, U.S. ATT’Y’S OFF. (Aug. 17, 2023), <https://www.justice.gov/usao-sdoh/pr/cincinnati-woman-charged-crimes-related-making-false-racial-discrimination-claims> [https://perma.cc/YT3Q-YESM] (charging woman with making a false report to law enforcement for “allegedly fabricat[ing] messages from her landlord stating the landlord did not want Black tenants”).

304. See, e.g., *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587 (6th Cir. 2013) (requiring the Equal Employment Opportunity Commission to pay a company’s costs, attorney’s fees, and expert fees after frivolously filing a lawsuit accusing the company of using an employment policy that “did not exist”).

305. See, e.g., William Glaberson, *Plaintiff is Awarded \$345,000 in Brawley Defamation Case*, N.Y. TIMES (July 30, 1998), <https://www.nytimes.com/1998/07/30/nyregion/plaintiff-is-awarded-345000-in-brawley-defamation-case.html> [https://perma.cc/DS3E-9696] (reporting on jury verdict finding that the Rev. Al Sharpton falsely claimed that a White man committed racially motivated violence and sexual assault against a Black woman).

306. See Katherine Donlevy, *Oberlin College Makes \$36M Payment to Bakery in Racial Profiling Defamation Case*, N.Y. POST (Dec. 16, 2022, 11:40 PM), <https://nypost.com/2022/12/16/oberlin-college-makes-36m-payment-to-bakery-it-labeled-racist> [https://perma.cc/J2EF-8WKW].

307. Kushagra Kar, Emma Benardete, Ava Miller & Walter Thomas-Patterson, *Oberlin College v. Gibson Bros., Inc.*, OBERLIN REV. (Sept. 16, 2022), <https://oberlinreview.org/27513/news/27513> [https://perma.cc/V565-Q8AG].

308. See EJ Dickson, *How a Small Town Bakery in Ohio Became a Lightning Rod in the Culture Wars*, ROLLING STONE (July 18, 2019), <https://www.rollingstone.com/culture/culture-features/oberlin-gibson-bakery-protest-defamation-suit-controversy-culture-war-850404> [https://perma.cc/NZ6J-4JWZ].

309. *Id.*

310. *Id.*

311. See *id.*

312. Kar et al., *supra* note 307.

313. Complaint ¶ 25, *Gibson Bros., Inc. v. Oberlin College*, 187 N.E.3d 629 (Ohio Ct. App. 2022) (No. 17-cv-193761).

314. *Id.* ¶¶ 29–30.

315. *Id.* ¶¶ 92–94; Dave DeNatale & Lindsay Buckingham, *Gibson’s Bakery Receives Complete Payment of \$36.59 Million from Oberlin College in Defamation Suit*, WKYC NEWS (Dec. 16, 2022, 6:14 AM), <https://www.wkyc.com/article/news/local/lorain-county/>

to steal wine and admitted that Gibson Jr.'s actions were not racially motivated.³¹⁶

The facts did not matter to Assistant Dean of Students Antoinette Myers (Myers), who was present when the three Oberlin students entered their guilty pleas.³¹⁷ She only saw race: three African American students in court because of accusations of shoplifting from a White bakery owner. While listening to the court proceedings, Myers texted Meredith Raimondo (Raimondo), Oberlin College Vice President and Dean of Students, “I hope we rain fire and brimstone” on Gibson’s Bakery.³¹⁸

Her wish came true. The following day, hundreds of students and Oberlin faculty members arrived in front of Gibson’s Bakery to protest.³¹⁹ Oberlin College canceled its classes so that students could attend the protest at Gibson’s Bakery.³²⁰ Raimondo handed out flyers accusing the business of racially profiling Oberlin students for a long time,³²¹ even though there was no evidence of such history in college or police records.³²² Raimondo’s flyers urged people not to buy from Gibson’s Bakery and instead buy goods from a number of listed competitors.³²³ Oberlin College bought the student protestors pizza and winter gloves to feed them and keep them warm while they were protesting,³²⁴ and it canceled Gibson’s Bakery’s dining contract with the school.³²⁵

Gibson’s Bakery sued Oberlin College, bringing claims that included libel, slander, tortious interference with business relationships, and tortious interference with contracts.³²⁶ In 2019, a jury found in favor of Gibson’s Bakery, awarding compensatory damages, punitive damages, and attorney’s fees.³²⁷ This victory in court cleared Allyn Gibson Sr.’s family name and allowed his work at Gibson’s Bakery to live on. Allyn Gibson Sr. passed away just a few years later on February 12, 2022, at the age of ninety-three.³²⁸ In March 2022, Oberlin College lost its appeal, and the

oberlin-college-completes-payment-gibsons-bakery-defamation-case/95-ff4da16c-37d1-433f-bc1b-3e1ee219da29 [https://perma.cc/K9XZ-5EZA].

316. See Donlevy, *supra* note 306.

317. See Abraham Socher, *Gibson’s Bakery and Why I Quit Teaching at Oberlin*, WALL ST. J. (Sept. 1, 2022, 1:17 PM), <https://www.wsj.com/articles/why-quit-teaching-oberlin-gibson-bakery-steal-deans-college-ohio-lawsuit-w-h-auden-oppression-campus-students-university-11662045107> [https://perma.cc/9N8X-U5TR].

318. *Id.*

319. Complaint, *supra* note 313, ¶¶ 44–47.

320. *Id.* ¶¶ 44–45.

321. *Id.* ¶¶ 35–39.

322. Anemona Hartocollis, *Oberlin Helped Students Defame a Bakery, a Jury Says. The Punishment: \$33 Million.*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/us/oberlin-bakery-lawsuit.html> [https://perma.cc/H725-GGKA].

323. Complaint, *supra* note 313, ¶¶ 38–39.

324. Hartocollis, *supra* note 322.

325. Complaint, *supra* note 313, ¶¶ 55–58.

326. *Id.* at 1.

327. Anemona Hartocollis, *After a Legal Fight, Oberlin Says It Will Pay \$36.59 Million to a Local Bakery*, N.Y. TIMES (Sept. 8, 2022), <https://www.nytimes.com/2022/09/08/us/oberlin-bakery-lawsuit.html> [https://perma.cc/UER8-GNV5].

328. Anisa Curry Vietze, *Allyn W. Gibson, 93, Passes*, OBERLIN REV. (Feb. 25, 2022), <https://oberlinreview.org/26057/news/allyn-w-gibson-93-passes> [https://perma.cc/U3TB-Q22Y].

Supreme Court of Ohio denied review in August 2022.³²⁹ Oberlin College subsequently paid Gibson's Bakery \$36.59 million.³³⁰

For a diverse society to be truly inclusive and respectful of individual dignity, its people must continuously ask and explore the answers to difficult questions in the spirit of honest inquiry and truth seeking. Dishonest attempts to conceal discrimination and false accusations of discrimination obstruct the truth-seeking mission of public discourse and make it more difficult for people of different races to live together in mutual trust and harmony. Part of the mission of civil-rights advocacy, therefore, must be to promote a culture of honest, good-faith discourse and to impose sanctions for dishonest misconduct.

IV. CONCLUSION

The predominant framework for early Twenty-First Century civil rights advocacy, which this Article calls the identitarian framework, seeks to cast all civil rights issues in terms of conflicts between “people of color” and the White majority. That framework is reductionistic and flawed, as the *Fair Admissions* case revealed. Racial discrimination does not always fall so neatly into the White vs. non-White binary. By deploying legacy and athletic preferences to benefit mostly White applicants and racial preferences to benefit non-Asian racial minority applicants, Harvard created a system of nepotism, the primary victims of which were Asian. *Fair Admissions* revealed a blind spot of identitarians, who purported to advocate for “people of color,” but staunchly defended Harvard's illegal discrimination against Asian Americans.

Given that schools across the country, such as Thomas Jefferson High School, have taken efforts to attack the perceived problem of Asian American overrepresentation, it appears that anti-Asian discrimination is a recurring phenomenon which enjoys popular political support. Harvard may have believed that its admissions system made sense from a political perspective. However, from the perspective of civil rights law and the ideal of equality that has guided our nation throughout history—from the Founding; to the Second Founding; to the Twentieth Century Civil Rights Movement—Harvard's admissions system was indefensible. Identitarians' refusal to acknowledge Harvard's discrimination against Asian Americans revealed the hollowness of their promise to represent the interests of all “people of color” and demonstrated how interest-group racial politics can prevail over principle.

Fair Admissions recognized that discrimination in favor of some racial groups necessarily inflicts race-based harm on others.³³¹ In *Parents Involved*, Justice Thomas noted that “every time the government uses racial

329. *Gibson Bros. v. Oberlin College*, 187 N.E.3d 629, 664 (Ohio Ct. App. 2022), *review denied*, 193 N.E.3d 575 (Ohio 2022).

330. DeNatale & Buckingham, *supra* note 315.

331. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218–19 (2023).

criteria to ‘bring the races together,’ someone gets excluded, and the person excluded suffers an injury solely because of his or her race.”³³² As Chief Justice Roberts observed in that case, the “way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”³³³ The facts of *Fair Admissions* illustrate the profound wisdom of this simple observation, which Chief Justice Roberts echoed in one of the most memorable sentences of *Fair Admissions*: “Eliminating racial discrimination means eliminating all of it.”³³⁴

Respect for individual dignity is the only solid foundation on which to build a genuinely egalitarian society that welcomes people of all races. Society must banish the use of arbitrary racial categories from public life, eliminate both overt and covert discrimination, foster talent-based institutions that are inclusive of all people, and promote honest discourse about race. Many of the priorities of modern civil rights advocates are consistent with and serve to advance these principles. But efforts to achieve a “utopian vision” of proportional racial representation in all areas of life through race-based decision making are not, as they end up “siloining us all into racial castes and pitting those castes against each other.”³³⁵ The belief that people should be treated as individuals is not based on obliviousness to the racial discrimination that still occurs in our society on a daily basis. Rather, it is based on the recognition that any policy that treats people differently based on race will necessarily inflict its own race-based injustices on the next generation.³³⁶ As Justice Thomas stated in his *Fair Admissions* concurrence:

Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.³³⁷

Fair Admissions is a landmark victory for civil rights. It vindicated the rights of Asian Americans to equal educational opportunity after decades of unacknowledged discrimination. The case marks the beginning of a new chapter of civil rights advocacy rooted in the dignity of the individual.

332. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 759 (2007) (Thomas, J., concurring) (internal citation omitted).

333. *Id.* at 748.

334. *Fair Admissions*, 600 U.S. at 206.

335. *Id.* at 280–81 (Thomas, J., concurring).

336. *See id.* at 283 (warning of a “cycle of victimization”).

337. *Id.* at 277.