No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STUDENTS FROM THE NEW YORK UNIVERSITY SCHOOL OF LAW SEMINAR ON CRITICAL NARRATIVES IN CIVIL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

We are law students studying the African-American journey—from being "constitutional property" as slaves, to being designated as citizens by the Reconstruction Amendments, and through a continuing struggle for full constitutional personhood. Taking this perspective, we view our constitution and statutory laws not merely as documents to interpret, but as significant forces in the lives of people striving for equality.

Each of us carries a slightly different story of America. These stories inform our interactions and shape the character of our national community. Some are reflected in—and amplified by—judicial discourse. The *Dred Scott v. Sanford*[2] majority's narrative of the exclusion of African Americans from the "political family" foretold civil war. Stories of human dignity and tolerance in the prevailing opinions of *Lawrence v. Texas*[3] reflected a broadening understanding of social diversity. We are mindful of the social effects of the stories told by this Court.

The narrative of race in this country is very much in dispute. Some speak of racial inequality in the past tense and cast aspersions upon the continuing struggle for equality. But for many whose stories go unheard

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than amicus curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] 60 U.S. 393 (1857).

[3] 539 U.S. 558 (2003).

this struggle is a living reality. For many, racial inequality is a living reality.

We will soon be the lawyers tasked with safeguarding the law. We worry about how to use lessons of the past as we shape the law of the future. As the next generation of litigators, legal scholars, and advocates, we hope to begin an ongoing discussion of a national obligation to protect fundamental rights. As the future of the law, we seek a forward-looking jurisprudence. It is in this spirit that we urge the Court to reconsider the assumption that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution incorporates and requires the principle of color-blindness – a principle that has over the years stood as an insurmountable impediment to achieving social justice.

SUMMARY OF ARGUMENT

The first Justice Harlan famously said that "[o]ur Constitution is colorblind." In the same breath, Justice Harlan said that our Constitution "neither knows nor tolerates classes among its citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). The first of these statements has been ripped out of context and made to contradict the second. We argue that furthering the goal of avoiding unwarranted distinctions among classes of citizens requires keen-sighted efforts, and our colleges and universities should be at the forefront of those efforts.

In laying the groundwork for Reconstruction, post-Civil War founders rejected a proposed text of the Fourteenth Amendment that would have grounded the Equal Protection Clause in an explicit principle of color-blindness. However, even prior to ratification of the Thirteenth Amendment color-blindness had

ironically become both a caution against racial prejudice and a rallying cry for opponents of racial equality. In the course of congressional debates over basic social, economic, and educational legislation in support of newly freed slaves, political heirs of the confederacy argued that race-consciousness was per se unconstitutional; that race-conscious remedies only served to confer benefits upon a special class of citizens; that race-conscious remedies would inevitably breed dependency in blacks and resentment in whites; and that these remedies would harm newly freed slaves by creating the impression that they could not succeed through their own hard work.

As a result, there developed even before the last battle of the Civil War (and there remains to this day) a beguiling narrative, pursuant to which color-blindness is the initial constitutional state, race-consciousness is a disruption of, or departure from, Equal Protection norms, and only a hard, willful blindness to the reality of race will restore or redress the ideal of color-blindness that the constitution supposedly requires. We offer a more realistic story of Equal Protection: one in which a clear-eyed understanding of the reality of race is understood as a prerequisite for equality, and color-blindness is the disruptive impediment to restoring the original meaning of the Fourteenth Amendment.

I. THE CHECKERED HISTORY OF THE COLOR-BLIND PRINCIPLE

In one of the Court's most frequently quoted dissenting opinions, Justice John Marshall Harlan declared, "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes

among citizens."[4] The notion of a color-blind constitution has a natural logic. A constitution that is color-blind will avoid classifications on the basis of race and, as such, will seem to value all citizens equally regardless of their race. However, there are reasons to question this facile understanding of colorblindness. The history of colorblindness tells a complicated and troubling story.

A. The Fourteenth Amendment Drafters Rejected the Color-Blind Principle

The states ratified the Fourteenth Amendment on July 9, 1868, granting citizenship to "all persons born or naturalized in the United States," forbidding states to make or enforce any law to "abridge the privileges or immunities of citizens of the United States, and forbidding states to deprive "any person of life, liberty, or property, without due process of law, or denying "any person within its jurisdiction the equal protection of the laws." Wendell Phillips, an abolitionist Republican from Massachusetts, had proposed an alternative version of the Fourteenth Amendment which would have read: "No State shall make any distinction in civil rights and privileges . . . on account of race, color, or descent."[5] The Phillips version would have pointed narrowly to the problem of avoiding racial distinctions that was so pressing in the immediate wake of racialized slavery. It was declined in favor of more universal language that provides all persons with equal protection and due process, and all citizens with appropriate privileges and immunities.[6]

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[4] *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) *(*Harlan, J., dissenting).

[5] Randall Kennedy, *Colorblind Constitutionalism*, 82 Fordham L. Rev. 1, 4 (2013).

[6] *Id.* at 5.

B. Opponents of Emancipation and Reconstruction Revived the Color-Blind Principle as an Argument Against Benefits for Newly Freed Slaves.

The fact that the anti-slavery drafters of the Fourteenth Amendment rejected the color-blindness principle is unsurprising, for, even prior to the ratification of the Thirteenth Amendment color-blindness had become a rallying-cry for opponents of racial equality. Between 1863 and 1868, Congress took up four major pieces of social welfare legislation, generally known as the Freedmen Bureau Acts, to help ease the transition of millions of people who had been disempowered "by a peculiarly complete system of slavery, centuries old; and. . ., suddenly, violently, [came into] a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters."[7] The benefits to be provided by this legislation were modest. The 1865 bill, for example, authorized the Department of War to provide "provisions, clothing, and fuel" for "destitute and suffering refugees and freedmen,[8] and allowed the Bureau to sell a maximum of forty acres to a refugee or freedman.[9] The 1866 Bill, in turn, provided for "such issues of provisions, clothing, fuel, and other supplies, including medical stores and transportation, and . . . aid, medical or otherwise, . . . deem[ed] needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen, their

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[7] W. E. Burghardt Dubois, *The Freedmen's Bureau*, ATLANTIC MONTHLY, Mar. 1901, at 354, 357, *available at* http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm.

[8] Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 508.

[9] *Id.*

wives and children[.][10] It also authorized the construction of "suitable buildings for schools" and asylums[11]

These supports for emancipation were heatedly opposed by some members of Congress. One opponent of land set-asides argued with respect to the 1864 bill that there was no reason why "this vast domain, paid for by the blood of white men, should be set apart for the sole benefit of the freedmen of African descent, to the exclusion of others."[12] A white Congressman, objecting to provisions of the same Bill, argued that "[i]f this bill is to be put upon the ground of charity, I ask that charity shall begin at home and . . . I shall claim my right to decide who shall become the recipients of so magnificent a provision, and with every sympathy of my nature in favor of those of my own race."[13] In the Senate, opponents claimed that the Bill attempted "to make war for, to feed, to clothe, to protect and care for the negro, to give him advantages that the white race do not receive or claim."[14]

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[10] CONG. GLOBE, 39th CONG., 1st SESS. 209 (1866).

[11] Bill 60 H.R. EXEC. DOC. NO. 11, 39th CONG, 1st SESS., 28 (1866). General Oliver O. Howard, the first Commissioner of the Freedmen's Bureau, emphasized the importance of education to properly equip newly freed people for citizenship, reporting to Congress that: "Education is absolutely essential to the freedmen to fit them for their new duties and responsibilities . . . ." *id.* at 33. By the end of the 1867 fiscal year, educational activities accounted for $208,445.82 of the Bureau's $284,117.39 expenditures. Report of the Commission of the Bureau of Refugees, Freedmen and Abandoned Lands, reprinted in Annual Report of the Secretary of War, 2 H.R. EXEC. DOC. NO. 1, PT. 1, NO. 1, 40TH CONG., 2D SESS. 654 (1867).

[12] H.R. REP. NO. 2, 38TH CONG., 1ST SESS. at 3 (1864).

[13] CONG. GLOBE, 38TH CONG., 1ST SESS. app. 54 (1864).

[14] *Id*. at 2801.

When the 1865 bill came up for renewal, opponents echoed and embellished the color-blindness principle. Although the legislation referred to "newly freed slaves" and "refugees," and although the racial make-up of such people was varied, opponents argued that race-consciousness was unconstitutional. As one House member argued, "not only are the negroes of the South set free, . . . but a bill is passed by Congress conferring upon them all civil rights enjoyed by white citizens of the country, and they are now selected out from among the people of the United States, the public Treasury put at their disposal, and the white people of the country taxed for their support."[15] Another maintained that the bill would create "one government for one race and another for another."[16] In the Senate, argument also centered on the notion that any consideration of race, even under the circumstances of recent emancipation of the slaves, was per se unconstitutional. One Senator maintained that "if there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States who may need education and providing for."[17] President Andrew Johnson suggested that both race-conscious and race-neutral supports for freed slaves would be unconstitutional: In vetoing the first version of the 1866 bill, he argued that

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[15] CONG. GLOBE, 39TH CONG., 1ST SESS. 3841 (1866).

[16] *Id.* at 627.

[17] *Id.* at 372.

> a system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color or one people more than another.[18]

Constitutional arguments aside, opponents of the bill argued that to provide public support to former slaves would simply be unfair. As one Congressman put it, the work of the Freedman's Bureau would serve as a message to white soldiers that "they may starve and die from want, and no wail will be raised in their behalf; but when money is wanted to feed and educate the negro [there would be no]. . . complaints of the hardness of the times or of the scarcity of money."[19] Or, as one Senator put it: "This bill undertakes to make the negro in some respects their superior, as I have said, and gives them favors that the poor white boy in the North cannot get. . ."[20] Another explained it in more personal terms: "[W]hen I was a boy, and in common with all other Kentucky boys was brought in company with negroes, we used to talk, as to any project, about having 'a white man's chance.' It seems to me that now a man may be very happy if he can get a 'negro's chance.'"[21]

Post-bellum opponents of relief for freed people in 1866, like many opponents of affirmative measures

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[18] Andrew Johnson, Veto Message (Feb. 19, 1866), *in* John Wooley & Gerhard Peters, THE AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=71977.

[19] CONG. GLOBE, 39TH CONG., 1ST SESS. 629 (1866).

[20] *Id.* at 401.

[21] *Id*. at. 71.

today, argued that providing relief would create dependency among freed people,[22] provoke resentment among whites, and create the impression that newly freed slaves were unable to succeed on their own merits. As one Senator reasoned: the legislation would enable the Freedmen's Bureau "to depress the whites, to favor and hold up the blacks, to flatter the vanity and excite the insolence of the latter, to mortify and irritate the former, and perpetuate between them enmity and strife."[23] When President Johnson attempted to veto the 1866 Bill, he crisply articulated the fear that race-conscious remedies would both breed dependency in blacks and create the impression in whites that blacks were unable to succeed on their own merits, writing: "The idea on which the slaves were assisted to freedom was that on becoming free they would be a self-sustaining population. Any legislation that shall imply that they are not expected to attain a self-sustaining condition must have a tendency injurious alike to their character and their prospects."[24] And lastly, as early as 1866, opponents worried about whether these special benefits would ever come to an end: "Will the white people who have to support the Government ever get done paying taxes to support the negroes?"[25]

By the time the 1866 Act came up for renewal in 1868, the principle of colorblindness was established and well rehearsed. For example, one senator, echoing

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[22] *Id*. at 401.

[23] *Id.*

[24] Andrew Johnson, Veto Message (Feb. 19, 1866), *in* John Wooley & Gerhard Peters, THE AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=71977.

[25] CONG. GLOBE, 39TH CONG., 1ST SESS. 635 (1866).

the 1866 debates, stated that the Bureau was for placing freedmen "in supremacy and in power over the white race."[26] One House member disagreed with "taxing white men" for the aid of blacks.[27] Another objected that the Freedmens' Bureau legislation gave the Bureau "authority to feed, clothe, educate, and support one class of people to the exclusion of others equally as [sic] destitute and much more deserving."[28]

Of course, to say that as a principle color-blindness has deep roots in post-bellum opposition to freedom and equality for the black race is not to ignore that some Reconstruction-era advocates of racial equality, including some members of the first class of African-Americans to serve in the United States Congress, believed quite sincerely that when it came to race "the distinction when made and tolerated by law is an unjust and odious prescription. . ."[29] Nor is it to ignore the fact that today, people of good faith may believe just as sincerely that color-blindness is both a constitutional requirement and a social virtue. The point remains, however, that from the start post-bellum founders did not settle on color-blindness as *the* constitutional ideal, but rather as a tool that could serve, depending on time and circumstance, as an impediment to or a catalyst for constitutional equality. Indeed, in the days of Reconstruction, color-blindness served as *a* tool to dismantle the "new birthright" promised to newly freed slaves; today, there is a

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[26] CONG. GLOBE, 40TH CONG., 2D SESS. 3054 (1868).

[27] *Id.* at 1452.

[28] *Id*. at app. 292.

[29] 3 Cong. Rec. 944, 945 (1875).

danger for it to be used as an instrument to prop up the remains of our racial caste system.

C. Our History Has Shown that the Color-blind Principle Can Perpetuate, Rather than Remedy, Racial Oppression

As a young civil rights lawyer, the late Justice Thurgood Marshall was known to advocate color-blindness as a remedy for racial injustice. Arguing to the Court on which he would one day sit, Marshall said, "classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws. . ."[30] When, at Marshall's behest, the Court ruled in *Brown v. Board of Education of Topeka*,[31] that *de jure* racial segregation violated the Equal Protection clause of the Fourteenth Amendment, the limits and perversities of color-blind principle quickly became apparent. Segregation continued. More than a decade following the Court's decision in *Brown*, fewer than one in one hundred black children in the South attended school with whites, while the number of whites in predominantly black schools was "infinitesimal."[32] Civil rights attorneys recognized that advocating for color-blind constitutionalism would not help their clients achieve equal protection under the law.[33]

Indeed, opponents of desegregation began to use color-blind constitutionalism as a means of

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[30] *Id*. (citing Brief for Petitioner at 27, *Sipuel v. Bd. of Regents of the Univ. of Okla*., 332 U.S. 631 (1948) (No. 369), 1947 WL 44231 at *27).

[31] 347 U.S.. 483 (1954).

[32] *Id*. at 810.

[33] *Id*.

maintaining segregation. In 1969, North Carolina passed a law requiring that "[n]o student . . . be assigned or compelled to attend any school on account of race, creed, color or national origin. . ."[34] The Court struck the law down, in *North Carolina State Board of Education v. Swan*, understanding that it "exploit[ed] an apparently neutral form to control school assignment plans by directing that they be 'color blind.'" As the *Swann* Court recognized, a color-blindness requirement, *against the background of segregation*, would render illusory the egalitarian promise of *Brown v. Board of Education*."[35] In rejecting the principle of separate-but-equal the *Brown* Court repudiated its earlier conclusion that any insult taken from segregation was illusory—the result of an interpretation that the segregated might choose to place upon forced separation.[36] The Court acknowledged in *Brown* that segregation was hurtful[37] as it acknowledged in *Loving v. Virginia* that segregation was designed to enforce white supremacy.[38] *De jure* segregation perpetuated racial injustice only so long as we remained blind to its historically subordinating purpose. As the *Swann* Court well understood, color-blindness can also mask and perpetuate an unjustifiably hierarchical status quo.

When Thurgood Marshall became a Supreme Court Justice, he recognized the dangers of the color-blind

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[34] *Id. (citing N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 44 n.1 (1971)).

[35] *Id.* (emphasis supplied).

[36] *Brown v. Bd. of Educ*., 247 U.S. 483 (1954).

[37] *Brown*, 347 U.S. at 494-95.

[38] 388 U.S. 1, 6 (1967).

principle he had previously supported.[39] Writing in the Court's first higher education affirmative action case, he explained: "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America."[40] Justice Marshall recognized that it would be impossible to ensure all citizens equal protection of the laws if the Court disregarded the nation's history:

> it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that, for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people

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[39] *Id.* at 811.

[40] *Id*. (*citing Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in part and dissenting in part)).

> were marked as inferior by the law. And that mark has endured.[41]

And that mark will continue to endure for as long as color-blind constitutionalism is used to maintain a societal hierarchy and constrain remedial options such as affirmative action programs.

II. Governments and Educational Institutions Should Have the Tools and Flexibility to Pursue The Goal of Eradicating Caste.

When the first Justice Harlan said "there is no caste here," he articulated a goal rather than a reality. The Justice knew well that there was a racial hierarchy in the United States in 1896. He believed, however, that the goal of the Fourteenth Amendment was to recreate the United States as a nation with neither slavery nor classes of citizens. The goal was constitutional equality. Constitutional equality does not, of course, amount to equal assets or equal levels of happiness or success. It does, however, require eradication of class-based barriers to opportunity.

The color-blind principle oversimplifies our understanding of group-based subordination. It focuses on anti-classification, insisting that race-based categories are inevitably "invidious."[42] This approach contributes

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[41] *Bakke*, 438 U.S. at 400.

[42] Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. Rev. 293, 295 (2014) ("Anti-classification theories argue that, in order to have a world in which discrimination is absent, we should not classify people based on race (or any other social identity) and should ignore any classifications completely."). *See also* Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 Wis. Women's L.J. 60 (1987).

little to eradicating arbitrary social hierarchies. If an institution is to address group or category-based disadvantage, it must first *recognize* what the categorization has meant and what it has wrought. Disadvantaged groups are defined by more than just phenotypical differences; they are defined by their histories and limited by their perceived identities.

Though the United States' experiences of race-based slavery, legally sanctioned racism and *de facto* societal discrimination have created their own set of problems, the experience of group subordination is far from *sui generis*. As long as humankind has existed, identifiable groups and classes of people have experienced systemic disadvantages in education and other arenas, whether because of skin color, sex, gender identity or orientation, social class, political divisions, or religious differences. The problem of group-based subordination is a "truly global phenomenon."[43]

The United States has not been unique in its commitments to challenging biases and achieving constitutional equality. Other countries have fashioned judicial and legislative responses to systemic societal discrimination that are built upon keen-sightedness about, rather than blindness to, patterns of social stratification. Two of the world's largest democracies, India and Brazil, have been keen-sighted rather than category-blind in their efforts to heal age-old divisions in their distinctly heterogeneous nations. They have recognized diversity as a compelling

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[43] Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 Mich. L. Rev. 1296, 1302 (1999).

interest and a national good, [44] and worked to remove entrenched and subtle obstacles to economic, political and social success. Both Brazil and India have recognized that the harms resulting from group-based subordination cannot be eradicated with the mere prohibition of overt discrimination.

The Indian government has created categories of protected groups *with the explicit goal of eradicating* "*societal hierarchies*."[45] In 1950, it made discrimination against lower castes constitutionally impermissible.[46] The Indian government recognized that the caste system was an arbitrary system of social stratification, codified and reinforced by British colonial authorities,[47] which distinguished people on the basis of descent and rank.[48] The lower castes, much like African-American people and other minority groups in the United States, experienced violence and exclusion from social institutions. It also created "reservations," or quotas, for government positions

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[44] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[45] Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 Conn. L. Rev. 747, 751 (2004) (Former Indian Prime Minister V. P. Singh argued: "[I]f there is discrimination by birth, then in delivering the remedy, identification of victims of such an order can be only done by birth. So the remedy will also have to refer to birth, not because caste has to be sanctified, but ... there is a practical need to refer to birth.").

[46] Constitution of India, 1951, art. 15.

[47] Jay Elwes, Alexander Brown, *How does India's caste system work? Prospect Magazine*. November 13, 2014.

[48] Velassery, Sebastian. *Casteism and Human Rights: Toward an Ontology of the Social Order*. Singapore: Marshall Cavendish Academic, 2005.

based on lists of castes and other excluded groups (such as isolated tribes).[49] The groups in the list are "artificially" fashioned to take into account multiple factors contributing to disadvantage, and they are updated and maintained with the aim of ensuring that reservations are given to those who most need them.[50] Though it is certainly subject to criticism and at times the subject of protest, the Indian system forthrightly "aspires to secure a society free of all distinctions based on caste; but at the same time, it permits as a necessary means to that end caste-based remedial programs--but only when those programs are carefully designed, limited, and self-liquidating over time."[51]

Brazil's history parallels the American experience with slavery in some ways, but diverges from it in others. Brazil imported more slaves than the United States, slavery existed throughout the entire country,

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[49] *See* India's Constitution (Scheduled *Castes*) Order, 1950 (C.O. 19) 2nd Constitution (Scheduled Tribes) Order, 1950 (C.O. 22), available at http://lawmin.nic.in/ld/subord/rule3a.htm and http://lawmin.nic.in/ld/subord/rule9a.htm

[50] In 1992, the Indian Supreme Court further developed the system by creating a means test for individual eligibility, based on the concerns "(1) that the benefits of reservations are not distributed evenly throughout a backward group but instead are monopolized by persons at the socioeconomic top of the group; and (2) that reservations are going to persons who do not in fact need them because they have been raised in privileged circumstances due to parental success in overcoming the disadvantaged status of the backward group."

[51] Cunningham & Renon, supra at 1307. ("Anticaste and antidiscrimination principles are integrated into a single jurisprudence in which both equality and discrimination have more complex meanings than in American legal discourse.")

and it was not abolished until 1888.[52] However, the country never adopted a system of *de jure* segregation, and Brazil differs from the United States in that Brazilians do not abide by a "dichotomous definition of race."[53] Like South Africa, Brazilian society has "intermediate racial categories," with vast swaths of the population identifying as mixed or biracial.[54] In Brazil, race is defined by physical appearance rather than descent. There are hundreds of terms to classify people according to skin color.[55]

For many generations, Brazil fashioned itself a "racial democracy," due to its high levels of mixing between white, black, and indigenous peoples.[56] However, social science showed, and policymakers increasingly accepted, that in Brazil, as in the United States, race or color correlated disturbingly with "poverty, income distribution, education, and adequate housing."[57] In 2001, after decades of denying the country suffered from racial discrimination, the Brazilian government endorsed a national affirmative action program with quotas for Afro-Brazilians, women, and disabled people. The foreign ministry created a program to increase the number of black diplomats and

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[52] Leslie Bethell, *Transactions of the Royal Historical Society*, Vol. 1 (1991), pp. 71-88.

[53] Mala Htun, *From "Racial Democracy" to Affirmative Action: Changing State Policy on Race in Brazil*, 39 Latin American Research Review 1 60, 62 (2004).

[54] *Id.*

[55] *Id.* at 64 ("Their application varies according to context, social class, who is doing the labeling, whether the labels are chosen freely or determined in advance and so on.").

[56] *Id.*

[57] *Id.* at 62.

three states introduced 40 percent quotas for Afro-Brazilians at their universities.[58]

We do not offer international comparisons as panaceas or as models for the United States. We simply propose that the Court return to an interpretation of the Fourteenth Amendment that allows institutions to recognize social hierarchies so that carefully and locally tailored solutions can be fashioned to help discriminated groups achieve constitutional equality.[59] Doing so would allow institutions of higher education to pursue the goal of eradicating, rather than denying, social hierarchies.[60]

To shift the Fourteenth Amendment's focus from antidiscrimination to eradicating caste would restore its noblest intent: the elimination of unjustifiable group-based barriers to opportunity.

CONCLUSION

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[58] *Id.* at 66.

[59] Cunningham & Menon, supra at 1296, 1297-98 ("We urge reappraisal rather than abandonment of the caste analogy: a reappraisal that would prompt American legal scholars to begin a long overdue look beyond their own borders for fresh ideas on the affirmative action debate.").

[60] Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410, 2439 (1994).

As Justice Blackmun argued, "[i]n order to get beyond racism, we must first take account of race. There is no other way."[61] Keen-sighted, class-conscious admissions policies should be seen as means to a "just and fair social order," not an "exception to equality of treatment, but a method of providing it."[62] The very modest and carefully drawn policies challenged here surely meet the requirements—and serve the goals—of equal protection within a diverse and wrongfully stratified society.

Respectfully submitted,

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[61] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (concurring in part and dissenting in part).

[62] Cunningham & Menon, supra at 1307.