Dear Participants in the NYU Race & Inequality Colloquium,

Thank you so much for taking the time to engage with me on this very early-stage project. As you will see, the various components of the piece remain imperfectly woven together, and I welcome suggestions on how to improve that aspect. More generally, I look forward to all of your comments, questions, and collective wisdom. Please excuse the state of the footnotes (or lack thereof)!

With appreciation,
Joy

THE CONSTITUTION AND RACIAL REPAIR

Joy Milligan

INTRODUCTION

Is it possible that the Constitution bars racial repair?

Until 2023, the U.S. Supreme Court sanctioned race-based remedies for two purposes: increasing racial diversity in educational settings and overcoming past racial discrimination.[1] With the Court's (anticipated) decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, the majority will likely end the use of race-based measures to achieve diversity.

That will leave a single constitutionally sanctioned goal: remedying past intentional discrimination. At the *Students for Fair Admissions* oral arguments, conservative advocates staunchly affirmed the availability of race-based remedies for past harms.[2] What they did not acknowledge, however, is that the federal courts have drastically limited the possibility of enacting such measures—to the point that government's supposed ability to remedy sweeping racial harms like Jim Crow and slavery may be largely hypothetical in the present.[3]

Would the federal courts allow the Constitution to block all racial remedies? One must step back from that question to appreciate its significance.

The Constitution was, of course, drafted and ratified only by white men, to shape a country defined in substantial measure by slaveholding.[4] None of its subsequent amendments were ratified by anything modern Americans would call a democracy,

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[1] *See* Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-22 (2007).

[2] Transcript of Oral Argument at 6, 15, 19-20, Students for Fair Admissions v. President & Fellows of Harvard College (No. 20-1199).

[3] *See infra* Part. I.C.

[4] *See* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 230 (John P. Kaminski et al. eds., 2009) (listing 55 delegates that attended Constitutional Convention); for lists of delegates to state ratification conventions see 2 ELLIOT'S DEBATES HOME PAGE: U.S. CONGRESSIONAL DOCUMENTS; *see also* Pauline Maier, *Narrative, Interpretation, and the Ratification of the Constitution*, 69 WILLIAM & MARY Q. 382, 388-89 (2012) ("Just who were 'We the people'? The category included . . . 'the American 'political population'—that is, those adult white men who qualified for the vote."). On the role of slavery in shaping the Constitution, see generally PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996).

until the very last three, which were ratified between 1967 and 1992.[5] That governing framework—one that we theoretically are not to alter except by arduous processes requiring the approval of extreme supermajorities— trumps more democratically enacted laws.[6] Further, out of the two hundred plus years of the nation's history, the first three quarters involved the government in open racial oppression and degradation. Only in the last quarter of the nation's life, did the U.S. halt those overt practices and approach anything resembling a democracy.

Serious racial repair has come only in fits and bursts in the decades since 1965. No measures commensurate to the scale of harms have been attempted. Various partial measures were blocked by the Supreme Court, on purportedly constitutional grounds.[7]

Is it possible that this instrument—itself originating in whites-only rule and serving to legitimate centuries of racial oppression—should be read now to block further attempts to undo the country's racial legacies? Would the Court read its broad, ambiguous phrases in such a regressive manner?

Perhaps that question answers itself. Of course, a governing document drafted by those actors, for that sort of whites-only democracy, would foreclose attempts to re-construct the governing political, social, and economic framework toward racial equality. Even the Fourteenth Amendment was drafted before its framers determined that they should grant Black men the vote.

To accept such an answer, though, would be to acknowledge defeat. If the United States is ever to live up to its claimed constitutional ideals, then the Constitution cannot bar racial repair.[8] In this Article, I consider the Constitution and how it has shaped the

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[5] Given massive disfranchisement in the South, the U.S. cannot be considered a functional democracy until after the enactment of the Voting Rights Act, Pub. L. 89-110, 79 Stat. 437 (1965). *See* STEVEN LAWSON, RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941, at 108-09, 118 (4th ed. 2015)) (stating that only 43% of eligible African Americans were registered to vote in former Confederate states in 1964, while that figure rose to nearly 60% within four years of the Act). *See* U.S. CONST. amend. xxv (ratified in 1967) (order of succession in executive branch); *id.* amend xxvi (ratified in 1971) (voting rights for eighteen year-olds); *id.* amend. xxvii (ratified in 1992) (regulating Congressional pay increases).

[6] For the formal barriers to constitutional change, see U.S. CONST. art. V; for formal barriers to statutory change, see U.S. CONST. art. I, § 7.

[7] *See, e.g.*, Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

[8] Cf. Adjoa A. Aiyetoro, Why Reparations to African Descendants in the United States Are Essential to Democracy, 14 J. Gender, Race, & Justice 633 (2011) (arguing that "substantive democracy requires reparations" as a means to alleviate the consequences of past oppression, which undermine equal citizenship for African Americans); Lawrie Balfour, Unreconstructed Democracy: W.E.B. Du

possibilities for racial repair for Jim Crow, tracing the ways in which the judiciary has used the Constitution to foreclose racial repair. I argue that the judiciary's strategies for halting such remedies are deeply at odds with the need to continue to reconstruct the United States and its governing institutions toward true racial democracy.

Part I reviews the jurisprudence of racial remedies, situating the recent affirmative action cases within the larger arc of the courts' treatment of government attempts to undo racial harms. I argue that the diversity rationale has been a distracting offshoot from the more basic purpose of affirmative action, which was originally aimed at dismantling the racial caste system. I show how the judiciary has narrowed the use of racial remedies to undo past discrimination over the past several decades, by characterizing de jure segregation and other forms of systemic racial subordination as distant, evanescent, and difficult-to-trace phenomena. I conclude by summarizing the current state of doctrine.

Part II probes one massive and under-addressed set of racial harms, the federal government's sweeping investment in and extension of racial segregation through twentieth century social programs in education, housing, healthcare, farming, employment, and other areas.[9] I ask what sorts of remedies would be necessary to undo the extensive and interlinked consequences of what I refer to as "federal Jim Crow."

Part III considers what forms of racial repair the Constitution would currently permit for that federal investment in segregation. If premised on the foundation of careful, systemic historical tracing and research, such remedies could be more sweeping than recent case law might suggest. While existing doctrine could be read to authorize broad remedies if carefully designed, convincing the judiciary to sanction such steps would require counteracting the impulse of recent decades, which has seen the federal courts diminish and explain away the nation's discriminatory past.

Bois and the Case for Reparations, 97 Am. Pol. Sci. Rev. 33 (2003) (exploring how Du Bois' work supports the idea that reparations could help to reconstruct American democracy).

[9] Although they remain under-addressed, a deep and growing literature exists documenting these federally inflicted (or sometimes federally assisted) wrongs. *See, e.g.*, DESMOND KING, SEPARATE AND UNEQUAL: AFRICAN AMERICANS AND THE US FEDERAL GOVERNMENT 172-202 (1995); ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 7-9 (2001); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54-55 (1993); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); ROBERT CLIFTON WEAVER, THE NEGRO GHETTO (1948); Deborah N. Archer, Transportation Policy and the Underdevelopment of Black Communities, 106 Iowa L. Rev. 2125 (2021); Deborah N. Archer, "White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction, 73 Vand. L. Rev. 101 (2020); Olatunde C. A. Johnson, Stimulus and Civil Rights, 111 Colum. L. Rev. 154 (2011); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631.

Engaging the public in historic excavation and truth-telling processes is necessary to push judges in that direction.

Part IV responds to the inadequacy of the Constitution as currently interpreted, even given the remedial possibilities outlined above. A Constitution that freezes the nation in the racial patterns of the past, while blessing measures that deepen those forms of oppression, cannot undergird an egalitarian democracy. The systems of governance embedded in the Constitution were designed and ratified in deeply undemocratic conditions, including the meta-process set forth in Article V for changing those systems. The Reconstruction Amendments remain the best that this system has been able to muster in terms of moving those frameworks toward racial democracy. If the system is to be salvaged rather than scrapped, then those Amendments cannot be read to continue and worsen the racial exclusions of the past. Progress toward a more egalitarian democracy requires interpreting the Constitution in ways that authorize racial repair.

I. THE LAW OF RACIAL REMEDIES

A. Affirmative action as racial repair

1. The current context

In oral arguments before the Supreme Court in *Students for Fair Admissions*, the conservative lawyers opposing affirmative action squarely endorsed racial remedies to repair past discrimination. But their apparent concession was quite limited. In fact, they described the Supreme Court's entire doctrine approving the use of racial classifications in programs aimed at remedying prior discrimination as "the remedial *exception*."[10] It was not just an "exception," but a "fairly narrow" one at that, they argued.[11]

The opponents of affirmative action first distinguished the use of race-based programs to remedy the harms of slavery. Reconstruction-era programs like the Freedmen's Bureau were legitimate "remedial measure[s] . . . in response to the end of slavery and the position that Black Americans found themselves in," they argued.[12] That was a strategic concession. Those programs differed markedly from affirmative action—after all, such programs were not aimed at diversity, but at remedying de jure racial discrimination—so their enactment did not cast any light on what the Fourteenth Amendment's framers might have intended vis-à-vis race-based programs in different

[10] "I believe that the remedial exception is still good law," Norris said, citing Parents Involved. Transcript of Oral Argument at 19, Students for Fair Admissions.
[11] Id. at 15.
[12] Id. at 6.

contexts. Simultaneously, the advocates indicated that those harms were long since cured. "Those same measures . . . would not be constitutional today because they would no longer serve a remedial purpose."[13]

Thus, the remedial "exception" had little import in the present. Even as the conservative lawyers suggested that remedies aimed at addressing slavery could be race-based, and that steps directed to former slaves themselves would not even merit strict scrutiny,[14] they pushed those phenomena into the distant past.[15] Nothing in the present would support such remedies, and benefits directed to the descendants of slaves were entirely different from benefits to slaves themselves, such that strict scrutiny would apply to any such remedial program.[16] Questioned by Justice Alito, an advocate said he was unaware of any de jure segregation in the present—nothing outstanding remained to be cured.

2. Affirmative action's past

[most of this section still needs to be written; it will go into more depth on Bakke, Grutter, and the problematic origins and impact of the diversity rationale, juxtaposing that trajectory against early ideas of affirmative action as a means to "unfreeze the status quo" and begin to compensate for centuries of discrimination]

Affirmative action as it originally was understood aimed directly at curing Jim Crow and the enduring impacts of slavery, as well as other race-based harms. But in subsequent decades, the diversity rationale has sidetracked and narrowed the nation's ability to address longstanding legacies of past discrimination, as well as present day discrimination. Now, conservatives have circled back to kill it off entirely.

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[13] Id. at 6-7.

[14] Norris argued that programs for former slaves were not race-based at all, because they rested on the classification of slavery rather than race itself. Id. at 14-15.

[15] See also UNC Oral Argument at p. 68 ("Nothing stops UNC from honoring those who have overcome slavery or recognizing its . . . past contribution to segregation. But the question is, . . . is that a basis to make decisions about admission of students who are born in 2003. And I don't think that it necessarily is.").

[16] In response to follow-up questioning, Norris argued that remedies aimed at descendants of slaves "generations later" would become race-based, with any link to "ancestry" rendering such initiatives suspect or as he put it, presumptively operating as a "proxy for race." Oral Argument, p.16. See also UNC Oral Argument at p.44-45 (stating that benefits targeted at descendants of slaves "very quickly starts to look like just a pure proxy for race" given that slavery was "so highly correlated with race in the history of our country"). The irony is that conservatives are highly inconsistent in acknowledging race's proxy status for the experience of slavery and Jim Crow. [e.g. Jackson pressing them on their refusal to acknowledge that race-based exclusions operate as racial discrimination in the present (exploring legacy applicant to UNC v. Black student explaining that his family was barred from that opportunity) UNC p.68]

The problem is that diversity was never primarily what was at stake—or if it was, it should not have been. It amounted to a euphemistic way of addressing deep-seated racial inequality, along with ongoing discrimination and structural exclusion. For a Court unwilling to describe that reality accurately, pushing affirmative action onto a different track altogether was appealing.

Even as the most prominent challenges to affirmative action trained attention on the "diversity" rationale in higher education, in other settings the main justification for affirmative action has remained "remediation."

B. The origins of modern doctrine

A decade after the Court struck down de jure segregation in *Brown v. Board of Education*,[17] the federal courts embarked on what one scholar termed "the jurisprudence of remedy."[18] Those courts began to mandate more aggressive approaches to ending Jim Crow, including what came to be called "institutional reform."

School desegregation cases required school authorities to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[19] Cases challenging whites-only hiring by police and fire departments and other public agencies mandated corrective remedies including affirmative action.[20] Court-ordered remedies were often race-based, sometimes necessarily so given Supreme Court doctrine requiring that such measures "promise[] realistically to work, and … to work now."[21] Those cases thus outlined the remedies that a court may, or must, order in response to intentional, systemic racial discrimination by government.[22] The federal courts never overturned that case law, but over time an increasingly conservative judiciary scaled back the need for court-ordered remediation by suggesting that any discrimination had disappeared or become irrelevant.

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[17] 347 U.S. 483 (1954).
[18] *See* Freeman, *supra* note **Error! Bookmark not defined.**, at 1079.
[19] Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1, 22-31 (1971) (approving race-based measures to bring about school desegregation).
[20] *See, e.g.*, United States v. Paradise, 480 U.S. 149, 153-168 (1987) (plurality opinion) (describing Alabama state troopers' decades of refusing to hire nonwhite candidates, and affirmative action remedies mandated by courts in response).
[21] *Green*, 391 U.S. at 439.
[22] *See id.* at 438 n.4 ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965))).

A second line of cases considered what remedies a government actor may "voluntarily" use to address past systemic discrimination in which it participated, actively or passively.[23] By the late 1960s, some government authorities began to take it upon themselves to comply with civil rights mandates, voluntarily adopting institutional reforms even without being sued.[24] Early statements in the Court's desegregation cases suggested that government actors had ample discretion to adopt race-based measures for this and related purposes.[25] However, the Court ultimately equated such measures with all affirmative action programs and imposed strict scrutiny on them.[26] In doing so, the Court majority accepted a government's compelling interest in remedying its past discrimination, while requiring that the government present a "strong basis in evidence" supporting the remedial need. Governments defending their remedial programs did not have to definitively prove their own past wrongdoing but did have to offer evidence approaching a "prima facie case."[27]

In the present, the current jurisprudence of racial remedies is sharply bifurcated. Remedies that are aimed at curing past, identified harms to specific people are not considered "race-based" and hence do not undergo strict scrutiny. As Justice Scalia explained in concurrence in City of Richmond v. J.A. Croson, if "a State . . . giv[es] the identified victim of state discrimination that which it denied him," the government is not acting on the basis of race at all, but rather by identifying who has been harmed by a specific legal violation.[28]

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[23] The "voluntary" label is often a misnomer, because Brown II and subsequent cases indicated that governments that previously engaged in intentional segregation have an "ongoing, affirmative" duty to eliminate its effects. *See* McDaniel v. Barresi, 402 U.S. 39, 40-41 (1971) (citing the school district's "affirmative duty to disestablish the dual system [of prior segregation]" in upholding a race-conscious voluntary desegregation plan).

[24] *See id.*; *see also* Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting) (noting that after the Court mandated desegregation, "different [school] districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools").

[25] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (stating that school boards had the authority to adopt racial integration plans requiring each school to match the district's overall racial makeup, in order "to prepare students to live in a pluralistic society . . . as an educational policy… within the broad discretionary powers of school authorities").

[26] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion).

[27] *See Croson*, 488 U.S. at 500 (pointing out that city presented "nothing approaching a prima facie case of a constitutional or statutory violation" to justify its remedial program); *Wygant*, 476 U.S. at 277 (plurality opinion) (requiring that defendant have "a strong basis in evidence for its conclusion that remedial action was necessary"); *id.* at 292 (O'Connor, J., concurring in part) (stating that evidence supporting "a prima facie Title VII pattern or practice claim" would suffice).

[28] *Croson*, 488 U.S. at 526 (Scalia, J., concurring in judgment).

But when for practical or other reasons, remedies cannot be targeted precisely to the exact group who suffered past harms and are instead directed to people of a particular race—then current Equal Protection doctrine requires that those programs meet strict scrutiny. Under that test, if the program's purpose is to repair past intentional discrimination by government, then the purpose is compelling and meets the first prong of strict scrutiny. Governments may not simply claim that they believe they committed past discrimination, but rather must present "a strong basis in evidence" of their own guilt. To meet the second prong of strict scrutiny, remedies must be "narrowly tailored" to repair that past discrimination.

C. Disappearing discrimination

This section turns to the narratives and doctrines that courts have employed to stop racial repair. In essence, they have recharacterized the discrimination of the past, and in doing so, have characterized it as very distant and easily dissipated. Such ephemeral, long-ago events are difficult to identify, much less trace into the present.

Beginning in the 1970s and working against the backdrop of recent cases that embraced—even required—race-conscious measures to address Jim Crow segregation, a conservative set of judges and legal advocates articulated standards that did not overturn that authority, but instead subtly eroded it.

Those courts and activists acknowledged the constitutional mandate to cure discrimination but depicted that discrimination as increasingly distant. They emphasized the passage of time since such racial exclusion occurred, as well as the importance and impact of governments' subsequent good faith compliance with judicial mandates. They also atomized the actors involved. If the precise governmental entity at issue could not be shown to have caused particular racial harms, then the actual cause became an amorphous phenomenon they termed "societal discrimination." Thus, even as conservatives could not deny that discrimination had occurred, they suggested that it had occurred long ago, had been aggressively addressed, and could hardly be thought to affect the present. Moreover, anyone asserting that the past remained relevant had the burden of showing exactly how the particular governmental entity in question had caused specific present harms.

1. Time alone

The Supreme Court has frequently suggested that remedies for past discrimination may be left in place only for a limited period. In some instances, the passage of time in and of itself cures "old" discrimination.

In the context of terminating existing consent decrees that include race-based relief, modern courts acknowledge that discrimination occurred. However, they limit that discrimination to the period prior to the original judicial ruling or approval of the consent decree. Viewed as existing only up to the entry of the decree, that discrimination appears to have existed only in the distant, foggy past.

Those decisions invariably emphasize the many years since discrimination was first found, and how long affirmative action remedies have persisted since then. For example, the Fifth Circuit in 2006 described a consent decree that had operated for twenty years as "breathtakingly long"—even as it earlier in the opinion noted "the City now admits that for over 100 years it systematically excluded all minorities from its fire department."[29] Similarly, an Ohio district court in 2013 marveled that a requested extension to a consent decree governing the Cleveland Fire Department would "affect[] only applicants who had not even yet been born at the time the discrimination was found to have occurred."[30] The court ruled that the discrimination identified in 1975 had long since been cured, seemingly ignoring subsequent charges of discrimination post-dating the initial consent decree.[31] The Sixth Circuit in an earlier opinion in the case had approvingly cited a 1994 Eleventh Circuit decision suggesting that "thirteen years of racial preferences" should presumptively exhaust any governmental interest in remedying past discrimination."[32]

Time alone also limits voluntary racial remedies. The Court has frequently indicated that voluntary programs of affirmative action must have an end date. In its doctrine governing constitutional challenges to affirmative action, the Court in cases like *United States v. Paradise* and *Grutter v. Bollinger* cited the "duration of the relief" as a key factor in judging whether the remedies were narrowly tailored.[33]

2. Good faith interventions

Another tactic is to assert that past remedial steps have fully cured any past discrimination. No vestiges remain. However, the court or litigant that asserts this usually does not prove it as a matter of empirical fact. Instead, it is established by fiat—as a matter of law. As Alan Freeman presciently wrote in 1978, the result is "to

[29] Dean v. City of Shreveport, 438 F.3d 448, 456 (5th Cir. 2006).
[30] Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland, 917 F. Supp. 2d 668, 676-78 (N.D. Ohio 2013).
[31] *Id.* at 672, 680-82.
[32] Cleveland Firefighters for Fair Hiring Pracs. v. City of Cleveland, 669 F.3d 737, 742 (6th Cir. 2012) (quoting Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1575–76 (11th Cir. 1994)).
[33] *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion); *see also* Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (describing a "durational requirement" for affirmative action in university admissions).

make the problem of racial discrimination go away by announcing that it has been solved."[34]

Relatively early on, school desegregation cases exhibited this tendency. For example, in *Pasadena Board of Education v. Spangler*, the Court indicated that a one-time institutional shift sufficed to erase the consequences of past de jure segregation.[35] "For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy…"[36] To the extent neighborhood segregation evolved in ways that undermined the effects of the prior remedial attendance plan, the court was powerless to intervene.[37] The one-time act of creating racially integrated zones for a single year was sufficient to purge the constitutional violation.[38]

Fifteen years later, in *Board of Education v. Do*well, the Court indicated that all desegregation orders should have a limited time span, ordering lower courts to terminate them if school officials "had complied in good faith with the desegregation decree since it was entered, and . . . the vestiges of past discrimination had been eliminated to the extent practicable."[39] Good faith and "practicability" thus governed—no finding that the vestiges had actually been eliminated was required.[40]

Another decade and a half after *Dowell*, the Court's majority ruled that the Jefferson County, Kentucky public school system no longer had an interest in remedying the effects of the system's prior de jure segregation.[41] A federal judge had

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[34] Freeman, *supra* note **Error! Bookmark not defined.**, at 1102.
[35] 427 U.S. 424 (1976).
[36] *Id.* at 436-37.
[37] *See id.* at 431-36 (noting that "literal compliance with the terms of the court's order had been obtained in only the initial year of the [desegregation] plan's operation" while attributing increasing resegregation to a "quite normal pattern of human migration" falling outside of the school district's responsibility to address).
[38] *Id.* at 434 ("[A]doption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in the PUSD.").
[39] Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991).
[40] *Id.*; *see also* Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 820 (2010) ("The *Dowell* decision freed school districts from the obligation . . . to convert intentionally segregated schools to integrated schools.").
[41] Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 715-16, 721 (2007) ("Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments.").

declared the system "unitary" (i.e., sufficiently desegregated) after 25 years in 2000.[42] This finding sufficed even though the Supreme Court's own decisions (like *Dowell* itself) meant that a "unitary" ruling was neither an onerous threshold, nor a definitive finding that the vestiges were eradicated.[43]

3. "Societal" discrimination

Another way to render past discrimination irrelevant, and hence inadequate as a basis for current race-based remedies, has been to locate it outside of the government entity before the court. Under current doctrine, if discrimination is too widespread, so that it cannot be adequately localized in one particular decisionmaker or entity, it necessarily becomes "societal discrimination."[44] Similarly, if one government actor's discrimination has commingled with other governmental discrimination, especially over time, then the whole must be attributed to those other causes—most often to the lumpy, amorphous whole of "society."

Thus, if discrimination is felt by a prior generation and those impacts affect the victims' children or even grandchildren, any such later follow-on effects are erased. For example, if socioeconomic status explains students' achievement gap in a formerly de jure segregated school district, then courts have ruled that non-attributable to the schools' own discrimination. Federal courts have proved willing to declare that without any inquiry into whether the segregated and unequal education offered in the past to current children's parents diminished the current socioeconomic status of those families, and their children's academic achievement.

As the en banc Fourth Circuit wrote in 2001, "Most courts of appeals … have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination."[45] The court noted that desegregation in the Charlotte-Mecklenburg schools had only begun 30 years earlier, and "only 15 [percent] of black parents are college graduates, compared to 58 percent for white parents."[46]

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[42] "To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects." Hampton v. Jefferson Cnty. Bd. of Educ., 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000).

[43] *See supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text.

[44] *Cf.* Regents of University of California v. Bakke, 438 U.S. 265, 307-09 (1978) (Powell, J.) (critiquing "societal discrimination" as "an amorphous concept of injury that may be ageless in its reach into the past").

[45] Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 330 (4th Cir. 2001) (en banc).

[46] *Id.* at 313-15, 331 (quoting expert witness).

Nonetheless, the court refused to consider whether that gap in Black college attainment might be partially rooted in the prior Jim Crow era.[47] Terming that and other indicators of the socioeconomic gap "startling," the en banc majority cited a former superintendent's statement that "in Charlotte, a majority of poor students happen to be African-American."[48] Accepting happenstance as the explanation for structural racial inequality, the court ruled that "socioeconomic disparities between black and white pupils are troubling, [but] they are not the result of [Charlotte-Mecklenburg Schools]'s actions or inactions."[49] In such a world, structural racial inequality is everyone's and no one's fault. But surely the local school system is one of the most logical places to look in considering why a black-white gap in parental education levels exists—especially in a district that was intentionally segregated just a generation and half earlier.

Similarly, the Fourth Circuit announced in a case challenging a race-based remedial program at the University of Maryland, that "any intergenerational effects of segregated education are the product of societal discrimination, which cannot support a program such as this one."[50] That is an astonishing conclusion for the court to endorse, considering that the state of Maryland not only intentionally segregated its university system, but also its entire system of elementary and secondary education.[51] Even if the units involved were administratively separate arms of the state, that does not explain how the overall state policies mandating segregation in all parts of the Maryland public school system could be dismissed as "societal discrimination."[52]

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[47] *Id.* at 330-32 (identifying no clear error in district court's finding that the achievement gap was not a vestige of prior de jure segregation).
[48] *Id.* at 331.
[49] *Id.*
[50] Podberesky v. Kirwan, 38 F.3d 147, 157 n.8 (4th Cir. 1994).
[51] *See* John K. Pierre, *History of De Jure Segregation in Public Higher Education in America and the State of Maryland Prior to 1954 and the Equalization Strategy*, 8 FL. A&M L. REV. 81 (2012).
[52] All three judges on the *Podberesky* panel themselves graduated from segregated institutions of higher education, an indicator of segregation's enduring impacts. Podberesky, 38 F.3d at 151 (listing judges on panel); *see* Federal Judicial Center, Biographical Directory of Federal Judges, "Hiram Emory Widener, Jr.," https://www.fjc.gov/history/judges/widener-hiram-emory-jr (earned B.S. from Naval Academy in 1944, and L.L.B. from Washington and Lee University School of Law in 1953); *id.*, "William Walter Wilkins," https://www.fjc.gov/history/judges/wilkins-william-walter, (earned B.A. from Davidson College in 1964, and J.D. from University of South Carolina in 1967); *id.*, "Clyde H. Hamilton," https://www.fjc.gov/history/judges/hamilton-clyde-h (earned B.S. from Wofford College in 1956). As to those institutions' desegregation timelines, see Wofford College, "A History of Wofford College, 1854-present," https://www.wofford.edu/about/fast-facts/wofford-history/chapter-3; Carl W. Tobias, *Brown and the Desegregation of Virginia Law Schools,* 39 U. RICHMOND L. REV. 39, 49 (2004); Susan D. Hansen, *The Racial History of the U.S. Military Academies*, 26 J. BLACKS HIGHER EDUC. 111, 115 (1999); Davidson College, "Historical Timeline: From the College's Inception to the Commission on Race and Slavery," https://www.davidson.edu/news/2021/01/15/historical-timeline-of-davidson-college; University of South Carolina, "50th Anniversary of Desegregation," https://www.sc.edu/desegregation/.

Thus, over a wide variety of settings, courts have characterized racial discrimination as long-past, already well-addressed, and/or untraceable to any particular government actor. To opponents of race-based remedies, the time of discrimination is always long ago, and it can never be connected to the present. The consequence of these distortionary strategies is stark: We cannot accurately recall or describe Jim Crow in the law. Nor can we accurately characterize the present. Legal language and rhetoric have become inadequate.

II. FEDERAL JIM CROW

This Part foregrounds an area in which remedies have been underdeveloped, and the harms inadequately understood: the federal government's role in extending and deepening racial inequality during the twentieth century, via the national social welfare state. Then it asks what full repair for the harms of twentieth century discrimination by government officials might include, looking to both legal doctrine and theories of transitional justice. I then consider what remedies have actually been undertaken, and the extent to which constitutional doctrine has shaped or inhibited those remedies.

A. The federal role

1. The relative invisibility of federal discrimination

Because of the prominence of vicious racism perpetrated by state and local officials, the role of the federal government in racial injustice has often been perceived as neutral at worst. That vision also is rooted in the structure of U.S. federalism which locates authority for most day to day governance in the states, leaving the federal government to operate in selected areas and using indirect tools of governance—a division of power that renders the federal government's role in governance less visible.

Some federal officials and agencies broke with Jim Crow relatively early. The federal government began to racially integrate its own operations before the Supreme Court required it, and before the major developments of the civil rights era of the 1950s and 1960s. The Justice Department under Presidents Truman and Eisenhower sided with the NAACP in major cases challenging Jim Crow, including in Brown v. Board of Education itself. By the 1960s the federal government appeared to be an active ally of civil rights, often joining the NAACP or even pursuing civil rights claims itself with its new powers under the Civil Rights Act of 1964.

Recently this picture of the federal government intervening on the side of racial justice and civil rights has begun to be adjusted. Collective memory has begun to be

corrected. The early federal role in racial residential segregation is becoming well known, thanks to books like the Color of Law. But the extent of the federal role in backstopping, encouraging, and extending Jim Crow practices throughout the U.S. remains insufficiently understood, at both a popular and academic level.

Black leaders and civil rights groups themselves consistently identified and challenged the federal government's complicity in racial oppression. Rather than solely viewing the federal government as an ally or neutral party, civil rights forces challenged the federal government because they understood that it played an outsize role in segregation and racial subordination, across many sectors.

2. Cooperative federalism and federal investment in Jim Crow

Since the New Deal, national social programs have largely operated through "cooperative federalism." Because the federal government lacks constitutional authority to intervene in housing, healthcare, schools, and other areas directly, it provides conditional offers of federal funding to the states in exchange for the states agree to operate federally regulated and structured programs in these areas. Even in instances where the federal government has provided almost all or all of the funding, the frontline management and implementation is delegated to states or localities.

As major federal social programs were enacted in the twentieth century, Southern Democrats were often a critical part of the political coalition supporting them. Their votes were necessary to overcome opposition from conservatives and business interests who branded these social supports as socialism. The price those Southern Democrats and other supporters of white supremacy extracted was to require that federal money support Jim Crow, in South and North.

That pattern predates even the twentieth century. It began with the second Morrill Act of 1890 which extended federal funding for land grant universities, but permitted such funding to flow to whites-only universities in the South so long as purported separate but equal institutions were created for black students. Those institutions were never equal, and the segregated land grant universities provided a backbone for a network of other separate, unequal federal programs (such as agricultural extension and research to assist farmers). Similar patterns characterized many other federal social programs, which authorized and funded segregated education, hospitals, housing, job training and placement, and farm programs.

When the Leadership Conference on Civil Rights demanded that President Kennedy halt these practices in 1961, they pointed out that in the prior year more than

$1 billion had flowed to the states of the confederacy practicing overt segregation.[53] For states like Mississippi it was nearly a quarter—even in years when the USCCR, as it did in 1963, reported that the state participated in "systematic denial of constitutional rights… brutality and terror."

Federal agencies were not oblivious to the fact that there were significant constitutional problems with approving and funding segregation. Rather agencies like the USDA or what was then the Office of Education had been designed to coexist with white supremacy. Their political survival depended on Congressional Democrats from the South.

Civil rights activists consistently argued that the Constitution barred the federal government from collaborating in segregation and discrimination. From the 1930s onward, the NAACP challenged federal agencies to stop funding Jim Crow. In the legislative arena, Adam Clayton Powell, Jr., the first black Congress member from New York, who represented Harlem, became famous for proposing statutory prohibitions on discrimination in federally funded programs. His repeated proposals became known as the Powell Amendment. Leading Northern liberals voted against them on the grounds that such prohibitions would simply lead to the defeat of the proposed program; such initiatives could not be enacted without white Southern Democrats' votes.

All of these efforts finally succeeded in 1964 when, to the surprise of many, Title VI was enacted as part of the landmark Civil Rights Act of 1964. It barred race discrimination in any federally funded program, giving agencies the power to cut off funds to discriminatory institutions. The courts also began to recognize that federal funding for segregation or other forms of systemic race discrimination violated the Constitution. After decades of litigation, by 1980, the D.C. Circuit Court of Appeals could announce that this principle was "clearly established constitutional law."

Title VI and Constitutional rulings vindicated the moral claim—that federal taxpayers' money, paid by those of all races, should not flow only to benefit whites or reinforce racial hierarchy. Yet administrative inertia and loopholes meant that federal officials supported segregated institutions well after the 1960s in many instances.

In practice the federal institutions, their practices, and their legacies remained resistant to reform. And the litigation campaign to rule federal involvement in Jim

[53] Memorandum from Roy Wilkins, Chairman, Leadership Conference on Civil Rights, & Arnold Aronson, Secretary, Leadership Conference on Civil Rights, Proposals for Executive Action to End Federally Supported Segregation and Other Forms of Racial Discrimination (Aug. 29, 1961) (on file with National Archives and Records Administration, College Park, Md. [hereinafter "NARA II"], RG 235, Box 133, Secretary's Correspondence) [hereinafter, LCCR Memorandum].

Crow unconstitutional succeeded just as the courts began to become far more conservative. That timing radically limited the remedies that could emerge for the federal government's long-term funding of segregation.

B. The scope of needed remedies

What should the remedies for federal Jim Crow have encompassed?

Research increasingly demonstrates how devastating the impact of pervasive segregation, racial exclusion, violence, and subordination has been. Race discrimination in federal programs blocked equitable access to jobs, schooling, healthcare, higher education, ownership of homes and land, and other wealth-generating opportunities. The impacts to racial minorities' wealth, income, education, health, and wellbeing have been massive, as a robust body of literature has shown.

Social scientists have increasingly succeeded in quantifying the specific effects of long-term discrimination, demonstrating that it is possible to estimate impacts from prior periods and even to trace their effects going forward. For example, Abhay Aneja and Guo Xu have shown that segregation in the federal workforce, introduced under Woodrow Wilson's administration, increased the Black-white wage gap by 7 percentage points, with the gap increasing over time.[54]

A. Full repair

Beyond measuring the immense economic impacts of Jim Crow as the basis for material remedies, any attempt at redress must also consider the other forms of harm it inflicted.[55] One way to measure full repair in such contexts relies upon transitional

[54] Abhay Aneja & Guo Xu, The Economic Costs of Segregation: Evidence from the Federal Government under Wilson, Quarterly Journal of Economics, at *12 (forthcoming 2023), https://abhayaneja.files.wordpress.com/2020/11/costs_of_segregation.pdf

[55] A broad and growing literature considers reparations and offers specific proposals. For a small sampling from legal scholars, see Adjoa Aiyetoro, *Achieving Reparations While Respecting Our Differences: Model for Black Reparations*, 63 Howard L.J. 329 (2020); Roy L. Brooks, *Racial Reconciliation through Black Reparations*, 63 Howard L.J. 349 (2020); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L. 497 (2001); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 Harv. L. Rev. 1684 (2018); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 683 (2004); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 597 (1992); Kaimipono David Wenger, *Too Big to Remedy - Rethinking Mass Restitution for Slavery and Jim Crow*, 44 Loy. L.A. L. Rev. 177 (2010); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 Cal. W. L. Rev. 1 (2007).

justice theories.[56] For example, the Chicago Principles on Post-Conflict Justice include:

1. States shall prosecute alleged perpetrators of gross violations of human rights and humanitarian law ("legal accountability")
2. States shall respect the right to truth and encourage formal investigations of past violations by truth commissions or other bodies ("truth-telling")
3. States shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparations ("repair")
4. States should implement vetting policies, sanctions, and administrative measures ("administrative accountability")
5. States should support official programs and popular initiatives to memorialize victims, educate society regarding past political violence, and preserve historical memory ("history and memory")
6. States should support and respect traditional, indigenous, and religious approaches regarding past violations ("remedial pluralism")
7. States shall engage in institutional reform to support the rule of law, restore public trust, promote fundamental rights, and support good governance ("governance reform").

Another approach rests on American law itself. In torts, the notion of "make whole relief" requires "that the plaintiff's compensatory damages should in principle be enough to return the plaintiff to the *status quo ante*—the condition she was in prior to the happening of the tort."[57] While as a practical matter tort law excludes certain remedies as outside the authority of the judiciary to bestow, such as apologies, "make whole relief" provides a conceptual framework for conceptualizing what full repair might require. Under that perspective, full repair would require all the steps needed to return to a counterfactual state of the world in which the racial harms had never taken place. That exercise is conceptually challenging, since the world cannot be rewound and history might have taken multiple conceivable paths in the absence of slavery and Jim Crow. Nonetheless it provides a frame for considering what aspects of present reality are the result of massive racial harms in the past.

Weaving the concept of "make whole relief" together with the elements of the Chicago principles, intrinsic elements of racial remediation could be categorized as: (1) truth-telling, (2) repair, (3) history and memory, and (4) governance reform.[58] In this context, the call for remedial pluralism can be thought of as an admonition to

[56] Cite work of Yuvraj Joshi here and above

[57] John C. P. Goldberg & Benjamin C. Zipursky, The Oxford Introductions to U.S. Law: Torts 344-45 (2010).

[58] This list sets aside for now the questions of legal and administrative accountability for perpetrators, which is crucial but cannot be adequately addressed within the scope of this article.

foreground the decision-making of those people and communities most impacted by the Jim Crow and slavery, a mandate that cuts across all four areas. These elements echo many reparations proposals, as conceived by various activists and authors.[59] For example, the Movement for Black Lives platform calls for material repair as measures to address denial of educational opportunity, wealth divestment, and the theft of land, among other form of discrimination; it also calls for truth-telling and history and memory work, in the form of school curricula, memorials, and other actions to preserve and disseminate the truth regarding centuries of racial oppression.[60]

Applying these elements to federal Jim Crow

In the context of federal Jim Crow, *truth-telling* would require the federal government to invest in officially documenting the role of federal officials and programs in segregating, dispossessing, denying resources to, refusing to provide legal protections for, and otherwise harming Black and other nonwhite communities over the course of the twentieth century. That would require a sweeping, multi-sectoral analysis across all areas of federal activity and social investment, ensuring that sufficient depth is allocated to each element in areas varying from hospital construction to vocational training programs to environmental enforcement.

Repair encompasses work at the individual, institutional, and community levels to create economic, human, and social capital that parallels those that could have been secured in a world without Jim Crow. While it should encompass individual monetary remedies, as a number of scholars have argued a program of repair should reach much further in investing long-term funding, structured programs, and infrastructure to build up the neighborhoods and institutions that have the ability to sustain and create opportunity, wealth, and wellbeing for African Americans and other people of color. The types of reparative investments that should be included are as extensive, again, as the federal investment in social programs and institutions itself has been. Just as political scientist Ira Katznelson described the tremendous scope of those historic investments and their role in creating a more secure white middle class in his book, *Affirmative Action for Whites*, so should a program of reparative assessment work on the same scale—from mortgages to universities to workers' protections and beyond.[61] As others have posited, the combined ambition of the investments might reflect something like a "Marshall Plan" for those formerly segregated and excluded in America.[62]

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[59] E.g., Aiyetoro, supra note 8, at 663-64.
[60] Movement for Black Lives, Reparations, https://m4bl.org/policy-platforms/reparations/.
[61] IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 17-23 (2005).
[62] See Robert S. Browne, The Economic Basis for Reparations to Black America, 2 Rev. Black Pol. Econ. 67, 67 (1971) (citing former Urban League leader and civil rights activist Whitney Young as

History and memory work hand in hand with truth-telling investigations. The federal government should preserve memory and honor those that suffered because of its actions, in the form of memorials, museums, days of remembrance, and other official ways of marking public space and ideas. It should also make efforts to ensure that historical truth is preserved in government reports and archives, but widely understood through publications and programming aimed at the general public.

Governance reform represents both the most challenging and likely the most important aspect of thinking about undoing the impacts of federal Jim Crow. What would governance that fostered racially egalitarian democracy look like? What would our national institutions look like if Jim Crow had not tainted the twentieth century?

Arguably, the entire national state would be configured differently, in terms of the myriad agencies and programs that were designed, extended, and entrenched over that period. We might term that "the counterfactual administrative state"—the one that would have been chosen and implemented in conditions of racial democracy. While it is difficult to predict that counterfactual regime at any level of detail, the administrative state would almost certainly have been far more generous in terms of federal investment in programs for the poor and working class. It likely would have allowed for far less "cooperative federalism" in the sense of empowering states to design and administer their own versions of national programs, a set-up that permitted extensive race discrimination and encouraged exceedingly limited benefits for the poor of all races in many states.

Beyond the administrative state, what of other parts of the legal framework and democracy itself?

It is important to remember that even the most egalitarian parts of the current legal framework were shaped under profoundly undemocratic conditions. People of color were not equal citizens and did not have fair representation within the constitutional and legislative processes that produced those frameworks. The Reconstruction Amendments (and the Nineteenth Amendment), along with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, were shaped by processes composed almost entirely of white men. The voting public remained seriously distorted and exclusionary until the effective implementation of the Voting Rights Act enfranchised

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the original source of this description); Whitney M. Young, Jr., The Urban League and Its Strategy, 357 Annals Amer. Acad. Pol. & Soc. Sci. 102, 107 (1965) ("Last year the Urban League called for a massive, crash effort on the part of all governmental bodies, private institutions, foundations, and settlement houses--… the entire fabric of American society—to make compensatory effort for a brief period in time to help [Black] citizens qualify themselves for the new opportunities opening up before them.").

African Americans and other people of color in the South, Southwest, and other parts of the nation. Thus, the compromises and limits built into even our more egalitarian frameworks did not reflect truly democratic processes or broad assent.

Arguably, the remedy would be to rethink the limits of those legal frameworks and reenact more ambitious approaches under democratic conditions now. The difficulty is that without undoing the severe legacies of the nation's past racial oppression, even in the present day when formal democracy reigns, it is not feasible to achieve substantive democracy.

Further, the legal outcomes of the past are entrenched against revision, insofar as the Constitution sets up very arduous routes for constitutional and statutory change. The irony is that those meta-rules for legal change were never assented to by the full public, under democratic conditions. Yet, in order to achieve more adequate democracy, that public must surmount those obstacles created by prior decisionmakers.

The next section asks to what extent the federal government ever undertook any of the work of truth-telling, repair, history and memory, and governance reform, in response to its twentieth century participation in racial oppression.

C. Inadequate federal remedies

As described above, from the mid-1960s through the 1980s, federal courts and other actors constructed demanding remedies for Jim Crow—often with measures that relied on race to reshape previously segregated institutions like schools and workforces. While these remedies were demanding, especially from today's perspective, it is important to note what they did not include.

The institutional reforms achieved in *Brown* and subsequent cases were aimed at prospective remediation—they did not generally involve compensating past victims of Jim Crow, but rather changing the way institutions would operate and look in the future. Such court-ordered institutional reforms left entirely unanswered the question of making individuals whole for the wrongs they suffered. The people who had directly experienced the material, economic and other harms of segregation—schoolchildren, workers, farmers, residents of segregated neighborhoods—did not receive compensatory remedies.

Courts also did not order, and governments generally did not take, affirmative steps to commemorate and atone for Jim Crow through history, monuments, and other expressive means. That flawed, incomplete truth-telling and memory work reverberates in the present day's pitched battles over race in schools and public spaces,

facilitating the active denial of the past's legacies. Those are significant gaps that existed in remedies at all levels of government.

But for the federal government remedies were even more limited, because the federal government had played a more indirect role in segregation and often allied with plaintiffs in civil rights litigation against state and local governments. Further, recognition that federal behavior had violated the Constitution came relatively later, as the courts were already growing more conservative. Remedies for federal participation in Jim Crow were scarce, and generally only came when the federal government was added as a defendant in suits against other entities, as a way of enlisting a federal agency in supporting institutional reforms.

If the sparse federal efforts toward remediation were assessed against the rubric of full repair, what is missing? Below I examine the glaring gaps along the axes of truth-telling, repair, history and memory, and governance reform.

Truth-telling: The federal government has played a very limited role in investigating, documenting, and disseminating the truth of its actions to further Jim Crow. Through the 1980s, the U.S. Commission on Civil Rights issued a number of reports addressing, in whole or in part, the federal role in segregation and discrimination.[63] The federal judiciary has adjudicated multiple cases involving federal Jim Crow, and the resulting judicial decisions documented the federal complicity to a varying extent. Occasionally an agency has done its own investigation, as the U.S. Department of Agriculture did to a limited extent toward the end of the Clinton administration.

But in general, there has been no systemic effort by the federal government to build on and supplement the leading academic studies that have traced federal actions furthering de jure segregation and inequality. That is a marked gap, because the federal government itself controls the most relevant sources of information within agency archives. Moreover, agencies would be well-equipped to trace federal actions within particular programs in a coordinated and granular way that is unlikely to simply emerge by happenstance via private efforts, as rich and detailed as the academic work has been.

Repair: The federal government's participation in segregation did not end all at once. Various agencies resisted and maintained their investments in Jim Crow over time. In some instances, litigants successfully challenged sustained discrimination by federal agencies; in many instances those suits achieved programmatic, forward-

[63] E.g., U.S. COMM'N ON CIVIL RIGHT, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT (1973); U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1970).

looking reform but without any reparative responses (such as compensatory damages or even heightened investment in minority institutions or communities as a form of redress).[64] The highly publicized settlements of the USDA with Black farmers are a rare exception, achieved in part because the Equal Credit Opportunity Act waived federal sovereign immunity for damages, and in part because Congress chose to toll the statute of limitations for such claims.[65]

Institutional repair, which might include both equalizing resources to formerly marginalized institutions and opening egalitarian access to historically white institutions, has been uneven. Take for example the segregated land-grant colleges. No court has ever ordered, nor has the federal government ever undertaken an attempt to fully equalize and redress the century and a half of unequal investment in the "1890 institutions" (the HBCUs that were included within the federal land grant system by the 1890 Morrill Act), though the states were themselves subject to a modicum of compelled equalization by virtue of Title VI and desegregation suits against systems of public higher education.

As for voluntary forms of relief, apart from certain delimited federal initiatives, such as those intended to foster minority small businesses via contracting or those intended to support minority farmers via targeted supports, there is no clear reparative program aimed at addressing the substantive inequality left by federal Jim Crow. Even those just mentioned are probably better conceived as attempts to secure a more equal field of opportunity going forward, rather than actually undoing past discrimination. No such program has been proposed, whether denominated as "reparations" or otherwise. Even the legislation historically proposed by Rep. John Conyers to create a commission studying reparations has never been voted upon by the full Congress.[66]

History and memory: Apart from broader civil rights memorials or investments in recovering Black history, which in themselves are limited, there appear to be few examples in which the federal government has worked to uncover, memorialize, and disseminate its particular role in Jim Crow. And to the extent that attempts have been

[64] For example, mobility programs adopted to allow low income families to move to suburban and mixed-income settings after challenges to public housing segregation are probably best conceived as prospective remedies, rather than compensatory ones. For discussion of those programs, see Olatunde C.A. Johnson, Social Engineering: Notes on the Law and Political Economy of Integration, 40 Cardozo L. Rev. 1149, 1161-62 (2018); Florence Wagman Roisman, Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation, 42 Wake Forest L. Rev. 333 (2007).

[65] *See* Stephen Carpenter, *The USDA Discrimination Cases: Pigford, In re Black Farmers, Keepseagle, Garcia, and Love*, 17 DRAKE J. AGRIC. L. 1 (2012).

[66] See Kevin Freking, House panel votes to advance bill on slavery reparations, Apr. 14, 2021, https://apnews.com/article/race-and-ethnicity-discrimination-legislation-slavery-john-conyers-4929d09132b8a72e655d8a42cc068a9d.

made by federal actors to encourage curricula that are more historically truthful, as well as inclusive, even those general efforts have been met with staunch criticism.

Governance reform: The most obvious way in which federal governance structures have been revised toward racial equality (and a counterfactual world in which systemic oppression had not existed) consists of Title VI's bar on race and national origin discrimination in federally funded programs. Notably, though, Title VI itself does not control federal officials themselves or bar discrimination in programs directly operated by federal agencies—it only applies to states, localities, and private recipients of federal funds. Plaintiffs have no broad statutory basis for challenging federal discrimination or seeking remediation. Instead they must rely on limited waivers of federal sovereign immunity in particular areas, such as the ECOA's waiver in lending or in a very delimited set of constitutional Bivens actions.

Further, if a flat bar on race discrimination is the most minimalist form of governance reform one can imagine, that leaves open the need to address institutional structures and decision-making, which were developed under exclusionary conditions during Jim Crow. Post Title VI, most federal agencies have internal offices of civil rights, which monitor recipients of federal funding, and accept complaints of both internal and external discrimination. But those structures vary widely in their power and effectiveness, and often sit uneasily within larger agency structures and cultures historically aimed at serving quite different goals and constituencies. At best, they should be understood as mechanisms to impede specific instances of discrimination going forward—but not a means to make agencies more racially egalitarian overall, from the ground up.

Many agencies, even as they have been made formally race-neutral—nonetheless still maintain design features—missions, programs, constituencies that continue to distribute political power and resources in an unequal way, and thereby preserve the racial status quo.[67]

President Biden has issued two executive orders on racial equity in the federal government, including a very recent order that bolstered requirements for agencies to address barriers to equal access for racial minorities and other marginalized groups.[68]

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[67] For work highlighting means of shifting agencies away from such patterns, see Olatunde C. A. Johnson, Beyond the Private Attorney General: Equality Directives in American Law, 87 N.Y.U. L. Rev. 1339 (2012); Olatunde C. A. Johnson, Disparity Rules, 107 Colum. L. Rev. 374 (2007).

[68] Exec. Order, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Feb. 16, 2023; Exec. Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Jan. 20, 2021; Dean Scott, Biden Elevates Racial Equity Actions Across Federal Agencies, Bloomberg Law, Feb. 16, 2023, https://news.bloomberglaw.com/environment-and-energy/biden-elevates-environmental-racial-equity-across-government.

In April 2022, over 90 federal agencies revealed their first ever Equity Action Plans. These initiatives seem aimed at strengthening systemic monitoring and coordination to improve federal programs' overall impact on racial equality. While they appear designed to achieve more equal treatment on a prospective basis, to the extent they achieve structural reforms that undo old barriers to equality, they can also be understood as a part of governance reform. However, those structural changes are too new to assess their impact. If the institutions endure and are effective, they could help enable egalitarian policy outcomes that in turn contribute to more democratic governance frameworks.

At the statutory level, most of the national laws and institutions enacted in the decades of Jim Crow have not been seriously revised with input by a more inclusive polity. To the extent they have been revisited post-1965, some national programs have been retrenched to be more racially regressive than the past, such as in the overhauls to welfare and criminal systems of the 1990s.[69] Systems designed under Jim Crow and that continue to inflict disproportionate harms on people of color, like Medicaid's grant of permissive authority to states, have persisted and even been reinforced by a conservative Supreme Court. Formal democracy has not proven a satisfactory means to achieve redress, in the face of conservative and white backlash to the "civil rights revolution" of the 1960s.

III. THE CONSTITUTIONAL POSSIBILITIES

The last Part suggested, in broad strokes, what a program of full repair for federal Jim Crow might encompass. Given the constraints that the Constitution currently places on racial remedies, could such a program be upheld against legal challenges?

The key questions center on material remedies. That is true even though right-wing backlash has attacked the very possibility of truth-telling regarding past racial oppression. While history and memory initiatives face political obstacles and potential state-level legislative or executive restrictions, federal measures appear unlikely to face serious constitutional challenges in the federal courts.[70] Governance reform is an extremely far-reaching and ambitious target, which would ultimately require profound constitutional and statutory changes—but achieving those reforms is unlikely to founder on "colorblindness" doctrine itself, since the aim is to reimagine and recreate

[69] Personal Responsibility and Work Opportunity Act of 1996; Antiterrorism and Effective Death Penalty Act of 1996

[70] Cite CRT backlash, lawsuits, decisions rejecting lawsuits claiming that DEI or other curricula constitute a hostile environment against whites etc.

institutions along the lines they might have taken in conditions of racially egalitarian democracy.[71]

What then of the sweeping material remedies that would be needed to address the impact of federal Jim Crow? Constitutional law currently allows two routes to remedying past racial harms. Even under the constraints of current doctrine, both routes potentially provide space for measures aimed at addressing past systemic racial harms.

One route relies on conservative justices' past assertion that remedies provided to "identified victims" of discrimination do not constitute race-based initiatives at all (no matter how intrinsically race-driven the harms themselves were). Under that rubric, it should be possible to provide benefits to individuals and their descendants, institutions, and perhaps entire communities harmed by Jim Crow and slavery. If descendants, institutions, and communities are identified with sufficient precision, there should be no need to apply strict scrutiny at all to such initiatives.

The second route would test the limits of the remedial rationale for race-based measures, by pushing the judiciary to stop distancing and erasing the harms of the past. Such initiatives would rely on race to target remedies. These would also need to rest on a relatively precise account of the harms government has inflicted and their impact on the present, but they would not need to be distributed solely to those people, institutions, and neighborhoods that can be precisely identified as having been harmed. This second set of remedies is necessary because of the obvious limits to tracing direct chains of causation in the relatively distant past. If the remedial rationale is still good law, as conservatives assert, and the historical and empirical work is done carefully, these programs should satisfy strict scrutiny.

A. Reaching Harmed Families, Institutions, and Communities

Is it true that remedies targeted at those who suffered harm—even if those targeted were of a specific race—are not "race-based"? Yes. A tort-based remedy to a Black family that suffers environmental harms from toxins in its well water is not race-based. What's more, a civil rights remedy for that family, based on proof that they were targeted for environmental harms based on their race, would not be race-based either. It would be based on their identity as specific victims of legal wrongs. No challenge could be brought on the ground that these remedies somehow discriminated against whites who were not beneficiaries. This accords so deeply with lawyers' common

[71] But to the extent that governance reforms have rested on "effects tests"—like the VRA—then they do fall within the scope of colorblindness challenges, cf. Ricci and the racial gerrymandering cases. Further other constitutional doctrines have been used to undo such laws, as with federalism in undoing Section 5 of the VRA.

sense that it can somehow be overlooked in discussions of racial repair. Justice Scalia, conservative lion, helpfully explicated this point in *Croson*, as noted above.[72]

Further, this point can be extended. If government identifies a neighborhood that was, say, cut off from municipal water or denied sidewalks, based on the race of the residents, then the government has the ability to address the resulting harms to that neighborhood. Such steps would not be race-based at all. They would be based on past legal wrongs to that specific community.

The principle that remedies for identified victims do not undergo strict scrutiny thus opens the door to at least three types of repair:

1. Individual remedies targeted at those who suffered under specific Jim Crow programs/practices and their descendants,
2. Remedies targeted at institutions that remain distorted by Jim Crow, and
3. Community level remedies targeted at neighborhoods or larger communities that suffered disinvestment and segregation.

Identifying people, institutions, and places for remedies based on past harms from Jim Crow or slavery is not a race-based remedy. While such programs might face very significant political obstacles, the Constitution should not be a barrier if they are well designed. This is not a guarantee of course—conservative jurists might find ways to claim that such backward looking steps are not truly aimed at repairing legal wrongs. Nonetheless, current law should justify such measures.

In many situations, one can recover the identities of the individuals most directly harmed by state-sponsored segregation and discrimination. Black children who attended segregated schools or Black families who lived in segregated public housing can be identified. Black farmers served (or not) within a segregated farm extension system can be named.

Other impacts of discrimination do not leave readily identifiable victims. Refusing to allow access to a valued resource is one example. Most people, knowing they will be refused, never apply for access. Such was true of myriad overt policies restricting various resources to whites, from housing to education to jobs. All non-white Americans who could not access the Levittown homes or Virginia Tech's degrees or craft unions' apprenticeship programs were harmed. At the same time, who the specific beneficiaries might have been is unknowable in a certain sense, because they were usually denied the chance to apply or understood the legal exclusion well enough not to bother.

[72] City of Richmond v. J.A. Croson, 488 U.S. 469, 526 (1989) (Scalia, J., concurring).

That should not serve as an absolute barrier to remedies, though. How can we best conceptualize those who were harmed? We might approximate it by considering all those who lived within the geographic areas served by the housing or the university, or those who worked in proximity to the union or employer, and who were deemed ineligible on the grounds of race. It is true that not all those people would have purchased homes, obtained admission, or secured jobs, even in a non-discriminatory world, but civil rights suits have encountered and resolved similar problems of how to distribute remedies among likely victims. The important point is that a first pass approximation based on residence and race should be sufficient to define a population of those harmed. Descendants of those people should be eligible for remedies, given that the economic benefits of that housing, schooling, and jobs would have passed along familial lines.[73]

Using such criteria cannot be labeled race-based, since these are not remedies allocated to all people of a particular race without regard to past harm. Families that immigrated to the United States after the relevant period of discrimination, for example, would not be eligible under such a scheme.

Such a program would be tailored to meet the barriers of the Constitution, as interpreted by conservatives—but would it be anything close to complete? It would leave out a great many people who could not be shown to be victims of Jim Crow in a specific enough sense. It could not adequately address ongoing forms of race-based discrimination and inequality, like mass incarceration. And it would require additional steps to do the work of truth-telling, historical preservation, and governance reform.

B. Race-based remedies

Recently a cautionary episode played out around a Congressional attempt at race-based remedies for past federal discrimination. In the American Rescue Plan Act (ARPA), Congress provided loan forgiveness for minority farmers with outstanding farm debt. Congress explicitly explained that it wished to help cure a long history of racial discrimination within federal farm agencies, citing multiple sources of evidence

[73] In Title VII cases, discriminatory hiring exams have raised somewhat analogous questions—even if we know all those who took the exam, we cannot create the counterfactual world in which we know their scores and their hiring outcomes after a non-discriminatory exam. Clearly not all the applicants would have been hired even in that counterfactual. Instead, hiring remedies have sometimes used a lottery approach to allocate jobs among those who remain interested and eligible using a non-discriminatory process. Damages for the period of lost employment can be allocated pro rata among the eligible.

buttressing that history.[74] Yet when conservative organizations sued on behalf of white farmers claiming reverse discrimination, several federal courts quickly enjoined the program.[75]

Those courts applied strict scrutiny, a demanding test in which the narrow tailoring requirement represents a major hurdle even for programs like ARPA that are aimed at strongly-backed evidence of past discrimination. Tracing exactly how a century of overt racial exclusion can be understood to have shaped the present and specifying what calibrated remedies should look like are challenging tasks.[76] What made the district court decisions so striking was that they did not focus solely on the narrow tailoring issues. Rather, the courts questioned or rejected the possibility that the US might have a compelling interest in remedying past race discrimination in farm programs at all.[77] One court stated: "It is undeniable—and notably uncontested by the parties—that USDA had a dark history of past discrimination against minority farmers."[78] Yet those courts found a compelling interest in remedying that history lacking.[79]

Congress repealed the ARPA loan forgiveness before the litigation could proceed. Further, the litigants appear to have hand-picked the district courts in question for the odds that the suit would draw a conservative, sympathetic federal judge. So the outcomes do not necessarily reflect an accurate appraisal of the overall state of racial remedies law in the federal judiciary.

Nonetheless the ARPA decisions, and the broader jurisprudence dismissing the significance of past discrimination outlined in Part I, bear important lessons. Any attempt at designing race-based remedies for past systemic discrimination has to draw on very specific evidence of the historical discrimination at issue, ideally with empirical research that links it to present-day outcomes that are to be remedied. That type of research linking the past to the present is needed both to show (1) that the

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[74] *See* H.R. Rep. No. 117-7, at 12 (2021); *see also* Defendant USDA's Brief in Support of Motion for Summary Judgment, at 1-2 (March 11, 2022) (describing Congressional deliberations regarding past discrimination).

[75] *See* Wynn v. Vilsack, 545 F. Supp. 3d 1271 (M.D. Fla. 2021) (enjoining the loan forgiveness program); Holman v. Vilsack, No. 21-1085, 2021 WL 2877915 (W.D. Tenn. July 8, 2021) (same); Order, Miller v. Vilsack, No. 4:21-cv-0595 (N.D. Tex. July 1, 2021) (same); Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (issuing a temporary restraining order to halt the loan forgiveness program).

[76] *See Paradise*, 480 U.S. at 171 (describing factors affecting narrow tailoring determination).

[77] Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1279-81 (M.D. Fla. 2021); Holman v. Vilsack, No. 21-1085, 2021 WL 2877915, slip op. at 6 (W.D. Tenn. July 8, 2021); Miller v. Vilsack, No. 4:21-cv-0595, slip op. at 16-17 (N.D. Tex. July 1, 2021); Faust v. Vilsack, 519 F. Supp. 3d 470, 475-76 (E.D. Wis. 2021).

[78] *Wynn*, 545 F. Supp. 3d at 1279.

[79] *Id.*; *Holman*, slip op. at 6.

discrimination has not dissipated, but continues to impact the present, and (2) how the intended remedies are calibrated to match the scope of the enduring harms in the present.

Under *United States v. Paradise*, courts reviewing race-based remedies evaluate "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."[80] Those factors, particularly the mention of the "labor market," were designed to review affirmative action programs in employment. But the idea that the relief should be calibrated to the scope of the past harms underlies the *Paradise* factors, both in the requirement to assess the "necessity for the relief" and the idea that any numeric goals should be related to the shortfall in Black or other minority representation (measured in the jobs context by the availability of such workers in the relevant labor market). Thus, in the employment context, reviewing courts have sometimes asked whether the number of hires or promotions that will rest on affirmative action were precisely calibrated to mirror the number lost to discrimination.

Given the jurisprudence on these questions, as well as courts' increasing conservatism, it is near certain that race-based remedial programs will have to demonstrate a close relationship between the scope of the relief and the amount of benefits to be provided. The evidence to support such a relationship likely needs to come from historians and social scientists. For example, a program to compensate for the federal housing agencies' role in red-lining would likely have to rest on detailed quantitative assessments of the economic harm to Black potential homebuyers and homeowners in specific metropolitan areas, as well as estimates of its impact on subsequent generations.

Thus, a race-based approach would require a great deal of detailed research and evaluation regarding the systemic harms of federal Jim Crow and its continuing consequences in the present. Given the frameworks outlined above, a supporting historical and empirical account would have to justify the measures based on specific wrongs, show that the beneficiary groups are not haphazardly included, and that the amounts or other remedial steps involved are calibrated to the actual impacts of those wrongs.

[80] 480 U.S. 149, 171 (1987) (plurality opinion).

C. Pursuing Both Routes

Both routes are worth pursuing, and the research required to underpin them serves the goal of truth-telling and preserving history.

Arguably, the federal administrative state is best equipped to answer many of the core questions regarding federal Jim Crow, aided by social scientists, historians, and other researchers. The U.S. Commission on Civil Rights once monitored, reported on, and spurred the government's attempt to dismantle Jim Crow. The Commission issued multiple reports that indicted specific agencies for their failings in doing so. It might once again take the lead in coordinating the historic documentation and evidence required to support remedies for the federal wrongs outlined here.

Significant room may exist under current doctrine to provide redress to specific families, institutions, and communities directly affected by state-sponsored discrimination. By relying on particularized historical evidence of discrimination and expert assessments of its impact, government might also take affirmative race-based measures to repair entrenched racial inequality.

However, gaps would persist even under such initiatives. The requirement for detailed historical tracing and empirical support would likely inhibit any attempt to provide remedies on anything close to the full scale of the material harms visited on African Americans and other communities of color.

Further, there are massive questions relating to political and legal feasibility. As to legal feasibility, would the federal courts—headed by a Supreme Court that appears largely opposed to racial remedies—actually allow existing doctrine to authorize sweeping reparative steps? Apart from that legal barrier, how could movements for racial justice muster sufficient political power and voice to enact the necessary components of repair?

The next Part takes on these challenges, arguing that they go to the heart of the nation's most profound challenge—achieving a racially inclusive democracy.

IV. RACIAL REPAIR AND CONSTITUTIONAL DEMOCRACY

Can a Constitution that inhibits racial repair be the basis for an egalitarian democracy? In this Part, I consider what progress toward a reconstructed American governance framework—one that both allows racial repair and has itself been repaired—might require. The short answer is that the most promising path appears to consist of iterative, mutually reinforcing changes to substantive policy and institutional frameworks. The goals would be to deepen political equality and entrench more inclusive self-governance in institutional design, in incremental and self-reproducing ways over time.

[this Part is still in an embryonic stage—I look forward to talking about how best to develop it]

Through 1965, the American Constitution failed to create an actual democracy—given the deep racial exclusions that prevented Black Americans and other people of color from voting, participating, or having their substantive interests fairly represented in the political process. The laws and institutions arising under that flawed system bear deep marks of illegitimacy.

Yet many continue to believe that the Constitution can be drawn upon to create racially inclusive democracy. Previous Reconstructions made partial progress, particularly toward formal equality. Some argue that it is still possible to redeem the egalitarian ideals of the Declaration of Independence, gradually remaking the existing constitutional order toward that end.

Several glaring obstacles remain. First, none of the legal or institutional reforms enacted to date have brought about anything approaching substantive political equality. The interests of people of color remain deprioritized and devalued overall within the American political order.

Second, the significant obstacles to realizing democratic or constitutional reform, which are based in the original Constitution and reflect the prior exclusionary system, nonetheless continue to entrench that prior framework (and the many institutions built upon it) against change.

Third, an undemocratic institution, the Supreme Court, has drawn upon an instrument drafted and ratified in undemocratic conditions, as the supposed basis for limiting attempts to create more substantively equal conditions for African Americans and others originally excluded from the polity.

If racial repair is needed, and is itself intrinsic to efforts to achieve egalitarian democracy, yet the means of achieving such repair via political reform are blocked, in part because of the racially unjust institutions of the past and in part because unequal citizenship remains the rule—how can these Catch-22(s) be resolved? A more inclusive democracy is needed, if racial repair is to become politically feasible; yet the lack of racial repair itself stands in the way of realizing more equal democratic conditions. Racial repair, understood at its broadest, includes overhauling the Constitution and the various legal frameworks written under exclusionary conditions; yet that same Constitution has been interpreted to impede even much smaller attempts at repair, rendering repair legally infeasible. Even if we were to call a Constitutional convention tomorrow, and otherwise attempt to recreate the political system along more inclusive lines, it is doubtful that this would deliver desirable results—for the very reason that the conditions necessary for equal, deliberative participation across lines of race and class are lacking.

The only plausible answer seems to be to plan for and envision much more sweeping change toward racial democracy, while understanding the steps toward such an end state as consisting of mutually reinforcing, incremental steps toward both repair and equal citizenship.

Policy and institutional changes that improve conditions of substantive political and economic equality for Black communities and other minorities can aid in the path toward achieving racial repair. At the same time, measures aimed at racial repair (both tangible and intangible ones) can help to bolster political and economic equality. Ultimately the goal would be to create self-reinforcing virtuous circles of reform in both dimensions: democracy and repair.

More pragmatically, to the extent the judiciary might be inclined to read the Constitution as forestalling racial repair, those courts must be called to account. Truth-telling, history, and memory—alongside litigation, lobbying, and regulatory policymaking—are the primary means of applying moral pressures and stigmatizing such efforts.

Moral claims have to be made on the United States' claimed identity as a democracy, as well as its pragmatic interests in that status, just as they have been in past civil rights struggles. For activists, this requires a dualism—leaning heavily on, even reinforcing and praising, the nation's egalitarian aspirations, while asking the nation to take responsibility for its failings. That strategy would leverage current majorities' tangible and intangible interests in understanding America (and themselves as part of) a democratic nation in order to push whites in particular toward redistributing their illicit gains and redressing the nation's deep violations of democratic ideals. If Derrick Bell was correct, attempting an interest convergence of

this sort may be the most powerful driver of reform available, at least until we can achieve more egalitarian frames of governance.